

Post-committal negotiation

Fact sheet for practitioners and counsel

From 18 January 2011 Victoria Legal Aid (VLA) introduced a package of changes to fees in all legally aided indictable cases to facilitate resolution of cases where appropriate or to assist in narrowing the issues for trial.

The changes

The package of changes in effect from 18 January 2011 has three components:

- An **increase of one third to the committal brief fee** in contested committal hearings. This is designed to encourage senior and capable counsel to become involved in indictable cases at an early stage.
- The same counsel to conduct a **mandatory post-committal negotiation with the prosecution**. This is designed to take advantage of the knowledge of the case gained at committal to attempt to resolve the case or to narrow the issues for trial.
- The committal and post committal negotiation brief must include a **requirement to appear at the first directions hearing** in the County or Supreme Court. This will ensure that the case can be meaningfully progressed by taking advantage of counsel's case knowledge and involvement in the post-committal negotiation.

Which cases?

The post-committal negotiation must take place if:

- the matter proceeds to a contested committal, has not resolved into a plea, and the accused has been committed for trial; or
- there is a committal for trial without a contested committal.

There is no need for a post-committal negotiation, and no fee payable, if the accused is committed for plea.

24 Hour Initial Directions Hearing Pilot in the County Court

Minor changes to post-committal procedure have been made to accommodate matters where the accused is committed for trial to the County Court following a contested committal and that case proceeds in the 24 Hour Initial Directions Hearing Pilot.

The Pilot is for all non-sex matters where the accused pleads not guilty at contested committal hearing and is committed for trial to the County Court at Melbourne from a metropolitan Magistrates' Court.

The post-committal negotiation fee

The post-committal negotiation fee is paid at the respective County or Supreme Court rate, to a maximum of three hours. The fee is **only payable once** and only payable if the same counsel who conducts the contested committal also does the negotiating and appears at the first directions hearing, **or** where there is no contested committal, if the same counsel does the negotiating and appears at the first directions hearing.

The fee will not be paid unless VLA receives the checklist attached to this fact sheet.

Briefing counsel

- The brief for counsel to appear at a contested committal **must** include a brief to conduct a post-committal negotiation and a brief to appear at the first directions hearing and must include a copy of this fact sheet.
- Where there is a committal for trial without a contested committal and counsel is to be briefed for the first directions hearing, that brief must be sent immediately following committal and **must** include a brief to conduct a post-committal negotiation and must include a copy of this fact sheet.
- Nothing prevents a practitioner from conducting post-committal negotiations without counsel and the fee will be payable if the practitioner also appeared at the contested committal and the first directions hearing.

Expectations for post-committal negotiation

This process is intended to enable meaningful negotiation with the prosecution in order to either resolve the case, or narrow the issues for trial. Where there has been a contested committal, it is expected that issues will have been narrowed, evidence tested and assumptions about the case confirmed or negated. Where there has not been a contested committal the brief to counsel must include sufficient information and instructions to allow negotiation to take place.

The fee is based on an expectation that three hours will be spent on this process. At least part of the negotiation process should be in person or by telephone.

The issues discussed will depend on the case. However, the following are the standard issues that will be discussed:

- How strong is the prosecution case following committal?
- What are the 'correct' charges?
- What are the evidentiary issues in dispute?
- What are the factual issues in dispute?
- What is not in dispute?
- How can the prosecution and defence narrow the issues in dispute?
- A plea offer?
- Is a sentence indication hearing worthwhile? (NB there is a new fee payable for Sentence Indication Hearings).

The negotiations must take place at least seven days before the first directions hearing in the County Court for all cases except those in the 24 Hour Initial Directions Hearing Pilot, or the post-committal case conference in the Supreme Court.

For cases in the County Court 24 Hour Initial Directions Hearing Pilot, negotiations must take place within 14 days after the Initial Directions Hearing.

Who to negotiate with?

The Office of Public Prosecutions (OPP) supports post-committal negotiation. The OPP has advised that the solicitor with the conduct of the file prior to committal will retain conduct of the file throughout the post-committal negotiation period. That solicitor is the first point of contact, but will have access to a Crown Prosecutor. The OPP will monitor this process, with VLA, to see whether further changes are required to support it. Feedback on the process is encouraged (see contact details below).

In the circuit court matters, the OPP are trialing a post-committal process where the prosecutor who appeared at the committal is retained by the OPP for 28 days post-committal to negotiate a resolution with the defence, or prepare a draft trial opening.

If the case does not resolve

If the case cannot be resolved, then the post-committal negotiation must be used to ensure that the case is properly prepared for trial. In practical terms, this means that counsel must have considered and be able to answer all issues and questions contained in the checklists and questionnaires used by the County and Supreme Courts to manage first directions hearings. Both Courts are aware of these changes and will expect assistance that reflects the additional effort now required and funded.

Trial length estimates

Trial length estimates are notoriously inaccurate. That reflects, in part, the inherent difficulty of predicting what will occur at trial. However, estimates can be improved and the Courts have identified this as a priority. It is expected that particular effort will be put into more accurate trial length estimates.

The trial estimate should include separate estimates for pre-trial argument and the trial itself. The estimate for trial should take into account (but does not need to particularise) pre-trial issues, opening addresses, Crown evidence, Defence evidence, closing addresses, charge and jury deliberation time. Where possible the Court will expect an agreed trial estimate.

Checklist and evaluation

This new process will be evaluated over the first 12 months to assess whether it improves continuity of representation, appropriate early resolution and better progress made at first directions hearings. A post-committal negotiation checklist must be completed and returned to VLA with the invoice, before the fee will be paid.

The post-committal negotiations checklist is available in the [VLA Handbook for lawyers](#). Completed checklists will be compliance checked. Feedback will also be sought from the Supreme and County Courts.

Feedback

Feedback on this new process, both positive and negative, is welcome and will be built into the evaluation and review of the process. Your feedback should be sent to vlapolicies@vla.vic.gov.au