

Criminal Bar Association (Victoria)
Submission to the Victorian Law Reform Commission

Committals - VLRC Issues Paper June 2019

1. INTRODUCTION

- 1.1 The Criminal Bar Association (“CBA”) welcomes the invitation from the Victorian Law Reform Commission (“the Commission”) to provide comment on the Commission’s *Issues Paper* of June 2019 regarding its review of Victoria’s committal procedure (“*Issues Paper*”).¹ Our written submission is intended to assist the Commission with its review and recommendations.²
- 1.2 The CBA is the peak body for Victorian barristers practising in criminal law. We represent criminal barristers who prosecute and defend criminal prosecutions and those who have a mixed practice. Our members comprise almost one quarter of all Victorian barristers. We are involved in the continuing legal education scheme of the Victorian Bar, prepare and contribute to submissions on law and policy reform, issue press releases and meet regularly with the judiciary, government and others involved in criminal justice.
- 1.3 Members of the CBA appear in criminal cases of all types, in Victoria and across all states and territories of the Commonwealth. Such appearances involve all facets of criminal law, both state and federal, indictable and summary. Our members are very familiar with the committals process in Victoria. Our submission is made after consultation of our members, and others involved in criminal justice.
- 1.4 We set out some preliminary issues in Part 2 of our submission, before addressing the questions posed by the Commission in Part 3. In Part 4 we set out observations more broadly arising from the Commission’s Terms of Reference and the *Issues Paper*.

¹ The background to the *Issues Paper* and the Commission’s Terms of Reference are set out in Part 4.

² CBA members have also briefly met with the Acting Chair of the Commission, and other representatives, and are willing to do so again if it assists with clarification of any matters raised in this submission.

2. PRELIMINARY OBSERVATIONS ON COMMITTALS & THE *ISSUES PAPER*

2.1 The CBA submits that the current committals process plays a fundamental role in Victoria's criminal justice system and should be retained and enhanced rather than abolished or altered to potentially erode or diminish its many useful functions.

2.2 Committal proceedings, and the ability to test certain evidence at pre-trial proceedings, have long been regarded as essential to the process of ensuring a fair trial on serious charges.³ In 1986, in its Report following a similar review in Victoria, the Advisory Committee on Committal Proceedings expressed the unanimous view that the committal hearing is a "vital cog" in the machinery of the criminal law.⁴ This remains so. Indeed, the Commission acknowledges in its *Issues Paper* that it is crucial to ensuring a fair trial that there are some forms of pre-trial proceedings.⁵

2.3 As set out later in this submission, substantial reforms first implemented almost 20 years ago (and expanded upon since) overcame what might, in the past, have been perceived as a right to cross-examine all witnesses prior to trial. Many other initiatives have been introduced in recent years to provide a greater role for victims and to better assist victims in the criminal justice process.⁶ Tackling delay in criminal prosecutions and trials is an ongoing objective.

2.4 While very important, such initiatives or objectives must be balanced with other fundamental principles applicable to criminal trials and summary prosecutions. Sight cannot be lost of the primary objective of providing access to a fair hearing.

2.5 No comprehensive study or review appears to have been undertaken with past initiatives to restrict the right to cross-examine witnesses, including the recommendations implemented after the 1986 Report. Other than anecdotal assessments, it is not clear whether changes have been effective in streamlining issues for criminal proceedings, encouraging early resolution or reducing victim trauma.

³ *R v Barton* (1980) 147 CLR 75 at 99.

⁴ John Coldrey QC & others, *Report of Advisory Committee on Committal Proceedings*, February 1986 at p.i.

⁵ Victorian Law Reform Commission, *Issues Paper*, June 2019 at p.3 (para 1.8).

⁶ The *Victims and Other Legislation Amendment Act 2018*, due to come into operation on 4 November 2019, provides for substantial additional support for victims.

- 2.6 The CBA commends the Commission's intention to ensure any recommendations with respect to changes to committal proceedings are evidence-based.⁷ The CBA anticipates that this will involve a clear assessment of examples of past cases, to determine how and why the committals system has worked or has not worked in specific prosecutions. Such an analysis is likely show that criminal cases are extremely varied and there is no hard and fast rule as to how effective the committals process is in each instance. Experience of CBA members is that the committals process is, in most cases, extremely useful. The Commission's review ought to assess what, if any, aspects of the current system might not be working as well as they might, and how these aspects might be improved.
- 2.7 Many of the statistics cited in the *Issues Paper* highlight how much of the Victorian criminal justice system, including the committals process, appears to be working well, and that it is working better than it has in the past and better than in other jurisdictions.⁸ However, the statistics alone are not determinative, or necessarily even illustrative, of how effective the committals process is as part of Victoria's current criminal justice system, or provide bases for how it might be improved.
- 2.8 There are, for example, no details on the types of offences ordinarily giving rise to committal hearings or the classes of witnesses who are cross-examined at committal hearings.⁹ There are no details on the number or proportion of committal hearings that involved cross-examination only of the informant ("informant-only committals") or no witnesses ("submissions-only committals"). There are no details of the number or percentage of combined committals, where leave was granted to multiple accused to cross-examine a witness and the witness was only cross-examined on one occasion, possibly only on behalf of one accused. There are no details on the number of committal hearings where an accused has elected to proceed on indictment rather than have his or her charges dealt with summarily.

⁷ VLRC, *Issues Paper*, June 2019 ("*Issues Paper*") at p.vi.

⁸ In the DPP's *Annual Report 2017-2018* (2018) at p.12 the DPP highlights how 79.4% of guilty pleas are achieved by committal, and how the 91.8% of prosecutions resulting in a guilty outcome is the highest on record.

⁹ An indication of the range of different categories of prosecutions undertaken by the DPP is set out in the DPP's *Annual Report 2017-2018* (2018) at p.11. In the County Court of Victoria's *Annual Report of 2015-2016* (2016) at p.12 her Honour Judge Hannan sets out the categories dealt with in the County Court at the Initial Directions Hearing and trial stages, including the proportion of different types of offences (eg. 21% of the cases the IDH stage and 29% at trial involved offences against the person).

There is no separate data with respect to the categories where rights to cross-examine witnesses at committal are already severely constrained.

- 2.9 A positive interpretation of the statistics provided might be that an overwhelming majority (79.4%) of prosecutions dealt with on indictment in Victoria between 2017 and 2018 were finalised as guilty pleas before they reached the higher courts in large part *because of the significant benefits provided by committal proceedings*. The statistics from the Victorian Sentencing Advisory Council might also be properly be read as further showing that between 2009-10 and 2013-14 about one-third of the matters initially listed for trial in the higher courts resolved again in large part *because of matters arising from the committal proceedings*.¹⁰
- 2.10 Of the remaining number of cases, the additional third in the higher courts that resolved at the door of the higher court or during trial are not likely to have been avoided by the committal proceedings. It is unlikely the delay in resolution in such cases could have been avoided if committal proceedings were abolished or changed. The same applies to the third which proceeded to trial. The statistics do not demonstrate whether the committal proceedings assisted in clarifying important matters prior to trial, but, based on the experience of those prosecuting and defending trials, this is very likely.
- 2.11 Bold assertions that abolition of cross-examination of all witnesses at committals is likely to reduce the impact of stress on victims and witnesses carry less weight when there are no details available on the number of complainants and other civilian witnesses who were cross-examined, whether such cross-examination was lengthy or difficult and whether it obviated the need for the witness to give evidence at trial.
- 2.12 It is axiomatic that the benefits of committal proceedings may well *reduce the impact of stress on victims and witnesses*. This is because the committals process might mean, as often happens, that a witness does not need to be cross-examined at trial before a jury, the proceedings are expedited, the issues are narrowed for trial, the trial

¹⁰ The figures set out in paragraph 3.66 of the *Issues Paper* from the Victorian Sentencing Advisory Council do not include the numbers of accused found not guilty after trial. Based on the DPP's *Annual Reports* over this period, it is only possible to ascertain an average annual acquittal rate (of all charges) of about 42%. Applying this proportion, there would have been about 826 acquittals after trial during the period cited.

length is reduced and there is greater scope and momentum for early resolution to appropriate charges.

- 2.13 Great care therefore needs to be taken to ensure that there is no knee-jerk response to cries from some quarters to dispense with fundamental aspects of the criminal trial process. This involves the potential erosion of longstanding, and tested, rights and procedures, that are not likely to be easily restored.
- 2.14 For example, placing faith in the DPP and police as the sole decision-making authorities with respect to charges or committing a person for trial and ensuring disclosure carries risks. As explored further later in this submission, reliance on the independence of police for disclosure obligations is one issue currently under examination by the Royal Commission into Management of Police Informants. While the independence of the police and DPP is also fundamental to a fair and expeditious process, those involved in criminal justice and the broader community are likely to continue to be comforted by retention of an open and accountable process of committing a person to trial and monitoring proper disclosure.
- 2.15 The statistics set out by the Commission do not provide much insight into the reasons for delay that might take place prior to an accused being committed, or what aspects of the committal process might be responsible for any undue delay. The following example highlights this:

Leave was granted to 3 accused to cross-examine 5 witnesses in an alleged fraud. The committal hearing was listed for one day. The first witness produced voluminous documentary evidence in his statement. The prosecution sought to simply tender the witness's statement and to refer to the documents produced by reference to the page numbers in the hand-up brief, which was to be tendered at the conclusion of the hearing. The magistrate insisted, as a matter of law, that the witness needed to identify each document produced, which took many hours. This meant submissions from one accused could not be heard in the day allocated and the matter was adjourned to the next available date for the magistrate, about 3 months later, for submissions. On that date the magistrate was unfortunately ill, so the committal hearing was further adjourned by another 3 months.

- 2.16 On its face, the above committal might distort statistics by suggesting that delay in three matters was attributable to the committals process. However, any delay in this instance would have been avoided by a clear indication that, as a matter of law, a witness did not need to identify every exhibit produced. The delay involved here did not arise because of the committal process itself.
- 2.17 Again, based on statistics alone, the case might be seen as stress and inconvenience being created for five witnesses. In reality, none of the witnesses (two civilians, one financial expert and two investigators) were reluctant to give evidence. Nor did they express any particular stress. All of them were assisted in better understanding their evidence, and the issues, by attending Court, having a conference with the prosecutor and being cross-examined. It provided comfort to the prosecution and to the witnesses that, if a witness is unavailable for trial, there is now the potential for admissible evidence that could be played or read. Witnesses were also comforted by the fact that, because of their evidence, the issues for trial were distilled for both prosecution and defence and the trial might resolve or at least be more limited in scope.
- 2.18 The written and oral submissions made on the committals test highlighted the strengths and weakness in the cases to the three accused and the prosecution. It helped clarify the alleged role of each accused, and how the case was put. Investigators were able to conduct further relevant investigations. The real delay follows in awaiting allocation of a County Court trial. However, the listing of such a trial would have taken longer if the issues had not been narrowed in advance at the committal hearing and the estimate for the length of the trial reduced.
- 2.19 This is, of course, only one example. But it highlights the caution required when looking at statistics and perceptions when interrogating the utility of the committals process. Examples must be scrutinised, and assessed against alternative proposals. Doing this, the CBA submits that the Commission is likely to find that, in the vast majority of instances, the committals process, including the committal hearing, remains extremely useful as part of the procedures for determining serious criminal charges.

3. QUESTIONS POSED BY THE COMMISSION IN ITS *ISSUES PAPER*

3.1 *What purposes can or should committal proceedings serve?*

3.1.1 The statutory purposes of committal proceedings are set out in section 97 of the *Criminal Procedure Act 2009*:

- a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;
- b) to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;
- c) to determine how the accused proposes to plead to the charge;
- d) to ensure a fair trial, if the matter proceeds to trial, by:
 - i) ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;
 - ii) enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;
 - iii) enabling the accused to put forward a case at an early stage if the accused wishes to do so;
 - iv) enabling the accused to adequately prepare and present a case;
 - v) enabling the issues in contention to be adequately defined.

3.1.2 The purposes are clear, well-established and multi-faceted.¹¹ More broadly, committal proceedings achieve the following aims:

- a) enhancing efficiency of the criminal justice system;
- b) facilitating efficient use of court time;
- c) ensuring the fair trial rights of accused persons;
- d) encouraging parties (both prosecution and defence) to be properly prepared for trial; and
- e) improving early disclosure processes.

3.1.3 The purposes are very distinct from those in a higher court, where the primary focus is on ensuring a fair and expeditious trial.

3.1.4 The committal purposes provide a degree of flexibility, reflecting the large volume of charges that commence or shift into the indictable or committals stream of the

¹¹ John Coldrey QC & others, *Report of Advisory Committee on Committal Proceedings*, February 1986 at pp.5-12. The Committee identified four “grounds” for committal hearings, three “basic purposes” and additional purposes “in practice”. These are all still valid purposes of the committal process.

Magistrates' Court and the conjunctive administrative and judicial functions and roles required at that stage.

- 3.1.5 Committal proceedings are generally in open court. Those involved in the process are therefore open to greater scrutiny and likely to be more accountable.
- 3.1.6 It is not appropriate to proceed immediately from charge to trial. While of course delays must be avoided, the prosecution must investigate and prepare its case. Only after this can police and the DPP properly assess the appropriate charge or charges. An accused can only consider the evidence, and options to plead guilty or contest the charges, if he or she understands the nature of the allegations. Prior to hearing, in most instances the prosecution discloses its case in written form. This is expeditious, but it may not accurately reflect the evidence likely to be relied upon.
- 3.1.7 As set out in Part 4 of our submission, there are often significant differences between a written statement and oral evidence. There is also a danger of investigators being selective (whether intentionally or not) with evidence in preparing written materials. There are also clear benefits to the prosecution in not only reading statements, but hearing from the victims and witnesses before trial.
- 3.1.8 With the most serious charges, the committals process provides the best means for an accused to explore and, when appropriate, challenge evidence at an early stage and, in some instances, to call evidence in rebuttal. It permits independent scrutiny of the evidence, separate from the police investigation and prosecution assessment, before an accused faces trial. This key benefit protects the right of an accused to receive a fair trial. An accused may also properly conduct inquiries as a result of information disclosed during committal proceedings, and do so in advance of a trial date being allocated.
- 3.1.9 Significantly, committal proceedings also provide the prosecution with an opportunity to closely review its evidence and, where necessary or appropriate, consider and undertake further investigations and amend charges or the bases for or nature of allegations. The need for additional inquiries by the prosecution can be identified and hopefully addressed and disclosed well before trial.

3.1.10 The committals process also provides clear points for the parties to comply with expectations and to make contact with each other, with monitoring by the Magistrates' Court and potential consequences for the parties for failing to do so. There is a well-established timetable for the prosecution and defence to discuss potential resolution of charges, disclosure and other relevant issues. Committal proceedings encourage the narrowing of issues between prosecution and defence, assisting with resolution, avoiding unnecessary contested plea hearings and reducing the length of trials.

3.2 *What, if any, measures should be introduced to: a) reduce the difference between charges that are initially filed and those ultimately prosecuted and b) ensure appropriate charges are filed at the earliest possible stage in a case?*

3.2.1 As outlined above, it is essential that police and the OPP and/or DPP give proper consideration to the appropriate charge or charges only after all relevant evidence is gathered. This is an ongoing responsibility, where there needs to be some pressure placed on authorities to attempt to complete the investigation and assessment of the allegations and charges as expeditiously as possible.

3.2.2 Even in what might at first blush seem to be relatively straightforward cases, determining the appropriate charges is only capable after a proper analysis of the evidence. For example, there might be evidence from a victim that he was assaulted in his home. Arising from this, a police officer might charge an accused with aggravated burglary and intentionally causing serious injury. Based on the evidence available at the time of charging, there might be different views about the ability to prove whether there was a trespass, whether the injury was serious or not, whether the accused was the person who inflicted the injury and, if it was the accused, whether he intended to trespass or cause a serious injury or even injury. There might be different perspectives between various witnesses, some of whom might indicate other people were seen to enter the premises and inflict the injury. Some witnesses might indicate the person was entitled to enter the premises; others might indicate there was no permission. Witnesses not known at the time of charging might come forward. Witnesses might change their evidence. Witnesses who were initially regarded as reliable or truthful might later, after being challenged or presented with other evidence, be exposed as having an agenda or potentially being unreliable or untruthful. Once consulted, experts might disagree on the nature and extent of the injuries and what caused them.

- 3.2.3 The recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (“RCIRCSA”) to improve charging practice, cited in the *Issues Paper*, unhelpfully refer to the importance to complainants of “correct charges” being determined at the earliest possible stage. This underestimates the complexity of issues in the majority of criminal prosecutions and the potential for change and variance of views.¹² In a just system, prosecutors must strive for the *most appropriate* charge or charges, although again there may be a variance of opinion as to what is most appropriate.
- 3.2.4 Charges are often laid at the time of an accused’s arrest, when police might have little, if any, evidence in an admissible form. Views also often quite properly change substantially after there has been a full and proper investigation, and after evidence has been carefully considered and challenged. Sometimes this justifies greater or lesser charges.
- 3.2.5 Applications for extensions of time for service of a hand-up brief are not uncommonly made. These often arise because of the need to obtain forensic analysis of evidence, such as DNA and drug testing. The relevant forensics services are under resourced, and delays occur. In other instances, there are delays awaiting the taking of evidence from unwilling witnesses or obtaining evidence from overseas via the *Mutual Assistance in Criminal Matters Act 1987* (Cth) or identifying and arresting co-accused. Determining appropriate charges might be impacted upon by the resolution of charges against co-accused and undertakings later given by co-accused to give evidence, and the complicating factors that might apply to such witnesses (including consideration of indemnities, letters of comfort and the like). These matters all take time. There is no publicly-available data to show the number or proportion of cases affected by such scenarios.
- 3.2.6 In some instances, an investigation is well underway, or considered by investigators to be almost complete, before charges are filed. Experience shows that, in such cases (for example, complex fraud matters), the delay is often substantially greater than that which applies when a person is arrested and time

¹² *Issues Paper* at p.51 (para 5.22). Notably, the types of cases considered by the RCIRCSA are more likely to involve one complainant, potentially with video-recorded evidence or at least a clear statement obtained prior to charges being laid, where the evidence is less likely to change and appropriate charges might ordinarily be able to be identified at an earlier stage.

limits apply to investigation, preparation and assessment of evidence. Supervision of the Court often speeds up this process.

- 3.2.7 There are different views as to the efficacy and justification for listing charges for committal hearing prior to all evidence being available, or at least a firm indication being provided by the prosecution as to when the bulk of the evidence will become available. Consideration might be given to clearer guidance (whether through legislation or practice directions) to encourage momentum, but this should not mean that, to avoid delay, cases are unnecessarily or inappropriately rushed. The Magistrates' Court is in a better position to independently assess the appropriate balance than investigators or the DPP.
- 3.2.8 Care needs to be taken in accepting the suggestion that complainants are at times upset by changes to charges and that, because of this, general rules should apply to "lock-in" charges at an early stage of proceedings.¹³ As emphasised above, it is fundamental that only *appropriate charges* proceed to trial. Legislation is about to take effect that will try to ensure victims are better informed of the court process and, importantly, why there might be changes to charges.¹⁴
- 3.2.9 Many charges perceived as "duplicates" are laid by police only because they reflect potential alternative assessments of the adequacy of evidence or appropriateness of charges. Having regard to the example provided above at paragraph 3.3.2 with the alleged aggravated burglary and serious injury, it would not be uncommon for police to initially charge the most serious charges and others in the alternative. Charging in this manner is not inappropriate. In fact, it shows a preparedness by the prosecution to keep reviewing the evidence and an understanding that the most appropriate charge might not, at an early stage, be able to be precisely ascertained.
- 3.2.10 The *Issues Paper* contrasts the police practice of initially filing individual charges with the DPP's position of often "consolidating" charges (by rolling-up charges or having aggregate charges).¹⁵ This is potentially misleading. First, as a matter of

¹³ Much of the reporting of victim's concerns over changes to charges appears to arise from sexual offences, where the evidence is generally more discrete and often limited to the complainant's evidence. This can be distinguished from other cases, where there might be multiple, conflicting witnesses of an alleged act or acts. As set out later in the submissions, concerns about changes to charges may in large part be alleviated by better supporting, and informing, victims and the broader community about the processes involved.

¹⁴ *Victims and Other Legislation Amendment Act 2018*, due to come into operation on 4 November 2019.

¹⁵ *Issues Paper* at p.51 (para 5.19).

law, generally charges can only be rolled-up for a guilty plea. Secondly, despite rolling up or aggregating charges, prosecutors remain under a duty to identify specific offending, and Courts need to be able to assess what offending is contained within the charge. Rather than being a problem, evidence that charges change from individual charges to later resolve as rolled-up or aggregate charges is consistent with the system working well.

- 3.2.11 Current attempts to ensure consistency in charging practice are assisted by charges being approved by senior police officers, but a police officer in Maryborough, however senior, may not be aware of the charging practice of a police officer in Bairnsdale. This is why it is important for early involvement of the OPP and for the OPP, DPP and Crown Prosecutors to aim for consistent charging practice.
- 3.2.12 Almost identical conduct might result in a person being charged with very different offences. One not uncommon example involves accused alleged to have made a false report or statement to police. On precisely the same conduct, an accused might be charged with making a false report to police or charged with attempting to pervert the course of justice. One charge carries a maximum penalty of imprisonment for 12 months and is only triable summarily, while the other carries a maximum penalty of imprisonment for 25 years and is only triable on indictment.¹⁶
- 3.2.13 There is real merit in the OPP being involved in determining appropriate charges at an earlier stage. However, what might be appropriate at the early stage may not be appropriate later on. It is the prosecution's obligation to continue to assess the case as it moves along. This ongoing obligation to review the charges, and liaise with informants and victims, requires appropriate resourcing. It also requires appropriate procedures being in place within the OPP and with the DPP and Crown Prosecutors to ensure that input is sought from prosecutors with necessary skills and experience, and the ability to make binding decisions.

3.3 Should the OPP be involved in determining appropriate charges at an earlier stage? If so, how?

- 3.3.1 As outlined above, the CBA supports the OPP being involved in determining appropriate charges at an earlier stage. Indeed the OPP and DPP are already involved in the pre-charge stage in matters, particularly serious criminal

¹⁶ *Summary Offences Act 1966* s. 53 & *Crimes Act 1958* s.320.

allegations. The issue is who within the OPP and Prosecutors' Chambers ought to consider the charges, and at what stage.

- 3.3.2 Presently, only the DPP and Crown Prosecutors (and only the DPP and Senior Crown Prosecutors for certain charges) can make important decisions regarding appropriate charges and other important decisions with respect to the criminal trial process. This decision-making cannot be made unless the DPP or Crown Prosecutor is fully-informed of the relevant facts and issues to make the appropriate decision. This is difficult when the DPP or Crown Prosecutor is in most instances not likely to have read or viewed all of the available materials or spoken with witnesses. The DPP or Crown Prosecutor must therefore be instructed by properly-trained and experienced prosecutors.
- 3.3.3 Recommendations and decisions are unlikely to be able to be made immediately in most cases. For the reasons outlined above, most often it will only be able to be made once the evidence is available to be reviewed and, in some instances, scrutinised. This might require conferencing of witnesses, meetings with informants and input from counsel. It is likely to require ongoing review.
- 3.3.4 Steps may need to be introduced to ensure suitable prosecutors at regular points consider the available evidence and assess the appropriateness of charges. Ordinarily, this now occurs at the very least when the hand-up brief is served (subject to the HUB containing all relevant evidence and materials) and immediately prior to and after the committal hearing. Regardless of what system is adopted, it is essential that - as with the current committals process - there are such checks in place along the way.
- 3.4 What measures can be introduced to improve disclosure in indictable matters: a) between investigating agencies and the DPP and b) between prosecutors and the defence?**
- 3.4.1 "Disclosure" is a broad term that encompasses any material or information that might have an impact upon a criminal proceeding. Fundamentally, it means that investigators, prosecutors and accused and their legal representatives are fully informed and able to make proper assessments of evidence prior to providing advice and/or making decisions.

3.4.2 It is therefore vital that investigators and prosecutors are adequately trained to identify what inquiries might be relevant to an investigation and what information ought to be provided in statements and other exhibits, and that investigators are sufficiently resourced to ensure that appropriate inquiries are made and appropriate evidence obtained. It is also essential that there is ongoing communication between investigators and prosecutors to ensure that relevant inquiries are made and relevant information and materials are disclosed to an accused and his or her legal representatives.

3.4.3 For the reasons outlined below, committal proceedings play an essential role in ensuring proper and timely disclosure, putting time pressures on police and the DPP, supported by the prospects of supervision from magistrates.

3.5 To what extent do committal proceedings play a necessary role in ensuring proper and timely disclosure?

3.5.1 Committal proceedings are critical to ensuring proper disclosure in all cases.

3.5.2 As set out in the *Issues Paper*, in the bulk of cases the preparation and service of the hand-up brief is sufficient. Decisions can be made by the DPP and instructions obtained from an accused on the basis of detailed statements from relevant witnesses and an indication that all appropriate inquiries have been made. However, the committals process is essential to ensuring that the parties are confident that this has taken place. This is not always the case.

3.5.3 In exceptional cases, decisions can be made based on more limited information. Examples might include where an accused has made full admissions in an interview in which the allegations, and the bases for them, are clearly set out. As noted in the *Issues Paper*, in such cases a “plea brief” might suffice. However, to engage this process and avoid the delay of preparing a hand-up brief, it is essential that there is still adequate disclosure, and the parties are in a position to meaningfully discuss the allegation and appropriately resolve charges.

3.5.4 Committal proceedings ensure proper and timely disclosure by providing additional checks and balances. It provides the DPP a forum to openly update the Court and the accused and defence counsel as to what is happening, what evidence is proposed to be relied upon and what additional material may be held that might

be relevant. Defence counsel and magistrates may ask questions and raise issues. The informant may undertake, in the presence of the accused, to provide information.

3.5.5 Barristers who prosecute committal hearings cite examples of where information is not forthcoming from police, despite requests from counsel and the OPP, and at times even the DPP. Experience shows that recalcitrant informants are more likely to respond to Court pressure. It is one additional measure to try to ensure full and proper disclosure.

3.6 Could appropriate and timely disclosure occur within a pre-trial procedure that does not include committal proceedings?

3.6.1 Alternative systems rely upon placing greater trust in the DPP and investigative agencies and removing the role of the accused's legal representatives, the magistrate and the public scrutiny that currently applies. The CBA sees no merit in doing so, and real risks. An accused ought to be entitled to ask questions in open court. The DPP and police ought to be accountable, with some supervisory role and input from the Court. The Magistrates' Court appears the most logical place for this to occur, with greater flexibility and options.

3.6.2 Experience shows that, particularly in states where the committals process and access to a committal hearing has been curtailed, trials are unnecessarily prolonged, adjourned and discontinued due to disclosure issues. A properly-conducted committals process is likely to avoid such unnecessary expense, inconvenience and delay arising from failure to disclose relevant materials.

3.7 To what extent, if at all, is the ability to cross-examine witnesses during a committal hearing necessary to ensuring adequate and timely disclosure of the prosecution case?

3.7.1 The ability to cross-examine witnesses is, in many cases, fundamental to proper disclosure. The alternative is simply to rely upon a written statement. While sometimes this might be sufficient (or at least sufficient to form the basis of an allegation to which an accused can plead guilty), other times it is not. The reasons for this are set out in detail in Part 4 of our submission.

- 3.7.2 Unduly restricting a witness to the precise terms of his or her first written statement would not be seen as satisfactory from the perspective of victims, other witnesses or proponents of justice involving an attempt to determine the truth.
- 3.7.3 In circumstances where issues are identified in the written statement, how do parties to a criminal proceeding better understand the evidence likely to be given?
- 3.7.4 Often bail conditions restrict an accused from making contact with a witness. Even without bail restrictions, such contact might unnecessarily intimidate a witness. In many cases, it is not appropriate or desirable for an accused's legal representatives to speak with and/or test a witness outside of court.
- 3.7.5 Often the prosecution confers with a witness, occasionally in the presence of the accused and/or the accused's legal representatives. This generally results in a further written statement or statements being required. It is undertaken often without the defence being given the opportunity of asking questions and/or challenging aspects of the evidence. It relies upon the prosecution being able and prepared to ask all relevant questions. It is not done in an open environment, where attempts can be made to ensure parties and witnesses are held accountable.
- 3.7.6 Significantly, experience shows that evidence given in the witness box will not always be in accordance with a written statement. This is one of the key benefits of the committal hearing, for the prosecution and defence, to identify, at an early stage, whether a critical witness will maintain, change or add to the account previously given in a written form.
- 3.7.7 As set out in Part 4 of our submission, CBA members cite examples of witnesses who, at committal hearing, deny having read their statement prior to signing it, claim not to have appreciated parts of their statement or indicate parts were left out. In committal hearings involving issues of identification, it is not uncommon to discover only in cross-examination that witnesses were shown photo boards but were unable to positively identify the accused or did positively identify another person.

3.7.8 Without pre-trial examination, such issues would only arise at trial, before a jury. Such late disclosure might well result in many more applications for discharge of juries and the need to adjourn trials to conduct appropriate inquiries.

3.8 Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so, why?

3.8.1 The CBA submits that the existing pre-trial opportunities to cross-examine witnesses, including victims, ought to be retained.

3.8.2 There are already extensive restrictions on cross-examining certain classes of victims and witnesses. No comprehensive assessment has been made to ascertain whether these restrictive procedures have assisted to reduce trauma for victims or witnesses or indeed to promote resolution or to avoid delay. With a system that appears to be working, there seems no benefit to remove the pre-trial opportunity to scrutinise evidence in other cases, which might otherwise help to expedite resolution and streamline criminal proceedings.

3.8.3 Contrary to the DPP's submission to the Commission,¹⁷ this is not in the context of a "culture" in Victoria of "extensively" cross-examining "all substantive witnesses" on a brief at a committal hearing. Limitations have been set in place since the 1986 Report. There have been further restrictions in more recent years. A magistrate may only grant leave if an accused has identified an issue to which the proposed questioning relates, has provided a reason the evidence of the witness is relevant to that issue and cross-examination of the witness on that issue is justified. This is no easy hurdle. It avoids witnesses being unnecessarily called for cross-examination whilst allowing scrutiny of the prosecution case and ensuring proper disclosure and avoiding witnesses unnecessarily being called. The procedure is monitored by a judicial officer.

3.8.4 If there are specific aspects of the committals process that cause concern, these should be identified and, if there are actual problems, solutions proposed and considered, rather than simply abolish or undermine a system that has effectively worked over a long period of time.

¹⁷ *Proposed Reforms to Reduce Further Trauma to Victim and Witnesses*, DPP Policy Paper, 1 October 2018.

3.9 Should cross-examination at a committal hearing be further restricted or abolished? If so, why?

- 3.9.1 For the reasons outlined above, the CBA submits cross-examination of witnesses at committal should not be abolished or further restricted.
- 3.9.2 If there are problems with the types of questions being asked or the way questions are being asked, it may be that, as a matter of practice, prosecutors are encouraged to more readily object and magistrates to more readily intervene to ensure only appropriate questions are asked. However, these are issues that could be better identified and quantified. Without examples having been given, it is difficult to precisely address the general complaints.
- 3.9.3 The *Issues Paper* cites the Commission's 2016 Report on the *Role of Victims in the Criminal Trial Process (Victims of Crime Report)* as support for cross-examination at a committal hearing often being described as "worse than at trial."¹⁸ The reasons cited are that victims are only subject to cross-examination, rather than being able to tell their story through evidence-in-chief, and the manner of questioning by defence at committal is not constrained by the presence of a jury.
- 3.9.4 Such perceptions contrast with the experience of CBA members who prosecute committal hearings. Most prosecution witnesses express relief once they are told in advance that they do not need to recall everything in their statement. Most, when properly informed, understand the process. The ability of a witness in a committal hearing to simply adopt his or her statement is intended to in part alleviate stress for the witness, and mostly does, as it does in any pre-trial hearing. Witnesses are in practice asked if there is anything they seek to add to their statement(s), and leave can be granted to give supplementary oral evidence-in-chief if it is in the interests of justice.¹⁹ If there was any doubt in the past, the Court of Appeal has clearly stated that the prosecution can in re-examination take a witness to any matters in his or her statement to clarify matters arising in cross-examination.²⁰

¹⁸ *Issues Paper* at p.56 (para 5.5.1), citing VLRC, *The Role of Victims of Crime in the Criminal Trial Process* (Report No.34, August 2016) at p.207.

¹⁹ *Criminal Procedure Act 2009* s.130.

²⁰ *The Queen v Ward* [2017] VSCA 37 per Maxwell P & Redlich JA at [134]-[135] & Whelan JA at [149]. The decision related to VARE answers, but the principles apply equally to a statement that is tendered.

- 3.9.5 As for the perception that defence counsel are not constrained by a jury, this is the same for any pre-trial hearing. Counsel who have appeared in committals over many years would recall magistrates in the past at times indicating that defence counsel show restraint precisely because they are *not* before a jury. Such sentiments are expressed less often today only because cross-examination is, as a matter of practice, generally more restrained, and better controlled, in this forum. Magistrates, like judges, have the power to limit the form of questioning to ensure it is appropriate. Prosecutors can object.
- 3.9.6 As outlined above, significant thresholds must already be met in order for leave to be granted to cross-examine a witness at a committal hearing.²¹ As a matter of practice, magistrates already consider issues such as the potential vulnerability of a witness before determining whether cross-examination is justified and proactively discuss such issues with practitioners. There is no need for a stipulation that the Court must have regard to a victim's ability and wish to be cross-examined.²² Such pre-trial examination might avoid the stress of being cross-examined at trial. A degree of flexibility is required rather than a hard rule.
- 3.9.7 The Commission's 2016 proposal for a victim only to be cross-examined at a committal hearing on "a matter that relates directly and substantially to the decision to commit for trial"²³ does not take into account the multi-faceted functions of the committal hearing and the potential for victims to avoid being cross-examined at trial and the potential benefits of early resolution arising because of evidence being given at a committal hearing.
- 3.10 If cross-examination at a committal hearing is further restricted, how should this occur?**
- 3.10.1 Refer to the comments above.
- 3.11 Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so, who?**

²¹ *Criminal Procedure Act 2009* s.124.

²² Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No.34, August 2016) at p.213 (Recommendation 39).

²³ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No.34, August 2016) at p.213 (Recommendation 39).

- 3.11.1 The CBA submits that no additional class of victims or witnesses should be added to the existing categories of witnesses who are not to be cross-examined pre-trial. The existing classes are broad enough and, as outlined above, there has been no proper assessment as to whether the restrictions imposed have reaped benefits.
- 3.11.2 If a witness is particularly vulnerable for some additional reason and reluctant to be cross-examined, this is a factor that might be properly taken into account by the magistrate in assessing whether cross-examination is justified.
- 3.12 What additional measures could be introduced to reduce trauma for the victims or other vulnerable witnesses when giving evidence or being cross-examined at a committal or other pre-trial hearing?**
- 3.12.1 Other than the examples referred to above, it is not clear what trauma has been described by victims or other vulnerable witnesses when giving evidence or being cross-examined at a committal hearing or other pre-trial hearing as opposed to being cross-examined at trial. For the reasons outlined above, the perceptions, and the reasons given for them, may not be well-founded.
- 3.12.2 Giving evidence in court might be a stressful process, but there are a range of responses. There are instances when witnesses, including victims, look forward to giving evidence and having their day in court. Other witnesses are assisted by the opportunity of giving evidence in the Magistrates' Court before potentially having to do so in a higher court, often before a jury. One concrete rule that all witnesses are likely to be traumatised by any questioning, and particularly so at committal hearing, is not helpful. Witnesses are to be supported and treated appropriately, but their evidence in a written statement should not be beyond challenge.
- 3.12.3 There are already many processes available to minimise or avoid trauma to victims and vulnerable witnesses. This includes the provision of expert support, the giving of evidence from a remote facility and orders for a closed court. These measures must be balanced against the need to ensure a fair trial to an accused.
- 3.12.4 One primary measure that is likely to reduce trauma for victims, and indeed all witnesses, is to ensure they are spoken with in advance, to have explained to them the nature of the proceedings and ensure this is understood, and given the opportunity of speaking with the prosecutors after giving evidence. CBA members

who prosecute committal hearings endeavor to do so, often without any remuneration. Counsel are at times briefed at short notice, but attend Court to try to speak with witnesses who may not have been spoken with in advance.

3.13 Should the current test for committal be retained?

3.13.1 The CBA supports the retention of the current committal test. It has served the community well. Other than the fact that it has been removed in other jurisdictions (without any clear assessment of the impact), there is no apparent justification to remove the test. Refer to the further comments below.

3.14 Having regard to the DPP's power to indict directly, is there a need for a test for committal?

3.14.1 The test for committal is different from that applied by the DPP. The latter must determine whether there are reasonable prospects of conviction and whether it is in the public interest to prosecute.

3.14.2 The DPP is required to apply a higher test, but there is rarely precise information released as to how the test is applied. Nor is there a basis to challenge the application of the test. An accused can only submit a request for reconsideration (or a request for discontinuance of charges or proceedings).

3.14.3 Despite applying a lower test than that to be applied by the DPP, the Magistrates' Court has, in some cases, discharged an accused on some or all committal charges. This includes instances when the DPP has not subsequently elected to directly indict the accused. Discharge might not happen in many cases, but in those cases where it occurs it avoids the need for the investment of additional resources and stress, including a potential jury trial.

3.14.4 Significantly, the possibility of discharge in open court, and the risk of costs being awarded against police, is also a real incentive for the DPP to be in a position to properly consider the charges in advance of a committal hearing. It is common for the prosecution on the day of the hearing to substantially revise charges and add or withdraw charges against an accused.

3.14.5 Charges also change after a committal hearing. It provides a clear opportunity for all parties to review their positions at the conclusion of evidence and submissions.

In some cases it is a powerful indicator to an accused to hear from a magistrate in open court that the evidence is of sufficient weight to support a conviction.

Comments from a magistrate on the strengths of the evidence are often made. At times this assist with resolution, when an accused hears that the evidence is strong or the prosecutors hear from a judicial officer of concerns.

3.14.6 Arguments have been mooted for magistrates to apply the DPP's first test, namely whether the prospects of conviction are reasonable, rather than their traditional test. However, there appears likely to be greater scope for consistency if the DPP (and those delegated by the DPP) continue to make the decision on whether there is a reasonable prospect of conviction rather than a magistrate.

3.15 Is there an appropriate alternative process for committing an accused person to stand trial?

3.15.1 The alternative processes outlined in other jurisdictions do not appear, on their face, to offer any readily identifiable solutions to apparent problems.

3.15.2 As outlined above, it is desirable, as part of the review (particularly if significant decisions are made regarding longstanding procedures), that any existing problems are clearly identified, including how the problem arises from the current process, and careful consideration is given to how an alternative process might alleviate the problem.

3.15.3 Many of the suggestions appear to arise from perceptions that a different court, or different judicial officers, might approach matters differently. Some come close to suggesting that there should be a "one court" system.

3.15.4 The CBA urges caution before proposing the adoption of such a system. There are sound reasons why the committals process has traditionally taken place in the Magistrates' Court. It more easily allows cases to be identified that might be capable of resolution in the summary jurisdiction. There is less formality, and the likelihood of a more administrative, and less judicial, approach.

3.15.5 Suggestions that committal proceedings might be better and more expeditiously dealt with in higher courts, including by judicial registrars, are only likely to work if the higher courts are adequately resourced to take on the additional work. This is

in the context of there already being significant delays in the higher courts and arguments for better resourcing to deal with existing workloads.

3.16 How effectively do committal proceedings ensure: a) appropriate resolution of cases, b) efficient use of court time and c) parties are adequately prepared for trial?

3.16.1 As outlined above, the current system works well, albeit it can always be improved. The CBA submits that a mix of pre-trial procedures is required to achieve the best outcomes. The current committals process plays a pivotal role in this system.

3.16.2 Means for improvement might include more training, encouragement of greater scrutiny and/or intervention by magistrates and prosecutors and more funding for adequate resources for prosecutors and for accused to be properly represented.

3.17 Are there other pre-trial procedures that could equally or more effectively ensure: a) appropriate early resolution of cases, b) efficient use of court time and c) parties are adequately prepared for trial?

3.17.1 Based on the evidence at hand, the CBA is not persuaded that any other pre-trial procedures are likely to better achieve the outcomes assisted by the current system.

3.17.2 The DPP's proposal, that committals be abolished and replaced with pre-trial cross-examination at a Case Management Hearing in the Supreme Court or County Court, is unnecessarily complicated and its purported benefits entirely reliant on the higher courts being better resourced than the Magistrates' Court to deal with pre-trial hearings. This is in the context of current lengthy delays in listing plea hearings and even short trials. It is unclear from the proposal how the Supreme Court or County Court would assess or allocate the time required for pre-trial hearings based on a magistrate's directions or how the magistrate's orders would in any way bind the judge to hear evidence from a witness. There is no guarantee that judicial officers in the County Court and Supreme Court will be more robust in limiting cross-examination of witnesses than magistrates. The proposal also does not address the issue of likely further delays arising from duplicated case management roles in the lower and higher courts. Nor does it address how further delay seems inevitable if issues are identified at the Case Management Hearing that require further investigation and/or further consideration of the appropriate charges.

3.17.3 As outlined above, proposals for committal hearings to be initiated in higher courts, and possibly dealt with by judicial registrars, are only likely to work if the higher courts are adequately resourced to take on the additional work. There is the further difficulty of the higher courts identifying which cases can be appropriately dealt with summarily and transferred to the Magistrates' Court.

3.18 How should concerns that the committal proceedings contribute to inappropriate delay be addressed?

3.18.1 It is difficult to answer a question that relates to concerns without understanding how the concerns arise. It is not clear what other factors arising in committal proceedings are perceived to cause inappropriate delay or how these factors are likely to be remedied by a different system.

3.18.2 It might be that people need to be better informed. Prosecutors and indeed all involved in the criminal justice system might assist victims, the media and the general community to better understand how the system operates, including the roles of the prosecution, how charges are determined, why it often takes time for matters to be investigated and to assess evidence and charges and why charges might change over the course of a proceeding.

3.18.3 If there is evidence to show that any part of the committal proceedings does contribute to unnecessary delay, these should be identified and, when possible, remedied. In Part 5 of our submission, we put forward simple, positive suggestions that might assist to avoid delay.

3.19 How should concerns that other pre-trial processes contribute to inappropriate delay be addressed?

3.19.1 Refer to the comments above.

3.20 Do committal proceedings contribute to inappropriate delay in the Children's Court?

3.20.1 The increase in committal proceedings in the Children's Court is a recent phenomenon attributable to legislative changes to require or encourage more serious matters to be dealt with in higher courts.

3.20.2 The number of committal cases in the Children’s Court are limited, and the reasons for inappropriate delay, if there is inappropriate delay, are no doubt capable of readily being examined and hopefully addressed.

3.20.3 The CBA notes, however, that the Children’s Court jurisdiction is, and ought to be, different from other courts.

3.21 What are the resource implications of any proposed reforms to committals or pre-trial proceedings?

3.21.1 The CBA supports the commitment of adequate resources for investigators, the OPP, prosecutors briefed to appear for the DPP and barristers and solicitors engaged to act on behalf of accused persons who are eligible for assistance from Victoria Legal Aid. The CBA supports appropriate resources in our courts. The criminal justice system is only as good as those who work within the system. Many of us do so in part for altruistic reasons, but we are faced with funding and resource issues that do not apply to other areas of the law or justice.

4. OTHER ISSUES REGARDING THE TERMS OF REFERENCE & ISSUES PAPER

4.1 *Terms of reference*

4.1.1 In October 2018 the State Government invited the Commission to review Victoria’s committal procedure and to recommend legislative, procedural or administrative changes.

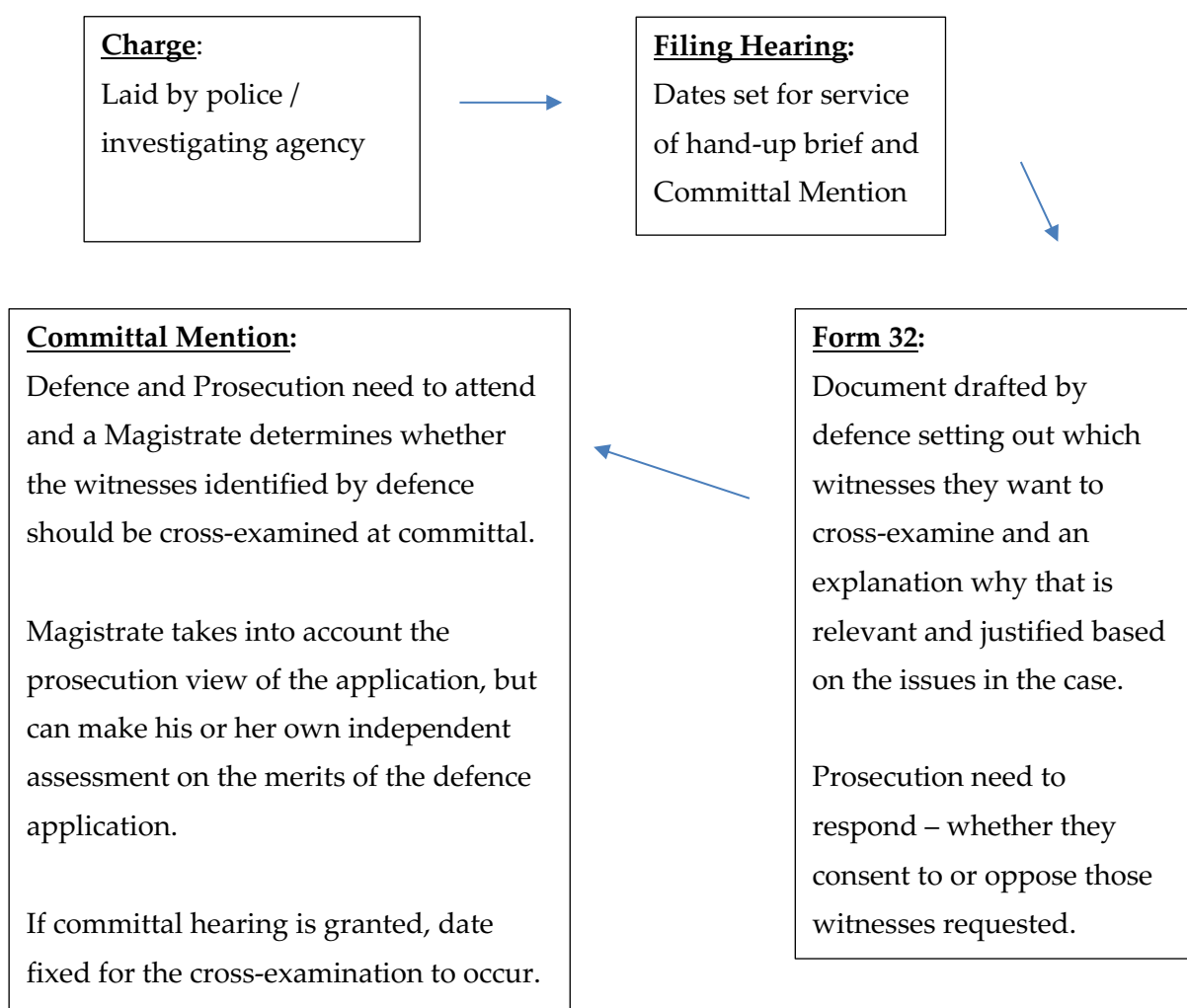
4.1.2 In exploring the role of committals, the Terms of Reference require the Commission to more broadly consider the following principles and goals:

- minimising trauma to victims and witnesses;
- identifying at an early stage charges that should proceed summarily;
- encouraging appropriate early guilty pleas;
- enhancing the efficiency of the criminal justice system;
- ensuring the fair trial rights of accused persons;
- facilitating the efficient use of court time;
- encouraging parties’ proper preparation for trial;
- improving early disclosure processes;
- minimising the need for witnesses to give evidence multiple times;
- encouraging best practice for supporting victims.

4.1.3 The principles and goals are extensive, and mean that matters are considered by the Commission beyond the 21 questions posed in the *Issues Paper*.

4.2 *The current committals process and early resolution initiatives*

4.2.1 Understanding the process for indictable offences proceeding through the committals stream to a committal hearing involving witnesses is important. A simplified summary is set out below:



4.2.2 The summary illustrates the significant points in reaching a committal hearing. The summary does not set out what happens for cases that resolve summarily. Not all indictable matters are listed for committal hearing, and, as outlined above, some matters may be listed for a hearing but involve only submissions or cross-examination of the informant. The outline provided does not include the committal case conference, which is available in some cases to assist with potential resolution.

- 4.2.3 Defence and prosecution practitioners must appear at both the Filing Hearing and Committal Mention (and Committal Case Conference if one is listed). These are forced opportunities for both sides to be in the same room and have discussions about the future progress of the case.
- 4.2.4 Communications from the date of the Filing Hearing between practitioners make early resolution easier to facilitate and to occur.
- 4.2.5 Further, even if the matter looks like proceeding to a committal hearing, the procedure set out above requires the parties to assess the brief and evidence and have meaningful interactions with the other side. Such processes mean that if the case is capable of being resolved on a basis suitable to all sides that can and does happen. Indeed, as the statistics suggest, this happens in the majority of cases.
- 4.2.6 The CBA notes the submission of the Magistrates' Court of Victoria to the Commission, and endorses the sentiments that the current committal system is working effectively and efficiently, producing considerable benefits to the administration of justice.²⁴ Around two-thirds of all cases in the committal stream resolve prior to committal with a guilty plea heard either summarily or in a higher court. The Court notes the changes introduced over a number of years to enhance the efficiency of committal proceedings, including more active case management.
- 4.2.7 The resolution of two-thirds of cases in the committal stream, prior to committal, is a significant number. As outlined earlier in this submission, this high resolution rate is another matter in favour of retaining committals as a way of advancing the interests of victims and avoiding the need for them to unnecessarily give evidence.

4.3 *Contrasts with the civil process*

- 4.3.1 When contrasted with the civil pre-trial process, the criminal system is efficient and effective.

²⁴ Criminal Law Committee of the Magistrates' Court of Victoria, *Magistrates' Court Response to the DPP's Proposed Reforms of the Committal Process* (10 April 2019).

- 4.3.2 There is no one size fits all in respect of the interlocutory steps in a civil matter in the Supreme Court or County Court of Victoria. The steps depend on the division of the court, the specialist list within the division (if any – for example, the Probate List, the TEC List) or whether the matter is subject to a particular statutory code (corporations matters, for example).
- 4.3.3 Generally speaking the process may be distilled as follows:
- i. Writ / originating process, with a statement of claim;
 - ii. Defence;
 - iii. Reply;
 - iv. Request for Further and better particulars (although sometimes people wait until after discovery);
 - v. Further and better particulars;
 - vi. Notice for discovery;
 - vii. Affidavits of documents filed and served;
 - viii. Inspection;
 - ix. Sometimes Third Party subpoenas are served;
 - x. Mediation (although this can be very fluid as to when it occurs and regularly occurs after expert opinions as to loss and damage have been obtained).
- 4.3.4 Then comes pre-trial directions (every court is different):
- xi. Witness statement/affidavits in chief;
 - xii. Witness statements/affidavits in reply;
 - xiii. Expert statements in chief and reply (sometimes there will be a conclave, sometimes not);
 - xiv. Objections to the evidence;
 - xv. Court books prepared;
 - xvi. Outline of opening submissions served;
 - xvii. Trial.
- 4.3.5 Of course the criminal process commences with charges, followed by service of a brief of evidence. However, when compared to the civil system and its discovery process, a committal is an effective and efficient method of obtaining such discovery for the benefit of both the prosecution and the defence.

4.4 *Reforms over the last twenty years*

4.4.1 As touched upon in Part 3 of our submission, it is important to note that there have been significant reforms to the committals system over the last twenty years.

Committals can no longer be conducted as of right. The reforms, introduced in 1999 / 2000 and further refined over time, have made it more difficult for an accused to run a committal hearing and puts the onus on defence to justify why a committal hearing should be conducted.

4.4.2 These reforms and their implementation have promoted:

- Enhancing the efficiency of the criminal justice system; and
- Facilitating the efficient use of court time.

4.4.3 An accused must demonstrate that in each particular case a committal can be justified. When appropriate, an accused's legal representatives must draft a Form 32 document setting out in some detail why a witness is sought for cross-examination at a committal hearing. This document must identify:

- An issue to which the proposed questioning relates;
- Why evidence on that topic is relevant; and
- Why cross-examination can be justified.

4.4.4 Once this has been done the prosecution can either oppose or consent to each witness being questioned at a committal. The ultimate determination, as to whether there is a committal hearing and which, if any, witnesses can be questioned, is made by a magistrate at a Committal Mention. Magistrates perform this task with some rigour, ensuring committal hearings are only listed if they can be justified.

4.5 *"Unnecessary" committal hearings*

4.5.1 Despite our submission that the existing committals system works well, the CBA acknowledges there are still committal hearings conducted which might appear unnecessary.

4.5.2 This is likely to occur when the person conducting the committal hearing does not adhere to reasons why a hearing was allowed, and justified, at the committal mention.

4.5.3 Further safeguards could be considered to ensure unmeritorious committal hearings (and, more particularly, applications to cross-examine witnesses) are limited as much as possible moving into the future. The magistrate presiding over a committal hearing has an important role to play in this regard, by limiting questioning to relevant topics as identified in the Form 32 prepared prior to committal mention.

4.5.4 There is a need for further training and professional development amongst barristers and solicitor advocates who conduct committals to reduce the occurrence of committals that may serve no purpose.

4.6 *The tension between making things easier for victims and ensuring the right to a fair trial*

4.6.1 Three out of the ten points of reference for the Commission focus on improving matters for victims, namely:

- minimising trauma to victims and witnesses;
- minimising the need for witnesses to give evidence multiple times;
- encouraging best practice for supporting victims.

4.6.2 It is acknowledged these are important considerations.

4.6.3 Two out of the ten points of reference for the Commission focus specifically on ensuring fairness for an accused, namely:

- ensuring the fair trial rights of accused persons;
- improving early disclosure processes.

4.6.4 There is often a clear tension between making things easier for victims and ensuring that a person accused of serious criminal conduct obtains a fair trial. It is acknowledged that this tension is difficult to resolve.

4.6.5 The rights of an accused have been consistently eroded over the last 20 to 30 years by express legislative modification. But a few examples include:

- The introduction of majority verdicts;
- The removal of the right to cross-examine children or cognitively impaired complainants at committal;

- The reduction of the number of challenges, without cause, to potential jurors from six to three.

4.6.6 With this reduction in an accused's rights, there has been a corresponding increase in sentences for serious criminal offending. Two specific examples are culpable driving and rape. An analysis of sentences for these two offences over the last twenty years shows a substantial increase in sentences over that period. The likelihood of further increases in sentences has been aided by the High Court's recent decision in *DPP v Dalglish* (2017) 262 CLR 428; [2017] HCA 41.

4.6.7 The increase in sentences, depriving citizens of their liberty for significant periods of time, adds to the need to ensure people who are convicted receive a fair trial.

4.7 *Appreciating the difference between a written statement and oral evidence*

4.7.1 A witness's account in a written statement is not set in stone, nor does it mean they will give the same account in the witness box while being asked questions in the absence of their statement.

4.7.2 This is one of the key reasons committals are needed, to determine if a witness will maintain, change or add to their account previously given in written form. Remembering that it is the police (or investigating agency) who control how statements are drafted in the following way:

- What questions are asked of potential witnesses;
- (just as importantly) What questions are not asked of potential witnesses;
- Determining what is relevant or not relevant;
- Deciding what should go into a final statement or be left out.

4.7.3 In relation to witnesses on a brief of evidence who inculpate an accused person, it is a matter of fairness that such witnesses be questioned before a jury is empanelled, so as to give full disclosure to an accused.

4.7.4 It does not mean an accused should be entitled to cross-examine every witness on each brief in the hope a witness may change his or her mind, but proper disclosure about other topics on which a witness can give evidence, but were not included in a statement, is important.

4.7.5 Whether it be correct or not, the following are times arises in answers in cross-examination at a committal hearing:

- Witnesses deny having read their statement prior to signing it. This is a justification for a change in their account as between oral evidence and an earlier written statement.
- Witnesses claim that parts of the statement are not their account but were inserted by investigating police and they were asked to agree with it.
- Witnesses assert they told police about other information (which usually assists the defence) and the police / investigators told them it was not relevant and / or should not be included in their statement.

4.7.6 These are matters which an accused should not be forced to deal with 'on the hop' before a jury empanelled to finally determine the matter.

4.7.7 Some opponents to committal hearings argue that there is no need for them as all witness accounts have been committed to writing. With respect, this is too simplistic and ignores the following:

- Police and investigators may restrict material in statements which assist their case theory.
- Exculpatory material, or material which undermines the police case theory, might be cast aside or excluded from statements which end up on a brief of evidence.
- When appropriate, a committal is an opportunity to explore whether there is more a witness can say about a critical topic and / or provide further information which may cast their written evidence (in statement form) in a different light.

4.8 *Needing to be aware, prior to trial, if an investigation has been selective*

4.8.1 Experience shows that some investigating police will only provide and disclose material that assists their case – that is the prosecution of an accused person.

4.8.2 Often this will only be revealed by a committal hearing, which occurs in advance of a contested trial and allows the defence an opportunity to remedy any unfairness.

- 4.8.3 An oft-repeated example is photo boards. In a case where identification of the relevant offender is crucial to a successful prosecution, the use of photo boards can be a powerful tool.
- 4.8.4 The following scenario plays out in some committal hearings where identification is a central issue:
- Photo boards are disclosed where the accused has been identified by certain witnesses.
 - A number of other witnesses given identification evidence without, on the face of their police statements, having been shown photo boards.
 - No photo boards other than those where a positive identification has occurred are disclosed.
 - Witnesses, apparently not shown photo boards based on their police statements, are asked at committal if they were shown photo boards. The witness states they were shown photo boards.
 - The photo boards are then produced which disclose that people other than the accused were selected and / or people were shown photo boards with the accused in them and the witness failed to select anyone.
- 4.8.5 The committal hearing provides the best opportunity to discover such scenarios. If it has taken place, it generally does not require much cross-examination to uncover. It is better that it is revealed at the committal stage than before a jury at trial.
- 4.9 *Recent public inquiries show deficiencies with police taking statements and making proper disclosure***
- 4.9.1 One of the key terms of reference, concerning committals, is ensuring the fair trial rights of accused persons. This is a fundamental consideration to avoid trials where a substantial miscarriage of justice arises.
- 4.9.2 This is critical as such trials lead to appeals and re-trials – which is in no-one’s interests, be they victims or accused.
- 4.9.3 The IBAC public hearing into the Silk / Miller murder investigation
Earlier this year the Independent Broad-Based Anti-Corruption Commission (“IBAC”) conducted public hearings into the Silk / Miller murder investigation.

- 4.9.4 The evidence before those public hearings raised very serious questions about how police take witness statements when investigating serious criminal conduct.
- 4.9.5 After the public hearings IBAC released a statement setting out significant concerns over improper practices that have occurred, and continue to occur, when Victoria Police take witness statements.²⁵ Other concerns were expressed about non-compliance of police to make full disclosure to prosecution and police. IBAC Commissioner Redlich stated these practices have the potential to adversely impact the integrity of criminal investigations and the delivery of justice in summary hearings in the Magistrates' Court and in higher court trials. It was expected that the evidence from the hearings would result in Victoria Police examining their training programs, practices and the current culture that enables the identified improper practices. As noted by Commissioner Redlich, "police have significant powers, and the community rightly expects them to always use these powers responsibly and perform their duties fairly, impartially and in accordance with the law."
- 4.9.6 The IBAC inquiry highlights significant and substantial issues with police taking statements and making disclosure. Removing the current committals process, which acts as a check to these aspects, therefore comes with real risks. It is in this context that the CBA expresses strong concerns over proposals to remove the ability to independently test and explore evidence before trial.
- 4.9.7 The Royal Commission into the Management of Police Informers
The hearings at the Royal Commission into the Management of Police Informers ("RCIMPI") have further highlighted deficiencies with police disclosing all relevant material to the prosecution and defence.
- 4.9.8 In addition to its terms of reference, which deal with issues relating to police failure to disclose highly relevant materials, the RCIMPI itself has been plagued by continued non-disclosure and late disclosure of relevant information. This again points to real problems within Victoria Police. It highlights the need for objective, independent and open steps that can be relied upon to ensure adequate disclosure by police (and others) with respect to serious criminal allegations.

²⁵ IBAC, *Media Release: IBAC's Operation Gloucester public hearings conclude and identify significant issues with police practices*, 1 March 2019 (available on the IBAC website).

4.10 *Benefits to the prosecution of the committals process and committal hearings*

4.10.1 As outlined above, there are invariably substantial benefits to the prosecution via the committals process.

4.10.2 The many advantages for the prosecution were set out by then Commonwealth DPP Mark Weinberg QC (now Justice Weinberg of the Victorian Court of Appeal) at a 1990 conference on the future of committals.²⁶ The multitude of factors identified, all relevant to the public interest aim of ensuring those who are guilty of serious criminal offences are prosecuted to conviction, apply equally today. They include promoting earlier resolution, learning how witnesses will perform under scrutiny, assessing prospects of conviction based on observations of witnesses rather than just their statements and other tactical advantages for the prosecution. The following observations were made:²⁷

A committal hearing may expose weaknesses in the prosecution case, which, while not fatal to that case, may nevertheless point to the need to strengthen the evidence, prior to trial. The prosecution may discover, for example, that the charges which have been laid are inappropriate, and cannot be sustained. Lesser charges may be substituted and, in some cases, may lead to a plea of guilty, and perhaps summary disposal. If a prosecution witness does not perform well at committal, and there is thought to be a need for more evidence to be obtained to support his testimony, such evidence can be sought, and obtained before the trial. This is particularly true with experts. If an expert is unchallenged at committal, it can probably be inferred that he will be unchallenged at the trial. If he is subject to a strong attack at committal, the need for corroborative evidence may become apparent. Other experts may be procured.

4.10.3 Often a case can look good on paper (based on witness statements), but is less strong when those witnesses are tested by cross-examination.

²⁶ Weinberg QC, Mark, *A Prosecution Perspective*, Paper presented at "The Future of Committals", Australian Institute of Criminology Conference, 1-2 May 1990, pp.139-150.

²⁷ Weinberg QC, Mark, *A Prosecution Perspective*, Paper presented at "The Future of Committals", Australian Institute of Criminology Conference, 1-2 May 1990 at pp.144-145.

- 4.10.4 Post committal, the prosecution can consider the evidence given at committal and if need be re-cast its case and / or change the charges, whatever the case requires.
- 4.10.5 Without committals, if the prosecution case falls apart or is weakened substantially during oral evidence, this happens at trial before a jury with limited prospects to remedy such a situation.
- 4.10.6 Discovery and further particulars, provided at committal, can assist the prosecution just as much the defence. It can aid in a stronger, more focused prosecution.
- 4.10.7 This is a matter which thereby advances the interests of victims in criminal proceedings. It is in the interests of victims that proceedings that can be properly prosecuted are pursued to full effect, and that they do not fail in circumstances where further time and consideration could more clearly focus a prosecution.
- 4.11 *Early and appropriate resolution of cases***
- 4.11.1 Beyond the two thirds of cases that resolve prior to committal, committal hearings often led to the resolution of a case to appropriate charges and on a proper factual basis. This is in large part because they focus the parties' attention well before any contested trial and provide an opportunity for discussion to occur after evidence has been given at a committal hearing.
- 4.11.2 This is one of the purposes of a committal as recognised specifically in the *Criminal Procedure Act 2009*. A victim may have to give evidence at a committal hearing, but if this is the only occasion on which they give evidence, that process is less involved, and likely to be less stressful, than evidence given before a jury.
- 4.11.3 In a case where a complainant (as they would be at that time) has been subjected to multiple sexual assaults, they are not required at committal in their evidence-in-chief, to relive in detail each of the sexual assaults. They may have to answer questions in cross-examination about these details but, if that leads to a resolution post-committal, the trauma of giving evidence at a committal hearing has avoided the need for it at trial. At trial their evidence would have to be much more detailed, particularly when they give their evidence-in-chief.

4.11.14 Further, as a matter of human nature, some accused will only plead guilty if satisfied a key witness such as a complainant will ‘turn up’ to court and ‘swear up to their statements.’ With the opportunity for this to occur at committal, rather than at trial, some accused will enter pleas post-committal after seeing that a key witness has turned up to court and given evidence consistent with their statement. Without committals, accused who take this view may well run contested trials to see if critical witnesses appear and give evidence against them.

4.12 *Likely increase in contested pleas in the higher courts*

4.12.1 The general public perhaps underappreciates the desire within criminal justice for plea hearings to proceed on the basis of an agreed set of facts, and the attempts by parties, and the Courts, to encourage resolution on the basis of agreed facts that properly set out the nature and gravamen of offending. Failure to do so is likely to lead to trials, contested plea hearings and further distress to victims and those affected by the criminal process.

4.12.2 Committal proceedings, and in particular committal hearings, can often greatly assist to resolve factual disputes between the prosecution and defence and allow charges to resolve to appropriate charges and on an appropriate factual basis.

4.12.3 Without committals allowing this to be achieved in certain cases, there will likely be an increase in the number of contested plea hearings in higher courts, where the charges are resolved and a plea is entered but the factual basis for the charges remains in dispute.

4.12.4 On a contested plea, evidence is often called by both the prosecution and defence. Contested pleas are more likely to involve victims being forced to give evidence, and being cross-examined, about the circumstances of offending.

4.12.5 By way of example – take a case where three accused are charged with, and plead guilty to, a home invasion where the occupants of the home have been seriously assaulted and injured. If the accused were wearing items of clothing to conceal their identity, an issue may arise on any plea as to ‘who did what?’ One or more of the offenders may argue that, whilst they were present and involved, they did not physically assault any victim.

4.12.6 Offenders who plead guilty often insist on pursuing matters such as this as a matter of perceived mitigation of their criminality. Such matters can currently be explored at committal hearing and may lead to resolution of such issues between the defence and prosecution so they do not become an issue on a plea hearing.

4.12.7 In such circumstances, the removal of access to a committal hearing, even when a plea of guilty is entered, might not obviate the need for a victim to give evidence and be cross-examined. They would likely have to give evidence, based on the above scenario, at a contested plea hearing. This, in turn, means lengthier plea hearings and more time expended in the higher courts to resolve such issues.

4.13 Specific examples of where committal hearings have been effective

4.13.1 There are many and varied examples of committals having been effective and having prevented lengthy and time-consuming trials from proceeding and / or prevented charges from unnecessarily proceeding. These are only examples of some cases that received media attention.

4.13.2 Recent assault case (Walker, Walker and Fitt) (2019)

Sam Walker, Dominic Walker and Benjamin Fitt were each charged with serious charges, including reckless conduct endangering life and recklessly causing serious injury in circumstances of gross violence, arising from an alleged assault of other football patrons near the MCG. Leave was granted for a committal hearing. The DPP proceeded to committal hearing on the serious charges laid by police.

4.13.3 During the first day of the committal hearing, after evidence was given, the matter resolved, with each accused agreeing to plead guilty to two charges of intentionally causing injury. There was no opposition to the matters being heard summarily.

4.13.4 The DPP was only able to properly consider the charges, and make appropriate concessions, after hearing evidence being tested at the committal hearing. On the basis of this evidence, the case resolved, at an early stage, to appropriate charges to be dealt with in the Magistrates' Court. Potentially difficult, stressful and expensive proceedings in the higher courts were avoided, as was delay.

4.13.5 John Setka and Shaun Reardon (2018)

The DPP discontinued blackmail charges against high-profile union officials, John Setka and Shaun Reardon, during their joint committal hearing, again as a result of evidence given at the hearing. The DPP effectively conceded that, because of the evidence that came to light during the committal, the case was fatally flawed. Questions asked on behalf of the accused disclosed that a large law firm had played a significant role in drafting witness statements, some of which did not accurately reflect the witness's evidence. This was not known to the DPP prior to the committal hearing.

4.13.6 The resolution again demonstrates how, only because of the committal process and the committal hearing, was the DPP able to properly consider the evidence and charges, with the hearing uncovering deficiencies and exposing significant disclosure issues that impacted significantly on the strength of the prosecution case.

4.13.7 RBA note-printing foreign-bribery case (2012 and 2013)

Two companies and a number of employees were charged by the Australian Federal Police with respect to various foreign-bribery allegations. A magistrate discharged accused at a committal in 2012 regarding one aspect of the case, and discharged about half the charges in a later committal in 2013. The Commonwealth DPP filed a direct indictment. Ultimately, in part due to issues discovered during the committal hearing, the High Court upheld an earlier order staying proceedings.²⁸ In the process, potentially very lengthy trials (over many months) and the repercussions of such trials, were avoided.

4.13.8 Theo Theophanous (2009)

After a committal hearing, the magistrate dismissed rape charges against a member of parliament. There was no direct presentment. The committal process proved effective and avoided a matter unnecessarily proceeding to trial.

4.14 Delays in the criminal justice process

4.14.1 It is in the interests of the prosecution and defence that unnecessary delay is avoided. It is essential, however, that there is focus on the real contributors to delay rather than simply individual perceptions of what might cause delay.

²⁸ *Strickland v Commonwealth DPP* [2018] HCA 53.

- 4.14.2 At the committals stage, it is common, for example, for committal mentions to be adjourned due to the prosecution needing additional time to obtain evidence or to obtain instructions with respect to potential plea negotiations. The latter issue can only be alleviated if there is a system in place where instructions can more readily be obtained from a Crown Prosecutor.
- 4.14.3 Most committal hearings are dealt with in less than a day. On the rare occasions when they exceed their estimate, there is at times significant delay in obtaining a date that is suitable for the magistrate. This might be rectified by the Court reconsidering its processes for allocation and management of hearings.
- 4.14.4 At present the significant delays in the process of dealing with serious indictable offences occurs substantially in the higher courts. County Court trials are often listed more than a year after a person is committed for trial and may well not be reached on their first listing and adjourned for another significant period. Reviewing the causes of such delay would require careful analysis of the processes for listing and managing trials in the County Court.
- 4.14.5 The existence of such delays is highly relevant to the review of the committals process in that having pre-trial proceedings in the Magistrates' Court avoids further pressures on the County Court and encourages the successful resolution of most matters at an earlier stage.

4.15 Potential reforms that might improve the committals process

- 4.15.1 The criminal justice system is imperfect, but those involved in it, including members of the CBA, aspire to make the system as good as it can be.
- 4.15.2 Members of the CBA have identified issues where consideration might be given to reforming existing practice and procedure with the committals process. The CBA acknowledges that further research and input from other parties might be required before any changes are properly considered.
- 4.15.3 Possible reforms include the following:
- a) It should be emphasised, either through a practice direction or legislative change, that a prosecution witness need not identify exhibits produced

unless there is a specific issue about an exhibit. This might avoid delay such as that which occurred in the example above at paragraph 2.15.

- b) In appropriate cases, a witness might be more readily permitted to refer to his or her statement given that he or she has adopted the contents. This might overcome perceived issues with the witness not being able to recount the version as set out in their statement.
- c) Where criminal proceedings have been split (for example, where one accused was charged initially but a co-accused is not charged until after the initial accused was committed or dealt with), there could be a presumption against cross-examination of witnesses who have already been cross-examined at an earlier committal hearing or at least limits on what aspects may be cross-examined.
- d) Consideration might be given to limiting the right to proceed to trial on some indictable charges. Some unrepresented accused elect to proceed to committal hearing, and then trial, on charges that are capable of being heard summarily. The Commonwealth *Crimes Act 1914* restricts the right to trial on indictment to thefts of greater than \$5,000.²⁹ Legislation in other states also limits the right to trial in trivial prosecutions. No figures are available on the number of such cases that do proceed to committal and trial. However, this is one simple means of potentially avoiding unnecessary use of court resources and expenses and witnesses having to give evidence twice.
- e) The Magistrates' Court currently restricts Committal Case Conferences to types of cases that appear more likely to be capable of resolution. Such a targeted response is to be commended. But the approach might be expanded to include other types of cases, where the magistrate can play a more proactive, but non-binding, role to assist with potential resolution of charges and/or issues.

4.15.4 These might appear to be small suggestions. However, they are in response to actual, identified, issues rather than perceived general concerns.

4.15.5 As outlined earlier in the submission, the CBA anticipates that proper scrutiny of problems within the committals process, looking at specific examples, is likely to highlight that the problems arise not from the procedures in place, but how they

²⁹ *Crimes Act 1914* (Cth) s.4J(4).

have at times been misapplied. Such problems are only likely to be rectified by having suitably trained and resourced lawyers and magistrates.

- 4.15.6 The CBA submits that it is appropriate to ensure that specific problems are identified and, when possible, solutions proposed that are capable of appropriate monitoring and assessment. The many and varied advantages of the committals process, highlighted in our submission, ought not to be sacrificed in any attempt to address perceived issues by some of general problems.

5. CONTACT DETAILS

- 5.1 We hope our submission is of some assistance. If you have any queries, please contact at first instance Jason Gullaci or John Dickie, whose contact details are supplied separately.

Criminal Bar Association of Victoria

15 August 2018