

Submission to the Victorian Law Reform Commission on the Review of Committals

August 2019

Victoria Legal Aid

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Executive Summary

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Commission's consideration of reforms to the committal system that will improve the efficiency of the criminal justice system, reduce the trauma experienced by victims and witnesses and ensure rights to a fair trial.¹

We consider that these objectives can be achieved by retaining the key elements of the current committals system, with improvements to address inefficiencies and bolster protections for victims.

Acknowledging the significant legislative reform efforts of the past ten years, our emphasis is not on a wholesale restructure of the system, but on improving practices by all parties (defence lawyers, investigators, prosecutors and the courts) with a focus on timely disclosure, increased communication and early involvement and oversight by senior lawyers. Investment in these areas will make a significant difference to the efficiency and effectiveness of the current committal process, while also limiting trauma for complainants and witnesses.

The committal system is more than just the series of Magistrates' and Children's Court hearings. It incorporates the negotiations, disclosure and evidence testing procedures that precede the trial in a superior court. It is essential to consider this function as part of the indictable criminal process as a whole.

When meeting its objectives, a well-run committal proceeding can:

- facilitate early resolution by ensuring that the accused has sufficient information to allow them to make an informed decision about whether to enter a guilty plea early in the process, reducing the number of matters going to trial, saving complainants and witnesses the greater trauma of the trial process and vicissitudes, and saving the community costs;
- protect an accused's rights in criminal proceedings by ensuring that the prosecution case against the accused is adequately disclosed;
- expedite any subsequent criminal trial processes by narrowing and defining the issues in contention;
- ensure that the evidence of complainants and witnesses is tested only on relevant and confined matters and in an appropriate manner;
- give both parties enough time to adequately prepare and present their case in an efficient and economic manner if it does proceed to trial.

Time spent on a well-run committal will often be recouped with trials being avoided altogether because material produced or the quality (either good or bad) of a witness's evidence prompts the entry of a guilty plea, a discharge, later discontinuance or a remittal to be heard summarily. According to the Office of Public Prosecution's Annual Report 2017-2018, 79.4 per cent of the guilty pleas achieved that year were achieved through committal proceedings.²

These benefits cannot be achieved if committal proceedings are not well prepared and well managed. In our experience, while a well-run committal paves the way for an efficient and well-prepared trial or resolution. Conversely a poorly run committal does not and can cause

¹ Victorian Law Reform Commission, *Committals Issues Paper*, June 2019.

² Director of Public Prosecution and Office of Public Prosecutions Victoria, *Annual Report 2017-18*, 12.

unnecessary distress to complainants and witnesses before the trial. For this reason we make recommendations to improve the current system.

Moving pre-trial proceedings from the Magistrates' Court to the higher courts may appear to be a straightforward step that would reduce delays and make effective management of criminal proceedings simpler. However, in our submission such a move would be tremendously expensive and require significant change in the higher courts. The experience of similar committal reform in other jurisdictions tends to suggest that this does not result in significant improvements in efficiency or reductions in delay.

There is a real risk that, especially without adequate investment, the early resolution rate will reduce and there will be greater delays in the finalisation of indictable matters and an increase in the number of trials in which victims of crime are required to give evidence. There would be particular challenges in this regard in regional areas with limited presence of higher courts. In our submission, if the same funds were instead invested in resourcing agencies and improving current systems, it would have a much greater positive impact on efficiency, speed of finalisation, and the experience of victims in the pre-trial process.

VLA recognises that victims and witnesses to criminal acts may experience physical or psychological trauma. This observation arises directly from our experience representing victims of family violence as well as criminal clients, who frequently have themselves been victims of crime. We acknowledge that giving evidence in court, especially cross-examination, can be traumatic and intimidating, and support measures to improve the experience of victims and other witnesses, particularly vulnerable victims and witnesses who are required to give evidence throughout the criminal process.

We note and support reforms made in recent years to restrict the cross-examination of vulnerable complainants during committal proceedings. Application of the existing test for granting leave to cross-examine at committal, in combination with better use of existing mechanisms, can ensure that cross-examination in committal proceedings is confined to relevant issues and the questioning is appropriate. VLA also supports the expansion and greater application of alternatives processes such as ground rules hearings, which can establish parameters on cross-examination that have been demonstrated to reduce the trauma for certain witnesses without diminishing fairness.

We do not identify other classes of victims or witness who should be excluded from pre-trial examination. However, if the Commission takes a different view and is concerned with the impact of giving evidence at committal for particular categories of victims, we recommend making specific provision for this or amending the test for granting leave for cross-examination, rather than abolishing committals altogether.

Any reforms should be carefully tested with key system stakeholders in the course of the Commission's considerations, and should be evaluated after three years, to assess the impact of the reforms on system efficiency, resourcing, and victims' experience. Establishing a strong baseline of data, and filling existing gaps in available data, will be essential to the evaluation process.

List of key recommendations

- The existing purposes in the *Criminal Procedure Act 2009* should be amended to include the additional purposes of facilitating early resolution, and providing independent consideration of the prosecution case. **(Question 1)**
- Improved charging practices (including addressing overcharging), oversight of charges by the prosecution, improved disclosure and better communication between parties would all assist in reducing the difference between charges that are initially filed and those that are prosecuted. **(Question 2)**
- The Office of Public Prosecution should have an earlier and enhanced role in relation to determining the appropriate charges, advising on the preparation of the hand up brief, and certifying the charges. **(Question 3)**
- Several mechanisms should be introduced to improve early and appropriate disclosure, including standardised disclosure obligations for all matters, mandatory early disclosure conferencing to improve communication and early engagement, prosecutorial review and certification of disclosure, and enforceable mechanisms to address failures to comply with disclosure obligations. **(Question 4)**
- Appropriate and confined pre-trial examination of witnesses should be retained. Victims' participation in committal proceedings could be improved by enabling their statement to be read aloud in open court, and providing more information about the criminal justice process. A specialist committal list in the Magistrates' Court would ensure that magistrates have experience in applying existing protections, confining questioning to relevant and justified matters, and not allowing intimidating or oppressive questioning. **(Question 8)**
- Cross-examination at committal hearing should not be further restricted, instead victims should receive additional support to minimise any trauma associated with this process. In particular, we support the expansion of intermediaries and ground rules hearings to all court locations and beyond the current restricted eligible cohort. **(Question 9)**
- Committal proceedings should be retained in the Children's Court jurisdiction, despite the increase in the number of committals resulting from the 2018 reforms which created a presumption in favour of uplift to the adult jurisdiction for serious youth offences. **(Question 21)**
- Any changes to the current system, especially any shift of pre-trial proceedings to a higher jurisdiction, will have significant resource implications. It is essential that there be detailed process modelling with participation of all criminal justice agencies to meaningfully assess the impact of the recommendations. There must be an independent evaluation to assess the impact of the reform implementation, starting with addressing the existing inadequacies in the available data. **(Question 21)**

About VLA

VLA is an independent statutory authority established under the *Legal Aid Act 1978 (Vic)*. We receive funding from the Commonwealth and Victorian governments and through the Victorian Public Purpose Fund but are independent of government. The Legal Aid Act sets out our responsibilities to provide legal representation, advice and assistance, and to administer the Legal Aid Fund to Community Legal Centres and private practitioners who provide eligible services in the most effective, economic and efficient manner.

Our clients

VLA plays an important institutional role within the criminal justice system, representing both offenders and victims at various stages of the criminal process. We are committed to the provision and coordination of legal services that promote victim safety and interrupt cycles of offending.

VLA represents some of the most disadvantaged people in Victoria. In 2017-2018, VLA recorded that 5 per cent of our clients were of Aboriginal or Torres Strait Islander background, 22 per cent were from culturally and linguistically diverse backgrounds, 26 per cent disclosed having a disability or mental illness, 5 per cent were experiencing homelessness, and 29 per cent had no income.³

Many of our criminal law program clients have themselves been the victims of crime, trauma or abuse.

Our services

VLA provides legal information, education and advice to all Victorians, including free legal information through our website, Legal Help telephone service, community legal education, publications, and free clinics on specific legal issues.

VLA provides a duty lawyer service in most courts and tribunals in Victoria. This is intended to capture those who attend court without legal representation.

Of most relevance to the Commission's review is that VLA funds in-house lawyers and private practitioners to represent accused persons in criminal proceedings on an ongoing basis, provided they meet eligibility criteria based on their financial situation and the merits of the case. These criteria differ depending on whether the matter proceeds in committal or summary streams.

In committal stream matters, the merits test for an initial grant of legal assistance is lower than for summary matters to recognise the greater consequences ordinarily associated with these more serious cases.⁴ Different tests will apply depending on whether the case will proceed to committal, plea or trial.⁵

Where a case progresses to trial and the accused is unrepresented, the court can order that VLA fund representation if it is satisfied that it would be unable to ensure a fair trial unless the

³ Victoria Legal Aid, *Annual Report 2017-18*, 12.

⁴ Under the summary crime guidelines assistance may only be granted where conviction is likely to result in a term of immediate imprisonment, *Victoria Legal Aid Handbook for Lawyers*, Guidelines 1.1. and 1.2.

⁵ *Ibid* Guidelines 3.1, 3.2, 4 and 4.1.

accused were represented and the accused was unable to afford private legal representation.⁶ VLA therefore funds approximately 80 per cent of criminal trials in Victoria, with the test being that the matter cannot be heard and disposed of in the Magistrates' Court, and it is desirable in the interests of justice to provide a grant of assistance.⁷

In the 2017/18 financial year:

- VLA funded 3706 grants of aid for indictable cases, an increase of 5 per cent from the previous year.⁸
- The overall expenditure on grants of aid for committals was approximately \$2.2 million.⁹
- The overall expenditure on grants of aid for indictable matters was \$31.8 million.¹⁰
- The VLA in-house practice accounted for 29 per cent of indictable grants, the remaining 71 per cent were provided by private practitioners or community legal centres.¹¹

Table 1: VLA indictable program trends

	FY2014	FY2015	FY2016	FY2017	FY2018	FY2019
Number of unique indictable service clients (adults and children)	3,252	3,271	3,263	3,896	4,023	4,119
Aboriginal and Torres Strait Islander (self-identified)	7%	6%	7%	8%	8%	9%
Report having a disability or mental health issues (self-identified)	27%	27%	24%	22%	22%	21%
Speak a language other than English (self-identified)	21%	20%	20%	19%	20%	18%
Total certified case costs of indictable program (inhouse and private practitioner)	\$19.6mil	\$20mil	\$19.3mil	\$20.7mil	\$25.1mil	\$31.8mil
Number of trial grants (inhouse and private practitioner)	799	759	652	683	849	830
Number of committal grants (inhouse and private practitioner)	1,121	1,065	1,038	1,254	1,395	1,430

Our lawyers practice across the indictable system in all jurisdictions - the Magistrates' Court, Children's Court, County Court, Supreme Court and Court of Appeal. The extent and breadth of our indictable practice uniquely places VLA to appraise the indictable system as a whole, including its nexus to the summary crime system, rather than in isolation.

VLA is one of the largest criminal law solicitor practices in Victoria and operates VLA Chambers, a specialist group of in-house advocates who are briefed to provide in-court representation for clients at all stages, mostly in serious indictable matters.

⁶ *Criminal Procedure Act 2009* (Vic), s 197.

⁷ Victoria Legal Aid, *Delivering High Quality Criminal Trials: Consultation and Options Paper*, January 2014, 4. For more information see <<https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/delivering-high-quality-criminal-trials>>

⁸ Victoria Legal Aid, above n 3, 39.

⁹ Unreported VLA data, approximate only. Includes appearance fees and preparation.

¹⁰ Victoria Legal Aid, above n 3, 39.

¹¹ Victoria Legal Aid, above n 3, 38.

VLA's specialist youth crime program provides duty lawyer services at all Children's Court (criminal division) lists across the state and provides legal representation for all children charged with criminal offences.

Our Civil Justice program provides information, advice and representation to victims of crime seeking financial assistance from the Victims of Crime Assistance Tribunal or via court-ordered compensation from offenders. Our Family, Youth and Children's Law program provides assistance to victims of family violence, for example, applying for family violence intervention orders.

Given our position as an extensive law practice and funder, VLA has a significant interest in ensuring that people's rights in criminal proceedings are upheld, that the criminal law system functions effectively and that the public has confidence in the criminal justice system. VLA welcomes reform which aims to improve the system for all participants.

Question 1. What purposes can or should committal proceedings serve?

The purposes of committals are set out in section 97 of the *Criminal Procedure Act 2009 (Vic)*. VLA supports the expansion of this provision to reflect the following additional purposes of committals:

- facilitating early resolution through disclosure;
- facilitating early resolution through appropriate testing of key evidence; and
- independent consideration of the prosecution case.

This change will give greater emphasis and legislative guidance to practitioners on the role of committals in the promotion of early resolution. Each of these purposes are outlined in more detail below.

1. Facilitating early resolution through disclosure

The purpose provision in section 97 of the Criminal Procedure Act should be updated to include the significant role of committals in facilitating early resolution and the critical need that the case against the accused be adequately disclosed at this pre-trial stage. This ensures that the accused and their legal representative has sufficient information to enable them to enter into meaningful negotiations and potentially enter an early guilty plea.

The existing purpose provision does not give sufficient weight to the important role of disclosure in facilitating early resolution. Disclosure is currently framed only insofar as it enables preparation for trial (s 97 paragraph (d)(i)).

In our experience, failure of timely and appropriate disclosure is a significant barrier to early resolution and contributes to delays in pleas being entered. The current reality of the system is that defence practitioners, investigation and prosecution services are under-resourced. Committal case management has become a means of holding all parties accountable to their obligations to provide all relevant evidence at an appropriate time. This should be reflected in section 97.

2. Facilitating early resolution through targeted testing of key evidence

The legislative purpose provision should reflect that one of the purposes of committals is to ensure that the evidence of complainants and witnesses is tested only on relevant matters and in an appropriate manner. This can facilitate an early resolution and avoid a trial, or substantially narrow the issues in dispute for any subsequent trial. Currently, complainants and witnesses are only referred to in the statement of purpose in section 97 in so far as the accused is able to cross-examine them as prosecution witnesses.¹² This position is no longer completely accurate (following amendments which exclude certain categories of witnesses from being cross-examined at committal), and does not truly reflect the active role that complainants and witnesses can play in facilitating early resolution.¹³

John – Committal processes supporting earlier resolution of criminal charges

John* was charged with three counts of recklessly engaging in conduct endangering life (principal charge) and other personal violence offences, all of which occurred in the context of family-violence. Following a one-day committal, the principal charge was dismissed and John was committed to trial on less serious charges. Subsequently, the matter resolved to a plea of guilty to the summary charges, as the evidence of the complainant at committal had facilitated effective negotiations on the remaining charges.

John had been on remand and following the committal he was ultimately sentenced to a community corrections order with the custodial sentence already served. This one day, well-run committal, bought to the forefront evidentiary weaknesses of the indictable charges. A 10 day trial is likely have reached the same outcome, however the end result would have taken many more months to achieve, during which the accused would have remained in custody. The complainant would have also been cross-examined at trial. Through the committal process the accused was held accountable for the criminal acts committed and the end result was achieved sooner.

*VLA client, not his real name.

3. Independent consideration of the prosecution case

The independent scrutiny of the prosecution case by a judicial officer is an essential component of a fair system. Scrutiny of the case and the ability to hold parties to account is as relevant at the pre-trial stage as during trial proceedings. Furthermore, now that *Prasad* directions have been held to be contrary to law,¹⁴ committal proceedings are one of the last independent protections against prosecuting misconceived or weak cases. The provision should highlight a purpose of committals is to ensure that the decision to commit an accused for trial is made by an independent decision-maker. We expand on this below at **Question 14**.

¹² Criminal Procedure Act 2009, s 97(d)(ii).

¹³ *Justice Legislation Miscellaneous Amendment Act 2018*, No 4/2018.

¹⁴ *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9.

Michelle - Committal processes testing the strength of the prosecution case

Michelle* was charged with armed robbery and a key issue was the identification of Michelle as the offender. VLA invited the prosecution to discontinue the proceedings given several weaknesses of their case in relation to identification. The identification evidence was provided by two witnesses, who purportedly identified Michelle from nightclub photographs. Their identification was based on one prior meeting where they were not introduced to Michelle, did not speak with her, were told her name by a third party and could not recall when this prior meeting occurred.

The prosecution declined to discontinue the charges and the matter proceeded to committal hearing on the issue of identification. At the committal hearing a single witness was cross-examined on identification. Having heard the evidence of the witness on the issue of identification the magistrate discharged Michelle of the charges at the end of the committal hearing. The prosecution did not lay a direct indictment.

In this matter an independent magistrate formed the view that there was not sufficient evidence to support a conviction, despite the different view of the prosecution. Had the matter gone straight to trial, all parties would have incurred greater costs in the County Court to conduct the same testing of the evidence. The prosecution also benefited from the committal as this saved the state the greater costs it incurs when having to call all relevant witnesses at trial.

*VLA client, not her real name

Question 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?

VLA supports improvements to charging practices to reduce the discrepancy between charges that are filed and those that proceed to prosecution. Changes in the number and nature of charges that proceed can be particularly challenging for victims, can place an additional time and resource burden on criminal justice agencies, and can delay a guilty plea.

In our view, significant changes to support early resolution can be achieved through:

1. a focus on improving the appropriateness of the charges initially laid;
2. early engagement and oversight by the relevant prosecuting agency;
3. improved disclosure and active engagement with the evidence by both the prosecution and defence lawyers at an early stage (rather than waiting until committal hearing).

1. Improved charging practices

Ideally, the initial charge(s) filed should properly reflect the actual criminal conduct for which a person is accused and for which guilt can be proven on the available evidence.

The NSW Law Reform Commission (NSWLRC) concluded that “charging practices are one of many interrelated systemic factors that contribute to the entry of late guilty pleas in NSW”.¹⁵ The Australian Law Reform Commission highlighted the significance of charging decisions in their report into incarceration rates of Aboriginal and Torres Strait Islander peoples, noting:

[c]harging practices can impact on the likelihood of an inappropriate guilty plea, the likelihood of bail refusal, and ultimately the likelihood of the accused receiving a term of imprisonment. Charging decisions interact with criminal justice systems which are designed to encourage and reward early guilty pleas with sentence discounts to save considerable public resources.¹⁶

The practice of charging an accused with multiple offences in relation to one incident, or charging too serious an offence for the conduct in question, or both, is commonly referred to as ‘overcharging’. Overcharging has several detrimental impacts on participants in the system:

- overcharging can result in wasted time in the consideration and testing of charges which should not have been laid;
- overcharging increases the likelihood of a person being refused bail; this has taken on particular significance following the introduction of categories of offences for which a person must demonstrate exceptional circumstances to get bail in May 2018;¹⁷
- overcharging gives victims a misleading impression about the possible results and sentences and can create dissatisfaction and distress when charges are reduced in number or seriousness.

The adverse outcomes attached to overcharging may be magnified for vulnerable people who have a cognitive impairment or mental illness, language barriers and other communication barriers, are homeless, or have a criminal record. A focus on improving the appropriateness of

Josh – Overcharging example

Josh* was charged with attempted armed robbery. CCTV footage and the complainant’s statement indicated: Josh had approached the complainant at a supermarket while holding a pencil, he asked for a small amount of money, the complainant refused Josh walked away.

VLA invited the prosecution to discontinue the proceedings, as the offence of attempted armed robbery requires demonstration of an attempted theft, the use of force and use of an object which could be perceived as a weapon. The matter proceeded to committal hearing.

On the day of the committal hearing the complainant failed to attend court and the prosecution made an offer of attempted robbery. Josh rejected this offer. At the listing of the second committal hearing, the complainant attended court. Nevertheless, prior to the complainant giving evidence the matter resolved with a plea to a charge of summary assault. Josh was placed on diversion.

The well-run committal reality tested the indictable charge which was laid. Regrettably two committal hearings were required before a resolution was achieved.

*VLA client, not his real name.

¹⁵ NSW Law Reform Commission, *Report 141 Encouraging appropriate early guilty pleas*, December 2014, 128.

¹⁶ Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), 28 March 2018.

¹⁷ *Bail Amendment (Stage 1) Act 2018* (Vic); *Bail Amendment (Stage 2) Act 2018* (Vic).

the initial charges would have ongoing efficiency benefits throughout the life of the matter and be fairer to the victim and the accused.

2. Oversight of charges by the prosecution

The relevant prosecuting agency should have greater involvement with the investigating agency at an earlier stage. We discuss this further in response to **Question 3**.

3. Improved disclosure and early engagement with the evidence by all parties

In our experience, the most effective way ensure that charges are amended at the earliest possible stage in a case is to ensure that the available evidence has been properly disclosed, and the parties have been properly funded and incentivised to consider the evidence at the earliest stages in proceedings. Suggestions to improve disclosure and timely analysis of the evidence by all parties are discussed below in response to **Questions 4 and 5**.

Question 3. Should the OPP be involved in determining appropriate indictable charges at an earlier stage? If so how?

VLA supports active and earlier engagement by the prosecuting agency with the investigating agency. This should include:

1. supervising the laying of the charges as the investigation proceeds guiding the preparation of a complete hand-up brief;
2. certifying that the charges have been reviewed and are appropriate;
3. liaising with police in their communication with the complainant at the pre-charge and the brief compilation stages of the investigation; and
4. engaging early with the evidence.

To support this practice, it is essential that agencies have the necessary resources. In our view:

- resources should be allocated to assist investigators in laying appropriate charges, which are supported by admissible evidence; and
- the Office of Public Prosecutions (OPP) should be properly funded for sufficiently senior prosecutors to be available to undertake this work.

1. Oversight of charges and the preparation of the hand-up brief

The filing hearing is the first step at the Magistrates' Court. At a filing hearing the magistrate will set out a timeline for when the brief of evidence, called the hand-up brief, must be provided. This is legislatively mandated to occur within 6 weeks, though more time can be sought with leave. The hand-up brief includes the charges laid and the evidence relied upon by the investigating agency.

In our view, there would be substantial value in having earlier support from the prosecuting agency's lawyers, who usually have more trial experience than police investigators. This would assist police investigators to advance the preparation of a complete hand-up brief in accordance with the rules of evidence and admissibility, to ensure that appropriate evidence is obtained and included, and ensure that the process is completed in a timely manner.

To make the prosecution case as clear as possible, and ensure the charges filed are appropriate, the prosecution's consideration of the case should include:

-
- whether all charges will be proceeded with, or are thought to be justified, or some charges should be withdrawn or added;
 - consideration of all statements for admissibility and capacity to support the charges, including whether inadmissible statements should be removed from the brief prior to it being served on the defence, or whether additional statements and evidence should be obtained.

VLA does not recommend that the prosecution provide investigative advice, rather, pre-charge advice about what evidence would be required to support the charge.

The Issues Paper refers to the practice of the UK Crown Prosecution Service, which actively engages with the police service and provides advice on the compilation of the brief of evidence. VLA supports this approach, noting that the prosecution service will require funding to deliver these additional functions.

In Victoria, the former OPP Specialist Sex Offence Unit assessed the charges and gave early consideration to any evidentiary issues. Anecdotally, VLA lawyers' experience is that it was common that this review would result in a new set of generally more appropriate charges being served and evidentiary issues being identified at an early stage.¹⁸

2. Certification of the appropriateness of the charges and disclosure

The Issues Paper refers to the recent amendments in NSW which requires a senior prosecutor to certify that the charges are appropriate. VLA supports this approach. We suggest that the certification could approve the charges as well as the full satisfaction of disclosure requirements. Such a certificate should indicate to the court and defence that proper disclosure has been made of everything that is currently available, and provide detail of all outstanding

Susan - Potential for earlier involvement to support early resolution

Susan* was charged with 21 counts of obtain property by deception. Her VLA lawyer identified evidentiary deficiencies in 3 of the charges of the prosecution case. All charges proceeded to committal hearing, where the defence called the complainant and one witness to be cross-examined on discrete issues.

The prosecution spoke to the complainant on the morning of the committal. As a result, it was discovered the complainant's statement in the brief was not wholly accurate. The prosecution required an adjournment to further assess the evidence. Susan made a plea offer three weeks prior to the second committal hearing, nevertheless the offer was accepted on the day of the second committal hearing.

The example demonstrates that had the prosecution been able to critically analyse the evidence prior to the committal hearing, the inaccuracies in the complainant's statement may well have been discovered at a much earlier stage and may have led to an amended statement being provided – directly influencing the appropriateness of the charges laid.

*VLA client, not her real name.

¹⁸ VLA understands these matters have now been spread across the OPP, with a small specialist unit retained, such that there is less consistency in these matters being identified at an early stage.

investigations and procedures that the prosecution intends to carry out. This is discussed further in response to **Question 4**.

3. Communicating with victims

Earlier coordination between investigation and prosecution agencies ensures that victims are supported with relevant information about the likely progress of a matter through criminal justice processes. This can assist to manage their expectations and avoid any trauma associated with a change in the nature or number of charges progressing to prosecution.

The Centre for Innovative Justice's research into communicating with victims, found that the victims in their study had already formed views about the likely outcome of a case before they had had contact with the OPP, largely based on assurances they were given by members of the police. The report notes:

Therefore, victims' unrealistic expectations, which police may contribute to, may make it harder for them to understand the case. It is also clear that the creation of unrealistic expectations among victims sets the conditions for a problematic dynamic between the victim and the OPP from the outset, due to OPP lawyers having to correct victims' unrealistic expectations, which can be experienced as bad news by victims.¹⁹

The CIJ Report recommends that "the OPP should liaise with Victoria Police to identify strategies to support police officers to communicate effectively with victims about prosecution processes and decisions."²⁰ This aligns well with our recommendation that prosecutors should engage with investigators earlier, and that both Victoria Police and the OPP could involve the complainant at the pre-charge and the brief compilation stages of the investigation, in accordance with their obligations under the *Victims Charter Act 2006*. These obligations require agencies to tell complainants about key progress in the investigation and the prosecution, including charges laid.

4. Early engagement with the evidence by all parties, including senior prosecutors

Earlier communication between defence, prosecution and the informant, focusing on the issues in dispute, the strengths and weaknesses of the evidence relied upon to prove the elements of a charge, and timely disclosure, would significantly contribute to the early identification of the appropriate charges. Our suggestions for improving disclosure and timely analysis of the evidence by all parties are discussed below in response to **Questions 4 and 5**.

Question 4. What measures can be introduced to improve disclosure in indictable matters? a) between investigating agencies and the DPP? b) between prosecutors and the defence?

VLA supports the following measures to improve disclosure in indictable matters:

1. standardised disclosure across all indictable matters;
2. prosecution review and supervision of disclosure and certification;
3. filing hearing directions and forensic analysis;

¹⁹ Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs*, Report to the OPP Victoria, April 2019, 13.

²⁰ *Ibid*, recommendation 4.

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4. conferencing and seniority of prosecutors; and
 5. communication and engagement between parties.

Disclosure fundamentally goes to a person's rights in criminal proceedings.²¹ Timely disclosure is also critical to facilitating early resolution. In our experience, defence lawyers cannot provide proper advice on the merits of a case without disclosure of all of the supporting evidence. Furthermore, clients are often not persuaded by the strength of a case until they have seen the information for themselves. We note that the NSWLRC concluded that much of the delay in the Local Court committal process "is attributable to delays in serving the brief of evidence."²²

1. Standardised disclosure obligations across all indictable matters

Setting out a list of obligatory standard disclosure items, at the same time or shortly after providing the hand-up brief, would facilitate the timely provision of essential information which is required to properly analyse a case.

Currently, parties prepare a Form 32 Case Direction Notice, which can include requests for outstanding evidence. To illustrate, a deidentified Form 32 is provided at **Appendix A**.

Examples of the type of information requested are:

- LEAP and INTERPOSE documents, and entries relating to this investigation;
- prior convictions of prosecution witnesses (except sworn officers);
- witness statements taken as part of the investigation (but not included in the hand-up brief);
- diary notes or entries made by any witnesses which relate to their evidence;
- all notes, test results, and reports of all doctors, forensic medical examiners, scientists or other experts who have conducted tests, investigations or examinations on behalf of the prosecution as part of this investigation (but not provided in the hand-up brief);
- photographs taken, maps or charts prepared as part of this investigation, including those relating to the crime scene (but not provided in the hand-up brief);
- call charge records relating to telephone service monitored as part of the investigation, including any reverse call charge records.

Many of these items are requested as a matter of course, and are generally provided. Yet in many of these cases they are not provided until the committal proceedings are well advanced. Providing this information at the earliest opportunity would facilitate pre-hearing negotiations and early resolution.

Section 123 of the Criminal Procedure Act was recently expanded to preclude cross-examination at a committal proceeding of all witnesses in sex cases involving a child or cognitively impaired complainant. A new Form 32A has been introduced for these cases, which includes explicit and detailed disclosure requirements to be served at the same time as the hand-up brief.²³ This new standard disclosure format is intended to mitigate against delayed

²¹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 25 recognises that a person charged with a criminal offence in Victoria is entitled to be 'informed promptly and in detail of the nature and reason for the charge'.

²² NSW Law Reform Commission, above n 15, 128.

²³ Magistrates' Court of Victoria, Practice Note 3 of 2019.

disclosure in these cases. Our position is that this level of disclosure should be required in all indictable matters, at the earliest appropriate stage.

2. Prosecution review, supervision and certification of disclosure

In our response to **Question 3**, VLA recommends that the prosecuting agency should oversee the charges and the preparation of the hand-up brief, to improve the appropriateness of the charges filed and address overcharging. Similarly, an additional requirement for the prosecution to certify that disclosure requirements have been satisfied, would improve disclosure. This certificate should indicate to the court and defence that full and proper disclosure has been made of all the evidence currently available, and detail outstanding investigations and procedures that the prosecution intends to carry out.

This certification could be incorporated into a standard disclosure form which mirrors the new Form 32A. This level of supervision over disclosure processes in all committal proceedings would significantly address current issues with the timeliness and completeness of disclosure.

3. Early disclosure conferencing with all parties to improve communication and engagement

A key feature of the majority of committals reviews in Victoria and interstate, has been their conclusion that early preparation and discussion between the parties is essential for a committal system to function well.²⁴

In our experience, a significant barrier to early disclosure is a lack of communication and engagement between the informant, the prosecution and defence. Early communication between defence and prosecution, focusing on the evidentiary issues and/or the elements in dispute, would contribute to the delivery of complete hand-up brief that meets the evidentiary needs of the prosecution and defence.

Parties are currently required to conference at least 14 days prior to the committal mention and “engage in discussion to explore resolution of the case”. If resolution cannot be reached parties should “identify the relevant issues in the case and the witnesses requested for a contested committal”.²⁵ However, in practice this does not achieve results, due to delays with disclosure or delays in appropriate plea offers being provided by sufficiently senior prosecutors.

We recommend an approach that encourages earlier and communication between all parties through early stage ‘disclosure conferences’. We believe this would improve communication and foster a culture of communication between the parties, designed to give effect to the ongoing obligation of disclosure without imposing onerous obligations on parties, or significant costs.

These early stage disclosure conferences would involve the following:

- **First Disclosure conference:** the parties (defence lawyer, prosecution lawyer and informant) could be required to meet via telephone conference (or in person) shortly after the filing hearing. Meeting at this early stage would assist in prioritising evidence

²⁴ See for example, Advisory Committee on Committal Proceedings, *Report on Committal Proceedings* (Coldrey Committee Report) 1986; Pegasus Task Force Report, *Reducing delays in criminal cases*, 1992; Project Pathfinder: Reengineering the criminal justice system, *Final Report Stage 1 – Redesign Opportunities*, 1996; NSW Law Reform Commission, above n 15.

²⁵ Magistrates’ Court Practice Note 6 of 2013.

analysis, for example, to reach agreement as what forensic analysis is required, what digital devices have been seized and what may be in issue (such as expert statements on telephone signal towers). To properly realise the utility of this first conference, participants would need to have confidence that the informant will provide all the relevant information at this early stage, particularly in matters where there is no remand summary, such as a homicide.

- **Second Disclosure conference:** all parties should be required to meet via telephone shortly after the hand-up brief is served (either before/just after first committal mention) to discuss disclosure and the possibility of early resolution. This will assist in resolving disputes as to (i) relevance and (ii) privilege, and help to narrow requests where appropriate.
- **Senior staff review:** By the conclusion of a second disclosure conference, the charges, evidence and offers should be reviewed by a senior prosecutor with delegated authority to resolve matters.

We acknowledge that in a pressured system, agencies will need time and resources to ensure they can service these new procedural steps. In our submission, this would be a valuable and worthwhile investment, as even brief telephone calls would significantly facilitate appropriate disclosure and early resolution of matters. With proper resourcing and funding, the initial costs of an extra communication step would be outweighed by the savings made through improved disclosure, early narrowing of issues, reduction in delays, and downstream benefits to the system and to complainants and witnesses.

4. Conferencing and seniority of prosecutors

VLA recommends that senior prosecutors with delegated authority to consider and approve plea offers should be made available to prepare and engage with the evidence at the earliest stage of committal proceedings, including for case conferencing and appearance in the committal proceedings, prior to the committal hearing. This will enable full effect to be given to the Magistrates' Court Practice Direction that both parties who attend committal mentions and conferences should have authority to resolve the case.²⁶

In house advocates from the OPP routinely appear at committal mentions without being specifically assigned to the case and without delegated authority to resolve matters. For logistical and funding reasons, the solicitors with carriage from the OPP also do not appear at these hearings and generally do not attend at all.

VLA's experience is that offers made by our lawyers at an early stage are rarely fully considered until committal hearing stage. Despite the Magistrates' Court Practice Notes which encourage case conferencing,²⁷ these are typically carried out by solicitors without authority to make or accept offers. This means that after a case conference has been conducted, instructions must be sought from a prosecutor with delegated authority, who is rarely present at the hearing. Due to current capacity constraints this step often results in delays, which impedes timely resolution. Currently, it is only at the committal hearing stage that prosecutors with delegated authority are considering the evidence in any detail. As a result matters cannot resolve as offers cannot be made and accepted.

²⁶ Magistrates' Court Practice Note 7 of 2013.

²⁷ Magistrates' Court of Victoria, above n 25 and n26.

Adam and Robert – The benefits of facilitating early resolution

In these two separate cases Adam* and Robert* had been charged with murder. Both had raised self-defence. Both Adam and Robert instructed their VLA lawyers to make an offer to plead guilty to manslaughter in advance of the committal. The response by the crown was that the offer would not be considered until after the committal.

The issue at committal was to further explore whether Adam and Robert lacked the intent required for murder.

In Adam's case two eye-witnesses and a pathologist were called. The first committal hearing had to be adjourned as the prosecution had not secured independent legal advice about self-incrimination for the witness. Adam's lawyer remade his offer in advance of the second committal hearing.

In Robert's case only a pathologist was cross-examined at committal.

In both cases the offers were accepted post committal. This avoided the need for a 15-20 day trial and the deceased's family were spared the trauma of going through a trial.

*VLA clients, not their real names.

We consider that this early engagement will be particularly important if the VLRC does not support our recommendations regarding supervision and certification by the prosecution of the charges and disclosure obligations

VLA accepts further work can also be done by the profession in terms of training and support to assist defence practitioners to identify issues early and continue to be active in discussing resolution. VLA has already commenced this process with the reforms implemented as a result of our Delivering High Quality Criminal Trials (DHQCT) including:²⁸

- creation of brief analysis tool and consequent roll out of training;
- brief analysis fee to encourage early analysis and preparation;
- encouragement of early briefing practices; and
- providing for continuity and quality of counsel.

There are a number of procedural steps that may support early resolution. However, agencies have limited resources to allocate to supporting early resolution within existing service and staffing structures. Additional funding which targets and incentivises early preparation and resolution is required, such as that provided to support the NSW Early Appropriate Guilty Plea initiative (see below).

Interstate legal practitioners cite the ability to engage with the prosecution at an early stage of the committal process, and access to senior prosecutors with delegated authority to resolve matters, as being crucial when engaging in early plea negotiations. The NSW Office of the Director of Public Prosecutions (ODPP) employ 109 Crown Prosecutors. Each of these Counsel are statutory office holders and together they form the largest 'floor' of criminal barristers in the

²⁸ Victoria Legal Aid, <<https://www.legalaid.vic.gov.au/about-us/news/evaluating-our-delivering-high-quality-criminal-trials-project>>, as at 22 July 2019.

state.²⁹ This means each counsel who engages in early case conferencing has the necessary delegated authority of the Director to approve a resolution.

Crown Prosecutors are salaried and are free of the financial considerations that arise from a funding model that favours the 'first trial day'. This is an important cultural factor as it shifts the focus away from milestone hearings, which attract fees, and shifts to preparation and attention to consideration of these issues earlier in the process. A principal of a private criminal law firm in New South Wales with more than 20 years post-admission experience, who holds an Accredited Specialisation in Criminal Law, indicates that it is this early involvement of senior lawyers and crown prosecutors that has been the key to improvements in early resolution in NSW.

The extensive 2018 committal reforms in NSW³⁰ were supported with significant funding, including \$29.5 million for reforms to encourage early guilty pleas in appropriate cases and an additional \$10 million for Legal Aid NSW, "to help clear the District Court backlog, minimise court delays and reduce stress for victims".³¹

With this funding, Legal Aid NSW was able to match the commitment by the ODPP in providing senior public defenders or senior lawyers for committals matters. This means both sides have the benefit of lawyers and counsel with experience to engage in early discussions and, where appropriate, resolutions.

5. Filing Hearing directions and forensic analysis

As well as active early engagement by the prosecution, defence and informants, early engagement by the magistrate at the filing hearing stage would significantly contribute to the timely advancement of matters.

At the filing hearing stage, the investigation is in its infancy and typically the only material available to the parties is a limited police summary and charge sheets. The filing hearing is a crucial opportunity for the magistrate to directly and proactively engage with the informant and the parties, to triage and prioritise evidence analysis which will be required for the hand-up brief.

Of particular importance is forensics and IT evidence, which typically take at minimum 6-9 months to process due to capacity limitations. Triage and prioritising these types of slow but critical evidence analysis would significantly address disclosure delays.

To give an example of an existing Victorian mechanism which is not widely used, approximately three years ago the Magistrates' Court introduced a direction about purity analysis (that is, of drugs of dependence substances) that meant Victoria Police Forensic Services Department (VPFSD) should prioritise the analysis of these samples. Despite this requirement, it was recently discovered that VPFSD were generally not being informed of these directions or were still waiting for a matter to be booked in for committal before they started analysing the drugs. As a result of VPFSD attending a court users' meeting this direction has been clarified.

This relatively simple example demonstrates the need for closer collaboration and communication between the courts, practitioners and forensic services. To this end, forensic services and analysts should have an active presence or voice in communicating to the court

²⁹ Office of the Director of Public Prosecutions New South Wales, *Annual Report 2017-2018*, 14.

³⁰ Based on the NSW Law Reform Commission Report, above n 15, 2016.

³¹ NSW Government Media Release, *Funding Support for Courts and Legal Centres*, June 2018.

which services they can realistically deliver, as well as the time frames in which it can be delivered. This could be through initial advice to the prosecution and/or informant which is communicated to the court, or through the early disclosure conferences proposed above.

It is important to note that regional criminal investigation units do not enjoy the same level of access to forensic services as their metropolitan counterparts. Often in regional criminal investigation units, the police detectives will collect buccal swabs from the crime scene because forensic services do not have the capacity to attend to every crime scene. Where forensic services are required, police will generally seek additional time, beyond the 6 weeks for the service of the brief, because of the time required for the collection and analysis of forensic evidence. If the forensic evidence is pivotal to the prosecution case, then the delay in collecting and analysing forensic evidence will affect the ability of the parties to enter into plea negotiations.

In our experience, the extent to which the filing hearing directions are complied with is directly affected by the level of expertise, attention and engagement which all parties to proceedings bring to bear on the facts-in-issue of a particular case.

VLA supports a move to view and fund the committal stream as a 'specialist' jurisdiction within the Magistrates' Court, which is only staffed by magistrates who have substantial expertise in this area. Our experience is that when such specialist magistrates preside over filing hearings, brief preparation and hearings are expedited as parties engage in preliminary discussions about evidence that may be in dispute and individualised timeframes are set for the provision of material, rather than reliance on 'standard' disclosure timeframes which can contribute to routine delays.

6. Enforceable responses to lack of compliance with disclosure obligations

Often disclosure obligations are not complied with, and the committal hearing is used as a mechanism to ensure the investigators are held to account to their obligations. To illustrate this, we have provided an example of a completed Form 32, deidentified, at **Appendix A**.

A consistent finding over 10 years of committals reviews and reforms across Australia is that disclosure is the key element of early resolution and efficiency.³² Despite reform and investment, disclosure issues persist in these jurisdictions. This supports the conclusion that cultural practices are unlikely to change until there are real and significant consequences for failure to comply with disclosure requirements. In our view, enforceability of disclosure is the key to properly incentivising engagement with the evidence and compliance with obligations by all parties.

Practitioners from Legal Aid Queensland indicate that sometimes police officers are ordered to attend court to give evidence as to why they have failed to meet disclosure obligations. However, this course is only adopted after extensive court time has been used. In addition the court in Queensland may order costs in favour of the accused where full disclosure has not been complied with and the non-compliance was unjustified, unreasonable or deliberate. However, Legal Aid Queensland advises that this ability to order costs is rarely or never used.

³² See for example: Advisory Committee on Committal Proceedings, *Report on Committal Proceedings* (Coldrey Committee Report) 1986; Pegasus Task Force Report, *Reducing delays in criminal cases*, 1992; Project Pathfinder: Reengineering the criminal justice system, *Final Report Stage 1 – Redesign Opportunities*, 1996; NSW Law Reform Commission, above n 15.

Question 5. To what extent do committal proceedings play a necessary role in ensuring proper and timely disclosure?

In our experience, committal proceedings are the primary mechanism to ensure that disclosure obligations are complied with, and mitigate any prejudice that flows from inadequate disclosure by enabling the crown case to be tested at that early stage. Our regional office colleagues indicate that lack of early case management impedes appropriate disclosure. In addition, the experience of interstate legal aid practitioners is that removing committals has led to a deterioration in pre-trial disclosure.

Disclosure is more than the provision of documents, it is about preparing the case for trial and obtaining the relevant evidence to enable a fair trial. The value of a well-run committal is a well-prepared, confined and economically run trial. Committal proceedings are crucial to proper disclosure as they:

- enable the identification of credibility and reliability issues which often lead to further investigation;
- ensure that all parties prepare for the matter in advance of the trial, particularly in regional courts;
- hold parties to account to ensure that all the required evidence is made available;
- ensure the information disclosed adheres to the stringent obligations required in indictable matters; and
- provide the defence with an appropriate period of time before the trial to obtain additional evidence which may only have been revealed in committal.

Victorian regional experience

Committals present an opportunity for early resolution in regional circuits. Disclosure issues persist across the state, but the shortfalls and impacts are more frequent and acute in regional areas. There are many reasons for this, the most significant being differences in police practice, resourcing limitations and issues associated with circuit listings.

VLA regional lawyers report that removing committals from the regional courts is likely to have a significant detrimental effect on circuit lists, as this will effectively remove the only procedural impetus to closely examine issues and seek early resolution. Regional circuits provide no trial date certainty and matters often get bumped out of a circuit or do not get reached. As a result, matters are often left dormant until allocated to a specific circuit and OPP counsel, and there is often no continuity of OPP counsel or solicitor at circuits. This is a disincentive to early resolution as there may be a reluctance to work on a matter if there is lack of accountability or a high degree of uncertainty as to whether it will proceed as listed.

Issues with circuit lists and the lack of OPP counsel allocation are compounded by the fact that local police members may be less experienced in identifying what to disclose. Local officers are generally more experienced at appearing in the summary jurisdiction, where obligations for full disclosure are not routinely addressed, and may have less experience with the stringent obligations of disclosure that need to be met in the indictable stream. This can contribute to delays in the provision of relevant material.

Interstate experience

Tasmania and Western Australia have moved pre-trial proceedings to the higher courts. Australia's other states and territories have retained some lower court proceedings but limited options for cross-examining prosecution witnesses.

In the absence of any formal evaluation of these reforms, we have consulted extensively with legal aid commissions in other states and territories. Feedback from practitioners with extensive experience in the indictable system in other Australian jurisdictions, gives practical insights into the impacts of various reforms across Australia.

The anecdotal experience of our interstate counterparts is that significant committal reforms in those jurisdictions has neither improved disclosure nor reduced delays, stymying any efficiency benefits sought to be gained.

The experience of New South Wales defence practitioners is that the significant 2018 committal reforms and investment have not yet translated into meaningful improvements in the levels of disclosure (although other elements of the process have improved). Despite the early allocation of senior crown prosecutors to review the brief and engage in negotiations, defence practitioners continue to experience delays with timely disclosure. Where the matter proceeds to trial, the OPP Charge Certificate is not always meaningfully holding the prosecution to account, and it is commonly found that important brief items are missing.

The experience of one former managing lawyer an office of Northern Territory Legal Aid Commission is that the rate of trials needing to be adjourned, or being unable to proceed at the last minute appears to be higher than ever. The lawyer offered the following insight from his practice:

The committals reforms were introduced with the reassurance that prejudice would not flow to defendants as a result of the lack of opportunities to cross-examine witnesses. These reassurances have not translated into practice. The current practice is that police do not make full disclosure to the crown, police continue to gather evidence after the accused has been indicted, this late discovery of evidence is then disclosed to the crown and in term the defence, busy crown prosecutors do not proof complainant or key witnesses until the eve of the trial and arising from that is further disclosure. This culminates in significant disclosures or changes to the crown case being made on the morning of the trial. The remedies available for inadequate crown disclosure are in turn often ineffective. A trial judge may adjourn the trial, but in a serious case that will not necessarily mean the accused will get bail. In theory, there is an effective remedy, namely for the court to refuse to allow the belated crown evidence to be adduced, but often that remedy is simply inapplicable and rarely granted.³³

Similarly, the Director of the Aboriginal Legal Services in Western Australia noted that the justification for committals being abolished was to bring about better disclosure, better charging practices and improved plea negotiations. The reforms have not achieved these aims and in their experience disclosure still remains inadequate. Because there is no capacity of the court to test the prosecution case and filter weak or inappropriate matters, all matters are committed to District or Supreme Court. In their experience, there are now bottlenecks in the higher courts as a result.

³³ Interview with the former managing lawyer of an office of NT Legal Aid Commission, for the purpose of preparing this submission, 1 August 2019.

The Queensland reforms were focused on securing proper and timely disclosure, yet the experience of our Queensland colleagues is that disclosure is still a significant problem. A senior colleague and Assistant Director from Legal Aid Queensland reports that disclosure is typically poor, and many trials commence without the accused knowing the full case against them. It is unclear if the lack of compliance with disclosure arises from inadequate resources to comply with the orders or other systemic issues.

Question 6. Could appropriate and timely disclosure occur within a pre-trial procedure that does not include committal proceedings?

In light of the current and long-standing barriers to timely disclosure, which many jurisdictions have not succeeded in improving, it is difficult to envisage a process in which disclosure could be improved without a closely case-managed committal stage that holds all parties to account.

As discussed above in **Question 5**, the experience of interstate legal aid practitioners is that disclosure has not improved despite significant reform squarely aimed at doing so. We could not find a formal evaluation and recommend that the VLRC should seek interstate data about the impacts of these changes on resolution rates and time to finalisation.

If committals were abolished or severely restricted, under most reform models the case-management hearings and proceedings, which are a necessary aspect of pre-trial disclosure, will be moved to the trial court. This has occurred for sexual offence matters where the complainant is a child or cognitively impaired. In addition, the Supreme and County Courts have the capacity to order pre-trial examination of witnesses under section 198 of the Criminal Procedure Act (order for taking evidence from a witness before trial), or section 198B hearing processes.³⁴

In our view, there are significant barriers to vesting pre-trial management in the higher courts which may negatively impact on appropriate and timely disclosure, including the significant investment required to move the case management hearings currently held in the Magistrates' Court to the higher courts, particularly in the regional courts. This is discussed below in **Question 21**.

Question 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?

It is our experience that cross-examining witnesses at committal is key to proper disclosure of the prosecution case in the current system, and is highly effective at facilitating early resolution. A significant issue is that statements taken by Victoria Police and included in the hand-up brief often lack crucial detail. This may be for many reasons, including that statements may be taken in pressured situations or with a particular investigation direction in mind. The detail that is lacking at this stage is often best obtained through relevant and confined cross-examination at committal. Facilitating early resolution averts trials and reduces the trauma of a trial for victims and witnesses.

³⁴ which replaced *Basha* proceedings *R v Basha* (1989) 39 A Crim R 337.

Liam – Pre-trial cross examination to support early resolution with a plea of guilty

Liam* was charged with the importation of a commercial quantity of methamphetamine on the basis that he assisted in moving the drugs upon their arrival in Australia. The issue at trial was role, identity and the reliability and credibility of witnesses. The matter proceeded as a two day committal hearing. Cross-examination was confined to identity.

Making a forensic judgement on the reliability and credibility of a witness cannot be meaningfully achieved through reading their statement. This is because a witness's statement is obtained at an early point in the investigation, when the police may have formed an opinion about the direction of the investigation, which frames the questions put to the witness. Reality testing the entire prosecution case against the client instructions is a part of testing the credibility and reliability of witness evidence.

Following the cross-examination, counsel was able to confidently advise Liam to enter a plea of guilty to attempting to import a commercial quantity. In the absence of conducting the committal hearing which included confined cross-examination, the matter would have proceeded to a 6-8 week trial.

*VLA client, not his real name.

Cross-examination at the committal stage is the most effective mechanism to assist in putting parties in a position to properly consider plea offers or discontinuances, or demonstrate the strength of a case to the accused and put the accused in a position to weigh up the evidence and prospects of going to trial.

Table 2 in the Issues Paper notes that 90.5 per cent of applications for leave to cross-examine were granted. The data does not show that sometimes the only witness is the police informant, and in some cases neither the complainant nor other witnesses are called to give evidence. The data also does not demonstrate how often the informant and the OPP do not oppose the defence application to cross-examine witnesses. The informant and OPP often share the defence view that calling a witness at committal hearing does satisfy the legislative provisions under section 124 Criminal Procedure Act.

The importance of committal hearings in facilitating an ability of the accused to test the prosecution case, especially in complex committal proceedings, and the consequences flowing from the loss of that opportunity has been highlighted in Queensland. In that state legal aid colleagues advise that judges from the Supreme and District Courts have found that removing committals has led to increased problems with a lack of prosecution disclosure and an increased use of *Basha* hearings to compensate for the fact that witnesses have not been examined by the defence.³⁵ The Queensland experience demonstrates that removing the accused's ability to conduct meaningful cross-examinations on specific issues at committal, frustrates disclosure and shifts the exercise to the costly higher courts.

It is worth noting the basis of the committals reforms in Queensland, which were the recommendations in the Report by Hon Martin Moynihan AO, *Review of the civil and criminal*

³⁵ Director of Criminal Law Services in Legal Aid Queensland, via e-mail 22nd July 2019.

justice system in Queensland (Moynihan Report).³⁶ The Moynihan Report found that witnesses were being cross-examined at committal for trivial matters; defence were not required to provide justification. Some practitioners demanded a list of witnesses be made available and then at the last moment were agreeing to a full or partial hand-up brief.³⁷ This led to delays in the committal stream. The threshold which the accused must now meet for cross-examination is modelled on the New South Wales test.³⁸ This is no longer the position in Victoria, where the magistrate must be satisfied that the cross-examination is relevant and justified (discussed below).

The experience in Western Australia provides a good example of how the lack of committal hearing procedures in the Magistrates' Court, combined with inadequate disclosure, heightens the disadvantages suffered by accused persons. It is important to put the Western Australian committals reforms into context. Prior to the committal reforms in Western Australia, some committal hearings went for weeks, if the accused had financial capacity to run lengthy committals. The reforms were introduced as a reaction to those unnecessarily long committal hearings. However, as all committals were abolished, the opportunity to narrow the issues for trial in confined 1-2 day committals was also lost.

The abolition of committals in Western Australia was introduced against the expectation that there would be improvements in disclosure, plea resolutions and quality of charging processes. The Director of Aboriginal Legal Service in Western Australia advises that in their practice and experience these expectations have not been realised, in part due to limitations inherent to the depth of disclosure in the initial brief of evidence. Statements obtained from witness in the early stages of an investigation are structured according to the police officer's view of what has occurred. Any evidence not contained in the statement is not necessarily on account of a witness hiding or withholding information. As an example, a witness may give evidence pertaining to the elements of an assault charge, but may not be asked about how much alcohol or drugs they may have consumed prior to the witnessing the assault. Cross-examination of the witness at committal allows for critical analysis of the evidence by both the prosecution and defence.

Question 8. Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so why?

VLA supports the retention of access to pre-trial opportunities for cross-examination on confined issues for appropriate complainants and witnesses because:

1. it frequently leads to resolution and avoids the need for a trial, saving victims from having to give evidence twice and the cost of a trial;
2. the committal process can be a positive experience, and cross-examination can be confined and well-managed to minimise distress;
3. victims could may feel empowered by the opportunity to tell their story and participate in the process;

³⁶ Report by the Hon Martin Moynihan AO, *Review of the civil and criminal justice system in Queensland*, December 2008.

³⁷ Moynihan Report, *ibid*, 191.

³⁸ *BJC v Police* [2011] QMC 01, commencing at para 15 is a helpful summary of the history of the legislative changes introduced by the Moynihan Report and the case law from NSW which is relied upon to interpret the QLD provisions.

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4. victims and witnesses could be provided with appropriate information and supports to support their understanding of the committal procedures.

1. Role of committals in early resolution

Our experience is that cross-examination at the pre-trial stage is often pivotal in either facilitating a guilty plea and precluding the need for a trial. The process can also reduce the number of charges committed or the issues in dispute, thereby narrowing and shortening the subsequent trial. A well-run committal can avoid the need to give evidence at trial, which is a lengthier process where cross-examination does not have the same limitations and protections as a confined committal proceeding.

A critical component of cross-examination is the ability to observe the presentation of a witness and clarify the detail of the evidence so that the accused can understand the case against them. In some circumstances the evidence will be a reality test for the accused and encourage a guilty plea which was not previously forthcoming. In other circumstances the evidence will result in a refinement of issues in contention and lead to an appropriate plea offer.

Craig – Role of committals in encouraging a plea of guilty

Craig* was adamant that he would not plead guilty and no offers were made pre-committal. Craig was charged with rape, and the one day committal involved confined cross-examination of the complainant as the only witness. The committal cross-examination was less confrontational compared to a trial procedure because the committal cross-examination is confined to the discrete issues on which the magistrate has given leave.

The complainant was an impressive witness. Craig was confronted with the reality of the strength of the prosecution case. This persuaded Craig to enter a plea of guilt and an offer was made that afternoon. This cross-examination averted a trial and the complainant did not need to provide evidence more than once.

*VLA client, not his real name

While the experience of giving evidence can be challenging for victims and witnesses, recent data suggests that only a small number of witnesses are cross-examined at committal:

- **Plea of guilty:** the majority of matters in the committal stream proceed by way of a plea of guilty such that there is limited need for the victim to give evidence. For example, in the 2017-2018 Financial Year, the OPP recorded 68.7 per cent of completed cases that year resolving to a guilty plea pre-trial.³⁹
- **Plea of guilty after listed for trial:** of the remaining 30.6 per cent (0.7 per cent were listed as ‘Other case completion’), a further 11.7 per cent resolved to a guilty plea after having been listed for trial.⁴⁰
- **Finalised at trial:** only 18.9 per cent of cases completed that year finalised by way of trial.

³⁹ Office of Public Prosecutions, above n 2, 75.

⁴⁰ Office of Public Prosecutions, above n 2, 75.

This data demonstrates that in the vast majority of completed cases that year (80.4 per cent), either no witness was required to be called at all, or witnesses were only required once (assuming that each of the 11.7 per cent of cases which resolved after a trial was listed involved a committal). This indicates that only a very small number of victims who give evidence at committal will also be required to give evidence in a trial. There are also cases where committals are conducted with only professional witnesses such as forensic scientists, pathologists and police officers, who are trained to give evidence and not likely to experience distress from a cross-examination.

2. The committal process can be positive, and cross-examination can be well-managed to minimise distress

The Issues Paper highlights that cross-examination can be traumatic and intimidating.⁴¹ VLA acknowledges there is inherent anxiety in having to give evidence in the criminal process, and that witnesses, especially vulnerable witnesses, find the experience stressful. On the other hand, the VLRC review of the role of victims in the criminal trial process found that some of the victims they spoke to found cross-examination at committal a positive experience:

Some victims found being cross-examined at the committal hearing particularly distressing. Other victims consulted by the Commission found giving evidence at the committal to be positive—it was an opportunity to ‘practise’ for the trial and to be heard by a court.⁴²

The problems associated with cross-examination at committal could be addressed by magistrates applying the existing legislative tests robustly and consistently, both in granting leave to cross-examine at committal mention, and disallowing questions that are outside scope, inappropriate, irrelevant or oppressive.

In our submission, there are existing protections built in to committal proceedings, which are not always sufficiently or appropriately employed. For example, at committal, the prosecution has the ability to object to questioning upon which leave has not been sought, as well as improper questions.⁴³ Our experience is that this mechanism is rarely exercised by the prosecution.

Moreover, the presiding magistrate can of their own motion similarly restrict questioning and disallow certain lines of cross-examination. When properly managed by a suitably experienced magistrate, cross-examination is confined to relevant and justified matters, and does not need to be oppressive or intimidating to be effective. The exercise of this authority in a firm and fair manner would alleviate some of the concerns of committals causing trauma to complainants and other witnesses.

It is our recommendation that committal proceedings become a specialised jurisdiction within the Magistrates’ Court, comprised of magistrates with criminal trial experience and the expertise to control and filter cross-examination. Specialisation would be a greater issue in regional courts where there are a limited number of magistrates to hear matters, particularly in the smaller regional courts such as Warrnambool, Horsham and Mildura, where there is a single magistrate.

Further consideration needs to be given to appropriately training or rotating regional staff. One option may be to videolink regional committal mentions into Melbourne to be presided over by

⁴¹ Victorian Law Reform Commission, above n 1, 48.

⁴² Victorian Law Reform Commission, *Final Report: Review into the Role of Victims in the Criminal Trial Process*, 2016, 138.

⁴³ *Evidence Act 2008 (Vic)*, s 41.

specialist committal mention magistrates. This would also have the advantage of freeing up scarce court time in busy regional courts to deal with the array of summary, family violence and other matters.

We also support judicial officers and defence lawyers being required to undertake training on the questioning of complainants and witnesses, especially vulnerable ones. The recent publication of the Judicial College of Victoria provides guidance in this respect.⁴⁴

3. Supporting victims to tell their story at the committal stage

Committal proceedings have the potential to provide an opportunity for victims to better participate in the criminal proceeding. We recommend that complainants and witnesses be given the option to have their statement read aloud in court, prior to any cross examination on that statement. The VLRC's Report on the role of victims in the criminal trial process included criticism of committals due to victims reporting that they were not able to tell their story through evidence-in-chief, and their statement was simply tendered to the magistrate.⁴⁵

The CIJ research of victims' experience highlights the importance of victims having a voice in court.⁴⁶ To facilitate this, we recommend that complainants and witnesses be given the option of electing to have their statement read aloud before the cross-examination, so they feel that their story is shared at the committal.

This is the current practice in the Coroner's Court. In coronial proceedings, a witness statement is read out loud by the Coroner's clerk or counsel assisting the Coroner. The witness is asked to confirm that it is their statement and then given an opportunity to make any changes. The witness may then be asked questions which expand on what they have said in their statement. Lawyers representing any other interested parties may then ask the witness questions.

There are a number of difficulties with the current approach of not giving evidence in chief. First, the witness is subject to cross-examination immediately upon entering the witness box. In practical terms, examination in chief is helpful in allowing witnesses to become comfortable, or at least familiar with, the process of sitting in the witness box and answering questions before facing cross-examination.

Under the current process, the witness is not afforded an opportunity in the court room setting to refresh his or her memory as to the content of the witness statement. While witnesses will usually be advised to read their statement before they come to court, anecdotal evidence suggests that this does not always occur.

Enabling the witness statement to be read out loud in court allows the witness to hear the contents of his or her evidence-in-chief immediately prior to cross-examination. For example, the focus in cross-examination may be on any perceived or actual inconsistencies between what the witness says in the witness box and what was set out in the written statement, rather than on the truthfulness of the witness's recollection of the relevant events. Having their statement read out loud in court before cross-examination commences would allow witness to refresh their memory of their statement, and assist in helping the witness to give their best and most accurate evidence.

⁴⁴ Judicial College, *Victims of Crime in the Courtroom: A Guide for Judicial Officers*, 1 August 2019.

⁴⁵ Victorian Law Reform Commission, above n 42

⁴⁶ Centre for Innovative Justice, above n 19.

In addition, a witness who is unfamiliar with the committal process may also be confused as to whether the magistrate is familiar with the contents of their statement.

Finally, the current procedure can make it difficult for the public to follow the committal proceeding and particularly, to appreciate the significance of any cross-examination, in circumstances where they do not have copies of the relevant witness statements. This can be relevant to the public's confidence in the criminal justice system.

Witness statements were removed from committals in 1986, at a time when a majority of prosecution witnesses were cross-examined by the defence and reading every statement was time consuming.⁴⁷ Under the current system, significantly fewer witnesses are called and committal hearings have become shorter. In most cases, the reading of the statement is likely to take only a few minutes. In light of the small number of witnesses called for the purpose of cross-examination, and the short amount of time required to read out a typical statement, this change would not significantly add to the length of the committal hearing.

Some witnesses may not elect to have their statement read aloud, and it may not be necessary for such a process to be available to all witnesses. For instance, it may not be necessary or appropriate where a witness is experienced in giving evidence, such as informants, police officers and expert witnesses.

4. Information and assistance provided to victims can improve their experience

VLA supports measures that will increase victim understanding of the criminal justice process, including these ideas to increase understanding and manage expectations of the committal process.

The Issues Paper highlights that 'long delays', complex processes, and feeling 'almost incidental' to proceedings can cause stress and anxiety.⁴⁸ Trauma is also experienced by complainants who prepare in anticipation of a trial commencing and then are advised the trial will not be reached. In this circumstance the trial is adjourned for a new date, usually a further 8-12 months away.

We note the findings of the CIJ research on victims' experience in trials which found that victims often report that the uncertainty and delay involved in trials is a significant source of trauma. The report found that victims assumed that if a matter had been committed for trial, this means that a trial will certainly run, and a conviction is highly likely or even a certainty. This led to "intense disappointment and misunderstandings" in some cases when a trial did not go ahead.⁴⁹

The CIJ recommend that the prosecuting agency should ensure that they communicate with victims that:

- in committing the matter, the magistrate has decided that a conviction is possible on the available evidence; the magistrate is not offering a view on whether or not there will be a conviction;
- trials are inherently uncertain;

⁴⁷ On the recommendation of the Advisory Committee on Committal Proceedings, Coldrey Committee Report, above n 24.

⁴⁸ Victorian Law Reform Commission, above n 1, 48.

⁴⁹ Centre for Innovative Justice, above n 19.

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- the magistrate’s decision makes it possible for a trial to be run; this might not be what actually happens;
 - many matters resolve after the committal and before the trial;
 - the standard of proof the magistrate relied on when making the decision to commit the matter is much lower than the standard of proof (beyond reasonable doubt) that applies at trial.

Question 9. Should cross-examination at a committal hearing be further restricted or abolished? If so, why?

All complainants and witnesses should be treated with dignity and respect and the trauma associated with giving evidence should be minimised. VLA supports processes that reduces the distress involved with participating in the criminal processes. However, it is not necessary to abolish or further restrict cross-examination at a committal hearing. In our experience, the committal system can contribute to a more positive experience for complainants and witnesses, through the promotion of early resolution of the criminal charges.⁵⁰

Test for granting leave to cross-examine

Reforms introduced in 2014 restricted the cross-examination of all witnesses during committal proceedings,⁵¹ including:

- creating a new test for the magistrate in determining when to grant leave to cross-examine at a committal hearing;
- requiring the accused to seek leave for every issue on which they propose to cross-examine, and address the relevance and justification of the proposed cross-examination; and
- clarifying the credibility rule *does* apply to committal proceedings, meaning that an accused must not be granted leave to cross-examine about a complainants’ credibility unless it could substantially affect the assessment of the credibility of the complainant.⁵²

Properly applied, these requirements already serve as a key filter to ensure that cross-examination is limited, and where permitted is confined to necessary and relevant issues.

The VLRC in 2016 recommended that the test for granting leave to cross examine be further restricted.⁵³ Our experience is that the current test, when properly enforced, sets an appropriate threshold for enabling cross-examination and precludes committals being used as a fishing exercise. However, if the Commission took a different view, we would invite further consultation to ensure that current benefits relating to disclosure, narrowing issues at trial and promoting early resolution, are maintained.

⁵⁰ Victorian Law Reform Commission, n 42, the VLRC found that some victims report finding cross-examination at committal a positive experience.

⁵¹ *Criminal Organisations Control and Other Acts Amendment Act 2014 (Vic)* amended ss 123 and 124 of the *Criminal Procedure Act 2009 (Vic)*.

⁵² A new explanatory note inserted at the foot of s124(4) of the *Criminal Procedure Act* clarified that the credibility rule, contained in sections 102 and 103(1) of the *Evidence Act 2008*, applies in committal hearings.

⁵³ Victorian Law Reform Commission, above n 42, Recommendation 39.

Existing restrictions and supporting mechanisms

The current committals process precludes child and cognitively impaired complainants of sexual offences from being cross-examined at a committal. Recently, this was expanded to prohibit any witness from being cross-examined at a committal in these cases.⁵⁴ Other child witnesses are in practice not cross-examined, due to the requirement of special reasons for granting leave to cross-examine a child⁵⁵ which is rarely granted in our experience.

The remaining proportion of adult, non-cognitively impaired, complainants who will be required to give evidence during the committal process and again at trial, can be supported to minimise the distress of the committal experience through the bolstering of existing mechanisms and supports.

Distress can be minimised by giving evidence under alternative arrangements such as via remote witness facility or in the presence of an emotional support person.⁵⁶ Magistrates are currently empowered to employ alternative arrangements for complainants and witnesses in sexual offence cases and cases involving conduct that constitutes family violence. These include various physical interventions such as remote facilities, support people and screens. We support the VLRC's recommendation that these be made available to a wider group.⁵⁷

An effective scheme to reduce trauma to witnesses has been the use of intermediaries and Ground Rules Hearings. This two-year pilot program was introduced in July 2018 and seeks to match vulnerable witnesses in certain cases with communication specialists called intermediaries to advise on how these witnesses can give their best evidence to investigators and/or the court. At select courts, Ground Rules Hearings can be held, with or without the assistance of an intermediary, to establish 'ground rules' for the questioning of vulnerable witnesses, again allowing them to give their best evidence but also to protect them from improper questioning and reduce the stress associated with the court process.

The pilot program currently provides for an intermediary only for children in homicide cases and complainants in sexual offence cases if they are a child or cognitively impaired. In our view, this could be expanded beyond the current restricted cohort, providing assistance for a greater range of complainants and witnesses. VLA suggests that this scheme be expanded to all court locations and be used within the existing criminal process.

Examples of cohorts of witnesses to which the scheme could be extended include complainants with vulnerabilities, complainants in family violence matters, witnesses with significant cognitive disabilities or mental health issues, limited English or from a vulnerable community, or from offending of a type likely to involve particular trauma. Were the scope of ground rules hearings to be expanded, the Criminal Procedure Act currently provides for the court to direct a ground rules hearing on the application of a party or its own motion.⁵⁸ It is submitted that greater curial

⁵⁴ *Justice Legislation Miscellaneous Amendment Act 2018*.

⁵⁵ The *Criminal Procedure Act 2009* (Vic), s 124(5) requires the magistrate to take special considerations into account in determining whether to grant leave to cross-examine a person under 18 years of age, including the need to minimise the trauma that might be experienced by the witness in giving evidence; and any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding; and any mental, intellectual or physical disability to which the witness is or appears to be subject and of which the court is aware.

⁵⁶ *Criminal Procedure Act 2009* (Vic), s 360.

⁵⁷ VLRC, recommendation 37, above n 42, 38.

⁵⁸ *Criminal Procedure Act 2009* (Vic) s 389B.

intervention and application of this mechanism can mitigate some of the concern surrounding trauma without interfering with the rights of a fair trial.

Question 10. If cross-examination at a committal hearing is further restricted, how should this occur?

In our experience, the existing restrictions on cross-examination in certain matters, in combination with the properly applied discretion to grant leave to cross examination, are effective in protecting the needs of complainants and witnesses. In our submission, cross-examination should not be further restricted.

Where properly applied, the test ensures that witnesses are only cross-examined where the judicial officer is satisfied that the cross-examination is appropriate and necessary. The accused is currently required to provide detail on the specific issue which will be the subject of cross-examination, the relevance of the witness to this issue and justification on why they should be cross-examined. As noted above in **Question 9**, further restricting the test for granting leave risks undermining the purposes of committals.

Question 11. Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so who?

VLA does not support the specification of additional classes of victims that are restricted from cross examination at committal. The existing discretion under the Criminal Procedure Act for magistrates to refuse cross-examination is a sufficient safeguard for all classes of complainants, as the court can take the circumstances of the case into account.⁵⁹ There are also sufficient protective mechanisms in place to support vulnerable witnesses to give evidence, including remote witness facilities and the availability of alternative arrangements.

The current arrangements recognise that giving evidence can be particularly difficult or traumatic for child and cognitively impaired adult complainants in sexual offences⁶⁰. VLA also recognises that the experience of giving evidence can be challenging for child witnesses more generally due to their age, experience and vulnerability. However, we consider that this class of witness is already protected by the application of section 124(5) of the Criminal Procedure Act and our experience is that the court does not grant leave to cross-examine child witnesses except in rare and exceptional cases.

VLA proposes the expansion and greater application of alternatives processes such as ground rules hearings, which can establish parameters on cross-examination that have been demonstrated to reduce the trauma for certain witnesses without diminishing fairness. While the program in Victoria is still a pilot, it based on proven models in New Zealand and the United Kingdom.

If the Commission takes a different view and is concerned with the impact of giving evidence at committal for particular categories of complainants, we would submit that the prohibition on cross-examination be extended, taking into account the impact of the changes on early resolution in particular, rather than the alternative of prohibiting all committal proceeding cross-examination in all cases.

⁵⁹ *Criminal Procedure Act 2009* (Vic) s 124.

⁶⁰ *Criminal Procedure Act 2009* (Vic) s 123.

Question 12. What additional measures could be introduced to reduce trauma for victims or other vulnerable witnesses when giving evidence or being cross-examined at a committal or other pre-trial hearing?

VLA supports the continued availability of cross-examination of victims and witnesses in committal proceedings, with enhanced support with a view to minimising distress.

As noted above in response to **Questions 7 and 8**, the testing of the prosecution evidence at a committal proceeding can support an early resolution of the criminal charges. This can limit the need for a trial and alleviate any protracted involvement in the criminal justice system. Furthermore, as discussed above, suitably experienced magistrates can ensure questioning is relevant and confined, and prosecutors have the ability to object to questions which are improper or beyond scope.

VLA supports recent reforms that have introduced protective mechanisms to ensure complainants and witnesses are supported through the criminal justice process. Ground rules hearings and intermediaries are an example of recent reforms which assist complainants and witnesses to participate in the process and reduce trauma. An evaluation of the pilot intermediaries program found that witnesses found the process less confusing and intimidating. VLA supports the expansion of the use of intermediaries and the extension of this successful pilot program.

We also support the expansion of existing programs which improve the experience of vulnerable witnesses. An example is the OPP Victim Support Dog Program, which enables the use of a trained support dog to provide comfort to vulnerable witnesses when waiting for court or when giving evidence from the remote witness facility.

The child witness service caters to the unique developments of children and tailors its services to ensure children are supported through the court system in the Magistrates' Court, County Court and Supreme Court, both regionally and metropolitan. This service ensures that the child complainant or witness has a support person who will help them through all stages of the criminal justice process. The service assists to reduce trauma by helping the child to understand the criminal process, what to expect when they attend court, and what to expect when giving evidence.

There may be benefits associated with providing individual support to other victims and witnesses involved in the criminal justice process. For example, there could be advantages associated with making this support available to victims of intimate partner violence who have children with the perpetrator and may have some form of ongoing relationship with them.

Question 13. Should the current test for committal be retained?

VLA supports the retention of the current test for committal.

Currently the Criminal Procedure Act requires the magistrate to commit an accused for trial if there is 'evidence of sufficient weight to support a conviction for the offence with which the accused is charged'.⁶¹ In our experience, this threshold does not effectively filter out weak cases. This experience is supported by available data. In Victoria over 80 per cent of accused persons in committal hearings are committed to trial and approximately 40 per cent of people

⁶¹ *Criminal Procedure Act 2009* (Vic) s 141.

who stand trial in Victoria for indictable offences are found not guilty.⁶² This trend is higher than both in NSW (29 per cent) and Western Australia (36 per cent).⁶³

In our experience the valuable aspects of the committal test are:

- the need to satisfy the committal test focuses the attention of the parties at an early stage on whether the charges can be made out on the evidence;
- this focus facilitates early and appropriate disclosure; and
- the independent and transparent assessment made by a judicial officer of the capacity of the evidence to support a conviction.

Any recommendations to reform the expression of the test should ensure it continues to meet these objectives.

Question 14. Having regard to the DPP's power to indict directly, is there a need for a test for committal?

VLA considers the role of the committal is separate and complementary to the power of the DPP to indict directly. The committal test ensures that there is an independent scrutiny of the prosecution case before investing time and resources into a trial.

The power by the DPP to directly indict must be exercised separately, having regard to separate guidelines, and only in circumstances where there is a reasonable prospect of conviction. Given this usually happens after a judicial officer has discharged the accused at committal, the power to directly indict should be very sparingly exercised.

It is noted that in 10 matters in 2017-2018, an accused was discharged of all charges following a committal hearing. The DPP filed 19 direct indictments in the same financial year.⁶⁴ Data does not reveal if any of the 19 direct indictments were at the request of the defence, seeking expedited plea proceedings, or in response to a magistrate's decision to discharge the charges. We suggest that ascertaining the reasons for the direct indictments could help to build a better picture of how these processes and functions intersect.

In our submission existence of the preceding decision made by an independent judicial officer, that the prosecution has not demonstrated sufficient evidence to support a conviction, itself provides cause for the DPP to proactively demonstrate the need for the direct indictment and for the prosecutors to ensure they have sufficient evidence for a trial. Now that *Prasad* directions have been held to be contrary to law,⁶⁵ committal proceedings are a last independent protection against the prosecution of misconceived or weak cases.

⁶² Office of Public Prosecutions, above n 2, 75.

⁶³ Michaela Whitbourn, 'Court verdicts: More found innocent if no jury involved', *The Sydney Morning Herald* (online, 23 November 2013) <<https://www.smh.com.au/national/nsw/court-verdicts-more-found-innocent-if-no-jury-involved-20131122-2y17l.html>>; Office of Public Prosecutions Western Australia, *2015/2016 Annual Report* (Office of Public Prosecutions Reports, 30 June 2016) 8.

⁶⁴ VLRC, above n 1, 11.

⁶⁵ *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9.

Question 15. Is there an appropriate alternative process for committing an accused person to stand trial?

The processes for committing an accused to stand trial are appropriate for the majority of cases (that is, other than the existing alternative processes for child sex-offence complainants). We would have concerns with alternative processes which would not involve the independent scrutiny of the prosecution case, would not as affectively facilitate early resolution or refinement of issues for trial, or disclose inadequacies in the prosecution case. This would create further congestion and delays in the higher courts.

In the absence of formal evaluations of alternative processes, VLA has sought feedback from our interstate legal aid practitioners with extensive experience in the indictable system in other Australian jurisdictions. These experiences give insight beyond a comparison of the legislative frameworks, into the practical application of the system and the effect on their work. The most commonly reported view that disclosure was the most critical aspect of reducing delay in any pre-trial system, and that removing committals had neither improved disclosure nor reduced delays in those jurisdictions. Every other jurisdiction has reportedly experienced bottlenecks in the higher courts.

The Magistrates' Court provides a cost-effective, flexible and responsive jurisdiction for the case management of the majority of committals. As an example, the Melbourne Magistrates' Court has a dedicated committals stream with a group of magistrates who generally promote and maintain continuity of committals. They can do this to enable matters to be brought forward if they are relatively simple, or there is some imperative, such a child or vulnerable witness and to enable continuity of case management.

In our submission, the Magistrates' Court is the most suitable location for case management of pre-trial proceedings. If a pre-trial ruling is appropriate, there should be a mechanism to seek pre-trial ruling at the directions hearing stage, well before commencement of the trial. Ideally any rulings required could be identified at the committal mention stage, with a mechanism to go straight to the higher court. The informant could be cross-examined before the judge, who makes a ruling, and then sends the proceedings back to committal for case management. This could be done with a practice direction of the County Court, without legislative amendment.

Abolishing committals would result in an increase in the number and length of pre-trial proceedings in the superior courts. Anecdotally we are advised by a Director of Criminal Law at Legal Aid Queensland that there are greater numbers of *Basha*-like hearings held. A similar increase in Victoria would significantly impact on the already strained capacity of our higher courts, particularly the regional circuit courts and the Supreme Court in Melbourne. This will likely lead to greater delay in time to trial due to the reduced capacity of the Courts to hear matters given their limited capacity as compared to the Magistrates' Court. There are also the cost implications of running matters in a more expensive jurisdiction.

Based on the current levels of demand, the County Court has limited capacity to hear more matters, and the investment required to achieve the objectives of the reform would be prohibitively high. We consider increased investment in better processes to support early resolution will deliver more effective reform. In our view, the Magistrates' Court is the fastest and cheapest jurisdiction in which to hold these high-volume case management proceedings. Furthermore, resolving matters through a plea following a committal is significantly cheaper, as

well as less traumatic for witnesses and victims, than when a plea is entered after the commencement of a trial.

Question 16. How effectively do committal proceedings ensure: a) appropriate early resolution of cases; b) efficient use of court time; c) parties are adequately prepared for trial?

In our experience, well-run and prepared committals are extremely effective at ensuring appropriate early resolution of cases; efficient use of court time; and that parties are adequately prepared for trial.

Appropriate early resolution and narrowing of trial issues

The timing of the entry of a plea of guilty is an important consideration both economically and in terms of bringing a sense of finality for complainants and witnesses. Late entry of pleas of guilty in the higher courts, commonly known as pleas of guilty ‘at the door of the court’ are among the major causes of uncertainty in the listing system and are an inefficient use of court time.⁶⁶

As discussed in **Question 8**, data indicates that the majority of matters resolve at or shortly after a committal hearing. According to the OPP’s Annual Report 2017-2018, of the guilty pleas achieved that year, 79.4 per cent were achieved by committal.⁶⁷ Importantly, the time spent on a well-run committal will often be recouped with trials being avoided altogether because the material produced prompts the entry of a guilty plea, a discharge, later discontinuance or a remittal to be heard summarily.

Equally as important, where a matter does proceed to trial, the well-run committal will result in a more confined trial because it will have narrowed the issues and given parties a thorough basis with which to properly prepare their case. The evidence given at a committal hearing gives the parties insight into the nature and quality of the evidence that will be given at trial and is often of pivotal importance to the parties’ preparation.

Luke – Role of committals in promoting resolution and avoiding costly trials

Luke* and three other co-accused were charged with murder. VLA identified pre-committal that a charge of manslaughter was appropriate due to inability to demonstrate the requisite intent. Luke instructed VLA to make an offer to manslaughter. The prosecution indicated that the offer would not be considered until after a committal hearing. A four day committal hearing was conducted involving all 4 accused on the confined basis of cross-examining a single eye witness and pathologist.

Post committal the offer to plead to manslaughter was made again and the offer was accepted. This four day committal averted the need for a trial in the Supreme Court that would have lasted for 20-25 days.

*VLA client, not his real name.

⁶⁶ 32.8% resolved at Further Final Directions Hearing and 37.2% finalised at first day of trial, See County Court of Victoria, *Annual Report 2017-2018*, 818.

⁶⁷ Office of Public Prosecutions, above n 2, 12.

These early resolution benefits are magnified in regional circuits. As noted elsewhere in this submission, regional circuit courts provide no trial date certainty and matters are often left dormant until allocated to a specific circuit and OPP counsel. There is often no continuity of OPP and defence counsel at circuits and matters often get bumped out of a circuit or do not get reached. This does not encourage early resolution as there may be a reluctance to work on a matter, from both sides, if there is a high degree of uncertainty as to whether it will get on or not. If committal proceedings are not available in regional circuits, it may eliminate one of the earliest opportunities for early engagement and resolution between the parties.

Efficient use of court time

VLA supports measures that will increase efficiency in the criminal justice system, particularly given the current levels of demand impacting across the system. There are a number of factors contributing to the growing demand, including population growth, investment in enforcement and the increasing complexity of criminal prosecutions. This growing volume directly impacts on capacity of all courts to hear and finalise matters and has resulted in reduced clearance rates and delays. For example, the time to trial for custody matters in the County Court has increased from an average of 8 months in 2015-2016 to an average of 10 months as at August 2019. For 5-day trials, this has increased from approximately 9 months in 2015-2016 to 12 months at present.⁶⁸

Alongside this documented increase in volume, there has been an increase in the complexity, in both clients and cases.⁶⁹ Furthermore, VLA has observed an increase in lengthier trials which has resulted in a significant increase in our operating costs. In 2017/18, the cost of funding indictable matters was \$31.8 million, an increase from \$26.9 million recorded the previous year.⁷⁰ This has largely been attributed to a number of very long, multi-accused Commonwealth cases.

The criminal justice system is therefore collectively suffering from an increase in case initiations, complexity, delay and reduced finalisation rates across all jurisdictions with the problems interconnected between the courts. This affects everyone involved in the system: victims, witnesses and accused people, especially those in custody. We also note that changes to the *Bail Act 1977* in May and July 2018, have led to more people being remanded, bringing with it increased pressure on Corrections and the courts.

⁶⁸ County Court of Victoria *Annual Report 2016-2017*, 19 and County Court Victoria, <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/criminal-division>>, as at 16 August 2019.

⁶⁹ Victoria Legal Aid, above n 3, 15.

⁷⁰ Victoria Legal Aid, above n 3, 37 and Victoria Legal Aid, *Annual Report*, 2016-2017, 147.

Sam - The value of committal proceedings in bail

Sam* was charged with murder. The issue was self-defence. There was a two day committal, where the pathologist, blood splatter expert and civilian witness, revealed a strong case in support of self-defence.

This resulted in the Magistrate granting the client trial bail. Had the committal hearing not been conducted the client would have spent a year on remand pending trial.

*VLA client, not his real name.

In this context, the idea of eliminating committal proceedings as a duplicative or 'redundant' hearing might be an attractive proposition to save the time and cost associated with that hearing. However, committal proceedings cannot be looked at in isolation – rather they are a critical pre-requisite for efficiency in the indictable criminal process as a whole. As noted elsewhere, the value of the committal proceedings is frequently about narrowing or avoiding more costly trial processes. This can also assist to reduce downstream delay in the system.

On balance, committal proceedings account for only a small proportion of court time in the Magistrates' Court relative to volume of matters in that jurisdiction. In 2016-2017, 2607 committals were listed among the 726,249 total listings in the Magistrates' Court or 0.35 per cent of the work of that jurisdiction.⁷¹

Over the last 10 years, committal proceedings have lasted, on average, 1.47 days.⁷² Where committal proceedings that require more than the average time, it is typically because the complexity of the issues involved require a longer hearing. This may be due to a number of accused people being involved or the scope of the investigation and evidence gathered (for example in large and complex Commonwealth and drug matters) warranting a more in-depth enquiry on matters of disclosure. This additional investment of time in the committal process can function to narrow the issues and restrict the length of any subsequent trial.

Reports of lengthy and wide-ranging committals which are used by an accused to gain a tactical advantage by delaying finalisation has been raised as the basis for reform.⁷³ However, it is not clear from the data the extent to which this remains a problem in Victoria. This issue should be managed by proper oversight of cross-examination by appropriately skilled magistrates.

⁷¹ Magistrates' Court Victoria, *Annual Report 2016-2017*, 33.

⁷² VLRC, above n 1, 19.

⁷³ VLRC above n 1, 7; David Brereton and John Willis, The Australian Institute of Judicial Administration Incorporated, *The Committal in Australia* (1990), 65.

Peter – Examining the prosecution case and achieving resolution on an appropriate charge

Peter* was charged with intentionally causing serious injury in circumstances of gross violence. The complainant and Peter had known each other for many years. There was a history of animosity owing to bullying by the complainant towards Peter, and this was known to the witnesses. The issues were the reliability of the complainant and witnesses' observations in relation to the incapacity of the complainant, and their recollection of the time in between the "first incident" when Peter was assaulted by the complainant, and the second incident which gave rise to the charges (to explore self-defence).

Peter made an offer to plead guilty to intentionally causing serious injury prior to the committal mention; this was rejected. The matter proceeded to a committal hearing where three witnesses were called on the discrete issues of credibility and reliability. Through cross-examination the complainant's history of animosity towards Peter became evident. Following the committal hearing and prior to the initial directions hearing, the defence offer to plead to intentionally cause serious injury was made again, this time the offer was accepted.

The well-run committal hearing allowed both parties to see first-hand the issues relating to credit. This in turn led the prosecution to make a fair and reasonable concession which in turn paved the way for a resolution.

*VLA client, not his real name.

The benefits of the committal process can also be considered in circumstances where they have been significantly altered or even abolished. After reviewing the reforms and results of removing committals in Australian states and territories, England and Scotland, Flynn concludes:

Accordingly, the reforms implemented across Australia and international jurisdictions do not appear to have had the anticipated positive impact on court delay and efficiency levels. Instead they have simply added delay, or shifted the problem to the superior jurisdiction.⁷⁴

More specifically, Flynn noted that:

- Following the Tasmanian changes to pre-trial procedure, prosecutors were not gaining earlier access to relevant files, that the delays which had existed in the lower court were "simply shifted to the later stage in the criminal justice process".⁷⁵
- In England there was an increase in the average waiting time for a trial.⁷⁶
- In Scotland, "committing an accused directly to the superior jurisdiction has not positively impacted on court efficiency, adjournment or delay levels".⁷⁷

⁷⁴ Asher Flynn, 'A Committal Waste of Time? Reforming Victoria's Pre-Trial Process: Lessons from Other Jurisdictions' (2013) 37(3) *Criminal Law Journal* 175, 183.

⁷⁵ *Ibid*, 182.

⁷⁶ *Ibid*, 183.

⁷⁷ *Ibid*, 185.

Practitioners from Legal Aid Queensland indicate that judges from the Supreme and District Courts have found that removing committals has led to increased problems with a lack of prosecution disclosure and an increased use of *Basha* hearings.

Preparation for trial

The committal system provides the opportunity between committing an accused for trial, and the trial itself, for both parties to follow up further information required and properly prepare for the trial. If pre-trial examination of witnesses were conducted shortly prior to trial, it will significantly impact on the preparedness of parties for the trial, as there would not be sufficient time to properly examine the evidence disclosed in pre-trial proceedings and prepare the prosecution or defence points in response.

It may also deprive the accused of the opportunity to obtain additional evidence and could lead to prejudice where further disclosure occurs immediately before or during a trial. Through cross-examination of police and witnesses at committal, both parties discover the need to obtain further statements from additional potential witnesses, who had not been canvassed for statements in the preparation of the hand-up brief, or where further disclosure is uncovered. Other times it becomes evident that expert evidence may be required. In practice, engaging an expert is an involved, time-consuming process given the limitations on expert witness availability and the requirement to seek additional funding for expert reports.

Question 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; c) parties are adequately prepared for trial?

The value of a well-run committal is a well prepared, confined and economically-run trial. Our experience is that the key to facilitating early disclosure and resolution is early engagement and communication and the involvement of sufficiently senior prosecutors and defence practitioners. Magistrates' Court committals are an efficient use of court time, leading to either the early resolution of the case, or a refinement of the issues for trial and the trials consequent length.

The following case demonstrates how a well-run committal can narrow the issues at trial, saving higher court time and space and enabling parties to prepare for trial on a narrower range of issues.

Thomas – Role of committals in narrowing the issues in dispute for the subsequent trial

Thomas* was charged with murder of a young person. Prior to committal one of the issues was whether the death could have been accidental and not caused by a person. At committal, counsel cross-examined the pathologist for half a day, this transcript of evidence was taken to the defence expert who agreed with prosecution expert's views. It was agreed that the cause of death could not have been accidental. Therefore, at trial there was no need to have an extended consideration of the cause of death.

*Client of a panel firm, not his real name.

The committal happens within a short as possible time from the filing of the brief. In specific cases (child witness, sex offence matters and vulnerable accused) our experience is the Magistrates' Court will prioritise (fast track) committals where requested. It is essentially at the earliest possible stage of proceedings.

In this submission we have made a number of recommendations for improvements to current committal processes which could significantly improve appropriate early resolution of cases, preparedness for trials and efficient use of court time. These include:

1. The OPP be funded to provide senior advice to police while compiling a brief regarding appropriate charges and disclosure materials and be required to certify the charges and the satisfaction of disclosure obligations.
2. The prosecution assigns a senior prosecutor to the case, who attends the first committal mention and case conferences.
3. Senior defence solicitors and public defenders could be funded to likewise staff committals with appropriately experience lawyers, providing continuity and seniority of representation.
4. Two mandated disclosure conferences would improve communication and disclosure and foster a culture of openness:
 - At the First Disclosure conference the parties (defence lawyer, OPP lawyer and informant) could meet via telephone conference (or in person) shortly after the filing hearing, to assist in prioritising evidence analysis.
 - Upon receipt of the hand-up brief, the prosecution and defence review it.
 - At the Second Disclosure conference all parties could meet via telephone shortly after the hand-up brief is served, (and the hand-up brief has been reviewed by defence OPP as above) to discuss disclosure. This will assist in resolving disputes as to (i) relevance and (ii) privilege and help to narrow requests where appropriate. It will also foster a culture of communication between the parties, designed to give effect to the ongoing obligation of disclosure.
 - A senior prosecutor should be required to certify the appropriateness of charges and meaningful disclosure.
5. The Magistrates' Court could treat committals as a specialist jurisdiction:
 - The filing hearing could be better used to triage and prioritise evidence, particularly any delays to forensic testing.
 - The form 32 and any applications for leave to cross-examine witnesses are robustly considered by the magistrate.
6. Victims and witnesses' participation and experience is improved:
 - Police and prosecutors communicate early and regularly about the status of the charges and the prospects on trial.
 - Complainants may elect to read their statement in court, or have it read for them.
 - Victims and witnesses who are being cross-examined are provided with alternative arrangements and supports where appropriate.
 - The magistrate closely monitors questioning to ensure it is relevant and justified, and not intimidating.

Question 18. How should concerns that committal proceedings contribute to inappropriate delay be addressed?

Addressing the concerns around delay requires further consideration of its possible causes, and why the delay might be inappropriate. The experience of Victoria and other states however is that disclosure issues are one of the key drivers of delay in committal proceedings.

While adjournments may be granted in many circumstances, there is no single answer to solving these inefficiencies. The available data regarding adjournments of committal proceedings also does not assist in determining what role adjournments play in contributing to “inappropriate delay”, as the data does not discriminate as to the cause.

For example, Tables 10-13 in the Issues Paper document the median time for a case to proceed to committal hearing. These numbers do not demonstrate that when listing the matter for committal hearing the courts list hearings to accommodate the availability of the informant, police and civilian witnesses. Therefore, the committal hearings are not always listed at the courts earliest available date.

Around 31 per cent of matters listed for committal hearings last year had adjournments.⁷⁸ Applications for adjournments are granted for numerous reasons, some examples include: an accused not attending court, witnesses not attending court for the committal hearing, service of new evidence which necessitates the need to seek leave to call additional witnesses and thus in vacating a committal hearing, or the lack of available magistrates available to preside over the committal hearing. In recent times, there has been an increased number of adjournments due prisoners not being produced at court by Corrections Victoria.

It is also often inferred that inappropriate delay is attributable to the accused, however, in our experience delay is commonly due to factors beyond the accused’s control, for example, non-transportation to court. Delay may also have a deleterious effect on the accused including extended time in custody.

Unproductive delay in the committal process could be alleviated through the recommendations outlined in this submission, which focus on open dialogue between parties, early engagement with the evidence to resolve disclosure issues, and appropriate seniority to accept decisions. Specifically this could include:

- senior prosecutors being resourced to prepare and engage with the evidence and the parties at the earliest stage of committal proceedings, and being required to sign a certificate approving the charges;
- funding for the provision of senior public defenders or senior lawyers for committal matters to ensure that experience defence practitioners are engaged in early discussions and, where appropriate, resolutions;
- proposed early stage disclosure conferences by way of the recommended First Disclosure Conference and Second Disclosure Conference;
- forensic services and analysts having an active presence or voice in communicating to the court what services they can realistically deliver;
- senior prosecutors with delegated authority being resourced to consider and approve plea offers.

⁷⁸ VLRC, above n1, 20.

Question 19. How should concerns that other pre-trial processes contribute to inappropriate delay be addressed?

The delay in all court processes is a function of court workload, space capacity and circuit allocation requirements. This limited space capacity gives us concern that delays in the higher courts will increase if they are required to absorb the case management function of committal proceedings.

Pre-trial processes such as initial directions hearings and final directions hearings in the County Court are designed to provide a platform through which parties communicate their readiness to proceed to trial, an opportunity for Judges to hold parties to account to their obligations under the Criminal Procedure Act or under County Court practice notes and to guard against last minute trial adjournments.

Question 20. Do committal proceedings contribute to inappropriate delay in the Children's Court?

Conducting committals for children in the Children's Court is a crucial aspect of their right to access a specialised justice system that caters for their needs, and in our experience does not cause undue delay.

The Victorian *Charter of Rights and Responsibilities Act 2006* draws upon the United Nation Convention on the Rights of the Child which provides, among other things, that children be dealt in manner that takes account of their particular needs. In particular, the Victorian Charter of Human Rights and Responsibilities provides that:

A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.⁷⁹

The specialist children's jurisdiction recognises that children and young people are different from adults and require responses which focus primarily on rehabilitation.

The intersection between the Charter of Human Rights and Responsibilities and the best interests of a child to have their criminal matter heard in the Children's Court was considered in *Baker*.⁸⁰ The child was aged 17 at the time of the alleged offending, which was sexual penetration of another child under 16, knowingly possess child pornography and transmit child pornography. The accused was not charged until he was 19. This denied him the opportunity to have his charges dealt with by the Children's Court. The Supreme Court agreed that Baker "was entitled to the protection of his best interest as a child in the form of access to the jurisdiction of the Children's Court for the hearing of any future charges arising from the offending."⁸¹

It is important to note the specialist nature of the Children's Court jurisdiction, and the training of the judicial officers and advocates who appear in that jurisdiction. The Children's Court has exercised the power to discharge or commit for trial since the court was first established in 1906.⁸² If the Court decides that the charges are unsuitable to be determined summarily or the young person charged chooses to have the charges dealt with by a higher court, then a committal proceeding must be held. For the purpose of proceedings in the criminal division, a

⁷⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 25(3).

⁸⁰ *Baker (a pseudonym) v DPP* [2017] VSCA 58.

⁸¹ *Ibid*, 99.

⁸² Children's Court of Victoria website, accessed at <https://www.childrenscourt.vic.gov.au/about-us/history>.

child is defined as a person who is above 10 years of age but under 18. This does not include a person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court.

The specialist nature of the Children's Court jurisdiction, and the reason why committals should remain in that Court, is best highlighted through the extensive common law on applications to 'uplift' matters from the Children's Court to the higher jurisdictions. Extensive case law articulates the specialist nature of the Children's Court jurisdiction. In *DL (a minor by his litigation guardian) v A Magistrate of the Children's Court & Others*, Justice Vincent of the Supreme Court held:

A legislative scheme has been devised with respect to the conduct of criminal proceedings involving young persons...[F]or very good reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved. It is only where *very special, unusual, or exceptional*, circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.⁸³

In *A Child v A Magistrate of the Children's Court*, Justice Cummins of the Supreme Court stated: "[I]t is plain that the protective and therapeutic character of the Children's Court jurisdiction is markedly different from that of adult courts."⁸⁴ In *DPP v Michael Anderson* the court held:

It is clear that the Children's Court should only relinquish its jurisdiction with great reluctance. It is a specialist jurisdiction with a specialist approach to the criminality of children and young persons under the age of 18 years.⁸⁵

In *D (a Child) v White* the Supreme Court considered the test of 'special reason' rather than 'exceptional circumstances' as a basis for the Court refusing summary jurisdiction under s15(3) of the then *Children's Court Act 1973 (Vic)*.⁸⁶ Justice Nathan held:

As the Act invests the Court with embrasive jurisdiction in respect of children it should only be relinquished reluctantly. The reason to do so must be special; not matters of convenience or to avoid difficulties. ... The power should be exercised sparingly and reasons for doing so given. The overall administration of justice is the most important criterion. That is justice as it affects the community as well as the individual.⁸⁷

A regional VLA practitioner, holding accredited specialisation in Children's Law provides the following insight:

[t]he Children's Court jurisdiction is a constant reminder to all of the parties of the status of the accused as children, the different issues to be considered for children accessing the criminal justice system, and the fact that there needs to be constant consideration and re-evaluation of the way the committal must be conducted to ensure the process is fair for the child accused.

⁸³ *DL (a minor by his litigation guardian) v A Magistrate of the Children's Court & Others* (Supreme Court of Victoria, unreported, 09/08/1994) at 4, per Vincent J.

⁸⁴ *A Child v A Magistrate of the Children's Court & Others* (Supreme Court of Victoria, unreported, 24.02.1992), at 6 per Cummins J.

⁸⁵ *DPP v Michael Anderson* [2013] VSCA 45, 26 (Maxwell P, Neave JA and Kaya AJA).

⁸⁶ *D (a Child) v White* [1988] VR 87.

⁸⁷ *Ibid*, 93.

The changes in 2018 to the *Children, Youth and Families Act 2005 (Vic)* (CYFA) have created a presumption in favour of uplift to the adult jurisdiction, this makes it imperative that committals be retained in the children’s jurisdiction. The amendments introduced two categories of offence:

- Category A serious youth offences—if an accused child is aged 16 or over at the time of the offence, it is presumed that these cases will be determined in a higher court.
- Category B serious youth offences—if an accused child is aged 16 or over at the time of the offence, the Children’s Court must consider whether the charge is suitable to be heard and determined summarily before proceeding.

Prior to the 2018 amendments, uplift applications could be made, but it was uncommon for the Court to find that a charge should be dealt with in a superior court. The Issues Paper notes that following the 2018 CYFA amendments, there has been a two-fold increase in the number of initiations in the Children’s Court committal stream.

Charlie – Importance of dedicated committal processes in the Children’s Court

Charlie* is a young person who was charged with aggravated home invasion. Given his age he was in the category of offenders who are presumed to be heard in the adult jurisdiction. Upon defence analysis of evidence it appeared the evidence to support the charge was weak. However, OPP would not consider any withdrawals. The matter proceeded to committal with informant and the complainant. The narrow issue upon which the complainant was cross-examined was identification. The magistrate who heard the committal found that there was no evidence to substantiate the charge of aggravated home invasion and therefore the charge was dismissed. The OPP subsequently handed over the prosecution to Victoria Police who withdrew all other charges. The client was originally remanded on the charges, however was granted bail after a month.

If Charlie had been automatically committed to the County Court, he would have had significantly longer than 3-4 months between committal mention and committal / committal and trial. Having committals in the specialist jurisdiction of the Children’s Court also meant the proceedings were dedicated to meeting the needs of the young person facing indictable charges.

*Client of a Panel firm, not his real name.

It does not follow that the increase in committals is evidence of the need to abolish committals in the Children’s Court. Although the implementation of changes in 2018 has contributed to some delay, this does not provide a rationale for dismantling the framework. Removing committals in the children’s jurisdiction will undermine the longstanding specialist framework under the CYFA, which has been designed to respond to criminal offending by children and young people. It demands more effort and rehabilitative innovation, to secure a reduction in harm and recidivism for these young people who will almost certainly re-enter the community.

To address issues of delays we suggest that there be shorter timeframes for the service of the hand up brief and shorter periods to committal mention. Presently, the adult time frames have been imposed on the Children’s Court: 6 weeks to service of hand-up brief and 6 weeks to committal. It is suggested that these time frames be shortened.

It has been our experience that the introduction of Category A and Category B offences has led to a number of instances where young people, typically those with limited or no prior criminal history, have spent increasingly longer periods on remand as a result of the introduction of dates for the filing hearing, service of hand up brief and committal mentions. In a number of cases charges that have been the subject of Category A and Category B offences have ultimately been withdrawn but not until well after the service of the hand up brief. The young person has typically remained in custody since being placed on remand and issues of the contaminating experience of custody are ever present in these matters.

While there exists a presumption against summary jurisdiction, committal proceedings in the Children's Court remain a necessary guard in the interests of children who are charged with indictable offences.

Question 21. What are the resource implications of any proposed reforms to committal or pre-trial proceedings?

The expense of any widescale reform to committal proceedings warrants a careful cost-benefit analysis based on detailed modelling. In assessing the desirability of reform, it will be important to understand the scope of investment required for any significant changes to the model, and to be confident that there will be commensurate efficiency or other benefits from the change.

The tremendous investment required to move pre-trial proceedings to the higher courts has not significantly addressed delay or inefficiencies in other jurisdictions. The material we have before us does not suggest that the significant investment necessitated would have the anticipated benefits, and would not deteriorate the already stretched system.

In our submission, that same investment instead directed at improving the current system and properly resourcing the courts, prosecution, investigators, defence, and witness services, would have a much greater and measurable impact on the quality of the system, the experience for victims and witnesses and the quality of outcomes.

It is essential that the Commission carry out a thorough process analysis of the proposed changes. This should involve all criminal justice agencies working with the Commission to analyse the intended and possible unintended impacts on their own business and the likely costs of those impacts on the system.

Current criminal justice system pressures

One of the most significant challenges currently facing the criminal justice system is that the level of current resourcing does not meet demand. The resource impacts of any proposed changes must be properly modelled and assessed. If wide-scale system reforms are implemented without appropriate and significant investment, there is a real risk that current rates of resolution will reduce and the system will experience more delay.

Increasing volumes of indictable matters in Victoria in recent years has also placed pressure on the resources of the courts, which have found it difficult to manage. For example, in the County Court, while it is generally accepted that there is listing uncertainty in regional circuit courts, even in Melbourne it cannot be said that a trial date is a fixed date. In order to ensure the full utilisation of available judges, the County Court over-lists the number of trials to take account of matters that resolve or are not ready to proceed. The consequence of this practice is that

routinely there are a number of listed trials for which there are no available judges. These are listed in the 'Reserve List' on Monday of each week and are adjourned to the next day if no judge is available. If a judge cannot be found by the middle of that week the trial is marked 'Not reached' and is re-fixed for trial at the next available opportunity, currently in 9 to 12 months.

The current pressures on the system are evident from a review of both the number of Not Reached trials and trials in the Reserve List. For the period 1 January 2019 to 31 May 2019 there were 10 Not Reached trials, compared to one Not Reached trial during this same period in 2018. On 12 August 2019, 17 trials were listed to commence. Only six were allocated a Judge, one was adjourned to a later trial date, while the remaining 10 continued to remain in the Reserve List and adjourned to the following day. By week's end, three trials were unable to be reached.

The criminal justice system has recently experienced the effects of equivalent changes with the implementation of reforms to Special Hearing cases arising from the *Justice Legislation Miscellaneous Amendment Act 2018*. This amendment expanded section 123 of the Criminal Procedure Act to preclude *any* witnesses from being cross-examined at a contested committal in sex cases involving children or cognitively impaired adults. An accused can still apply under section 198A of the Criminal Procedure Act to cross-examine in the higher Court, witnesses other than the complainant. These changes are expected to comprise about 70-150 additional County Court days, the jurisdiction in which these cases are almost always heard. No additional funding was provided by government to support the impact of these changes.

This snapshot serves to highlight the *current* resourcing limitations experienced and demonstrates that there would need to be significant investment in the higher courts should pre-trial examination and case management, or any initiative that increases the workload of these court, be implemented. Not doing so would be antithetical to the objectives of the Commission's review and will compound the existing delay issues.

With more people being remanded due to changes to the Bail Act, any delay will have particular impact on Corrections Victoria with respect to both cost and logistics.

Any reduction of the opportunity to properly test the case at the committal hearing or in pre-trial cross examination would limit the ability of the parties to streamline the issues for trial or resolve the trial; it is likely that trials will become less efficient in the absence of a committal process.

The removal of committals may also lead to the derailment of trials or the adjournment of trials, significantly reducing the number of matters resolved early and increase the number of trials. This will be particularly problematic in tight circuit lists.

The experience of New South Wales defence practitioners is that the significant 2018 investment in early appropriate resolution, where all parties were funded to institute new systems, have not yet translated into meaningful improvements (discussed above at **Question 4**). We acknowledge the difficulty of translating the intent of those reforms into practice, however highlight the importance of proper planning, appropriate resourcing of the reforms, place-based piloting of changes to address regional differences, and proper follow-up evaluation based on access to quality data.

Cost of moving all pre-trial proceedings to the higher courts

In our view, the resource implications of moving all pre-trial cross-examination to the trial courts would be significant, with no clear guidance on what additional benefit this change might bring.

This is in comparison to the significantly lesser investment in the current system, which has evolved through considered staged reform, with focus and fortification on early resolution, disclosure and expansion of current programs that reduce trauma for witnesses and complainants.

While the number of committals in the Magistrates' Court may be a relatively small proportion of that court's work, shifting this volume of hearings and/or pre-trial case management to the higher jurisdictions, which are already at their limited capacity, will not improve efficiency. Conversely, doing so will likely *increase* delays due to the disproportionate impact this added burden will have on the higher courts and its current inability to accommodate this extra volume.

If pre-trial examination is moved to the higher courts, approximately 2,607 additional pre-trial examinations will be shifted to a higher jurisdiction based on the Magistrates' Court 2016/17 data.⁸⁸ This would require at least 2,607 court sitting days to be found between the County and Supreme Courts, based on a highly conservative estimate of one sitting day per pre-trial examination. This does not include the time required for case management hearings.

Perhaps most critically, the higher courts are already at capacity, both in numbers of judges and physical courtroom availability. The limited courtroom capacity in the regions and significant issues with regional circuit listing practices (discussed above in **Question 5**), suggest that there is very limited ability for the circuit lists to absorb the pre-trial hearings which are currently held in the Magistrates' Court lists.

It is difficult to conceive the County and Supreme Courts having sufficient Judges, courtrooms, support staff and facilities (e.g. remand facilities) to manage this additional committal type procedures without significant additional funding, including new court rooms and precincts. The extra number of court rooms required to hear all pre-trial proceedings would be prohibitively expensive.

There are also higher costs associated with funding matters in the County and Supreme Courts, which are more expensive venues than the Magistrates' Court. The Issues Paper sets out the different hourly rates for counsel and judges in the County Court compared with the Magistrates' Court. However, it is unclear whether this takes into account other operational costs associated with the higher jurisdictions, either added or more expensive, including increased forms of security (Corrections Victoria officers and G4S), court holding facilities, tipstaves and associate time, and circuit travel costs for the judges and support staff.

In addition, the OPP and VLA would require additional resources with higher solicitor and counsel costs in the County and Supreme Courts, compared to a committal in the Magistrates' Court. Aside from the higher fees for legal aid and prosecution counsel appearing in the higher jurisdiction, County Court and Supreme Court hours are significantly more expensive than Magistrates' Court hours.

Regional impacts

There are particular challenges in regional locations that are relevant to the consideration of reform and any shift of pre-trial proceedings from the Magistrates Court to the County Court. There is potential for procedural reform to amplify the inequality between metropolitan and regional courts. Some of these challenges are set out below.

⁸⁸ Magistrates' Court Victoria, *Annual Report 2016-2017*, 33.

Listing practices. One of the greatest hurdles faced by regional clients, complainant and police is the lack of certainty of when a trial will be heard. Currently where a County Court is not gazetted to sit continually throughout the calendar year a County Court circuit will sit two times per year or in other regional areas six to eight times a year. Often trials get reshuffled and re-listed with great regularity. For example, a matter involving sex charges where the complainant is under 16 or has a cognitive impairment may 'bump' another trial in the list to take prime position. This means practitioners, on both sides of the bar table, are reticent to fully prepare a trial matter till they are sure the matter will be heard.

Access to interpreters. A VLA lawyer in Bendigo points to the lack of interpreting services in regional areas. Ordinarily interpreters utilised for court proceedings hold the highest level of accreditation.⁸⁹ However, in regional Victoria clients and police do not have access to highly qualified interpreters. Often police and regional clients need to rely on a telephone service where the interpreter phones in, however the telephone service is often a poor substitute when faced with a client who has a hearing impairment, mental illness or cognitive impairment. If the police need to show the witness an exhibit in English, the telephone interpreting service is limited in the assistance it may offer. When faced with witnesses and accused from culturally and linguistically diverse backgrounds, police require additional time to obtain witness statements and often the lack of high quality interpreting services means weight that can be attributed to those statements is minimal.

Availability of forensic services. VLA practitioners in Bendigo and Gippsland note that Victoria Police crime scene service officers do not readily travel to regional areas for all crime scenes. If the offence is not considered serious enough then detectives may gather buccal swabs, or the crime scene services attend upon the crime scene several days after the alleged offending. The delay in the attendance of the crime scene services means there are delays in taking the evidentiary material back to the laboratory for testing. Further, if defence wish to retain an expert to conduct examinations at a crime scene, they often need to seek long periods of adjournments. As an example, a practitioner from Gippsland advised that he sought to retain an expert to give advice about an allegation of arson. The expert advised that if the report were to be conducted on the notes of the police he would be able to return a report within a few weeks, however if he needed to conduct further examinations of the scene the report would take several months because the expert needed to find availability in their diary that would allow for a couple of days of travel into their schedule.

In the event that the VLRC supports the shift of committal processes to the County Court, we suggest the following additional measures to minimise any disparity in the accessibility of the criminal justice system for those in regional areas:

- a) the County Court will need to sit with greater regularity to ensure clients are not waiting for up to 6 months to come before a judicial officer who will adjudicate their matter;
- b) County Court judges will need to be permanently allocated to large regional hubs to hear the pre-trial arguments;
- c) the County Court will need to ensure that clients in custody with pending appeals are not adversely affected through longer periods of delay as a consequence of absorbing additional pre-trial procedures and hearings.

⁸⁹ This is currently a NATEE Level 3.

These measures are recommended to ensure that disclosure obligations are met, pre-committal examinations are conducted, and parties engage in case conferencing to promote the earliest opportunity for resolution.

VLA specific resource implications

VLA provides funding for all aspects of an indictable case after the filing hearing. In the early stages, this includes funding the solicitor for general preparation, taking instructions, negotiating with the prosecution and preparing and filing the Form 32 Case Direction Notice. Further, as incentive to encourage early and thorough preparation of a committal matter, VLA provides specific funding for a practitioner to conduct an analysis of the brief and develop a case strategy.

Funding is also provided to counsel for preparation of the committal proceeding, conferencing with the client and case conferencing. In addition, at the time of briefing counsel for a contested committal, counsel is also be briefed to undertake post-committal negotiations, for which there is additional funding if this conducted. Again, this is to incentivise resolution. Fees are paid for each necessary attendance at a committal mention and each contested committal hearing day.

Remuneration rates for lawyers and barristers in the higher courts are significantly higher than in the Magistrates' Court. If committals are replaced with cross-examination in the higher courts, then the cost of conducting the matter will be commensurately higher.

Implementing significant procedural changes requires updating the VLA online grants management system and the online VLA Handbook for Lawyers. Both of these changes require a significant investment of time and resources. Changes to our online grants management system also involves a cost to VLA.

Internal resources will be required to prepare training sessions and develop materials to support VLA inhouse and private practitioners. Changes to VLA's eligibility guidelines and fees paid for indictable criminal law matters will require specific financial cost implications of any changes.

Evaluation

We suggest that regardless of the system ultimately recommended, there must be a robust evaluation at three years following the commencement of any reforms. The importance of this is highlighted by the experience of other jurisdictions that reforms have not had the positive intended consequences. We strongly recommend that there be a legislated requirement for an independent evaluation tabled in Parliament. We believe three years is sufficient time to enable lengthy trials to commence and complete within the evaluation period.

As noted above, there are significant gaps in the data described in the issues paper, likely due to gaps in data collection and extraction from the courts' systems. We note that these inadequacies should be addressed in advance of the commencement of any reforms, such that the evaluation can properly measure and consider the impact of the reforms.

Appendix A – Example Form 32

Not published in accessible format for confidentiality reasons