

# Additional MCV Submission to the Victorian Law Reform Commission in Response to the Committals Issues Paper June 2019

**Date:** 30 August 2019

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**From:** Deputy Chief Magistrate Felicity Broughton and Magistrate Kate Hawkins,  
Joint Supervising Magistrates for Family Violence  
Magistrate Belinda Wallington, Supervising Magistrate for Sexual Offences.

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**Subject:** This submission addresses questions 11 and 12 of the Issues Paper as they relate to complainants in family violence and sexual offence committal proceedings

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

1. The Family Violence and Sex Offence Supervising Magistrates note that the court intensively case manages offences in these specialist areas. The Magistrates' Court of Victoria (MCV) conducts specialist sex offence lists at Melbourne and at the following regional headquarter courts: Ballarat, Bendigo, Geelong, Latrobe, Mildura and Shepparton. It should be noted that the specialist sex offence lists at the regional headquarter courts cover sex offence matters from other courts within their region. The role of the sex offence lists in early resolution of sex offence proceedings was endorsed in the independent evaluation by Success Works.

2. Specialist Family Violence Divisions operate in indictable matters at Ballarat and Shepparton where applicants and respondents are supported by family violence support workers. These divisions are to be replicated at other courts via the introduction of Specialist Family Violence Courts. The MCV is concerned that reforms to the role of committals in matters of family violence comply with the recommendations of the Royal Commission into Family Violence. Limiting or reducing the role of committals is at odds with the development

of providing a 'one stop shop' court response to reduce the risk to families experiencing family violence.

3. Committal proceedings play a pivotal role in revealing the strengths and weaknesses of the case which then informs further negotiations between the parties. How this can be translated into simple statistics is unclear. The matter may resolve immediately upon conclusion of the committal or later after further negotiation. Either way, if the matter resolves after a committal hearing, the complainant's time in the witness box is shortened as they do not have to give evidence in chief.

Two recent examples illustrate how a committal can result in an immediate resolution: -

- at committal mention the evidence of rape was weak whilst the evidence of an indecent assault was strong and supported by admissions. A plea offer was rejected by the prosecution after conferencing the complainant. After the complainant gave evidence at the committal, the matter was stood down and the prosecution accepted a plea of guilty to the indecent assault.
- At committal mention the matter appeared to be a very strong case on the papers, but the accused would not plead. After hearing the complainant's strong evidence at committal, the accused entered a plea of guilty.

4. Case management of family violence and sexual offences enables committal proceedings, where appropriate, to resolve in the summary jurisdiction. This allows both early resolution and for complainants to have related family violence intervention orders or victims of crime applications to be dealt with by the same Magistrate. These benefits would be lost if committal proceedings were removed.

5. The Family Violence and Sexual Offences Supervising Magistrates submit that further committal reform (other than as suggested in paragraph 7 below) should not occur until the new procedures provided by s123 and 198A of the *Criminal Procedure Act* (where pre-trial questioning is effectively moved to the County Court) has been evaluated. For example, the impact that these changes have on early resolution of sex offence matters and the length of time a case takes from charge to finalisation are both important matters to be assessed.

6. For the reasons above, the Family Violence and Sexual Offence Supervising Magistrates are not recommending that adult complainants in these matters be exempt from cross-examination at committal as a matter of course.

7. Presently the protections given to cognitively impaired and child complainants in sexual offence proceedings which prohibit their cross-examination at committal do not extend to cognitively impaired and child complainants in family violence proceedings. This appears to be anomalous. The Family Violence Supervising Magistrates support the extension of these protections so that vulnerable witnesses do not have to be cross-examined twice. The special hearing provisions in the County Court should apply to these complainants.

**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?**

1. Section 124(5) of the *Criminal Procedure Act 2009* provides a more stringent test for leave to cross-examine child witnesses at a committal. Cognitively impaired witnesses do not have this extra protection. There is a strong argument in favour of expanding section 124(5) to include cognitively impaired witnesses.

2. Complainants in sexual offences and family violence offences are a particularly vulnerable group but are almost invariably of primary importance in these committal proceedings.

3. If consideration were to be given to formulating a more restrictive test for leave to cross-examine adult complainants who are not cognitively impaired, in our view s 124(5) is not fit for this purpose.

4. Section 124(5) was designed to address considerations relevant to child witnesses (excluding child complainants). Criteria in s124(5) such as “the importance of the witness to the case”, “probative value”, “issues in dispute” and the “weight of the evidence” are of no assistance in determining whether a complainant should give evidence at committal. If a more restricted test for cross-examination of adult complainants were to be considered, a new test would need to be formulated, nuanced to take account of the primary role of the complainant.

5. A test which barred cross-examination in proceedings where the prosecution case was very strong may assist in the aim of minimising trauma. The downside would be that there would be less matters that resolve after a strong performance by the complainant at committal. It would also then fall to the Magistrate to determine the strength of the case on the papers and would be a difficult test to apply in practice, specifically where and how would the line be drawn.

6. An alternative option would be for additional requirements to be placed on parties seeking to cross-examine complainants in sex offence and family violence matters at committal to more thoroughly identify the matters in issue, how those matters are sought to be cross-examined and why cross-examination is justified. An application akin to that required for cross-examination of complainants on sexual history could be crafted whereby the application must set out for each issue raised; the initial questions sought to be asked, the scope of the questioning in respect of that issue and the way in which that questioning would be relevant to one of the purposes for which committals are granted. This would cause lawyers for both prosecution and defence to turn their minds at an early stage to the specifics of the evidence and would assist in limiting the length of cross-examination at committal stage, whilst still allowing for the strengths and witnesses in the case to be assessed by both parties. This would give the presiding Magistrate at the committal hearing a strong basis to intervene if cross-examination strayed from the parameters set at the committal mention.

7. Trauma could be further reduced by empowering Magistrates at the committal mention to limit the amount of time a complainant could be cross-examined at committal in a way that was commensurate with the issues as defined in the case direction notice and took into account the number of incidents alleged and the complexity of the factual scenario. A time limit would make the process more manageable for complainants and contribute to ensuring a more focussed approach from defence counsel.