



**SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION
ON COMMITTAL PROCEEDINGS**

9 SEPTEMBER 2019



BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal organisation established in 1972 by committee and incorporated in 1975. VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and respecting the cultural diversity, values and beliefs of our clients. VALS vision is to ensure that Aboriginal Victorians are treated with true justice before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak Aboriginal organisations in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, family and civil law.

Our 24-hour support service is backed up by the strong community-based role our Client Service Officers play, in being the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is a legal conflict of interest and we cannot act. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, Djirra, community legal centres and private practitioners as appropriate.

ACKNOWLEDGEMENTS

VALS takes this opportunity to acknowledge Aboriginal and Torres Strait Islander people and traditional owners throughout Victoria, including elders past and present.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Kin Leong (*Accredited Criminal Law Specialist*), Principal Legal Officer, Criminal Law Division
- Isabel Robinson, Policy, Research and Advocacy Officer



SUMMARY OF RECOMMENDATIONS

Recommendation 1: Committal proceedings for indictable offences should be retained in the Magistrates' Court as a critical check and balance on improper charging and prosecutorial discretion, and to ensure that fair trial rights are protected.

Recommendation 2: The OPP should be involved in the investigation from an early stage, including through prosecutorial supervision of police charging and providing guidance in development of the Hand-Up Brief.

Recommendation 3: Committals should be treated as a specialist stream within the Magistrates' Court and be run by magistrates with specific expertise in committal proceedings.

Recommendation 4: As recommended by Victorian Legal Aid, the following measures should be implemented to improve disclosure in indictable matters:

- Standardised disclosure across all indictable matters, modelled off the Section 32A Form for sex cases involving a child or cognitively impaired complainant;
- Prosecution review, supervision and certification of disclosure;
- Early disclosure conferences to improve communication between the parties, including shortly after the filing hearing and shortly after the Hand-Up Brief is served;
- Earlier involvement of senior prosecutors, who have authority to negotiate;
- Proactive engagement by magistrates at filing hearing directions to order triage and prioritisation of evidence required for the Hand-Up Briefs;
- Active presence of forensic services in communicating to the court what services they can realistically deliver;
- Harsher penalties for not complying with disclosure obligations.

Recommendation 5: The existing Intermediaries and Ground Rules Hearings pilots should be expanded to include witnesses in family violence matters, people with



significant cognitive disabilities or mental health issues, or other vulnerabilities, across all courts.

- Recommendation 6:** Unnecessary trauma for victims and witnesses should be safeguarded against through properly applied discretion to grant leave to cross-examine witnesses.
- Recommendation 7:** The OPP should receive additional funding to ensure that senior prosecutors with authority to negotiate can provide oversight during charging and disclosure.
- Recommendation 8:** VALS should receive additional funding to recruit specialist lawyers to deal with indictable matters. If committal proceedings are abolished and replaced with pre-trial proceedings in a higher court, VALS would also require funding to cover the additional costs associated with the higher court.



DETAILED SUBMISSIONS

VALS submission responds to questions 1- 12 in the Issues Paper, as well as question 21. We also use this opportunity to raise some additional issues not covered in the Issues Paper.

PURPOSE OF COMMITTAL PROCEEDINGS

1. What purposes can or should committal proceedings serve?

In VALS experience, well managed committal proceedings serve a variety of purposes that are beneficial for all parties, including prosecution, defence and the Court. From the perspective of the defence, committals are essential for facilitating disclosure, thereby ensuring the right to a fair trial, including the right to be informed promptly and in detail of the nature and reason for the charge, as well as the right to have adequate time and facilities to prepare a defence.¹

As discussed further below, witness statements included in the Hand-Up Brief (HUB) are usually prepared under the guidance of Victorian Police, who lack trial experience and a detailed understanding of the rules of evidence. Accordingly, committal proceedings - including the opportunity to cross-examine witnesses - are critical for full and proper disclosure.

Additionally, VALS is of the view that committal proceedings play a critical role in filtering out weak cases and providing a check and balance on improper charging and prosecutorial discretion. As set out in the Issues Paper, 3.7% of cases that went to a committal hearing in 2017-2018 resulted in either charges being withdrawn or discharged by the Magistrate. Whilst this is a small percentage of the overall number of matters, it represents 89 matters where the accused rightly avoided trial, and where the cost implications of proceeding with the trial in a higher court were avoided.

In a criminal justice system that continues to be affected by systematic racism and over-policing of Aboriginal and Torres Strait Islander Peoples, we believe that independent judicial oversight of the

¹ INSERT Reference to ICCPR and Charter of Human Rights and Responsibilities.



prosecution's case is essential to ensure fairness and help protect the right to be treated equally before the law.²

Finally, we are concerned that removing the possibility to filter out weak or inappropriate cases will mean that all matters are committed to County or Supreme Court, with much longer delays than is already the case and more time on remand for clients whose cases should not proceed. We understand that this has been the experience in Western Australia, where removal of the possibility to test cases in the Magistrates Court has resulted in bottlenecks in the higher courts.

Despite the above, it is VALS experience that the fundamental objectives of committal proceedings may sometimes be frustrated or undermined, including as a result of lengthy and unnecessary delays with disclosure. We therefore believe that reforming the current system is essential, in order to ensure that the benefit of committal proceedings can be maximised for all parties.

Recommendation 1: Committal proceedings for indictable offences should be retained in the Magistrates' Court as a critical check and balance on improper charging and prosecutorial discretion, and to ensure that fair trial rights are protected.

CHARGING PRACTICES

- 2. What, if any, measures should be introduced to: (a) reduce the difference between charges that are initially filed and those ultimately prosecuted; and (b) ensure appropriate charges are filed at the earliest possible stage in a case?**
- 3. Should the OPP be involved in determining appropriate indictable charges at an earlier stage? If so, how?**

² INSERT reference to ICCPR and Victorian Charter.



In VALS experience, there is often a disparity between the charges that are initially filed by the Victorian Police and the charges that are ultimately prosecuted. In our experience, the key reasons for overcharging are:

- Police informants regularly charge all alternate charges available under both the *Crimes Act 1958* (Vic) and the *Summary Offences Act 1966* (Vic), based on an expectation that charges will be reduced through negotiation;
- Police informants do not take into account underlying reasons for offending behaviour; and
- Police informants often have limited knowledge of the rules of evidence, specifically in relation to admissibility, and the burden of proof required to substantiate a charge.

We believe that one of the best ways of ensuring that appropriate charges are filed at the earliest stage possible is to ensure that the OPP is involved in determining the charges. We support reforms that would enable prosecutors, with experience in running trials, to be involved in preparing the charges and the HUB. In this regard, we note the approach introduced in NSW, whereby a senior prosecutor has to certify that the charges are appropriate.

Recommendation 2: The OPP should be involved in the investigation from an early stage, including through prosecutorial supervision of police charging and providing guidance in development of the Hand-Up Brief.

DISCLOSURE

4. **What measures can be introduced to improve disclosure in indictable matters: (a) between investigating agencies and the DPP?; and (b) between prosecutors and the defence?**
5. **To what extent do committal proceedings play a necessary role in ensuring proper and timely disclosure?**



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

As noted above, it is our experience that well-run committal proceedings are critical for proper and timely disclosure. This is because committal hearings provide an opportunity to cross-examine witnesses and test the prosecution's case, but also because committals provide a mechanism to ensure that the police comply with their disclosure obligations.

Despite this, we have encountered challenges that frustrate and undermine the effectiveness and efficiency of the disclosure process. In particular, disclosure obligations are not complied with, meaning that we often need to request outstanding evidence after receipt of the HUB. This is particularly the case for forensic and medical reports, which are often delayed in part due to apparent under-resourcing of the Victorian Institute of Forensic Medicine (VIFM) and Victoria Police Forensic Services Centre (VPFSC). As a result, committal hearings are used as a mechanism to ensure that full disclosure occurs.

In our experience, these challenges are often more accentuated in regional and rural areas where police may have less experience with disclosure processes or have less resources to dedicate to identification of what needs to be disclosed.

VALS is concerned that abolishing and replacing committal proceedings with an alternative process will lead to full disclosure occurring much closer to the trial - which may impact on the right to have an adequate time to prepare a defence, or situations where a defendant is committed to trial without being fully aware of the case against them. In this regard, we note concerns with the Tasmanian model, where reforms have resulted in more defendants being committed to the Supreme Court without proper disclosure of the case against them.³

We believe that challenges with timely and full disclosure can be addressed through reforming the existing committal system. We strongly support the recommendations from Victorian Legal Aid, 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

³ New South Wales Law Reform Commission, *Report 141: Encouraging Appropriate Early Guilty Pleas* (December 2014), p. 190-191.



disclosure.⁴ VALS also supports general reform to improve the ability of forensics to provide reports in a timely manner, including increasing funding to VPFSC and VIFM.

Finally, we believe that treating committals as a specialist stream within the Magistrate's Court would help to ensure that committals are managed by Magistrate's with relevant expertise and experience, who can ensure that they are effective in achieving the purposes set out above.

Recommendation 3: Committals should be treated as a specialist stream within the Magistrates' Court and be run by magistrates with specific expertise in committal proceedings.

Recommendation 4: As recommended by Victorian Legal Aid, the following measures should be implemented to improve disclosure in indictable matters:

- Standardised disclosure across all indictable matters, modelled off the Section 32A Form for sex cases involving a child or cognitively impaired complainant;
- Prosecution review, supervision and certification of disclosure;
- Early disclosure conferences to improve communication between the parties, including shortly after the filing hearing and shortly after the hand-up brief is served;
- Earlier involvement of senior prosecutors, who have authority to negotiate;
- Proactive engagement by magistrates at filing hearing directions to order triage and prioritisation of evidence required for the hand up briefs;
- Active presence of forensic services in communicating to the court what services they can realistically deliver;
- Harsher penalties for not complying with disclosure obligations.⁵

⁴ Victorian Legal Aid, *Submission to the Victorian Law Reform Commission on the Review of Committals*, August 2019, pp. 12-18.

⁵ *Ibid.*



CROSS-EXAMINATION OF WITNESSES

- 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?**
- 8. Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so, why?**
- 9. Should cross-examination at a committal hearing be further restricted or abolished? If so, why?**
- 10. If cross-examination at a committal hearing is further restricted, how should this occur?**
- 11. Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so, who?**
- 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?**

As noted above, the ability to cross-examine witnesses during a committal hearing is vital to test the evidence and ensure full and proper disclosure.

A written statement prepared by a police officer may often lack sufficient detail, that can best be obtained through cross examination at a committal proceeding. Whilst involvement of a senior prosecutor earlier in the investigation process - including in preparing the HUB - would help to improve the quality and timeliness of disclosure, we submit that cross-examination is still important as it allows for testing the veracity and relevance of witnesses' evidence. VALS has been involved in multiple cases previously where the charges have been amended or reduced following cross-examination of witnesses.



We acknowledge that cross-examination can be traumatic for victims and witnesses and that certain restrictions need to be in place to limit this trauma and ensure that all witnesses are treated with respect and dignity. In this regard, we support retaining the amendments to prohibit cross-examination of any witnesses in sexual offence cases where the complainant is a child or is cognitively impaired. We note that in practice, children are also not regularly cross-examined as special reasons are required and rarely granted. We submit that these amendments should be maintained as they have been successful in reducing trauma experienced by vulnerable witnesses.

We support the Intermediaries and Ground Rule Hearings pilots to reduce the trauma experienced by witnesses being cross-examined. VALS supports expansion of this pilot beyond its current scope, to include witnesses in family violence matters, people with significant cognitive disabilities, mental health issues, and other vulnerabilities, across all courts.

Additionally, we believe that proper application of the rules requiring an accused to provide detail, justification and the relevance as to the need to cross-examine a witness, overseen by a Magistrate is an effective mechanism to contain and limit cross-examination.

VALS believes that any further restrictions on cross-examination during committal proceedings are not necessary. Further restrictions on cross-examination in order to protect victims and witnesses should not be at the expense of the right to a fair trial. We therefore respectfully disagree with VLRC's proposals to introduce a "protected" victim category. We also note that many witnesses are only cross-examined once, because the matter is resolved with an early guilty plea and does not proceed to trial.

Recommendation 5: The existing Intermediaries and Ground Rules Hearings pilots should be expanded to include witnesses in family violence matters, people with significant cognitive disabilities or mental health issues, or other vulnerabilities, across all courts.

Recommendation 6: Unnecessary trauma for victims and witnesses should be safeguarded against through properly applied discretion to grant leave to cross-examine witnesses.



RESOURCE IMPLICATIONS

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

It is clear that abolishing committals from the Magistrates' Court and replacing them with pre-trial proceedings in a higher court will have significant cost implications for all parties involved, including the court, the defendant and prosecution. Such an approach will increase public expenditure overall, and VALS is concerned that this cost will be borne by other areas of the criminal justice system that are already drastically under-funded.

In VALS perspective, there is insubstantial evidence to demonstrate that such a significant financial investment will achieve the intended results. Indeed, experiences from other jurisdictions suggests that shifting the process to a higher court simply shifts the burden, with higher costs for delays in a higher court. We are therefore of the view that additional resources should be channelled towards improving the current system through a range of reforms.

One such reform, as noted earlier, is oversight of the OPP in relation to charging and earlier involvement of senior prosecutors with authority to negotiate. We note the approach in NSW where reforms to the committal process were accompanied by significant additional funding to the OPP and NSW Legal Aid. We believe that a similar approach would be necessary if these recommendations are taken up.

Reforms to enhance the ability of forensics to support reports in a timely manner would also involve resource implications, including additional funding to VPFSC and VIFM.

Regarding cost implications for VALS, we are currently already stretched to cover the cost of committal proceedings in the Magistrates' Court. If committal proceedings are abolished in favour of pre-trial proceedings in a higher court, we would face additional resource challenges that would have a significant impact on our ability to adequately service the Aboriginal community across Victoria. While we are currently eligible for VLA funding for the appearance work of a barrister, the cost of instructing in higher courts and brief analysis by our solicitors comes from our core funding.



The cost of allocating an instructing solicitor would increase significantly if the equivalent of a committal process is moved into the higher court. We would therefore require additional funding to cover this cost.

If committal proceedings are retained in the Magistrates Court, we would also benefit from funding to recruit specialist lawyers to deal with indictable matters.

Recommendation 7: The OPP should receive additional funding to ensure that senior prosecutors with authority to negotiate can provide oversight during charging and disclosure.

Recommendation 8: VALS should receive additional funding to recruit specialist lawyers to deal with indictable matters. If committal proceedings are abolished and replaced with pre-trial proceedings in a higher court, VALS would also require funding to cover the additional costs associated with the higher court.

ADDITIONAL ISSUES

We would like to use this opportunity to highlight a key challenge relating to the way that cases move out of the committal stream and are determined summarily. In making a summary jurisdiction application, we often face challenges if the magistrate hearing the summary jurisdiction application is not a Koori Court magistrate, as the Koori court magistrate ultimately hearing the case may take a different view about its suitability for summary determination in the Koori Court. In our perspective, summary jurisdiction applications that will ultimately be heard before a Koori Court magistrate, should be heard and decided by a Koori Court magistrate.