



# County Court Submission: Committal Reform

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The following submission is provided to the Victorian Law Reform Commission (*the Commission*), in response to its review of committal procedure.

The Court provides this submission based on its experience and practice in conducting criminal trials in Victoria. While the Court does not directly engage in the committal process, the Court has an immediate interest in its efficient and effective functioning. The Court considers that a number of issues raised in the review are matters of policy for Government. As such, the Court will not address all questions raised in the review.

At the outset, the Court considers that, in many cases, pre-trial cross-examination of witnesses exists as a central part of the full and fair disclosure of the prosecution case. It is a process that, when conducted efficiently and fairly, is of benefit to all parties, as well as the court. It can facilitate early resolution, full disclosure, and the elucidation of issues in dispute.

There are two broad views within the Court regarding the need to reform committals, particularly regarding the overall merit of transferring pre-trial cross-examination to the trial court.

One view is that the policy reasons in support of reform are compelling, and that transfer of pre-trial cross-examination to the trial court will reduce the delay of 'double queuing', improve the protections afforded to witnesses, and streamline the trial process by facilitating early resolution and the early identification of the issues in dispute.

The other view is that while acknowledging that there are significant issues with committals in their current form, it is undesirable to transfer pre-trial cross-examination to the trial court. When properly conducted, committals provide both the defence and prosecution with an invaluable opportunity to test the strengths and weaknesses of the case before entering a higher - and more costly - jurisdiction.

Despite these differing views, the Court is unified in its support of reform to pre-trial disclosure, and the procedure prior to charging and initiating proceedings.

The Court is also singular in its view that, should reform be considered, any transfer of pre-trial cross-examination to the County Court must be supported by appropriate resource allocation, prior to implementation. In New South Wales, the 2018 reforms were accompanied by \$200 million in dedicated funding as part of a broader criminal justice reform package. The Court considers that a significant change in procedure must be accompanied by pre-emptive funding that meets the increased demand on the County Court. This will allow the Court to implement reform in advance of the change, rather than responding to the reform in a piecemeal fashion.

The Court is unanimously opposed to any reforms to committals without upfront and appropriate resource allocation.

## **Reforms to charging and disclosure**

### *Charging*

The Court supports the improvement of procedures regarding the charging of an accused. There is significant benefit in ensuring that the charges filed are appropriate. This can assist in managing the expectations of both complainants and the accused. Further, it reduces delay in the time to resolution due to the more limited need to reduce the number of charges by way of negotiation.

The Court supports the model adopted in the United Kingdom whereby senior lawyers from the prosecution service play a role in determining the appropriate charges. In Victoria, the Director of Public Prosecutions (“DPP”) is responsible for filing the indictment for state offences at trial. It stands to reason that the DPP should also file the charges at the commencement of the proceeding. The Court recognises that this process would increase resource demands on the DPP.

### *Disclosure*

The Court supports legislative reform to provide for timely and effective disclosure. The Court considers that delayed or inadequate disclosure and requests for disclosure are a significant factor (some would argue the single greatest factor) which results in delays in criminal trials. A more structured and legislated disclosure process is likely to reduce delay.

The Court recognises that issues arise, particularly regarding disclosure, that impact on adherence to timelines. The Court has observed increasing delays in the preparation and service of forensic material. In the Court’s experience, such delays can be most effectively managed by the trial court. Court orders relating to service can provide the prosecution with a stronger basis upon which to pursue disclosure of relevant material. Further, sanctions give the court additional powers to encourage compliance and censure non-compliance.

The Court proposes a staged process, as follows:

- 1) All materials relied upon in determining the charges and relied upon as part of the prosecution case to be included in the hand-up brief.
- 2) Upon request, “standard disclosure” is to be provided to the parties by Victoria Police. As part of the implementation of reforms to special hearing matters, the standard disclosure process has been adopted by the profession, including Victoria Police (Annexure A).
- 3) The parties request any other material identified outside of standard disclosure by Victoria Police. A framework and process should be legislated to provide for the request and provision of this additional material.
- 4) The investigatory agency is required to provide all relevant material to the prosecutorial agency. The prosecution must then provide a certificate, upon reviewing this material, confirming that all relevant material has been disclosed, in compliance with ongoing disclosure requirements.

- 5) Sanctions should be available for delays or failures to disclose. Sanctions could include orders for costs, and/or the staying of a charge or charges.

The Court considers that a clearer procedure will give rise to more accountability to ensure that disclosure is timely and complete.

## Reform of committals

One view of the Court is that reform to committals is necessary to reduce delay, duplication and the impact on witnesses. The current bifurcated approach is no longer necessary in the context of an independent DPP and where charges can be appropriately filtered by increased interaction between prosecutors and Victoria Police. Further, by moving cross-examination to the trial court, matters would no longer need to queue for both committal and trial, which would reduce delay. The parties need not duplicate efforts to prepare for committal and trial, and argument in relation to the strength of the prosecution case need not be made in two separate jurisdictions. Finally, witnesses have a greater degree of protection in the trial court because cross-examination can be restricted to the key issues in dispute at the trial.

This view of the Court considers that committals require reform to address the following issues:

1. *Delay*

- a. Double queuing results from matters awaiting both a committal date, and then subsequently a trial date. This can also cause delays to existing trials. For example, if a matter is awaiting trial in the trial court and new related matters arise and are filed in the lower court, the new matters must first go through the committal process to join up with the matters at trial.

2. *Impact on witnesses*

- a. Currently, witnesses are cross-examined in two separate jurisdictions and sometimes subject to less restricted cross-examination in the Magistrates' Court. This is often due to the absence of trial counsel and the issues at trial not yet being firmly established.
- b. The Magistrates' Court is not in the best position to utilise alternative witness arrangements, and s.342 *Criminal Procedure Act 2009* ('CPA'), s.128 and s.32C *Evidence Act 2008* ('EA') issues are not always readily identified at committal. This can be due to the fact that the parties, absent the need to prepare for trial, are not as cognisant of these issues.
- c. The lack of video recording of cross-examination in the Magistrates' Court can create issues where witnesses become unavailable before trial.
- d. Cross-examination at committal often occurs without the involvement of trial counsel, and before the issues in dispute have been fully established; as they would be prior to a trial. This creates a difficulty in ensuring that questioning at committal is directly relevant to the facts in issue, resulting in a degree of

unfairness to witnesses. A witness at committal has not had an opportunity to give their evidence in full prior to cross-examination. As such, control over questioning is essential to ensuring that cross-examination is not oppressive and unfair. In the absence of a clear direction from the parties, the cross-examination is more likely to unnecessarily revisit the evidence contained in the witness' statement.

### 3. *Duplication*

- a. It is the experience of the Court that, despite the existence of committal procedures, when cases arrive at the trial court, significant disclosure issues persist and must be litigated. This is despite the process also occurring in the Magistrates' Court. As such, there is a duplication of efforts. This is further exacerbated by the fact that each court must familiarise itself with the case, resulting in a duplication of effort.
- b. Consistency in representation is impacted by lengthy pre-trial that crosses two jurisdictions. A break in continuity of representation results in staggered and delayed negotiations. This has a flow on effect of delaying timely resolution.
- c. Committal cross-examination is not frequently relied upon at trial. The extent to which the evidence adduced at committal is deployed forensically within the context of a trial is limited. When it is relied upon, there are often issues with the quality of the audio recording, the quality of the questions themselves, and the sometimes lengthy and free roaming nature of the questioning.

### 4. *Disclosure*

- a. Committal hearings do not play an irreplaceable role in disclosure. In fact, matters often arrive in the trial court with disclosure still outstanding. Disclosure of materials can be completed without the need for a committal to be held in the Magistrates' Court.
- b. This view of the Court supports the reforms to charging and disclosure outlined above.

### 5. *Resolution*

- a. The trial issues not being fully prepared or established at an early committal stage can result in inadequate cross-examination and subsequently a lack of resolution.

## *Abolition of committals*

A view held by a number of judges of this Court is that reform to committal proceedings could be achieved in the following ways:

- a. Abolition of committal proceedings, and the committal test;
- b. Transfer of all pre-trial cross-examination to the trial court;
- c. Retention of the same "justification test" used in the Magistrates' Court for pre-trial cross-examination;

- d. Retention of early case management in the Magistrates' Court, including filing of charges, bail and standard disclosure; and
- e. Reform to early disclosure and filing of charges by police and prosecution.

This view considers that abolishing committal proceedings will provide the following benefits:

- a. By moving cross-examination to the trial court, a trial date can be set while the pre-trial cross-examination is finalised, alleviating the delays created by double queuing.
- b. Trial issues are more clearly identified in the trial court, resulting in cross-examination being shorter and of greater assistance. Further, trial counsel is often more experienced and more aware of the issues at trial.
- c. The re-traumatisation of victims is reduced by shortening and simplifying the pre-trial process. Further, it requires less confusion and frustration in victims coming to terms with the more complex bifurcated process that currently exists.
- d. The trial court conducts pre-trial examination regularly, despite the existence of committals. Abolition would end this bifurcated process that can cause further delay and duplication.
- e. Evidence in the trial court is recorded in both audio and visual form. This carries a number of critical benefits to the efficient case management of criminal matters, for example, where evidence is not in dispute or when a witness become unavailable.
- f. The trial court is alive to s.342 CPA, s.128 and s.32C EA issues that are not always identified by parties at committal stage.
- g. The time on remand for an accused is substantially reduced. This is particularly important in the current environment where Victoria's remand population has doubled in the last four years.<sup>1</sup>
- h. Events are fresher in the minds of witnesses, and their reliability is not diminished by delay.
- i. A reduction in the duplication of disclosure management, resolution negotiations, and familiarity. The process occurs in the trial court and is more streamlined and subject to a greater level of case management.
- j. The Court considers that it is best placed to direct pre-trial cross-examination towards the possibility of resolution.
- k. The Court considers that, absent committals, a significant number of matters will still resolve in the Magistrates' Court, albeit a reduced number. However, the increase in not guilty matters arriving in this jurisdiction will be off-set by the following factors:

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<sup>1</sup> Corrections Victoria, *Monthly Prisoner and Offender Statistics, 2015-2019*.

- i. The County Court is capable of utilising the same powers and procedures available to the Magistrates' Court, and as such, can ensure that matters which should resolve, do resolve.
  - ii. Resolution is more readily achieved with the involvement of a trial judge, trial counsel, and the filing of all relevant trial material.
  - iii. When resolution does occur in the trial court, it will occur sooner. The County Court is better placed to pursue a speedier resolution through intensive case management. This case management process is expanded on below.
- I. The Court acknowledges that the trial court is a more costly jurisdiction than the Magistrates' Court. However, the Court considers that it will conduct more targeted pre-trial cross-examination sooner. As such, any increased cost is offset by a number of factors:
- i. The County Court will conduct cross-examination sooner, and more efficiently. This is due to the trial issues being identified through its pre-trial case management process.
  - ii. With the issues at trial clarified, there will be a reduced need for extraneous witnesses to be cross-examined, and the length of the hearing will be reduced to questions that are relevant to the facts in issue.
  - iii. Conducting cross-examination in the trial court provides greater control to ensure the questioning is relevant. This is due to the fact that the issues at trial have been elucidated to a greater extent. Further, the trial judge has more familiarity with what is fair and necessary questioning in the lead up to the trial.
  - iv. Removing the committal will reduce the time between initiation and trial, improving the availability and quality of evidence. This will allow trials to be run more efficiently and reliably.

### *Continuing role of Magistrates' Court*

The Court recognises that a criminal matter proceeding through the Magistrates' Court at first instance has merit. The filing of charges, the setting of bail, and the disclosure of evidence are all invaluable to good case management. Further, the prosecution and defence must be provided with adequate time to assess the evidence, obtain instructions, and enter negotiations. It is for this reason that the Court is of the view that matters can still properly proceed through the Magistrates' Court at first instance, but for a limited purpose.

### *Case management*

The Court considers that effective case management and pre-trial processes are essential to its efficient functioning. Three critical factors play a direct role in pre-trial delay, namely:

1. delayed disclosure;
2. late identification of pre-trial issues; and
3. a lack of resolution.

These critical issues can be effectively managed through an increase in case management.

The Court is piloting a redesign of its listing processes in the criminal division. This process includes a redesign of the way matters progress through pre-trial, with a much earlier focus on case conferencing matters that are capable of resolution, or require further clarification of the issues. Further, the appointment of judicial registrars and division lawyers is designed to assist in a more hands on approach. Finally, judicial registrars could preside over pre-trial cross-examination, thereby streamlining the pre-trial process, and reducing resource demands.

In order for the judiciary to engage in the 'active case management' that is required to facilitate appropriate and timely disclosure, it is necessary that they receive legal professional support in the process and to shift this administrative work onto the legal professional case managers, namely division lawyers.

The Court considers that combining this new approach to earlier case management with reform to committals would provide an opportunity to extensively streamline criminal trial procedure. With matters arriving in the trial court sooner, the Court intends that matters that are capable of resolving are intensively case managed and expedited.

### *Resource implications*

As previously stated, the Court's support for reform is entirely predicated on the provision of necessary resources to facilitate systemic change. However, the Court also considers that the entire purpose of reform is to create a more efficient and cost-effective pre-trial procedure.

Additional resources would need to be re-directed to the County Court. However, the purpose of reform is to create a system that is overall more efficient, and therefore less costly in the long term.

The County Court recognises that transferring pre-trial cross-examination would require additional resources in order to meet the increased workload in the trial court. As the Court acknowledges, the trial court carries a higher base cost, however through efficient case management, abolition of committals would create considerable savings to Government. This is due to the following considerations:

- a. Committals would no longer occur in the Magistrates' Court, resulting in a significant cost reduction in that jurisdiction.
- b. The involvement of a trial judge and intensive case management will result in the earlier identification of trial issues, reducing delay and promoting earlier resolution.
- c. Cross-examination in the trial court would be significantly shorter. The number of witnesses required, and the length of questioning, would be reduced. This is due to the increased preparedness of trial counsel, the elucidation of the issues at trial, and the involvement of a trial judge.
- d. Matters arrive in the trial court sooner. This completely removes the delay of double queuing, resulting in matters reaching resolution or trial sooner.
- e. Reducing delay in time to trial would directly improve the availability and quality of evidence. This results in more efficient and reliable trials.

- f. Continuity of counsel would ensure that issues at trial are established sooner, promoting early and appropriate resolution. This also carries a significant cost saving for the parties in reducing the duplication of work.
- g. Despite an increase in not guilty matters being initiated in the trial court, the Court considers that resolution will still be readily and speedily achieved where appropriate.

The Court wishes to note that with the recent commencement of special hearing reforms, the Court is collecting granular data on the impact of these changes and will be in a position to use this data to extrapolate the impact of broader committal reforms in July 2020 (once 12 months of data is available).

As a broad estimate of the impact of the committal reforms, the Court has gathered data on the anticipated resource impact. Taking into account the efficiencies that could be achieved by conducting the cross-examination in the trial court, the Court would require significant additional judicial resources to address this increased workload.

#### *Other reform models*

The Court considers that the model proposed by the Supreme Court provides a significant degree of utility to that higher jurisdiction. In a context where there are fewer trials than the County Court, but a greater degree of seriousness, the Supreme Court model may have merit. However, in the context of the County Court, as the major trial court, this model would not be a practical or effective method of case management.

The Court considers that the model proposed by the DPP does not go nearly far enough and would not significantly reduce delays. To that end, the Court supports the transfer of all pre-trial case management to the trial court. Crucially, this would include the pre-trial cross-examination of witnesses. The Court is also of the view that, by retaining extensive case management and calling of evidence in the Magistrates' Court, significant delays will follow. Finally, the Court holds concerns that relevant stakeholders may not be able to consistently comply with the disclosure timelines as proposed by the DPP.

#### *Test for cross-examination of witnesses*

An amendment to the test for justification of cross-examination would be unnecessary if the trial court was seized of the pre-trial cross-examination. The Court considers that trial judges are capable of applying the 'justification' test more strictly, and ensuring that cross-examination is always relevant and relates to an issue in dispute.

This approach was adopted in the recent reforms to special hearing trials through the creation of 198A. The Court supports this mode of reform.



## Retention of committals

The other view of the Court is that committals are an essential part of ensuring the accused receives a fair trial; that they provide the defence and prosecution with an opportunity to look past witness statements and obtain a complete understanding of the prosecution case. Further, committals provide an essential filtering process, which results in a significant number of matters resolving or being withdrawn. For matters that do proceed to the trial court, committals ensure that the issues are clarified further and the scope of the charges are limited. Finally, the transfer of pre-trial cross-examination to the trial court in its entirety will result in simply shifting the burden in to the higher court, resulting in the similar delays, at greater cost.

According to this view, abolishing committals would have the following consequences:

- a. A number of matters that would be resolved or withdrawn prior to, during, or immediately following a committal are significantly more likely to be transferred to the trial court.
- b. The trial court will be required to allocate a substantial amount of time to hearing pre-trial cross-examination.
- c. Trial dates will be provided in matters that could resolve following pre-trial cross-examination. This would result in a large amount of time being allocated for trials that will never eventuate. This could effectively compound delay.
- d. The parties will arrive in the trial court with less clarity of the trial issues, and a greater number of charges. That is because:
  - i. Without a committal threshold, the parties' minds are not as keenly turned to the strength of the case.
  - ii. Removing a magistrate's assessment of the strength of the prosecution case takes away a critical opportunity for the parties to be exposed to an impartial and independent view of the case.
  - iii. Due to there being no risk of a conflict arising, a magistrate can be candid in their views and push more proactively towards encouraging resolution.
- e. The abolition of committals will split the disclosure process. Material will be provided in the Magistrates' Court and witnesses will be examined in the trial court. Committals provide the benefit of both forms of disclosure occurring together.
- f. If committals were abolished it could result in more senior counsel being briefed early, resulting in greater resourcing requirements for parties. Further, there would likely be a reduction in valuable quasi-trial experience for junior counsel. This could have significant flow on effects for the profession as a whole. At the very worst, it could result in an insufficient number of senior counsel available to engage in trial work before the County Court. Essentially, this could manifest in a decrease in the quality of advocacy before the trial courts.

According to this view, retaining committal proceedings will provide the following benefits:

- a. Committals provide an early and vital opportunity to test the prosecution case and its role is well established under common law. The case of *R v Ngalkin (1984) 12 A. Crim. R. 29* outlined three deficiencies in the failure of the prosecution to produce a witness for cross-examination at committal:
  - i. The accused has been deprived of full knowledge of what the Crown witnesses say.
  - ii. The accused has been deprived of the opportunity of cross-examining them.
  - iii. The accused has lost a distinct possibility that the magistrate would hold that there was no *prima facie* case or that the evidence was insufficient to put them on trial.
- b. While rates of discharge are low, this does not take into account the number of cases where charges are withdrawn (even partially), or resolved. The power of a committal threshold test in focussing the minds of the parties, particularly in a jurisdiction where costs can be awarded, should not be underestimated.
- c. A committal test can play a vital role for practitioners to have an opportunity for their client to hear, first hand from a magistrate, the views of an independent third party on the strength of the prosecution case. This would occur in the context of the accused having witnessed the evidence first hand.
- d. Committals are distinct from pre-trial cross-examination. Their effectiveness is not necessarily confined to exposing how the trial will be put, and the availability of all prosecution notices (hearsay, tendency etc.). Their benefit lies in an early examination of the evidence with the ability for both parties to gain a better understanding of the basis on which the case could proceed to trial.
- e. The early stage of a committal retains the benefit of a plea of guilty in the lower jurisdiction, even if the committal is contested. Further, resolution frequently occurs following committal due to discontinuance applications with reference to depositional evidence arising from the cross-examination.
- f. A significant shifting of the resource burden to the County Court will be avoided. Not only will the impact of the reform on the County Court be significant given that it is the major trial court, it is likely to increase the cost, given the higher costs of conducting hearings compared to the Magistrates' Court.

## **Annexure A – Standard Disclosure Form – Special Hearings**

The Accused seeks the production of the following items to be served with the hand-up brief:

1. Copies of all crime reports, attendance registers, police notes, diary and day book entries (whether official or otherwise), Form 501/502 (running sheets) in relation to the investigation of the Accused and/or the subject of the allegations against the Accused, which were made or created by any member of Victoria Police during the course of the investigation of the Accused.
2. A copy of any notes (whether in written, printed, or in electronic form) made or created by any civilian witness (including any complainant) if in the possession of the Informant.
3. Copies of all relevant INTERPOSE database entries made in relation to the subject matter of this investigation and/or the allegations against the Accused, including but not limited to the 'Full Response Report';
4. Copies of all relevant Victoria Police LEAP database entries made in relation to the subject matter of this investigation and/or the allegations against the Accused, including but not limited to the "Incident Report and Case Progress" information, inclusive of sub-heading:

### *Incident Report & Case Progress*

- (a) Persons Involved;
- (b) Accused Details;
- (c) Case Progress;

5. Copies of any audio or video recordings or transcripts thereof, and other notes or documents (whether in written, printed, or electronic form) concerning any interviews, discussions, debriefings, or conversations conducted during the course of the investigation of the Accused, between any member of Victoria Police and:-
  - (a) any witnesses in this proceeding;
  - (b) any person who could or might be called as witnesses for the prosecution; and
  - (c) any person suspected of or investigated in relation to the commission of an offence or offences the subject of this investigation;
6. Copy of all covert recordings (video and/or audio) between any member of Victoria Police and any other person, made in the course of the investigation of the Accused;
7. Copies of any statements (including drafts of such statements) obtained from any person during the course of the investigation of the Accused which are not contained in the Hand-Up Brief (whether or not those statements were finalised and/or signed).
8. A copy of any notes or documents used by any prosecution witness relied upon in any way to assist them with drafting/preparing their witness statement.
9. Copies of all warrants obtained by police during the course of this investigation.
10. Complete copy of all photographs and video footage taken by any member of Victoria Police in the course of this investigation (digital copies on a CD/DVD are sufficient).
11. Copies of any audio, visual, or audio-visual material (such as photographs, audio recordings or video recordings) made or created by any civilian witness in relation to the subject matter of the allegations against the Accused, irrespective of whether such witness is to be called.

12. Copies of all exhibit logs, property receipts, property book entries, and other similar documentation relating to all exhibits and property obtained or seized during the course of the investigation of the Accused.

13. All prior convictions and findings of guilt from all Australian states of any witnesses (including for any alias of any witness) who is or may be called to give evidence for the prosecution save for Police or expert witnesses.

**Notes:**

These documents are to be served on defence and prosecution at the same time as the hand up brief is served.

The documents must be appropriately redacted by the informant prior to being served on the parties.

While the material is to be served at the same time as the hand up brief, it does not form part of the hand up brief and should be clearly identified as disclosure material.

As soon as possible after the Filing Hearing, the Informant and OPP solicitor will discuss the production of these standard disclosure items including issues of relevance and any grounds for objection

The order to produce these standard disclosure items does not preclude the Informant from objecting to provision of any items if appropriate. Reasons for any objection should be given.

Where there is objection to the production of any standard disclosure item(s), notice should be given to the accused as soon as possible. The parties are encouraged to discuss the nature of the objection.