

## Committals Submission - Confidential

[REDACTED] 13 September 2019

Thank you for the opportunity to make a submission. It is my submission that committals should be abolished and that other procedures be put in place to achieve some of the objects that the committal process was intended to achieve. In broad terms I am of the opinion that the impact of the delay inherent in the committal system far outweighs its utility.

I have read the Committals: Issues Paper with great interest and agree with the Submission and proposals made by the Supreme Court of Victoria. Those suggestions would easily fit with County Court procedures and practices.

I am familiar with the current committals process [REDACTED]

[REDACTED] My experience was that committals were effectively a rubber stamp and that the most that was ever achieved was the tidying up/reduction of charges to better reflect the evidence in the hand-up brief. Once leave was granted, cross examination was generally wide ranging and appeared to be a fishing exercise except in very rare cases.

[REDACTED]

I note from the Issues Paper that there are a relatively small number of committal case conferences and there is a lack of clarity about their impact. This seemed a useful innovation but was very rarely used and does not seem to have in itself reduced the number of committals or increased the rate of early pleas. This may be because prosecution and defence are able to resolve many issues themselves.

[REDACTED] I formed the view that committals served very little purpose and that the delay involved was harmful and unwarranted. Delay is very distressing for victims of crime particularly where cases involve sexual offence and violence charges. Although some defendants do not seem troubled by delay many are. Not all accused persons plead guilty or are found to be guilty and those people have their opportunity to have their trial in the County Court very much delayed by the committal system. Witnesses are also distressed and made anxious by delay and delay has an adverse impact on memory. Increased

financial costs are also involved for all participants. It was uncommon for witnesses to be cross examined at trial about their committal evidence – I assume this was because they generally were consistent. On a relatively few number of occasions defence counsel relied on committal evidence as a prior inconsistent statement. I do not recall any trial where I thought this had any material impact on the outcome. Others, of course, may have had a different experience.

## Q1 What purposes can or should committal proceedings serve?

I was surprised when reading the Issues paper by the high proportion of cases which commenced in the committal stream but which were determined summarily. [REDACTED]

[REDACTED] The OPP are more than capable of making an assessment as to whether the case ought be heard summarily. This often depends on what charges are ultimately considered appropriate and the OPP/CDPP is very well placed to review the charges, consider any defence submissions and the evidence and make that determination. If a certification process were implemented the OPP/CDPP could be required to certify that the case ought be heard in a higher court or that an accused charged with an indictable offence had not consented to summary jurisdiction. Provision could be made for an application for transfer to the summary jurisdiction from the higher court if it later became apparent that was the appropriate course.

The OPP/CDPP is well equipped by training, experience and professionalism to certify that there is evidence of sufficient weight. Those appointed to senior prosecution offices are very experienced and well qualified if supervision/guidance of more junior officers is required. With the entirely appropriate introduction of direct presentment I can see no purpose in requiring a Magistrate to make this decision.

Compared to earlier times the prosecuting agencies and police are well used to preparing hand up briefs which properly disclose the relevant material. My suggestion would be that after charges are filed in the Magistrates' Court there be a specified period of time within which the brief must be provided to the OPP and defence for review and certification of the above matters within a defined period of time. Defence could be given a period of time within which to raise any issues or indicate a plea. The Magistrates' Court could make decisions as to extensions of time and appropriate sanctions where time limits were not complied with.

After certification the relevant cases could be transferred to the higher court where that court's case management process would commence. The current case management system in the County Court provides opportunities for further disclosure, defining of issues and plea consideration and any other matters required for proper preparation of cases. As I understand it, the County Court is seeking to strengthen its case management system and in my view that part of the process can be better handled in the court where any potential trial is to take place, perhaps with the assistance of Judicial Registrars. This would eliminate the delay caused by waiting for committal transcripts. Counsel are much more focussed at that stage as are accused persons. The court door seems closer.

Clearly early pleas assist efficiency and the accused in terms of sentencing but I do not think the suggested process would in itself cause any extra delay in obtaining pleas – rather the reverse. [REDACTED]

[REDACTED] I think the current intuitive synthesis regime should remain.

Multiple rounds of cross examination do increase the chances of inconsistencies but I do not think the fair trial of an accused depends on having that opportunity. That is evident from the experience with trials where witnesses were not able to be cross examined at committal or where the choice was made not to have a contested committal. Currently attempts have been made to confine committal cross examination in any event although the small number of refusals is consistent with my experience that a fairly 'lenient' approach is generally taken.

Police officers are now better trained than they used to be and statements should include all relevant matters. Cross examination in committals [REDACTED] is generally a very 'hit and miss' affair. Cross examination in Basha enquiries and voir dices was very much more focussed and targeted on relevant issues where there might potentially be relevance and inconsistency or a gap in the evidence as set out in the statement. The current test assists in ensuring there is a clear and cogent reason for the enquiry. I do not consider the current requirement to be too restrictive in its operation. Counsel are well prepared at that stage and know what the case is about. They have had the opportunity to get relevant instructions from the accused and the trial judge is well aware of what the trial is about and what the issues in dispute might be. These would usually take an hour or two rather than a day or days and would often have the effect of shortening cross examination during the trial.

The current system of committals and then case management at the higher court means there is a significant amount of double handling for no extra benefit.

**Q2 What, if any, measures should be introduced to:**

**reduce the difference between charges that are initially filed and those ultimately prosecuted?**

**ensure appropriate charges are filed at the earliest possible stage in a case?**

**Q3 Should the OPP be involved in determining appropriate indictable charges at an earlier stage? If so, how?**

This should be a matter between the prosecuting agency and the OPP/CDPP. My impression over the time I have been involved in criminal matters generally is that the prosecuting agencies have generally improved in identifying the appropriate charges rather than the 'hamburger with the lot' approach. I would not require police etc to consult with the OPP/CDPP before laying charges but there could be an internal mechanism for obtaining advice in more complex matters or liaising with the OPP/CDPP. The suggested certification process would require OPP/CDPP oversight once the charges had been filed. In some cases the identification of appropriate charges is not easy – it depends on the nature of the alleged offence and the evidence. There has to be a degree of flexibility throughout the process to accommodate these complexities without resulting unfairness to the accused.

**Q4 What measures can be introduced to improve disclosure in indictable matters:**

**a) between investigating agencies and the DPP?**

**b) between prosecutors and the defence?**

I have no further suggestions on this.

**Q5 To what extent do committal proceedings play a necessary role in ensuring proper and timely disclosure?**

Committal proceedings do currently play an important role in proper and timely disclosure but there are other ways in which this could be achieved especially in view of the increased involvement by the higher courts in case management..

**Q6 Could appropriate and timely disclosure occur within a pre-trial procedure that does not include committal proceedings?**

**Q7 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?**

**Q8 Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so, why?**

**Q9 Should cross-examination at a committal hearing be further restricted or abolished? If so, why?**

**Q10 If cross-examination at a committal hearing is further restricted, how should this occur?**

See above.

**Q11 Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so, who?**

I cannot think of any extra classes but the suggested process would allow the presiding judicial officer to take particular instances of vulnerability into account when deciding whether to allow a Basha or voir dire. I am particularly thinking of people with mental health issues or physical health issues. If committals are continued perhaps there is scope for witnesses to be able to apply to be excused from cross-examination on the grounds of mental or physical health issues.

**Q12 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?**

The various measures that have been introduced to reduce trauma for victims and witnesses have been of great assistance in my opinion. I was particularly pleased to see the instigation of the pilot program on the use of intermediaries. The use of remote witness facilities could be streamlined particularly in the regional courts where the facilities are often not very comfortable and not remote. Eliminating where possible the need for such witnesses to travel far would be positive.

**Q13 Should the current test for committal be retained?**

**Q14 Having regard to the DPP's power to indict directly, is there a need for a test for committal?**

No – except as suggested above

**Q15 Is there an appropriate alternative process for committing an accused person to stand trial?**

I do not consider a committal decision to be necessary.

**Q16 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?**

The current processes do assist with early resolution in some cases and do put the pressure on the prosecution to provide material which assists in resolution and preparation. For the reasons given above I do not consider this to be an efficient use of court time or that such matters could not be enhanced by changes to the pre-trial process as suggested.

**Q17 Are there other pre-trial procedures that could equally or more effectively ensure:**

- appropriate early resolution of cases**
- efficient use of court time**
- parties are adequately prepared for trial?**

See above

**Q18 How should concerns that committal proceedings contribute to inappropriate delay be addressed?**

Abolish them. If that is not done then the test should be further tightened so that leave to cross examine is only given where there would be a risk of serious unfairness. Counsel will not be happy with this idea but perhaps potential questions could be provided to the court in advance – clearly these would have to be quarantined from the prospective witness.

**Q19 How should concerns that other pre-trial processes contribute to inappropriate delay be addressed?**

I think this is an issue of the legal culture rather than any specific rule or procedure. It has taken a long time to get counsel and judges used to court case management and to tighten up the approach. Changes such as more pre-trial judicial involvement and requirements for defence disclosure and open pre-trial discussion of a number of issues in a trial have been difficult for some to adjust to. This is changing over time and the culture is changing. Unwarranted delay is unacceptable and not as easy to get away with by prosecution or defence as it used to be. Continued provision of feedback and information to the courts including detailed data and statistical information would in my view encourage tighter control of time delays by the courts.

**Q20 Do committal proceedings contribute to inappropriate delay in the Children's Court?**

I am unable to comment. [REDACTED]

**Q21 What are the resource implications of any proposed reforms to committal or pre-trial proceedings?**

If cases moved quickly to the higher courts without a committal process as it now is there would be resource implications for the OPP/CDPP, Victoria Legal Aid, the Magistrates' Court and the higher courts. Given the current involvement of all these bodies in the management of cases I do not consider that there would be an unacceptably large increase in the work required overall. For the OPP in particular there would be a considerable saving of resources in not having committals as they presently operate. There would also be a saving for Legal Aid.

There is a potential for increased time being taken up in the higher courts with pretrial matters including Basha enquiries. This would have resource implications for the courts, the OPP and VLA in particular but should be far less than the current resources involved in the current committal process. Presumably there would be significant resource savings in terms of magistrate time and other court resources for the Magistrates' Court. Given their current increasingly demanding workloads that should be of considerable benefit.

[REDACTED]

