VICTORIAN LAW REFORM COMMISSION

COMMITTALS

SUBMISSION BY THE SUPREME COURT OF VICTORIA

September 2019

PREFACE

This submission

The Supreme Court of Victoria makes the following submission to the Commission's review of committals. The submission is based on the experience of the Court in dealing with criminal matters which have come through the committal process and which are managed by the Court as they are prepared for trial.

Optimising the conduct of criminal proceedings is properly a matter of importance to the Supreme Court and it is with that aim that the Court makes this submission.

Some of the topics raised by the consultation paper released by the Commission concern issues which properly fall within the realms of policy for determination by Government. The Court does not address these matters.

The consultation paper includes a proposal put forward by the Court in 2017 for some limited amendments in relation to committals. This review creates an opportunity to look at the issue of committals in a much broader way. The Court has welcomed the Commission doing so and has taken the opportunity to reflect on how that consideration might be approached and what changes might be made for improvement.

Criminal Proceedings in the Supreme Court

The majority of criminal cases dealt with in the Supreme Court are homicide charges. The Court also deals with terrorism charges, and miscellaneous matters such as some large scale drug or fraud matters.

These charges are indictable and not triable summarily. The only matters triable summarily that the Court deals with are those related to a more serious indictable charge.

This means that matters which will proceed to the Supreme Court are readily identifiable when they are commenced in the Magistrates' Court. They are not in the cohort that may ultimately be resolved summarily as even the lesser alternative charges are purely indictable. The only exception being the very small number of cases involving children which commence in the Children's Court where resolution to a lesser charge can result in the matter being dealt with summarily in that Court.

It is also rare for a matter in the category of cases dealt with by the Supreme Court not to be committed for trial. The figures show that it is a very small proportion of matters that are not committed through a committal determination, but this is particularly so for the Supreme Court cohort. There remain many cases where there is a real contest in respect of the charge or a defence, but the committal determination is not the mechanism by which those issues are resolved.

These matters both inform the Court's perspective and provide opportunities to consider different ways of approaching this issue.

APPROACH TO THE REFERENCE

Current structures for pre-trial criminal procedure are the result of historical development. This reference provides an opportunity to examine what is needed within that structure from a principled basis. The Court encourages the Commission to approach this reference from that starting point because it focuses on what is important to achieve, rather than existing structures.

The following are suggested as the essential elements for designing pre-trial criminal procedures reflecting fundamental principles.

Fair trial, liberty of the subject and the presumption of innocence

a. The accused must know the charges brought against them and the evidence on which the charges are sought to be proven.
b. Issues of bail/remand must be addressed.
c. Full disclosure must be made by the Crown and evidence made available to the accused.
d. The accused should have an opportunity to cross examine witnesses pre-trial where, in the absence of such an opportunity, they will be denied a fair trial.
e. There should be appropriate opportunity before trial to challenge charges on the basis of insufficiency of evidence or questions of law.

Minimising trauma and delay and making the best use of resources

f. Matters should be brought to conclusion within the shortest time possible consistent with the just disposition of the case.

g. Duplication should be eliminated or minimised wherever possible.

h. Appropriate charges and pleas should be established as early as possible.

i. Issues should be appropriately narrowed to those on which there is a real contest.

DELAY

The time currently taken for matters to be brought to final conclusion from the point of charge is of significant concern to the Court.

As the Court has noted previously, justice is best served by bringing criminal proceedings to a conclusion within the shortest possible time consistent with fairness because:

- time which may be spent on bail or remand is minimised for the accused;
- events are fresher in the mind of witnesses and therefore the quality of their evidence is not diminished by delay;
- the experience of victims is substantially improved; and
- for those convicted and sentenced, access to rehabilitative programs is brought about sooner.

Current timeframes for matters to be brought to trial from the point of charge are well beyond the objective time required for a matter to be properly prepared for trial and well beyond the reasonable expectations of accused persons, victims, witnesses and the community.

Reducing those timeframes is a function of optimising processes (making the best use of resources and avoiding duplication) and appropriately resourcing each of the necessary components of the system.

Efforts have been made across the criminal justice system over time to achieve improvements. The Court has experienced how cooperative reform efforts can yield real improvements. The reforms introduced by the Court of Appeal in the processes for dealing with appeals, with the support and assistance of prosecution and defence agencies, achieved significant reductions in the time taken to complete criminal appeals. This was achieved largely through process reform. Resources were realigned across agencies and modest investments made in the right areas yielded significant savings in other areas allowing them to be reinvested elsewhere.

OPPORTUNITIES TO IMPROVE PROCESS AND REDUCE DUPLICATION

Process improvement

Within the cohort of cases which come before the Supreme Court, it is considered there is a significant opportunity to reduce duplication and bring

matters to conclusion within a shorter period by allowing some matters to be managed by the Supreme Court at an early stage.

This is not a reflection on the Magistrates' Court or the capability of Magistrates. The benefit and efficiency is derived from having an integrated case management process that avoids duplication and can adapt readily to the needs of individual cases.

This approach would allow for either prosecution or defence to seek, at an early stage, to have the matter managed by the Supreme Court and forgo a committal determination procedure in the Magistrates' Court.

The determination would be foregone but not the essential elements outlined above. The Supreme Court would be provided with capacity to manage matters in accordance with the needs of the individual case, including management of the disclosure process and pre-trial cross-examination of witnesses. Those processes would be integrated with the case management which the Court currently undertakes post-committal.

Ensuring proper disclosure, facilitating resolution discussions and the narrowing of issues are all elements of the Court's current case management process. That process also extends to the preliminary determination on important evidentiary and legal issues. This option will expand the existing processes in the Supreme Court, but allow them to be managed cohesively with preliminary matters that can only be dealt with by the Court.

The Court is aware of concerns that productive conferencing and plea discussions are adversely affected by not having dedicated people with sufficient authority dealing with the matter at an early stage. One advantage of elevating the process is to ensure the appropriate authority, continuity and focus is there on all sides from an early stage to avoid that problem.

The mechanics of this approach could take a number of forms and more than one option could be incorporated to provide the greatest flexibility to adapt to particular cases. This could include:

- judges and judicial registrars within the Court undertaking the different aspects of case management;
- the capacity to refer pre-trial cross-examination of witnesses to a magistrate (similar to the model in Tasmania);
- having specialist magistrates attached to or as part of the Supreme Court working with judges and judicial registrars (similar to aspects of the model used in Western Australia).

Key to the approach is that the case is managed in a coordinated way, even where more than one judicial officer may be involved. Current structures do not afford this opportunity.

This is a model which the Court has successfully developed across its jurisdiction. The structures developed by the Court facilitate communication

and cooperation, provide consistent support staff and allow for case tracking, trend analysis and performance measurement.

Principal Judges have visibility across a cohort of cases and work with less senior judicial officers and other judges to manage what needs to occur in each case and how that is best undertaken.

There is discussion as the matter progresses of which issues should be dealt with before a judge and which matters should be handled by a less senior judicial officer with a keen emphasis on efficiency. Staff support judicial officers in this process and active steps are taken outside of court appearances to ensure that matters remain on track and that steps are completed in the timeframes set by the Court. Equally where issues arise the parties can raise them with the Court and they can be managed. This can reduce the need for multiple appearances and adjournments.

It is a model which is based on the most efficient deployment of resources across the life of a case.

The approach to cases in regional areas would require particular attention and a flexible approach. The Court currently manages matters in its regional circuits pre-trial from Melbourne. In some cases that may remain appropriate (for example the hearing of legal argument or if the case required pre-trial cross-examination of an expert witness who was Melbourne based). In others a local sitting will be appropriate.

Technology affords opportunities to accommodate the needs of witnesses, ensure community access to cases, and appropriate participation by accused and client access. Different configurations of remote links and access are now possible.

Reducing Duplication

This option provides a means of reducing duplication. This can be illustrated through some simple examples.

Currently, after a matter is committed for trial by the Magistrates' Court, the matter is listed for initial directions within a day or two before the higher court at which point parties provide information about the case and its future conduct so that orders can be made. That appearance would become unnecessary if case management currently undertaken in the Magistrates' Court was conducted within the higher court from an earlier stage.

Currently, pre-trial cross-examination of witnesses takes place at the committal stage, but also commonly in the higher court. This may occur where additional evidence is sought to be led, but may also be for the purposes of determination of legal or evidentiary issues prior to trial. Management from an early stage would allow these processes to be managed as one and reduce the prospect of multiple instances of witnesses giving pre-trial evidence.

There are also cases where there are critical issues, especially evidentiary issues, which will determine the direction or even the outcome of a case, but which can only be determined in the trial court. By allowing the matter to be brought through to the trial court at an early stage there is the opportunity to address those critical issues in a way that may avoid the need for processes which would otherwise be undertaken in the committal process.

RESOURCING

Once an optimal system design is arrived at, resourcing needs to be considered which reflects that model at all levels and for all parts of the criminal justice system.

Inefficiencies are created when one or more aspects of the system are not resourced to keep up with the processes of other parts of the system. Bottlenecks and adjournment are typical signs of this occurring. For example, bottlenecks in courts developing as a result of a rise in prosecutions through increased police resources; or the adjournment of cases otherwise ready to proceed because resources to process forensic evidence do not match demand.

In order to make the option outlined above work, resources would need to be aligned to matters coming before the Court at an earlier stage and the fact that aspects previously dealt with in the Magistrates' Court would be dealt with within the Supreme Court.

The model needs to be an efficient one. From the Court's resourcing perspective that would be achieved by utilising a structure of judges, less senior judicial officers and support staff and reducing duplication.

There is also a transitional issue which arises from speeding up the flow of cases through to trial. As most courts do, the Supreme Court operates with a backlog of cases. To realise time reductions in the cohort of cases coming through a more streamlined process, the backlog of current cases needs to be reduced. If this is not done, new matters ready for trial sooner will bottleneck behind a backlog of cases awaiting trial.

With an additional judge in the Criminal Division and the use of reserve judge capacity, the Supreme Court has made significant inroads in reducing its pending trials (decreasing by 26% in the last six months of 2018/2019). However, at the same time the Court is experiencing a growth in average case length and is facing other demand pressures from application work outside of trials. Some investment of resources is therefore likely to be needed to reduce backlogs to realise the benefit of reforms.

Detailed data will be needed to properly quantify what resource allocation would be required to allow the proposed model to operate and to optimise the benefits by clearing backlogs.

At this stage the Court resources would include:

- judge resources to reduce trial backlogs and facilitate early management;
- judicial registrar/magistrate resources for case management tasks including aspects of pre-trial cross examination;
- staff support to maximise the capacity of judicial resources and undertake out of court management to reduce adjournments and the need for appearances; and
- consequential costs associated with the above reflective of having a greater number of matters running at a given time including jury and transcript costs and accommodation.

The Court has supplied data to assist the Commission in building up an understanding of the current system, combined with data from other sources. The Court would welcome the opportunity to consider the results of the Commission's data analysis to inform a detailed consideration of the resources required.

The Court recognises that this change would also necessitate realigning resources for prosecution and defence and addressing their resourcing through the transitional phase. As noted above, having representatives with appropriate authority, continuity and focus are important parts of optimising case management. The Court would suggest, that resourcing should primarily reflect the nature of the case and the activity and should not simply be a function of the Court in which those activities occur.