

SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION REVIEW INTO COMMITTALS

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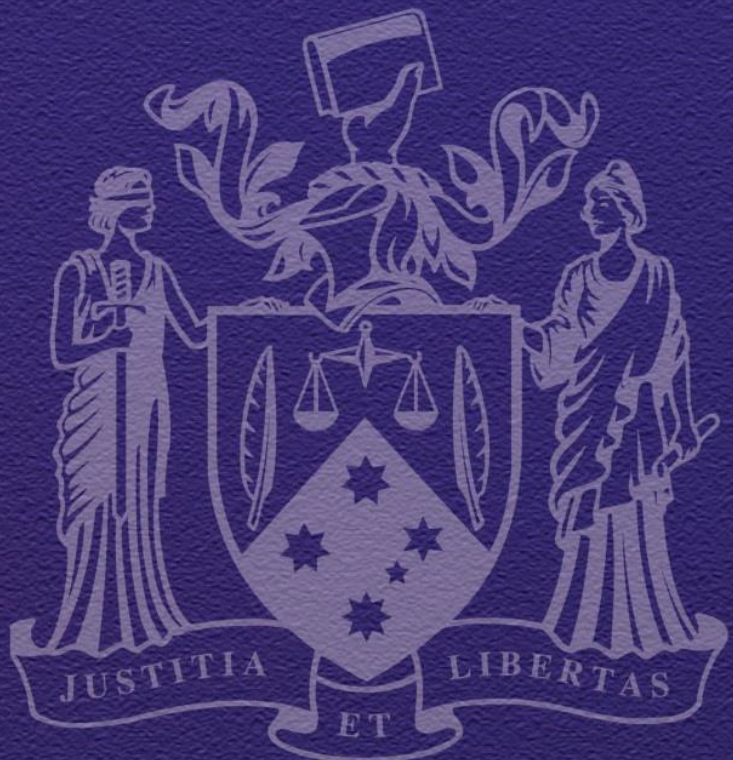


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EXECUTIVE SUMMARY

The Law Institute of Victoria ('LIV') welcomes the opportunity to provide a formal submission to the Victorian Law Reform Commission's ('the Commission') review of the Victorian committal system.

The LIV is Victoria's peak body for lawyers and represents approximately 19,000 people working and studying in the legal sector in Victoria, interstate and overseas. Its members are legal professionals from all practice areas, and work in the courts, academia, policy, state and federal government, community legal centres and private practice.

The LIV's membership includes expert lawyers specialising in criminal law. Many criminal lawyers work as solicitor advocates, appearing in committal hearings as counsel. As such, they have considerable experience of the current committal system. The LIV's submission is informed by this vast pool of expertise and experience and is supported by relevant case studies provided by our membership.

The Commission has been asked to recommend any legislative, procedural or administrative changes to Victoria's committal procedure, which could reduce trauma experienced by complainants and witnesses, improve efficiency in the criminal justice system and ensure fair trial rights.

The LIV submits that the Victorian committal system serves these purposes by:

- facilitating the early resolution of matters;
- narrowing the scope of issues in contention including clarifying issues not in dispute;
- providing an effective mechanism for the prosecution case against the accused to be adequately disclosed and the evidence is sufficient to warrant a trial;
- Maintaining the principle of ensuring that no person shall stand trial unless there has been a prima facie case established against them. The decision to take a matter to trial should not be made by the Director of Public Prosecutions alone.

The evidence indicates that committal proceedings are working. It is therefore the LIV's position that their abolition would be inappropriate. Instead, the LIV supports improving committal inefficiencies, better support for witnesses and complainants, increasing the number of judicial officers and increasing the number of court rooms to substantially reduce the issue of delay.

RECOMMENDATIONS

The LIV makes the following recommendations to improve systematic efficiency which reduces trauma and to safeguard against weak or misconceived prosecutions which is ultimately in the interests of justice and public interest.

1. Investment in court resources, particularly more courtrooms and judicial officers, to address the increasing volume of matters, in accordance with the Strategic Asset Plan key recommendations. Through improving funding and increasing the capacity of the courts, this will better assist in reducing delays.
2. The VLRC to perform a broad cost-benefit analysis of any proposed changes to the lifespan of a matter, from the initial charges through to resolution i.e. whether reducing delays through increasing the number of judicial officers and courtrooms would be offset by reducing the cost of individuals being held on remand; presently at an average cost of \$391.18 per prisoner per day.¹
3. Addressing the procedural issues that create delay during the committal stage is important and improvements in disclosure processes and procedures is one such issue that requires attention. The LIV recommends:
 - New approaches to improving disclosure in the *Criminal Procedure Act*.² Presently, the amendments only apply to matters involving sexual offences, child complainants and complainants with a cognitive impairment. Section 123 contains disclosure obligations at the time of the hand-up brief which are prescribed in Form 32A. The new requirements under s198A are for the prosecution to file the indictment, prosecution opening, depositions, family violence checklist, witness information sheet, *Jury Directions Act* notices and *Evidence Act* notices (including tendency and coincidence evidence notices) no later than 14 days after the date of committal.

¹ Australian Institute of Criminology, *Executive Summary*, Research Report 05, 2018, x.

² *Criminal Procedure Act 2009 (Vic)* s 123, s 198A.

- Strict disclosure obligations to be made standard procedure for all indictable matters at committal mention to improve consistency and reduce disclosure indiscretions and inordinate delay.
- The introduction of a disclosure certificate condition, similar to that introduced in NSW. This would require the investigating agency to confirm that all relevant information has been provided to the prosecution and the provision of a disclosure certificate signed by a senior officer. Such a certificate should then be required as part of the hand-up brief.

It is the LIV's view that these requirements will result in a cultural change, that will ensure disclosure extends beyond limiting the hand-up brief to evidence that is incriminating. At present, the cross-examination of both police and civilian witnesses is essential to ensure proper and prompt disclosure.

4. Key stakeholders who engage directly with complainants and witnesses, such as the OPP and the Court, should provide more services, such as the use of communication assistants aimed at reducing complainant and witness trauma. The LIV understands the risks of retraumatising persons who have already suffered the trauma of the alleged offence. However, this issue is unlikely to be addressed by abolishing the committal system.

INTRODUCTION

Committal hearings are an important stage in criminal justice proceedings. Founded on the principle of fairness, they contribute to reducing the length of trials and to the early resolution of matters. For example, data indicates that from 2017-2018, 79.4% of guilty pleas were achieved through committal proceedings.³

As of 2017-18, the average cost of a criminal trial finalising in the County Court exceeds \$16,000 per trial,⁴ for the Supreme Court it is \$50,000.⁵ Whereas, a matter finalising in the Magistrates' or Children's Court is less than \$800.⁶ This is a considerable saving.

Committals also provide an accused person the opportunity to consider the allegations against them, with the strength or weakness of the evidence against the accused contributing to guilty pleas or a narrowing of the issues in contention.

For the prosecution, it provides an opportunity to test the strength of the evidence and for proper consideration of evidence by the Director to discontinue matters that are unlikely to succeed at trial. If a matter proceeds from committal to trial, they do so often having had the issues in contention narrowed and the quality of the evidence filtered, thus reducing the length of the trial in a superior court. As the above data indicates, superior courts are notably more expensive than the Magistrates' Court, in reducing the length of trials, it reduces the overall cost.

The LIV believes that one of the significant contributory factors of delay in committal proceedings is a lack of resources in the superior courts to hear matters sooner, namely a lack of courtrooms and appropriately qualified judicial officers.

³ Office of Public Prosecutions, *Annual Report 2007/08*, Appendix 4.

⁴ Productivity Commission, *Courts*, Figure 7.8 (Web Page, 2019).

<<https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/justice/courts/rogs-2019-partc-chapter7.pdf>>.

⁵ Ibid, Figure 7.7.

⁶ Ibid, Figure 7.9.

Victoria is currently the fastest growing state in Australia.⁷ Whilst crime rates can fluctuate, through sheer growth in population alone, the number of matters before the Courts will only increase in the years to come. The introduction of new offences and mandatory sentences over the past 5 years in Victoria has further impacted upon the increase in offences charged and brought before the court.⁸ The importance of retaining committals therefore becomes more relevant to ensure the accused knows the case against them and a rigorous assessment of the case can be undertaken particularly where the accused is facing a mandatory sentence of imprisonment.

The LIV supports the current protections for vulnerable witnesses and complainants to be restricted from being cross-examined. Similarly, the LIV supports the test for granting leave to cross-examine, which when properly controlled by the Court, confines cross-examination to relevant and appropriate questioning.

As a provider of continued professional development for practitioners, the LIV has an intimate understanding of practice and education norms regarding advocacy.

LIV members who work as solicitor advocates believe the issues of delay and witness and complainant trauma considerations can be addressed within the current committal system. An increase in support services to be made available for complainants during the committal process and better information given to complainants prior to cross examination would alleviate the trauma of giving evidence in most circumstances.

1. Purpose of Committals

1.1. The LIV considers committals to be essential for ensuring both fairness and efficiency. The LIV submits that all seven purposes of a committal proceeding listed in s 97 of the *Criminal Procedure Act 2009* (VIC) ('CPA') are important, however this submission will address the following three purposes which assume particular importance:

s 97 (d) *to ensure a fair trial, if the matter proceeds to trial, by—*

(i) *ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;*

⁷ 3101.0 – Australian Demographic Statistics March 2019, Australia Bureau of Statistics (Web Page, 2019) <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>.

⁸ Offences include those committed in circumstances of gross violence, offences against police and emergency workers, offences of home invasion and serious youth offences under the *Bail Amendment (Stage 1) Act 2018* (Vic); *Bail Amendment (Stage 2) Act 2018* (Vic).

(ii) enabling the accused to hear or read the evidence against the accused and to cross examine prosecution;

(iii) enabling the issues in contention to be adequately defined.

- 1.2. The LIV will address topics of disclosure, cross-examination and pre-trial clarification of the relevant issues in more detail below. Although the explicit purpose of this section is to ensure a fair trial, the LIV considers there is an equally strong benefit in terms of efficiency.

2. The Evidence Base

- 2.1. To quote from the preface of the VLRC's Committals - Issues Paper (**'Issues Paper'**) "the Commission will gather all available and relevant data and undertake a principled evidence-based comparative assessment of the various possible models."
- 2.2. It is unfortunate that, for understandable reasons, the VLRC has not yet been able to obtain substantive empirical qualitative and quantitative data that may shed some light on many of the topics and concerns that are raised in the Issues Paper; in the Director of Public Prosecution's (**'DPP'**) policy paper; and numerous other media publications.
- 2.3. Although one of the terms of reference relates to trauma experienced by complainants and witnesses, there is little data on such trauma in the Issues Paper. The data presented seems largely to be repeated from earlier published reports and is mostly confined to children and those suffering from mental impairment.
- 2.4. Similarly, the issue of delay is addressed at some length in the Issues Paper but the data presented on this topic is limited in scope and does not allow for meaningful analysis.
- 2.5. Without detailed quantitative data, it is very difficult to assess the real resource implications, for example in terms of cost, the need for additional judicial officers and court space, or on any other 'models' that the Commission may seek to assess.
- 2.6. LIV members report considerable delays in the higher jurisdictions are due to a lack of available courtrooms or judicial officers to hear the matter any sooner. Whilst a matter awaits trial, the defendant is held on remand at an average cost of \$391.18 per day.⁹ Comparing a reduction in the length of time a defendant is held on remand to the upfront costs of more judicial officers and courtrooms to reduce delays, is an example of the type of cost benefit data required to support any recommendations made by the VLRC.

⁹ Australian Institute of Criminology, *Research Report 05, Executive Summary*, 2018, x.

- 2.7. However, some data within the Issues Paper is of particular significance. According to Table 1, from 2015–2018, consistently 29% of matters that enter the indictable stream were ultimately resolved within the summary jurisdiction.¹⁰ This highlights the substantial benefits of the current committal proceedings both in terms of early resolution of matters and in avoiding the need to transfer to the costly higher courts.

3. Outcomes of Committals

- 3.1. The LIV notes that the OPP published data indicating that the current committal processes indeed promote early resolution. For example, 80.4% of OPP matters were finalised as a plea of guilty in 2017/18.¹¹ This proportion has been increasing consistent and is the highest level recorded at the OPP since comparable records began 22 years ago.¹² For comparative purposes, it was 69.8% in 2007/8.¹³ Further, the clear majority of these guilty pleas, 79.4%, were achieved by the committal stage. In short, this data clearly indicates that Victoria's committal system achieves high levels of early resolution; a trend that continues to improve.

Why committal hearings achieve high levels of resolution

- 3.2. It is important to note that committals contribute to a high level of early resolution as it provides an opportunity for the accused to see how prosecution witnesses appear under cross-examination. If, for example, they are convincing witnesses and their evidence corroborates testimony from other witnesses and/or other objective evidence (such as CCTV footage), then many accused will understand the strength of the prosecution case against them. Until this stage, it is not uncommon for the accused to downplay, or seek to ignore, the evidence against them in the hand-up brief. However, the committal hearing itself and the witness testimony that is given in court often enables the accused to accept reality and plead. Further, key witnesses demonstrating that they are willing to attend court and give evidence against the defendant is often a sobering reality check that encourages a guilty plea. The accused is also incentivised to plead early at trial as they derive a benefit from doing so prior to trial.¹⁴ Such incentives diminish as a trial draws near.
- 3.3. The same can be said for committals where witness are not compelling, and their evidence falls short of the anticipated case against the accused. Witnesses may change, revise or clarify their evidence during cross examination which effects the strength of the prosecution case and major charges are withdrawn at committal stage or discharged by a Magistrate. This

¹⁰ Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, Table 1, [3.24], 15.

¹¹ Office of Public Prosecutions, *Annual Report 2017/18*, 12

¹² *Ibid*

¹³ Office of Public Prosecutions, *Annual Report 2007/08*, Appendix 4

¹⁴ *Cameron v The Queen (2002) 209 CLR 339*.

represents one of the significant purposes of committals; to ensure that only charges where there is a case to answer progress to a trial proceeding.

- 3.4. In the event a committal proceeds to trial, it allows the parties to sufficiently prepare and narrow the issues that are in contention. Witness statements are often an incomplete record of what the witness saw or heard and in the broader context surrounding the incident. Such omissions are not necessarily deliberate nor malign, but the opportunity to cross-examine witnesses and to understand all that the witnesses have observed, is crucial. For example, if an assault occurred in a pub, cross-examination can reveal important aspects of the evidence such as the lighting, noise, the number of people in the immediate area and the location of the various participants. Factors of this nature can have a significant effect the forensic value of the evidence.
- 3.5. Further on the issue of forensic value, the LIV notes that the areas of crime that have been increasing are in areas where forensic experts have a crucial role in early resolutions. These crimes include drugs offences, deception and weapons offences.¹⁵ Committal proceedings provide a forum for this early involvement, as they confirm the strength or weakness of a forensic expert's evidence.
- 3.6. Case study

A client stole a cut of meat valued at \$100. Upon attempting to exit the store, it was alleged that the accused produced a knife. The accused was arrested and remanded on several charges following interview. The accused was willing to plead guilty to theft and assault with a weapon, however the prosecution refused to withdraw a charge of armed robbery. The matter was subsequently resolved at the committal where upon cross-examination, the circumstances of the assault with a weapon revealed that armed robbery had not occurred. The prosecution withdrew the more serious charge in the summary jurisdiction. If it were not for the committal proceeding, the accused would have spent much longer in custody awaiting a trial. Instead, the committal resolved the matter within 6 months of their arrest.

Wider contextual issues can be similarly important. Cross-examination may reveal factors such as undisclosed discussion or collaboration between witnesses, relevant, physical or mental health conditions or significant incidents in the lead-up to the alleged offending.

¹⁵ Crime Statistics Agency, *Key Figures: Year ending 31 December 2018* (Web Page, 31 December 2018) <<https://www.crimestatistics.vic.gov.au/key-figures-year-ending-31-december-2018>>.

3.7. Case study

In a case involving a rape charge, the complainant, in her police statement, described a non-consensual sexual event but gave virtually no detail about the surrounding context. The accused instructed that he and the complainant had been communicating via Facebook prior to the incident, and had arranged to meet, to take drugs and to have sex. This was put to the complainant during cross-examination at the committal hearing and she acknowledged the extensive prior arrangements. If the complainant had never been cross-examined at committal both the prosecution and defence would have been operating under a completely inaccurate understanding of the context and events leading up to the incident.

Culture

- 3.8. The Director of Public Prosecutions submits that the proposed reforms abolishing committals effectively “abolishes the culture of cross-examining prosecution witnesses twice during a criminal proceeding”.¹⁶ The LIV rejects the categorisation of cross-examination as a “culture”. The purpose of cross examination witnesses is the right of an accused to face their accuser. It is the right of an accused to test the evidence against them and for a judicial officer to assess whether the evidence is of sufficient weight to support a conviction. Cross examination of a witness at committal has been significantly moderated and only permitted with leave of the court. There is judicial oversight of the scope of cross examination at a committal stage and practitioners are not permitted to undertake cross examination at large.¹⁷ Indeed the suggestion by the OPP in their submission promoting the abolition of committals that “Committal hearings can take days or even weeks for defence to cross-examine **all the witnesses it wants** to and for the magistrate to make the committal decision” [emphasis added] is incorrect and misstates the current procedural requirements for committal hearings, which are highly regulated proceedings¹⁸.
- 3.9. In order to obtain leave to cross-examine a prosecution witness at a committal hearing, the accused must make a written application to the court specifying the name of each witness sought for cross-examination, and in respect of each witness also set out:
- (i) each issue for which leave to cross-examine is sought;

¹⁶ Director of Public Prosecutions, *Proposed Reforms of the Committal Process*, 1 October 2018, 1

¹⁷ *Criminal Procedure Act 2009 (Vic)* s 119, s 123-124.

¹⁸ For example, Parts 4.5 and 4.6 of the *Criminal Procedure Act 2009*

- (ii) the reason why the evidence of the witness is relevant to the issue; and
- (iii) the reason why cross-examination of the witness on the issue is justified.

3.10. The application is then determined by a Magistrate at the committal mention hearing. The prosecution has the opportunity to indicate whether the application for each witness is opposed, and after hearing from both parties, a Magistrate must make an order specifying which witnesses are permitted for cross-examination and on what specific issues. It is not uncommon – even where the prosecution does not oppose such an application – for a Magistrate at the committal mention stage to refuse the application for leave to cross-examine a witness (or allow cross-examination on a particular issue/s) if they determine that the accused has not established a sufficient basis for same. The LIV submits that to abolish this form of regulated pre-trial procedure will impact upon the cross examination ultimately undertaken at trial which may be rigorous and lengthy. This is counterproductive to reducing the trauma of giving evidence in criminal trials.

3.11. The LIV also rejects the suggestion that committal hearings “can take days or even weeks”¹⁹. Whilst there is unfortunately no access to reliable data on the average duration of committals, our members report that the vast majority of committal hearings occupy no more than 2 days of court time, and many are completed within a day. Committals which run for multiple days – or, in some rare cases, weeks, are usually large and/or complex prosecutions involving large numbers of witnesses or complex evidence. In those rare cases, the conduct of a committal hearing of some days or weeks duration will ultimately result in a reduced trial duration, as the evidence and issues in dispute will almost always have better crystallised as a result of the committal process.

3.12. There is no current procedural impediment for the prosecution to give an indication at an early stage of proceedings of which charges it considers have reasonable prospects of conviction (and are likely to appear on an indictment), to ensure the parties are properly engaging with the issues in dispute.²⁰ Nor is there any current procedural impediment for the prosecution to assess the sufficiency of evidence and interests of justice in a prosecution at an earlier stage.²¹ To achieve this result, to encourage parties to engage with the issues and to consider appropriate charges prior to any cross examination does not require a procedural change.

Consistency

3.13. Cross-examination is also important for other reasons. It can establish the consistency, or otherwise, of the witness’s evidence. There are several reasons behind witness inconsistency,

¹⁹ Director of Public Prosecutions, *Proposed Reforms of the Committal Process*, 1 October 2018, 2.

²⁰ *ibid*

²¹ *Ibid*

such as lapses of memory, which are understandable. However, cross-examination at committal enables witnesses to demonstrate how they handle inconsistency. Under cross-examination, a witness with an inclination to 'fabricate' is likely to fabricate more, but a witness who can explain inconsistencies strengthens the impact of his or her evidence.

3.14. Case study

A client was charged with three armed robberies. Discussions were held with the prosecution in relation to a resolution. The defence put an offer in to resolve to one armed robbery, as the defence had identified issues relating to the evidence of an eye witness. The offer was rejected by the prosecution and the matter proceeded to the committal hearing. At the committal, this eye witness was called. The inconsistency issues were made apparent during cross-examination. The remaining witnesses were not required to be called, which included the remaining victims of the armed robberies. The prosecution then agreed to resolve the matter on the same basis as the original offer. The matter was then listed for a plea in the County Court, and the client received a Community Corrections Order. This would not have occurred if there was no committal. The prosecution would not have had reason to change their view otherwise. The Court time was significantly reduced, and the victims were spared having to give evidence. Further, the matter was resolved in a timely manner, rather than having to wait a year or more until trial.

3.15. The LIV rejects the assertion that committals are "fishing expeditions". Changes in legislation and court practices has led to a general cultural and behavioural shift in both magistrates and legal practitioners. The LIV also strongly disagrees with the notion that in the absence of a jury, defence counsel can feel uninhibited and conduct aggressive, unduly challenging cross-examination of witnesses at committal hearings. The LIV submits that this archaic method of aggressive advocacy has proven to be ineffective, and modern advocacy training precludes this type of intimidating court behaviour.

3.16. Further, the LIV rejects the suggestion that cross examination provides the defence "the opportunity to try to manufacture inconsistent statements from witnesses which, in turn, unnecessarily delays proceedings"²² This would suggest an interference with evidence which would not only be contrary to good practice but tantamount to contempt.

²² Ibid 7.

4. Disclosure

- 4.1. The importance of proper and timely pre-trial disclosure is a generally accepted element of the criminal justice process.²³ The issue is whether such disclosure is aided by the committal process. The Issues Paper in addressing the negative elements of disclosure in committals, appears to exclusively focus on the New South Wales experience,²⁴ yet the Victorian experiences reflect positively on the effectiveness of committals for disclosure.²⁵ The LIV contends that the committal process in general, and the opportunities for cross-examination in a committal hearing are essential to ensure effective and timely disclosure.
- 4.2. The Issues Paper states that there ‘is now some doubt about the value of committal proceedings... as statutory obligations and other pre-trial procedures attempt to ensure early disclosure.’²⁶ The LIV does not support the contention that procedural and other obligations are sufficient to ensure appropriate disclosure without the ‘safety net’ of the current committal processes. LIV members report that there has been a noticeable improvement in disclosure practices over the last decade or so, and that requests for disclosure of police running sheets, notebooks and interpose records as specified in the Case Direction Notice (Form 32) are generally effective in practice.

Inadequacies of Disclosure by Informant

- 4.3. LIV members have reported experiencing issues with poor disclosure practices. This may be from a lack of experience by some informants but it is reported that the most common disclosure issues arise from what is deemed to be ‘relevant’ or ‘corroborative’. Disclosure of evidence extends beyond disclosing evidence that supports a prosecution case and non-incriminating evidence may still be relevant. The LIV submits that this may be addressed with further targeted education and training for police members and a more vigorous oversight by the Director whose duty extends throughout the prosecution.

²³ Ibid 1, Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, [5.27] – [5.30], 53.

²⁴ Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, [5.32] and [5.35], 53.

²⁵ Ibid [5.33], [5.34] and [5.36] – [5.39], 53-54.

²⁶ Ibid [5.31], 53.

4.4. Case study

In a case where the accused was charged with rape and police had intercepted the telephone calls of the accused in the hope of obtaining admissions after the event, the existence of telephone intercept material had been omitted from the hand-up brief. It was only during the cross-examination of the informant at committal that the existence of the material was discovered. The explanation provided by the informant was that the phone calls contained no incriminating material, therefore they were not considered relevant. This indicates a lack of understanding of the significance of disclosure. There was no conception in the mind of the informant that there could be material within the phone calls that might tend to raise a doubt about the prosecution case or support the accused in his defence.

- 4.5. LIV members report that one of the more particularly common issues in disclosure relates to the use of photo boards. As numerous examples were provided by LIV members with consistently similar facts, the following case study is a generic example which reflects the common disclosure issue regarding the use of photo boards.

4.6. Case study

There was no indication in the hand-up brief of the witness having partaken in a photoboard identification procedure during which the witness had not picked out the accused or had selected a number of persons on the photoboard. This is important exculpatory evidence that only came to light during cross-examination of the witness at committal.

- 4.7. The LIV submits that cross-examination in the context of disclosure should not be considered a form of re-traumatisation for complainants and witnesses. Any cross-examination of civilian witnesses about disclosure is unlikely to be intrusive as it effectively exposes erroneous disclosure practices.

4.8. Case study

On the first day of a committal in a historical sexual offence case involving incest charges and multiple complainants, the informant arrived at court, with two archive boxes of documents from the Department of Health and Human Services. None of this additional material had been mentioned previously. It had not been provided to the prosecution or the defence. As a result, the hearing was adjourned to allow the parties to review the documents.

4.9. Case study

In an armed robbery matter, it was apparent that the OPP was unwilling to actively seek out disclosable material. After what was, in essence, a two and a half years process of discovery including extensive subpoenas and arguments before a court over public interest immunity. The initial hand-up brief of four folders grew to encompass fifty-six folders including CCTV, telephone intercepts and CCR material. Throughout this process, it also became apparent that there were about twenty other potential persons of interest who had not been thoroughly investigated by police. This additional information was critical, and it can only be inferred that it had not been provided because the police did not think it was relevant and made the assessment that it was outside the scope of the requested disclosure.

4.10. The LIV strongly supports new approaches to improving disclosure in the *Criminal Procedure Act*.²⁷ Currently, the amendments only apply to matters involving sexual offences, child complainants and complainants with a cognitive impairment. Section 123 contains disclosure obligations at the time of the hand-up brief which are prescribed in Form 32A.²³ The new requirements under s198A are for the prosecution to file the indictment, prosecution opening, depositions, family violence checklist, witness information sheet, *Jury Directions Act* notices and *Evidence Act* notices (including tendency and coincidence evidence notices) no later than 14 days after the date of committal.

4.11. The LIV recommends that these detailed disclosure obligations should be made standard procedure for all indictable matters to improve consistency and reduce disclosure indiscretions.

²⁷ *Criminal Procedure Act* s 123, s 198A.

- 4.12. The LIV would also support a disclosure certificate condition, akin to that introduced in NSW. This would require the investigating agency to confirm that all relevant information has been provided to the prosecution and the provision of a disclosure certificate signed by a senior officer. Such a certificate should then be required as part of the hand-up brief.
- 4.13. It is the LIV's view that these requirements will result in a cultural change which will ensure disclosure extends beyond just the hand-up brief to evidence that is incriminating. At present, the cross-examination of both police and civilian witnesses is essential to ensure proper and prompt disclosure.

5. Test for Committal and Direct Indictment

- 5.1. A significant proportion of cases in the committal stream are discharged, either fully or partly. Although the number of such discharges as a proportion of initiated matters is only in the order of 2.4% over the last 5 years,²⁸ it must be noted that approximately two thirds of matters resolve prior to a committal hearing with a plea of guilty.²⁹ This means that the number of cases which are discharged as a proportion of those which go to a contested committal is significantly higher, in the order of 7.2%, on the same basis.
- 5.2. The prospect of a discharge and the risk of an award of costs provides the prosecution with a substantial incentive to review the case and to decide whether to amend the charges or consider resolution in the summary jurisdiction.
- 5.3. Case study

A client was charged with negligent driving. He had fallen asleep at the wheel and, as a consequence, his daughter was killed and he was severely injured. Up until that point, he had driven responsibly, taken rest breaks and was driving during the day. After a half day committal, the magistrate declined to commit the accused for trial and the matter was discharged. This was because there was no evidence of fatigue prior to the collision and no evidence that the accused was aware that he was fatigued. The OPP did not file a direct indictment. This was a life changing event for the accused man.

²⁸ Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, Table 1 and Table 4, 15, 19.

²⁹ *Ibid* [3.62], 21.

Direct indictment

- 5.4. The LIV submits that it is important that the DPP has the power to directly indict. This power acts as a check; if a Magistrate's decision not to commit a matter for trial is ill-founded, the DPP can directly indict to the higher courts. It should be noted that current evidence indicates that the DPP are not reluctant to use this power. While the absolute numbers of direct indictments are low (averaging 16 per year over the last five years)³⁰ the number of direct indictments, when expressed as a proportion of matters which are discharged, averages to approximately 21.9% over the last five years.

6. Delays

- 6.1. The issue of delay is complicated for several reasons. Firstly, the LIV submits that issues with delays are limited to a small proportion of cases which enter the committal stream. As noted previously, approximately 30% are finalised within the summary jurisdiction and about 80% of committal cases resolve to a guilty plea. Therefore, it seems that issues are confined to where there is a contested committal followed by a trial in the higher courts.
- 6.2. Secondly, it is difficult to distinguish between 'appropriate' and 'inappropriate' delay.³¹ Before making such a distinction, it is perhaps more pertinent to separate the causes of delay in two categories:
- a. Those attributable to the parties: these include the time required to prepare the brief of evidence, provide additional forensic information such as DNA and to make special applications such as seeking leave of the court to issue a subpoena to compel the production of confidential communications;³² and
 - b. Those attributable to the court system: these would appear to be largely related to the capacity constraints imposed by unavailability of court rooms, the number and availability of judicial officers, and to listing procedures that prioritise sex matters and matters involving accused persons who are on remand.
- 6.3. Regarding delays attributable to the parties, there are several examples such as those outlined above, that would clearly fall into the category of an 'appropriate' delay. There are, however, some delays that appear to be 'inappropriate', such as waiting for the provision of reports from

³⁰ Ibid, Table 9, 24.

³¹ The term 'inappropriate' with respect to delay is used in questions 18, 19 and 20 in the Victorian Law Reform Commission, *Issues Paper June 2019: Committals*.

³² *Evidence (Miscellaneous Provisions) Act (Vic) 1958*, s 32C.

Victoria Police's Forensic Service Department (FSD), who cover issues such as DNA, examination of mobile phones, and Call Charge Records. It seems clear that the significant delays in reports from the FSD are due to insufficient funding and resourcing and would not be resolved with the abolition of committals.

6.4. It should also be recognized that some delays are unintended, such as the ill-health of important witnesses or the accused.

6.5. Case study

A client was charged with serious injury offences and remanded in custody. The committal case conference date was set for twelve weeks after the accused was charged. On the day of the committal case conference, the magistrate booked the matter in for a special mention in seven weeks to see how the testing was going and the contested committal for nine weeks after the committal case conference. That was a delay of five months between charge date and committal, which is considered extremely fast. However, the testing was then not completed in time and the committal could not proceed. It was vacated and re-listed for a further 12 weeks later.

6.6. It has been reported by LIV members that a delay of nine months from date of charge to a committal hearing is standard.

Court resources

6.7. The LIV submits that a lack of court resourcing is one of the primary contributory factors of delay. The capacity of the three courts is limited by the number of suitable courtrooms, the competing uses for these courts (i.e. civil and criminal matters) and the number of judicial officers with relevant experience in criminal law to hear a matter. It has been reported that often, the defence and prosecution are prepared for committal, however there are no judicial officers available to preside over the matter. Similarly, when a contested committal overruns the allotted time, the part-heard committal is often adjourned for three or four months to suit the Court's availability rather than the parties. Following the 2018 introduction of categories of offences for which a person must demonstrate exceptional circumstances to be granted bail,³³ it is most probable that a defendant will be remanded, at some expense to the taxpayer, for the duration of these extended delays.

³³ *Bail Amendment (Stage 1) Act 2018* (Vic); *Bail Amendment (Stage 2) Act 2018* (Vic).

County Court delays

- 6.8. The issue of limited resourcing is not contained to the Magistrates' Court. Data from the Magistrates' Court indicates that substantive delays are occurring in the higher courts. In a five-year period between 2012/13 to 2017/18, the median term between filing hearing and committal to a higher court, was seven months if the committal occurred at a committal hearing; and 3.3 months if committal occurred at committal mention.³⁴ This suggests that the 3.7 months' difference is due to circumstances occurring during the contested committal, although there may be other contributing reasons for this difference, such as the above examples i.e. awaiting DNA evidence. The periods of time that matters take in the Magistrates' Court can be compared to the overall time that indictable matters take from initiation in the Magistrates' Court until finalisation in the higher courts. This was, according to the OPP, 19.9 months averaged over the same five-year period.³⁵ On this basis, it would appear that the bulk of the time spent from initiation to finalisation, occurs in the higher courts, at 12.9 or 16.6 months, depending on the stage at which the matter was committed to the higher courts.³⁶
- 6.9. The LIV agrees that delay is a significant concern, however it is not solely, or even largely attributable to the current committal process. Rather, it is substantively due to the limited capacity of the court systems, imposed by limited funding and resource constraints in the higher courts.
- 6.10. Whilst the LIV recommends that addressing the procedural issues which sometimes create delays during the committal stage is important, the issues of improving funding and increasing the capacity of the higher courts will better assist in removing current bottleneck issues.
- 6.11. The Court Services Victoria Strategic Asset Plan stated that "Current and historical funding for court asset management has been constrained and below levels that are required to maintain and develop appropriate court environments."³⁷ The LIV supports the recommendations within this report of investment in ten new court and tribunal facilities and an expansion of five existing court and tribunal facilities.³⁸

³⁴ Magistrates Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019), Request 7. An average of 30 days per month was used.

³⁵ Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, [5.90], 63.

³⁶ It should be noted that the Director of Public Prosecutions *Policy Paper* data does not distinguish between initiation to finalisation times for matters which have resolved to a plea, compared with those that go to trial. It would be expected that matters which go to trial (and which are more likely to have followed a contested committal) would have a much longer time frame between initiation to finalisation, than those matters which have resolved to a plea.

³⁷ Court Services Victoria, *Strategic Asset Plan 2016-2031*, 10.

³⁸ *Ibid* 4.

7. Witnesses and Complainants

- 7.1. The DPP has proposed some very significant changes to the current committal processes. The primary objective of these changes is clear based on the title of the DPP's paper, "Proposed reforms to reduce further trauma to complainants and witnesses."³⁹
- 7.2. The LIV notes that the DPP's proposal would 'create a presumption against complainants and witnesses having to give evidence twice in the proceeding.' However, it is important to recognise that any such presumption on having to give evidence twice applies to a small proportion of cases. As noted above, 80% of OPP matters resolved to guilty pleas before trial during the year 2017/18.
- 7.3. The remaining 20% of matters involving both a contested committal and a trial do not reflect how seldom matters actually involve complainants and witnesses, when taking into account:
- the total number of matters involving straight hand-up briefs;
 - matters that exclude the cross-examination of children or mentally impaired complainants; and
 - matters where only informants and experts are cross-examined at committal.
- Further, between 2013 and 2018, the average application to cross-examine this limited pool of complainants and witnesses, made up 48% of those committals.⁴⁰
- 7.4. Forthcoming legislation in the *Victims and Other Legislation Amendment Act 2018* (which comes into operation on 4 November 2019) will provide for significant additional support for complainants in relation to communications with complainants, victim impact statements, and issues arising from historical care and protection orders.
- 7.5. The LIV understands the risks of retraumatising those who have already suffered the trauma of an alleged offence. The LIV submits however, that the abolition of the committal system will not address this issue. The LIV suggests that key stakeholders who engage directly with complainants and witnesses, such as the OPP and the Court, be appropriately resourced to be able to provide more services and support to reduce complainant and witness trauma.
- 7.6. One such service the LIV recommends is the use of communication assistants for complex matters with complainants and witnesses who have language or learning difficulties. A communication assistant service involves an expert speech-language therapist appointed by

³⁹ Director of Public Prosecutions, *Policy Paper*, 1 October 2018.

⁴⁰ Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, Table 1 and Table 2, 15 and 18.

the Court to perform a specialised assessment of the speech, language and communication skills of the complainant or witness. The assessment will gauge the person's ability to understand essential procedures such as the cross-examination process, the evidence they are providing and their need to instruct counsel. If the assessment indicates it would be appropriate for a communication assistant to be appointed, then the Court can do so. This would result in the communication assistant, in a neutral and objective role, facilitating methods to improve comprehension such as modifying courtroom language and using visual supports. In facilitating a better understanding of the criminal justice system, it provides for a more inclusive and less daunting experience for complainants and witnesses.

8. Resource Implications

- 8.1. The LIV appreciates the considerable difficulties involved in trying to address the resource implications of any proposed changes to the current committal process. As acknowledged in the Issues Paper, the costs data presented in Table 17,⁴¹ is over a decade old. The LIV does not agree that this data sufficiently demonstrates “relative affordability of hearings and case management conducted in the Magistrates’ Court compared with the higher courts.”⁴²
- 8.2. There are significant methodological difficulties in using the hourly costs under Table 17. This is illustrated in the PriceWaterhouseCoopers report (**‘PwC report’**),⁴³ where data from the Productivity Commission was used to show that the average administrative costs per trial in the County and Supreme Courts were in the order of \$10,097 and \$23,612 respectively.⁴⁴ This indicates that the cost of a Supreme Court criminal case is 2.4 times greater than that of a County Court criminal case. PwC then factored in all the other ancillary costs, such as the time of the prosecution, defence, jury and witnesses, to give a total indicative cost for a case that goes for a week in the County Court of approximately \$17,000 and in the Supreme Court of approximately \$48,000.⁴⁵
- 8.3. On this basis, the Supreme Court costs are of the order of 2.8 times those of the County Court. By contrast, however, the hourly costs of the Supreme Court in Table 17 are only 1.27 times

⁴¹ PriceWaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases (Victorian Bar Report, April 2008)*.

⁴² Victorian Law Reform Commission, *Issues Paper June 2019: Committals*, [5.109], 67.

⁴³ PriceWaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases (Victorian Bar Report, April 2008)*, 11.

⁴⁴ *Ibid* 25.

⁴⁵ *Ibid*.

those of the County Court.

8.4. The LIV submits that there are many significant factors which need to be considered if many of the pre-trial procedures are to be carried out in the higher courts and the current committal process is abolished or substantially altered, including:

- trials which are aborted or delayed because of poor disclosure;⁴⁶
- longer trials because matters in contention are not narrowed and refined at committal;
- later guilty pleas once the credibility of witnesses is established (as they cannot be viewed by accused in a committal);
- a single matter for a number of co-accused treated in one committal hearing may require several trials in the higher court because of severance.

8.5. There are several cost advantages in continuing committals in the Magistrates' Court jurisdiction:

- court rooms can be smaller as there is no requirement for juries;
- viva voce evidence is dealt with more efficiently as there is no evidence-in-chief;
- judges are typically assigned one or two associates and a tipstaff compared to one allocated clerk for each magistrate.

8.6. As outlined above, the LIV considers that resource implications favour the retention of the committal process in the Magistrates' Court. In the absence of any clearer and more current data, the LIV contends that conducting committals and other pre-trial procedures in the Magistrates Court must, on the balance of probabilities, be more cost-effective than in higher courts.

9. Conduct of Committal Proceedings

9.1. The LIV have addressed several of the issues relating to the conduct of committal proceedings such as in 3.13 and 6 above.

9.2. Further, LIV members report that committals have improved noticeably over the last few decades in terms of judicial oversight, particularly over cross examination of witnesses and the conduct of cross-examination in the committal hearing itself.

⁴⁶ Ibid.

- 9.3. The LIV notes that many other aspects of case management occur during committal procedures. These include applications for bail, the funding of mentions, custody management issues and confiscation orders.
- 9.4. The LIV submits that this work is best handled in the Magistrates' Court as part of the committal process. If the substantive pre-trial procedures currently carried out during the committal processes were to be reallocated to the higher courts, these routine and administrative tasks of case management should also be reallocated to the higher courts. The LIV believes it would be impractical to split administrative tasks between jurisdictions. The loss of continuity and unnecessary burden to administer overlapping jurisdictions would cause confusion to the accused, legal practitioners, court administration, and the judiciary.

CONCLUSION

Committal hearings are integral to ensuring fairness in criminal proceedings, and any changes to committal procedures should be explored only to the extent that they do not undermine the accused's right to a fair trial.

The LIV acknowledges that the role and usefulness of committal hearings have frequently been called into question over the years, and committal hearings are often blamed for delays in the criminal justice process. However, the data and case studies outlined above highlight the effectiveness of committal proceedings. Committals enable both the prosecution and defence to determine the relevance and admissibility of evidence gathered in the course of a police investigation. The Court is then able to identify and consider those charges where there is insufficient evidence to convict the accused at trial.

In moving matters to the more expensive higher jurisdictions sooner, the already strained court system will face a significant increase in costs and delays, which cannot be said to assist complainants and witnesses, nor meet the objectives outlined in the Commission's Issues Paper.

Should the Commission wish to discuss any aspect of this submission further, please do not hesitate to contact me, or Maurice Stuckey, Policy Officer, at mstuckey@liv.asn.au or (03) 9607 9311.

Yours sincerely



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