SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION: COMMITTALS

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I INTRODUCTION

Reform of Victoria's present committal system is frequently conceived of as an exercise in balancing victim welfare, expediency and fair trial rights.[1] This submission argues that reform, so conceived, is impossible. More specifically, it claims that such a conception of reform foists competing objectives upon the committal system that cannot be simultaneously achieved. It is thus impossible to make meaningful, concrete proposals for reform without first properly answering the question: 'What purposes can or should committal proceedings serve?'[2]

The argument develops in three stages. First, this submission demonstrates that the reform debate, as currently framed, is inherently insoluble due to an unavoidable tension between the objectives of reform. Secondly, it resolves this tension in favour of the objectives of protecting victim welfare and increasing expediency. Thirdly, on this basis, it proposes that Parliament *reform* the committal system into a purely case management system and relegate the role of protecting fair trial rights to the trial. On this basis, it recommends that Parliament:

1. replace committal cross-examination with pre-trial cross-examination; and
2. focus the committal system solely on case management.

II THE TENSION INHERENT IN THE CURRENT DEBATE

A *The Current Committal System*

The 'committal system' is the series of Magistrates' Court hearings, negotiations and procedures that precede the trial of an indictable offence in a superior court.[3] One of its purposes is to test 'whether there is evidence of sufficient weight to support a conviction for the offence charged'.[4] It thereby reduces the number of expensive trials and protects the

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[1] See, eg, Victorian Law Reform Commission, *Committals* (Issues Paper, June 2019) 48–50 [5.1]–[5.18] ('*Committals*'); Asher Flynn, 'A Committal Waste of Time? Reforming Victoria's Pre-Trial Process: Lessons from Other Jurisdictions' (2013) 37(3) *Criminal Law Journal* 175 ('A Committal Waste of Time?').

[2] *Committals* (n 1) xiii, 50.

[3] *Criminal Procedure Act 2009* (Vic) s 96 ('*CPA*'). See generally at ch 4; Richard G Fox and Nadia M Deltondo, *Victorian Criminal Procedure: State and Federal Law* (Federation Press, 15th ed, 2019) ch 7.

[4] *CPA* (n 3) s 97(b); Fox and Deltondo (n 3) 241.

accused's rights by preventing weak or unjustified prosecutions from reaching trial.[5] Another of its purposes is to 'ensure a fair trial' of the accused.[6] It does so by 'ensuring that the prosecution case against the accused is adequately disclosed'[7] and 'enabling the accused to hear or read the evidence against [them] and to cross-examine prosecution witnesses'.[8] This also expedites the criminal justice process and guarantees fair trial rights by defining 'the issues in contention'[9] before commencement of the trial and giving the accused enough time 'to adequately prepare and present a case'[10] — or, alternatively, allowing them to enter an early guilty plea.[11]

The magistrate decides whether the evidence is sufficiently strong to support conviction at the final stage of the system, the 'committal hearing'.[12] The evidence originates from two sources. The first is the prosecution's 'hand-up brief',[13] which contains 'any information, document or thing on which the prosecution intends to rely',[14] such as 'the signed and sworn written statements of witnesses'.[15] The second is defence counsel's cross-examination of prosecution witnesses. This cross-examination may only occur with the magistrate's leave,[16] and is confined to the issues for which leave was sought.[17]

B *The Current Debate*

1 *Arguments for Abolition*

Those in favour of abolishing this system advance two main arguments. The first is that the committal process is very lengthy. Abolition, they argue, would reduce delay.[18] Related to this is the second argument that abolition of committal proceedings would reduce trauma suffered by victims.[19] According to this argument, abolishing committal proceedings obviates

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[5] Fox and Deltondo (n 3) 240–4; Flynn, 'A Committal Waste of Time?' (n 1) 176. See *Grassby v The Queen* (1989) 168 CLR 1, 15 (Dawson J) ('*Grassby*').
[6] *CPA* (n 3) s 97(d); Fox and Deltondo (n 3) 241.
[7] *CPA* (n 3) s 97(d)(i); Fox and Deltondo (n 3) 241, citing Cosmas Moisidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology Press, 2008) ch 9.
[8] *CPA* (n 3) s 97(d)(ii). See also *Grassby* (n 5) 15 (Dawson J); *Barton v The Queen* (1980) 147 CLR 75, 99 (Gibbs ACJ and Mason J) ('*Barton*').
[9] *CPA* (n 3) s 97(d)(v).
[10] Ibid s 97(d)(iv).
[11] Flynn, 'A Committal Waste of Time?' (n 1) 175–6.
[12] *CPA* (n 3) s 141(4). See generally at pt 4.7.
[13] See generally ibid pt 4.4.
[14] Ibid s 110(d).
[15] Fox and Deltondo (n 3) 256.
[16] *CPA* (n 3) ss 124(1), 130(2)(a).
[17] Ibid ss 124(6), 132(1)(a).
[18] Flynn, 'A Committal Waste of Time?' (n 1) 175, 179; *Committals* (n 1) 49 [5.10]–[5.12].
[19] *Committals* (n 1) 48–9 [5.6]–[5.8]. But see Moisidis (n 7) 208–9.

the need for victims to testify twice should the accused choose to cross-examine them at the committal hearing, preventing double-traumatisation.[20]

2 *Arguments against Abolition*

The most common rebuttal to these arguments is that abolition would infringe the accused's fair trial rights.[21] Here, those in favour of retaining the committal system invoke a particularly strong version of the 'principle of orality'.[22] According to this version of the principle, live pre-trial cross-examination of prosecution witnesses is integral to adequate preparation of the defence case. This is for two reasons. First, mere knowledge of the identity of prosecution witnesses and the contents of their written statements is insufficient. In an adversarial system, it is unlikely prosecution investigators will gather all evidence beneficial for the defence. Even with the best intentions to do justice to the accused, they will not know which questions to ask witnesses without a knowledge of the particulars of the accused's defence.[23] Moreover, psychological evidence suggests that witnesses' memories may be distorted by the investigative process.[24] For instance, police questions that tend in a particular direction may lead a witness to misremember certain facts.[25] Cross-examination — allegedly — acts as a safeguard against such distortions.[26] Secondly, cross-examination itself is a source of information valuable to the preparation of the defence case.[27] Through cross-examination, defence counsel can observe the witness' demeanour.[28] They may also, due to the wide-ranging nature of cross-examination, be able to derive a useful though surprising result.[29] Later, at trial,

[20] Flynn, 'A Committal Waste of Time?' (n 1) 179; Jonathan Doak, Submission No 31 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (19 October 2015) 2 [3.2]. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, 4 August 2016) 207 [8.63] ('*The Role of Victims of Crime*').
[21] See, eg, Flynn, 'A Committal Waste of Time?' (n 1) 185–8. See also *Committals* (n 1) 50 [5.14].
[22] Louise Ellison and Vanessa E Munro, 'A "Special" Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) 23(1) *Social & Legal Studies* 3, 4.
[23] David Napley, *A Guide to Law & Practice under the Criminal Justice Act 1967* (Sweet and Maxwell, 1967) 15, cited in Moisidis (n 7) 211.
[24] Moisidis (n 7) 211–13.
[25] Ralph Norman Haber and Lyn Haber, 'Experiencing, Remembering and Reporting Events' (2000) 6(4) *Psychology, Public Policy, and Law* 1057, 1068–70.
[26] Moisidis (n 7) 213. But see Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37(3) *Melbourne University Law Review* 539, 551–7.
[27] *Barton* (n 8) 105–6 (Stephen J).
[28] *R v Kent; Ex parte McIntosh* (1970) 17 FLR 65, 78.
[29] *Wakeley v The Queen* (1990) 93 ALR 79, 86.

they may use discrepancies between a witness' trial and committal testimony to discredit a witness.[30]

3 *The Insolubility of the Current Debate*

The strength of the principle of orality so stated renders the current debate insoluble. Satisfying this principle requires the committal hearing to be a 'mini-trial' at which defence counsel may extensively cross-examine victims before they testify again at trial. This increases delay and doubly-traumatises victims.[31] It thus seems as if no solution can satisfactorily accommodate these competing considerations.

III A DIFFERENT FRAMING

The assumption underpinning the current debate is that *the committal system should be responsible for simultaneously discharging these competing functions*. This is the cause of the insolubility: as previously demonstrated, it is impossible for the committal system to simultaneously reduce delay, protect victims and uphold a strong principle of orality.[32] This suggests a satisfactory solution can only arise from an alternate framing of the debate that rejects this assumption. In other words, the debate should not be about the prioritisation of some considerations over others, but about the relegation of some of the committal system's functions to other elements of the criminal justice system.

In this alternate framing, one solution is to *reform* the committal system solely as a case management device and relegate the role of protecting fair trial rights to the trial. At this point, however, those who regard the committal system as a bulwark of fair trial rights might argue that the requirements of justice are absolute and so should take precedence over pragmatic considerations such as expediency and reduction of trauma.[33] This argument is problematic for several reasons. First, it is not self-evident that fair trial rights are absolute.[34] Even if they are, it is not self-evident that expediency and the reduction of trauma are merely pragmatic

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[30] Fox and Deltonto (n 3) 240–1. Cf *The Role of Victims of Crime* (n 20) 211 [8.88]; Bowden, Henning and Plater (n 26) 551–3.
[31] See above Part II(B)(1).
[32] See above Part II(B)(3).
[33] See Karen Kissane, 'Chief Judge Scolds the Prosecutor', *The Age* (online, 18 November 2008) <http://www.theage.com.au/national/chief-judge-scolds-the-prosecutor-20081117-693w.html>.
[34] See *The Role of Victims of Crime* (n 20) 196 [8.5]; Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 240–1 [8.98]–[8.99]. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 7(2), 25(2); *Momcilovic v The Queen* (2011) 245 CLR 1, 90–3 [162]–[171] (Gummow J); Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340.

considerations.[35] For example, delay itself may be a form of injustice — hence the oft-repeated maxim: 'justice delayed is justice denied'.[36] Secondly, the strength of the principle of orality itself generates injustice. The current Victoria Legal Aid funding structure prioritises funding of trials over pre-trial proceedings.[37] This means that only wealthy accused can afford to hire defence counsel to extensively cross-examine witnesses at the committal hearing and obtain the knowledge necessary to fully prepare a defence case.[38] Thirdly, this argument merely *subordinates* the importance of expediency and victim welfare, instead of *relegating* the role of achieving these to some other institution. (Such relegation is in fact impossible since the principle of orality inherently requires delay and double-traumatisation.)[39] It thus appeases less people than the suggested solution.

IV RECOMMENDATIONS

On this basis, this submission makes two recommendations:

A *Replacing Committal Cross-Examination with Pre-Trial Cross-Examination*

First, this submission recommends that Parliament *replace committal cross-examination with pre-trial cross-examination*. The purpose of this pre-trial cross examination is to replace the committal cross-examination as a means of pre-trial disclosure of the prosecution case. Its arrangements would be similar to those of the pre-trial cross-examination procedure for underage or cognitively impaired sexual offence victims.[40] It would take place in front of the trial judge within three months of committal and be recorded.[41] The recording would then form the entirety of the victim's evidence unless the court grants defence counsel leave to re-examine the victim.[42] However, unlike the pre-trial cross-examination of underage or cognitively impaired sexual offence victims, this pre-trial cross-examination procedure

[35] Bowden, Henning and Plater (n 26) 557–60.
[36] See generally Tania Sourdin and Naomi Burstyner, 'Justice Delayed Is Justice Denied' (2014) 4(1) *Victoria University Law and Justice Journal* 46. See also *Committals* (n 1) 50 [5.17].
[37] Asher Flynn, 'Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-Trial Process' (2010) 34(1) *Criminal Law Journal* 48, 53–4; Asher Flynn et al, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' (2016) 40(1) *Melbourne University Law Review* 207, 220. See generally *Dietrich v The Queen* (1992) 177 CLR 292; *Fuller v Field* (1994) 62 SASR 112.
[38] Flynn, 'A Committal Waste of Time?' (n 1) 188–9.
[39] See above Parts II(B)(2)–(3).
[40] See generally *CPA* (n 3) pt 8.2 div 6.
[41] Cf ibid ss 370(1), 371.
[42] Cf ibid ss 374, 376.

would only take place with the committing magistrate's leave. The primary consideration for granting leave would be adequate disclosure of the prosecution case.[43]

These arrangements protect the accused's fair trial rights by permitting them to extensively cross-examine the victim before the trial while avoiding double-trauma. They also reduce financial inequity as more funding should be available on the basis that this pre-trial cross-examination is effectively part of the trial itself.[44] There is no need to worry about prejudice to the accused, as empirical studies suggest jurors do not perceive recorded evidence differently.[45] The fact that the procedure would not be available as of right addresses the worry about insufficient resources.[46]

B *Focusing the Committal System on Case Management*

Secondly, to supplement the new pre-trial cross-examination procedure, this submission recommends that Parliament *orient the committal system solely towards case management*. If committal cross-examination is abolished, then the goals of the committal system should be to, on the basis of the hand-up brief, determine whether there is sufficiently strong evidence to support conviction,[47] and, if so, which witnesses defence counsel should be allowed to cross-examine pre-trial.[48] The accused should still be allowed to enter an early guilty plea after pre-trial cross-examination.

This ensures rigorous testing and sufficient disclosure of the prosecution case so that the accused can adequately prepare their defence or enter an early guilty plea.[49] However, it also reduces delay and victim trauma by preventing defence counsel from cross-examining victims twice.

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[43] Cf ibid s 124(4)(a).
[44] See above nn 41–2 and accompanying text.
[45] Ellison and Munro (n 22); Natalie Taylor and Jacqueline Joudo, 'The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study' (Research and Public Policy Series Report No 68, Australian Institute of Criminology, 2005).
[46] *The Role of Victims of Crime* (n 20) 201 [8.33], 204–5 [8.50]–[8.53].
[47] Cf *CPA* (n 3) s 141(4).
[48] Cf ibid ss 119(c), 125(1)(c).
[49] See *The Role of Victims of Crime* (n 20) 211 [8.89].