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Victorian Law Reform Commission
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Dear Sir/Madam,

Submission to Inquiry into Committals

Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to comment on the issues raised in the Victorian Law Reform Commission's (**VLRC**) Issues Paper, which canvassed information relevant to whether Victoria should maintain, abolish, replace or reform the present committal system, as well as what is best practice for improving the efficiency of pre-trial procedures, advancing fair trial rights and/ or reducing the trauma experienced by witnesses and victims.

1. About ALHR

ALHR was established in 1993 and is a national association of more than 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and Specialist National Thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

2. General Comments

The terms of reference ask the VLRC to consider opportunities for reform to the committal procedures in respect of criminal proceedings in Victoria. In particular, the VLRC is tasked with considering what reform, if any, would encourage appropriate early guilty pleas, facilitate efficient

use of court time, improve early disclosure processes, minimise the need for victims and other vulnerable witnesses to give evidence multiple times, and protect fair trial rights.

ALHR wishes to contribute to the VLRC's inquiry because ALHR is concerned about the potential for adverse impacts on the human rights and liberties of Victorians, should reform of committal proceedings be rushed or pursued without comprehensive analysis of relevant human rights and rule of law considerations.

ALHR submits that properly run committal proceedings are an asset to Victoria's criminal justice system. The VLRC Issues Paper reveals that committals in Victoria often lead to early resolution, either by providing an opportunity to test the strength of the Crown case, narrow the issues in dispute at trial, and encourage appropriate early guilty pleas both in the Magistrates' and superior Courts. These outcomes serve the interests of justice, including the interests of victims, and saves trials resolving 'at the door of the Court'¹ at far greater public expense.

Reforms to criminal justice processes often have human rights implications and it is therefore important that the proposed reforms fully consider the human rights issues involved in the abolition of committal hearings.

The key human rights issue enlivened by committal hearings is the right to a fair trial. This right is proclaimed in several international human rights instruments to which Australia is a party including Article 14 of the International Covenant on Civil and Political Rights (**ICCPR**)², Article 40 of the Convention on the Rights of the Child (**CRC**)³ and Article 13 of the Convention on the Rights of Persons with Disabilities (**CRPD**).⁴ The rights and obligations created by these articles are discussed in detail in section 4 of this submission.

The right to a fair hearing is also legislated within the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**), pursuant to which the right to a fair trial includes the following minimum guarantees:

- (a) the right to have a charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing;
- (b) the right to defend a criminal charge, including the right to cross-examine the prosecution's witnesses and to obtain/adduce other evidence in support of a defence;⁵
- (c) the right to be tried without unreasonable delay;
- (d) the right to have adequate time to prepare a defence;

¹ Magistrates' Court of Victoria, *Practice Direction No 7 of 2013: Committal Case Conference*, 10 October 2013.

² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

⁴ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106

⁵ Australian Law Reform Commission, 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129, March 2016), accessed online at <<https://www.alrc.gov.au/publications/right-obtain-and-adduce-evidence-and-confront-witnesses>>.

- (e) the right to equality before the law; and
- (f) the right of victims and witnesses to protection from interference from an accused person in criminal proceedings.⁶

Whilst the attributes of a fair trial are now set out in international treaties, the right also has its roots in the common law⁷ and has been described as ‘a central pillar of our criminal justice system’⁸, ‘fundamental and absolute’⁹, and a ‘cardinal requirement of the rule of law’.¹⁰

Given the crucial role that committal proceedings play in our criminal justice system, it is imperative that reform only takes place when it is informed by rigorous quantitative or qualitative evidence, and not by the political taste of the moment. ALHR therefore submits that the Commission should focus its inquiry on whether the abolition, reform or maintenance of committal procedures will protect the human rights of the accused and any potential victims and witnesses. Further, ALHR cautions that any reform proposal should carefully consider the risk of a situation where the abolition of committals saves the time of the magistrates at the expense of judges, and the public purse.

3. Previous Victorian Inquiries and Reforms

It is hard to deny the veracity of the statement that a call to reform committal proceedings arises ‘almost as a tradition’ every few years.¹¹ The VLRC and its predecessor bodies have investigated the committal process at least four times before the current reference, some of which were not referred to in the Issues Paper. In all of these reviews, and in cases before the Australian Courts,¹² it has been repeatedly affirmed that the committal proceedings are important while allowing for the introduction of various reforms over the years with the intention of improving courts’ capacity to encourage early disclosure, to protect vulnerable witnesses and to increase efficiency.

In 1976, the Law Reform Commissioner published a report entitled ‘Rape Prosecution (Court Procedures and Rules of Evidence)’ which addressed whether committal proceedings for rape offences should be abolished and concluded that this ‘would be highly undesirable.’¹³ The Commissioner asserted that ‘to deprive all persons charged with rape offences the benefit of being able to confront, investigate and challenge their accusers at such a hearing would be seriously inimical to the interests of justice.’

⁶ See, e.g. ss 24-27 of the Charter.

⁷ Australian Law Reform Commission ‘Fair Trial’ available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/ip46_ch_8_fair_trial.pdf

⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

⁹ *Brown v Scott* [2003] 1 AC 681, 719.

¹⁰ Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.

¹¹ Criminal Law Committee of the Magistrates’ Court of Victoria, *Magistrates’ Court Response to the DPP’s Proposed Reforms of the Committal Process* (10 April 2019), 1.

¹² *Grassby v The Queen* (1989) 87 ALR 618, 627 (Dawson J); *Barton v The Queen* (1980) 147 CLR 75, 100 (Gibbs ACJ and Mason J); *Director of Public Prosecutions v Bayly* (1994) 126 ALR 290; *Purcell v Vernardos (No.2)* [1997] 1 Qd R 317.

¹³ Melbourne Law Reform Commissioner, ‘Rape Prosecution (Court Procedures and Rules of Evidence)’, 22.

In 1988, the VLRC published a report entitled 'Sexual Offences against Children: Research Reports', which investigated whether to increase restrictions on the right to cross-examine child complainants. Ultimately the Commission did not recommend doing so and instead, made a number of other recommendations in relation to special preliminary hearing procedures for cases involving sexual offences against children, including having appropriately trained police prosecutors presenting the prosecution case at the preliminary examination.¹⁴

In 1986, John Coldrey QC, the first Director of Public Prosecutions (**DPP**), published the Report of the Advisory Committee on Committal Proceedings (**the Coldrey Report**).¹⁵ The Report, prepared by a committee consisting of representatives of the magistracy, the Bar, solicitors and the police force, unanimously recommended the retention of committal proceedings, noting their benefits for both defence and prosecution, calling them a 'vital cog in the machinery of the criminal law'.¹⁶ The Coldrey Report referred to the then-recent High Court judgment in *Barton v R* (1980) 147 CLR 77 where the Court noted:

*It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.*¹⁷

ALHR notes that since 1995, all committal hearings have been prosecuted by the Director of Public Prosecutions, instead of the police; and the *Civil Procedure Act 2010* (Vic) provided a major overhaul of criminal procedure (but incorporated only minor changes to committals).¹⁸ In 2012, the Victorian Attorney-General of the Liberal National Party (**LNP**) canvassed the abolition of committal proceedings as a way of dealing with the costs and backlog associated with the asserted 'unnecessary' examination of cases at committal.¹⁹ The LNP's proposal was described by Robert Richter QC as a 'disaster' for the justice system.²⁰ The campaign resulted in the *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic), which provided for a 'more rigorous test for the granting of leave to cross-examine a witness at a contested committal'.²¹

Following on from the VLRC's Victims of Crime Report of June 2016, the *Justice Legislation Miscellaneous Amendments Act 2018* (Vic) introduced a 'number of protections for children and persons with a cognitive impairment who are complainants in sexual offence cases, including a

¹⁴ Victorian Law Reform Commission, 'Sexual Offences against Children: Research Reports', Recommendation 26, 8.

¹⁵ Advisory Committee on Committal Proceedings 1986, 'Report on Committal Proceedings', Victorian Government.

¹⁶ John Coldrey QC, 'Committal Proceedings: the Victorian Perspective', 1990 AIC conference on committals, 2, accessed at <<https://aic.gov.au/sites/default/files/publications/proceedings/downloads/07-coldrey.pdf>>.

¹⁷ Advisory Committee on Committal Proceedings 1986, 'Report on Committal Proceedings', Victorian Government, 100.

¹⁸ Simon Moodie, 'The trade-off between fairness and efficiency', Law Institute of Victoria Journal (1 April 2019).

¹⁹ NSWLRC Report, Encouraging Appropriate Early Guilty Pleas, 191 citing Munro, 'Justice System Faces 'Disaster'', *The Age*, 22 July 2012.

²⁰ *The Age*, 'Justice System Faces Disaster', accessed online at <<https://www.theage.com.au/national/victoria/justice-system-faces-disaster-20120721-22h7w.html>>, The Conversation, 'Reforming the Committal Hearing System', accessed online at <<http://theconversation.com/reforming-the-committal-hearing-system-8544>>.

²¹ *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic) pt 4 div 1. See also the Second Reading Speech *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic), *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2386.

prohibition on the cross-examination of these complainants at a committal hearing.²² This Act received Royal Assent on 25 September 2018, just a few days before the release of the DPP's policy paper on 1 October 2018.²³ The effects of the 2018 amendments were therefore unlikely to have been taken into account by the OPP.

In light of this extensive history of review and reform, the VLRC will need to consider whether, notwithstanding the foregoing, there is room for further reform. One must call into question an initiative for reform in a field which is so well-trodden, with a proven history of saving court time and expense and ensuring procedural fairness for all participants. There is significant danger in creating change for change's sake rather than on the basis of strong evidence and with stated aims and objectives for reform approached from within a human rights framework. Without such structured aims and objectives, there is a high risk of unjustified and ill-conceived change; the consequences of which may be prejudicial to people in the criminal justice system, threaten to undermine fundamental human rights and institutionalise inefficiencies in place of a proven effective legal procedure.

4. Responses to the Issues Paper

Question 1 What purposes can or should committal proceedings serve?

Recommendation In considering whether any reform to committal proceedings will impact on the accused's (and other parties') rights to a fair trial, the VLRC should have full regard to the factors contained in section 97 of the Criminal Procedure Act 2009 (Vic) (**CPA**), section 25 of the Charter, and all relevant international human rights instruments.

Committal proceedings must serve an accused's right to a fair trial, including the right to be properly informed about the nature and reason for the charge, and to be tried without unreasonable delay.

Committal proceedings should carefully balance the rights of the accused with the rights of victims and witnesses.

Committal proceedings should protect the public interest of having criminal matters dealt with in a way which is as just, efficient and humane as possible.

²² Justice Legislation Miscellaneous Amendment Bill 2018, Second Reading Speech, accessed at <http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+no+w+read+a+second+time&IW_FIELD_IN_SpeechTitle=JUSTICE+LEGISLATION+MISCELLANEOUS+AMENDMENT+BILL+2018&IW_FIELD_IN_HOUSENAME=COUNCIL&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2018&IW_FIELD_IN_SittingMonth=July&IW_FIELD_IN_SittingDay=26>.

²³ Director of Public Prosecution, 'Proposed reforms to reduce further trauma to victims and witnesses' Policy Paper 1 October 2018.

Committal proceedings in Victoria serve numerous purposes, as outlined by s 97 of the CPA. The proceedings are designed to determine whether a charge can be heard and determined summarily, and if there is sufficient evidence to support a conviction for the offence. They are also intended to assist in ascertaining a plea from the accused; and to ensure a fair trial, if the matter proceeds to trial. The committal proceeding aims to achieve these purposes by:

- (a) ensuring the prosecution case is adequately disclosed in the form of depositions;
- (b) enabling the accused to hear or read evidence against the accused and to cross-examine prosecution witnesses;
- (c) enabling the accused to put forward a case at an early stage if the accused wishes to do so;
- (d) enabling the accused to adequately prepare and present a case; and
- (e) enabling the issues in contention to be adequately defined

The broad statutory purposes of committal proceedings, are consistent with the common law characterisation of the purposes of committal proceedings as an important element in the protection which the criminal process gives to an accused. They are also consistent with the human right to a fair trial, which is codified in section 25 of the Charter, and is drawn from Article 14 of the ICCPR. Specifically, the Charter recognises that a person charged with a criminal offence in Victoria is entitled to be 'informed promptly and in detail of the nature and reason for the charge',²⁴ and ensures that individuals have the right 'to be tried without unreasonable delay'.²⁵

In addition, rights and freedoms which arise under any other law (including international law), are not abrogated or limited by their absence or partial inclusion in the Charter.²⁶ As such, it is appropriate to consider the international human rights instruments which bind the Victorian government by virtue of Australia's status as a party to them and their potential application to the proposed reforms.

International Covenant on Civil and Political Rights

Article 14 of the ICCPR (together with other Articles such as 2 (right to life), Article 7 (torture, cruel inhuman or degrading punishment), and Article 17 (arbitrary or unlawful interference with privacy, family, home or correspondence) require the existence of an effective criminal justice system to protect accused persons, victims and witnesses from harm. Further, Article 14(3) of the ICCPR states that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
- b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*

²⁴ The Charter, s 25(2)(a).

²⁵ *Ibid*, s 25(c).

²⁶ *Ibid*, s 5.

- c. *To be tried without undue delay;*
- d. *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
- e. *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- f. *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- g. *Not to be compelled to testify against himself or to confess guilt.*²⁷

In the above, notwithstanding (c) (tried without undue delay), there are a number of other guarantees relevant to the proposed abolition of committal hearings, such as:

- an accused person's right to be informed promptly and in detail of the prosecution case, including via disclosure of material which is helpful because it weakens the prosecution case or strengthens the defence case;
- adequate time and facilities to prepare a defence;;
- the right not 'not to be compelled to testify against oneself or to confess guilt';.
- and the ability to cross-examine witnesses..

In its General Comment No. 13, the United Nations Human Rights Committee (**UNHRC**) stated that the right to be tried without undue delay is a guarantee that 'relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay'.²⁸ Thus, procedures must be available in order to ensure that the trial will proceed 'without undue delay'.

Even if it is accepted that the committal process gives rise to some delay, it is not correct to say that committal hearings may 'undermine, rather than support, an accused's right to a fair trial'²⁹ What is a 'fair trial' is obviously contingent on the various factors enumerated above. A trial will not be fair if it is brought on so quickly that the accused has had inadequate time and facilities to properly prepare their defence.

In relation to subparagraph 3(d) of Article 14, General Comment 13 notes that 'the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair.' In relation subparagraph 3(e), it is noted that 'this provision is designed to guarantee to the accused the same legal powers

²⁷ ICCPR Article 14(3) Op. cit.

²⁸ Office of the High Commissioner for Human Rights, General Comment No.13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 04/13/1984.

²⁹ Victorian Law Reform Commission, Issues Paper June 2019: Committals, [5.17], 50.

of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.³⁰

Other Human Rights Instruments

Article 40(2) of the *Convention on the Rights of the Child* similarly provides that every child accused of a crime should be guaranteed the opportunity to be informed properly and directly of the charges against him or her, and to legal or other appropriate assistance in the preparation and presentation of his or her defence. It also provides for the child to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.

Article 13 of the *Convention on the Rights of Persons with Disabilities* states that parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Finally, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power acknowledges that victims are entitled to fair treatment and access to the mechanisms of justice, and generally draws attention to the need for victims' rights in the criminal justice process.³¹

Broader Human Rights Considerations

Recommendation The VLRC should use its discretion under the terms of reference to consider the broader human rights impacts of any proposed reforms. These considerations should include the inefficiencies in the broader criminal justice system, the current imprisonment rate in Victoria, the social and financial cost of mass incarceration, and the underlying causes of criminal offending.

Under its Terms of Reference, the VLRC has a wide scope to consider issues relevant to the proposed reforms, including any matter relevant to 'reduce trauma experienced by victims and witnesses and improve efficiency in the criminal justice system, while also ensuring fair trial rights'. ALHR submits that the VLRC should rely on the scope of this power to contextualise the proposed reforms in the broader criminal justice system and to consider their potential human rights implications.

As recent reporting in the Age has shown, the imprisonment rate in Victoria has skyrocketed to a level not seen since the 19th century.³² This is occurring at the same time as the crime rate in

³⁰ Ibid.

³¹ General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, 96th plenary meeting.

³² The Age, 'Prisons are booming as Victoria pays for its tough on crime stance', accessed online at <<https://www.theage.com.au/national/victoria/prisons-are-booming-as-victoria-pays-for-its-tough-on-crime-stance-20190627-p5220f.html>>.

Victoria is low and continues to drop,³³ and the Magistrates' Court struggles with under-resourcing as its caseload expands.³⁴ These reports portray a crisis in our criminal justice system that has gone unremarked in either the OPP's policy paper or the VLRC's Issues Paper. ALHR considers that this crisis has been caused by a range of reasons including; stricter bail laws; mandatory sentencing laws; and laws which criminalise addiction, homelessness and poverty. Our submission highlights that there is a significant paucity of evidence connecting this crisis with the function of committal proceedings.

The annual cost of Victoria's prison system is now \$1.6 billion (triple what it cost in 2009-10), and the Government has announced a further \$1.8 billion spending to pay for the expansion of the existing system.³⁵ In Queensland, which is struggling with similarly high levels of incarceration as Victoria, the Queensland Productivity Commission (**QPC**) has issued a draft report noting their findings that (a) the massive increase in imprisoned Queenslanders was not caused by underlying rates of crime, (b) it costs \$107,000 to keep an adult in prison for a year, (c) the median prison term is just 3.9 months, (d) 65 per cent are for non-violent offences, and (e) that prison does little to rehabilitate offenders or reduce the prospects of re-offending.³⁶

In light of the huge cost of imprisoning people in these circumstances, the QPC has made a number of draft recommendations, including. *inter alia*, decriminalising a range of drug and administrative offences, providing a range of victim-focused restitution and restoration, reforming sentencing and bail legislation, reducing the use of remand, and improving preventative, rehabilitation and reintegration programs.³⁷ Notably absent from the QPC's report is any consideration of the committal process in Queensland.

Question 16 How effectively do committal proceedings ensure: appropriate early resolution of cases; efficient use of court time; and that parties are adequately prepared for trial?

Question 17 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?

Question 18 How should concerns that committal proceedings contribute to inappropriate delay be addressed?

Question 19 How should concerns that other pre-trial processes contribute to inappropriate delay be addressed?

³³ The Age, 'Victoria crime rate down new criminal statistics agency', accessed online at <<https://www.abc.net.au/news/2018-09-20/victoria-crime-rate-down-new-criminal-statistics-agency-figures/10284918>>.

³⁴ The Age, 'Victorian Magistrates under pressure court caseload increases', accessed online at <<https://www.abc.net.au/news/2018-11-07/victorian-magistrates-under-pressure-court-caseload-increases/10460176>>.

³⁵ Australian Lawyers for Human Rights, 'Victoria spends \$1.8 billion on prisons', accessed online at <<https://alhr.org.au/vic-1-8-billion-on-prisons/>>.

³⁶ Queensland Productivity Commission, Draft Report: 'Imprisonment and Recidivism', accessed online at <<https://www.qpc.qld.gov.au/media-release-draft-report-recommends-criminal-justice-reform/>>.

³⁷ Queensland Productivity Commission, Draft Report: 'Imprisonment and Recidivism', accessed online at <<https://qpc.blob.core.windows.net/wordpress/2019/02/Imprisonment-and-recidivism-Draft-Report.pdf>>.

Recommendation ALHR considers that committal proceedings are currently effectively achieving these aims.

Notably, in the period 2017 - 2018, a large proportion (approximately 30 percent) of committal stream cases were either dealt with summarily or withdrawn by the prosecution, so are never committed to trial; this means that all other indictable charges were withdrawn or discharged.³⁸ The proportion of cases to which this statistic refers provides fairly strong evidence against the argument that committal proceedings are used by the defence as a 'fishing exercise'.³⁹ Rather, this statistic evidences that the process plays an extremely important role in filtering out of the criminal justice system, those cases which have no (or little) reasonable prospect of a conviction..

The results of the committal procedure may be the appropriate modification of both the seriousness and the number of charges which may properly be brought against the accused person; whether this be the reduction of a murder charge to that of manslaughter or the re-evaluation of the number of charges of sexual assault which may properly be brought against an alleged offender.⁴⁰ In those cases where all indictable crimes are withdrawn, leaving only summary matters (or indictable matters triable summarily), such matters can be resolved in the Magistrates' Court, saving the time, expense and inconvenience of all witnesses, victims and accused persons having to appear before a superior Court.

Importantly, of all the OPP's cases in 2017-18 that were finalised as a guilty plea, **79.4% of guilty pleas were achieved at committal**.⁴¹ Further, of all the cases committed to higher courts in the years 2013-2018, of committal stream cases involved a guilty plea prior to committal 50% of these cases had a guilty plea entered at the time of committal.⁴² These statistics highlight the important role that committal proceedings play in enabling the parties to focus on the strengths and weaknesses of the evidence (having been tested), thereby encouraging appropriate early guilty pleas.⁴³

ALHR submits that all of the statistics provided by the Magistrate's Court, outlined in the Issues Paper, have remained fairly constant over the last few years. This raises the question of why reform is being called for now, particularly in light of the extensive and regular rate of review and inquiry to which the Victorian committals process has been subjected.

ALHR notes that England and Wales, Western Australia, Tasmania and New Zealand have each effectively abolished committal proceedings. Abolition of committals in these jurisdictions sought to address issues of expediency and court efficiency. While the Coldrey Report predicted that the abolition of committals would see longer trials due to extended voir dire hearings in the higher

³⁸ Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019), Table 1.

³⁹ Kerry Stephens, 'Committals in Victoria—a Police Perspective' (Conference Paper, Australian Institute of Criminology, *The Future of Committals*, 1–2 May 1990) 158.

⁴⁰ John Coldrey QC (Director of Public Prosecutions Victoria), 'Committal Proceedings: the Victorian Perspective' (undated), 5, accessed at < <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/07-coldrey.pdf>>.

⁴¹ Victoria Director of Public Prosecutions, *Annual Report 2017–18* (2018) 11–12.

⁴² Criminal Law Committee of the Magistrates' Court of Victoria, *Magistrates' Court Response to the DPP's Proposed Reforms of the Committal Process* (10 April 2019).

⁴³ Magistrates' Court of Victoria, *Committal Data Requested by the VLRC* (24 April 2019), Table 6.

courts, WA and the UK saw **increased delays** due to late disclosures by the Crown, and a **lack of effective case management practices** being implemented to replace the committal procedure.

Committals in WA were abolished in 2002 following a report from the Law Reform Commission of Western Australia which concluded that the committal hearing was redundant. The most important aspect of committal hearings was said to be the facilitation of prosecutorial disclosure, which the Commission considered could be achieved through other means. The Commission also considered that the DPP's power to indict was a more effective mechanism for screening charges than the committal hearing.⁴⁴ However, in 2006 the Chief Judge of the WA District Court noted that some of the benefits of the reforms had been lost because the Office of the DPP did not have an organised presence in the Magistrates Court.⁴⁵ Furthermore, proper decisions as to the key evidence in issue were still not being made at an early stage because trial counsel did not become involved until after the matter was committed to the District Court.⁴⁶ This was **causing significant adjournments** in the District Court due to late disclosure.⁴⁷

Statistics published by the UK Ministry of Justice in the year following the abolition of committal proceedings also evidence **a lack of immediate benefit to the jurisdiction in respect of efficiencies**:

- (a) The number of outstanding cases in the Crown Court increased in the second quarter of 2014 by 63% for either-way cases and 16% for indictable only cases, compared to the first quarter of 2013 before committals for either-way offences were abolished;⁴⁸
- (b) The average number of days from offence to completion in the Crown Court was 304 days immediately prior to the abolition of committals for either-way offences, and increased to 317 days by the second quarter of 2014; and
- (c) The time a matter spent in the Magistrates' Courts prior to being allocated to the Crown Court decreased from 26 days to 7 days, while the time spent in the Crown Court increased from 134 days to 164 days.⁴⁹

The delays detailed above were said to have occurred because the reform did not replace the committal process with any sort of case management that might have helped weed out weak cases or encourage early resolution between the parties.⁵⁰ These statistics do not promote a picture of

⁴⁴ Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System in Western Australia, Final Report (1999) [28.26]-[28.27]; see also NSWLRC Report, 'Encouraging Early Guilty Pleads' Report 141, December 2014, 189, accessed online at <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-141.pdf>>.

⁴⁵ A Kennedy, 'Getting Serious About the Causes of Delay and Expense in the Criminal Justice System' (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 5; the WA Office of the Director of Public Prosecutions now manages committal hearings in the Perth Magistrates Court and Stirling Gardens Magistrates Court, but in suburban and most country courts this remains the responsibility of the WA Police: Office of the Director of Public Prosecutions for Western Australia, 'Role of the ODPP' (14 January 2013).

⁴⁶ *Ibid.*, 6.

⁴⁷ *Ibid.*

⁴⁸ UK, Ministry of Justice, Court Statistics Quarterly April to June 2014 (2014) 27.

⁴⁹ *Ibid.*

⁵⁰ New South Wales Law Reform Commission, 'Encouraging Early Guilty Pleas' (Report 141, December 2014), 188.

efficiency and savings in the UK. In contrast, by streamlining processes in the Magistrates' Courts, the cases moved to the Crown Court earlier, bringing with them an accompanying delay.⁵¹

In Queensland, South Australia and the Northern Territory, committal hearings remain but recent reforms have placed restrictions on the circumstances when a witness can be cross-examined at a committal hearing. In its report on committals, the Northern Territory Law Reform Committee decided not to abolish committal proceedings on the basis that **well-conducted committal hearings promote efficiencies** within the criminal justice system. In particular, they referred to early disclosure by the Prosecution which allows defendants to be properly advised and encourages resolution.⁵²

Question 7 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?

Question 8 Should some or all of the existing pre-trial opportunities to cross-examine victims and witnesses be retained? If so, why?

Question 9 Should cross-examination at a committal hearing be further restricted or abolished? If so, why?

Question 10 If cross-examination at a committal hearing is further restricted, how should this occur?

Question 11 Are there any additional classes of victims or witnesses who should not be cross-examined pre-trial? If so, who?

Question 12 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?

Recommendation: ALHR recommends that the cross-examination procedures remain unchanged. ALHR considers that the recent reforms in relation to cross-examination of vulnerable witnesses in committal proceedings sufficiently addresses the concerns raised in these questions.

Witnesses are cross-examined in only a small number of committal matters. In the cases where a guilty plea is entered after the committal proceeding, any witnesses who gave evidence would not be required to provide evidence a second time. When this is considered together with the fact that over the period 2013 to 2018, an application to cross-examine was made in less than 50% of all committal stream cases (average of 48% across all years),⁵³ it is submitted that the DPP's reform proposal overstates the frequency at which witnesses are required to give evidence twice. Indeed, in many cases where matters settle at the Committal stage, no witnesses at all will be required to give evidence.

⁵¹ Ibid.

⁵² Northern Territory Law Reform Committee: Report on Committals (Report No. 34 – September 2009).

⁵³ Victorian Law Reform Commission, Issues Paper June 2019: Committals, Table 1 and Table 2, 15 and 18.

While ALHR is very conscious of the importance of protecting the rights of witnesses and victims and the fact that providing evidence can be highly traumatic and stressful,⁵⁴ it is crucial that this aspect of committal hearings is not exaggerated and co-opted for an alternative purpose. Further, the protection of the rights of particularly vulnerable witnesses and victims is better addressed via specific reforms designed to protect them throughout all stages of the criminal justice process. For instance, reform of relevant Evidence Acts to give people with complex communication needs a general entitlement to have a specially trained Communication Assistant present for any contact with the criminal justice system, is likely to provide far more comprehensive protection.

In support of protecting an accused' right to cross-examine Crown witnesses, the Coldrey Report⁵⁵ drew particular attention to the difference between a witness statement and evidence adduced from cross-examination. Whilst the revelation of the Crown case can be accomplished administratively by the production of documents, the Report noted the vast difference between subjecting an accused person to trial on the basis of typewritten statements of unknown reliability and presenting an accused person for trial upon the basis of evidence, the potency of which has been tested by cross-examination.

According to OPP's own data, over the past five years, between 3% and 4% of committal stream cases have had the charges withdrawn or the matter has been discharged.⁵⁶ While this might seem like a small proportion of cases, Mr Justice Lee of New South Wales Supreme Court rightly stated, in a paper entitled 'In Defence of the Committal for Trial' delivered at the Second International Criminal Law Congress:

It is not an argument for abolition of the committal that only a small percentage of those charged are discharged at committal, for the very requirement that a case must be made out at the committal is itself, and has been, a significant factor inhibiting baseless committals.⁵⁷

Question 13 Should the current test for committal be retained?

Question 14 Having regard to the DPP's power to indict directly, is there a need for a test for committal?

Question 15 Is there an appropriate alternative process for committing an accused person to stand trial?

Recommendation ALHR supports the current test for committal proceedings being retained.

The DPP argues that its proposed model for reform, which abolishes the magistrate's committal decision, is a natural progression following the introduction of the independent office of the DPP.⁵⁸

⁵⁴ Victorian Law Reform Commission, 'The Role of Victims of Crime in the Criminal Trial Process' (Report No 34, August, 2016), 207.

⁵⁵ Advisory Committee on Committal Proceedings 1986, 'Report on Committal Proceedings', Victorian Government.

⁵⁶ Victorian Law Reform Commission, Issues Paper June 2019: Committals, Table 5, 20.

⁵⁷ John Coldrey QC (Director of Public Prosecutions Victoria), 'Committal Proceedings: the Victorian Perspective' (undated), 4, accessed at < <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/07-coldrey.pdf>>.

⁵⁸ Victorian Law Reform Commission, Issues Paper June 2019: Committals, 70; see also the Director of Public Prosecution, 'Proposed reforms to reduce further trauma to victims and witnesses' Policy Paper 1 October 2018, 7.

ALHR notes that this appears to be a moot point given the OPP has been independent since 1982, and John Coldrey QC was the DPP when he made recommendations in 1984 for the retention of committal hearings.⁵⁹

In a 2014 NSW inquiry into committal hearings, the Law Society of NSW submitted that the committal decision provides transparency and impartiality that could not be achieved if the OPP were given sole responsibility for filtering out weak prosecutions.⁶⁰ NSW Young Lawyers also submitted that there needed to be some form of pre-trial process, independent of the OPP that evaluates the strength of the evidence against the defendant.⁶¹

Further, a Senior Public Defender submitted to the NSW inquiry that the positive features of committals are not reflected in statistics about the number of discharges. In his view, if committals were abolished and the independent decision-maker removed from the process, there would be less impetus for the parties to engage to the same extent in the pre-arraignment phase.⁶²

This was also an argument that featured strongly in the 1990 debates on the abolition of committals. Then Commonwealth DPP Mark Weinberg expressed the view that the integrity of the criminal justice system called for the continued involvement of magistrates in determining whether prosecution authorities are correct in saying that the case is of sufficient weight to justify putting the defendant on trial.⁶³ It is one thing, he argued, to have available the residuary power to *ex officio* indict in extreme cases, and another to take over the task of independently scrutinising the evidence from judicial officers.⁶⁴

Question 20 Do committal proceedings contribute to inappropriate delay in the Children's Court?

Recommendation ALHR considers that the recent reform to the *Children, Youth and Families Act 2005 (Vic) (CYFA)* have caused an unsatisfactory number of initiations to the Children's Court committal stream.

The 2018 amendments to the CYFA have significantly broadened the scope of offences which cause an accused child's⁶⁵ case to be dealt with outside the Children's Court; prior to the reforms, only six death-related offences fell within this category.⁶⁶ The impact of this reform is reflected by

⁵⁹ John Coldrey QC (Director of Public Prosecutions Victoria), 'Committal Proceedings: the Victorian Perspective' (undated), 4, accessed at < <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/07-coldrey.pdf>>.

⁶⁰ Law Society of NSW, *Consultation EAEGP32*.

⁶¹ New South Wales Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 13.

⁶² M Ierace, Senior Public Defender, *Submission EAEGP15*, 3.

⁶³ M Weinberg, 'A Prosecution Perspective' in J Vernon (ed.), 'The Future of Committals', Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 139, 145.

⁶⁴ *Ibid*, 151.

⁶⁵ When the accused child is aged 16 or over at the time of the offence.

⁶⁶ Murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death: *Children, Youth and Families Act 2005 (Vic)*, s 356(1).

the fact that nine committal stream cases were initiated in 2014–15, whereas 45 committal stream cases were initiated in 2018–19.⁶⁷

ALHR is concerned with this two-fold increase in the number of initiations in the Children’s Court committal stream. This has the propensity to cause delay when an uplifted matter is transferred back to the Children’s Court for determination, for example, if resolution is achieved on the basis of downgraded charges that can be determined summarily.⁶⁸

In light of the number of matters involving accused children which are being dealt with outside the Children’s Court and the delay this can create, ALHR submits that the VLRC should consider the rights of children under article 40(2) of the Convention on the Rights of the Child (see response to question 1) in its consideration of reform to committal proceedings, and/or further reform of the CYFA.

Question 21 What are the resource implications of any proposed reforms to committal or pre-trial proceedings?

Recommendation ALHR notes that the cost of abolishing or reforming committal hearings may be prohibitively high, and that their abolition is a false economy.

Reforming pre-trial procedure may have wider impacts throughout the criminal justice system, and implementing reform is likely to have resource implications. For example, an increase in voir dices or directed acquittals, or the attempted prosecution of cases with no reasonable prospect of conviction all have resource implications in the operation of the criminal justice system. Utilising superior Courts’ time to achieve resolutions that have hitherto be achieved in the Magistrates’ Court is a false economy. Ironically the costs occasioned by the proposed extinction of the committal process will inevitably prove to be greater than the savings envisaged by the exercise.⁶⁹

Further, on the 30th of April 2018, significant changes were made to The *Criminal Procedure Act 1986* (NSW) such that committal hearings were effectively abolished and replaced with a new process; charge certification and case conferencing.⁷⁰ The ‘*Early Appropriate Guilty Plea*’ (EAGP) reforms also made significant changes to the committal process.⁷¹ Only serious indictable offences committed by children are subject to the *EAGP* committal process. The overall aim of the reforms is that they will facilitate negotiations and expeditious resolution of children’s committals.

⁶⁷ Victorian Law Reform Commission, Issues Paper June 2019, Table 8; Response to Request for Children’s Court Data Email from Children’s Court of Victoria to Victorian Law Reform Commission, 16 May 2019.

⁶⁸ *Criminal Procedure Act 2009* (Vic) ss 168, 168A.

⁶⁹ John Coldrey QC (Director of Public Prosecutions Victoria), ‘Committal Proceedings: the Victorian Perspective’ (undated), 5, accessed at < <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/07-coldrey.pdf>>.

⁷⁰ Fernanda Dahlstrom, ‘Changes to Committal Proceedings (NSW)’, accessed at <<https://www.gotocourt.com.au/criminal-law/nsw/changes-committal-proceedings/>>.

⁷¹ Annie Whitehead and Aaron Tang, ‘Early Appropriate Guilty Pleas for child defendants’ *Law Society Journal*, Issue 46, July 2018, 78-79, accessed online at <<https://lawsociety.cld.bz/LSJ-July-2018/78>>.

However, the EAGP reforms cost the NSW Government \$92 million to implement.⁷² The reforms were part of a wider criminal justice reform package which cost \$200 million.⁷³ Of this money, a proportion went to the New South Wales Police Force and the New South Wales OPP.⁷⁴ The New South Wales Government has since committed \$19 million for the funding of Legal Aid lawyers.⁷⁵ The expense associated with effectively abolishing committals in NSW, at least in the short term, appears to be very high. They would appear to outweigh any purported savings.

5. Conclusion

ALHR submits that the available evidence regarding the current committal system suggests it is not as unsatisfactory as some critics have suggested. The evidence indicates that a substantial number of weak prosecution cases are being filtered out, and a large number of guilty pleas are being identified at the committal stage. The present arrangements also seem to be operating reasonably well in relation to disclosure mechanisms. Furthermore, there appears to have been somewhat exaggerated perceptions of the amount of time in Magistrate's Courts which is expended on committal hearings and of the extent to which committals have contributed to delays in the whole system. Claims about the impact of committal proceedings on witnesses also appear to have been overstated, given the small proportion of committal hearing that seek and are granted leave to cross-examine witnesses.

There is no doubt that some aspects of the committal system may be improved, but ALHR submits that is not fundamentally flawed. Any future policy decisions about it should flow directly from recommendations out of the VLRC inquiry and they must be based on clear and incontrovertible evidence, not unsubstantiated hopes or optimistic assumptions regarding saving time or convenience in the operation of the criminal justice system. It is respectfully submitted that the so-called benefits of their abolition have not been demonstrated in those States which have taken that course.

It is submitted that contested committals should not be abolished. While not perfect, they are a vital link in the criminal justice system and in the protection of the right to a fair trial.

If you would like to discuss any aspect of this submission, please email me at:



Yours faithfully

Kerry Weste

President
Australian Lawyers for Human Rights

⁷² Emmanuel Kerkyasharian, 'Crisis in Legal Aid' (Spring 2018) *Bar News, New South Wales Bar Association* 18, 20.

⁷³ *Ibid* 1.

⁷⁴ New South Wales Office of the Director of Public Prosecutions, *Annual Report 2017–18* (2018), 17.

⁷⁵ Emmanuel Kerkyasharian, 'Crisis in Legal Aid' (Spring 2018) *Bar News, New South Wales Bar Association* 18, 20.