

# **COMMITTALS – DISCUSSION PAPER**

Response on behalf of the Criminal Bar Association of Victoria

## **THE CRIMINAL BAR ASSOCIATION OF VICTORIA**

The Criminal Bar Association (“CBA”) is the peak body for barristers in Victoria practising in the criminal law. Its members comprise almost one quarter of all barristers practising in Victoria and it counts almost one third of Victoria's Judiciary among its Honorary Members. The Association issues press releases, regularly meets with the judiciary and government, and is involved in the continuing legal education scheme of the Victorian Bar. The website of the CBA can be found at [www.crimbarvic.org.au](http://www.crimbarvic.org.au) and is regularly updated.

## **INTRODUCTION**

This is a response on behalf of the CBA to a discussion paper circulated by the Department of Justice (“Justice”) which is reviewing committal hearings in Victoria pursuant to the Justice Statement released by the Attorney-General in May 2004.

The CBA assisted in the compilation of the discussion paper by providing a preliminary report and participating in the consultation process which included two workshops where the options referred to in the discussion paper were first formulated.

In terms of both principle and policy the CBA is committed to the retention of committal hearings. We believe that it provides the best opportunity for the prosecution and the defence to fairly identify relevant issues and test the sufficiency of the evidence at an early stage. If the process leading up to a committal hearing is conducted with rigour, fairness and transparency there is potential for an early resolution of matters and correspondingly a just outcome. Accordingly the CBA believes that a properly run committals system is an essential step in a fair and just system of criminal justice.

## OVERVIEW OF CBA RESPONSE

An overview of the position of the CBA to the discussion paper and committals generally (prior to a detailed response to the specific questions raised in the discussion paper) is best summarised by the following points:-

i). We support Option One.

In principle the CBA supports change to the committal hearing process so that the focus is directed away from a focus on procedural compliance prior to a contested hearing and towards resolution and/or confinement of the issues. Option One is the process that is capable of achieving this outcome.

The capacity for Option One to succeed is however dependant upon the extent to which the Office of Public Prosecutions (“OPP”) is properly funded and structured.

Since the OPP is responsible for the prosecution of all committals in this State involving breaches of State law it is essential that at an early stage in the process the OPP is satisfied that:-

- a). appropriate charges have been laid; and
- b). that the material in the brief of evidence is sufficient to support them.

This is an essential pre-requisite. Without it Option One becomes a hollow and toothless exercise.

ii). Adequate Defence Funding

It is also essential that at an early stage a defendant is able to obtain proper legal advice and representation. The success of informed dialogue between the parties, which is at the heart of Option One will depend upon it.

iii). A Comprehensive Disclosure Policy

During the committal process and prior to a committal hearing the prosecution (including the OPP, the informant and other relevant third parties) disclose to the defendant all material that bears upon the case, including a list of unused material. Without full disclosure negotiations will not be conducted on a level field and the process will become distorted and unfair. Additionally unless and until the defence is able to access all material the motivation to achieve a resolution is diminished.

A separate document concerned with disclosure policy and the need for legislative prescription is annexure "A" to this paper.

iv). Identification of the Real Issues

The real issues in the case are identified at an early stage and leave to cross examine witnesses on these issues be granted. This is also an essential step in Option One.

This will only occur if points -(i). to (iii). are implemented

v). Unambiguous Committal Test – Role of the Court

The CBA believes that the Court should continue to fulfill an important and independent role at committal hearings. It should be able to protect a citizen from arbitrary and unjustified prosecution. This can only be achieved if the test for determining whether a defendant is committed to stand trial is unambiguous and is capable of ensuring that weak cases in which there is no prospect of conviction are terminated. The present test is too ambiguous.

The CBA recommends the adoption of the current NSW test which considers whether there is a reasonable prospect of conviction.

Whilst this might elevate the role of the Court and increase the possibility of discharge it will also ensure that the prosecution are better prepared; which is a principle aim of Option One.

vi). Direct Presentment Role of the DPP

The CBA believes that the role of the Committal Court should not be undermined by the Director of Public Prosecution (“the Director”) DPP unilaterally choosing to directly present for trial a citizen who has been discharged.

The decision whether a citizen should or should not be prosecuted for an indictable offence is not solely that of the Director. Nor should it become so. The Court must be able to provide an independent buffer between the citizen and the executive.

The CBA believes that a defendant who has been discharged at a committal hearing should only be directly presented to stand trial if upon application by the Director to the Supreme Court the Court finds:-

- a). that new evidence exists which would have affected the decision; or
- b). error has been demonstrated.

## **SPECIFIC QUESTIONS**

### Question 1 [Purpose of Committals]

The list generally reflects the purposes of Committals. We would add that Committals provide both the prosecution and the defence an early opportunity to assess the quality of important witnesses. This can be significant in determining whether a prosecution should be continued or in convincing a defendant that he or she should plead guilty.

We would also add that the reference to “disclosure of the prosecution case” should not be limited to only those matters that the prosecution see as relevant to its case. There are much wider considerations that are set out in the annexure “A”.

#### Question 2 [Plea Brief]

Although the plea brief process is rarely used, it should be retained as it does provide a useful alternative in the event that a matter is settled prior to the brief being served.

Even if Option One is enacted, there will still be some cases where negotiation between the parties resolves the charges and a guilty plea prior to preparation of a brief.

#### Question 3

The information presently in Schedule 5 is sufficient.

#### Question 4 [Reserved Pleas]

Reserved pleas should be retained. The recent increase in the number of the reserved pleas is a product of various failings in the present system. In particular it is indicative of the trend away from matters settling at the Committal stage being sent through to the case conference stage in the County Court, where more meaningful discussions occur. This is due to the lack of preparation and allocation of senior people by the OPP. It is also the product of a committals test that inevitably requires a defendant to stand trial.

It is hoped that the proper implementation of Option One will resolve some of these problems as would a more refined committals test. Notwithstanding, it is proper that a defendant still be entitled to reserve his or her plea at the Committal stage. It is not the trial of the issues. At the committal stage the state of negotiations between the parties may be ongoing in which case the requirement to enter a plea is undesirable and potentially unfair. A defendant may want to plead guilty to one charge but not the other. If forced to enter a plea, then the guilty plea might be later used against him or her in proof of the other count.

These issues are discussed in the judgement of Ipp J. in *R v Atholwood* (1999) 109 A Crim R 465 and adopted by the High Court in *Cameron v R* (2002) 209 CLR 339.

Question 5 [Option One - Advantages]

The significant advantage of Option One is that a greater number of cases will resolved at an early stage. This will help alleviate the ever increasing case list in the County Court with a corresponding saving of public and private funds. It will also help to relieve the burden experienced by victims through the delay.

In short the Option One has the potential to create a fundamental shift in focus from the end of the process to the beginning of the process. This represents both a shift in resources as well as a shift in culture. Its potential for positive change is however fundamentally dependant upon adequate funds and structure being allocated by the OPP so that the issues between the parties have the potential for an early resolution. At present problems in the charges and/or the brief of evidence are not being identified at an early stage. They are either being ignored or the OPP is unaware of them. Cases that should settle are not. This is clogging up the process unnecessarily with the associated cost and trauma.

Question 6 [Option One – Disadvantages]

If properly implemented the significant advantages of Option One overcome any perceived disadvantages.

Question 7 [Option Two – Advantages]

We see little advantage in the adoption of Option Two. It does not address the current problems. Neither party is required to be prepared at an early stage. There is no provision for proper disclosure. It will not produce any cultural change as in effect it maintains the status quo.

Question 8 [Option Two – Disadvantages]

Refer to question 7.

Question 9 [Option One or Option Two]

For the reasons stated the CBA believes that Option One is the only realistic change to the present system. However if implemented it will not achieve its aims unless and until a system of management is implemented within the OPP that provides for the proper management of the case prior to the brief of evidence being served.

Question 10 [Early decision making]

Without the capacity for early decision making by the OPP or CDPP (Commonwealth Director of Public Prosecutions) Option One will fail.

There is no reason in practice why an appropriate officer of the OPP or CDPP who is sufficiently familiar with the suggested charges and the brief of evidence cannot seek the advice and instruction from a Crown Prosecutor without the need for the Prosecutor to read all the material. This should not be an expensive exercise, but it may involve a change in practice.

What is required is for an officer of sufficient knowledge and experience to confer with a Crown Prosecutor and be able to explain the basis for the suggested charges and whether evidence exists to prove each element. The advantage of this is that from an early stage the appropriate officer is acting under the direction of a Crown Prosecutor so that meaningful discussions can then occur with the representatives of the defendant.

Question 11 [Police charging practices]

Earlier involvement might or might not improve police charging practices, but it would certainly rectify at an early stage the problems created by the laying of inappropriate charges. At present police tend to lay every imaginable charge whether or not it is capable of proof. This wastes valuable Court time and causes unnecessary cost. It should not be the responsibility of the Court

or the defendant to identify the appropriate charges after scrutinising the brief. This however is happening. Early participation by the OPP is essential.

Question 12 [Quality of Briefs]

It is inevitable that early involvement by the OPP would improve the quality of briefs. The quality would also be improved by better prescription of how briefs should be structured, with appropriate pagination and indexing.

Question 13 [Identification of Charges]

Earlier involvement by the OPP in identifying the appropriate charges and overseeing the brief must produce greater certainty for a defendant of the case he or she has to meet. This will inevitably produce more meaningful dialogue directed to an earlier resolution- either in terms of a plea of guilty or a trial.

Question 14 [Early involvement - Option One – Option Two]

As stated the CBA supports Option One. Early involvement by the OPP is as essential step in its implementation and success.

Question 15 [Savings in System]

The CBA believes that if Option One is implemented there will be considerable saving at all stages along the line. There will be a saving of Court time in the Magistrates Court. In particular there will be an easing of the congestion in the County Court and less pressure on the Court of Appeal.

Question 16 [Allocation of Resources]

If there is a proper allocation of funds to ensure that Option One is properly implemented the CBA believes that the advantages will certainly outweigh any perceived disadvantage.

Question 17 [Application for Summary Jurisdiction]

There should be no requirement to give notice of an intention to apply for summary jurisdiction. The issue of summary jurisdiction can arise during negotiations or in the course of a committal hearing. There needs to be flexibility in the system. Provided the parties are on top of the material they are able to deal with an application without there being any need for notice to be given.

Question 18 [Amendment of Schedule 5]

The committal process should provide for a matter to be dealt with summarily at any stage, even if this occurs at the conclusion of a committal hearing. If a Magistrate believes that the case should properly be dealt with in the Magistrates Court it should be. The administration of justice is not served by such a case being added to the long list of cases already before the County Court.

Question 19 [Disclosure - Identification of Issues]

If the charges are properly clarified and the brief of evidence sufficiently clear in support of the charges then the issues between the parties are readily identifiable. This is what Option One is supposed to achieve. As an adjunct to this is proper disclosure by the prosecution as discussed in annexure "A".

The CBA believes that whilst a defendant should be required to identify the relevant issues for the purpose of a contested committal hearing, a defendant should not however be required at the committal stage to make any binding admission or statement or disclose his or her defence. Such a requirement would in effect shift the burden of proof. At trial an accused is only required to disclose his or her defence at the conclusion of the prosecution case.

There is an important distinction between revealing a defence and identifying the issues in dispute. The requirements of the *Crimes (Criminal Trials) Act* are directed towards identifying the essential issues between the prosecution and the defence. There is no requirement for an accused to reveal his defence. The CBA opposes any attempt to alter this basis principle.

Question 20 [Prosecution Statement]

A case can change between committal and trial. Accordingly, neither party should be locked into a binding statement about the case.

Question 21 [Delay in Material]

The present delay in providing material inevitably involves forensic testing (ie: drug or DNA analysis). This is simply a product of modern police techniques and a lack of resources (both financial and professional). There is no simple solution to this problem. The present delays have resulted in defendants being admitted to bail.

Currently some Magistrates list committal hearings prior to the provision of forensic tests in the hope that they will become available in time for the hearing. This does not always happen, or they are provided too late prompting an application to adjourn the committal. Short of suggesting a radical increase in funding and professional staff for VFSL there is no remedy that the CBA can suggest.

Question 22 [Extension of Time]

An extension of time for the service of the hand up brief should be by application to the Court. This is the present system and it should be retained. If a case is not properly managed by the Court, it tends to disappear in the cracks with significant problems emerging later.

Questions 23 and 24 [Rules for Hand-Up Briefs]

There should be one set of general rules for all hand up briefs. This would establish the minimum requirements. However there should also be the capacity for the content of briefs to be subject to practice directions by the Court. In more complicated cases such as complex fraud or drug cases, the brief may need to be supplemented by appropriate summaries and flow charts.

Questions 25 and 26 [Format of Hand-Up Brief]

Not all defendants have access to a computer. Indeed not all of our members have computers. Briefs should still be served and filed in paper but also available upon request by the defendant in

electronic format. In more complex cases, where the size of the brief is significant, the use of electronic format may provide a useful alternative, but we do not believe it should be provided in substitution for the traditional format.

Questions 27 [Trial Briefs]

Traditionally trial briefs were always served in paper format. This is no longer the case and it is creating the potential for significant disadvantage to an accused, who does not choose to be a party to the proceedings. If this is a policy decision by the OPP to save costs there should have been proper consultation. If it is intended to continue to serve briefs in this format, allowance must be made for the provision of a paper brief at the request of an accused.

Question 28 [Withdrawal of Statements]

There is no need to withdraw statements from the brief that are ruled inadmissible or are withdrawn, provided there is proper notification by the Crown of the names of witnesses that are to be called. This is contained on the presentment.

Question 29 [Cross-Examination of Witnesses]

An agreement between the OPP and the defendant of the witnesses to be called for cross-examination at the committal hearing will assist the Court in determining whether to grant leave. However we do not believe that an agreed list should determine this issue. The requirement for leave to be granted should be retained as the Court has a duty to the community to ensure that resources are not being wasted. In short it is working well under the present system.

Questions 30, 32 and 33 [Restriction on Cross-Examination]

In Victoria once leave to cross-examine has been granted there is no restriction on the range of that cross-examination except as provided by the rules of evidence as enforced by the Court. By way of contrast, in N.S.W. cross-examination is limited to the issues identified in the application for leave. If it is intended to go beyond those issues leave of the Court is required.

Whilst it might appear that there is a significant difference between the two, it is the experience of the CBA that in practice there is little difference. Counsel who are properly on top of the relevant issues in the hearing cross examine on those issues. If during the hearing an issue arises that is beyond the issues earlier identified the Court invariably grants leave to cross examine.

Problems do arise with repetitive cross examination particularly where there are multiple accused. Some Magistrates are prepared to intervene whilst others are not. In this regard the CBA would support some minor legislative amendment to enable Magistrates to intervene where the cross examination has been unreasonably repetitive or prolix.

Question 31 [Test for Leave to Cross-Examine]

The current test for leave is appropriate and should not be changed. It has already been the subject of amendment and is currently working well.

Question 34 [Witnesses to read out Statements]

Evidence from witnesses (including evidence in chief) is usually given orally. The hand-up brief procedure in Victoria has for many years replaced the usual practice by permitting witness statements to be tendered, if they are in the appropriate form and are adopted by the witness on oath or affirmation. This is not the practice in other States.

The CBA believes that in general the Victorian practice has operated well, with a resultant saving in time and expense for the community and the defence.

If all prosecution witnesses are required to read their statements out aloud, committal hearings will take longer. The CBA would not endorse a general requirement of this nature.

However, we do believe that there are occasions when it is in the interests of justice that a witness be required to read aloud their statement in Court before it becomes their evidence in chief. Those occasions usually arise when the witness is a tainted witness (such as an

accomplice or prison informer) or a witness who for a variety of reasons may be regarded as unreliable, or the circumstances in which the statement was taken raise concerns. In these instances a witness should be required to read aloud their statement if requested to do so by the defendant.

Questions 35 and 36 [When should the Witness be so required?]

In the limited circumstances referred to in question 34 the CBA believes that the Court should require the witness to read out their statement when requested to do so by the defendant. If the prosecution object to this procedure then the Court should only refuse the defence request if the prosecution satisfies the Court that it would be contrary to the interests of justice to so require.

Question 37 [Committal Test]

The issue of the committal test ultimately depends upon what is perceived to be the role of the Court at a committal hearing and what is perceived to be the role and function of the Director of Public Prosecutions (“the Director”). This is a matter of principle and philosophical perspective.

Historically a committal Court exercises an administrative function which oversees the prosecution of a citizen for an indictable offence to determine whether or not they should be put on trial. The Court provides a filtering process which is independent from the executive branch of government.

The Director is a creature of statute. Pursuant to s.22(1) of the *Public Prosecutions Act* 1994 the Director’s functions include:-

[authority] to institute, prepare and conduct on behalf of the Crown, proceedings in the High Court, Supreme Court or County Court in respect of any indictable offence.

Contrary perhaps to the views that others assert, the Act does not confer on the Director the sole discretion for deciding who is or is not to be prosecuted for an indictable offences in this State. The Act does not abrogate the role and function of a Court at a committal hearing.

If contrary to our opinion, the Director is the sole arbiter of who is to be prosecuted for an indictable offence, then the function of a committal hearing is reduced to a mere process of discovery for the benefit of a defendant. In this instance the Court's role becomes perfunctory and the committal test becomes irrelevant.

If on the other hand the true position is as we assert, - that is that the Director is not the sole arbiter and that the Court fulfills an important and independent function which protects the rights of citizens - then the committal test is a matter of significance.

The CBA believes that the current test does not adequately fulfill its function. When first introduced following the report of the Coldrey Committee, the test was intended to permit Magistrates to take into account issues of credit (without usurping role of the jury) and then consider whether the evidence militated sufficiently towards a conviction. However, following a number of decisions such as *Thorpe v Abbotto* which was primarily concerned with the issue of competing inferences, the ambit of the test has become too restrictive, particularly in the manner in which it is being interpreted by Magistrates, which is not uniform.

There is a pressing need for an unambiguous test that is simple in its application, which promotes consistency and which provides the Court with an important role in weeding out weak cases.

Having considered the tests in other jurisdictions we support the test in NSW, which focuses on whether there is "a reasonable prospect of conviction". The test is easily understood, it is simple, it will promote consistency in application and it will give the Court some bite in the Committal process.

We do not believe that the NSW test will change the character of the Court's function, which remains administrative. Nor do we believe that the test will require Magistrate's to engage in discretionary rulings on evidence. This has never been their function. In short whatever concerns have been expressed by interest groups to date are easily answered by reference to the NSW experience.

Anecdotally the change of test in NSW in 1996 has not led to a flood of persons being discharged. Nor has it resulted in a significant increase in the number of persons receiving *ex officio indictments*. We believe that the NSW test provides a fair and simple test which will provide a number of benefits, including:-

- a). the prosecution are more likely to ensure that cases are properly prepared at the committal stage;
- b). the process is better understood;
- c). weak cases are weeded out – this will provide a significant cost saving;
- d). the significance of the Courts' role is enhanced;
- e). there will be greater consistency in decision making by Magistrates.

That the test is similar to that which is applied by the Director is also immaterial. The Director might simply disagree with a Magistrate's decision and choose to prosecute in any event. There is nothing new in the fact that the Director from time to time considers that decisions of a Judges and Magistrates are attended by error. It happens on a regular basis and the Director has his remedies.

Even with the present test based on the "sufficiency of evidence" – it does not mean that if a person is committed to stand trial that the Director will decide to proceed, even if he considers the same evidence in light of the same test. This happened recently in the matter of George Defteros. Despite submissions by his counsel that the evidence at its highest didn't support the charges, he was committed to stand trial. Subsequently the Director agreed with the view of defence counsel and entered a *nolle prosequi*. In reaching this decision the Director stated that it involved a question of law and did not involve an assessment of the credit of any witness.

Question 38 [Cost Implications]

We do not believe that there will be any negative cost implications if the test is changed. Whatever additional costs orders might be made in favour of successful defendants will be adequately offset by the savings made further along the trial process.

Question 39 [Discretion to Award Costs]

The discretion to award costs should not be affected by a subsequent decision by the Director to directly present. A successful litigant is entitled to his costs. This was recognized in *Latoudis v Casey* as well as in the amendment made to clause 26 of schedule 5 of the *Magistrates' Court Act 1989*.

Questions 40 and 41 [Comments by Magistrates]

There is no place for Magistrates making additional comments about the strength or weakness of a particular case other than those normally expressed during the decision making process. That has never been the role of the Court and should not become so. The Court is to apply the rule of law. Comments of the type contemplated, even if they emanate from a judicial officer, does not serve the ends of justice.

Questions 42 and 43 [Special Decisions]

Subject to the CBA's view that the Director should require leave of the Supreme Court to directly present following a complete discharge at committal (as expressed in answer to question 44) the CBA believes that the process for a special decision should be simplified as suggested in question 42. There is no useful purpose served by requiring the Director to first consult with the Director's Committee, in order to refine the counts on the presentment.

It is also the view of the CBA that the 'Special Decision' process is of little utility given that the Director is not bound by the views of his committee. His discretion is unfettered, subject only to the direction of the Attorney-General. There is no independent buffer between the citizen and the

executive. Where a Court has discharged a person because of the insufficiency of evidence, the benefit of that decision should not be lost simply because the Director, who is member of the executive, disagrees. Confidence in the administration of justice is eroded. It is for that reason that the CBA believes that the decision to directly present should require the leave of a superior court.

Questions 44 and 45 [DPP'S Power to Directly Present]

For the reasons already expressed, in certain cases there should be a restriction on the power of the Director to directly present. That restriction should occur in cases where a person has been discharged of all offences at the committal hearing. The CBA endorses paragraph 19.3 in the Discussion Paper and also endorses the adoption of the UK model set out in 19.4.

In the absence of fresh evidence or a demonstrably erroneous decision by the Magistrate, it is unsatisfactory that the Director should notwithstanding be able to send the successful defendant to trial. As stated, confidence in the administration of justice is eroded. The decision of the Magistrate is swept aside at the behest of a member of the executive. The benefit of leave being required from a superior court is the independent protection of the court in the exercise of its supervisory role. The process is transparent and consistent with the ends of justice.

In our opinion there is no loss of independence in the role or function of the Director by such a requirement. The Director should not consider himself or herself to be independent from the supervision of the Courts when another Court has made a decision with which he or she disagrees.

Question 45 [Role of DPP and Magistrate]

It our opinion the adoption of the UK model should not adversely affect the role of the Director or the Magistrate. It should however produce a positive outcome for the Magistracy who will determine committals in the knowledge that a decision to discharge will have real meaning and significance in the administration of justice. At present Magistrates are acutely aware that a

decision to discharge is nothing more than an expression of opinion that carries little significance for a successful defendant except perhaps on the issue of costs.

Question 46 [Section 56A Hearings]

Changes should be made to the procedure. The process impacts upon the rights of a defendant. Having been charged a defendant is entitled to know when the Court is being called upon to participate in the gathering of evidence which may affect his or her interests. The s.56A process is not part of the investigatory stage. It occurs after a defendant is charged and is wholly concerned with the gathering of evidence by the prosecution to be led in that proceeding. In these circumstances the hearing should not be heard ex parte. The present proceeding amounts to a secret use of the Court process to benefit one party potentially to the detriment of the other.

There is a pressing need for transparency and fairness. The CBA believes that either the process under s.56A should be repealed, or that it should be amended to require notice to be given to a defendant who is entitled to appear and be heard on the application and during any subsequent examination.

Question 47 [Vacation of Order]

Subject to the adoption of our position as set out in answer the question 46, we would adopt an amendment permitting the Court to vacate an earlier order.

Questions 48, 49 and 50 [Post Committal Conferences]

Since the introduction of the *Crimes (Criminal Trials) Act* and the practice of case conferences in the Supreme and County Courts, the CBA believes that there is no benefit in the retention of Post Committal Conferences. They should be abolished.

Question 51 [Evidence after Committal]

Although the procedure in clause 24A of Schedule 5 is rarely used, we agree that it should be retained as it does provide a useful avenue to further examine witnesses if the need arises prior

to the case being managed by the Supreme or County Courts. Accordingly we endorse the general view expressed in paragraph 22.1 of the Discussion Paper.

## **CONCLUSION**

The CBA is grateful for the opportunity to have an input into this important discussion. Committal hearings are an important first step in the criminal trial process. We endorse their retention and urge the implementation of the changes that we recommend in our response. We believe that this is an opportunity to establish a fair and transparent procedure that will enhance criminal justice in Victoria.

**S.A.SHIRREFS S.C.**

**Vice Chairman**

**Criminal Bar Association of Victoria**

Latham Chambers

27 October 2005