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Criminal Procedure Proposals
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Proposed reforms to criminal procedure

Reducing trauma and delay for witnesses and victims

Criminal Law Review

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for the prosecution and the defence. More information on our organisation and activities can be found at: https://libertyvictoria.org.au/.

Thank you for the extension of time granted to make this submission.

Supreme Court proposal: flexible early case management

Questions:

1. Do you support the Supreme Court's proposal?

Liberty supports the Supreme Court's objective of minimising delay in the criminal justice system, particularly in the period between charge and the listing of trial. However, Liberty's view is that the Supreme Court's current proposal will not be effective in reducing delays and may jeopardise the accused's right to a fair trial.

The current proposal may be effective in reducing delay by shifting the workload of the Magistrates' Court into the Supreme Court in appropriate cases. However, the proposal does not address the key issues that lead to delay in the listing of committal proceedings. These include, among others:

- delay in the provision of forensic analysis (DNA, drug testing, ballistics analysis, e-crime reports, transcription of telephone intercept material)
- inadequate availability of remote witness facilities for contested committal hearings; and
- delays in the process of obtaining Legal Aid funding approval.

The proposal indicates that the uplift of matters from the Magistrates' Court to the Supreme Court could occur at the request of a party or at the Supreme Court's own motion. It is not clear whether it is proposed that the Supreme Court will have the power to uplift matters contrary to the preferences of the parties. Liberty is concerned that depriving an accused of a committal proceeding in the Magistrates' Court may disadvantage that person, for example, by burdening an accused who is privately funding their defence with the additional costs of conducting proceedings in the Supreme Court. Consistent with briefing practices across both Legal Aid and the Office of Public Prosecutions, counsel appearing in the Supreme Court are generally paid a higher daily fee than those appearing in the Magistrates' Court.

The proposal may also result in unfairness to the accused if it ultimately leads to a reduction in the use of committal hearings prior to trial. Australian courts have long accepted that committal hearings are necessary to protecting the accused's right to a fair trial. They are the key mechanism through which an accused obtains disclosure of the prosecution case. Liberty's view is that adequate pre-trial disclosure is not confined to the provision of witness statements, which are generally drafted under the guidance of police members. Proper disclosure is achieved where witnesses are cross-examined about important aspects of their potential evidence which are not found in the written materials.

Adequate disclosure protects the right of an accused to a fair trial only where it occurs in a timely manner, that is with sufficient time prior to the commencement of trial to allow for proper preparation. Liberty is concerned that any proposal that pressures the parties

to accept pre-trial *Basha* hearings in place of separately conducted committal hearings diminishes rather than enhances the disclosure process.

2. Are there any difficulties with the proposal which need to be addressed?

Liberty repeats its concerns about the proposal as outlined above under question 1.

3. What further amendments might be required to facilitate the proposal?

Liberty suggests that consideration be given to empowering the Supreme Court to deal with other matters that frequently accompany committal proceeding matters. For example, intervention order applications are often listed alongside substantive criminal matters.

4. Are there any additional matters that need to be considered in relation to the application of this proposal to regional courts?

Liberty suggests that, given the workload of the Supreme Court would substantially increase under this proposal, additional sittings of the Supreme Court in regional courts will be necessary.

5. Are there any resourcing implications for this proposal for the prosecution and defence?

As mentioned above, the cost of conducting proceedings in the Supreme Court is generally greater than in the Magistrates' Court. The majority of accused people appearing in the Magistrates' Court and Supreme Court are funded by Legal Aid. Currently, the daily rate for counsel appearing for an accused on the first day of a contested hearing in the Magistrates' Court is $766. The daily rate for counsel appearing for an accused on the first day of a trial in the Supreme Court is $3,938. The daily rate for counsel appearing on behalf of the prosecution on the first day of a trial in the Supreme Court is $1,540. Therefore, unless fees for counsel appearing in committal hearings remain the same, irrespective of the court in which they are held, the Supreme Court proposal will have a significant impact on the costs of both parties. In addition, the Supreme Court is likely to need additional resources if it is to conduct a higher volume of committal proceedings. These include additional remote witness facilities, video link facilities and audio visual facilities.

The Office of Public Prosecutions, which currently retains solicitor advocates to appear in the majority of pre-committal hearing matters (for example, filing hearings, committal mentions, committal case conferences and bail applications), will face an additional resourcing issue if those hearings are now conducted across multiple courts.

6. ***Where, following the filing of a direct indictment, the Supreme Court considers the balance of justice lies in favour of ordering a committal proceeding, would it be desirable to indicate whether Chapter 4 of the Criminal Procedure Act applies to the proceeding and whether any modifications to this committal proceeding are required?***

Liberty does not foresee any problem with this proposal.

7. ***Are there any particular problems that may arise from, or difficulties that need to be addressed, in relation to the transfer between the jurisdictions of the Magistrates' Court and the Supreme Court? Are any legislative mechanisms necessary to ensure seamless transitions?***

Liberty does not foresee any particular problems that may arise from the transfer between jurisdictions in the proposal.

8. ***The Magistrates' Court deals with many matters related, or connected, to committal processes (e.g. bail applications, DNA orders, disclosure related processes). Are there any issues relating to these matters that need to be considered in the context of this proposal?***

The Magistrates' Court currently handles the bulk of bail hearings in the criminal justice system. It is accordingly equipped to deal with issues that commonly arise in bail applications, which frequently include unavailability of housing for the accused, issues with substance abuse and mental health. The Court Integrated Services Program ('CISP') provides invaluable support for accused people seeking bail. The program is not available outside of the Magistrates' Court and presumably would not be available to an accused seeking bail under the Supreme Court's proposal. Liberty is concerned that accused people seeking bail in the Supreme Court may be materially disadvantaged in their bail applications if they cannot access CISP.

Liberty is also concerned that accused people seeking to list bail applications under the Supreme Court proposal may face longer delays waiting for available listings, depending on how often the Supreme Court proposes to sit as a committal mention court.

Finally, Liberty repeats its concerns about the higher costs associated with conducting these proceedings in the Supreme Court.

Proposal: removal of committal hearing where the complainant of a sexual offence is a child or person with a cognitive impairment

<u>Questions:</u>

1. ***Are any negative effects likely as a result of moving pre-trial examination to the trial court in the specified circumstances?***

Liberty foresees a number of negative effects as a result of moving pre-trial examination to the trial court. The first concern is that this process will jeopardise the right of an accused person to proper and timely disclosure of the prosecution case. While the complainant's evidence is often the crucial evidence in the case, there may also be important evidence from other witnesses, such as complaint witnesses, medical experts, forensic scientists and other civilians. Section 124 of the *Criminal Procedure Act* states that a court must not grant leave to cross-examine a witness at a committal hearing unless there is an identified issue, demonstrated relevance and justification. It should not be presumed that Magistrates are failing to apply section 124 when granting leave to cross-examine witnesses in cases involving child and cognitively-impaired complainants. As such, Liberty accepts that there are identifiable issues for cross-examination in these cases. Removal of the committal hearing will deprive accused people of adequate pre-trial disclosure in circumstances where there are valid reasons for seeking cross-examination.

Moving pre-trial examination into the trial court will mean that disclosure occurs much closer in time to the trial itself. Liberty is concerned that this does not provide for timely disclosure of the prosecution case and will not allow adequate time to prepare for trial. Pre-trial examination in the trial court may also be curtailed by issues of the higher cost of conducting proceedings in the trial jurisdiction due to, for example, the higher daily fees of trial counsel. Late disclosure of important evidence reduces the time for appropriate reflection by both parties. It reduces the utilitarian benefit of pleas of guilty, which would be more likely to occur just prior to trial. Resolution discussions between the parties may be hampered by the lost opportunity of obtaining summary jurisdiction, in appropriate cases. In addition, the prosecution may be inclined to proceed with a greater number of trials because resources will have already been allocated to the case, such as the preparation costs incurred by trial counsel and an instructing solicitor, and the witness attendance and preparation of exhibits for the jury. If more pleas of guilty are entered just prior to trial, then more of these resources will go to waste.

2. What are the resourcing implications of this proposal?

Significant resourcing implications flow from this proposal. They include:

- Increased number of trials
- Longer (and less certain) trial listings
- Increased delays in the running of trials, by virtue of disclosure occurring only at the commencement, or even in the running of the proceeding, which may result in the need for further investigation by police or further instructions by either party
- Increased delays in the running of trials will have flow on effects for witnesses waiting to be called, including professional witnesses such as DNA experts or medical professionals, who are removed from their other work duties
- Increased pressures on trial counsel availability
- Decreased certainty in parties' readiness for trial, or readiness for jury empanelment

- Increased periods of empanelled juries waiting in the jury room while counsel and the trial judge discuss legal issues arising from late disclosure
- Increased risk of juries being discharged due to late disclosure or unforeseen issues
- Increased cost of conducting proceedings in the trial jurisdiction, rather than the Magistrates' Court (including costs of judges, trial counsel and instructors)

3. Are any particular case management practices necessary in either the Magistrates' Court or the trial courts to ensure a focus on narrowing issues and identifying appropriate guilty pleas is not reduced by the delay in witness examination?

It may be argued that matters involving sexual offences are less likely to resolve as guilty pleas, especially in the early stages of the proceeding. This does not appear to be caused by lack of communication between the parties or lack of case management practices, which are extensive in the Magistrates' Court. Sexual offending involves a higher degree of stigma and shame, meaning accused people are more likely to contest the charges. This is especially the case where the offending occurs in an intra-familial setting. To a greater degree than other types of offences, the success of a prosecution will often depend on the credibility of the complainant. In the circumstances, Liberty does not envisage any further case management practices will assist in identifying early guilty pleas.

4. Is it necessary to clarify that section 198(2)(a) of the Criminal Procedure Act (which provides a relevant consideration is whether a witness was available at committal hearing) does not include a complainant who is a child or person with a cognitive impairment, but includes other witnesses who are made unavailable by virtue of this proposal?

Yes, this section should be clarified in the manner suggested if it is the intention of parliament that section 198(2)(a) not include a child or cognitively impaired complainant.

5. Should the Criminal Procedure Act be amended to:

- ***a. provide more clearly for the different circumstances in which a witness may be cross-examined under section 150 (post-committal) rather than section 198 (pre-trial)?, and***
- ***b. codify the Basha hearing and when it applies rather than section 198?***

Given that the County Court now conducts 24-hour initial directions hearings, section 150 serves little purpose. Liberty does not oppose the codification of the *Basha* hearing; however, any codification should provide the trial judge with sufficient flexibility to allow for the conduct of a *Basha* hearing where appropriate in the circumstances of the case. Any codification should also consider any agreement between the parties as to the appropriateness of a *Basha* hearing. Sometimes, due to witness unavailability or other unforeseen circumstances, the parties agree to dispense with a witness at a committal hearing where the prosecution agree that a later *Basha* hearing would not be opposed.

Section 198 should be retained as it is sometimes utilised to pre-record the evidence of witnesses who will be unavailable at trial.

VLRC Recommendation 39: Leave to cross-examine a victim at a committal hearing

Questions:

1. ***Should Victoria introduce a new leave test for the cross-examination of complainants at committal hearing, in the terms proposed by the VLRC?***

Liberty does not support a new leave test for the cross-examination of complainants at committal hearing. Liberty is concerned that narrowing the test for leave to cross-examine would unduly and unfairly curtail an accused's right to adequate disclosure during a committal hearing.

Magistrates rarely discharge cases at committal stage. In matters involving a complainant, discharge is extremely unlikely unless the complainant retracts or substantially departs from their statement. Indeed, in the majority of cases, defence practitioners will not seek to make submissions on the question of sufficiency of evidence, given the low threshold that the prosecution case must meet. This does not mean that the committal hearing is without merit or purpose. Proper disclosure of the complainant's evidence, which is generally provided in the form of a written statement taken by police members, is often only achieved with cross-examination during a committal hearing. Issues that are taken on instructions from the accused, or which are not sufficiently dealt with in the witness statement, can only be raised through cross-examination at a committal hearing. Even where this process does not result in the accused being discharged, it can have a substantial impact on how both parties proceed and the future of the proceeding.

Introducing a new leave test which restricts the Magistrate's consideration to the ultimate question of committal for trial may, in practical terms, eradicate the committal hearing process. It would also require the question of sufficiency of evidence to be raised during the committal mention stage, resulting in increased delay in the preliminary stages of the proceeding. The new test would also ignore all the other purposes of the committal hearing outlined in section 97 of the *Criminal Procedure Act*. Liberty's view is that this is likely to detract from resolution discussions which may diminish the prospects of an early guilty plea.

While it is accepted that cross-examination can be a traumatic experience for a complainant, and that courts should try to minimise this trauma as much as possible, this must not be at the expense of the paramount right of an accused to a fair trial.

2. ***Should any restriction apply to all victims, victims of certain classes of offences, or all vulnerable witnesses?***

Liberty does not support the introduction of the restriction to any witness.

3. Should any restriction apply only to the grant of leave for committal, or also to examination of a witness under sections 150 and 198 of the Criminal Procedure Act or at a Basha hearing?

Liberty does not support the introduction of the restriction at any stage of the criminal justice process, whether at committal stage or trial.

4. Should a victim's wishes about cross-examination have a role in determining whether they may be cross-examined at a committal hearing?

Liberty takes the view that a complainant's wishes should have no role in determining whether they may be cross-examined at a committal hearing. It would seem rare that a complainant would seek to be cross-examined at any stage, even where a complainant is supportive of the case proceeding. While it is important to minimise any trauma experienced by a complainant in the committal proceeding process, this should not be to the detriment of the accused's paramount right to a fair trial. While some complainants may find the experience of cross-examination difficult and upsetting, this process assists not only the accused but also the prosecution to evaluate the strengths and weaknesses of the case.

5. Are there alternative tests for granting leave for cross-examination which might be appropriate?

Liberty supports the current test for granting leave for cross-examination, which requires identification of issues, relevance and justification without unduly limiting the accused's right to a fair trial.

6. Should alternative options to the VLRC recommendation be considered? For example:

- ***making the complainant unavailable for cross-examination at committal hearing, but available in the trial court through a Basha inquiry or section 198 of the Criminal Procedure Act***
- ***introducing considerations related to reducing victim trauma and considering victim wishes to the existing determination of whether to grant leave to cross-examine in section 124 of the Criminal Procedure Act***
- ***adapting the considerations in section 124(5) of the Criminal Procedure Act to apply to all victims or to certain classes of victims?***

Liberty does not support these alternative options for the reasons outlined above.

VLRC Recommendation 18: disallowance of improper questioning

Questions:

1. ***Should section 41 of the Evidence Act 2008 be amended to require a court to disallow improper questions put to***
   - ***Victims who are witnesses, or***
   - ***Any witnesses?***

Liberty does not support either of the proposed amendments to s 41 of the *Evidence Act 2008*. There no need for these amendments to be introduced. Section 41, as it presently stands, provides adequate protection against improper questioning for all witnesses, including complainant witnesses.

As Liberty has previously expressed,[1] it is the practical experience of many Liberty Victoria members, who appear for both the prosecution and the defence, that the courts take the duty to protect witnesses very seriously and are active in interfering with improper questioning where it does (rarely) occur.

At present, judicial officers are able to exercise their discretion under s 41(1) according to the particular circumstances of the case before them. There is no need for Parliament to interfere with this discretion. Trial judges are best placed to make decisions and rulings concerning the fair and just conduct of criminal trials. Moreover, many complainant witnesses already fall within the definition of vulnerable witnesses in the *Evidence Act 2008*, and will therefore already be protected by the requirement in s 41(2).

It is also noted that, in addition to s 41 of the *Evidence Act 2008*, all barristers are, by their own rules, required to act properly when questioning witnesses. As the Bar Rules recognise, a barrister's duty to advance their client's case is always confined by a requirement to act properly and lawfully. Rule 35, for example, requires that: "A barrister must promote and protect fearlessly and by all ***proper*** and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interests or to any consequences to the barrister or to any other person."[2]

Furthermore, rules 61 to 63 of the Bar Rules relevantly provide:

> *61. A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:*
>
> > *(a) are reasonably justified by the material then available to the barrister;*
> >
> > *(b) are appropriate for the robust advancement of the client's case on its merits; and*
> >
> > *(c) are not made principally in order to harass or embarrass a person.*

[1] Liberty Victoria, Submission on the Role of Victims of Crime in the Criminal Trial Process, 26 April 2016.

[2] Legal Profession Uniform Conduct (Barristers) Rules 2015, r 35 (emphasis added).

62. Without limiting the generality of rule 61, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

(a) a barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

(b) a barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions that the barrister asks.

63. A barrister does not infringe rule 62 merely because:

(a) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

(b) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

In short, given there is already sufficient protection against improper questioning, the proposed amendments are unnecessary and undesirable.

2. ***Is there likely to be any adverse effect from the removal of the category of "vulnerable witnesses in section 41?***

   Liberty is of the view that the proposed amendment to s 41 would, without good reason, interfere with the trial judge's discretion to give directions and make rulings, according the circumstances of the case before them, to ensure a fair trial. As already stated, there is no need for Parliament to interfere the trial judge's discretion in this way. There are already sufficient protections in place, and trial judges are best placed to give directions and make rulings concerning the fair and just conduct of criminal trials.

VLRC Recommendation 19: Victim who is a witness entitled to be present in court.

<u>Questions:</u>

1. ***Should section 336A of the Criminal Procedure Act 2009 be amended as proposed by the VLRC [namely by repealing subsection (2)]?***

   Liberty does not support the proposed amendment of s 336A of the *Criminal Procedure Act 2009*. There is no issue identified with the operation of the current provision and there is no need to enact the amendment proposed. Subsection (2) of s 336A *clarifies* the operation of subsection (1), by providing that nothing in s 336A prevents a court from ordering an alleged victim who is a witness to leave the courtroom at any time after giving evidence. There is no need to create potential confusion or uncertainty by repealing it.

The VLRC has recognised that there may be circumstances in which a victim's behaviour justifies their exclusion from the courtroom, such as when their conduct risks prejudicing the jury against the accused or disrupts the orderly conduct of proceedings.[3] The power to order the exclusion of a witness is an inherent power of a trial judge. Amending s 336A by repealing subsection (2) is unnecessary and may create confusion.

Appeal from the determination regarding indictable offences triable summarily.

<u>Questions:</u>

1. ***Are there any issues that would arise due to the creation of an appeal right from a determination under section 29(1) of the Criminal Procedure Act 2009 that a charge for an indictable offence is, or is not, suitable to be determined summarily?***

   Liberty is not opposed to the proposal for the creation of a right of appeal, for both the defence and the DPP, from determinations under s 29(1) of the *Criminal Procedure Act 2009*.

   Liberty points out that the proposed appeal right would obviously place increased stress upon the resources of the County Court, and may also prolong some committal proceedings.

2. ***Should there be a right of appeal from a determination under section 356 Children, Youth and Families Act 2005*** **that a charge is, or is not, suitable to be determined summarily.**

   Liberty is not opposed to the proposal for the creation of a right of appeal, for both the defence and the DPP, from determinations under s 356 of the *Children, Youth and Families Act 2005*.

3. ***Are there different considerations to be considered in an appeal from the Children's Court than those applying in the Magistrates' Court (apart from the differences that already exist concerning when summary jurisdiction should be exercised in those jurisdictions)?***

   Liberty does not identify any different considerations concerning an appeal from the Children's Court apart from those which already exist concerning the question whether summary jurisdiction should be exercised in that jurisdiction.

[3] See VLRC, *The Role of Victims of Crime in the Criminal Trial Process*, at [5.69].

Appendix C: appeal from grant of summary jurisdiction

Questions:

1. ***What time limits are able to be placed upon the appeal process to reduce the potential for delay and fragmentation of proceedings?***

   Liberty does not take issue with the time limits proposed in Appendix C.

2. **Are there any other orders that should be made by the County Court?**

   Liberty does not suggest that any further orders be available to the County Court than those proposed in Appendix C.

3. **Should there be an option for the County Court to send a 'case stated' on a determination to an appeal court (e.g. on a complex case or where legal issues exist)?**

   Liberty is of a view that a "case stated" process is not necessary under the proposed amendments. Determinations under s 29(1) are discretionary. As such, they do not ordinarily involve complex or significant legal issues that would require the consideration of the Court of Appeal by way of a "case stated". Where an appeal concerning a determination of summary jurisdiction is based on a legal issue – for example whether a particular offence is triable summarily under s 28 – an appeal by judicial review is the vehicle that should continue to be used.

If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.

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