Third Party Review of Backlogs in the Tasmanian Court System

Report and recommendations

Lloyd Babb, SC

Contents

Executive summary

It is exciting to have been involved in this work. Planned reform opportunities to address systemic problems are relatively rare. In my experience, most systemic change happens over time and is incremental and unplanned. The process of change is happening all the time at a grass-roots level, noticed or not. It is made up of workarounds, subtle shifts in focus, attitudes and practices in response to prevailing conditions and professional and personal demands.

From time to time, the imperative for change becomes pressing enough to galvanise calls for a more deliberate approach. I happen to have the good fortune of being asked to work with Tasmania at such a point in time.

In conducting the *Third Party Review of Backlogs in the Tasmanian Court System* (the review), I feel privileged to be part of an opportunity taken by Tasmania to meet the challenge of planning for systemic change in the justice system, and to approach complex reform with intentionality.

The impetus for systemic review

In the 2024-2025 Tasmanian Supreme Court Annual Report, Chief Justice Chris Shanahan stated that "*The Court continues to face increasing workloads, backlogs and delay across all the elements of its jurisdiction.*"[1]

Inviting an independent review into court backlogs was a recommendation of Tasmanian justice system leaders following the January 2025 Justice Forum in Hobart. Forum participants, including the Attorney General, judicial leadership from both courts, and CEO and executive-level representation from courts, police, prosecution, the profession and policy makers, were convened to consider shared concerns held by legal and civic leaders about the impacts of delays in court processes, specifically:

> "*… extended case finalisation times, increased costs, and considerable distress for those involved - particularly victim-survivors and accused persons held on remand.*"[2]

The Forum recognised that:

> "*… these challenges cannot be addressed by the courts alone. A coordinated, system-wide response is required to reduce inefficiencies, improve case progression, and deliver sustained improvements in court timeliness.*"[3]

One outcome of the Forum was the decision to commission an independent review into court backlogs.

Contextualising this Tasmanian review

It felt important to me to ensure that the recommendations were made specifically with Tasmania's needs in mind. While this might sound like a redundant observation, I want to be explicit that I have not succumbed to the temptation to think that a solution that works well in one jurisdiction will necessarily work the same way in another.

Nor do I fail to understand the differences between large and small jurisdictions. Having been the DPP in both Australia's largest and smallest jurisdictions, I have a direct understanding of the different challenges faced by each.

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[1] Supreme Court of Tasmania, *Annual Report 2024-25* (Report, October 2025) 37 <https://supremecourt-tas-gov-au.assets.ionatahosting.net/uploads/2025/11/SCT-Annual-Report-2425-FINAL.pdf>.

[2] Tasmanian Justice Forum, *Court Backlogs: Systemic Response, Third Party Review and Next Steps* (internal discussion paper – not published) 2025.

[3] Ibid.

Integral to my recommendations is the insight derived from my consultations with Tasmanian stakeholders specifically for this review. I met with 64 individual Tasmanians, 50 of those meetings were held in-person on one of my 6 trips to Tasmania.

Also in the mix is the experience I have gained during my own not inconsiderable professional legal career, which has often involved a fair share of wrestling with court listing issues from positions including junior defence lawyer, junior prosecutor, legal academic, DPP, Public Defender, Crown Advocate and more. That experience reinforces the view that attempts at top-down change without "buy-in" often meet with as much success as the proverbial "square peg".

My approach to analysis and recommendation-making

Conducting a review process such as this is an excellent reminder that perfect systems and perfect solutions do not exist. Ensuring the recommendations I make incorporate the ideas and experiences of Tasmanian stakeholders is not lip service. I hope that basing my change recommendations on locally derived ideas, rather than seeking to impose "solutions" on Tasmania, will be one of the keys to making them more likely to be adopted and to succeed.

In fulfilling the brief given to me by Tasmania I endeavoured to:

- Elucidate the problems we seek to solve;
- Identify elements of our ideal system;
- Understand contextual conditions and limits;
- Identify potential options for change;

And, with respect to all of the above:

- Choose solutions that I think will set us on the best possible course.

The resulting recommendations are not the only possible way to tackle the issue of backlogs: they are recommendations that my review activities identified as the most apposite reforms based on Tasmania in 2026 and its aspirations and future potential.

One important decision was whether to make recommendations that accept current structural conditions and seek to counterbalance them, or to recommend the structural changes that "bite the bullet" on substantial reform. I chose the latter.

The aim of reforms

Tasmania's current criminal justice process habitually pushes out the timeframes for resolutions in criminal matters, often causing cases to remain in the system far longer than they need to. This contributes significantly to creating unsustainable delays and backlogs.

To deal with the causes of delay and backlog, Tasmania should structurally discourage slow, late-stage matter finalisations and strategically position policy, effort and resources to prompt consistent, good quality, early-stage finalisations. I have referred to this as an "early-stage focus", and it is about encouraging better early planning and decision-making so that charges can move more purposefully and quickly to resolution.

The reforms I recommend have an overall aim to reposition effort and resources to points where they are best placed to achieve appropriate justice solutions much earlier in the justice process.

Changes such as these will help the Tasmanian criminal justice system to fully actualise the fruits of its effort, for instance, the hard work of Tasmanian judicial officers in both the Supreme and the

Magistrates Courts.[4] Compared to the Australian average the Tasmanian Supreme Court uses fewer full-time equivalent judges to finalise each thousand matters. Nevertheless, Tasmania consistently experiences higher percentages of delayed finalisations of criminal cases than other States and Territories. The average number of attendances before the Tasmanian Supreme Court in criminal matters before finalisation in the 2024/25 year was 14.3.[5] Similarly, the latest data shows that the Magistrates Court also has the highest number of attendances for comparable Australian courts, with an average of 5.7 attendances per finalisation in criminal matters.

Available data also indicates a high number of matters being discharged after spending considerable time in the Supreme Court. This is likely because, as I discuss, it is only at that stage that the ODPP is able to become involved and make determinations about the charges, including reasonable prospects of conviction. The discharge figure for the Supreme Court for the 2024-2025 year was 342.

The abolition of committal hearings in Tasmania in 2000 left a vacuum which prevailing conditions have filled with a Magistrates Court process that is missing the involvement of the prosecution as the assayer of evidence and the charge definer. To the extent that effective committal rests upon appraising the evidence in relation to the charge, the current arrangements render time spent in the Magistrates Court without substantial value. This has caused the key business of evidence appraisal to happen in the most expensive jurisdiction – the Supreme Court – *after* a matter is committed.

Taking the path of reforming this issue will require substantial change. For example, it depends on the improvement of disclosure practices – a theme almost universally raised as necessary by review participants.

Improving disclosure: an essential to the operation of criminal justice

Evidence is so functionally integral to the criminal justice process that the provision of disclosure is possibly *the* key factor in determining how efficiently and effectively criminal matters can be finalised. Access to evidence through disclosure can dictate whether a matter is finalised expeditiously or whether it spends far longer than it should being managed as court backlog.

In Tasmania today, it is clear that delayed disclosure is hindering timely criminal case finalisations. While consultees were generally positive about Tasmania Police and recognised the challenges of frontline policing, they expressed frustrations with accessing evidence via disclosure.

Police are responsible for arresting and charging individuals for crimes, for investigations, and – through the process of disclosure – for supplying both their Crown counterpart, the prosecutor, and the accused (the defence) with the evidence which they (police) say proves that the charge is warranted. Both parties – the prosecutor and the defence – need this disclosed evidence: the former as the basis for deciding if the correct charge has been laid or if there should have been any charge laid at all, the latter as the basis for deciding how to plead and negotiate.

This is not a new issue. In his outgoing 2023/24 Annual Report of the Tasmanian Supreme Court, the-then Chief Justice Blow expressed the frustration felt by the Bench about delays as they specifically relate to late disclosure.[6]

My recommendations focus principally on improving disclosure in the Magistrates Court process of committal to the Supreme Court, however I also recommend adopting the approach set out in the

[4] Productivity Commission, *Report on Government Services 2026* (Report, February 2026) Table 7A.22 (Courts) <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.pc.gov.au%2F2026-01%2Frogs-2026-partc-section7-courts-data-tables_0.xlsx%3FVersionId%3DywiKzi9GYlvo.45YczU4CO3iYuojYgfJ&wdOrigin=BROWSELINK>.
[5] Ibid Table 7.24 (Courts).
[6] Tasmanian Justice Forum (n 2).

uncommenced *Magistrates Court (Criminal and General) Act 2019* (Tas) around improving summary disclosure practices.

Tasmania Police leaders participated in this review frankly and with goodwill, expressing a recognition of the need for reform and a desire for clear recommendations related to bringing that improvement about. Police experience their own frustrations with the disclosure process, particularly around a lack of guidance about adequacy. Section 56 of the *Justices Act 1959* (Tas) provides some generic guidance on this point but nothing usefully instructive about what is needed for disclosure to be functional.

It is not an overstatement to say that reforming disclosure processes represents a very a significant shift for Tasmania. Some might argue that it cannot afford to make the change; I argue that at this point Tasmania cannot afford to put off the reform any longer.

A word about funding

Almost all contributors to this review raised the fact of underfunding in Tasmania's criminal justice system. Ideally, justice systems and the important work they do would not face funding pressures, but it is an expensive responsibility and it hardly needs to be stated that the public purse is finite. Criminal law has connectivity to the work of many other important social institutions, including healthcare and education, all of which have a genuine claim on limited public resources.

As a former DPP with experience in relying on and managing criminal justice system funds, I really do appreciate how slim the margins are in small jurisdictions. Recognising that Tasmanian criminal justice is underfunded and that extra resources are scarce, my recommendations are cast within existing levels of funding *to the extent that that is possible while still achieving necessary reform*.

One way of thinking about this review process was to make recommendations only on the condition that they could be implemented without additional funding. Yet I do not think such an approach would create the change needed to "break the back" of backlogs. Meaningful systemic reform and absolute cost neutrality are antithetical, particularly when existing funding is already being stretched thin. Finding efficient ways of working means making transitions, and this needs and deserves investment. I believe Tasmania is in a position where opting not to sensibly invest in reform as a way of avoiding immediate expense will ultimately prove very expensive.

At the same time, I resist the notion that backlog can be solved solely by providing additional resources. While proper resourcing is essential, adding resources without systemic reform is a treatment of symptoms rather than causes.

I envisage that a more strategic application of existing funding can offer overall value by freeing funds that are currently not being used efficiently to be redirected where they are most useful. Introducing a proportion of new funds where that is necessary to establish a reform initiative is a worthwhile investment for improved functioning and reduced backlogs.

Recommendations overview

I have made a set of 20 recommendations designed to encourage and support an early resolutions-focused criminal justice system. Whether, when and how these recommendations are implemented is a matter for Tasmania. I have largely stayed away from being overly prescriptive about implementation unless there was in my view a specific utility in prescribing a certain way of doing things.

Recommendations include harnessing justice system leadership to oversee reform efforts, increase connectivity, and participate in co-design and monitoring. I also recommend adopting specific training and development recommendations made in a paper just released by UTAS researchers.[7]

[7] Jennifer Boocock et al, *Attracting and Retaining Criminal Lawyers in Tasmania* **(**Research report and recommendations, June 2026).

Some of my recommendations go specifically toward introducing structural changes. For example, moving matters out of the Magistrates Court that are better dealt with by tribunal or infringement notice.

I also recommend legislating an early guilty plea sentence reduction scheme, and implementing an initial "super call-over" process that can help to "clear the decks" by getting as many matters as possible appropriately finalised.

These recommendations are interconnected. I have sought to make a set of recommendations that can build upon one another to, over time, establish a system that produces early-stage resolutions. In this way the recommendations can be understood as a suite of reforms, and I suggest they would be most usefully implemented as a suite. Some reforms are only possible when done in this way, for example, the early guilty plea sentence reduction scheme depends on functional disclosure and the involvement of the ODPP.

Acknowledgments

As the sole independent reviewer, I am the "face" of the review, and I certainly devoted my experience and energy to this piece of work, but the product of a process such as this is never down to just one person.

So many Tasmanian stakeholders gave generously of their time and expertise with a will to make a difference. Likewise, many experts from outside of Tasmania, without a direct stake in the outcomes, gave significant contributions. I encouraged all participants to speak freely with me and I have not attached names to any verbatim quotes unless it seemed necessary, and only then with permission.

There are too many important contributions to highlight each individually and I fear I would miss people I definitely should thank, so I take this opportunity to give a general "shout out" to all those who participated in this process.

I do want to give specific thanks to Tasmania's Deputy Premier, Attorney-General and Minister for Justice, the Hon Guy Barnett, for his commitment to this work. Similarly, I thank the Hon Chief Justice Christopher Shanahan, Chief Magistrate, Catherine Geason, Commissioner of Police, Donna Adams APM, DPP Daryl Coates SC, Tasmania Legal Aid Director, Kristen Wylie, Amelia Higgs (President) Luke Rheinberger (Executive Director) of the Law Society of Tasmania, and Kristy Bourne, Secretary of the Department of Justice, for their contributions.

My eternal appreciation to the irrepressible Oliver Hinss, Director, Commission of Inquiry Response Taskforce and his team for their invaluable support. Also, to Athena Pythagoras who contributed with great insight and intelligence and was responsible for the writing up of the Report. I also acknowledge Ben Bartl and Kayla Millen for their assistance with the data report.

Lastly, thank you to the reader. One of my aims in preparing this report was to present my arguments in a way that provides an accessible, useful and, hopefully, enjoyable "read".

Recommendations

Recommendation 1.

Tasmania should legislate to provide the Magistrates Court with powers to manage committals and ensure that the following purposes are achieved:

(i) The setting of a timetable for the disclosure of the brief of evidence from the police to the prosecution and defence;

(ii) The scheduling of a mandatory criminal case conference between the ODPP and defence;

(iii) Preliminary proceedings for the taking of oral evidence of prosecution witnesses (where permitted);

(iv) The entry of a plea in the Magistrates Court; and

(v) The power to dismiss a matter (without affecting the ability to re-lay the charge) if a charge has not been settled within a prescribed period of time and if it is in the interests of justice to do so

Recommendation 2.

The Tasmanian Police Commissioner and the Director of Public Prosecutions should develop an agreed early disclosure protocol and codify this protocol in a publicly available Memorandum of Understanding (MOU)

Recommendation 3.

In criminal matters in Tasmania, the police officer responsible for a case should also be responsible for disclosing directly to the prosecution and defence

Recommendation 4.

Tasmania Police should establish and formalise training initiatives to assist frontline officers and police prosecutors with the delivery of functional disclosure

Recommendation 5.

The Tasmanian ODPP should have carriage of matters for committal in the Magistrates Court

Recommendation 6.

Tasmania should legislate to require the ODPP, during committal-stage proceedings in the Magistrates Court, to certify a charge within a legislatively prescribed timeframe and prior to the requirement for the entry of a plea

Recommendation 7.

Tasmania should legislate a requirement for mandatory, committal-stage conferences between the defence and the prosecution – post-charge certification and prior to the entry of a plea

Recommendation 8.

Tasmania Legal Aid should structure and deliver legal aid with the intention of supporting the early resolution of committal matters while they are in the Magistrates Court

Recommendation 9.

Tasmania should legislate for a sentence reduction scheme, with a sliding scale reduction based upon the timing of the plea, for criminal matters in the Magistrates Court and the Supreme Court

Recommendation 10.

Residential tenancy disputes should be moved from the Magistrates Court to the Tasmanian Civil and Administrative Tribunal (TasCAT)

Recommendation 11

Tasmania should expand the offences that can be dealt with by way of infringement notice with an ability to elect to challenge in Court

Recommendation 12.

The Tasmanian Supreme Court should conduct a one-off "call-over" of all pending Supreme Court matters with a view to facilitating the prosecution and defence appropriately settling matters and reducing the current backlog

Recommendation 13.

Tasmania should repeal or amend section 2 of the *Supreme Court Act* 1887 (Tas) to facilitate a possible increase in the number of Supreme Court judges

Recommendation 14.

Tasmania should amend the *Supreme Court Act* 1887 (Tas) to make provision for a pool of reserve judges to be appointed by the Governor in Council. Reserve judges should be able to be appointed for a period of up to five years and that term should be renewable up to a specified retirement age

Recommendation 15.

Tasmania should fund the Supreme Court to either appoint a further permanent Supreme Court judge, or use the funds to appoint acting and reserve judges as required at the discretion of the Chief Justice, up to the total cost of a permanent Supreme Court judge

Recommendation 16.

Tasmania should introduce, as soon as possible, tailored information technology solutions to support agencies and individuals working in the criminal justice system to do their work more effectively and efficiently

Recommendation 17.

Early-career professionals working in criminal law should have access to, and be supported by their employers to participate in, a formal mentoring program that matches them with a senior practitioner

Mentors should be supported to undertake training on effective mentoring and relevant skills such as recognising and responding to distress and effective debriefing and reflective practice

Consideration should be given to the Law Society of Tasmania providing incentives for senior lawyers to participate in mentoring, such as reduced practising certificate fees; free CPD points; reduced CPD course fees; and formal recognition of contributions to mentoring through, for example, specialist accreditation programs

[Originally Recommendation 6 of *Attracting and Retaining Criminal Lawyers in Tasmania: Research report and recommendations* by Jennifer Boocock, Yvette Maker, Jane Nielsen, Jeremy Prichard and Garrett O'Duffy (2026)]

Recommendation 18.

The feasibility of an ongoing, funded Tasmanian Criminal Law Graduate Program should be explored. Such a program could build on Department of Justice Graduate Legal Officer program to enable graduate lawyers employed under the *State Service Act 2000* (Tas) to undertake a structured early career program, including placements at both the DPP and TLA with ongoing mentoring support from senior personnel

[Originally Recommendation 7 of *Attracting and Retaining Criminal Lawyers in Tasmania: Research report and recommendations* by Jennifer Boocock, Yvette Maker, Jane Nielsen, Jeremy Prichard and Garrett O'Duffy (2026)]

Recommendation 19.

Tasmanian criminal lawyers should have access to training and development for the purpose of building the skills and confidence necessary for achieving appropriate early resolutions. Topics covered should include; understanding processes and the lawyers' role, planning, negotiation skills, conferencing witnesses, determining sufficiency of evidence to determine the correct charge, effectively counselling clients considering early pleas

Recommendation 20.

Tasmanian justice leaders should meet regularly, at least every six months, to collaborate on an agenda that covers:

- Agreeing upon and establishing a reform agenda to deal with the root causes of court backlog;
- Development and adoption of a "minimum data set" (MDS) made of no more than 12 key indicators, strategically selected for their ability to provide a snapshot of how the reforms (and the system overall) are tracking;
- Working together to consider if there are any agency-specific measures that would be worth tracking;
- Overseeing an expert-conducted monitoring and evaluation program based on the MDS, and qualitative data; and
- Making recommendations to Government regarding legislative changes where necessary

I. Introduction

> "*The impact of delay ripples far beyond the walls of the Supreme Court and Magistrates Court. It shapes the lives of victims-survivors, their loved ones, the accused, and the wider community's trust in the rule of law.*"[1]

The Macquarie Dictionary defines "backlog" as *an accumulation of work, correspondence, etc., awaiting attention*.

Defined in this way, backlog is not of itself a bad thing; matters waiting in a monitored queue for upcoming action – or "work awaiting attention" – is an inescapable fact for courts and the justice system. It is just another day in the office for a complex human service process.

Problematic backlogs arise when the status quo is not maintained: that is, the pace at which existing matters are exiting court lists is slower than the pace at which new matters are entering the queue. As the pool of matters grows, the court's finite attention needs to be spread further across the growing numbers of matters.

Why and how a manageable balance becomes unmanageable varies. Sometimes particularly high numbers of new matters are entering the system, or existing matters are taking longer to exit. Sometimes both of these are happening at once. In the case of a court with a small bench, the need for a judicial officer to take sick leave can be very impactful in terms of getting through work.

I preface my report and recommendations with the recognition of the inherent complexity of court matters. Problem-solving on paper with visions of market-based efficiency is one thing, but cases are not simple transactions. Each legal case represents a unique set of human circumstances in a legal context and can be usefully thought of as a discrete, highly complex project, replete with unknowns.

The criminal justice process requires skilful, contemporaneous decision-making and action by various parties at relevant steps and stages. Proceedings are handled with a nuanced combination of flexibility, discretion and adherence to prescription. As well as providing specialist adjudication services, judicial officers also manage the path of each "project", providing attention as required to finalisation and exit.

Although backlogs *become apparent* in court lists, they are invariably the product of systemic issues encountered at various stages of the justice process, including well before they reach the end of the court process.

1.1 Tasmania's court backlogs

As the independent reviewer appointed to examine the issue of Tasmanian court backlogs, my task is to understand court congestion in the Tasmanian context and make recommendations that may assist for Tasmanian circumstances. Many justice systems, nationally and internationally,[2] experience

[1] Editorial, 'Court backlog reform bill', *The Mercury* (Hobart, 16 January 2026)18.

[2] The Courts in England and Wales are facing severe backlogs, with trials in London Crown Court being set down for 2029 – see, for example, Daniel Alge, 'How did the courts backlog get so bad?', *The Conversation* (Online, 17 March 2026) <https://theconversation.com/how-did-the-courts-backlog-get-so-bad-278111>; Committee of Public Accounts, House of Commons, *Crown Court Backlogs* (Twelfth Report of Session 2024-25, 5 March 2025) <https://publications.parliament.uk/pa/cm5901/cmselect/cmpubacc/348/report.html>.

problematic levels of backlog. The reasons for delays and congestion tend to be similar, however specific causes vary from jurisdiction to jurisdiction based on the local prevailing conditions.

Tasmanian courts certainly are experiencing severe congestion. Available data confirms that there is a growing backlog of criminal cases in the Tasmanian Supreme Court and the Magistrates Court. The latest available Supreme Court Annual Report which covers the 2024-2025 year indicates that 912 criminal non-appeal cases were pending as of 30 June 2025.[3][4] This an increase of 139% on the same measure a decade ago (381).[5]

The latest Magistrates Court Annual Report for the 2024-2025 year indicates that 11,426 criminal cases were pending.[6] The number of pending criminal cases a decade before that was 7,426.[7] This is an increase of over 53%.

In comparison to all other Australian jurisdictions, a high number of matters in Tasmania experience long finalisation timeframes. Delayed finalisation is a significant problem in both the Supreme and the Magistrates Courts. The Productivity Commission's nationwide Report on Government Services (ROGS) in relation to justice and courts data includes measures for "on time case processing," and Tasmanian matters are overrepresented in statistics for extended delays. This is not a new problem – Tasmania had the highest delays in finalisations in the Supreme and Magistrates Courts across the nation a decade ago.[8]

In the 2024-2025 Tasmanian Supreme Court Annual Report, Chief Justice Chris Shanahan stated that "*The Court continues to face increasing workloads, backlogs and delay across all the elements of its jurisdiction.*"[9] A decade before, the then Chief Justice Alan Blow AO had reported that *"Delays of around two years between the commission of a crime and the trial of the alleged offender are now far more common than they should be. Such delays result in the deterioration of the memories of witnesses, and substantial unfairness to both victims and accused persons.*"[10]

Unmanageable court backlogs are a systemic problem. Funding is of course an important factor to consider when looking at causes and solutions. However, simply applying more resources to under-performing systems without targeted systemic change cannot solve entrenched problems. It may increase capacity and help the system to manage better for a time, but it will not change the conditions that lead to delay and congestion.

Finding the best ways to tackle congestion in any meaningful, longer-term sense relies on understanding the root causes of court backlogs in the particular jurisdictional context.

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[3] Supreme Court of Tasmania, *Annual Report 2024-25* (Report, October 2025) 37 <https://supremecourt-tas-gov-au.assets.ionatahosting.net/uploads/2025/11/SCT-Annual-Report-2425-FINAL.pdf>.
[4] Tasmanian Supreme Court registry data shows that as at 2 February 2026 the number of pending non-appeal criminal cases was 844.
[5] Supreme Court of Tasmania, *Annual Report 2015-2016* (Report, 2016) 29 <https://supremecourt-tas-gov-au.assets.ionatahosting.net/uploads/2018/11/SCoT_AnlRpt_1516.pdf>.
[6] Magistrates Court of Tasmania, *Annual Report 2024-25* (Report, October 2025) 53 <https://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0004/835555/Magistrates-Court-of-Tasmania-Annual-Report-2024-25_web.pdf>.
[7] Magistrates Court of Tasmania, *Annual Report 2015-2016* (Report, October 2016) 34 <https://www.parliament.tas.gov.au/house-of-assembly/tabled-papers/2016/HATP8_17_11_2016.pdf>.
[8] Productivity Commission, *Report on Government Services 2026* (Report, February 2026) Table 7A.22 (Courts)<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.pc.gov.au%2F2026-01%2Frogs-2026-partc-section7-courts-data-tables_0.xlsx%3FVersionId%3DywiKzi9GYlvo.45YczU4CO3iYuojYgfJ&wdOrigin=BROWSELINK> ('*Report on Government Services*').
[9] Supreme Court of Tasmania, *Annual Report 2024-25* (n 3) 2.
[10] Supreme Court of Tasmania, *Annual Report 2015-2016* (n 5) 2.

ROGS data can give some important insights. Data for the period 2015/16 to 2024/25 tells us that there was a major shift in the number of criminal matters coming before the Supreme Court and that, over the same period, the time taken to finalise matters increased significantly. From 2015/16 to 2024/25 the number of matters lodged in the Supreme Court criminal jurisdiction *grew by 59%*,[11] while civil jurisdiction matters shrank by 8% over the same period. In 2015/16, 84% of all cases in the Magistrates Court were finalised within a 12-month timeframe. A decade on, the rate dropped to 72.6%.[12] In the Supreme Court the 2015/16 clearance rate within 12 months was 64%. This dropped dramatically to a nadir of 46% in 2022/23, but has experienced an uptick over the intervening years to be at 55% in 2024/25.[13]

Data analysis by the Information Analysis Services at Tasmania's Department of Justice (DOJ) points to a sustained increase in breach of justice offences, for example, breaches of family violence orders and breach of bail. Over the last decade the percentage increase in breach offences for family violence orders is 255% (2,825 in 2015 to 10,053 in 2025) and 177% for breach of bail (2590 in 2015 to 7175 in 2025). The increasing prevalence of breach of family violence orders is a systemic impact of family violence.

Family violence breach matters can be process-intensive because the Court is often managing high numbers of charges for multiple breaches.[14]

This is important context, but it does not tell the whole story about problematic backlogs in Tasmania's courts. Foundational to my review is specific work done by Tasmania to identify the local circumstances contributing to court congestion.

1.2 The 2025 Tasmanian Justice Forum

Commissioning an independent review into court backlogs was a recommendation of Tasmanian justice system leaders arising from a dedicated Justice Forum held in Hobart in January 2025.

The Justice Forum was convened due to shared concerns held by legal and civic leaders about the impacts of delays in court processes, specifically:

> "… *extended case finalisation times, increased costs, and considerable distress for those involved - particularly victim-survivors and accused persons held on remand.*"[15]

Holding such a Justice Forum was a recognition by Tasmanian justice leaders of the systemic nature of the problems Tasmanian courts are experiencing, and the corresponding imperative for a concerted, systemic response.

The Forum's internal discussion paper stated:

> "… *these challenges cannot be addressed by the courts alone. A coordinated, system-wide response is required to reduce inefficiencies, improve case progression, and deliver sustained improvements in court timeliness.*"[16]

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[11] *Report on Government Services* (n 8) Table 7A.1 and 7A.2 (Courts).
[12] Ibid.
[13] Ibid.
[14] Figures provided by Information Analysis Services, Tasmanian Department of Justice.
[15] Tasmanian Justice Forum, *Court Backlogs: Systemic Response, Third Party Review and Next Steps* (internal discussion paper – not published) 2025.
[16] Ibid.

The key areas of concern identified by leaders at the Forum were:

- *Delays in police disclosure and expert reports;*
- *Limited availability of prosecution and defence counsel;*
- *Increasing complexity of criminal matters;*
- *Infrastructure limitations; and*
- *Adjournments driven by systemic inefficiencies.*[17]

1.3 The Terms of Reference

The 2025 Forum considered the parameters for an independent review. These considerations helped to give rise to the Terms of Reference for my review,[18] which are:

> *1. Promoting committed leadership to improve access to justice across all levels of the criminal justice system, through a systemic approach that acknowledges the interdependent roles and responsibilities of institutions and participants within the system;*
>
> *2. Assessing relevant processes and procedures across the criminal justice system, including court processes, to identify issues and barriers that are contributing to delay and impacting efficiency and timeliness;*
>
> *3. Identifying strategies and mechanisms that could be applied to improve case progression across the system. This would include consideration of listings, adjournments, readiness practices, and a range of case-flow and case management practices;*
>
> *4. Considering how current Court resourcing arrangements correspond with the ongoing operational needs of the Courts; and*
>
> *5. Developing a framework of indicators which may be used to measure the timeliness and effectiveness of any strategies coming out of the 2026 Review and may also provide a foundation for ongoing evaluation.*

I note here that the Terms of Reference refer specifically to the "criminal justice system".

The data provided above about the correspondence between exponential growth in numbers of criminal matters in the Supreme Court and backlogs is telling. In the 2024-25 Tasmanian Supreme Court Annual Report, Chief Justice Shanahan stated that "*the continuing emphasis on allocating judicial resources to criminal work has had an impact on the Court's capacity to discharge its obligations in its civil jurisdiction*."[19] In light of this, it seems clear that any improvements generated by reforms in the criminal jurisdiction will be felt generally.

The Terms of Reference do specifically "*welcome any observations or recommendations related to the civil justice system*."[20] Of 24 written submissions received, three included mentions of issues with processes in civil matters. All three contributors favoured changes to listing and case management practices in the Supreme Court, however each of the three contributors had a different view. I note that the Chief Justice of the Supreme Court has recently announced the establishment of a Civil Court User Group. Where approval was given by contributors to do so, I have forwarded submissions dealing with civil matters on to the Chief Justice. I consider the Supreme Court Civil Users Group to be the appropriate

[17] Tasmanian Justice Forum (n 15).
[18] This excerpt of the TOR specifically does not include the short preamble. The full TOR is provided at Annexure 1.
[19] Supreme Court of Tasmania, *Annual Report 2024-25* (n 3) 4.
[20] TOR – see Annexure 1.

venue for discussion of reform ideas for the case management and listing practices of Supreme Court civil matters.

The Terms of Reference define a key aim of this independent review as the development of a "backlog action plan."[21] An action plan emphasises the practical and the achievable, and I trust that my recommendations meet this objective without resiling from the need for necessary reforms which involve challenging work for Tasmania. My recommendations set out to be achievable, and also substantial enough to create the systemic justice process improvements Tasmania seeks.

The full Terms of Reference for my Report, including the short introductory statement, can be found at Annexure 1.

1.4 Tasmanian consultations

Key to this review has been an extensive schedule of face-to-face consultation discussions with a diverse cross-section of Tasmanian representing a wide range of relevant expertise. Since February 2026 I have travelled to Tasmania on six separate occasions and held consultations with 64 Tasmanians, 50 of whom I met with in person.[22]

The Tasmanian legal profession and its skilled allied cohorts – for example, police, court staff, Information and Technology (IT), and policy experts – generously shared with me their views on challenges in the current justice system and their favoured solutions. Every person I spoke with personally, and all who made submissions, had constructive ideas about ways to make things better and a clear commitment to doing so.

I asked contributors to this review to be frank and fearless. I made the decision to not identify contributors of specific pieces of feedback unless there was a particular utility in doing so; and even then, not without express permission from the contributor.

Ultimately, I do not believe that mindfully aggregating aspects of the material in this way detracts from the utility of the findings. While individuals did have particular areas of interest or concern, overall, the contributors overwhelmingly and consistently returned to the same key themes which I have set out below.

An open, public invitation to contribute to this review was published on 18 March 2026 and included guidance about the types of submission which the review would find of particular interest.[23] I received 24 written submissions from various contributors[24] and I am grateful for their participation. The key themes of the written submissions corresponded with those identified in the direct consultations.

1.5 Major themes identified in the Tasmanian consultations

Five key themes emerged in contributions from Tasmanian stakeholders. I set these out in the order of the frequency with which they were raised in the consultation process:

1. Delays in disclosure;
2. Resourcing constraints;
3. Wanting earlier resolutions;

[21] TOR – see Annexure I.
[22] See Annexure 2 for a list of consultees to this review.
[23] The public consultation page is found on the Department of Justice website: <https://www.justice.tas.gov.au/community-consultation/consultations/2026/third-party-review-of-backlogs-in-the-tasmanian-court-system-2026>.
[24] See Annexure 3 for details of written submission received.

4. Improving jurisdictional settings for best "fit"; and
5. Practice and procedure.

These themes have close correspondences with the issues raised by the Justice Forum and, ultimately, with my own findings for this review.

1.5.1 Delays in disclosure

The most frequently raised concern was the delay, inadequacy and practical dysfunction of disclosure. Contributors described it not as a peripheral administrative problem, but as one of the principal causes of congestion. One characterised inadequate and untimely disclosure as the "*fundamental pollutant of the system*". Importantly, the complaint was not merely that existing material is handed over too slowly. Often the evidence has not yet been gathered, tested or reduced to a form capable of being disclosed and used.

A recurring observation was that meaningful disclosure too often follows, rather than precedes, a plea of not guilty. As one contributor put it, "*they won't do proper disclosure until there's been a plea of not guilty*". Matters can therefore spend substantial time in the Magistrates Court, or be committed to the Supreme Court, before essential statements, forensic material, CCTV or body-worn footage are obtained. Contributors also described further disclosure arriving after trial papers had been filed and, in some cases, within a week of trial.

The consequences extend throughout the system. Defence lawyers cannot properly advise on plea, negotiations or prospects without the evidentiary case. Courts are required to manage repeated adjournments, incomplete files and trials that are not genuinely ready to proceed. The central consultation message was that Tasmania's criminal justice system is too dependent on late disclosure and is correspondingly deprived of the early information needed for timely, principled decision-making.

1.5.2 Resourcing constraints

The second major theme was the extent to which backlog is inseparable from broader resourcing constraints. Participants described pressure across police, prosecution, Legal Aid, private defence practice, courts, registries, forensic services and the administrative systems supporting them. As one contributor said, the "*lack of resources*" was "*no secret*". The problem was often described less as an isolated shortage than as systemic fragility: there is little spare capacity to absorb an absence, an unexpected trial or delay elsewhere.

Legal Aid and the criminal defence profession featured prominently. Legal Aid was described as "chronically underfunded", with insufficient lawyers and limited capacity to undertake the volume and complexity of work required. Legal Aid rates were also said to be contributing to firms shrinking their involvement in criminal work. Although trainees continue to express interest in criminal law, contributors summarised the problem plainly: "*we've got the interest, but not the jobs*". Regional participants reported particular difficulty securing representation, including for serious matters.

Contributors did not suggest that funding alone will solve backlog. They did, however, emphasise that reform cannot proceed on the assumption that present pressures are marginal or temporary. The consultation evidence points to a system operating with limited institutional depth and resilience, particularly in the areas responsible for disclosure, representation and the administrative progression of cases.

1.5.3 Wanting earlier resolutions

A third major theme was the preference for a system that produces earlier, better-informed resolutions. This was not simply a call for more guilty pleas. It was a call to move substantive decision-making earlier so that each matter can be directed sooner toward its appropriate outcome: plea, charge amendment, discontinuance, summary disposition or trial. One contributor described the imperative as being to "*resolve matters sooner rather than later*"; another observed that too many finalisations currently happen "*later rather than sooner*".

This concern was especially pronounced in relation to indictable matters entering the Supreme Court on a trial footing but ultimately resolving in another way. By the time that occurs, the system may already have incurred the costs of repeated appearances, preparation, uncertainty and, in some cases, unnecessary time in custody. Several participants said the aim should be to avoid suitable matters reaching the Supreme Court at all, rather than committing them first and making the substantive decisions later.

The conditions identified for earlier resolution were broadly consistent: timely disclosure, earlier DPP involvement, realistic charge assessment, mandatory or more purposeful conferencing, and active case management. One contributor proposed requiring prosecution and defence to sit down and have "*a realistic discussion*" about whether a matter could be resolved. The recurring point was that early resolution requires early information and the involvement of people with sufficient authority to make decisions.

1.5.4 Improving jurisdictional settings for best "fit"

The fourth major theme concerned whether matters are being dealt with in the forum best suited to their seriousness, complexity and likely outcome. Contributors repeatedly observed that Tasmania's Supreme Court is undertaking work that would ordinarily fall within a county or district court in jurisdictions with a three-tier structure. Others questioned why relatively minor frauds, lower-level assaults and similar matters are required to enter the Supreme Court at all.

The consultation evidence pointed to structural causes, including a narrow range of electable or parallel offences, limited summary equivalents and cumbersome processes for sending matters back down. As one contributor observed, there are not many parallel offences in Tasmania, "*and that's a big problem*". Another considered that "*there should be some more things that are electable*". Where a forum is determined too early and rigidly, matters can be committed upward, reassessed only after DPP involvement, and then returned to the Magistrates Court after avoidable delay and duplication.

The same principle was applied at the lower end of the system. Contributors identified scope to move suitable matters from the Magistrates Court to infringement processes, administrative pathways or TasCAT. The prevailing observation was that jurisdiction should follow the real needs of the matter. Better "fit" would allow the Supreme Court to concentrate on work requiring its authority and expertise, while removing from all courts matters that can be dealt with fairly and proportionately elsewhere.

1.5.5 Practice and procedure

The fifth major theme was that existing practice and procedure are too fragmented and too often fail to produce substantive progress. Contributors described repeated appearances, adjournments and case management events that generate activity without resolving the issues preventing a matter from advancing. Criminal case management lists were described by one participant as an exercise in "*being* *busy doing nothing*", while another referred to the prevailing defence view that they had become "*case mismanagement*" lists.

A recurring concern was that current processes do not sufficiently test whether disclosure is complete, the charge is appropriate, the parties have conferred, and the matter is genuinely ready for its next stage. Participants called for clearer timetables, earlier identification of issues and witnesses, and stronger powers to enforce compliance. Practical impediments were also said to delay even straightforward guilty pleas and, in some circumstances, to produce "*a ludicrous waste of resources*".

This theme also encompassed paper-based processes, inconsistent practices, limited data and the absence of integrated technological support. These conditions make it harder to identify where a matter is stuck, establish what has been disclosed and intervene effectively. The consultation evidence points to the need for a more coherent procedural framework: one requiring timely preparation, disclosure, conferencing and decisions, while distinguishing matters that genuinely require additional time from those simply being allowed to drift.

1.6 Other direct consultations

As well as working directly with Tasmanian stakeholders, I engaged in direct consultations with representatives from a range of organisations across the other Australian jurisdictions. I contacted criminal justice system stakeholders from each of the States and Territories as well as with the Commonwealth Office of the Director of Public Prosecutions. I was fortunate to have time with representatives of both the NSW Police Prosecutions Branch and the NSW Bureau of Crime Statistics and Research (BOCSAR), who gave me perspectives and learnings from their experiences of the outcomes of significant reform implemented almost a decade ago.

1.7 Existing research and reports

Existing research and reports lend further contextual weight to the rationale for my recommendations. Recognising the primary importance of local perspectives, I want to highlight the significant contributions made to this paper by the Sentencing Advisory Council of Tasmania (SACoT) through its 2018 Report, *Statutory Sentencing Reductions for Pleas of Guilty*,[25] and the work of Jennifer Boocock et al in their 2026 report, *Attracting and Retaining Criminal Lawyers in Tasmania.*[26]

Other Australian and international resources were also apposite. The following list is not exhaustive in terms of the materials considered, however it does represent materials that were particularly relevant to my process, as well as a list of references to which the report will frequently return:

- The New South Wales Law Reform Commission's 2014 report, *Encouraging appropriate early guilty pleas*;[27]
- BOCSAR's 2021 report, *The impact of the Early Appropriate Guilty Plea reforms on guilty pleas, time to justice, and District Court finalisations;*[28]

[25] Sentencing Advisory Council of Tasmania, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No. 10, October 2018) <https://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0003/449553/Web-version-Sentencing-Discounts-Final-Report-October-2018.pdf> ('*Statutory Sentencing Reductions*').

[26] Jennifer Boocock et al, *Attracting and Retaining Criminal Lawyers in Tasmania* **(**Research report and recommendations, June 2026).

[27] New South Wales Law Reform Commission, *Encouraging appropriate early guilty pleas* (Report 141, December 2014) <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-141.pdf> ('*Encouraging appropriate early guilty pleas*').

[28] Ilya Klauzner and Steve Yeong, 'The impact of the Early Appropriate Guilty Plea reforms on guilty pleas, time to justice, and District Court finalisations' (2021) 240 *NSW Bureau of Crime Statistics and Research Crime and*

- The Hon Martin Moynihan AO KC's 2008 report, Review of the civil and criminal justice system in Queensland;[29]
- The Hon Brian Martin AO KC's 2019 reports, *Review of the Sentence Reduction Scheme – Part 2 Division 2 Subdivision 4 of the Sentencing Act 2017 (SA)* and *Review of the Major Indictable Reforms—Criminal Procedure Act 1921;*[30]
- The Victorian Law Reform Commission's 2020 report, *Committals*;
- The Hon Janine Prichard's *Western Australian Terms of Reference for the Review of jurisdiction, process and procedure and Supreme Court fees;*[31]
- The Rt Hon Sir Brian Leveson's 2015 report *Review of Efficiency in Criminal Proceedings* and 2025 reports *Independent Review of the Criminal Courts: Part 1* and *Independent Review of the Criminal Courts: Part 2*;[32] and
- The UK Committee of Public Accounts' 2024 report, *Crown Court Backlogs*.[33]

1.8 Learnings from the existing research and reviews

The abundance and persistence of materials on the theme of court process from comparable jurisdictions across the globe is a confirmation that justice system problems, including backlogs, are both widespread and knotty. The following principles consistently emerged as fundamental to well-functioning criminal justice processes, most of which were highlighted in the 1988 *Best Practice Model for the Determination of Indictable Charges* developed jointly by the Australian Directors of Public Prosecutions and National Legal Aid[34]:

1. Prosecution disclosure should be required prior to committal proceedings unless the disclosure requirement is waived by the defence;

Justice Bulletin <https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb240-report-impact-of-eagp-reforms-2021.pdf>.

[29] The Hon Martin Moynihan AO KC, *Review of the civil and criminal justice system in Queensland* (Report, December 2008) <https://cabinet.qld.gov.au/documents/2009/Jul/Review%20of%20civil%20and%20criminal%20justice%20system%20in%20Qld/Attachments/Review%20by%20Moynihan.pdf>.

[30] The Hon Brian Ross Martin AO KC, *Review of the Sentence Reduction Scheme – Part 2 Division 2 Subdivision of the* Sentencing Act 2017 *(SA)* (Interim Report, June 2019) <https://hdp-au-prod-app-dpcsa-yoursay-files.s3.ap-southeast-2.amazonaws.com/8917/7680/9046/51d7b20d37ef2a471d22b492e1b0afcc_01_final_report_-_signed_0.pdf> ('*Review of the Sentence Reduction Scheme*'); *Review of the Major Indictable Reforms—Criminal Procedure Act 1921 (As Amended by the Summary Procedure (Indictable Offences) Amendment Act 2017)* (Report, September 2013) ('*Review of the Major Indictable Reforms —Criminal Procedure Act 1921'*). Unavailable in soft copy. I have provided a scanned version at Annexure 4.

[31] In August 2025 Western Australia commissioned the Hon Janine Pritchard as an Independent Reviewer of Justices Court and Tribunals. The Terms of Reference, which include "reducing the time to trial and increasing process and procedural efficiency," can be found here: <https://briefonline.com.au/wp-content/uploads/2025/08/WA-Courts-Review-Terms-of-Reference-July-2025.pdf>.This review had not concluded at the time of writing.

[32] The Rt Hon Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Report, January 2015) <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf> ('*Review of Efficiency*'); *Independent Review of the Criminal Courts: Part 1* (Report, July 2025) <https://assets.publishing.service.gov.uk/media/686be85d81dd8f70f5de3c1f/35.49_MOJ_Ind_Review_Criminal_Courts_v8b_FINAL_WEB.pdf>; *Independent Review of the Criminal Courts: Part 2* (Report, February 2026) <https://www.gov.uk/government/publications/independent-review-of-the-criminal-courts-part-2>.

[33] House of Commons, *Crown Court Backlogs* (n 2).

[34] For a good discussion of the general background to the *Best Practice Model for the Determination of Indictable Charges* – developed jointly by the Australian Directors of Public Prosecutions and National Legal Aid and with further work done in a 1999 report prepared by a Working Group and Deliberative Forum convened by the Standing Committee of Attorneys-General – see Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act* 1921 (n 30) 6-12.

2. For matters being committed to the higher jurisdiction, the DPP should have responsibility for the prosecution beginning at the committal stage;
3. Grants of legal aid should be structured to encourage resolution of matters prior to committal.
4. Both the prosecution and defence should, prior to committal, involve Counsel with sufficient experience to deal with the issues likely to arise at trial;
5. Both counsel should have authority to make decisions or be able to expeditiously obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion; and
6. Both Counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.

The NSW Law Reform Commission's 2014 Report *Encouraging appropriate early guilty pleas* delved into causes of delay specifically related to late guilty pleas. The findings support the principles above, expressing them in the obverse as factors found to contribute to problematic late guilty pleas:

1. Parts of the brief of evidence are served late;
2. The defence expects further evidence will be disclosed closer to the trial;
3. The defence believes that it is common practice for the prosecution to overcharge early, and that the charges will be reduced as the proceedings advance;
4. The prosecution accepts a plea to a lesser charge late in the proceedings;
5. Crown Prosecutors with the authority to negotiate are not briefed until late in the proceedings;
6. The defence perceives the court to be flexible in the way it applies a sentence reduction for the utilitarian benefit of an early guilty plea that occurred later in the proceedings;
7. The defence is sceptical that sentencing discounts will be conferred to their client;
8. The defence believes that they will obtain better results in negotiations that occur just prior to trial;
9. Discontinuity of legal representation means that advice and negotiations are inconsistent; and
10. The defendant holds back a plea because he or she wants to postpone the inevitable penalty; denies the seriousness of his or her predicament until the first day of trial; and/or is hopeful that the case will fall over due to lack of witnesses or evidence.[35]

Speaking in the context of a statutory early plea reduction scheme, the Commission's finding was that the problems born of delay and lack of timeliness become intertwined with one another over time and create more complicated compound problems that frustrate intended outcomes:

> "… *for example, late service of the brief drives defendants' expectations that the nature of the case will change. Late briefing of prosecutors leads to late reassessment of the charge, late negotiations, late change to the charge, and a greater likelihood that a sentencing discount will be available even to the courtroom door plea. The power and purpose of sentence discounts for the utilitarian value of a plea is thereby diluted*…"[36]

1.9 The data story

While the perspectives offered by Tasmanian consultees based on their local expertise and experience were the essential qualitative bedrock for my review, the quantitative perspective presented by the available data was essential to developing reliable, evidence-informed recommendations.

[35] *Encouraging appropriate early guilty pleas* (n 27) 9-10.
[36] Ibid 10.

Data can give tremendous insight into the way systems operate. In the case of this review, the available data provided clear correlations with the themes raised by Tasmanian contributors and which arose in my research more broadly.

The main quantitative data source for this review is the Report on Government Services (ROGS). ROGS is not a definitive data set in terms of the focus of this review, however its useful categories cover all Australian jurisdictions and contain specific, longitudinal data for measuring aspects of the operations of the justice system, including the work of Courts. ROGS provided the most useful data source in terms of ensuring that I could undertake comparative analyses, including trends over time, and that, when doing so, I was comparing apples with apples.

Another source of both qualitative and quantitative data was found in work done by Tasmanian DOJ researchers. The locally driven research I considered was well-targeted and looked at a number of issues of particular interest and importance to Tasmania. Its scope, however, was somewhat limited by practical issues, including data collection and analysis limitations.[37] Despite being well considered and executed, some of the projects which provided useful data were discrete or short-term pieces of work that have not continued as ongoing research. I am appreciative of the locally-derived research data I was able to access, and of the willingness of Tasmanian researchers to discuss material with me which was invaluable.

I will refer to the ROGS data throughout this paper, and a more in-depth data analysis paper is attached at Annexure 5.

The following insights were of particular interest.

1.9.1 Judicial officers in Tasmania work as hard as those in other Australian jurisdictions

The number of "full-time equivalent" judicial officers taken to finalise each thousand matters across both courts annually in Tasmania is at about the Australian average. In fact, compared to the Australian average, it takes fewer Tasmanian Supreme Court full-time equivalent judges to finalise each thousand matters.[38]

1.9.2 Tasmanian criminal matters experience high rates of delayed finalisation compared with most other Australian states and territories

Tasmania consistently experiences higher percentages of delayed finalisations of criminal cases. This is true of both the Supreme and the Magistrates Courts.[39] This is not a recent phenomenon: Tasmanian had the highest percentage of delayed finalisations in the Supreme and Magistrates Courts of any jurisdiction a decade ago.[40]

1.9.3 Highest average number in Australia of court attendances per matter, before a criminal case is ready for finalisation

The average number of attendances before the Tasmanian Supreme Court in criminal matters before finalisation in the 2024/25 year was 14.3.[41] It was 16.7 average attendances the previous year. Similarly,

[37] Sentences recorded for multiple offences are not disaggregated but listed as the sentence for the index (most serious) offence.
[38] *Report on Government Services* (n 8) Table 7A.29 (Courts).
[39] Ibid Table 7A.22 (Courts).
[40] Ibid Table 7A.22d (Courts).
[41] Ibid Table 7.24 (Courts).

the latest data show that the Magistrates Court also has a high number of attendances, with an average of 5.7 attendances per finalisation in criminal matters.

1.9.4 The significant increase in lodgements in the Supreme Court

The number of criminal matter lodgements in Supreme Court (also known as matters committed from the Magistrates Court) has increased by 60% in the past four years.[42]

This raises the question of whether all those matters should be in the Supreme Court. The information directly below could indicate that many of the committals to the Supreme Court were not warranted.

1.9.5 High numbers of matters are discharged by the ODPP after they have been committed to the Supreme Court

The discharge figure for the 2024-2025 year was 342.[43]

Matters may be discontinued in the Supreme Court for a number of reasons, including:

- A decision is made by the ODPP that there are no reasonable prospects of conviction and the matter should proceed no further;
- Adequate penalties apply summarily and the matter is re-laid as a purely summary charge to be finalised in the Magistrates Court; and
- In a small number of cases, the matter has abated with the death of the accused.

1.9.6 Tasmanian Police has a high public approval rating

In 2024-2025 in Tasmania, 78.1 percent of the adult population were 'satisfied' or 'very satisfied' with the services provided by police. This was the highest satisfaction rating for any police force in the country.[44]

As you will see, while I consider the need for a greater focus by police on the disclosure aspect of policing, I also consider it important to recognise that Tasmanians appreciate the work of their police officers. I believe improving disclosure practice and its flow-on effects will add to the high regard in which Tasmanian police are held.

1.10 A Tasmanian-focused reform agenda

My consultations elicited some excellent suggestions for tackling backlog. What became clear is that despite a will to keep matters moving, the current operation of the Tasmanian criminal justice system is unintentionally promoting delay and backlog. The justice system as it operates today prevents parties from taking advantage of key, early-stage solution opportunities and instead serves to funnel matters up the line so that basic decisions are not made until the matter is in the Supreme Court.

A good proportion of matters come to the Tasmanian Supreme Court requiring substantial "housekeeping" – that is, judicial time spent organising and managing the parties' activities to establish the appropriate course.

Much of this preparatory work – and many finalisations – could happen instead at the Magistrates Court stage of proceedings. Making strategic adjustments to the committal process in the Magistrates

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[42] Tasmanian Director of Public Prosecutions, *Annual Report 2024-25* (Report, September 2025) 14, Table 2 <https://www.dpp.tas.gov.au/__data/assets/pdf_file/0007/835837/ODPP-Annual-Report-2024-2025.pdf>.
[43] Ibid 15, Table 3.
[44] *Report on Government Services* (n 8) Table 7A.29 (Police Services).

Court would result in more matters being either finalised there or reaching the Supreme Court substantially prepared for finalisation by sentence or trial.

The aim of an early-resolutions focused system is to create more certainty for all concerned early in the process, and by doing so to improve both effectiveness and efficiency in the system overall.

While justice should certainly not be rushed, nor should it be unnecessarily delayed. With due regard for the principles of justice, efficacy and efficiency, the reform recommendations in this review look to develop the capacity and capability of Tasmania's criminal justice system to habitually produce, or set up for, appropriate finalisations at the earliest possible stage in the criminal justice process.

What is also clear to me is that there is no one-size-fits-all option for addressing backlogs. Problems happen in context and the workability of any proposed reforms depends on how well they are fitted to local needs and conditions. The best option for Tasmania requires choosing change "tools" or "levers" based on its unique situation and needs.

I concluded that the problem of excessive backlogs in Tasmania's criminal justice system is best treated by moving towards practices and processes that concentrate effort and results at the early stages of the justice process.

Taking this path will require substantial change. For example, the improvement of disclosure which I recommend – a theme universally raised as necessary by review participants – is a significant shift in practice. While it *would* be possible to make recommendations that offer some relief from backlogs without tackling the structural changes I have recommended, I believe that this would be a false economy for Tasmania.

Adding resources to a system that is recognised not to be working well, without making other changes, ultimately props up undesirable ways of working and potentially perpetuates problems. Any gains are likely to be short-term.

My recommendations aim to assist Tasmania to treat the *causes* of backlog and to "bite the bullet" on addressing long-term problems in disclosure practices, which all parties know have deleterious impacts on the flow of matters through the criminal justice system.

Tasmania's justice system abounds with quality agencies and individuals keen to improve outcomes and access to justice. I believe that there is sufficient will to work together to develop a justice system that prioritises identifying, and steering toward, the most appropriate, effective and efficient finalisation for each matter, from the earliest possible point in its life.

1.11 Overview of the recommendations

Broadly, my recommendations aim to establish and promote the production of early-stage criminal justice resolutions as a way of embedding better effectiveness and efficiency in the Tasmanian criminal justice system.

Areas of particular focus are: improving disclosure, increasing and better utilising capacity in the Magistrates Court, increasing capacity and flexibility in the Supreme Court, deploying technology, and actively engaging executive leadership.

I have sought to make useful, actionable recommendations ranging from the development of training and guidance materials to legislative change. As would be expected, because the recommendations are made in relation to systemic issues, they are at times highly interrelated. I have tried wherever possible to be clear about each issue and also to capture important intersections and hope that I have generally succeeded.

Unless specific timing and/or methods seemed integral to implementing a recommendation, I have resisted prescription in favour of allowing space for suitable, locally derived implementation approaches. Where it seemed appropriate to do so, I have included some more direct suggestions and options for consideration.

My recommendations include harnessing justice system leadership structures to oversee reform efforts, increase connectivity, and participate in co-design and monitoring. I also recommend that leadership is engaged to develop and commit to KPIs and to evaluation for continuous improvement.

Some of my recommendations go specifically to introducing more substantial changes. For example, I recommend diverting work from the Magistrates Court that can most appropriately be dealt with outside the court system.

I recommend an initial "super call-over" process in the Supreme Court that can help to "clear the decks" and take pressure off the Court's resources.

Structurally, I recommend legislating for statutory sentence reductions for early guilty pleas, an option I believe will prove beneficial for Tasmania in reducing delay and backlogs.

I recommend that Tasmania move expeditiously to introducing information technology (IT) solutions to support work going on across the various criminal justice stakeholder organisations, particularly in light of other recommendations I make about the essential need for more effective document handling.

1.11.1 Magistrates Court process recommendations principally relate to matters for committal

Building a criminal justice system that promotes early-stage criminal matter resolutions is an important goal irrespective of which venue matters are in. However, many of the recommendations I make with respect to process reforms in the Magistrates Court relate specifically to matters that are being committed to the Supreme Court, rather than to matters that are being finalised in the Magistrates Court. The reform recommendations I refer to here include processes around disclosure, ODPP involvement in the Magistrates Court at the committal stage, charge certification, case conferencing and others.

For matters being finalised in the Magistrates Court – summary matters, for want of a more inclusive term – provisions of the uncommenced *Magistrates Court (Criminal and General Division) Act 2019* (Tas) do, I think, support early-stage resolutions, for example:

- Disclosure of prosecution evidence in summary offences to ensure that defendants are aware of the case against them at the earliest opportunity[45];
- A specific statutory basis for case management procedures[46] and sentence indication powers[47] in criminal matters being dealt with to finality in the Magistrates Court; and
- Provisions which outline the process for electing to have eligible indictable offences dealt with by either the Magistrates Court or the Supreme Court and the expanded list of offences proposed to be electable.[48]

It would be open to Tasmania to commence the Act, or parts of it, to realise this guidance for summary matters. However, as the Act relates to matters being committed *from* the Magistrates Court, it does

[45] *Magistrates Court (Criminal and General Division) Act 2019* (Tas) ss 61-64.
[46] Ibid Part 7.
[47] Ibid s 90.
[48] Ibid Part 8, Schedules 1 and 2.

not materially differ from the current approach to indictable matters in the *Justices Act 1959* (Tas) (the *Justices Act*). In that respect, its commencement would fail to produce reform in a crucial area.

I recommend that legislation specifically related to improving committal-stage processes in the Magistrates Court be adopted; whether by amendment to the 2019 Act prior to its commencement, or in some other way.

Some of my recommendations relate more broadly to the Magistrates Court, for example the sentencing reduction scheme which I recommend should have application to all matters, and increasing capacity in the Magistrates Court by appropriately moving some matters to more fitting non-court venues.

1.12 Implementation considerations

When, whether, and how individual recommendations are actioned must be for Tasmania to decide. I have sought to make a set of recommendations that can build upon one another to, over time, establish a system that produces early-stage resolutions. In this way the recommendations can be understood as a suite of reforms, and I suggest they would be most usefully implemented as a suite.

Notwithstanding my commitment to retaining flexibility based on local needs, one reform is, in my view, fundamental to the healthy functioning of the Tasmanian justice system: establishing timely, adequate, committal-stage police disclosure for all matters that would be heard in the Supreme Court.

Improvements in disclosure must be in place before some other reforms can proceed, for example a statutory sentence reduction scheme for early guilty pleas.

1.13 Resourcing and these recommendations

Almost all reforms require some level of up-front funding. Tasmania faces a common challenge: how to fund much-needed change in the context of an overall lean fiscal landscape.

Having been a senior public lawyer in Australia's largest and smallest jurisdictions, I have direct understanding of the particular challenges faced in each. Smaller jurisdictions do not have the benefits of large revenue bases and economies of scale. They are also more susceptible to common human resource challenges in terms of finding and keeping talented people.

These recommendations are cast within existing levels of funding *to the extent that that is possible while still achieving necessary reform*. Realistically, meaningful systemic reform and absolute cost neutrality are antithetical, particularly when funding is already stretched.

But I resist the notion that the answer to backlog is only providing additional resources. While research and consultation for this report suggests that justice system under-resourcing is an issue for Tasmania, funding enhancements *without accompanying implementation of targeted systems changes* will fail to treat underlying causes.

Some of my recommendations directly reference the need for some kind of additional funding, particularly where this is necessary to transition to reformed ways of working. New ways of working more efficiently should, in time, produce better value for money and free up funding to be sent where it is most useful.

My recommendations assume that over time, applying existing resourcing more strategically as part of a change process – and introducing a proportion of new funds where that is necessary – is a worthwhile investment for improved functioning and reduced backlogs.

Better systems, established as a result of reforms, should produce their own benefits through the efficiencies of earlier finalisation practices.

2. Encouraging early-stage resolution in matters for committal

2.1 "Committal" in the Tasmanian context

According to the Australian Law Reform Commission:

> "… *The Purpose of Committal Proceedings…* [is for the Magistrate] *to determine whether, in the case of more serious criminal offences, there is sufficient, evidence to require the defendant to stand trial.*"[49]

In 2000, Tasmania legislatively dispensed with "Committal Hearings" whereby the Magistrate was the arbiter of the sufficiency of evidence for committal.[50] As SACoT says:

> "… *There are no longer committal proceedings in the Magistrates Court prior to an offender being committed to stand trial in the Supreme Court. This was to allow for the early involvement of the office of the DPP.*"[51]

To clarify what might be confusing to non-lawyers, the process to officially move a matter from the Magistrates Court into the Supreme Court is still referred to as the "committal" of a matter or "committing" a matter, but there is no longer a formal "Committal Hearing" where the Magistrate is responsible for assessing the sufficiency of the evidence. I have used the term "committal stage" throughout this paper in the more general sense of matters being committed, rather than denoting the now-defunct Committal Hearing.

In effect, Tasmania's 2000 reforms removed requirements for testing the sufficiency of evidence before committal. Rather than have the committing Magistrate be the arbiter of the sufficiency of the evidence, the reforms gave responsibility for the determination of sufficiency instead to the ODPP. Because the ODPP only begins involvement at the Supreme Court – *after committal* – that is the point at which evidence appraisal now happens.

Despite what SACoT refers to as an intention "to allow for the early involvement of the office of the DPP", I do not think that it can be reasonably argued that involvement at the Supreme Court is "early" involvement by the ODPP.

Without a Magistrate's determination of the sufficiency of evidence and without involvement by the ODPP, little actually happens at present during the committal stage. It becomes a going-through of the motions – a "ghost" committal process – which can take up time without achieving anything substantial.

I propose that there is a very good case to bring the ODPP involvement forward to fill this currently un-purposeful space in the Magistrates Court, and fulfil the intention of early ODPP involvement. The time set aside in the Magistrates Court is at present essentially a "gate" through which matters pass

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[49] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) [575] <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC31.pdf>.

[50] Supreme Court of Tasmania, *A Guide to New Proceedings for the Disposition of Indictable Offences 2.1* (February 2010) 5 <https://supremecourt-tas-gov-au.assets.ionatahosting.net/uploads/2019/03/A_GUIDE_TO_NEW_PROCEEDINGS_version_2_1.pdf>.

[51] *Statutory Sentencing Reductions* (n 25) 19.

unassessed. With ODPP involvement, it can and should, in my view, be a determinative process involving:

- Establishing the evidence through disclosure;
- Settling the charge;
- Facilitating substantive discussions between parties regarding the options – including possible resolution and narrowing issues as necessary; and
- Adopting mechanisms to deal with matters that are languishing to an extent that is not in the interest of justice.

I devote upcoming sections to the argument for having the parties – the ODPP and the defence – actively engaged before committal takes place.

2.2 Empowering the Magistrates Court to drive productive committals

Currently, there is a maximum number of three mentions prescribed in the *Justices Act* before a plea must be entered (or else be deemed) in the Magistrates Court, triggering committal to the Supreme Court.

To maximise the value of this time spent in the Magistrates Court, the focus should not be on getting through three mentions; it should be on empowering the Magistrate to ensure that the parties have sufficient time and the necessary materials to engage and move towards the appropriate resolution.

In my view, the Magistrate should be performing important case management functions at the early stage of a matter, shepherding the proceedings by giving directions as necessary to keep the activities on track within reasonable time limits, and, if necessary, having the power to dismiss a matter in the interests of justice.

I understand that a lack of *access* to the evidence due to issues with disclosure is a key problem here, and I will consider this extensively in the following sections.

Recommendation 1.

Tasmania should legislate to provide the Magistrates Court with powers to manage committals and ensure that the following purposes are achieved:

(i) The setting of a timetable for the disclosure of the brief of evidence from the police to the prosecution and defence;

(ii) The scheduling of a mandatory criminal case conference between the ODPP and defence;

(iii) Preliminary proceedings for the taking of oral evidence of prosecution witnesses (where permitted);

(iv) The entry of a plea in the Magistrates Court; and

(v) The power to dismiss a matter (without affecting the ability to re-lay the charge) if a charge has not been settled within a prescribed period of time and if it is in the interests of justice to do so.[52]

[52] This links to Recommendation 6 below relating to introducing charge certification.

2.3 Resource implications of doing more active committal work at the Magistrates Court

With reference to the 2019 evaluation of major indictable reforms in South Australia, specifically on the impacts of early resolutions reforms, the Hon Brian Ross Martin, AO KC stated:

> "… *Notwithstanding the increase in the number of pleas entered in the Magistrates Court, the time taken to finalise major indictable matters in the Magistrates Court has increased.*"[53]

It is true that if genuine case management processes are moved into the Magistrates Court, matters will spend more time in that court, but this is a better alternative than the current arrangement in which case management is done in the Supreme Court.

The point is that this work cannot be avoided and must be done somewhere. I argue that for reasons of both efficiency and due process, this substantive evidentiary consideration work should happen in the Magistrates Court, before the plea and before committal.

This approach will mean that a larger proportion of matters will never need to be seen at the Supreme Court because the DPP will be in a position to determine whether they ought not proceed at all or should be dealt with summarily. Many more will go straight to sentence in the Supreme Court without being listed for trial.

In a chapter of its 2020 *Committals* report aptly titled "Should the lower courts conduct indicatable case management?", the Victorian Law Reform Commission notes that modern case management principles favour management by the judge who will ultimately hear the trial.[54] However, the Report stops short of recommending that this approach is adopted in Victoria, noting that among the factors favouring lower court case management was the significant costs involved in case management in the higher court.[55]

In Tasmania today, this is exactly the case. The Supreme Court is effectively entirely responsible for case management of matters entering the Supreme Court. If the removal of Committal Hearings in Tasmania more than twenty years ago had yielded more expeditious and efficient processes, that would be a worthwhile outcome regardless of where management work is done. However, that has not been the case.

In my view, Magistrates can and should have the key role in directing the process and keeping it on track. This is not the same as the old committal hearing in which the Magistrate was the arbiter of evidence sufficiency – it is about allowing the Magistrate to properly manage the parties and ensure they are performing their roles.

The current structure of up to three mentions need not necessarily change, however the purpose of those mention proceedings could instead be to offer the Magistrate and the parties strategic direction-setting and timing-driving opportunities.

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[53] Martin, *Review of the Sentence Reduction Scheme* (n 30) 76

[54] Victorian Law Reform Commission, *Committals* (Report, March 2020) 52 <https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Committals-Report-forweb.pdf>.

[55] Relevantly, ROGS data provides some Tasmanian-specific figures indicating the cost differential between lower and higher jurisdictions. As of 2024-25, the average cost of a criminal matter finalising in the Tasmanian Supreme Court is $12,676, compared with $1,005 per matter in the Magistrates Court: *Report on Government Services* (n 8) Table 7A.34 (Courts).

2.4 The function of disclosure at committal-stage in criminal prosecutions

Adequate committal-stage disclosure is essential to ensure that the prosecution and defence are both privy to the evidentiary material the state intends to rely on when determining which specific charge, if any, it will prosecute.

For the prosecutor, the evidentiary material made available through disclosure is used to answer the following interconnected questions about the upcoming prosecution:

- Has the correct charge been laid?
- Should this charge be amended?
- Should further charges be added?
- Should some or all charges be discontinued?

For the defence, knowing if a prosecution will proceed and, if so, on what specific charges, is essential to moving forward. A settled charge provides definitive ground on which the accused person can challenge and negotiate with the prosecution and answer the questions: *Based on the available evidence, should I plead guilty or not guilty to the charge the state levels against me? What legal defences are available to me?*

An informed plea can only properly be made with the benefit of salient information and evidence about the allegations. Until the charge has been settled, there is always a looming possibility that the charges will change; while this is so, any decisions by the defendant are based on conjecture. As the NSW Law Reform Commission explained in its 2014 report *Encouraging appropriate early guilty pleas:*

> "… *A defendant is not likely to be advised to enter a guilty plea to a charge that might not be proved on the available evidence, and is likely to be changed. This set of circumstances – where the original charge laid by police is not treated by either party as the final charge – is part of a systemic problem whereby delaying a guilty plea in anticipation of new evidence and / or charge bargaining is considered a reasonable or even necessary defence strategy.*"[56]

Settled charges are not just important to the accused, they are also important to victims. As the same report went on:

> "… *the ODPP would generally consult with the victim (and the police) before the charge is laid. The victim may not always be happy with the assessment of the charges based on whether there was a reasonable prospect of conviction, but early engagement between all parties should reduce the feeling of disempowerment that victims currently experience. Importantly, having the ODPP determine the charge at the outset would help reduce false expectations. It may also cultivate a more positive relationship between police, victims and the ODPP, and improve the way victims experience the process.*"[57]

Until there is adequate evidence disclosed to allow the deciding of the charge, the charge cannot be settled.

In my consultations, both the ODPP and the defence indicated that there are significant difficulties and delays in getting the information that they need from police disclosure to answer these fundamental legal questions.

[56] *Encouraging appropriate early guilty pleas* (n 27) 60 [4.18].
[57] Ibid 69 [4.44].

2.5 Tasmania's current "dysfunctional" disclosure processes

As seen above, Tasmania's 2025 Justice Forum identified "delays in police disclosure and expert reports" as the first in a list of five key backlog drivers in the Tasmanian justice system. Almost without exception, information I gathered by way of direct consultations, written submissions, previous reports, and more general research corroborates the conclusion of the Justice Forum participants. The overall findings of this review, including extrapolating from the available data and research, resoundingly reflect what Tasmanian stakeholders say about disclosure.

The early-resolutions focused system that I recommend relies on disclosure providing enough material at the beginning of a case's life, that is, at the committal stage and before a plea is required to be entered.

Current disclosure practice in Tasmania can best be described as dysfunctional in the true sense: that is, it does not meet its intended and essential functions.

Consultees told us that sufficiently probative disclosure material is almost never produced unless "triggered" by the entry of a not-guilty plea by the accused at committal. Even when a not-guilty plea has been entered, disclosure material may not be forthcoming until management of the matter is well underway in the Supreme Court. In the Supreme Court Annual Report for 2023-24, the-then Chief Justice the Hon Alan Blow AO stated that:

> "… *The [Supreme Court] encountered unacceptable delays on the part of Tasmania Police in Hobart in relation to the disclosure of documents and recordings to defence counsel, and in relation to the completion of files after accused persons had been committed for trial. Delays in relation to these matters have been common for years. However, the number of cases delayed and the length of the delays were unprecedented and most unreasonable.*"[58]

According to the latest ROGS data, on average, Tasmanian Supreme Court criminal matters involve 14.3 attendances per finalisation.[59] While the data does not provide explanatory notes on the reasons for attendances, my consultations and my own experience lead me to believe that delayed decision-making due to inadequate disclosure is the most significant contributory reason for such high numbers of attendances.

Ultimately, the duty of disclosure is a duty owed to the court. As the Commonwealth DPP said in a statement in 2017:

> "… *The prosecution's duty of disclosure is ethical in nature and it is an obligation that is owed to the court. It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial. It is a longstanding tenet of the Australian criminal justice system that accused persons are entitled to know the case against them, so that they can properly defend the charges they face. An accused is entitled to know the evidence that will be adduced in support of the charges and whether there is any other material which may be relevant to the defence of the charges, including material*

[58] Supreme Court of Tasmania, *Annual Report 2023-2024* (Report, November 2024) 3 <https://supremecourt-tas-gov-au.assets.ionatahosting.net/uploads/2024/11/SCT-Annual-Report-2324-FINAL.pdf>.
[59] *Report on Government Services* (n 8) Table 7.24 (Courts).

relating to the credibility or reliability of a prosecution witness. A failure to disclose may result in a miscarriage of justice."[60]

The act of disclosure is integral to justice precisely because the evidence contained in disclosure is the practical foundation for the finalisation of all cases.

While there is general agreement that current disclosure problems in Tasmania are the central factor limiting effectiveness and efficiency in the criminal justice system, it is important to also point out that review participants overall expressed a positive view of the work done by Tasmania Police. Participants recognised the importance of frontline work and the challenges for Tasmania Police in providing their services.

Frontline policing is experiencing increased demand and complexity. In seeking to deliver effectively on its diverse charter, Tasmania Police targets its resources with the intention of concentrating its effort in the right ways, and at the right points. For example, domestic and family violence, with its human complexities and myriad breach opportunities is a growing offence area in Australia, and creates demands that must be met with correspondingly more complex policing responses.

However, focusing on frontline duties (arrest and charging) without maintaining focus on the equally essential process of disclosure has had a high cost for the operation of the justice system.

Disclosure is more than supplemental to frontline policing; it is key to its proper culmination. Without the evidence contained in disclosure, frontline police work cannot be translated into appropriate outcomes, including convictions.

Reforming disclosure in Tasmania requires two kinds of changes: a) ensuring that police and the parties have as clear an idea as possible about what is needed to meet functional disclosure in a given matter, including dispute escalation processes, and b) ensuring that the transfer of the disclosure materials from police to the parties is efficient and effective.

As discussed earlier, during the course of my review process, Tasmania Police has purposefully contributed to discussions about disclosure reform. There is a recognition of the localised and systemic benefits that could result from timelier and more sufficient disclosure, and there is a will to get on with reform.

2.6 Guidance for achieving functional committal-stage disclosure

In terms of a basis for the parties to be "on the same page" about disclosure, beyond the generic requirements codified in s 56 of the *Justices Act*, there is a lack of formal guidance about what the parameters of adequate disclosure are.

It is my view that Tasmania needs to introduce guidance material – co-sponsored by the DPP and the Tasmanian Police Commissioner – setting out the parameters of committal-stage disclosure. In NSW, committal-stage disclosure guidance was co-developed by the DPP and the Police Commissioner in the form of a publicly available agreement or memorandum of understanding titled the *Agreement between NSW Police Force and Office of the ODPP (NSW) concerning the content and Service of an early appropriate guilty plea brief, and, charge certification* (the NSW MOU). The NSW MOU was part of the

[60] Commonwealth Director of Public Prosecutions, *Statement on Disclosure in Prosecutions Conducted by the Commonwealth* (March 2017) 3 <https://www.cdpp.gov.au/sites/default/files/Disclosure%20Statement-March-2017_0.pdf>.

introduction of the Early Appropriate Guilty Pleas (EAGP) initiative in 2018. Should Tasmania Police and the DPP proceed with an MOU, they may wish to consult with defence representatives.[61]

The NSW MOU details not only what the committal-stage disclosure brief must contain, but also what is not necessary as part of a committal-stage disclosure. According to the NSW MOU, the job of the committal-stage brief is to:

> "… *provide the evidence necessary to satisfy the elements of the offence to enable the ODPP to certify the charge(s) laid by the Police against an accused.*
>
> *It is not the purpose of the brief to provide all the evidence in the admissible form that may be required should the matter proceed to trial.*"[62]

I note that what I have so far referred to as charge definition or deciding the charge is referred to in the above quote as "certify the charges". While I will pick up this issue in more detail shortly, first I want to give an example of how the NSW MOU supports functional committal-stage disclosure by allowing the disclosure process to dispense with some formality for the sake of making reasonably indicative information available at the committal stage.

Appendix A of the NSW MOU contains a table made up of two columns. The first column sets out *Evidence to be included in the brief,* and the second column describes *Acceptable Alternative Forms of Evidence (where not yest obtained in admissible form)* in relation to column one. Given its relative brevity, I have included the table in full here as it is useful to view it as a whole.

Evidence to be included in the brief	**Acceptable Alternative Forms of Evidence (where not yest obtained in admissible form)**
Key police and key witness statements, including from the Officer in Charge	Not applicable
Victim signed statement or transcript of recorded interview	In offence other than sexual assault or violence: notebook with jurat and signature accompanied by a typed version
Witness statements and/or transcript of interview	For non-key witnesses: handwritten signed statements in police notebook.
DVEC recording and transcript	Not applicable
Other evidence containing admissions by an accused	Not applicable
Photographs or documentary evidence	Statement producing evidence is not required provided photographs contain captions explaining their origin
Identification parades	Statement producing the recording is not required DVD recording of parade is required
Electronic Recorded Interview with Suspected Person transcript	Not applicable
CCTV footage	Statement producing the footage is not required to be provided. A synopsis is to be provided

[61] In NSW, defence representatives were not specifically consulted in the development of the MOU. Nevertheless, the Bar Association and the Public Defenders' Office provided feedback to Police and the ODPP about the MOU and the document was accordingly amended: see Mark Ierace SC, *Early Guilty Pleas: A New Ball Game* (Paper, April 2018) 7 <https://publicdefenders.nsw.gov.au/documents/resources-and-papers/eagp/early-guilty-pleas-a-new-ball-game-3.pdf>.

[62] *Agreement between NSW Police Force and Office of the ODPP (NSW) concerning the content and service of an early appropriate guilty plea brief and charge certification in committal hearings* (2022) <https://www.odpp.nsw.gov.au/sites/default/files/2023-08/MOU_NSWPF_and_ODPP_EAGP_Brief_Charge_Certification_and_Committals_September_2022.pdf>.

Evidence to be included in the brief	Acceptable Alternative Forms of Evidence (where not yest obtained in admissible form)
	which includes details about where the CCTV footage originates from. The video must be playable without additional software
Other Audio-Visual Material (eg Body worn video, Search Warrant Video)	Relevant recordings, property seizure form and exhibit list (from Forensic Database) are to be provided
Police scientific evidence (includes DNA, fingerprints, ballistics, drug and chemical analysis)	Result from Forensic Database or Forensic Summary Report. Short form statement / certificate with expert opinion explaining the summary report. Presumptive drug testing results which identifies drug and quantity
Telephone Intercepts and Listening Devices Audio and Transcripts	Audio of all relevant recordings with a detailed synopsis of the contents. All call should be summarised with explanation of any code/s used and identified. Key calls will need to be transcribed.
Visual and other Surveillance Evidence	Surveillance Log and relevant footage/photos
Telephone records	Download from IASK but with a synopsis
Expert medical	Photos, discharge summary, clinical notes or short opinion from doctor, and Sexual Assault Investigation Kit
Expert evidence	Short form opinion
Digital device download	Digital evidence download report (e.g. Cellebrite)
Financial evidence	Business records relied upon with a synopsis (e.g. Statement of Account)
Evidence obtained overseas including Mutual Assistance Evidence	Evidence about Mutual Assistance formalities not required.

Having a publicly available MOU with specific guidance helps to set expectations transparently for all involved. In NSW, relevant agencies developed internal materials that relate specifically to their own role. The NSW Police Prosecutions Command developed and made publicly available the *EAGP Standard Operation Procedures (SOPS)*,[63] setting out the practical implications of the MOU for police directly involved in disclosure. The NSW ODPP's website contains a publicly available page titled "Charges and EAGP" which offers guidance for prosecutors about their role in the EAGP process.[64] Similarly, the NSW Legal Aid Commission provides relevant material on its website.[65]

The NSW MOU has been operational for eight years. I spoke with a number of senior NSW Police representatives seeking their perspectives on the scheme at this stage of its implementation. A Superintendent from NSW Police Prosecutions Command had this to say:

> "… *I think the value of the MOU probably arises more where there's a point of contention between the OIC*[66] *and the ODPP Solicitor about what should be in the Brief. From a Police*

[63] New South Wales Police Force, *Early Appropriate Guilty Plea (EAGP) Standard Operating Procedures* (April 2024) <https://www.police.nsw.gov.au/__data/assets/pdf_file/0005/865877/EAGP_SOPs.pdf>.
[64] 'Charges and EAGP', *ODPP New South Wales* (Web Page) <https://www.odpp.nsw.gov.au/prosecution-guidance/steps-in-the-prosecution-process/charges-and-eagp>.
[65] 'Early Appropriate Guilty Plea (EAGP) resources', *Legal Aid New South Wales* (Web Page) <https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law-resources-and-tools/criminal-law-resources-early-appropriate-guilty-pleas>.
[66] Police "Officer in Charge" of the case.

perspective, the MOU has been particularly useful in providing a structured framework for resolving points of difference about early disclosure. While there can still be differing views in practice—particularly around whether material is sufficiently complete for certification or whether further formalisation is required—the MOU provides a shared reference point for those discussions. Importantly, it sets out agreed expectations about the purpose and content of the brief, and establishes a clear escalation pathway where issues cannot be resolved at the working level. In that sense, its value is less about removing all disagreement, and more about ensuring that disagreements are managed in a consistent, transparent and structured way."[67]

Recommendation 2.

The Tasmanian Police Commissioner and the Director of Public Prosecutions should develop an agreed early disclosure protocol and codify this protocol in a publicly available Memorandum of Understanding (MOU)

2.7 Changing Tasmanian police practice from indirect to direct disclosure

Disclosure involves communication and the transfer of information. The various jurisdictions across Australia go about the mechanics of the disclosure process in one of two ways. For the purposes of this report, I will call these direct and indirect disclosure.

By direct disclosure I mean disclosure where the investigating officer is individually responsible for properly preparing materials and disclosing directly to the prosecution and defence. New South Wales, Victoria, Queensland and Western Australia all practice direct disclosure.

In Tasmania, disclosure is indirect. Instead of personally disclosing material to the parties, the investigating officer forwards material to a disclosure unit staffed by civilian government (state servants) staff, who prepare it by undertaking processes such as redacting and editing before forwarding it on to the parties.

Disclosure unit staff do provide skilled support, but having a "middleman" system for dealing with the administrative aspects of disclosure is cumbersome and time-consuming. One of the potential problems with using this method is that it requires considerable staffing, and work can become problematically backlogged if staffing levels fall. In the 2023-24 Tasmanian Supreme Court Annual Report, the then-Chief Justice Alan Blow AO went into considerable detail about the problems of disclosure, including, specifically, the impacts of understaffing of the disclosure unit:

"… *No criticism can be made of the hard-working staff of the Southern Disclosure Unit of Tasmania Police. The problems with disclosure appear to have been caused by understaffing.*"[68]

His Honour went on to explain some of the consequences for the Court of the cumbersome disclosure process:

"… *The delays reached the point where prosecutors were telling judges that files sent back for completion were due for return months previously, and sometimes that there was no information as to when they might be completed. In one case a file sent back to the police for completion in April 2022 had still not been completed when a judge conducted a directions hearing on 28 March 2024. The judge commented that the delay was getting to*

[67] Response received from NSW Police on 19 June 2026.
[68] Supreme Court of Tasmania, *Annual Report 2023-2024* (n 58) 4.

a stage where a judge might direct the investigating officer to attend court and offer an explanation. By March 2024 the Southern Disclosure Unit had about 75 files relating to indictable offences awaiting the completion of disclosure procedures, and many of them were well overdue.

In some cases accused persons were granted bail when they had not been brought to trial after long delays, with the delays being taken into account as something weighing in favour of release on bail."[69]

The utility of spending time on manual, administrative tasks involved in disclosure needs to be balanced against the imperatives of frontline police work. However, disclosure, as we have seen, is more than administrative; it is important police work, an essential part of the legal process. It is much more than moving documents from one person to another; it requires an understanding of the elements of offences and a range of legal rules and formalities.

The one best placed to know what should be disclosed is the investigating officer. If further investigation or follow-up is needed to source material requested by the parties, liaising with the investigating officer directly makes good sense. While redaction and editing are manual tasks, knowing what should be redacted or edited requires judgment, and the investigating officer has the connection to the material to make that judgment.

In the context of optimal operations of the justice system, the Hon Sir Brian Leveson addresses the importance of "case ownership":

> "… *For each case, in the Police, the CPS and for the defence, to maximise the opportunities for case management, there must be one person who is (and is identified to be) responsible for the conduct of the case.*"[70]

Rather than using state servants in a disclosure unit arrangement, providing some administrative support as needed to officers who are directly disclosing is a sensible approach. Sometimes the need may be for clerical assistance in manual tasks – for example, in very high-volume matters – while at other times the need may be for specialist consultative assistance about substantive issues. The point is that utilising resources to support officers to disclose directly, rather than using a separate administration unit, supports both effectiveness and efficiency.

Recommendation 3.

In criminal matters in Tasmania, the police officer responsible for a case should also be responsible for disclosing directly to the prosecution and defence

2.8 Tasmania Police can build on already commenced training and development initiatives

Following our initial discussions during consultations for this review, Tasmania Police initiated a number of training measures aimed at giving police officers and police prosecutors better guidance about how to achieve effective disclosure.

This is a most welcome proactive approach. Investigating police must be able to recognise the key evidence in a matter and to provide that material in a timely way.

[69] Supreme Court of Tasmania, *Annual Report 2023-2024* (n 58) 3.
[70] Leveson, *Review of Efficiency* (n 32) 10.

For example, police officers need to identify and mark the important parts of body-worn footage taken at the scene so that the lawyers can quickly access the key evidence that could make the strength of the case clear. Using another example, CCTV footage that might show the commission of the crime and be crucial in identifying the offender should be clearly pinpointed and transmitted to the parties. Consultees indicated that very often a clearer demonstration of the strength of a case would have facilitated an early plea instead of the matter drifting to a late plea.

Compiling an effective disclosure brief involves understanding the underpinning purpose of disclosure as the evidence that the police say makes out the offence. This involves knowing the elements of offences and applying sound judgment and decision-making in terms of putting together functional material.

I believe that adopting an MOU and training police and police prosecutors in its use would be of great value, as would changing to a direct form of disclosure by the investigating officer.

Tasmania Police has begun rolling out specific training for new recruits at the Police Academy aimed at ensuring that they understand the essential function of disclosure to support charges, and their responsibilities for producing timely and effective disclosure. This effort is, in my view, crucial to developing and embedding good disclosure practices.

I support the efforts being made by Tasmania Police to improve disclosure and recommend that an ongoing training approach is developed and formalised by Tasmania Police based on the approach Tasmania chooses in terms of the recommended reforms.

Recommendation 4.

Tasmania Police should establish and formalise training initiatives to assist frontline officers and police prosecutors with the delivery of functional disclosure.

2.9 The need for the parties to be engaged at the committal stage – the ODPP

While the defence and police may have different views about whether the extant disclosure material in a particular case is sufficiently probative or needs supplementation, until the prosecution performs its role of deciding the charge, the point is moot. Until there is a settled charge, there is no definitive ground for the defence to argue on.

In terms of achieving functional disclosure, it is for the prosecutor *who will run the matter* to liaise with police, and to indicate satisfaction with the sufficiency of the committal evidence by declaring that a particular charge can and should proceed, or that no charge should proceed.

One of the key benefits of having the ODPP in the committal stage is the potential for defining, and even resolving, matters quickly.

Police prosecutors may *represent* the Crown in committal matters but they are not the prosecution party that will take the matter to the Supreme Court. As the proper prosecution *party*, the ODPP lawyer is empowered to negotiate with the defence in a way that police prosecutors cannot. Having the prosecution *party* in the matter early makes "on the spot" appraisals of the evidence, and productive dialogue with police and the defence, possible.

This can be a very useful means of saving time and effort around disclosure. For example, early available evidence in a case may be compelling enough to assist the ODPP to quickly form a view. This could lead to a number of outcomes, for example, no further disclosure may be necessary in order to settle the charge because the case is made out or because there are no reasonable prospects of conviction. It may also mean that the defence should be approached early in order to discuss the prospects of an appropriate guilty plea by the accused. It may also mean that the matter is one best dealt with summarily by police prosecutors.

Missing these early opportunities can be costly in many ways; to the victim, not least. It means that resolutions are put off rather than being expeditiously actioned.

The point is that having the prosecuting *party* involved from the beginning of the life of a matter creates *actionable* early-definition and resolution opportunities.

The need for prosecuting party involvement for dealing with substantial legal issues is demonstrated in Tasmania's preliminary proceedings provisions. Section 62 of the *Justices Act* provides an opportunity to have particular matters clarified by hearing directly from a witness on oath. When preliminary proceedings are undertaken, they are conducted by the ODPP; again, as the relevant party, they are the correct representative to do substantive prosecution work.

Currently in Tasmania the Crown is generally represented by Police Prosecutors in the Magistrates Court in matters that are to be committed. While many Police Prosecutors today have formal legal qualifications and deal with enormous caseloads, they are not party to matters in the Supreme Court and do not have the power to make binding decisions about the future of a Supreme Court case. It remains the prerogative of the prosecutorial agency that will be running the matter – the ODPP – to decide how to proceed, but the ODPP has no contact with matters to be committed until after committal and when the matter has reached the Supreme Court.[71]

In my view, systemically promoting efficient and effective early resolutions requires having ODPP lawyers running committals. Further, these must be lawyers with sufficient experience and authority to drive progress in the matter and to treat with police about evidentiary requirements, and the defence in terms of possible settlements.

His Hon Brian Martin AO KC observes:

> "… *The concept of counsel with sufficient authority and experience to resolve matters, or at least to narrow the issues being involved from the outset of criminal proceedings has been at the heart of many reviews and recommendations for improving the efficiency of the criminal justice system. In substance, for many years it has been the "common wisdom" that an essential element of an efficient system is the early involvement of "senior" counsel with authority to negotiate and make decisions to resolve matters through early withdrawals of charges, remission to summary courts and early pleas of guilty, and to narrow the issues at trial."*[72]

The importance of the early involvement of the ODPP and "senior" defence lawyers with authority was confirmed by research carried out by BOCSAR with respect to the rolling list court (RLC) in NSW.[73] The RLC was a new case management approach trialled in the NSW District Court. Under

[71] The exception is in preliminary proceedings. They appear to involve only about 10% of matters for committal. Although data on numbers of preliminary proceedings is not collected by the Court or the ODPP, the ODPP at my request did a manual count of the number of preliminary proceedings applications finalised during the period 1 July 2025 and 22 May 2026 and they numbered 83 in total.

[72] Martin, *Review of the Major Indictable Reforms—Criminal Procedure Act 1921* (n 30) 10.

[73] Sarah Rahman, Suzanne Poynton and Don Weatherburn, 'The NSW Rolling List Court Evaluation: Final Report' (2017) 208 *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin*

the new approach, cases referred to the RLC were dealt with from start to finish by the same defence and prosecution lawyers and the same judge. The new arrangement led to an increase in the proportion of cases committed for trial that were finalised on a plea of guilty, more early guilty pleas, shorter trials, and a reduced time between committal for trial and the trial start date. Interviews with prosecution and defence lawyers indicated broad agreement that early guilty pleas occurred more often under the RLC because senior prosecutors who would take matters to trial were briefed early on and available to negotiate much earlier with their opposing counsel. Defence practitioners in the Court said that this gave them confidence that the charges, evidence and plea deals negotiated were unlikely to change as both sides were appropriately briefed and authorised to make decisions, thereby removing incentives to delay a plea as no better offers from the prosecution would be forthcoming closer to trial.

The RLC was a joint initiative of the Chief Judge of the District Court, myself as the then-DPP and the Senior Public Defender, and was aimed to test the "common wisdom" that an essential element of an efficient system is the early involvement of "senior" counsel with authority to negotiate and make decisions to resolve matters through early withdrawals of charges, remission to summary courts and early pleas of guilty, and to narrow the issues at trial. Assessments of the initiative's success are particularly persuasive because planned evaluation mechanisms were implemented from the outset of the RLC, and a randomised allocation process was applied in assigning cases to either the RLC or the general list.

2.10 Resourcing implications of ODPP involvement

Objectively, beginning to have the ODPP in matters at committal has resource implications. For the ODPP, it means taking responsibility for a new area of work and providing staff to cover that work. However, beyond some necessary set up and transition costs, I would expect that, once embedded, this way of working would offer much better value for money by redirecting public funds away from unproductive processes and towards earlier-stage outcomes.

To illustrate my point, in Tasmania's current system matters spend a period of time – in some instances a considerable period – at the Magistrates Court prior to committal, but to what purpose is unclear.

As a rule, little substantive progress is made. Functional disclosure is not established and the prosecution remains undefined. This is a waste of resources for everyone involved, including the expertise of the court and the parties and, of course, in terms of public funds.

As we now know, when the matter does reach the Supreme Court it will then take an average of over 14 mentions to finalise.[74]

Last year, 342 Supreme Court matters concluded in a discharge of the accused, some after spending significant time on the Supreme Court's lists.[75] While I do not have data that allows me to know the exact period of waiting time for each of these matters, there *is* good data to show the prevalence of matters experiencing lengthy waiting times: of the 912 matters forming the "total pending caseload" for 2024/25, 365 or 40% had been pending for over 12 months. 155 or 17% had been pending for more than two years.[76]

<https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb208-report-the-nsw-rolling-list-court-evaluation-fianl-report.pdf>.

[74] *Report on Government Services* (n 8) Table 7.24 (Courts).

[75] Tasmanian Director of Public Prosecutions, *Annual Report 2024-25* (n 42) 15, Table 3.

[76] *Report on Government Services* (n 8) Table 7A.22 (Courts).

I do not claim to know how much it costs the state overall to maintain matters on a Supreme Court list, but from my own experience managing ODPP budgets in two Australian jurisdictions, I assume the costs are considerable. In a purely speculative exercise, if it costs $5,000 per matter per year (a very conservative estimate in my view), keeping 342 matters in a list would cost $1.71M per year.

A proportion of later stage discharges is, realistically, unavoidable, and might be expected even if the ODPP were in committals. However, even if only half the matters discharged last year in Tasmania had never gone to the Supreme Court, this would represent a very material saving. I suggest that this saving could then be applied strategically in ways that invest in efficiency and effectiveness, like having the ODPP in committals.

This recommendation is not intended to point fingers at any agency or at the courts. What I describe is a systemic situation which has become embedded as "business as usual" for Tasmania's justice system. It is not that people and organisations are not working hard but that, based on the way the system is operating, their effort is poured into unproductive processes.

Speaking specifically in the context of early plea incentivisation, the Tasmanian DPP has stated that any successful scheme would depend on having ODPP lawyers appearing in committals, and that such a system would present resourcing impacts for the Office. I consider that his words are applicable in terms of a system that seeks to drive early resolutions generally:

> "… *The appropriateness of charges would need to be reviewed by this Office at an early stage and there would need to be greater certainty for an accused that the charges will be those that are prosecuted to conclusion. Further in circumstances where there is to be some negotiation as to the charges, those negotiations must be had with this Office. In my view, the involvement of this Office at an early stage is crucial to the success of any proposed scheme. If such a scheme is introduced it would require funding to allow earlier intervention in matters by this Office.*"[77]

Tasmania does not have a surfeit of public funds and there is demand to be met across the system. However, in my view, providing sufficient seed funding for the transition to operationalising this way of working would be an important and worthwhile investment that will soon produce tangible benefits and measurable efficiencies.

Recommendation 5.

The Tasmanian ODPP should have carriage of matters for committal in the Magistrates Court

2.11 Charge certification – the culmination of committal-stage disclosure

Throughout this report so far, I have referred to the importance of the determination made by the prosecutor about the readiness of a charge to go forward.

This determination is a key point in the prosecution that should, in my view, be formalised. What I have in mind is to do this by way of "charge certification". Charge certification would be a formal notification by the prosecutor that they intend to proceed on a charge because it is the appropriate charge based on the available evidence. Certification would formalise the decision by requiring the prosecutor with carriage of the matter to sign a certificate, file it with the court registry and serve it on the defence. It would explicitly mark the point at which it is understood that the offence to be prosecuted has been settled.

[77] *Statutory Sentencing Reductions* (n 25) 71.

Charge certification provides certainty, however, it does not act as a bar to the prosecution making subsequent upgrades or additions to charges. It is important that some flexibility is available to add to charges where new information comes to light after certification, for example if a complainant discloses further offending related to the accused.

Charge certification does not create extra work for the ODPP; it involves formalising a decision that the prosecutor must, in any case, make. Charge certification is a way of both:

a) Formalising during the court process that the ODPP has decided the charge that will proceed; and
b) Recognising the ODPP's rights and responsibilities as the "owner" of the prosecution.

The practices, powers and responsibilities that charge certification involves rightly belong with the prosecutor. In NSW, the ODPPs responsibility for charge certification is codified in s 66 of the *Criminal Procedure Act 1986* (NSW).

For charge certification to have efficacy, it must be timely. Despite conditions in Tasmania that seriously delay settling the charge, the *Justices Act* requires that the accused person plead by the third occasion at the latest or be deemed to have pled not guilty. As s 59(2) provides:

> *"If the defendant, on being asked to plead under section 55 or 58, stands mute or refuses to, or does not, answer directly to the charge, he or she is taken to plead not guilty."*

While this can be seen as a means of ensuring the matter does not languish in the Magistrates Court, it is not in my view productive, as it sets an outer time limit on Magistrates Court proceedings that does not relate to the matter's readiness to progress.

Ultimately, this does not save work from needing to be done but simply defers that work to the more expensive Supreme Court jurisdiction instead of taking advantage of the very capable Magistrates Court. In an early resolution-focused system, matters leave the Magistrates Court for the Supreme Court when there is confidence about the future path of the matter for either sentence or trial based on the plea.

To encourage the efficient progress of committals in the Magistrates Court, charge certification by the ODPP should be required to occur within a prescribed timeframe. In NSW that timeframe is 6 months from the first return date and I recommend that as a reasonable time period for Tasmania to adopt, noting that extensions can be granted by the court if that is in the interests of justice.[78]

Recommendation 6.

Tasmania should legislate to require the ODPP during committal-stage proceedings in the Magistrates Court, to certify a charge within a legislatively prescribed timeframe and prior to the requirement for the entry of a plea[79]

2.12 Mandatory conferencing between the ODPP and the defence

Early resolutions rely on early dialogue. Conferencing and decision making by both sides is fundamental if committal stage processes are to have genuine value as a case management, resolution, and path-making process.

[78] This is the prescribed period mentioned in Recommendation 1.

Currently in Tasmania, there is often little opportunity or utility for the defence to engage on issues at the committal stage. With little disclosure and no ODPP lawyer in the committal court, defence representatives understandably leave getting across the file until after committal.

My recommended way of working requires both parties coming early to the committal process with a good grasp of the file and ready to canvass the issues. The defence will need to be ready to treat and have a familiarity with the brief and instructions from their client.

In other jurisdictions, legislation or practice directions require the parties to meet, confer and report to the court. This process should be legislatively mandated by Tasmania. If my recommendation is accepted, a mandatory conference should take place post-charge certification by the ODPP and before the entry of a plea.

Recommendation 7.

Tasmania should legislate a requirement for mandatory, committal-stage conferences between the defence and the prosecution – post-charge certification and prior to the entry of a plea.

2.13 Legal Aid funding and supporting an early-stage system

I do not seek to pre-empt how the Tasmanian Legal Aid should deliver its services in line with the structural changes I recommend in this report. However, what Tasmania Legal Aid can and should do, in my view, is focus on ways that it can use resourcing to structurally support early outcomes.

This was a recommendation of the *Best Practice Model* jointly developed by National Legal Aid and the Australian Directors of Public Prosecutions in 1988, which I have included as Annexure 6:

> "*3. Grants of legal aid should be structured to encourage resolution of matters prior to committal.*"

Any such restructuring needs to be done in the particular Tasmanian context and in consultation with the private profession.

Tasmania Legal Aid resources – including any briefing fee arrangements – should be designed to reward early preparation. I propose structuring to shift effort from later interactions to earlier and expect that there will be efficiencies for Tasmania Legal Aid in the earlier resolutions that will result.

The Hon Sir Brian Leveson made this same point in relation to the system in England and Wales:

> "*… I have acknowledged the ever decreasing sums available to the various participants operating within the criminal justice system and, in particular, the impact this has had on remuneration rates for defence lawyers. Part of the solution to improving the efficiency of the whole system is to acknowledge the critical role that the defence can play whether in relation to advising clients as to discount and the benefits of entering an early guilty plea or obtaining instructions to identify the true issues in dispute (so that preparation and trials can be focused in a more limited way than otherwise would be the case). I appreciate that, in the absence of an increase budget for the [Legal Aid Agency], an increase in remuneration rates for this would require drawing funds from other parts of the fee structure, but in the long run this may provide a more cost effective and efficient system. I would therefore recommend that the LAA look into this redistribution of the money available to them for fees, to support the efforts required for early engagement with clients so as to resolve the case or identify the true issues.*"[80]

[80] Leveson, *Review of Efficiency* (n 32) 30, [99].

Recommendation 8.

Tasmania Legal Aid should structure and deliver legal aid with the intention of supporting the early resolution of committal matters while they are in the Magistrates Court

3. A statutory sentence reduction scheme

3.1 Supporting the early-stage focus with a statutory sentence reduction scheme

All Australian jurisdictions except Tasmania have legislative provisions requiring a sentencing court to take an offender's guilty plea into account as a relevant factor mitigating sentence. This is also the position in England, Wales and New Zealand. How a sentencing court is required to take the guilty plea into account varies between jurisdictions. SACoT's 2018 report *Statutory Sentencing Reductions for Pleas of Guilty* provides a useful table which compares Tasmania's sentencing approach to sentencing in other jurisdictions.[81] Although compiled in 2018, the information remains largely accurate, although I note that legislative change has occurred in South Australia since the date of its publication.[82]

Including sentencing reduction requirements in legislation recognises the utility of a plea. A guilty plea – which is effectively the accused person admitting their responsibility – saves the state from having to prove the offending. Obviously, this has value in a number of respects. For victims it means the matter is concluded without the need for them to give evidence and be cross-examined. For the community more broadly, the process of justice is applied to the law-breaker without expending the very significant public resources required to take a matter through the trial process.

It is not just the fact of the plea that is important, however. Crucial to the utility of pleading is the timing of the plea. For example, if the plea saves time and money that would otherwise be spent on the court process, then it follows that the earlier the plea is entered, the more will be saved. All jurisdictions across Australia have legislative requirements to take this timing aspect into account.

In recognition of these facts, two Australian jurisdictions – South Australia and New South Wales – operate schemes specifically intended to incentivise the earliest possible guilty plea. They approach this by offering fixed-percentage, sliding scale sentence reductions (that is, the earlier the plea, the higher the reduction) in return for the utilitarian value the plea represents.

Before briefly describing the two schemes mentioned, it is important to note that there are complex considerations here about the "rightness" of adopting this type of scheme. One way of thinking is that even if considerable money is saved, a guilty person should not get a special deal for admitting they did the crime. Others object ethically to what they perceive as a "managerialism" trend in justice which

[81] *Statutory Sentencing Reductions* (n 25) 42, Table 5.1

[82] The most significant changes in South Australia were to the prescribed sliding scale reduction amounts, which were changed and made to vary depending on whether the matter is a serious indictable offence (25% maximum for a very early plea sliding to 5% for a very late plea), and other indictable offence (30% sliding to 5%) for or a matter being dealt with by a Magistrate (40% sliding to 10%). See the *Sentencing Act 2017* (SA) Part 2, Subdivision 4 – Sentencing reductions.

prioritises efficiency over other considerations, for example, the right of an accused to put the state to proof.[83]

As someone who has devoted my career to the law, I am in no doubt that the justice system is one of the mainstays of civil society and we should not view it as a commodity. However, properly considering and balancing the needs of victims, accused persons and our community overall demands that justice is delivered effectively.

Effectiveness and efficiency are not competitors; they are more usefully seen as two sides of the same coin. Effectiveness is about achieving anticipated results. Efficiency is about applying boundaries, so that the resources used to achieve results are an investment and the results an acceptable return. While justice should not be rushed, timeliness *supports* the fundamental principles of access, equality and fairness. Justice delayed *is* justice denied; undue delay can have deleterious outcomes for all those involved, and for the community at large.

Kate Warner et al's 2022 report *Juror and community views of the guilty plea sentencing discount: findings from a national Australian study* goes specifically to the issue of community perceptions of sentence reductions in Tasmania. The study found that community members were not generally supportive of reducing a person's sentence based on a plea. Specifically, the respondents were more inclined to agree with increasing a person's sentence in the event of a conviction being secured by trial after a *not guilty* plea. Nevertheless, the report concluded that:

> *"… abandoning the sentencing discount should be strongly resisted. Longer sentences would be inevitable, leading to increases in the imprisonment rate, with no advantage in terms of a reduction in crime and disadvantages in terms of both financial and broader social costs (see Bartels, 2017). Moreover, with no incentive for defendants to plead guilty, it is likely that delays in the criminal justice system would be exacerbated and many more stakeholders in a case would suffer the stress of a trial, with the potential for retraumatisation particularly high for victims of sexual offences."*[84]

The paper suggests that the better response is seeking to grow general understanding about the "*community benefits of guilty pleas, particularly reducing the emotional stress to victims…*"[85]

His Hon Brian Martin AO KC reached a similar conclusion in his review of the statutory sentence reduction scheme in South Australia:

> *"… it must be recognised that in addition to the public interest in ensuring that offenders are appropriately punished, the interests of the community also include economic considerations. The public interest* [is] *in* [an] *efficient criminal justice system which is fair, not only to an accused, but also to victims and witnesses. To this end, encouragement to offenders to plead guilty at an early stage in proceedings is a legitimate objective.*"[86]

And further:

83 Arie Frebierg, 'Managerialism in Australian Criminal Justice: RIP for KPIs?' (2005) 31(1) *Monash University Law Review* 12.
84 Kate Warner et al, 'Juror and Community Views of the Guilty Plea Sentencing Discount: Findings from a National Australian Study' (2022) 22(1) *Criminology & Criminal Justice* 78, 92 <https://journals.sagepub.com/doi/10.1177/1748895820956703>.
85 Ibid 93.
86 Martin, *Review of the Sentence Reduction Scheme* (n 30) [106].

> "… *the fundamental premise that the overall public interest is best served by providing an incentive to offenders to admit their guilt early in the proceedings, is well entrenched. Put bluntly, from a number of points of view, the community cannot afford to revert to a system in which an offender has no incentive to plead guilty*."[87]

I agree with these conclusions and consider that sentencing reduction for a plea of guilty is a legitimate objective in the public interest.

3.2 The sliding scale reduction scheme

I further consider that there is now sufficient evidence to establish that there is particular efficacy in having the most transparent and predictable form of reduction for an early guilty plea, namely a sliding scale reduction based on the plea's timing. The utilitarian value of the plea is a separate reduction to the mitigation that may flow from a judicial finding of remorse and contrition. Judges would retain their discretion to mitigate the sentence for reasons beyond the utilitarian value of the plea.

In my view, the key driver in early plea schemes is the level of certainty available for the defendant when they are deciding whether to enter an early plea. A sliding scale approach sets out in legislation the available reduction at relevant stages of the process. An accused person can know with certainty the reduction to be applied when the reduction amount is tied to the timing of the plea.

The two Australian jurisdictions that currently use a sliding scale approach have both evaluated the schemes. Both are considered to be successful and have yielded worthwhile increases in numbers of early guilty pleas.

3.2.1 South Australia

A statutory review of the system operating in South Australia since 2013 was conducted by his Hon Brian Martin AO KC in 2015. He concluded that the system had:

> "… a *significant impact on the number of guilty pleas entered in respect of major indicatable matters at an early stage of the proceedings. Further, speaking generally, the increase in the number of early pleas was improving the operation and effectiveness of the criminal justice system simply because more pleas of guilty were being entered or indicated at earlier stages of the procedures. In addition, the scheme was providing transparency with respect to reductions allowed in recognition of pleas of guilty. However, at the time the increase in the number of early pleas had not produced a flow-on effect to the District Court.*[88]"

His Honour suggests, however, that the lack of identifiable effect in the District Court may have been due to the fact that the evaluation was conducted early in the life of the initiative and the data evaluated was collected over a short period of time very soon after the reforms commenced.

He concluded that, while "it was too early to assess confidently the time impact of the reforms on the scheme,"[89] the statistical information that was available indicated that:

> "… *In major indictable matters, the number of offenders pleading guilty in the first 4 weeks increased dramatically following the commencement of the 2013 sentence reduction scheme and that increase has been maintained… Similarly, the scheme has resulted in a significant*

[87] Martin, *Review of the Sentence Reduction Scheme* (n 30) [165].
[88] Ibid [108].
[89] Ibid [162].

> *increase in the number of offenders being committed for sentence (rather than trial) and the major indictable reforms have not adversely affected this result.*"[90]

3.2.2 New South Wales

In August 2021, BOCSAR published a report titled *The impact of the Early Appropriate Guilty Plea reforms on guilty pleas, time to justice, and District Court finalisations*.[91] The study examined whether, following the introduction of a sliding scale system of sentencing reductions in NSW in 2018, there had been an increase in the proportion of cases with an early guilty plea and whether the time to case finalisation had been reduced. It also specifically examined whether the weekly number of case finalisations in the District Court had increased.

The study compared cases finalised before the reforms commenced to those finalised after the reforms commenced on 30 April 2018, with the data considered covering the period from 13 June 2016 to 16 March 2020.

The key finding of the study was that the proportion of cases finalised with an early guilty plea increased by 6.5% following the introduction of the EAGP reforms. The average number of days from committal to finalisation decreased by 27 days, however, this was offset by an increase in time from charge to committal.

The number of weekly finalisations in the District Court (DC) increased after the reforms by up to 12.3 cases a week.

The conclusion of the study was that "[t]he EAGP reforms have succeeded in increasing early guilty pleas and weekly finalisations in the DC. Further research, using a longer follow-up, will be necessary to gauge its effect on matters proceeding to trial in the DC."[92]

I consider that the evaluation of the sliding scale sentencing reduction schemes in both South Australia and New South Wales provides evidence for the efficacy of these schemes in encouraging early guilty pleas.

The fact that both evaluations demonstrated that there had been an increase in the time taken for indictable matters to leave the Magistrates Court does not dissuade me from that view. That there is more time taken in the Magistrates Court under such reforms is to be expected.

The point of the reforms is to do all the work necessary at an early stage; good early preparation creates more predictable conditions and sets matters up for more targeted finalisation processes. It also means that much of the preparatory work happens in a jurisdiction that is less expensive to administer than in a higher court.

3.3 Views of review consultees and other stakeholders

The desirability or otherwise of introducing a sliding scale reduction scheme was an important part of the consultations I conducted, and submissions received from Tasmanian stakeholders.

A number of contributors to this review strongly support the introduction of a statutory scheme offering transparent sentencing reductions for earlier pleas of guilty. There was a recognition that incentivising early guilty pleas supports the overall aim of a structural shift to focus effort, resources and results early in the justice process.

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[90] Martin, *Review of the Sentence Reduction Scheme* (n 30) [161].
[91] Klauzner and Yeong (n 28).
[92] Ibid I.

The DPP supports the introduction of a statutory scheme setting out a sentencing reduction and considers that the reduction should reflect the timing of the plea.[93]

The Law Society of Tasmania's view is that a statutory scheme setting out the extent of the reduction as a percentage would remove uncertainty because this can offer "clarity to defendants and a tangible, known reliable sentencing discount."[94] As it indicated in SACoT's 2018 report on the issue of statutory sentencing reductions, the Law Society does not consider that global sentencing is an impediment to implementation because:

> "… *In reality defence counsel see this as being a non-existent problem. The judicial officer will simply need to articulate the relevant discount for each and then identify the overall global sentence*."[95]

Tasmania Police indicated that, in their view, a legislative provision would provide greater transparency.[96]

The conclusion of SACoT's 2018 report was to recommend introducing statutory early guilty plea reductions *without* a sliding scale, and instead have reductions decided by the judicial officers. The Council's argument was premised on the fact that sliding scale discounts rely upon a set of conditions that do not currently exist in the Tasmanian system:

> "… *the Council* does not *consider that the value of the plea should be set out in legislation, either as a legislative cap or a sliding scale. As explained further at [6.2.4], the Council's view is that use of a sliding scale is dependent on the legal culture, resources available to both the prosecution and defence and appropriate funding to both parties. Successful operation of a sliding scale would require early disclosure to allow the office of the DPP to determine the most appropriate charge(s) and defence counsel to give proper advice as well as appropriate legal aid funding for early attention to the matter. Presently, these conditions do not exist in Tasmania. As indicated at [2.5], delay is endemic in the pre-trial process in Tasmania and many systemic factors (other than the timing of defendant pleas) contribute to this problem, a problem that will not be resolved by the introduction of a prescriptive sentencing discount scheme in isolation from broader reforms. Accordingly, it is the Council's view that Tasmania does not have the appropriate institutional or legal infrastructure that would support the adoption of a sliding scale.*"[97]

Tasmania Legal Aid indicated in its submission that it is not supportive of the introduction of statutory reductions for similar reasons, stating that:

> "… *irrespective of the introduction of laws which provide discounts for early pleas of guilty, whilst the quality of attention to charging decisions and disclosure obligations remain sub-standard, accused won't be incentivised, and nor should they be expected, to plead guilty to serious offending which is [sic] often shown to be excessive of what is in the public interest.*"[98]

[93] The DPP confirmed with me that the position as set out in detail in the Sentencing Advisory Council's report remains unchanged: see *Statutory Sentencing Reductions* (n 25) 62, 71-72.
[94] The Law Society confirmed with me that the position as set out in detail in the Sentencing Advisory Council's report remains unchanged: see *Statutory Sentencing Reductions* (n 25) 62, 70-71.
[95] *Statutory Sentencing Reductions* (n 25) 77.
[96] Tasmanian Police confirmed with me that the position as set out in the Sentencing Advisory Council's report remains unchanged: see *Statutory Sentencing Reductions* (n 25) 63.
[97] *Statutory Sentencing Reductions* (n 25) 62.
[98] Tasmania Legal Aid submission.

As I hope I have made out abundantly already, I agree with the position that, as things currently stand, the Tasmanian justice system could not accommodate the operation of a sliding scale discount scheme. Disclosure is the primary sticking point for SACoT and Legal Aid, with other considerations such as staffing and resourcing also impacting Tasmania's readiness; these are concerns that I have of course addressed. I recommend a sliding scale discount scheme because I believe it is the best option for Tasmania and because I think it is time for Tasmania to bite the bullet on disclosure and other matters that stand in the way. Realistically, unless recommendations about reformed disclosure and ODPP involvement at the committal stage are first implemented, a discount scheme would be unworkable.

In undertaking this review, I had to decide whether it was best to make recommendations that accept current structural conditions and seek to counterbalance them, or whether I should recommend the structural change needed to pave the way for substantial reform. After much consideration, I chose the latter. Without certain structural changes, the problems behind ever-growing delays and backlogs cannot be effectively addressed.

The Tasmanian justice system has thus far made creditable work of keeping matters moving through the system despite disclosure arrangements, and only Tasmania can decide on the question of what reform to pursue. But it is my conviction that without addressing disclosure issues directly, any recommendations I make will effectively be stop-gaps. Avoiding structural change any longer will put off reforms that must take place to give Tasmania systemic outcomes that reflect the hard work being done.

Recommendation 9.

Tasmania should legislate for a sentence reduction scheme, with a sliding scale reduction based upon the timing of the plea, for criminal matters in the Magistrates Court and the Supreme Court

I have determined not to be prescriptive about details of the scheme, for example with regard to the percentages and timings applicable to the sliding scale and also the offences that should be excluded from its operation. These are important matters upon which reasonable minds may differ. South Australia, for example, has used higher percentages in relation to matters sentenced in the Magistrates Court and some lesser indictable offences in order to attract very early pleas (within 4 weeks of charge). It has also retained greater discretion for the judge to apply a discount of "up to" the specified percentage.

NSW has few exceptions to a mandatory requirement to apply a set discount based on the timing of the plea; I was directly involved in the implementation of this approach and believe it was the most suitable one for the NSW context. While I can see the merits of higher discounts for very early pleas in less serious matters – part of the South Australian sentence reduction scheme – the certainty of the percentage of the discount is also a desirable feature of the NSW scheme. Ultimately, the best approach for Tasmania will be for it to decide.

In relation to exemptions, it is likely that mandatory sentence offences will need special consideration. Both NSW and South Australia also exempt matters where the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only by imposition of a penalty with no or a reduced discount.[99] While I consider that such an exception would also be necessary for Tasmania, I would otherwise

[99] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25F(2); *Sentencing Act 2017* (SA) ss 39(4) and 40(5).

refrain from being overly prescriptive in relation to other possible exceptions required in the Tasmanian context.

3.4 Sentence indication – not recommended for introduction to the Supreme Court

Some contributors raised the possibility of expanding the sentence indication approach used in the Magistrates Court. SACoT defines sentence indication as:

> "… *An indication from a magistrate hearing proceedings for a summary offence, or an indictable offence triable summarily, of the type of sentence that will be imposed if the defendant pleads guilty, or an indication from a judge hearing proceedings for an indictable offence of whether the defendant would be likely to receive a sentence of imprisonment if they plead guilty. This can occur as part of a contest mention hearing.*"[100]

All things considered, I believe sentencing indications in the Supreme Court would be of little utility if the recommendations encouraging early resolution in the Magistrates Court are actioned. I have concerns that sentencing indications in the Supreme Court could delay the entering of an early guilty plea, which would undermine the rationale behind the early resolution scheme I propose.

Nonetheless, I do not recommend the cessation of sentence indications in the Magistrates Court. Because of the less serious nature of the offending there, I consider that sentence indications may be given at an early stage and would not undermine early pleas in the same way as they might in the Supreme Court. No sentencing indication could ever be given by a Magistrate on a matter that is to be committed to the Supreme Court.

4. Increasing capacity and utility in the courts

If adopted, the recommendations I have made so far will realise currently untapped value in the Tasmanian Magistrates Court, with the Court presiding over more substantive legal work in indictable matters as opposed to largely ushering matters to the Supreme Court.

As I have said elsewhere in this report, the substantive preparation and case management work that I propose should be happening in the Magistrates Court is not *new* work. It is work that is currently being done in the Supreme Court. The potential of the Magistrates Court to do more of this type of work will have resource implications in terms of requiring more judicial time for committals matters.

Directly adding further resources may well be necessary, at the very least to ensure that the Magistrates Court can transition, adjust to and accommodate new ways of working, as well as lengthier, more substantive committal processes.

Another strategy to assist with facilitating appropriate resourcing in this regard is to move some matters to other venues. Specifically, I received feedback and submissions on some "quasi-legal" matters suitable to be heard in a quasi-judicial venue.

4.1 Possible transfer of matters to TasCAT

It has been suggested that Residential Tenancy matters could be effectively and efficiently dealt with by the Tasmanian Civil and Administrative Tribunal (TasCAT). This is a recommendation I agree with. Residential tenancy disputes are heard in Civil and Administrative Tribunals in most other Australian

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[100] Sentencing Advisory Council of Tasmania, *A Guide to Sentencing in Tasmania* (2020) xii <https://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0004/576139/A-Guide-to-Sentencing-in-Tasmania-July-2020.pdf>.

jurisdictions. Transferring that work would result in approximately 500 of the 2711 civil lodgements in the Magistrates Court in 2024-25 being moved.[101]

More flexible staffing arrangements mean that the Tribunal is able to ramp sittings up and down as necessary to meet current need.

Other areas suggested by review participants for consideration to transfer to the TasCAT jurisdiction included restraint order proceedings. However, I am of the view that because of the nature of those orders, that is properly work of the Magistrates Court and not something that could be transferred to TasCAT.

TasCAT itself was positive about the potential for assuming more responsibility where appropriate, noting that this would require further funding. Providing the matters selected can appropriately be heard in a Tribunal setting, in my view this is a worthwhile investment.

TasCAT is already demonstrating efficiency and efficacy in important non-criminal matters and disputes. As a quasi-judicial space, it is less expensive to operate than a court and is assisted by its flexible workplace arrangements, which can accommodate times of higher workload.

4.2 Possible extension of infringement notices

I also received many suggestions for potential offences suitable for adding to the infringement notice regime. Some of the more commonly recommended offences I encountered were the following, all these being relatively minor matters that frequently consume Magistrates Court time:

- Any summary offences involving a first-time offender, where there are no aggravating features;
- Cannabis-related offences capable of being dealt with summarily;
- Possession of drugs under a trafficable quantity;
- Possession of smoking devices;
- Possession of a dangerous article in a public place (low-level instances);
- Possession of ammunition (where not linked to more serious offending);
- Low-level offences involving abuse or vilification of police; and
- Make off without payment (for instance, petrol theft).

These types of matters were described as "classic 'court cloggers'", suitable for resolution by infringement rather than court process.

Other suggested inclusions in the infringement regime were public order or regulatory-style offences, that is, offences arising from social or situational factors, for example, public intoxication offences. In practice these matters can consume disproportionate court time, particularly where they do not involve ongoing risk to the community.

Equally suitable for inclusion in the regime are traffic and vehicle-related offences where the offending is not tied to dangerous or criminal driving behaviour. Examples suggested to me in consultations included driving-related administrative breaches where they are not accompanied by a dangerous driving component – for instance, driving a motor vehicle unregistered and lower-end examples of driving suspended, unlicensed or disqualified (noting that more serious offending in this category may still warrant court attention) – and lower-level instances of altering number plates. Also identified as

[101] Community Legal Centre Submission.

suitable for being dealt with outside the courts were underutilised or outdated offences such as several contained in the *Police Offences Act 1935* (Tas).[102]

I agree that these offences are suitable for inclusion in the infringement regime where they are not tied to broader criminal conduct, and that an expanded infringement regime would go some way towards freeing up valuable Magistrates Court time. Another suggestion put to me in consultations was a that a broader, more systematic approach be adopted through an "omnibus" infringement framework, one that would capture 1) rarely prosecuted offences, and 2) frequently prosecuted, low-level offences that do not warrant court attention. This is in alternative to an infringement regime where offences are assessed individually. I consider this a compelling suggestion in terms of its potential to remove "court cloggers" from the Magistrates Court while ensuring the work is appropriately dealt with.

Recommendation 10.

Residential tenancy disputes should be moved from the Magistrates Court to the Tasmanian Civil and Administrative Tribunal (TasCAT).

Recommendation 11

Tasmania should expand the offences that can be dealt with by way of infringement notice with an ability to elect to challenge in Court.

4.3 Conducting a super call-over to "clear the decks" before making structural changes

Many of the recommendations in this report are structural; they seek to address underlying causes of backlog and delay as a way of creating system change going forward and preventing future backlog blowouts. Problematic backlog is also an immediate problem; it self-perpetuates and adds complication and delay to any attempt to implement reform initiatives.

I recommend Tasmania takes the earliest opportunity to take pressure out of the Supreme Court by dedicating court time to a "super call-over". Call-overs, which work to ascertain what work is to hand and the status of each matter, are a regular feature of court management and planning. A super call-over applies the same process to problematic backlogs with a view to encouraging decision making in matters that are languishing so that the matters are properly considered and finalised appropriately where this is possible.

Legal Aid should fund practitioners to attend and engage in the super call-over process.

We know that the current Tasmanian system tends towards later-stage resolutions. It is quite likely that many matters have not yet had substantive legal consideration and could be appropriately resolved and exit the court if they are given some focused attention in a call-over.

In such a small jurisdiction, a call-over will create short-term resource pressure for the courts and agencies involved. It may be necessary to fund the court specifically for such a project, and if so, I would once again consider it a worthwhile investment.

[102] The offences specified in my consultations were those contained in ss 12, 13, 14, 14C, 15B, 16, 17, 19AA, 25, and 48 of the Act.

In 2017-2018 the Tasmanian Supreme Court held a super call-over with good success.[103] A single acting judge called over every matter listed before the Supreme Court and required the parties to provide detailed information about the state of their matter. A large number of matters were discharged prior to the listed call-over date and many matters entered pleas at the call-over.

Call-overs give backlogged matters the kind of purposeful attention they need to get moving. They can be an effective tool when from time-to-time immediate intervention is needed to allow day-to-day operations the space they require. Super call-overs are best seen as a late-stage intervention. My own recommendations, as will be clear by now, are premised on the benefits of encouraging *early*-stage focus, and if possible to avoid backlog altogether.

There may be occasions where a super call-over process is useful even in an early-focus system, but in my view it is best used sparingly. The structural changes I have already recommended to reduce the cause of backlog and facilitate sound early resolutions are long-term strategies rather than interventions.

Recommendation 12.

The Tasmanian Supreme Court should conduct a one-off "call-over" of all pending Supreme Court matters with a view to facilitating the prosecution and defence appropriately settling matters and reducing the current backlog.

4.4 Increasing Supreme Court capacity with additional resourcing

The Supreme Court needs additional resources to efficiently clear the backlog in preparation for the next way of working. The data supports the need for a further permanent judge, noting that the Supreme Court is highly efficient in disposing of each 1000 finalisations with fewer FTE judicial officers than the Australian average.[104]

In order to appoint a further Supreme Court judge there would need to be legislative change to the *Supreme Court Act* 1887 (Tas) (the *Supreme Court Act*). Section 2 of the Act currently puts a cap on the number of judges at 6, the Chief Justice and 5 puisne judges.

An amendment to the legislation would give the flexibility to appoint an additional Supreme Court judge.

Recommendation 13.

Tasmania should repeal or amend section 2 of the *Supreme Court Act* 1887 to facilitate a possible increase in the number of Supreme Court judges.

The Supreme Court should have sufficient flexibility to increase judicial capacity as required for short periods of time. Each Supreme Court around Australia has a system whereby assistance may be rendered to the permanent judges of the Court by acting, reserve or additional judges.

Tasmania, with its very small total of Supreme Court judges, needs an efficient and effective system for increasing judicial capacity. At present that need is met via the appointment of acting Judges pursuant to s 3 of the *Supreme Court Act.*

It is not an easy process to attract acting judges who have sufficient capacity to assist when there is need. An acting judge must be a retired senior judge.[105] It is imperative that the acting judge system

[103] Interview with his Hon Brian Martin AO KC, the presiding judge during the call-overs in 2017-2018.
[104] *Report on Government Services* (n 8) Table 7A.29 (Courts).
[105] *Supreme Court Act 1887* (Tas) s 3(1A).

be responsive. The Northern Territory employs a dual system of additional judges that remain available to work until retirement without the need for further executive appointment and acting judges who are less senior than additional judges and are appointed for specified periods of time not exceeding 12 months. [106] The additional judge system provides flexibility and avoids the need for annual reconsideration of acting appointments by the executive.

In addition to having acting judges in Victoria and Queensland, there is also a system of reserve judges provided for by statute.[107] Reserve judges are appointed to a pool for a period of 5 years, to be available to the Supreme Court *as required*. The Chief Justice engages a reserve judge by requesting them to sit for a period or for a purpose. A pool of reserve judges provides variety and capacity when the Chief Justice is looking to make an engagement.

The difference between the Northern Territory additional judges and the Victorian and Queensland reserve judges is essentially the length of time of the appointment. In the Northern Territory an additional judge is appointed until retirement, and in Victoria and Queensland reserve judges are appointed for a period of 5 years.

I think it would benefit Tasmania to have the increased flexibility that either of the additional and reserve judge systems have to offer. On balance I consider that the reserve judge system is the best for Tasmania's needs.

Recommendation 14.

Tasmania should amend the *Supreme Court Act* 1887 to make provision for a pool of reserve judges to be appointed by the Governor in Council. Reserve judges should be able to be appointed for a period of up to five years and that term should be renewable up to a specified retirement age

Recommendation 15.

Tasmania should fund the Supreme Court to either appoint a further permanent Supreme Court judge, or use the funds to appoint acting and reserve judges as required at the discretion of the Chief Justice, up to the total cost of a permanent Supreme Court judge

5. Information technology

5.1 Importance – and complexity of – introducing information technology solutions

With the voice of experience, I can attest to the fact that large-scale IT document management and communications systems are notoriously difficult to design and implement. The needs of legal systems, which are continuously evolving and feature onerous regulatory and privacy requirements, add to the complexity.

Nonetheless, I believe that introducing supportive information technology solutions into the Tasmanian justice system is not only desirable, but essential.

Contemporary forms of evidence are increasingly electronically based, as are forms of communication, and I would argue that appropriate technology which allows critical information to be stored and

[106] *Supreme Court Act 1979* (NT) s 32(2).
[107] *Constitution Act 1975* (Vic) s 81; *Supreme Court of Queensland Act 1991* (Qld) ss 6A, 6B.

shared securely and contemporaneously is no longer optional; it is necessary as a response to contemporary conditions.

Tasmania must introduce fit-for-purpose, contextualised IT support to securely store and share materials and to aid communication. Whether this is one system or a number of communicating systems, and whether it is specifically develop for the purpose or made by customising an existing platform, are all considerations for Tasmania, however the need itself is a *fait accompli*.

5.2 Local perspectives

The Tasmanian Department of Justice submission to this review drew particular attention to challenges being experienced with respect to document management in the Magistrates Court:

> "… *The Magistrates Court continues to operate on a paper-file system, with significant consequences for efficiency and resourcing. Documents must generally be filed in hard copy, and documents that are formally issued by the Court must also be produced and provided in hard copy. Court orders are handwritten onto the physical Court file as the official record, then retyped to create a digital version for circulation. This creates a substantial administrative burden. The Court must manage large volumes of paper records for both current and archived matters, and the staff effort required to maintain that system diverts resources away from other critical service delivery functions. The process is highly manual at every stage. Information from hard copy filings must be entered by hand into current Court databases. Summonses are filed in hard copy by TasPol, then signed, sealed and returned by Court staff for service. Documents issued by the Court are often typed, printed, signed by hand, physically sealed, and then either posted or provided to police for personal service. A major consequence of the backlog is that staff are occupied managing these labour-intensive administrative processes and often do not have the capacity to focus strategically on individual matters that are consuming disproportionate Court resources. That reduces opportunities for early intervention that might otherwise help expedite proceedings. Electronic processes would significantly reduce that administrative burden.*"

The Department favours the implementation of an IT platform which was designed to align with proposals in the *Magistrates Court (Criminal and General Division) Act 2019*.[108]

Beyond knowing that work has taken place, however, I have not given this in-depth consideration, as I do not have the necessary IT skills to adequately dissect and understand the proposed system and draw any cogent conclusions.

According to the submission, if adopted as a package:

> "… *New matters will be able to be filed electronically, court orders entered directly into the system, and documents generated and served by email or other electronic means. TasPol disclosure will also be capable of being provided electronically through a web portal, enabling lawyers and members of the public to access relevant material before attending Court. Where other justice system entities are integrated with Astria, there will be less need for manual follow-up to confirm processes, outcomes and orders. TasPol and other connected bodies will be able to rely on the system record as an accurate reflection of Court outcomes. This should substantially reduce the time currently spent responding to enquiries, reproducing orders manually, printing, signing, sealing, posting and storing paper documents. Importantly, those efficiencies would allow court staff to direct more time to*

[108] Tasmanian Department of Justice submission.

higher value work, including supporting court users with complex communication needs, reducing delays caused by defective paperwork, and managing matters more proactively. In that way, the Astria reforms are expected to make a material contribution to improving court administration and addressing the existing backlog."

The comprehensive work of Jennifer Boocock et al in their 2026 report *Attracting and Retaining Criminal Lawyers in Tasmania* points to the consensus amongst the profession about the need for better technology. The study quotes two contributors discussing their own ideas of what IT should be doing in the Tasmanian system:

> "*… One thing I constantly think about is how well the FCFCOA does audio visual connectivity for practitioners. As far as having, you know, a room you jump on at a certain time, you don't have to do requests.*" (Currently working in criminal law, interview)
>
> "*… Improved court processes, such as allocation of a hearing date early in the matter and implementation of a case management timetable so that deadlines are clear from the outset and all parties are working towards having the matter ready for hearing at a set time. (I now work in Family Law, and this is the approach taken in all family law matters. It works very well).*" (Previously worked in criminal law, survey)[109]

According to the report, both the Supreme Court and the Magistrates Court are undertaking work around their IT requirements, including, for the Magistrates Court, the possibility of utilising a system currently being used in South Australia. It also points to the Justice Department's goal to implement an end-to-end whole-of-justice IT system.[110]

The authors of the report go on to observe:

> *"… at this stage, it is unclear how these various reviews, scoping processes, and system upgrades will interact with one another, or the extent to which they will address the issues raised by participants in the present study. However, it would be beneficial for these projects to take account of the views expressed by participants in the present study to help ensure that any changes are beneficial to this user group reduce – and do not further exacerbate – high workloads and other frustrations."*[111]

In my view, systemic IT integration across very significant areas is difficult to achieve in practice. Even very sophisticated technology platforms have limits around how many jobs they are capable of doing. The more integration expected of a system, the more jobs the system must do. In my experience, the wider the system's reach, the more difficult it becomes to meet the needs of all the various users.

For Tasmania's justice system to be optimally operational, the implementation of appropriate information technology is in my view needed as soon as possible.

Recommendation 16.

Tasmania should introduce, as soon as possible, tailored information technology solutions to support agencies and individuals working in the criminal justice system to do their work more effectively and efficiently

[109] Boocock et al (n 26) 77.
[110] Ibid.
[111] Ibid 78.

6. Executive leadership and professional development

6.1 Building capacity and capability in the Tasmanian legal profession

Workplace development may seem to some like a less important change compared with other changes, for example to legislation. In my experience, this is not the case. As mentioned previously, small jurisdictions are particularly susceptible to workforce challenges that can be addressed only by paying attention to the needs of those working in the system.

The reformed system that I recommend relies on having practitioners in matters early – practitioners with sufficient knowhow and authority to allow them to treat with one another on the issues. My consultations revealed that a reasonable number of those practising criminal law in Tasmania are relatively inexperienced. In their 2026 report, Boocock et al make the excellent point about the prospect of early guilty plea sentencing schemes in Tasmania:

> *"… the potential hazards of introducing statutory sentencing discounts without also addressing the structural and professional pressures that appear to be contributing to delayed pleas. This concern is particularly relevant in respect of early-career lawyers, who may face increased pressure to advise clients to plead guilty in the absence of sufficient supervision or support. Such pressures risk undermining an accused person's rights to a fair hearing and competent representation. They may also exacerbate existing workforce challenges, as sustained exposure to high stakes decision-making without appropriate guidance can contribute to psychological distress and burnout, ultimately affecting the retention of early-career practitioners within the profession. Moreover, statutory sentencing incentives alone are unlikely to address underlying factors affecting defendants' decisions to plead guilty such as increasing complexity in criminal proceedings, lack of legal representation, delayed disclosure and the pressures on early-career lawyers.*[112] [internal footnotes removed]

As the Northern Territory DPP, I dealt firsthand with the challenges of attracting and retaining criminal lawyers. I relied heavily on talented newer lawyers to do the work alongside a few more experienced long-term counsel. Tasmania must strive to keep the criminal lawyers it has and attract new ones.

Boocock et al make two apposite recommendations. I feel I cannot do better than to adopt these in this report, as well as adding a recommendation of my own, which is in keeping and relates specifically to developing the whole sector to ensure practitioners have the skills and confidence to do decisive work.

Recommendation 17.

Early-career professionals working in criminal law should have access to, and be supported by their employers to participate in, a formal mentoring program that matches them with a senior practitioner.

Mentors should be supported to undertake training on effective mentoring and relevant skills such as recognising and responding to distress and effective debriefing and reflective practice.

Consideration should be given to the Law Society of Tasmania providing incentives for senior lawyers to participate in mentoring, such as reduced practising certificate fees; free CPD points; reduced CPD course fees; and formal recognition of contributions to mentoring through, for example, specialist accreditation programs.

[112] Boocock et al (n 26) 79.

[Originally Recommendation 6 of *Attracting and Retaining Criminal Lawyers in Tasmania: Research report and recommendations* by Jennifer Boocock, Yvette Maker, Jane Nielsen, Jeremy Prichard and Garrett O'Duffy (2026)]

Recommendation 18.

The feasibility of an ongoing, funded Tasmanian Criminal Law Graduate Program should be explored. Such a program could build on Department of Justice Graduate Legal Officer program to enable graduate lawyers employed under the State Service Act 2000 (Tas) to undertake a structured early career program, including placements at both the DPP and TLA with ongoing mentoring support from senior personnel.

[Originally Recommendation 7 of *Attracting and Retaining Criminal Lawyers in Tasmania: Research report and recommendations* by Jennifer Boocock, Yvette Maker, Jane Nielsen, Jeremy Prichard and Garrett O'Duffy (2026)]

Recommendation 19.

Tasmanian criminal lawyers should have access to training and development for the purpose of building the skills and confidence necessary for achieving appropriate early resolutions. Topics covered should include; understanding processes and the lawyers' role, planning, negotiation skills, conferencing witnesses, determining sufficiency of evidence to determine the correct charge, effectively counselling clients considering early pleas.

6.2 Approaching systemic change as a leadership collective

The Terms of Reference for this review appropriately begin with a focus on the importance of committed collective leadership:

> *1. Promoting committed leadership to improve access to justice across all levels of the criminal justice system, through a systemic approach that acknowledges the interdependent roles and responsibilities of institutions and participants within the system.*

Tasmanian justice leaders work hard in their individual spheres of responsibility, but they also recognise that there are opportunities to work more collectively with a view to driving wholistic improvements in the criminal justice system. This review itself was born of a coming-together of justice system leaders at the 2025 Justice Forum based on their collective concerns. They recognised the need to see and treat the delivery of criminal justice as a system.

I understand very directly the demands on leaders' time and I do not seek to overburden leaders who are already stretched. However, there is in my view very real significance and utility in making sure that leadership visible and explicit.

While leaders set the agenda, the hands-on work should be done by working groups at various levels. Modelling the importance of the work and of "showing up" wholeheartedly is, I believe, one of the key functions of leadership.

I believe that existing leadership structures and standing meeting schedules can be utilised to achieve a more systemic approach to the delivery of criminal justice.

6.3 Monitoring and evaluation, including a Minimum Data Set

Like all jurisdictions, Tasmania seeks to understand how well systems are operating and, when reforms are implemented, the outcomes they are delivering. A data-driven monitoring and evaluation program is in general highly desirable, but for tracking the benefits of reform it is indispensable.
KPIs are measures of duration/time (how long?), value (how much?), volume/output (how many?), quality/error rate (how did it go?), but they are not simple metrics: they are measurements of selected conditions and occurrences that are strategically chosen for their ability to give us insights into certain aspects of the system we are looking at.

Which things we should measure to get a good picture of systemic performance is a complex question. Many outcomes in the criminal justice process cannot be measured directly – for example, "is disclosure now working functionally?" is not able to be adequately answered by a single measurement. Where this is the case, "proxy" measures can give some perspective if they are well-chosen.

Data collection itself is one of the complexities, particularly where there are not IT solutions in place to assist. While existing, longitudinal comparative data, for example, ROGS, can be very useful, these are not designed to meet specific jurisdictional needs. Such jurisdiction-specific measures are worth generating. For example, having reliable longitudinal sentencing data is of assistance for many aspects of planning.

In conjunction with adopting my suggested reform program, I recommend that Tasmania's justice leadership group turn its mind to the question, "how will we know if the reforms are working?" and, with the assistance of relevant experts, collectively agree upon a minimum data set (MDS) – a standardised group of core data measures that can best answer that question by tracking how certain conditions are or are not changing over time. When considering a monitoring and evaluation regime, Tasmania would do well to consider what Tasmania-specific data already being collected might be useful, and what data is not being collected that should be.

I suggest being disciplined about setting the number of measures to be included in the MDS. Any measure will say something about the system – the aim is finding a manageable number of really targeted measures that answer our questions. I suggest no more than 12.

I offer some examples of the types of measurements that may be of interest when thinking about understanding changes connected with the causal conditions of backlogs, however these are not in any way definitive or exhaustive:

- How long are finalisations taking on Supreme Court matters?
- How many matters are exited, or dealt with summarily, or are leaving for the Supreme Court in a largely "ready to go" state, at the committal stage?
- How many appearances (mentions) in the Supreme Court average per matter? (This is an existing measure)
- How often are committal stage briefs accepted by the ODPP without any need for further Police disclosure to enable charge certification?

- How many times do magistrates grant extensions on brief service orders? (Measure how many matters this happens in *and* how many times in each matter)
- How long does the average committal process take – from first charge to first mention (pre-committal stage) and from first mention to committal?
- How many charge certifications happen within the prescribed period?
- How many matters are dismissed by the Magistrate because charge certification has taken too long?

Recommendation 20. Tasmanian justice leaders should meet regularly, at least every six months, to collaborate on an agenda that covers: • Agreeing upon and establishing a reform agenda to deal with the root causes of court backlog; • Development and adoption of a minimum data set (MDS) made of no more than 12 key indicators, strategically selected for their ability to provide a snapshot of how the reforms (and the system overall) are tracking; • Working together to consider if there are any agency-specific measures that would be worth tracking; • Overseeing an expert-conducted monitoring and evaluation program based on the MDS, and qualitative data; and • Making recommendations to Government regarding legislative changes where necessary

LIST OF ANNEXURES

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ANNEXURE 2: List of Persons Consulted with (formal and informal)

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ANNEXURE 4: The Hon Brian Ross Martin AO QC's 2019 report - *Review of the Major Indictable Reforms—Criminal Procedure Act 1921*

ANNEXURE 5: Analysis of ROGS data

ANNEXURE 6: *Best Practice Model for the Determination of Indictable Charges* developed jointly by the Australian Directors of Public Prosecutions and National Legal Aid, 1988

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Annexure 1
Terms of Reference

Third Party Review of Backlogs in the Tasmanian Court System 2026

Terms of Reference

Context

The Tasmanian Government is committed to facilitating timely access to justice for all Tasmanians. Like other jurisdictions, the justice system faces complex process challenges which create delays and affect the efficiency and timeliness of delivering justice.

In January 2025, the Tasmanian Government conducted a broad consultation process with key stakeholders on how to support the Tasmanian Courts and the justice system as a whole to best deliver accessible justice. The consultation included consideration of a third-party review and, following that, the Tasmanian Government has commissioned the *Third Party Review of Backlogs in the Tasmanian Court System 2026* (the 2026 Review).

Whilst the 2026 Review is focused on the criminal justice system, the Tasmanian Government welcomes any observations or recommendations related to the civil justice system.

The Review will respect the distinct constitutional roles and responsibilities of the courts and other institutions within the system.

Scope

The 2026 Review will develop a backlog action plan with a focus on:

1. Promoting committed leadership to improve access to justice across all levels of the criminal justice system, through a systemic approach that acknowledges the interdependent roles and responsibilities of institutions and participants within the system;
2. Assessing relevant processes and procedures across the criminal justice system, including court processes, to identify issues and barriers that are contributing to delay and impacting efficiency and timeliness;
3. Identifying strategies and mechanisms that could be applied to improve case progression across the system. This would include consideration of listings, adjournments, readiness practices, and a range of case-flow and case management practices;
4. Considering how current Court resourcing arrangements correspond with the ongoing operational needs of the Courts; and
5. Developing a framework of indicators which may be used to measure the timeliness and effectiveness of any strategies coming out of the 2026 Review and may also provide a foundation for ongoing evaluation.

Annexure 2

Court Backlog Review – List of Consultees

Contributors	Organisation (alphabetically)
Henry Pill – Principal Solicitor at Hall Payne Lawyers Phil Schubert – Director at Blumers Lawyers	Australian Lawyers Alliance
Malindi Sayle, Director, Insights & Modelling NSW Bureau of Crime Statistics & Research	BOCSAR (Bureau of Crime Statistics and Research NSW)
Mark de Crespigny	Commonwealth Director of Public Prosecutions
Kristy Bourne, Secretary Pauline van Adrichem, Deputy Secretary	Department of Justice Tasmania
Andrew Smith - Chief Information Officer, Michael Hall - Solution Architect Kayla Millen - Manager Information Analysis Services	Department of Justice, Office of the Chief Information Officer
Matthew Osborn Marian Quilty	Forensic Science Service Tasmania
Damian Bugg KC	Former Tasmanian DPP
John McKechnie	Former Western Australian DPP
Tom Tully APM (with Damian Bugg KC)	Independent Reviewers of Summary Prosecutions
Luke Rheinberger – Executive Director, Amelia Higgs – President, Luke Taylor Luke Brett Pip Monk	Law Society of Tasmania
Joanna Martin, Magistrate	Magistrates Court of South Australia
Chief Magistrate Catherine Geason Deputy Chief Magistrate Ken Stanton Chief Coroner Olivia McTaggart Magistrate Simon Brown Magistrate Leanne Topfer Magistrate Katie Edwards Magistrate Robert Webster, Magistrate Jackie Hartnett, Magistrate Chris Webster Magistrate Andrew McKee Magistrate Evan Hughes Magistrate Duncan Fairley Magistrate Reg Marron Jane Cook - Administrator of Courts	Magistrates Court of Tasmania
Anne-Marie Rice Jennifer Crawley	Novera Solutions, formerly Senior Judicial Registrars of the Federal Circuit and Family Court of Australia
Justice Sarah Huggett	NSW District Court Chief Judge and Supreme Court judge
Commissioner Mal Lanyon Commander Duane Carey, Police Prosecutions Command	NSW Police

Contributors	Organisation (alphabetically)
Matt Liddle	
Daryl Coates - Director of Public Prosecutions Linda Mason, Deputy Director of Public Prosecutions	Office of the Director of Public Prosecutions Tasmania
Simon Gates - State Litigator	Office of the State Litigator
Susie Winter	Parole Board of Tasmania
President Malcolm Schyvens and Principal Registrar Jarrod Bryan	President TASCAT
Kim Baumeler Cameron Scott Greg Melick KC	Private Bar
Chief Justice Christopher Shanahan The Honourable Justice Tamara Jago The Honourable Justice Michael Brett The Honourable Justice Kate Cuthbertson The Honourable Justice Helen Wood The Honourable Associate Justice Michael Daly The Honourable Justice Robert Pearce Penelope Ikedife - Registrar	Supreme Court of Tasmania
Former Tasmanian Chief Justice Alan Blow AO, retired	Supreme Court of the Northern Territory
Hannah Phillips – Principal Lawyer	Tasmania Aboriginal Legal Service
Kristen Wylie – Director, Matthew Bugg – Associate Director Criminal Law	Tasmania Legal Aid
Susie Winter Emma White	Tasmania Legal Practice Course
Donna Adams, Commissioner of Police and Secretary of the Department of Police, Fire and Emergency Management Deputy Commissioner Jonathan Higgins, Assistant Commissioner Adrian Bodnar Garth Stevens – Principal Legal Officer and Brenda Orr – Inspector – Southern Prosecution Services Nicholas Clark, Inspector Northern Prosecution Services	Tasmania Police
The Honourable Guy Barnett MP, Deputy Premier and Attorney-General	Tasmanian Government
Narelle Pamplin, Director of Prisons	Tasmanian Prison Service
Sarah Kay SC	Tasmanian Solicitor General

Annexure 3

Court Backlog Review – Written Submissions 2026

Contributors	Organisation (alphabetical order)
Chris Haynes	Australian Lawyers Alliance
Dr Kristine Klugman OAM – President	Civil Liberties Australia
Isabelle Crompton – Interim Commissioner for Children and Young People	Commissioner for Children and Young People Tasmania
Mark de Crespigny – Commonwealth Solicitor for Public Prosecutions	Commonwealth Department of Public Prosecutions
Chris Carney – Executive Director	Community Corrections – Department of Justice
Benedict Bartl – Policy Officer	Community Legal Centres Tasmania
Ross Smith – Acting Secretary	Department for Education, Children and Young People
Sally Badcock – Associate Secretary	Department of Health
Vanessa Ives – Court Support Liaison Service	Department of Justice
Lucy Edmonds	Engender Equality
Pauline van Adrichem – Deputy Secretary	Justice Connect – Department of Justice
Angela McCrossen – Executive Director	Justice Support Services – Department of Justice
Kathryn Fordyce – Chief Executive Officer	Laurel House
Rod Hassett	N/A
James Ayliffe	N/A
Helma Stevenson	N/A
Helma Stevenson	N/A
Cheryl Dow-Sainter	N/A
Colin Lamont	Prosecution - Tasmania Police (Western District)
David Longano and Annabelle Ward	Sdrinas Legal
Shane Gregory – Acting Secretary	State Growth
Dr Elise Histed	Supreme Court of Tasmania
Dr Toby Gardner (Chair)	The Royal Australian College of General Practitioners
Jaclyn Kosta	Victims of Crime

Annexure 4

Review of the Major Indictable Reforms - *Criminal Procedure Act 1921* (as amended by the *Summary Procedure (Indictable Offences) Amendment Act 2017*)

Report to the Attorney-General

Hon Brian Ross Martin AO QC

13 September 2019

I gratefully acknowledge the valuable assistance provided by Ms Amanda Giuliani-Solly, Ms Tammy Connelly, Ms Bianca Geppa and other members of the Attorney-General's Department in the preparation of this Report.

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Introduction

[1] On 12 September 2018 I was appointed by the Hon Vickie Chapman MP, Deputy Premier and Attorney-General, to conduct a Review and provide a written report concerning the operation and effectiveness of the sentencing reductions regime which operates in South Australia pursuant to Part 2 Division 2 Subdivision 4 of the *Sentencing Act 2017* (the Sentencing Act). My interim Report is dated 5 June 2019 (Sentence Reductions Report). As explained in that Report, the operation of the sentence reduction scheme is closely linked with the court processes which are covered by the *Criminal Procedure Act 1921* (SA).

[2] Against this background, on 12 March 2019 I was appointed by the Hon Vickie Chapman MP, Deputy Premier and Attorney-General, to conduct a Review and provide a written report concerning the "operation and effectiveness of the reforms to the processes applicable to the prosecution of major indictable offences which were introduced in South Australia pursuant to the *Summary Procedure (Indictable Offences) Amendment Act 2017* (the Amendment Act)". The reforms introduced by the Amendment Act are commonly known as the "Major Indictable Reforms".

[3] The Terms of Reference governing my Review are:

Inquiry into the operation of the *Criminal Procedure Act 1921*

You are asked to inquire into, and report to the Attorney-General on the operation of the *Criminal Procedure Act 1921* (as amended by the Amendment Act) and in particular:

- What efficiencies, if any, have been realised as a result of the Amendment Act;
- The extent to which the Amendment Act has achieved the intended outcomes, as stated by the former Attorney-General
- Any factors that exist, or have existed, which are, or have been, an impediment to the Amendment Act achieving the intended outcomes;
- Relevant statutory regimes in other jurisdictions regarding how major indictable matters are dealt with in the criminal justice system;

- Recommendations to improve the operation of the *Criminal Procedure Act 1921* to realise the efficiencies sought by the Amendment Act or to otherwise improve how major indictable matters are dealt with within the criminal justice system;
- Any other recommendations arising from your inquiry.

[4] Accompanying the Terms of Reference was a summary of the recent background to the reforms:

> The *Summary Procedure (Indictable Offences) Amendment Act 2017* (the Amendment Act) commenced operation on 5 March 2018. The Amendment Act was designed to improve the manner in which major indictable matters are dealt with in the criminal justice system.
>
> In particular it aimed to address concerns regarding unnecessary appearances in the Magistrates Court; long delays between arraignment and trial while police continued to gather evidence; the entering of late guilty pleas; and the late identification of matters in dispute, leading to backlogs and the practice of over-listing by the criminal courts (where the court will list more matters than it can hear, based on the expectation that a number of listed criminal trials will resolve due to late guilty pleas and late withdrawals).
>
> The Amendment Act made amendments to the *Summary Procedure Act 1921* (including changing its name to the *Criminal Procedure Act 1921*) and made related amendments to a number of other Acts.
>
> During introduction of the Amendment Act (as a Bill) into Parliament, the former Attorney-General spoke about the intended outcomes of the reform as follows:
>
>> *The Summary Procedure (Indictable Offences) Amendment Bill 2016 improves how major indictable matters are dealt with within the criminal justice system. The changes are designed to enable courts, police, forensic services and prosecutors to focus their resources where they are most needed and ease the pressures on our court system by:*
>>
>> - *introducing a tiered prosecution disclosure regime that will allow for earlier*

disclosure of the primary evidence to defendants;

- *requiring major indictable matters to be the subject of a charge determination by the Director of Public Prosecutions prior to the commencement of committal proceedings;*
- *giving the courts discretion to set realistic adjournment time frames that reflect the needs of individual cases and reduce unnecessary court appearances for major indictable matters when they are in the Magistrates Court;*
- *requiring case statements to be filed by prosecution and defence prior to a matter being arraigned in the District Court or Supreme Court to identify the matters that are genuinely in dispute in contested matters, thus enabling the courts, the police, forensic and prosecution resources to focus on those issues;*
- *changing the way subpoenas are issued in major indictable matters; and*
- *refining the discounts on sentence that already exist where guilty pleas are entered early and introducing a discount representing an incentive for cooperative conduct of the defence case.*

[5] In addition to the passage cited in the Terms of Reference, it is appropriate to note also the following matters from the second reading speech of the former Attorney-General on 2 March 2017:

- "The latest data from the Report on Government Services 2016 indicates that notwithstanding the South Australian District Court had the second highest rate of criminal finalisations, 22% of the outstanding matters had been pending for over 12 months.

  The Annual Report of the Office of the Director of Public Prosecutions for the 2014-2015 period shows that the reasons for vacated criminal trials in Adelaide across the Supreme and District Courts includes 35% that were vacated due to late guilty pleas. In addition, 14% were discontinued by the DPP, while almost 20% were vacated because there was no judge or court available.

The latter category is an unfortunate by-product of the practice of over-listing by the criminal courts. In the interest of efficiency, the court will list more matters than it can hear, based on the expectation that a number of listed criminal trials will resolve due to late guilty pleas and late withdrawals. However, there are often occasions where the number of matters resolving late is less than expected. This in turn means more trials are listed than there are available court rooms or judges to hear them, and some trials will have to be relisted to be heard on another date. These relisted trials then contribute to the backlog. They also contribute to stress and frustration for witnesses, and victims and the accused, and they represent wasted resources due to police, prosecutors, forensic services and defence practitioners preparing for a trial that is postponed."

- The major indictable reforms seek "to reduce the number of matters listed for trial only to resolve by late guilty plea or discontinuance by further encouraging the early resolution of major indictable matters and providing for the issues genuinely in dispute in a contested matter to be identified early."
- "As less matters are withdrawn or resolved late, it is anticipated that the need to 'overlist' also reduces thereby reducing the number of matters being vacated due to 'no judge available' and needing to be relisted in several months' time. It is anticipated that the backlog will reduce and more trials will be heard the first time they are listed."
- "The current system of scheduling court hearings in the lower court will be improved."
- The reforms introduce "a system of tiered disclosure and charge determination by the DPP for matters commenced by SAPOL which are to be subsequently prosecuted by the state DPP."
- "The preliminary brief will contain the key evidence available to prove the elements of the offence alleged to have been committed."

- "The DPP is required to consider the preliminary brief and make the charge determination before the committal proceedings can commence. The DPP will consider whether there is enough evidence to support the charge. Because this decision is not made until the preliminary brief has been provided, this ensures the charges better reflect the criminal culpability of the defendant. This should reduce the number of matters which are withdrawn later in the process. It should also reduce the number of matters where the charge is amended by the prosecution due to the late receipt of evidence. This in turn ensures that the defendant knows the charge has been reviewed by the DPP, and reduces any incentive to delay pleading guilty based on a belief that the prosecution is likely to amend the charges as the matter proceeds."
- Under the reforms, not only are the charges based on "better, more complete information than is currently the case", as a preliminary brief is provided to a defendant before committal proceedings commence, the defendant is given a better understanding of the case against them.

[6] I am aware that prior to the Attorney-General announcing this Review, some of the public comment about aspects of the reforms was less than complimentary. The primary area of concern appears to centre on the pre-committal procedure. However, it is important that views be formed after the reforms have been in operation for sufficient time to enable the gathering of accurate data, together with reliable information provided by persons and organisations with full knowledge of the operation of the reforms.

[7] In announcing the Review, the Attorney-General was hopeful that after 12 months of operation there would be sufficient quantitative data available to support a determination as to the impact of the reforms, and to enable a reliable comparison to be made between the current procedure and the procedure in operation prior to the reforms. Unfortunately, as explained later in this Report, with limited exceptions, it is too early in the operations of the reforms to draw any firm conclusions as to the impact

of the reforms.

[8] Through public advertisement and direct communication I sought assistance from the community and from persons and organisations listed in Annexure 1 of this Report. Written submissions received are in Annexure 2. I undertook formal and informal consultations with persons I considered were able to assist, including those persons listed in Annexure 3.

[9] A summary of criticisms made by respondents appears in [75]. My broad conclusions appear in [194] - [206] and conclusions concerning specific issues in [207] - [396]. My recommendations are set out in [400]. A list of recommendations is in Annexure 4.

General Background

[10] The operation of the criminal justice system is, by necessity, expensive. For a multitude of reasons, it is also prone to delays and, not infrequently, excessive delays.

[11] Over many years, and across all Australian jurisdictions, parliaments have endeavoured to provide legislative frameworks with a view to enhancing the efficiency of criminal justice systems. Numerous inquiries and reports, including Law Reform Commissions, have addressed a multitude of issues and resulted in a plethora of reforms. Trial courts have conducted internal reviews and sought to improve their efficiency through rules of court and practice directions.

[12] While each Australian jurisdiction has experienced its own particular problems, many of the difficult issues are common to all jurisdictions. In 1999, under the auspices of the Standing Committee of Attorneys-General (SCAG), a Working Group examined the systems of the administration of criminal justice across Australia. In September 1999 the Working Group provided a report to the Commonwealth Attorney-General identifying areas in which the Working Group considered the existing system could be improved. A copy of that report is Annexure 5.

[13] Following that report, a national conference, hosted jointly by the Australian Institute of Judicial Administration (AIJA) and SCAG, was held on 24-25 March 2000. That conference concerned criminal trial reform and used, as its starting point, the report and recommendations of the Working Group. Immediately following that conference, a Deliberative Forum, comprised of persons nominated by the Attorneys-General of all Australian jurisdictions, met and considered the report of the Working Group. Other papers and material were also examined, including the Western Australian Law Reform Commission review of criminal and civil justice systems and the operation of the *Crimes (Criminal Trials) Act 1999* (Victoria). In June 2000 the Forum provided a report to SCAG containing recommendations and comments from members of the forum.

[14] The report of the Deliberative Forum is Annexure 6.

[15] The Working Group and Deliberative Forum were assisted by "a Best Practice Model for the Determination of Indictable Charges" which was developed in 1988 jointly by Directors of Public Prosecutions and National Legal Aid. That Best Practice Model is Annexure 7. For present purposes, the following points in that Model are significant:

- Criminal procedure is and should remain, fundamentally accusatorial, that is the state accuses the citizen of a criminal offence and must prove guilt without the enforced assistance of the accused. While there is a public interest in improving the efficiency of criminal proceedings by reducing delay and costs, this must proceed in the context of the accusatorial framework.
- Directors believe that the operation of the criminal justice system could be improved by treating the committal as part of the overall trial instead of regarding it as the first step in a two stage process. If the amount of time between committal and first mention in the superior court were to be reduced to a matter of days or even hours and there was better interface between the committing court and the superior court through the use of technology, a more efficient determination of matters could be achieved.

- Whilst acknowledging that each jurisdiction has particular local issues and procedures with which to contend, Directors have identified the following as elements of a best practice approach to dealing with indictable crime.

    1. The DPP should have responsibility for the prosecution of matters at committal.
    2. Legal aid should be made available to all indigent accused facing committal on serious indictable offences as soon as possible after charge.
    3. Grants of legal aid should be structured to encourage resolution of matters prior to committal.
    4. Counsel with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.
    5. Both Counsel should have authority to make decisions or be able to expeditiously obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.
    6. Both Counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.
    7. Where a guilty plea has been identified prior to committal and the matter cannot be dealt with summarily, agreement should be reached on the indictment and facts constituting the offence so that the accused can enter a plea of guilty at committal.

    …

    13. Those accused committed for sentence should have their pleas dealt with expeditiously. (footnotes omitted)

[16] With respect to procedures prior to committal for trial or sentence, following the recommendations of the Working Group, the recommendations of the Deliberative Forum were as follows:

> 7. Prosecution disclosure should be required prior to committal proceedings unless the disclosure requirement is waived at the first or subsequent mention of the matter.
> 8. In advance of the committal hearing, the prosecution should supply to the Court and the defence a case statement outlining the acts, facts, matters and circumstances being relied upon by the prosecution. Where appropriate the case statement should also outline the manner in which the prosecution will present its case against the defendant.
> 9. In addition to recommendation 8, recognition should be given to the ongoing nature of the prosecution's obligation to disclose.
> 10. Legal aid should be made available to all persons unable to afford legal representation facing committal on serious indictable offences as soon as possible after charge.
> 11. Grants of legal aid should be structured to encourage resolution of matters prior to committal.
> 12. Counsel with sufficient experience to deal with issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.
> 13. Both prosecution and defence counsel should have the authority to make decisions or be able expeditiously to obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.
> 14. Where possible, there should be (1) consistency of representation throughout the committal and trial process, and (2) certainty of trial dates.
> 15. Both counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.
> 16. Consideration should be given to the introduction of measures aimed at preventing abuse of collateral review of investigative procedures. This might

include imposing restrictions on the collateral review process.

17. Where possible, a limited opportunity for prosecution witnesses to be examined and cross-examined at committal should be retained.

18. The DPP should be responsible for all committals, including the responsibility for deciding what material to present at the committal.

19. A “deposing” procedure similar to those in Western Australia and Victoria should be available to the prosecution.

20. Where a guilty plea has been identified prior to committal and the matter cannot be dealt with summarily, agreement should be reached on the indictment and the facts constituting the offence so that the defendant can enter a plea of guilty at committal.

21. A Fast Track System modelled on the system existing in Western Australia should be introduced.

22. A similar system should be introduced for defendants being committed for trial who consent to the abbreviated procedure.

[17] In the context of the reforms under consideration, it is significant that common to the Best Practice Model, and the views of both the Working Group and the Deliberative Forum, is the concept that from the outset, the Director of Public Prosecutions (DPP) should be involved and “counsel with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence”.

[18] The concept of counsel with sufficient authority and experience to resolve matters, or at least to narrow the issues, being involved from the outset of criminal proceedings has been at the heart of many reviews and recommendations for improving the efficiency of the criminal justice system. In substance, for many years it has been the “common wisdom” that an essential element of an efficient system is the early involvement of “senior” counsel with authority to negotiate and make decisions to resolve matters through early withdrawals of charges, remission to summary courts and early pleas of guilty, and to narrow the issues in dispute at trial.

[19] The importance of the early, and ongoing, involvement of “senior” counsel with

authority was confirmed by research carried out by the NSW Crime and Justice Statistics Bureau (BOCSAR). It is convenient to cite the summary provided in the Consultation Paper released in March 2018 by the Tasmania Sentencing Advisory Council; Statutory Sentencing Discounts for Pleas of Guilty[1]:

> Other research released by BOCSAR in 2018 suggests that changes in pre-trial procedure can be highly effective in altering a defendant's plea behaviour (separate from any reform to statutory discounts for guilty pleas). This research evaluated a new case management approach trialled in the NSW District Criminal Courts, where cases allocated to a special 'rolling list court' (RLC) were dealt with from start to finish by the **same judge and defence and prosecution lawyers instead of the usual arrangements where cases may be dealt with by different judges and lawyers at different points in the progress of a case**. Significant findings were that the RLC resulted in more early guilty pleas. Specifically, the research found that:
>
> - More than half (58%) of the matters resolved in a guilty plea before the trial date in the RCL compared to 22% of matters randomised to the general list of the NSW District Criminal Court.
> - The average time from committal to finalisation for cases in the RLC was 262 days, compared with 364 days for cases randomly assigned to the general list, a reduction of 28%.
> - The average time taken to enter a guilty plea in the RLC (151 days) was 31% lower than among cases balloted to the general list (220 days).
>
> **In interviews with prosecution and defence, the greater number of early pleas was attributed to the involvement of senior prosecutors early in the process and the confidence that this gave to defence counsel that 'nothing would change closer to the trial date and that 'incentives to delay in pleading guilty were removed as no better deal could be obtained by holding out until the day of the trial'**. (footnotes omitted) (my emphasis)

[1] At page 54. The Consultation Paper is Annexure 4 to the Report of 5 June 2019 concerning the Sentence Reduction Scheme.

[20] In 2003 a Committee was appointed in South Australia to advise the Attorney-General on issues of criminal trial reform that arose from the recommendations of the Deliberative Forum. That Committee reported to the Attorney-General in mid-2005 and, in December 2005, the *Statutes Amendment (Criminal Procedure) Act 2005* (the Amendment Act) was passed.[2] The Amendment Act did not deal with pre-committal procedures. It was primarily concerned with trial procedures such as the power to serve notices to admit facts and the power of the court to require an accused to give written notice to the DPP of an intention to introduce particular types of evidence. The Amendment Act also spelt out the duty of police to make full disclosure to the DPP of material that might reasonably be expected to assist the case for the prosecution or the case for the defence.

[21] In 2011 a Major Indictable Briefs Committee, comprised of representatives from the DPP, the South Australia Police and the Attorney-General's Department, reviewed practices and procedures with respect to major indictable matters and made recommendations to the Attorney-General.

[22] The work of the Committee resulted in a pilot program being conducted by the DPP in a suburban Magistrates Court. The primary purpose of the program was early resolution through withdrawal of charges, remission to the summary court or guilty pleas. It did not concern pre-committal procedures, but did assist with respect to the preparation of prosecution evidence. Although the program demonstrated the benefit of the early involvement of the DPP, for various reasons the model used in the pilot program was not a practical proposition for the immediate future and was overtaken by the Major Indictable Reforms.

[23] As this brief summary of the history demonstrates, the complex problem of improving the efficiency of the criminal justice system has been the subject of much attention and discussion over many years and numerous reforms have been implemented. This is

[2] Came into operation on 1 March 2007.

the context in which the major indictable reform package was introduced by the *Summary Procedure (Indictable Offences) Amendment Act 2017*. It came into operation on 5 March 2018.

Previous System

[24] At my request, the DPP provided a background document which includes a very helpful overview of the system that existed before 5 March 2018 for dealing with major indictable matters. In the summary that follows, I have taken the liberty of quoting a number of passages from that overview.

[25] Under the previous system, following an arrest for a major indictable offence, the DPP immediately became involved and thereafter remained responsible for the conduct of the prosecution. The responsibility of the DPP included an adjudication process which the overview described as follows:

> **3.1. Adjudications**
>
> The DPP has responsibility for adjudicating major indictable charges in circumstances where a defendant was arrested and refused bail (custody adjudications) or granted bail (bail adjudications). SAPOL would adjudicate major indictable charges where a defendant was reported with the prospect of issuance of a summons for their appearance in court (report adjudications). The adjudication process itself is described in further detail in relation to current MIR [Major Indictable Reform] processes.
>
> Pre MIR adjudications were undertaken by solicitors across the office of the DPP on a roster system. The adjudication advice confirming the appropriateness of a laying major indictable charge or charges would (generally)[3] lead to the laying of the recommended charge or charges in the Magistrates Court by SAPOL prosecutions

[3] "Although SAPOL would usually lay charges in accordance with the DPP adjudication advice, there was no legal obligation upon them to do so and no impediment to the police as an informant laying whatsoever charges they saw fit."

and the internal triggering of a direct/request to the investigating office to prepare and submit the declarations required for committal via a PD90 form.

[26] The overview explains that although the conduct of the prosecution was the responsibility of the DPP, as the investigative agency, SA Police was required to complete the investigation and gathering of evidence. It was also the responsibility of SA Police to prepare the evidence for presentation to a court in an admissible form. For example, statements of witnesses were required to be presented as "declarations" made on oath.

[27] As to the previous procedure in the Magistrates Court, the overview provides the following summary of the early stages:

> **3.2. First appearance**
>
> At a defendant's first appearance in the Magistrates Court the matter would be adjourned to a declarations date within 13 weeks, but usually in 10 weeks' time, followed by an answer charge date at least 14 days, but usually 4 weeks, thereafter.[4] This timeframe applied irrespective of the nature and number of charges, the number of defendants, the legal and/or factual complexities of the case or the nature of the evidence anticipated to be obtained in proof of the charge(s).
>
> **3.3. Compilation of the declaration file**
>
> The investigating officer would be required to make a return on the PD90 direction/request by submitting the original declarations and copies of exhibits and other relevant documentary material (the declaration file) to the SAPOL State Committal and Disclosure Unit (SCDU).[5] The functions of the SCDU included the vetting of the declaration file, filing of the original evidence in the Magistrates Court and provision of the declaration file to the DPP with a copy for the DPP to serve on the defendant's legal representative at the declarations hearing.
>
> Any further evidentiary material required or obtained in the course of the committal proceedings would be vetted, filed in court and prepared for service by the SCDU

[4] SPA s 104(1); Magistrates Court Rules 1992 (Criminal) pre-actions 5 March 2018 Rule 20.01

[5] This unit no longer exists

> notwithstanding that much material obtained or generated in the course of the committal proceedings would be requested by the DPP.

[28] In the opinion of the Director, the quality of declaration files received from SA Police was “extremely variable”. It was not unusual for essential evidence to be missing or in an inappropriate form. As a consequence of these types of inadequacies, it was common for a DPP solicitor to seek adjournments of declaration hearings for the purpose of completing the declaration files.

[29] The next step in the previous process was an “answer charge hearing”. The statutory time-frame for a defendant to answer the charge was at least 14 days after the declarations date, but was usually fixed as four weeks. In practice, however, where adjournments of declarations dates were granted, the original answer charge date (fixed at the first appearance) was vacated and delayed. It was common for an answer charge date to be adjourned at the request of both prosecution and defence.

[30] On average, there were approximately 3.8 hearings per prosecution brief before the matters reached the answer charge hearing date. The Director points out that this is not a precise figure because, due to discontinuance or a guilty plea, some declaration dates would not have had an answer charge date fixed. In addition, some answer charge dates would not have had a declarations date recorded because of a transfer from a country or circuit court.

[31] The figures for 2016 were similar. The total average number of hearings per brief was 3.64.

[32] It should be noted that these figures do not include separate hearings for matters such as bail, applications by defendants to cross-examine prosecution witnesses and submissions of no case to answer. Some of the issues associated with those types of applications were summarised by the Director as follows:

> **3.6. Interim committal hearings: Rule 20 and no case to answer**
>
> The *Summary Procedure Act, 1921* made provision for a defendant to apply to cross-examine prosecution witnesses (“Rule 20 Application”) and to assert no case to

answer.[6]

The Rules required that a notice in writing outlining the reasons for which nominated witnesses were required be filed and served not later than seven days before the date set to answer the charge.

The Director's experience was that timeframes for Rule 20 applications were rarely complied with, leading in the ordinary course to a prosecution application for an adjournment for time to obtain evidence to address the issues raised in the defendant's notice (usually by the obtainment of addendum witness statements).

As to submissions of no case to answer, a practice developed whereby a defence legal representative would assert their intention to make a submission of no case to answer which would lead the court to direct that the prosecution file and serve a Prosecution Case Summary. This practice inverted the parties' obligations on a submission of no case to answer and created in many cases a large amount of work for the prosecuting solicitor to prepare a written summary of the prosecution case irrespective of the nature and apparent strength or weakness of the case as revealed by the declarations.

It was the Director's experience that very few submissions of no case to answer actually proceeded to argument.

[33] The "answer charge hearing" was also commonly known as the "preliminary examination". This was the occasion when, based on all of the material provided by the prosecution, in the absence of a plea of guilty a magistrate determined whether the evidence was sufficient to put the defendant on trial. If a plea of guilty was entered, the defendant would either be committed for sentence to the Supreme Court or District Court or, where both the prosecution and defence agreed, sentencing could occur in the Magistrates Court. The number of major indictable matters resolved by way of

[6] SPA s 106; Magistrates Court Rules 1992 (Criminal); Pre-actions 5 March 2018 Rule 20.02

guilty plea in the Magistrates Court between 2013 and 2018 were as follows:

Calendar year	Number
2013	14
2014	100
2015	106
2016	110
2017	144
2018	112

[34] As to proceedings in the District Court under the previous system, the DPP overview provides the following summary:

> **3.8. Superior court proceedings**
>
> Arraignment dates for matters committed to the District Court for trial were set at not less than 56 days after committal.[7] In respect of matters committed for trial the Director would present an information and recommendation as to category (in the District Court) or summary of the prosecution case (in the Supreme Court), which would be filed in court and served upon the defendant's legal representative.
>
> The DPP solicitor would appear at arraignment where matters committed for trial and the subject of a plea of not guilty would be listed for trial. Thereafter a first (10 weeks after arraignment) and second (four weeks before trial) directions hearing callover would be conducted. A defendant committed to a superior court for trial could change his/her plea as of right at arraignment.
>
> It would be rare for a matter to be listed for trial on the basis of a complete or completely disclosed prosecution brief. To a degree the directions hearing process was utilised to manage outstanding disclosure. It was a common phenomenon for late, sometimes substantial, disclosure to occur once a matter had been assigned to a trial prosecutor. It was the Director's experience that late, sometimes substantial, additional disclosure requests would be made, or subpoenas issued, once a matter

[7] District Court Criminal Supplementary Rules 2014 R8(1)

had been briefed to defence counsel. The genuine narrowing of issues and agreement of evidence would rarely occur prior to discussions between trial counsel taking place, and often only in the days before (and indeed during) the trial.

Major Indictable Reform - New System

[35] The *Summary Procedure Act 1921* (SPA) was replaced by the *Criminal Procedure Act 1921* (CPA). The CPA commenced operation on 5 March 2018. The summary jurisdiction of the Magistrates Court was largely unchanged, but in respect of indictable matters, the CPA sets out procedures from the laying of charges through to trials and appeals (the SPA did not deal with procedures in the Supreme or District Courts).

[36] The significant changes brought about by the CPA to procedures in the Magistrates Court apply only to criminal offences in respect of which SA Police is the investigating authority and the SA DPP is to conduct the subsequent prosecution (s 106(1)). Section 106 does not apply to Commonwealth matters. The changes to procedures in State matters include specific statutory responsibility being placed on SA Police for the conduct of initial proceedings in the Magistrates Court. They also include involvement of magistrates in setting procedural timetables, having regard to the circumstances of each particular case.

[37] Although not specified in the CPA, following arrest the DPP undertakes an adjudication to provide advice to SA Police concerning the charge and evidence likely to be required. Adjudication in report cases is undertaken by SA Police.

[38] Section 105 of the CPA directs that at the time of an accused person's first appearance in the Magistrates Court, the accused must be provided with a notice containing information about the sentencing reductions available following guilty pleas, and the process for having a matter called on in court for the purpose of entering a guilty plea. In addition, the accused must be given a copy of the Information containing

the charge and a document containing “a brief description of the alleged offending (whether in the form of an extract from a police report relating to the alleged offence or otherwise)”. The Director advises that the document containing the brief description usually takes the form of a police apprehension report or a facts of a charge document. If the accused is charged with a minor indictable offence, the accused must also be provided with an appropriate form for electing for trial in a superior court.

[39] Under the previous system, at the first appearance the court fixed declarations and answer charge dates in accordance with a specified timeframe. However, under the new system, in fixing a date for a second appearance, a magistrate is required by s 105 of the CPA to have regard to “any information provided by the prosecution as to the likely length of time the prosecution requires in order to obtain witness statements and other material prior to the next appearance (subject to any requirements applying under s 106).”

[40] The context in which a magistrate makes a decision as to the date for the second appearance is of critical importance. It is provided by s 106 of the CPA. In substance, s 106 requires SA Police to prepare a “preliminary brief” for the DPP which, in the opinion of the DPP, is sufficient for the DPP to make a determination as to the appropriate charge or charges (the charge determination). The purpose of these provisions is to endeavour to ensure that the DPP has made a decision as to appropriate charges before the matter reaches the stage of committal for trial (or sentence). Section 106(1)(e) directs that the Magistrates Court must not commence committal proceedings unless the court has been advised that the DPP has made a “charge determination”.

[41] As mentioned, although the DPP has the power to determine otherwise, SA Police is required to appear before the Magistrates Court until the DPP has made a charge determination. At the first appearance, therefore, it is the responsibility of SA Police to advise the court as to the time required to prepare the preliminary brief and provide it to the DPP. Section 106(1)(d) provides that in fixing a date for the second appearance,

the Magistrates Court must:

i. have regard to information provided by the prosecution as to the witness statements and other material to be obtained for the purposes of completion of the preliminary brief and the time within which it is expected that the preliminary brief can be completed; and

ii. ensure that the adjournment is for a period that -

    a. allows sufficient time for the completion of the preliminary brief; and

    b. allows an additional period of not less than four weeks for the DPP to consider the brief and make a charge determination.

[42] Following the first appearance, the conduct of the prosecution file remains with the SA Police Major Indictable Brief Unit (MIBU). That Unit eventually submits a preliminary brief to the DPP Brief Assessment Team (BAT) for the purpose of enabling the DPP to make a charge determination. Once the DPP makes a charge determination, the DPP takes over the conduct of the prosecution in the Magistrates Court.

[43] If the DPP has not made a charge determination by the time of the defendant's second appearance, SA Police retains responsibility for the conduct of the matter in the Magistrates Court, and for applying to the court for an adjournment to enable a charge determination to be made. Section 106(3)(a) provides that when such an application is made, the court must have regard "to information provided by the prosecution as to the witness statements and other material to be obtained for the purposes of completion of the preliminary brief and the time within which it is expected that the preliminary brief can be completed and the charge determination made". Having regard to that information, the court may grant the adjournment or may dismiss the charge (s106(3)(b)). The fact that a charge has been dismissed in these circumstances does not prevent the charge from being laid again.

[44] Once a charge determination has been made by the DPP, at the second appearance (or subsequent appearance when the court is advised that the charge determination has been made), s 109 of the CPA provides that "committal proceedings" will consist

of a “committal appearance” and an “answer charge hearing”. If a matter is to proceed to an answer charge hearing, it is the responsibility of the prosecution to complete, and file in the Magistrates Court, a committal brief containing (s111):

> (a) statements of witnesses for the prosecution on which the prosecutor relies as tending to establish the guilt of the defendant; and
>
> (b) copies of any documents on which the prosecutor relies as tending to establish the guilt of the defendant (other than sensitive material or documents that are of only peripheral relevance to the subject matter of the charge); and
>
> (c) a document describing any other evidentiary material (including sensitive material and documents that are of only peripheral relevance to the subject matter of the charge) on which the prosecutor relies as tending to establish the guilt of the defendant together with a statement of the significance the material is alleged to have; and
>
> (d) all other material relevant to the charge (whether relevant to the case for the prosecution or the case for the defence) that is available to the prosecution except material exempt from production because of privilege or for some other reason.

[45] At the committal appearance, when fixing a date for the answer charge hearing, the court must ensure that “sufficient time is allowed for the completion of the committal brief in accordance with the requirements of s 111”. For that purpose, the prosecution is required to provide the court with information as to witness statements and other material to be obtained for the purposes of completing the committal brief and the time within which it is expected that the committal brief will be completed. In addition, the defendant must be given an opportunity to respond to the information provided by the prosecution and to advise the court whether any negotiations are taking place with the prosecution.

[46] The conduct of the answer charge hearing is substantially unaltered. As was the case under the SPA, if a magistrate determines that a defendant should be committed for

trial to the Supreme or District Court, the magistrate must fix a date for the defendant's arraignment. However, under the new system, as both the prosecution and the defence are required to provide the trial court with case statements, in fixing the date for arraignment the magistrate is required to take into account the following matters set out in s 120(1) of the CPA:

> (a) have regard to information provided by the prosecution as to the material to be considered for the purposes of completion of the prosecution case statement and the time within which it is expected that the prosecution case statement can be completed; and
>
> (b) have regard to information (if any) provided by the defendant as to the time that may be required for the purposes of completion of the defence case statement; and
>
> (c) ensure that the date fixed for the arraignment—
>
> > (i) allows a period of at least 6 weeks (or such longer period as may be necessary in the circumstances) for the completion of the prosecution case statement; and
> >
> > (ii) allows an additional period of not less than 6 weeks (to ensure that all of the case statement requirements set out in section 123 can be complied with).

[47] As to the case statements to be provided to the trial court, the prosecution is required to file the case statement, and give a copy to the defendant, not less than six weeks before the date fixed for the arraignment of the defendant. That statement must include the following (CPA s 123(2)):

> (a) a summary of the alleged facts;
>
> (b) a description of evidence that may be led by the prosecution in relation to each element of the offence;
>
> (c) a list of the witnesses the prosecution intends to call at trial;
>
> (d) details of each expert witness the prosecution intends to call at trial;
>
> (e) details of any additional witness statement that the prosecution is aware will

be obtained, but which has not yet been obtained;

(f) whether the prosecution intends to lead discreditable conduct evidence (within the meaning of section 34P of the *Evidence Act 1929*) that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue and, if so, details of that evidence;

(g) whether the prosecution intends to make any pre-trial applications under the *Evidence Act 1929* and, if so, a copy of any such application;

(h) whether the trial is one that is to be given priority under section 50B of the *District Court Act 1991*;

(i) an estimate of the length of the prosecution case;

(j) whether any interpreter will be required for the prosecution case (and if so, the language that the interpreter will be required to interpret).

[48] The defence case statement must be filed in court, and given to the prosecution, not more than four weeks after a defendant has been given the prosecution case statement. Section 123(4) provides that the defence case statement must include the following:

(a) any facts of the offence set out in the prosecution case statement which the defendant admits in accordance with section 34 of the Evidence Act 1929;

(b) any elements of the offence set out in the prosecution case statement which the defendant admits in accordance with section 34 of the Evidence Act 1929;

(c) any witnesses the defendant asks the prosecution to call (being witnesses who have provided a statement but who are not included in the list of the witnesses the prosecution intends to call at trial contained in the prosecution case statement);

(d) whether the defendant consents to any of the prosecution applications included in the prosecution case statement;

(e) whether the defendant intends to introduce—

(i) expert evidence; or

(ii) evidence of alibi (within the meaning of section 124), (in which case section 124 must also be complied with);

(f) whether the defendant intends to raise any of the following prior to commencement of the trial:

  (i) issues relating to joinder or severance;

  (ii) issues relating to cross-admissibility of evidence;

  (iii) challenges to the legality of any searches;

  (iv) challenges to the admissibility of any other prosecution evidence;

  (v) applications for stay of proceedings;

  (vi) issues relating to chain of evidence or continuity of custody of exhibits;

  (vii) any other points of law;

(g) whether the defendant agrees with the prosecution estimate of the length of the prosecution case and the defendant's estimate of the length of the trial;

(h) whether the defendant will apply for trial by judge alone;

(i) whether the defendant requires any interpreter (and if so, the language that the interpreter will be required to interpret).

Summary of Changes

[49] The major changes to proceedings in the Magistrates Court brought about by the Major Indictable Reforms may be summarised broadly as follows:

- Prior to the reforms, following an arrest for a major indictable offence the DPP was immediately involved and thereafter remained responsible for the conduct of the prosecution in the Magistrates Court.
- Notwithstanding the role of the DPP, SA Police was required to complete the investigation and gathering of evidence in an admissible form.
- Under the new system, although the DPP provides an adjudication between arrest and the first appearance, from the first appearance until the DPP has

made a charge determination, SA Police are responsible for the continuing investigation and preparation of the preliminary brief, and for the conduct of the prosecution in the Magistrates Court.

- Under the previous system, at the first appearance the matter would be adjourned to a declarations date, often in approximately 10 weeks' time, and an answer charge date would be fixed to occur between 14 days and four weeks after the declarations date. These timeframes were fixed irrespective of the nature of the case or its complications. Declarations dates were frequently adjourned which resulted in adjournments of the answer charge hearings.
- The new system introduced a more flexible regime for proceedings from the time of the first appearance. At the first appearance, the magistrate now possesses a discretion to fix a date for the second appearance having regard to the time required for SA Police to prepare a preliminary brief for the DPP, and for the DPP to make a charge determination. In that period the conduct of the matter remains entirely with MIBU.
- If the DPP has not made a charge determination by the time of the second appearance, SA Police retains responsibility for the conduct of the matter in the Magistrates Court and for seeking an adjournment for such a period as is required for the DPP to make a charge determination.
- Under the old system, the answer charge hearing (commonly known as the preliminary examination) was fixed by reference to the declarations date. Under the new system, once the DPP has made a charge determination, the legislation provides that "committal proceedings" will consist of a "committal appearance" and an "answer charge hearing". If the matter is to proceed to an answer charge hearing, at the committal appearance the court fixes a date for the answer charge hearing having regard to the time required for completion of the committal brief (in substance containing the evidence).

[50] Under both systems, for matters that are not resolved, the end result of proceedings in the Magistrates Court is the answer charge hearing/preliminary examination. Along the way, of critical importance to the efficiency of the system are the following matters:

- Resolution of matters in various ways including withdrawals of prosecutions, substitution of lesser charges that can be dealt with summarily and pleas of guilty that result in sentencing by a magistrate or committals for sentence in the Supreme and District Courts.
- The efficiency and quality of police investigations which culminate in the provision of a preliminary brief to the DPP.
- The quality of the preliminary brief provided to the DPP.
- The efficiency of the DPP in making a charge determination. This includes the standard applied by the DPP in assessing the quality of the preliminary brief.
- The efficiency or otherwise in the preparation of the committal brief.
- The timeliness or otherwise of disclosure of relevant material to a defendant.
- The state of the “file” at the answer charge hearing and the readiness of the parties at that time for the progress of the file through the superior court.

DPP Adjudication

[51] In the course of discussing the previous and current systems, it is appropriate to reflect upon the role of the DPP in providing adjudications at the outset of proceedings. As discussed, under the previous system, immediately following an arrest the DPP would adjudicate major indictable charges and provide advice to SA Police. Charges were usually laid in accordance with the adjudication advice, but SA Police was not obliged to follow that advice.

[52] Under the previous system, adjudications were undertaken by solicitors across the Office of the DPP on a roster basis, although SA Police retained control of the charges

and gathering of evidence.

[53] In preparation for the Major Indictable Reforms, the solicitor section of the DPP was restructured to create a specialist Brief Assessment Team known as BAT. The DPP background document describes BAT as a “singular point of entry for all major indictable files being submitted to the DPP by SAPOL for the purpose of ‘charge determination’”. The adjudication function following arrest is undertaken by BAT. SA Police carry out adjudications in report cases.

[54] The operations of BAT are discussed later, but for present purposes in summarising the operation of the new scheme, it is sufficient to note that the adjudication process is undertaken in a very short time. For example, if a person arrested at night is refused bail, the first appearance in the Magistrates Court occurs during the day following the arrest. In the period between arrest and first appearance, the DPP is required to undertake the adjudication and make a decision as to the appropriate charge or charges before the first appearance in the Magistrates Court. In addition, the DPP provides advice as to the evidence likely to be required. At that stage, the DPP is relying entirely upon limited information provided by SA Police investigators.

[55] In the space of a few hours, therefore, and on the basis of limited information, the DPP is required to adjudicate on appropriate charges and evidence. This adjudication forms the basis of subsequent police investigations. As will appear later in this Report, I have significant reservations about requiring the DPP to make these decisions in such circumstances. However, the DPP has put staff and procedures in place which the DPP believes has resulted in an efficient and effective system of adjudications.

Written Submissions

[56] Only one member of the public provided a written submission which expressed general dissatisfaction with the level of sentencing and did not address the Major Indictable Reforms.

[57] Other written submissions are in Annexure 2. It is apparent that persons and organisations involved in the criminal justice system believe that the reforms are not achieving the intended outcomes.

[58] In the summary of submissions that follows, I have not included submissions concerning the reforms to procedures in the District and Supreme Courts, including the provision of case statements. These matters are discussed later in this Report.

Judiciary

[59] The Chief Magistrate, Her Honour Judge Mary-Louise Hribal, identified a number of deficiencies and expressed the view that it is "unlikely" that the intended efficiencies will be achieved without further amendment to the processes. In summary, Her Honour expressed the following views:

- The DPP now reviews charges at the time of the charge determination, and it appears that decisions to downgrade charges are being made earlier than under the previous system. As a consequence, a greater number of matters are remaining in the Magistrates Court, but it remains to be seen whether defendants in these cases will be entering early pleas.
- As to time taken to finalise matters in the Magistrates Court, prior to the reforms, in the five month period 3 October 2017 to 4 March 2018, 96.5% of lodgements were finalised.
- In the 12 month period 5 March 2018 to 4 March 2019, being the first 12 months of the operation of the reforms, 47% of matters were finalised. Although the time periods are different, the Chief Magistrate's comments that this "could indicate that matters are remaining in the Magistrates Court longer."
- As to major indictable files sentenced in the Magistrates Court, the numbers have reduced from 8.9% in the pre-reform period, to 5.4% after the reforms

commenced.

- As to the number of appearances in the Magistrates Court, the Chief Magistrate made the following observation:

> The time from arrest to charge determination is lengthy and rather than less appearances in court, there are many. The statistics show less appearances but that is because the Courts Case Management System is unable to link cases where fresh informations have been laid. There seems to be an increase in fresh informations being laid post-reform (presumably with less appearances as they replace the informations more frequently). If the Court was able to link cases, it would most likely indicate more appearances.

- In the context of the aim of reducing the number of appearances, the Chief Magistrate identified a number of reasons why this aim is not being met:

> 13.1 SA Police appearing before the Court are often not personally familiar with the file but rather appear on instructions of the DPP following an overnight arrest.
>
> 13.2 Rather than assess each matter with regard to its particular circumstances, a fixed matrix is applied to estimate the time each step or process will require for a particular charge, irrespective of whether it is needed in the particular case, such as, for example, a request for DNA in a rape charge where identity of the alleged perpetrator is not in issue. Material requested during the initial adjudication may or may not influence the choice of charge. However, once requested its absence from the Preliminary Brief will result in the brief not being sent to the DPP.
>
> 13.3 There is no real sanction if the prosecution fails to meet the charge determination date; rather, prosecution appear to regard such date as only aspirational.
>
> 14. In addition to the time required to obtain evidentiary material, an additional period of at least 4 weeks is required for the DPP to consider

the Preliminary Brief and make a charge determination. Yet, some flexibility around that additional period would likely result in less adjournments. At present, SA Police will retain and not send on to the DPP a Preliminary Brief because 4 weeks does not remain before the next hearing; this is lost time.

- Also relevant to the number of appearances are other applications that follow when the charge determination has not been made by the time of the second appearance. The Chief Magistrate observed that adjournments of the second appearance result in additional applications for bail or variations of bail. Her Honour added that there are occasions when SA Police withdraw opposition to bail in order to obtain agreement from the defence to a further adjournment.
- There are particular problems in country courts.
- Delays in providing disclosure of the preliminary brief to the defence hamper the ability to obtain instructions and provide advice. Earlier disclosure might result in a guilty plea thereby avoiding the necessity of gathering further evidence.
- Consideration could be given to inserting statutory time limits.
- A legislative definition of the evidence required for a charge determination may be of assistance. Currently the test employed by the DPP sets a higher standard than the standard required by a Magistrate before committing a defendant to a superior court.
- Consideration should be given to reinstating the involvement of the DPP at an earlier time:

23. A return to the former system of requiring DPP to attend on the second appearance, irrespective of whether a charge determination has been made, would enable the Court to be properly informed about the reason for any delay and be able to test that request. SA Police officers appearing before the Court are often unable to adequately articulate the reason for the delay either because they are not properly instructed or do

not understand the reason for the delay. This has led to robust exchange between uniformed police prosecutors and Magistrates. The suggestion has been (wrongly) made that police prosecutors are being "bullied" when they are unable to state and defend their request.

24. The DPP 's insistence on 4 weeks to consider a Preliminary Brief (s.106(1)(d)(ii)(B)) and make a charge determination, irrespective of the complexity of the matter, has led to frequent requests for a further 5 weeks with "one week to get the brief together". If the DPP assumed conduct at an earlier time that additional time may not be required.

- Consideration could be given to amending the Act to allow the Magistrates Court to dismiss a summary or minor charge.

[60] The Hon Chris Kourakis, Chief Justice, supported the recommendation of the Chief Magistrate concerning the earlier involvement of the DPP in the committal process. In His Honour's view a lack of resources and proper management of such resources, particularly in the "collection of evidentiary material in a timely manner", contribute to delays in the Magistrates Court, as does the culture within police prosecutions and the defence profession. The Chief Justice suggested that consideration be given to the DPP providing "guidelines for the efficient investigation of major indictable offences". In advancing that recommendation, His Honour referred to the statutory power of the DPP, pursuant to s 11 of the *Director of Public Prosecutions Act 1991* (SA), to give directions to the Commissioner of Police or other persons investigating or prosecuting offences.

Legal Services Commission

[61] The Director of the Legal Services Commission, Ms Gabrielle Canny, made the general observation that the time taken for matters to be committed to the District Court, either for sentence or trial, "appears to be longer". In the view of the

Commission, "these reforms have not operated as intended" and "pressure on the criminal justice system has not been sufficiently eased".

[62] As to finalisation rates, Ms Canny produced a table of indictable matters in respect of which legal aid was granted, covering periods before and after the introduction of the reforms. Ms Canny accurately commented that the difference in the finalisation rate is "quite stark":

Reporting Period - Legal Services Commission	Major Indictable Matters	Finalised
1/3/2017 - 28/2/2018	5931	5255
1/3/2018 - 28/2/2019	5401	3345

[63] Ms Canny also set out a table of lodgement of criminal matters in the District Court which show a significant decline in the 2017-18 financial year:

Financial Year	District Court Criminal Lodgements
2013/14	2,371
2014/15	2,294
2015/16	2,172
2016/17	2,161
2017/18	1,766

[64] As to factors which are impediments to achieving the intended improvement in efficiencies, Ms Canny identified the following:

(i) Delays in the making of charge determinations and the standard applied by the DPP before making a charge determination (which is required before the committal process can commence).

(ii) Lack of sanctions on the prosecution for unnecessary delays which means that the prosecution "has no incentive" to expedite matters particularly if a defendant is being held on remand.

(iii) Delays in disclosure.

(iv) Inability of police prosecutors to negotiate with respect to the charges.

(v) The exclusion of the DPP from early involvement has “made it considerably more difficult to achieve the intended outcome of the amendments, including making any efficiencies”. Ms Canny added that the earlier involvement of the DPP “would ensure there is a single appropriate person responsible for conduct of the file, who is bound by equitable disclosure principles, and who has the authority to negotiate regarding charges.”

(vi) The lengthy adjournments are adversely impacting upon defendants’ opportunities to obtain sufficient disclosure, which is needed to enable defendants to make reasonably informed decisions concerning early pleas of guilty.

[65] Ms Canny summarised the recommendations of the Commission as follows:

- Introduce involvement of the DPP in pre-committal proceedings.
- Introduce disclosure protocols for police.
- Introduce timelines for the preliminary brief and impose sanctions on the prosecution for failure to meet these deadlines.
- Introduce guidelines as to the meaning of "sufficient" for the preliminary brief in section 106(1)(a).
- “Uncouple” the guilty plea discount timeframes from the Major Indictable Reform timeframes.
- Give police authority to negotiate on charges.

[66] Other recommendations submitted by Ms Canny included the creation of a separate Bail Court, particularly at Adelaide and Elizabeth, and the return of the Early Resolution Court. Ms Canny also emphasised the Commission’s view that “chronic underfunding of the justice system lies at the heart of delays in the justice process.”

Law Society

[67] The President of the Law Society, Ms Amy Nikolovski, made the following general observation:

> The Society notes that the Reforms commenced on 5 March 2018 and were intended to support the earlier resolution of major criminal matters. However, the Society is informed by its Criminal Law Committee, which comprises of practitioners who practise in this area, that the Reforms have increased delays significantly in the pre-committal stage and they have observed a marked decrease in the flow of matters to the District Court.

[68] As to other problems, in summary the Law Society made the following observations:

- There appears to be a "divide and/or disconnect between the Police Prosecution and the ODPP taking ownership of the matter, this can occur for several months". In this context the preliminary brief can be moved between the two organisations "numerous times" before finalisation.
- Legal practitioners "are experiencing difficulties in obtaining relevant and vital information from the MIBU in a timely manner." These difficulties and delays adversely impact on the ability of defendants to plead guilty at an early stage.
- The reforms have caused "significant delays" in the progress of matters in the Magistrates Court and these delays can "mostly" be attributed to the time taken by SA Police in completing the preliminary brief.
- In part the delays are caused by the time taken to obtain forensic evidence. However, in some cases, forensic evidence is sought unnecessarily for the purpose of the preliminary brief.
- Extensive delays are occurring, in some matters up to 18 months. The delays cannot be sustained and it is likely that, eventually, "a deluge of matters will arrive at the District Court causing the trial list to explode".
- The system is "in critical need of reform". The DPP should take control of matters

from the time of arrest “with the power to direct police to obtain further evidence in a timely fashion so matters can be advanced quickly and efficiently”.

- Within the DPP, files should be allocated to particular solicitors [a docket system], with the capacity to allocate a trial prosecutor early in the proceedings.
- The recommended changes can only be effective if the DPP is “adequately resourced.”
- The Law Society has been informed that in a number of matters, despite early guilty pleas, SA Police have insisted on continuing investigations. This practice is contrary to the intention of the reforms. In the view of the Law Society, once a guilty plea has been entered, the matter should be committed to the superior court for sentence. These cases should proceed by way of a statement of agreed facts.
- Of serious concern to the Law Society is the remanding of defendants in custody for long periods before a charge determination is made.

[69] The Law Society also reported that as a consequence of delays in the Magistrates Court, there is a lack of work for barristers practising in criminal law.

South Australian Bar Association

[70] In January 2019, on behalf of the SA Bar Association, the Chair of the Criminal Law Committee of the Association, Mr David Edwardson QC, sent a submission to the Attorney-General concerning the operation of the reforms. The submission observed that “only a handful of cases” had been committed to the District Court and that “disclosure before a charge determination is made by the DPP is all but non-existent”. Further, the submission suggested that the DPP has taken a “very strict view” as to what is required in the preliminary brief before a charge determination is made and, “therefore, the time requested by SAPOL to prepare the preliminary brief is

unconscionable”. The submission noted that these delays, without disclosure, often mean an accused person remains in custody, without disclosure, for an unacceptable period.

[71] I also met with Mr Edwardson, together with representatives of the Law Society, including the Co-Chair of the Criminal Law Committee, Mr Craig Caldicott. A number of important issues were raised, including the following:

- Following an arrest, an accused person does not have an opportunity to discuss the possible charges with the DPP during the DPP’s adjudication process. At this stage very little information as to the evidence is available to the accused. It would be helpful if there was a gap of up to seven days between the arrest and the “first appearance”. Such a gap would extend the adjudication stage and enable investigators to provide both the DPP and the accused with more evidentiary material than just a brief statement of facts. It would provide an opportunity for discussions concerning the charge and for an accused to take advice concerning a possible plea. This process would increase the prospects of an early resolution.
- The critical flaw in the current system is the lengthy period between the first and second appearances during which the system “grinds to a halt”. From the perspective of the DPP and an accused person, nothing happens and there is no occasion for contact between the DPP and an accused’s legal representatives.
- During this period, in substance no disclosure of evidence is made to an accused person. SA Police continue to work on the investigation, but unless the defence request materials from SA Police, nothing is provided during this lengthy period of many months. Even if a request is made, on occasions there is no response. By way of comparison, because of the number of adjournments under the old system, there was a “drip feed” of relevant material to the defence.
- Without disclosure of evidence, there is no occasion for an accused person to

obtain instructions or retain counsel.

- Before BAT makes a charge determination, there is no opportunity for an accused person to make representations as to the appropriate charge. Frequently, the preliminary brief is not provided to an accused at the same time as it is provided to the DPP.
- If an accused was able to make submissions prior to the charge determination, the prospects of early resolution would improve, including resolution in the Magistrates Court on a plea of guilty.
- Under the current system, no single person is responsible for the file at the prosecution end. The file moves from police prosecutor to police prosecutor, to BAT and then to a DPP solicitor.
- It appears that some investigating officers are not happy with the system and might be delaying delivery of material to MIBU. In addition, investigations are being ordered which are not needed.
- Once a charge determination has been made, there are significant delays because the DPP is insisting on additional material for the committal brief. The file moves from BAT to a solicitor in the DPP who puts together a further checklist of information required. Even if an accused person indicates a plea of not guilty and wants the matter sent immediately to the District Court, the DPP insists on gathering additional information for the committal brief before committal to the District Court.
- At the DPP end, files are not allocated to a prosecutor early enough. Solicitors are not in a position to make decisions.

[72] As to recommendations for improvement, in his January 2019 written submission Mr Edwardson wrote:

> Accepting that it is unlikely that the government would consider repealing this legislation, SABA has now considered possible amendments to the legislation that can make it work and overcome the current position which is untenable.
>
> These recommendations are made following consultation with numerous legal practitioners who practice in this area and Magistrates before being considered by the Criminal Law Committee. The recommendations are:
>
> 1. A time limit be inserted into s106(1)(d) namely, *"such period be no longer than 3 months except in exceptional circumstances".* This should prevent charge determination dates becoming oppressive whilst at the same time allowing for exceptions where some item of evidence vital to settling the charge will not be available;
> 2. Similarly, a time cap on adjournments under s106(3) namely, *"such adjournment to be no longer than a month except in exceptional circumstances";*
> 3. Inserting a requirement that any materials accumulated for a preliminary brief be forwarded to the DPP (and the DPP to receive them); served on the defendant; and filed with the court not less than 4 weeks before the charge determination date. This would deal with the current unsatisfactory position where at the second appearance the defendants' lawyers (and the court) have nothing but the charge. This would then enable proper submissions as to any adjournment of the charge determination date. It would avoid the need to question the prosecutor. It would also enable instructions to be taken and facilitate early pleas. It would remedy the current ad hoc approach to disclosure which is taking place, and recognises the defendant's fundamental right to see the materials supporting the charge and take legal advice;
> 4. Finally (and controversially) that the DPP appear at the second appearance whether a charge determination has been made or not. This is likely to be opposed by the DPP on the grounds of resources and it will be argued as too much of a

> return to the old system. However, the present system of sending down SAPOL prosecutors to explain decisions not made by them on charges they do not fully understand is unworkable. The DPP should be explaining why they cannot make a decision and why they need extra time. It would also address the unacceptable position of the DPP refusing to take a brief delivered 2 days short of 4 weeks.

Commonwealth Director of Public Prosecutions

[73] The Acting Assistant Commonwealth DPP, Ms Kate Watson, pointed out that s 106 of the CPA applies only to State offences. In respect of the few Commonwealth matters that have proceeded under the new system, Ms Watson reported there has been "no noticeable change" in the time taken to reach committal for trial or sentence.

Magistrates

[74] I consulted with the Chief Magistrate and other magistrates who are regularly involved in hearing major indictable matters. In summary, the following issues were highlighted:

- The time for the DPP to make an adjudication is very short. There is no opportunity for a discussion with defence legal representatives or to give proper instructions to a police prosecutor who appears in court having never previously seen the file. The first appearance has "real consequences", but is often an "uninformed discussion" because of the time constraints. Prosecutors simply ask for a number of months and, when asked why, they answer that this is the period sought by the Director. When asked why the DPP requires such time, they will quickly examine the file seeking an answer, but at the first appearance they know nothing about the circumstances or the evidence required other than a notation as to what the DPP has said is required.
- At the first appearance, the defence have no opportunity to make submissions

because of a lack of information about the matter or the evidence upon which the prosecution will seek to rely.

- In answer to a suggestion, there was agreement that the system might work better if a few days was allowed after arrest for the DPP to make the adjudication and for both the DPP and the defence to be given whatever relevant evidence becomes available within those few days. For example, CCTV might be important in securing an early plea.
- There was an agreement with a suggestion that a time limit should be prescribed for the preparation of the preliminary brief and the making of the charge determination. Similarly, if the charge determination is not made by the particular date, there should be a cap on the further period that can be allowed. These prescriptions would be subject to enlargements in exceptional circumstances.
- There is a problem between the police and the DPP in respect of the requirements that must be met for the preliminary brief. It appears that the police understand that every box must be ticked, for example, in a child sex matter, if the birth certificate proving the age of a young child is not available, the police will not submit the preliminary brief to the DPP. Similarly, if every step in the chain of evidence is not established, the preliminary brief is not submitted to the DPP. The DPP and police should give greater practical recognition to the fact that it is the "preliminary brief", as opposed to the "committal brief". As a matter of common sense, there would not appear to be any reason why the DPP could not accept a preliminary brief, and start work on the question of the charge determination, in the knowledge that, for example, the necessary birth certificate will be provided. After the charge determination, significant periods are sought for the preparation of the committal brief. Minor matters can be rectified in that time. The major problem occurs earlier and it might assist if the DPP was involved at an earlier time.

- Magistrates are hearing from defence that defence are not being provided with relevant materials at the time the preliminary brief is provided to the DPP. It is common experience for the defence to be provided with the preliminary brief on the charge determination date.
- There is a real issue with respect to bail. Many accused persons are "prescribed applicants"[8] for bail and are left in custody for many months while the preliminary brief is prepared and a charge determination made. The difficulties are acute in choking type cases, in respect of which lengthy delays can lead to withdrawal or some other form of resolution after the preliminary brief is prepared. The consequences for accused persons, particularly first offenders who are prescribed applicants, are significant.
- On occasions, because of lengthy delays, prosecution withdraw their opposition to bail.
- Perhaps charge determinations based upon presumptive tests in common drugs cases could assist.

Criticisms - Summary

[75] In addition to receiving written submissions, I consulted with members of the judiciary and the legal profession. From those consultations and the broad overview of the written submissions, the following summary of criticisms of the major indictable reforms can be distilled:

- Prior to adjudication, there is no opportunity for an accused person to discuss potential charges with the DPP.
- At the first appearance both the police prosecutor and the accused/solicitor lack

[8] A "prescribed applicant" is a person charged with specified offences who is not to be granted bail unless the applicant establishes "special circumstances justifying their release: *Bail Act* 1985 (SA), s10A.

meaningful information concerning the charges and evidence.

- SA Police are requesting excessively long adjournments between the first and second appearances.
- In determining the length of the adjournment sought from the first to the second appearance, SA Police are applying a fixed matrix and are not making an assessment based on individual circumstances of each matter.
- SA Police are unnecessarily seeking forensic evidence which, in turn, causes excessive delays.
- In the lengthy period between the first and second appearances, although SA Police continue to investigate, the system “grinds to a halt”. Nothing happens between the DPP and defence legal representatives. Disclosure of relevant evidence to an accused is delayed and such delays adversely impact on the ability of accused persons to make reasonably informed decisions concerning early pleas of guilty.
- Even if a request is made of SA Police for relevant material gathered between the first and second appearances, and prior to the preparation of the preliminary brief, on numerous occasions there is no response.
- There is a divide or disconnect between SA Police and the DPP taking ownership of files. The preliminary brief can move between the two organisations numerous times before finalisation.
- There are difficulties associated with obtaining relevant information and material from MIBU prior to service of the preliminary brief.
- The test being applied by the DPP when making a charge determination is too high and results in excessive delays in the preparation of preliminary briefs.
- The DPP is inflexible with respect to the four week period between the provision of the preliminary brief and the making of the charge determination.
- Frequently the preliminary brief is not delivered to an accused person at the

same time as it is provided to the DPP.

- Significant and unnecessary delays are occurring between the making of a charge determination and the provision of a committal brief. The DPP is insisting on additional work being undertaken for the purposes of the committal brief.
- SA Police are unable to negotiate pleas of guilty. No single person is responsible for the file at the prosecution end. The file moves from police prosecutor to police prosecutor, to BAT and then to a DPP solicitor.
- At the DPP end, files are not allocated to a prosecutor early enough.
- Following a plea of guilty, SA Police insist on continuing with investigations and the gathering of further evidence.
- There are more appearances and matters are taking longer to be resolved in the Magistrates Court.
- The number of offenders being sentenced in the Magistrates Court has dropped.
- The lengthy delays are to the detriment of accused persons who are remanded in custody and result in an increase in the number of bail applications.
- There is a lack of sanctions on a prosecution for causing unnecessary delays.
- There is an urgent need for the DPP to be involved earlier in the proceedings.
- The lengthy delays will result in a large number of matters being committed to the superior court within a short period (a “tsunami”).

Suggestions for Amendments

[76] In the context of those criticisms, proposals for amendments which emerged from the submissions can be summarised as follows:

- Allow up to seven days between arrest and the “first appearance” when the charge determination date is fixed.
- Require the DPP to be involved from the outset or, at the least, from the second

appearance onwards.

- Introduce a docket system for DPP prosecutors.
- Give the DPP power to direct police concerning investigations.
- Introduce statutory time limits within which the prosecution is to undertake the preparation and service of the preliminary brief, and make the charge determination.
- If a preliminary brief is not prepared in time for the second appearance, or has been returned by the DPP to SA Police for further work, introduce a requirement that any materials gathered for the preliminary brief be forwarded to the DPP and served on the accused well in advance of the second appearance.
- Introduce sanctions for non-compliance with statutory time limits.
- Provide a legislative definition of, or at least guidelines as to, the test to be applied for making a charge determination.
- Introduce disclosure protocols for SA Police.
- Empower SA Police to negotiate pleas of guilty.
- Introduce a procedure which ensures that following a plea of guilty committal for sentence occurs without delay on the basis of an agreed statement of facts.
- Require SA Police to provide to the DPP, and the defendant, such materials as have been accumulated for a preliminary brief not less than four weeks before the charge determination date. Each party would be in a position to make submissions concerning any adjournment of the charge determination date and it would provide an opportunity for a defendant to consider an early plea of guilty.
- "Uncouple" the guilty plea reduction timeframes from the major indictable reforms timeframes.
- Empower magistrates to dismiss minor indictable or summary matters for non-compliance to the statutory regime.

Director of Public Prosecutions (SA)

Background

[77] The submissions to which I have referred, and the summarised criticisms and suggestions, provide the context for a consideration of the submissions presented by the DPP and SA Police. The DPP provided a primary submission, which was supplemented by a further submission addressing specific points made by the Legal Services Commission and the Law Society.

[78] In the context of the submission by the DPP, it is helpful to have regard to a number of matters discussed in the background document to which I have referred. This document provides a helpful explanation of how the DPP prepared for the introduction of the Major Indictable Reforms. Preparation included providing information and training for the legal profession and SA Police. It is unnecessary to canvas the details of that training.

[79] As mentioned, the solicitors section of the DPP was restructured to create the specialist preliminary brief assessment team (BAT). The purpose of establishing BAT was to create “a singular specialist team to perform this function” with the intention of achieving and maintaining “a consistent approach to the assessment of preliminary briefs in terms of the DPP’s threshold for making or not making a charge determination, charging practices and assessment of early (pre-committal) guilty plea proposals.” With respect to consistency of charging practice, BAT undertakes all major indictable charge adjudications for arrest matters. BAT has been staffed with a view to “getting the charges right at the outset” and being able to deal promptly with defendants who wish to plead guilty early in the proceedings.

Adjudication

[80] Bearing in mind some of the criticisms and suggestions in the written submissions and from consultations with persons involved in the operation of the major indictable reforms, it is necessary to understand the administrative processes undertaken by the DPP and SA Police in the conduct of major indictable files. As mentioned, at the outset the DPP is involved in providing an adjudication with respect to charges and evidence likely to be needed. In the background document, the DPP has helpfully explained the adjudication process and its purpose:

> **6.1. Adjudication process**
>
> In all cases in which the police arrest and charge a defendant with a major indictable offence, the charge(s) are adjudicated by the Office of the DPP prior to an information being filed in the Magistrates Court. Arrest adjudications can take the form of arrests where police bail is refused or not applied for necessitating an appearance before a Magistrate as soon as is reasonably practicable[9] (**custody adjudications**) or where a defendant has been charged and granted police bail to appear in the Magistrates Court at a future date (**bail adjudications**). Where the police report a defendant in relation to a major indictable offence, report adjudications are undertaken by the SAPOL prosecution section. Note that since November 2018 the DPP has provided a legal resource to SAPOL in the form of a senior solicitor on secondment to address a backlog of report adjudications within the SAPOL prosecution section, and to assist SAPOL to develop capability with respect to undertaking those adjudications more efficiently moving forward.
>
> The primary function of the adjudication process is to enable the DPP to have input into the correct laying of charge(s) based upon the evidence as it is known at the time of arrest to ensure that the charge(s) as best as possible reflect the nature and extent of the criminal conduct disclosed by the evidence and will provide the court with an appropriate basis for sentence. Where the evidence gives rise to the possibility of

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[9] *Bail Act 1985*, s 13(3) - in any event not later than 4pm the next working day.

laying either major indictable or minor indictable/summary charges based upon the same essential facts (for example the spectrum of trespass offences; offences of violence; threat and endangerment offences; discretionary summary prosecution for certain firearm offences) the DPP adjudicator will give close consideration to the question of whether the matter under consideration warrants a determination in the District Court or whether it may be adequately dealt with in the Magistrates Court and by a Magistrate's sentencing power of up to five years for a singular offence and up to 10 years for multiple offences.[10]

…

The adjudication is undertaken by the DPP solicitor considering documentation which is supplied electronically by the SAPOL prosecution unit (suburban or regional) which is responsible for filing an information in the local court in which the defendant is expected to appear. Therefore, adjudication requests are incoming from SAPOL to the DPP from all parts of South Australia. Essentially the material which is provided to the DPP for adjudication purposes generally consists of draft charges, a summary of evidence, an offender history report and, in some cases where available, key witness statements or other advice from the investigating officer. Also included in the material presented for adjudication is a SAPOL document entitled **PD105M**, the significance of which is explained below.

The DPP adjudication consists of advice as to the appropriate charge(s), bail instructions where sought, forensic evidence required for the preliminary brief (if any) and notes for MIBU and the investigating officer intended to assist in the identification of evidence likely to be required as part of the preliminary brief.

…

The custody adjudications are invariably required to be completed and returned to SAPOL on a quick turnaround (usually a matter of hours, sometimes less than an hour) to ensure a prompt appearance of a defendant in custody before a Magistrate.

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[10] *Magistrates Court Act 1991* s 9(4).

Depending on when they are submitted, bail adjudications are turned around in days or weeks.

The DPP solicitor recommending the downgrading of a charge from major indictable to minor or summary at the adjudication stage (leaving no major indictable charge) is required to obtain instructions from a manager before authorising a downgrade. In the context of bail advice, a solicitor is required to obtain instructions from a manager or delegated senior solicitor before providing advice authorising a Crown review of a grant of bail. Apart from instructions with regard to the possible review of a grant of bail, … from time to time quite detailed advice is provided as to reasons for opposing bail and/or appropriate conditions in respect of a grant of bail. Where the DPP solicitor forms the view that bail ought not be opposed, that advice is provided.

The adjudication advice records details of any advice received from the investigating officer which might inform the adjudication advice. That advice will take the form of the contents of the PD105M and/or any other advice received (for example by telephone or email).

The PD105M is an internal document generated within SAPOL for the investigator to record at the time of the submission of the arrest file to the prosecution section details of any outstanding evidence to be obtained, including exhibits to be subject of forensic examination. This is an MIR specific process designed by SAPOL to support the first appearance obligation to inform the court as to the witness statements and other material to be obtained for the purposes of the completion of the preliminary brief and the time within which it is expected that the preliminary brief can be completed.[11] As noted above, the first appearance in respect of a major indictable offence is made by a police prosecutor. The purpose of the PD105M document is to alert the first appearance prosecutor to the details of the evidentiary material to be obtained by the investigator. Where that material includes the results of forensic examinations, the first appearance police prosecutor is to have regard to an

[11] CPA ss 105(5), 106(1)(d)(i).

information matrix which is accessible on the police computer system and which is said to provide up to date timeframes and estimates for the provision of forensic evidence of different types. Therefore if, for example, the PD105M indicated that exhibits had been or were to be submitted for drug analysis, and the matrix advised that the turnaround time for that type of analysis was four months, in theory the first appearance prosecutor would seek an adjournment of five months to account for completion of the analysis plus not less than four weeks for consideration by the DPP. Plainly, time estimates are made far more complicated where multiple exhibits are to be submitted for forensic examination and forensic examinations of different types are required to be undertaken with variable timeframes. From time to time, a defendant's first appearance in court where the police prosecutor is seeking an adjournment will occur when a crime scene or scenes are still being forensically examined and processed. The PD105M was plainly designed to attempt to address the potential uncertainties which can arise when endeavouring to make a reliable estimate of how long the police would require to compile a preliminary brief.

…

As has been noted above, in the first week of MIR a number of matters came before the Magistrates Court in which, through misunderstanding or misapplication of the PD105M process, police prosecutors sought unnecessarily lengthy adjournments on the basis of forensic estimates in cases where forensic analysis was not required for the purposes of a charge determination. In order to prevent a recurrence of such events, the DPP enlarged its adjudication advice to address specifically the forensic evidence, if any, required for the purpose of making a charge determination. The DPP's ability to provide that advice is inextricably linked with the information contained in the PD105M, and is usually supplemented by advice from the investigating officer where, for example, the DPP solicitor is unable to discern from the material provided what the significance of a particular exhibit or piece of evidence might be (usually mobile phones or other electronic devices). It should be noted that a PD105M is not always supplied and that those supplied are of variable quality. For that reason, the adjudication records whether or not the PD105M is supplied or where it is incomplete. As a general approach, the DPP will only nominate forensic evidence as being required for the preliminary brief if it is considered to be essential - for example, drug analysis on a drug charge: firearm identification on a firearm charge; chemistry analysis for a drug manufacturing laboratory; computer analysis for charges of obtaining child exploitation material via the internet, fingerprints or DNA where this constitutes the sole or substantial evidence of identification.

Apart from details of forensic evidence which is required for a charge determination, the DPP adjudication advice will contain general remarks directed at MIBU/the investigating officer intended to focus their attention upon the evidentiary matters which the DPP solicitor anticipates from his or her consideration of the material provided will be significant for the purposes of charge determination. These lists are neither essential nor exhaustive as it falls to the MIBU to assess whether there is sufficient material for a charge determination before submitting a preliminary brief to the DPP. The process acknowledges that there may be a change in the nature and quality of the evidence between the adjudication and the submission of the preliminary brief for example, admissions or other eyewitness evidence may come to light. However, the DPP provides this advice as a reflection of the intellectual effort which is applied to adjudicating the charges, and in the hope of providing some assistance and guidance to MIBU. The officers in charge of MIBU have specifically requested that the DPP continues to provide advice of this nature at the adjudication stage. When the adjudication advice is returned to the SAPOL prosecution unit, the investigating officer is also copied into that email correspondence to enable him or her to commence compiling the preliminary brief with the DPP's recommendations and suggestions in mind.

[81] It is readily apparent from this brief overview that the DPP has undertaken extensive administrative processes in an endeavour to ensure that the new system not only operates efficiently, but operates in a manner designed to achieve its aims. The DPP and SA Police both acknowledge that, initially, SA Police sought very lengthy and, at

times, excessive adjournments between the first and second appearances. However, a significant amount of work has been undertaken to avoid a repetition of those problems.

[82] Not surprisingly, however, there are complex cases which require lengthy periods for both investigatory purposes and for the DPP to make a charge determination. The DPP and SA Police have established a protocol for dealing with complex matters which it is unnecessary to discuss.

[83] One of the aims of any system of criminal justice is to ensure that only matters of sufficient gravity become involved in the major indictable processes. To this end, the exercise of discretion by SA Police and the DPP is important. Significantly, the involvement of the DPP in the initial adjudication process provides an early opportunity for decisions to be made as to whether matters involving major indictable charges are more appropriately dealt with as minor indictable or summary matters.

[84] One of the benefits of the creation of the BAT has been the early removal of more matters as part of the adjudication process. The background document summarises this significant development as follows:

> Since the commencement of MIR and the adjudication function being undertaken wholly within the BAT, an average of 23.65% of matters originally charged as major indictable have been the subject of advice to SAPOL to lay as minor indictable or summary offences which, between 13 March 2018 and 26 March 2019, equated to 611 briefs being kept out of the major indictable stream for disposition in the superior courts. During the same period in the previous year (i.e. prior to MIR), an average of 13.09% matters originally charged as major indictable were the subject of advice to SAPOL to lay as minor indictable or summary offences, equating to approximately 332 briefs being kept out of the major indictable stream for disposition in the superior courts.

Preliminary Brief - Charge Determination

[85] As to the charge determination processes, the background document notes that almost all of the standard preliminary briefs are received at or about the four week mark and not before. By the time administrative processes have been undertaken to log the file and determine an allocation, in practice the DPP solicitor ends up with something in the order of three weeks in which to obtain instructions and make a charge determination. Bearing in mind court rules require the charge determination advice be provided at least two clear working days prior to the second appearance, the background document continues:

> To state that which must be obvious, the amount of time and work required to be applied in respect of any given file for the purpose of charge determination depends upon the nature and number of the charges, the number of defendants, the volume and nature of the evidence and the complexity of the legal issues arising in respect of the matter. Even in cases which might be regarded as simple or straight forward, such as single instances of drug trafficking or sexual assault, it is very common for the preliminary brief of evidence to contain evidence in the form of audio visual recordings or mobile phone downloads which are inherently time consuming to assimilate.

[86] The DPP solicitor is required to consider whether there is a reasonable prospect of conviction and whether a prosecution is in the public interest. This involves considering whether the preliminary brief contains sufficient evidence to warrant the commencement of committal proceedings or whether the brief is lacking for that purpose and, if so, in what respects. The DPP solicitor provides advice in writing and authorisation by the BAT manager is required.

[87] Once a major indictable charge determination has been made, the BAT solicitor prepares a detailed memorandum for the DPP solicitor who is to appear at the second appearance. The memorandum is required in order to ensure that the solicitor

appearing at the second appearance is able to make informed submissions as to the material to be gathered for the purpose of completing the committal brief and assisting the court in fixing the date for the answer charge hearing.

[88] If the DPP declines to make a charge determination, and returns the preliminary brief to SA Police, a detailed advice is provided to SA Police explaining the reason or reasons for this decision. In addition, if the DPP determines that the charge should be reduced to a minor indictable or summary offence, advice to this effect is provided to SA Police.

[89] Bearing in mind some of the criticism directed at the DPP's approach to making a charge determination, and the suggestion of a "disconnect" between the DPP and SA Police in this regard, it is helpful to consider a few statistics relating to charge determinations. In the background document, the DPP has identified that in the first 12 months of the operation of the major indictable reforms, from 5 March 2018 to 27 March 2019, approximately 859 preliminary briefs were received by the DPP from SA Police. To 27 August 2018, 59.84% of the preliminary briefs received had resulted in a charge determination for a major indictable offence. To that date, 11.02% resulted in a charge determination for a minor indictable or summary offence. No charge determination was made in a little under 27% of matters.

[90] To 26 March 2019, the percentage of charge determinations for major indictable offences had increased to 70.46% (from 59.84% to 27 August 2018). The number of matters in which no charge determination was made following initial receipt of the preliminary brief dropped from 26.77% (to 27 August 2018) to 19.60% to 26 March 2019. Any impression that the DPP is rejecting the majority of preliminary briefs is dispelled by these figures.

DPP Submission

[91] In the written submission to this Inquiry, at the outset the DPP made the following observation concerning the aims of the reforms:

> As your Terms of Reference document identifies, the MIR reforms are directed to addressing concerns about:
>
> - unnecessary appearances in the Magistrates Court;
> - long delays between arraignment and trial while police continued to gather evidence;
> - the entering of late guilty pleas; and
> - the late identification of matters in dispute, leading to the backlogs and the practice of over-listing by the criminal courts.
>
> In particular, the new system was designed to achieve in the Magistrates Court: fewer appearances of little, or no, utility while a brief was being assembled; a more meaningful brief being provided to the Office and the defendant at a time at which substantial discounts would still be available for a plea and, if the matter could not be resolved without a trial, committal for trial once the brief was substantially complete so that the case statement obligations might have a meaningful impact on the conduct of matters in the Supreme and District Courts.

[92] Having regard to the limited time during which the reforms have been in operation, the DPP also observed that, “arguably”, the new procedures were “not designed to decrease the period between the first appearance in the Magistrates Court and any committal for trial or sentence.” The submission continued:

> Rather, as addressed above, the understanding held by this Office is that the new system was designed to achieve in the Magistrates Court: fewer appearances of little, or no, utility; a more meaningful brief being at a time at which substantial discounts would still be available for a plea while the matter is in the Magistrates Court and, if the matter is not resolved without a trial, committal for trial at a time when the brief is ‘trial ready’ so that progress of the matter to trial in the Supreme and District Courts is expeditious.

> Aspects of this in fact might lead to a longer time between the first appearance in the Magistrates Court and committal for trial and sentence, but the gain being that the matter is better prepared when committed for trial, providing a setting for it to be efficiently advanced in the superior court (for example, shorter trials in those matters that do proceed, fewer trials being adjourned as a consequence of trials not proceeding as a result late provision, or consideration of aspects, of the brief, and fewer witnesses being warned for trials only to be cancelled on the eve, or during, the trial).

[93] These points are a valid reflection of the legislative policy.

[94] In the context of complaints about delays in the Magistrates Court, the DPP acknowledged that, on occasions, SA Police has requested adjournments for unnecessarily long periods between the first and second appearances. However, the DPP correctly observed that under the previous procedures, the time taken to prepare a brief of evidence in the Magistrates Court "tended to be obscured by a series of adjournments given to permit the assembly of the brief." By way of contrast, under the new system, from the outset the time needed by SA Police for preparation of the preliminary brief is stated openly in Court, and stated openly at the first appearance. Any delays are also readily apparent if, at the second appearance, the prosecution is required to seek a further adjournment in open Court and give reasons for the application.

[95] One of the issues raised in the context of delays in the Magistrates Court concerns the standard applied by the DPP in determining whether a preliminary brief provided by SA Police is sufficient for the DPP to make a charge determination. It was suggested in submissions, and in discussions, that the standard being applied by the DPP is too high and results in delays while preliminary briefs are returned by the DPP to SA Police for further work. When a preliminary brief is returned, SA Police must seek an adjournment of proceedings.

[96] The DPP suggests that this view concerning the standard applied by the DPP might be

shared by some Magistrates and, from communications between the DPP and SA Police, the DPP believes it is a view held by SA Police. It has been reported to the DPP that during exchanges between police prosecutors and magistrates, the "impression" has been conveyed that some magistrates are of the view that, in order to make a charge determination, the DPP should simply decide whether the preliminary brief is sufficient to establish a case to answer.

[97] The DPP disagrees with this view. In the view of the DPP, this test of whether there is sufficient evidence for a case to answer would "not be consistent with the aims of the reforms":

> Otherwise the new process adds little to the former process. The purpose of the inclusion of the words "in the opinion of the Director of Public Prosecutions" [in s 106(1)(a)] was to enable this Office to set the standard for what would be required and to so in a way that is consistent with the goals of the reforms. One of those goals is to lessen the number of appearances in the Magistrate Court. This can only be achieved if a more complete brief is provided at an earlier time.

[98] The submission by the DPP as to the standard of the preliminary brief was made in the context of the DPP's view concerning the purposes of the major indictable reforms. Those purposes include the provision of the preliminary brief which provides the defendant with a level of information about the evidence at a time when the defendant is able to take advantage of substantial reductions for a plea of guilty. The second tier of reductions for an early plea applies in the period commencing after expiration of the first four weeks, and concluding on or before the committal appearance.

[99] The DPP made the obvious observation that the requirements for each case will be different, but there are certain types of evidentiary requirements which must be met. However, the DPP accepts the existence of a risk that there might be occasions when the DPP has expected too much with respect to the standard of preliminary briefs and, possibly, committal briefs.

[100] In the context of the suggestion that the DPP has set a standard which is too high, and which results in frequent returns of preliminary briefs to SA Police, as mentioned, the DPP pointed out that the rate of acceptance of preliminary briefs by the DPP has increased. Over the last 12 months there has been an increase of 5-10%. From the data kept by the DPP, "the current figures demonstrate that of all the preliminary briefs received and reviewed by this Office, approximately 70% have been the subject of a charge determination, with an additional 9% (approximately) being determined to warrant minor indictable or summary charges." In about 20% of cases, a charge determination has not been made.

[101] As to the test applied by the DPP in order to make a charge determination, in the submission the DPP stated that the charge determination threshold "might broadly be described as requiring that the preliminary brief contain apparently reliable evidence, in an admissible form, of each element of the offence." In the background document, the DPP explained that this test has been determined as appropriate against the background of problems that occurred under the previous system when the evidence obtained was insufficient to prove every element of the offence charged, and either lengthy adjournments would be sought or the charges would be discontinued on the basis that there was no reasonable prospect of conviction. In addition, the DPP pointed out that specific training has been provided to investigators and MIBU requiring investigators to "front end" important aspects of the investigation and to submit evidence capable of making out the offence charged.

[102] The DPP also made the following submission concerning the charge determination threshold:

> It is important to make one further observation about the charge determination threshold. Any lessening of the current standard will necessarily result in less complete briefs being provided to the ODPP. This in turn will potentially adversely impact the ODPP's ability to file both committal briefs and case statements in accordance with the timeframes identified in the *Criminal Procedure Act*, resulting in

further adjournments and delays. If it is ultimately recommended that the charge determination test is relaxed, corresponding amendments to the committal brief and case statement requirements, and potentially sentencing discounts, should also be considered.

[103] In the context of criticism concerning the DPP attitude to the four week period between the provision of the preliminary brief and the making of a charge determination, the DPP submitted that, “frequently”, the preliminary brief is not provided at least four weeks before the charge determination date. In the early stages of the reforms, the DPP accepted the majority of briefs that arrived in less than four weeks before the charge determination date, and made the charge determination. However, “the Office no longer has the capacity to do that.” The DPP suggested that SA Police and some magistrates might take the view that the DPP should make charge determinations even though preliminary briefs are provided in less than four weeks before the charge determination date.

[104] As to the process after a charge determination has been made, a Magistrate is required to fix an answer charge date. The fixing of that date occurs in the context of s 111 of the CPA which requires that at least four weeks before the date fixed for the answer charge hearing, the prosecutor must file the committal brief. Section 111 identifies the material to be included in the committal brief.

[105] Bearing in mind the need for case statements once a matter has been committed for trial to the Superior Court, it is the view of the DPP that to meet the reform objectives, at the conclusion of the committal proceedings “the prosecution brief must be close to trial ready.” The DPP reports that, anecdotally, it appears that both SA Police and some magistrates disagree with the standard applied by the DPP and that some may hold the view that the committal brief “need only disclose a case to answer.”

[106] In this context, the DPP has reported that, not uncommonly, magistrates allow a period less than the period requested by the DPP for the preparation of the committal brief. This has led to late provision of a committal brief both to the defence and the Court

which, not unreasonably, results in defendants requesting an adjournment to review the brief and obtain instructions. On occasions the DPP has been unable to provide the brief prior to the answer charge hearing and has been obliged to seek a later date for the answer charge hearing. The DPP has reported in its submission that the standard of many committal briefs submitted by SA Police to the DPP has been below the standard required by the DPP. These briefs are often provided less than four weeks before the answer charge hearing and it is rare for the committal briefs to be provided more than four weeks before the hearing.

Early Guilty Plea Processes

[107] In the submission, the DPP noted a criticism of the reforms related to the “perceived inability” for defence counsel to negotiate with the DPP at the early stages of a matter. The DPP has responded that from the outset of the reforms, “processes were established to allow for early guilty pleas and negotiations with the ODPP”. In the experience of the DPP, these processes have been used by some in the legal profession, particularly the Legal Services Commission.

[108] In view of the suggestion that the new processes cause difficulties for defendants in seeking to negotiate early pleas of guilty, it is appropriate to set-out the details of the processes to which the DPP referred. These details are taken from the background document provided by the DPP:

> **6.1. Early guilty pleas**
>
> The DPP BAT is responsible for assessing major indictable plea offers and having the conduct of sentencing proceedings in relation to early guilty pleas and early guilty plea offers made before the second appearance.

Where a defendant is charged with a major indictable offence and offers a plea to a minor indictable or summary offence in lieu thereof, it falls to SAPOL to determine the appropriateness of that resolution and, where accepted, to attend on sentencing submissions in the Magistrates Court.

Where a defendant is charged with a major indictable offence and pleads guilty as charged, the matter is committed for sentence and the DPP appears on the sentencing proceedings in the superior court.

Where a defendant is charged with a major indictable offence(s) and offers to plead guilty in circumstances which involve a plea to a lesser number of major indictable charges, alternate major indictable charges or contingent upon the acceptance of a particular factual basis by the prosecution, those matters are referred by MIBU to BAT for consideration of the guilty plea offer.

The procedures (as set out in the AGD's MIR information documentation) are as follows:

6..1. Early guilty plea as charged

The defendant or his or her counsel advises the Courts Administration Authority in writing of their intention to plead guilty as charged. The Courts Administration Authority advises MIBU, DPP and defence of the date and time of the hearing for the purpose of the entering of the guilty plea. Once the guilty plea is entered, the defendant is committed to the superior court for sentence. The prosecution is obliged to file and serve a factual summary in accordance with the rules and a DPP solicitor will attend at sentencing submissions in the superior court. The DPP solicitor, in conjunction with the investigating officer, will determine what, if any, outstanding evidentiary material is required to be obtained to be placed before the sentencing court for the purpose of imposing penalty.

6..2. Early plea proposal alternate major/as charged contingent

The defendant or his or her counsel advises MIBU in writing of an offer to plead guilty to an alternate major indictable offence or as charged but contingent upon a particular factual basis or pursuant to s116 of the CPA (Form 9A). MIBU refers that notification to BAT and provides whatever documentation is in existence on the police prosecution file at that time for consideration by the DPP. The DPP will consider the material provided and the offer, make a recommendation to the BAT manager and obtain instructions with respect to the proposal. The DPP solicitor may liaise with the investigating officer, any alleged victim and the defence while the matter is under consideration.

Where the DPP declines to accept the offer under consideration, the DPP will advise MIBU in writing who will in turn advise defence and continue to prepare the preliminary brief for the second appearance.

Where the offer is accepted, the DPP will advise MIBU and request a fresh information if one is required to give effect to the negotiated plea. MIBU will advise defence and file any fresh information as required. Upon a guilty plea being entered, the defendant is committed to the superior court for trial (or remanded for sentence in the Magistrates Court where a 9A resolution has been achieved) and the DPP solicitor will attend on sentencing submissions. Where the matter is committed to the superior court for sentence, the DPP files a factual summary in accordance with the rules and will make an assessment as to what, if any, further evidentiary material is required for the purpose of the sentencing proceedings.

SA Police

[109] SA Police was provided with copies of submissions by the DPP, Legal Services Commission, Law Society and Bar Association. In order to set the context, SA Police provided an overview of the processes that led to the major indictable reforms,

including consideration of a “Pre-Charge Bail” system which, ultimately, was not adopted. In addition, SA Police suggested that the Major Indictable Reforms failed to adopt proposals for “heavier defence disclosure obligations”, and the “idea of minimising the work for SAPOL investigators by avoiding the need to gather evidence for non-disputed elements of the alleged offence seems not to have been given a priority in the model as finally enacted or practised”.

[110] MIBU is part of the SA Police Prosecution Services Branch. This branch operates 15 general prosecution units located throughout SA and two specialist prosecution units, one of which is dedicated to the Licensing Court and the other to prosecuting complex matters. This branch conducts approximately 67,000 prosecutions annually in the Magistrates and Youth Courts.

[111] SA Police made the following general observation:

> The reforms were accompanied by a significant shift of responsibility, accountability and workload from the ODPP and SAPOL prosecutions (MIBU). This shift occurred with no injection of resourcing (or movement of resources from the ODPP) (ie, budget, people, technology, administrative support, etc) into SAPOL. SAPOL has supported the MIBU business model at the expense of other prosecutorial functions. This continues to have significant impact on service delivery to both the superior and lower courts. The burden created by not resourcing the function also extends to frontline policing resources where all major indictable investigations are now “front-end loaded”. That is, <u>every</u> major indictable investigation requires a close to trial-ready brief just to reach charge determination (whereas pre-reform only a handful of matters required such extensive investigation). The effect of the “front-end loading” (integrated with the charge-determination threshold) is that investigators must complete significantly more work in a much reduced period of time impacting their ability to manage multiple investigations.
>
> SAPOL continually assess these demands in order to ensure appropriate resourcing of the function. This is reflected in the 57% increase in staffing (since 5 March 2018)…

[112] A table at page 16 of the SA Police submission sets out the staffing of MIBU, together with the secondment of a DPP consultant which the submission explains in the following terms:

> The secondment of a DPP consultant began on 5 March 2018 and is continuing for a period of two years and is fully funded by SAPOL at LEC4 remuneration level. The DPP consultant role arose as a result of discussions between the Commissioner of Police and the Director of Public Prosecutions to assist the Prosecution Services Branch with the implementation of Major Indictable Reform.
>
> The Solicitor provides practical day-to-day guidance to MIBU throughout the implementation and monitoring stages of Major Indictable Reform; assists the MIBU in their understanding of the DPP approach to the prosecution of major indictable matters to enable SAPOL to develop their capability and capacity for ongoing decision making and management; and acts as an operational conduit between SAPOL MIBU and the DPP.

[113] As to the impact of the reforms on SA Police, in a “key observation”, the submission states:

> The true resourcing burden on SAPOL to support the reforms is unknown but it can be said the impact on investigations through to prosecution resources has been vast. A far greater number (almost all) of major indictable investigations require a much greater level of investigation prior to resolution of the matter.

[114] The submission explains the processes undertaken before the first appearance:

> When an arrest major indictable file is received at a prosecution unit the file is scanned and emailed to the DPP for adjudication. The ODPP endeavour to determine what forensic evidence is required (if any) for charge determination based on information contained in the Charge Sequencing Report. The DPP will provide adjudication advice indicating what forensic evidence is required for charge determination.
>
> The police prosecutor will then reference updated expert or forensic analysis timeframes (as provided by subject matter experts) to establish the estimated completion time for the required evidence.

> A crucial element of the reform is the mechanism by which timeframes are set, Each matter has a discreet adjournment length set at the first court hearing to allow the investigator to complete a preliminary brief and for MIBU prosecutors to review it. MIBU maintain a record of all adjournments sought at first appearance and the actual adjournment granted by the Court. SAPOL are granted the adjournment period sought in approximately 75% of cases.
>
> Approximately 25% of matters do not receive the estimated necessary adjournment period required to prepare the preliminary brief. This creates the need to attend Court more often and creates congestion in the Magistrates Courts.

[115] As to the issues concerning the charge determination, in response to an earlier consultation paper SA Police suggested that much of the success or failure of the contemplated reform would turn upon the Director's decision concerning the standard for an adequate preliminary brief. In the view of SA Police, the expectation was that "the charge determination would not require a water-tight case" and it was intended that "delays in obtaining conclusive forensic reports for example will not hold up proceedings at the pre-answer charge stage". It is the view of SA Police that the previous model, or its "promoted vision…appeared to encourage the Director to take a sensible, pragmatic approach to the certification exercise". SA Police were of the view that if the Director's standards were "unrealistic", and if "risk aversion becomes a prevailing influence, many of the potential efficiency gains will be lost". A comment was also made that it was necessary for the legal profession and the judiciary to adopt "some of the spirit of reform in ensuring that areas of contest are kept to those issues truly in dispute".

[116] In the current submission, SA Police stated that, anecdotally, it is estimated that from 5 March 2018 one in four matters were rejected by the DPP and returned to SA Police to either continue investigations, downgrade the charges or consider for withdrawal. The submission continued:

> There have been occasions where SAPOL has challenged the Director's threshold in regards to charge determination. Section 106 of the Criminal Procedures Act gives

absolute discretion for the Director to set this threshold. SAPOL is aware that the (previous) Director considers this threshold to be *credible, admissible evidence of all the elements of each offence charged*. Both SAPOL and the Courts are limited in their ability to impact this threshold. The Director's approach has a direct impact on the workload of investigators, prosecutors and courts alike.

It is acknowledged that the DPP face the same risk, which is courts giving them reduced adjournment times, to prepare the committal brief. That is, the preliminary brief plus the outstanding material for the trial ready brief. The issue for the ODPP is that they are bound by the state of the brief at the conclusion of the committal process. This understandably sees the Director set a higher threshold for charge determination against that of the former committal brief. This precise issue has been raised by Magistrates and reported broadly in the media.

Therefore it is in their (ODPP) interests that the majority of the evidence is obtained prior to them accepting the file at the charge determination stage. To that end the ODPP has, on occasion, appeared to request far more than would ordinarily be expected to determine the appropriate charge to proceed with. This has been the subject of adverse comments by the magistracy on a number of occasions.

Under the current legislative regime, it is within the ODPP's interests to set the charge determination threshold at a level that delivers as close to a trial ready brief as possible.

In summary it is arguable that the intent of the reform has achieved some of its main objectives. To what extent the intended objectives have been achieved will require greater time and system throughput. The additional unanswered question is at what (system wide) cost have the objectives been achieved?

Superior Court Proceedings

Case Statements

[117] The DPP background document provides a summary of procedures followed under the previous system following committal of a defendant to a superior court:

> Arraignment dates for matters committed to the District Court for trial were set at not less than 56 days after committal [District Court Criminal Supplementary Rules 2014 R8(1)]. In respect of matters committed for trial the Director would present an information and recommendation as to category (in the District Court) or summary of the prosecution case (in the Supreme Court), which would be filed in court and served upon the defendant’s legal representative.
>
> The DPP solicitor would appear at arraignment where matters committed for trial and the subject of a plea of not guilty would be listed for trial. Thereafter a first (10 weeks after arraignment) and second (four weeks before trial) directions hearing callover would be conducted. A defendant committed to a superior court for trial could change his/her plea as of right at arraignment.
>
> It would be rare for a matter to be listed for trial on the basis of a complete or completely disclosed prosecution brief. To a degree the directions hearing process was utilised to manage outstanding disclosure. It was a common phenomenon for late, sometimes substantial, disclosure to occur once a matter had been assigned to a trial prosecutor. It was the Director’s experience that late, sometimes substantial, additional disclosure requests would be made, or subpoenas issued, once a matter had been briefed to defence counsel. The genuine narrowing of issues and agreement of evidence would rarely occur prior to discussions between trial counsel taking place, and often only in the days before (and indeed during) the trial.

[118] The Major Indictable Reforms introduced significant changes to procedures in the Supreme and District Courts following committal for trial. As discussed, when fixing a date for the arraignment of a defendant in the superior court, a magistrate is required

to take into account that both the prosecution and the accused person are required to file case statements. These statements must be filed before the first arraignment. Section 123(2) identifies the material that must be included in the prosecution case statement (s 123(2) is set-out in paragraph 47 of this Report).

[119] Not more than four weeks after an accused person has been provided with the prosecution case statement, a defence case statement must be filed and served on the prosecution containing the information specified in s 123(4) (s 123(4) is set-out in paragraph 48 of this Report).

[120] In the submission, the DPP has observed that it is too early in the operation of the reforms to assess whether the case statement procedures are working satisfactorily. In the context of case statements, however, in the background document the DPP observed that requiring the filing of case statements before the first arraignment suggests that the statements are "intended to meaningfully inform the trial court as to the nature, length and complexity of the matter for listing purposes". In the view of the DPP, properly completed case statements "should reveal to the court what the case is about, what matters are in dispute and what court resources in terms of judicial time and special facilities are required". In this way, "case statement requirements should lead to more streamlined, efficient litigation in the criminal courts".

[121] In this context, the DPP has taken the position "that in order for both parties to meet their obligations in respect of case statements the prosecution brief must be close to trial ready by the time of the conclusion of the committal proceedings". I agree.

[122] His Honour Judge Paul Rice was actively involved in overseeing files committed to the District Court in the early stages of the operation of the major indictable reforms. In particular, his Honour has extensive knowledge of the case statements which have been filed under the new system.

[123] His Honour provided me with examples of case statements. Those filed by the DPP provide a comprehensive overview of the prosecution case and evidence. Those filed by counsel for accused persons vary significantly in their quantity and quality. Some

defence case statements provide the court with a good understanding of the issues and bases of objections to evidence, while others disclose a singular lack of co-operation with the aims of the legislation.

[124] Speaking generally, it appears that the system of case statements is a helpful addition to the court processes. It is a matter for the court to determine whether, in individual cases, the case statements are adequate or otherwise. I have no specific recommendation to make with respect to case statements other than to encourage co-operation with the aims of the legislation.

[125] An issue raised with respect to case statements in statements prepared by the Legal Services Commission concerns the interaction between s 123(4)(b) of the CPA and s 34 of the Evidence Act. Section 123(4)(b) requires that an accused indicate in the defence case statement any elements of the offence which the accused admits in accordance with s 34 of the Evidence Act. In the case statements prepared by the Legal Services Commission, the observation has been made that the elements of the offence are not “facts alleged or sought to be proved” and, therefore, cannot be admitted by an accused pursuant to s 34 of the Evidence Act.

[126] Strictly speaking, it appears that the Legal Services Commission is correct. Section 123(4)(b) identifies an admission to the elements of the offence as an admission “in accordance with s 34 of the *Evidence Act 1929*”. However, s 34 of the Evidence Act provides only that a person may admit on the trial any “fact” alleged or sought to be proved against that person. Facts might provide proof of an element of the offence, but facts are not, in themselves, elements of the offence.

[127] Section 123(4) identifies matters which must be included in the defence case statement. However, that section does not prevent an accused person from admitting an element or elements of the offence charged. It is always open to an accused person to admit an element of the offence. If an accused pleads guilty, that plea amounts to an admission of the elements of the offence to which the accused pleaded guilty.

[128] It appears that under the current provisions, while an accused may admit an element of the offence, the accused is not obliged to include such an admission in the defence case statement. A simple amendment would cure this defect. The words "in accordance with s 34 of the *Evidence Act 1929*" could be deleted from s 123(4)(b).

Statistics

[129] In addressing the operation of the major indictable reforms, it is helpful to consider statistics which might provide an indication as to the progress of major indictable matters through the court system. In particular, statistics might be able to provide a useful comparison with the old system.

[130] At my request the Justice Policy and Analytics, Policy and Community Division of the Attorney-General's Department (JPD) undertook an analysis of statistics gathered from the Courts Administration Authority and the DPP. JPD's report, Review of Major Indictable Reforms: Analysis of Courts Statistics, is Annexure 8.

[131] JPD had previously prepared reports with respect to the operation of the sentence reduction scheme and those reports, Stages 1 and 2, are Annexures 5 and 6 to the Sentence Reductions Report. They are also Annexures 9 and 10 to this Report.

[132] In the particular circumstances of this Inquiry, there are significant difficulties with attempting to draw any firm conclusions from the statistics. Those difficulties arise in this way:

- The major indictable reforms commenced operation on 5 March 2018.
- Major indictable matters lodged in the Magistrates Court, up to and including 4 March 2018 (pre-reform), continued to progress through the Magistrates Court under the old regime. Matters filed from 5 March 2018 onwards (post-reform) have been dealt with under the new reforms.
- For the purpose of comparing how pre-reform and post-reform matters have progressed through the Magistrates Court, it was necessary for JPD to select

groups of matters for comparison. The pre-reform group were major indictable matters lodged in the Magistrates Court in the 5 month period from 3 October 2017 to 4 March 2018. Difficulties with the database prior 3 October 2017 meant it was inappropriate to start from an earlier date.

- Most of the pre-reform group lodged between 3 October 2017 and 4 March 2018 were finalised by 4 March 2019. It is not known when each individual matter was finalised, but it can be said that the pre-reform group were in the court system for 12 to 17 months to the cut-off point of 4 March 2019.
- The post-reform group used for comparison purposes consisted of matters lodged in the Magistrates Court in the 12 month period immediately following the commencement of the reforms (5 March 2018 - 4 March 2019). As matters could have been filed right up to the cut-off point of 4 March 2019, only a percentage of matters filed in that 12 month period were finalised by 4 March 2019. For example, a matter might have been lodged on 3 March 2019 and will, therefore, be included in the total number of post-reform matters lodged in the Magistrates Court. Obviously, in that example, insufficient time will have elapsed for any action of significance to have occurred with regard to that matter by 4 March 2019.
- The comparison involves, therefore, a pre-reform group filed in the five month period which were in the system for 12 to 17 months, and a post-reform group which were in the system for 0 to 12 months.

Overall Numbers

[133] In the pre-reform period, 1,326 matters were lodged by 4 March 2018, of which 1,279 (96.5%) were finalised by 4 March 2019. In the post-reform group, 2,697 matters were lodged in the 12 months to 4 March 2019, of which 1,268 (47%) were finalised in the

Magistrates Court by 4 March 2019.[12] For the reasons discussed, no useful conclusion can be drawn from comparing these figures.

Method of Finalisation

[134] Details of the way in which the completed matters in each group were finalised appear in Table 1 of the JPD report. Again, great care must be exercised in endeavouring to draw any conclusions from the table. The following points should be made:

- The table relates to major indictable matters lodged in the Magistrates Court. Significantly, since the introduction of the major indictable reforms and the establishment of BAT within the office of the DPP, the number of matters charged by investigators as major indictable offences, but withdrawn or reduced to minor indictable/summary charges in the DPP initial adjudication, has risen significantly. As reported by the DPP in the background document, in the 12 month period prior to the reforms, an average of 13.09% of matters originally charged as major indictable were the subject of advice to SA Police to proceed as only minor indictable or summary offences. Since the reforms commenced operation, an average of 23.65% of matters originally charged as major indictable have been reduced through the adjudication process to minor indictable or summary offences. In this way there has been a significant increase in the number of matters kept out of the major indictable stream entering the Magistrates Court.
- JPD notes that the most common outcome in the Magistrates Court is dismissal/withdraw etc. JPD comments as follows:

> As shown in Table 1, the most common outcome for the 1,268 finalised case defendants in the first 12 months of the reforms was *dismissed, withdrawn,*

[12] Updated figures: To 30 June 2019, post-reform, 3798 matters lodged; 369 committed for sentence; 249 committed for trial.

> *not proceeded with or no action taken* (810 defendants: 63.9%). Although this was also the most common outcome in the pre-reform group (647 defendants: 50.6%), the proportion was higher in the post-reform group. This may be the result of the major indictable reform requirement for a preliminary brief prior to charge determination by the DPP, enabling the DPP to make an earlier decision about continuing the prosecution of the matter in that form.
>
> Of the 810 post-reform matters not proceeded with, 180 had a record of a fresh major indictable information, indicating that the original charges may not be proceeding, but the matter was still being prosecuted under a new file. This is a new data entry option, so it is possible that some of the 490 post-reform matters recorded simply as 'not proceeded with' may also be linked to a fresh major indictable information. As indicated, it is not possible to identify these matters as the Magistrates Court initiates a new case with a different file number when substitute or replacement charges are lodged with no linking of data between the old and new files.

- After dismissal, the next most common outcome was committal for trial. 24% were committed for trial from the pre-reform group, while 14.6% of the post-reform group were committed for trial. Again, for the reasons discussed, in my view no reliable conclusion can be drawn from a comparison of these figures.
- In addition to the difficulties associated with drawing conclusions from figures relating to the post-reform group, consideration must also be given to trends in the Magistrates Court which are demonstrated in Figure 1 of the JPD report. JPD commented:

> It is not possible, however, to attribute the changes in Table 1 *solely* to the impact of the major indictable reforms. Figure 1 shows trends in Magistrates Court outcomes for major indictable offences from 1 July 2010 to 31

December 2018.[13] As shown, the percentage of matters that were dismissed or withdrawn was increasing prior to the reforms, from 42.8% in 2015/16 to 49.3% in 2017/18. Similarly, the percentage of matters committed for trial was decreasing, from 34.7% in 2014/15 down to 22.7% in 2017/18. Interestingly, for both outcome types, the individual trends intensified in the first six months of 2018/19 (up to 56.3% for matters that were dismissed or withdrawn and down to 17.1% for matters committed for trial) suggesting that the reforms contributed to the escalation of an existing increase or decrease.

Figure 1 also shows that the percentage of matters committed for sentence increased between 2012/13 and 2016/17 (from 8.3% to 15.5%), likely the result of the commencement of the *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* in March 2013 that encouraged guilty pleas in the Magistrates Court. In contrast to matters dismissed or withdrawn or matters committed for trial, the upward trend in the percentage of matters committed for sentence reversed in 2017/18, decreasing marginally to 15.3% and then to 13.5% in the first six months of 2018/19. While the *timing* of the decrease suggests that it may be related to the implementation of the major indictable reforms, it is not clear how the reforms contributed to a *decrease* in this outcome. It is noted that the 2017/18 and 2018/19 data in Figure 1 include matters lodged under the previous system but finalised after 5 March 2018.

- As to matters committed for trial or sentence, as a percentage of the total number of matters committed, Figure 2 of the JPD report demonstrates a trend since 2010/11. The number of matters committed for sentence, as a proportion of total matters committed, has increased substantially since the sentence reduction scheme began in 2013 (19.6% up to 40.2%). JPD comments that there has been very little change between the pre- and post-reform periods in respect

[13] Figure 1 is based on financial years that do not align completely with the pre- and post-reform periods, and it does not differentiate between pre-reform and post-reform matters.

of major indictable matters committed for sentence.

Number of Appearances

[135] Table 3 of the JPD report compares the number of appearances between the pre and post-reform groups:

Table 3: Number of hearings for major indictable case defendants finalised in Magistrates Court

	No. of case defendants	Number of hearings		
		Minimum	Maximum	Median
All major indictable defendants finalised:				
• Pre-reform (October 2017 to 4 March 2018)	1,279	1	17	5
• Post-reform (5 March 2018 to 4 March 2019)	1,268	1	14	3
Defendants with a committal or sentence outcome only:				
• Pre-reform (October 2017 to 4 March 2018)	624	1	17	5
• Post-reform (5 March 2018 to 4 March 2019)	376	1	13	3

[136] JPD observes that the pre-reform group had a higher median of five hearings, and a wider range to a maximum of 17 hearings to finalisation. The comment is made that the decrease in the number of hearings is "consistent with the aim of the reforms to improve the flow of matters through the Magistrates Court", but that observation is hedged with the qualification that the results "may be affected by matters where the original charges are withdrawn and replacement charges are laid under a new file". As a consequence the figure might not accurately reflect the total number of hearings for each defendant.

Time to Preliminary Brief/Charge Determination

[137] One of the major criticisms of the reforms is the time sought by SA Police for the preparation of the preliminary brief and the making of the charge determination. It

appears that, initially, SA Police sought excessively long adjournments from the first to the second appearance. However, to 28 February 2019 the median number of weeks from the first appearance to the scheduled charge determination date was 16. To 31 May 2019, covering 3,562 lodgements, the median number of weeks remained at 16. To 30 June 2019, covering 3798 lodgements, the median dropped from 16 to 15 weeks.

Time to Finalisation

[138] Table 4 of the JPD report provides an indication as to the time taken to finalise major indictable matters in the Magistrates Court:

Table 4: Median number of weeks to finalisation for a Major Indictable file in the Magistrates Court

Period	Number of case defendants	Median weeks
Pre-reform (October 2017 to 4 March 2018) • All defendants first hearing to decision date	1,279	22
Post-reform (5 March 2018 to 4 March 2019) • All defendants first hearing to final appearance* • All defendants from hearing where Preliminary brief/charge determination ordered to final appearance	1,268 957	18 19

*Includes defendants on cases where no adjournment for preliminary brief/charge determination was recorded.

[139] As JPD observes, the median number of weeks to finalisation has decreased from 22 weeks pre-reform to 18 in the post-reform group. JPD suggests this is counter to the expectations that matters may take longer to finalise under the new reforms, but the result might be due to an increasing number of matters being dismissed or the charges being reduced. JPD further comments:

> For matters where a preliminary brief/charge determination was ordered, the median number of weeks between the adjournment and the final appearance was 19 weeks – still lower than the median weeks for the pre-reform group.

[140] Again, caution must be exercised in endeavouring to draw conclusions from these figures. However, the lesser time taken to finalise 1,279 matters from the post-reform group, coupled with the reduced number of hearings, gives cause for optimism that the reforms are having a positive effect and will improve the flow of matters through the Magistrates Court.

Case Statements

[141] JPD observes that it is too early to draw any statistical conclusion with respect to case statements.

White Papers

[142] One of the aims of the major indictable reforms was to ensure that an informed decision is made by the DPP concerning the charges before each matter is committed to the District Court. In turn, this should reduce the number of occasions when the DPP withdraws matters in the District Court. Although the number of briefs committed for trial in the post-reform period to March 2019 is limited, the statistics provided in Table 2 of the JPD report suggest that the reforms might have had a positive impact in this regard:

Table 2: Number and proportion of White Papers 1July 2014 to 31 March 2019

Period	Number of Briefs committed for trial	Number of White papers	% White papers
2014/15	1,107	108	9.8%
2015/16	983	107	10.9%
2016/17	1,019	118	11.6%
2017/18	852	108	12.7%
April 2018 to March 2019 (Post-reform only)	121	6	5.0%

Source: ODPP Annual Reports 2014/15 to 2017/18 and ODPP unpublished data for the period 1 April 2018 to 31 March 2019.

Statistics - Summary

[143] In summary, JPD made the following observations:

> Compared with the pre-reform group, in the 12 months post-reform there was:
>
> - A *higher* proportion of case defendants with an outcome of *dismissed, withdrawn, not proceeded with or no action taken*: 63.9% compared with 50.6% for the pre-reform group. Although this was consistent with a reduction in the number of major indictable matters dismissed, withdrawn etc. since 2016/17, the percentage increase intensified in the first six months of 2018/19.
> - A *lower* proportion of case defendants committed for trial (14.6% compared with 24.0% pre-reform). This was also consistent with longer term trends, with reductions recorded from 2015/16. Again, however, the decrease in 2018/19 was greater than the percentage decreases of previous years.
> - A *lower* proportion of case defendants committed for sentence (9.7% compared with 15.9%). This was not consistent with the percentage increases recorded between 2012/13 and 2016/17.
> - *No change* in the proportion of matters committed for sentence relative to the proportion committed for trial (39% and 61% respectively both pre- and post-reform).
> - *A lower* proportion of matters withdrawn by the DPP at arraignment (white paper): 5.0% compared with 9.8% to 12.7% in the years 2014/15 to 2017/18.
> - A *decrease* in the median number of hearings to finalise matters (from 5 in the pre-reform period to 3 post-reform).
> - A *decrease* in the median number of weeks to finalise major indictable matters in the Magistrates Court (from 22 weeks pre-reform to 18 weeks post-reform).

[144] Bearing in mind the limitations of the data, JPD summarised their conclusions:

> In summary, with the exception of the reduction in the proportion of matters committed for sentence, the findings are consistent with the aims of the reforms to facilitate earlier resolution of matters and improve the flow of matters in the Magistrates Court. Further time is required to assess the impact of the reforms on the

District or Supreme Court.

Other Jurisdictions

[145] The Terms of Reference for this Inquiry request that I inquire into, and report to the Attorney-General, concerning "relevant statutory regimes in other jurisdictions regarding how major indictable matters are dealt with in the criminal justice system". In the second reading speech for the introduction of the Major Indictable Reforms, the former Attorney-General noted that the reforms introduce "a system of tiered disclosure and charge determination by the DPP", concepts which had been considered in detail and recommended by the NSW Law Reform Commission in its report "Encouraging Appropriate Early Guilty Pleas" tabled in the NSW Parliament in June 2015.

New South Wales

[146] The NSW Law Reform Commission undertook an extensive review of committal processes in NSW with a view to encouraging early guilty pleas and improving the overall efficiency of the system. Noting that the existing system frequently led to the DPP eventually changing the initial charges laid by investigating police, and that this practice had become a "key obstacle to obtaining early guilty pleas in NSW", the Commission observed that stakeholders in NSW agreed that "charge certainty is essential to a fair and efficient criminal justice system". The Commission continued:

> There is consensus that the system will benefit from creating a process where defendants are confident that the charge has been firmly established at the outset and will not delay a guilty plea on the expectation that the charge will change on review. There is further agreement that the best way to achieve charge certainty is to involve the ODPP in the charging decision early in the process. There is, however,

disagreement among stakeholders as to the best model. We develop this below.[14]

[147] The Commission considered two models for providing charge advice by the DPP early in the criminal justice processes. Pre charge advice operates in England and Wales and requires that prior to a suspect being charged and court proceedings commencing, the DPP must provide a direction to police as to the most appropriate charges. In most situations, that advice is given on evidence sufficient to provide a reasonable prospect of conviction. As the Commission notes, the pre charge advice could more appropriately be referred to as "charge determinations" or "charge directions".

[148] The alternative model is referred to as post charge advice. Under this model police retain the original charging decision and, after charging, seek an adjournment to obtain charge advice from the DPP which must be returned within six months. In the intervening period police remain responsible for the matter.

[149] In discussing the relative merits for the two models, the Commission made the following observation which is relevant to the test to be applied by the DPP in South Australia when making a charge determination:

> **4.53** Whether charge advice is sought pre or post charge would not impact the requirements of the initial brief. For charge advice to be effective, police must supply sufficient material to support a reasonable likelihood of conviction.

[150] Acknowledging that there were advantages in the pre charge regime, "for practical reasons", the Commission recommended a post charge model. This is the model that underpins the South Australian Major Indictable Reforms.

[151] The Commission reviewed the local court procedures in NSW and the role of committal proceedings. Ultimately the conclusion was reached, by majority, that the decision of a magistrate to commit a person for trial be replaced with a scheme of local court case management. The view of the Commission was accepted by the NSW

[14] Victorian Law Reform Commission, Committals- Issues Paper, June 2019, 63.

Parliament and, on 30 April 2018, a new legislative scheme commenced in NSW known as the “early appropriate guilty plea reform”. In addition to the legislative changes, the NSW Chief Magistrate issued a local court practice note (Annexure 11) and a protocol was established between the NSW DPP and NSW police (Annexure 12). While there are similarities with the reforms introduced in South Australia, there are also significant differences.

[152] In broad summary, the NSW processes are now as follows:

- Committal proceedings are commenced by the issuing and filing of a court attendance notice.
- At the first appearance an order is made for the service of an early brief of evidence and the matter is adjourned for eight weeks to allow for service.
- The DPP/police protocol makes provision for the contents of the early brief of evidence which must be provided by police to the DPP and the accused. In essence, the early brief is a mini brief containing short form statements and reports. Any relevant material obtained in this early stage must be included. The brief is not to be provided to the DPP unless the supervisor of the officer in charge of the case has certified that the brief meets the requirements of the protocol.
- The copy of the early brief served on the DPP must be accompanied by a disclosure certificate pursuant to s 15A of the *Director of Public Prosecutions Act 1986* (NSW).
- If the brief is not completed by the date ordered by the court, the protocol allows for the accused to be served with the material available at that time.
- The protocol provides that it is not the purpose of the brief to provide the evidence in an admissible form.

- The local court practice note[15] directs that adjournments or variations to the timetable will not be granted unless it is in the interests of justice to do so. The South Australian DPP understands that, in practice, it is common for adjournments to be granted at the second appearance to allow police further time to serve the brief (and for the DPP to consider the brief and file a charge certificate).
- After service of the early brief of evidence, the matter is adjourned for six weeks to enable the prosecution to file a charge certificate setting out the offences upon which the matter is to proceed. The practice note specifies six weeks, but the legislation directs that the charge certificate must be filed and served not later than a date fixed by order of a magistrate, which date must be "not later than 6 months after the first return date for a court attendance notice in the committal proceedings" (s 67 *Criminal Procedure Act 1986* (NSW)). A magistrate is empowered to extend the time for filing of the charge certificate beyond six months with the consent of the accused person, or if it is in the interests of justice to do so.
- If a charge certificate has not been filed and served within six months, or before a later date set by a magistrate, the magistrate is empowered to dismiss the charge (s 68).
- The protocol provides that a police prosecutor appears at the first appearance and seeks the adjournment for the provision of the early brief of evidence. A police prosecutor also appears at the second appearance to confirm service of the brief or to seek an adjournment if the brief has not been served. If the brief has been served, police prosecutors will ask for the matter to be transferred into a DPP list for the third appearance. The DPP appears from the third appearance (or from the time the brief has been served).

[15] Local Court of New South Wales, Practice Note Comm 2, Procedures to be adopted for committal proceedings in the Local Court pursuant to the Early Appropriate Guilty Plea Scheme.

- The practice note directs that once a charge certificate has been filed, if the accused is legally represented, “proceedings will be adjourned for a total of 8 weeks, with an expectation that a criminal case conference(s) is to occur within the first 6 weeks”. At the conclusion of the case conferencing process, a case conference certificate must be filed in the remaining two weeks certifying that the parties have complied with the legislative requirements.
- The South Australian DPP has helpfully summarised the key aspects of the case conferencing process:

  1. Section 70(2) provides that the principal objective of a case conferencing is to determine whether there are any offences to which the accused person is willing to plead.
  2. Secondary purposes of a case conference are identified as:
     a. Facilitating the provision of additional material;
     b. Facilitating the resolution of other issues relating to the proceedings including identifying key issues for trial and any agreed or disputed facts.
  3. The case conference is to be held between the prosecutor and the accused person’s legal representative.
  4. Prior to the case conference an accused person’s legal representative is to obtain their client’s instructions and must explain to the accused the effect of the sentencing discount scheme, the penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made by the parties. The accused’s legal representative is statutorily obliged to certify that these matters have been explained to their client.
  5. A Magistrate is to make an order identifying the day on or before which a case conference certificate is to be filed. If more than one case conference is held, that certificate is to be filed after all of the case conferences are completed.

6. The contents of the case conference certificate are determined by s75 of the CPA. In essence, the parties are required to set out in some detail the nature of their negotiations and any offers made, both before and after the case conference. It is intended that the case conference certificate should represent the totality of the negotiations between the prosecution and defence whether in a case conference or by way of informal discussions. In the event that a plea is accepted the details of the agreed facts and the basis upon which the plea is entered are to be recorded.
7. The case conference certificate is to conform with Form 1B prescribed by the regulations. A copy is attached.
8. An unreasonable failure by the prosecutor to participate in a case conference may result in the accused being discharged or the proceedings adjourned. An unreasonable failure by the accused's legal representative to participate in a case conference or to complete the certificate may result in either the accused being committed or the proceedings adjourned.
9. The case conference certificate is to be treated confidentially and will be admissible as evidence only in proceedings relating to the sentence discount or in other limited circumstances. The confidentiality is intended to encourage an accused to make offers, without penalty.

(Footnotes omitted)

[153] If an accused is unrepresented, after the charge certificate is filed, proceedings are adjourned for two weeks to allow the accused to obtain legal advice and/or representation.

[154] After the case conference certificate is filed, the accused must enter a plea and is committed for trial or sentence.

[155] The South Australian DPP has advised that the NSW government provided significant additional funding to the NSW DPP and Legal Aid offices to ensure that those organisations could provide senior legal practitioners to conduct matters continuously

from the early stages of the process. In this way, there is an increase in certainty of charges and improved communications. Continuity of practitioners of appropriate seniority possesses obvious advantages, but comes at a significant financial cost.

[156] As to funding, the Victorian Law Reform Commission recently released an Issues Paper concerning the Victorian pre-trial criminal procedure and committals[16]. That Paper is Annexure 13. The Victorian Commission noted that the NSW reforms have received $92m in dedicated funding, which includes funding for the DPP and Legal Aid offices (4.83 and 4.84). The Commission also observed:

> 5.104 Although implementing reforms may be initially costly, the end result may be improved affordability. In the New South Wales example, if the early involvement of senior lawyers successfully reduces the proportion of late guilty pleas, it is likely this will reduce overall costs, given the time and resources spent on preparing matters for trial.

[157] The South Australian DPP understands that although there have been a number of implementation issues which required resolution, early results indicate positive trends. This is confirmed in the research carried out by BOCSAR which is cited at [19].

[158] This summary is sufficient to note the following distinctions between the South Australian and NSW processes:

- Both the NSW legislation and the Local Court practice note prescribe time limits for particular processes.
- The brief of evidence provided by NSW Police to the DPP and the accused does not have to contain evidence in an admissible form.
- Case conferencing is an important feature of the NSW scheme which does not exist in South Australia.
- There is an emphasis in NSW on continuity of counsel with sufficient seniority to make relevant decisions.

[16] Victorian Law Reform Commission: Committals Issues Paper June 2019.

- The needs of the DPP and Legal Aid have been recognised in NSW with significant increases in funding.

Queensland

[159] In substance, the Queensland regime involves a voluntary case conference following arrest at which the parties are encouraged to agree on a course for the future conduct of the matter. The conference is followed by a committal call-over during which the parties advise the court of the result of the conference. If the matter is to proceed for sentence, it is adjourned for a specified period to enable a partial brief to be prepared and filed. If a committal hearing is required, the date for that hearing is fixed and the full brief of evidence is subsequently prepared and provided to the accused person. There is also provision for a disclosure form to be filed and served.

[160] It is unnecessary to discuss the Queensland scheme in any further detail.

Victoria

[161] The Victorian regime is discussed at length in the Victorian Law Commission Issues Paper, Annexure 13. The following broad summary is extracted from that Paper and from advice provided by the office of the Victorian DPP:

- Initial responsibility for filing of indictable charges rests with Victoria Police.
- Once charges are filed, most indictable offences are prosecuted by the Office of Public Prosecutions (OPP) on behalf of the DPP.
- If the indictable offence may be heard and determined summarily, the matter may be listed for a mention hearing or a filing hearing. If the indictable offence charged cannot be heard and determined summarily, the matter must be listed for a filing hearing.
- The filing hearing usually occurs immediately after arrest, but the legislation

specifies that it must occur within seven days of the filing of a charge sheet if the accused has been arrested and either remanded in custody or granted bail.[17]

- The filing hearing is the commencement of a "committal proceeding". At the filing hearing a magistrate fixes a period for service of a "hand-up brief" and fixes a date for a "committal mention hearing".
- It is the responsibility of the OPP to work out suitable dates for service of the brief and the committal mention. In preparation for the filing hearing, therefore, the OPP contacts the informant and obtains a form providing information relevant to the time needed to prepare the brief.
- The hand-up brief must be served at least 42 days before the committal mention hearing unless a magistrate fixes another period for service. Section 110 of the CPA (Vic) specifies the material that "must" be included in the hand-up brief. It is an extensive list which, in substance, includes the evidence upon which the prosecution relies and other material relevant to the offence charged which the prosecution does not intend to tender at the committal hearing.
- There are a variety of time limits to which the parties must adhere in committal proceedings. For example, a committal mention hearing must be held within six months[18] of the commencement of the proceeding, unless it is in the interests of justice to extend this time,[19] and parties are required to engage in discussions to explore resolution of the case at least 14 days prior to a committal mention hearing.[20]
- Practice Direction Number 6 of 2013 concerns the parties engaging in discussion prior to the committal mention hearing. The Practice Direction not only directs the parties to engage in discussion "to explore resolution of the case", but identifies

[17] *Criminal Procedure Act 2009* (Vic), s 102.
[18] The period is reduced to 3 months in sexual cases: *Criminal Procedure Act 2009* (Vic), s 126(1)(a).
[19] *Criminal Procedure Act 2009* (Vic), s 126.
[20] Magistrates Court of Victoria, *Practice Direction No 6 of 2013: Directions Concerning the Case Direction Notice*, 10 October 2013.

the rationale for the legislation:

> The underlying philosophy of the legislation is that during the period from filing hearing to first committal mention the parties would either resolve the charges and proceed by way of summary hearing or straight hand-up brief; or alternatively, identify the issues in the case and the witnesses requested for cross-examination at the committal hearing.

- A magistrate may direct the accused and the prosecution to participate in a "committal case conference" which is a conference conducted by a magistrate. Section 127 directs that wherever practicable, this case conference should be conducted on the date of the committal mention hearing. Anything said or done in the course of the conference is not admissible in any proceeding unless the parties agree otherwise.
- Committal case conferences aim to reduce the number of committal proceedings which resolve at the door of the court[21] by providing 'a more informal opportunity for the prosecution, the defence and the court to discuss the case and attempt to identify the key issues to be resolved'.[22]
- The parties are required to file jointly a "case direction notice", which is a notice designed to indicate to the court how the case is to proceed:

> 3.35 Requiring the parties to jointly file this notice ensures the legal practitioners involved in a case will engage in discussion prior to the committal mention hearing. The purpose of this discussion is to lead to resolution of the case or identification of relevant issues.
>
> 3.36 The case direction notice must be filed seven days prior to the committal mention hearing and must include:
>
> - the procedure proposed for dealing with the matter

[21] Magistrates Court of Victoria, *Practice Direction No 7 of 2013: Committal Case Conference*, 10 October 2013.
[22] Victorian Law Reform Commission: Committals Issues Paper June 2019, [3.30]; Judicial College of Victoria, Chapter 4.1- 'Preliminary hearings', Victorian Criminal Proceedings Manual (web page), 19 July 2010 [30].

- if the parties have not reached agreement, details of the issues which have prevented the case from resolving
- the names of any witnesses the accused seeks to cross-examine, and for each witness:
  - the issue which will be the subject of cross-examination
  - the reason the evidence is relevant to that issue
  - the reason cross-examination on that issue is justified
  - whether the informant consents to or opposes the proposed cross-examination, and if the informant opposes it, his or her reason for doing so.

3.37 The case direction notice can also be used by the accused to request further disclosure, including of any document or thing the accused considers ought to have been included in the hand-up brief, or the particulars of previous convictions of any witness on whose evidence the prosecution intends to rely in the committal proceeding.

(Footnotes omitted)

- "The committal mention is the central case management hearing in committal proceedings. At this hearing, the magistrate may commit the accused for trial in a higher court, offer a summary hearing, determine an application for leave to cross-examine a witness, or make other appropriate orders or directions."[23]
- At any stage after the charge against the accused is filed, but before the committal hearing commences, the prosecution may seek an order requiring a person attend court for examination or to produce a document or other thing. An application for compulsory examination may be made after the committal mention hearing only if a magistrate is satisfied that it is in the interests of justice

[23] Victorian Law Reform Commission: Committals Issues Paper June 2019; Explanatory Memorandum, *Criminal Procedure Bill* 2009 (Vic) cl48; *Criminal Procedure Act 2009* (Vic) s125.

to permit the making of the application at that later time.

- Compulsory examination hearings are most commonly used when a prosecution witness has refused to provide a written statement. The transcript of the examination hearing then constitutes the evidence of that witness and forms part of the brief of evidence.
- The date for the committal hearing is fixed by a magistrate at the committal mention hearing.

[162] The brief of evidence prepared and served by the prosecution contains the evidence relied on by the prosecution and provides an accused person with disclosure of such evidence. The obligation of disclosure resting on the prosecution is ongoing (s 111 CPA (Vic)). The ongoing nature of the duty of disclosure is common to all Australian jurisdictions.

Western Australia

[163] In Western Australia a prosecution is commenced when a prosecution notice containing charges is signed. The disclosure of relevant material to an accused begins almost immediately (the discovery process). Section 35 of the *Criminal Procedure Act 2004* (WA) is headed “Initial disclosure by prosecutor”. It provides that at the time of service of the prosecution notice on the accused, or as soon as practicable after service, the prosecutor must serve the accused with a written statement of material facts and notice of any confessional material relevant to the charge. A notice as to a criminal record must also be served.

[164] The requirement for service of this material is mandatory unless it is “impracticable to do so”. In that event the court may adjourn the charge to a new date that permits reasonable time for service to occur. If service has not occurred by the new date, there may be a further adjournment or the court may dismiss the matter for want of prosecution.

[165] Once initial disclosure has been made by the prosecution, if the accused pleads guilty at the first appearance the WA legislation directs that the court "must" commit the accused for sentence to a superior court. In this instance a "fast-track" procedure occurs to ensure that the matter proceeds as expeditiously as possible.

[166] If, at the first appearance, the accused does not enter a plea of guilty, the court is directed to adjourn the matter to a "disclosure/committal hearing" that allows reasonable time for the prosecution to comply with the duties of "full disclosure" mandated by s 42 of the WA Criminal Procedure Act. In substance, s 42 requires that as soon as practicable after the adjournment to the disclosure/committal hearing has occurred, the prosecution must serve the accused with all evidentiary material relevant to the charge. As in other jurisdictions, the duty of disclosure is ongoing. If, having made disclosure, and before the matter is finally dealt with, the prosecution receives or obtains any additional evidentiary material, that material must be served on the accused "as soon as practicable".

[167] Although s 41(4) provides that the court must adjourn to a disclosure/committal hearing date that allows "reasonable time" for the prosecutor to comply with the duty of full disclosure, Practice Direction 1 of 2017 issued by the Chief Magistrate (Annexure 14) states that where an accused elects a disclosure/committal hearing, "the matter will be adjourned for 10 weeks" with the intention that during this period the police will "complete the brief" and serve it on both the DPP and defence. The court appearance at the end of the 10 week period is described as a police committal mention (PCM).

[168] If at the date of the PCM, all disclosure has occurred, "other than any outstanding drug analyst certificates and final forensic reports", the practice direction requires that the matter be adjourned to the central law courts in six weeks.

[169] If discovery has not occurred by the return date of the PCM, a further adjournment may be permitted to enable the disclosure requirements to be completed, but the practice direction states that the presiding magistrate "will expect to receive an explanation as to why the requirements have not been completed and information as

to when the requirements will be completed".

[170] Initially, the conduct of the matter is undertaken by WA Police. The DPP takes over at the disclosure/committal hearing.

[171] As this summary of the WA procedure demonstrates, like other interstate jurisdictions, but unlike the South Australian processes, time limits for various steps are specified either in the legislation or in practice directions.

General Discussion

[172] As discussed ([10] - [23]), over many years criminal jurisdictions throughout Australia have strived to improve the efficiency of the criminal justice processes, while not undermining the right of every accused person to a fair trial. The Major Indictable Reforms under consideration are another step in these ongoing endeavours. As previous efforts have amply demonstrated, there is no magic solution and, as is so often the case with the allocation of public monies, the criminal justice system is but one of many competing demands.

[173] In respect of the court processes, reasonable minds have differed and will continue to do so. Those involved bring different perspectives to their assessments and, reasonably, are influenced by divergent priorities. However, there appears to be widespread general agreement that some features of the old system were less than satisfactory.

[174] In essence, two stages of the criminal justice system are under consideration. First, the processes in the Magistrates Court, introduced by the Major Indictable Reforms, from the first appearance to the answer charge hearing when committal to the superior court occurs. Secondly, processes in the District and Supreme Courts which follow a committal for trial. The primary focus of complaints about the reforms is upon the processes in the Magistrates Court.

[175] I have not been asked to address the question of committals. That question was

considered by the NSW Law Reform Commission and is currently under consideration in Victoria.

[176] The processes in the Magistrates Court begin with the filing of charges against an accused person. For the purposes of this Inquiry and Report, I am concerned with only those processes governing how major indictable matters progress through the Magistrates Court into the superior courts. I have referred to these matters as the major indictable stream.

[177] Obviously, it is in the public interest if offenders can reasonably and properly be kept out of the major indictable stream. To that end, the current adjudication undertaken by the DPP is an important feature of the new reforms. That adjudication is not mandated by the legislation, but it is a sensible administrative step that has been undertaken by the DPP in conjunction with SA Police. It should be encouraged and appropriately resourced.

[178] Similarly, after an offender enters the major indictable stream, it is in the public interest if resolution can reasonably and properly occur before committal to the superior court. To that end, the discretion exercised by SA Police after the first appearance and before provision of the preliminary brief, and by the DPP at the charge determination point, have proved to be valuable. Significantly more matters are now being removed from the major indictable stream than occurred in the early stages under the old system.

[179] Speaking generally, in respect of all matters entering the major indictable stream, it is obvious that pleas of guilty entered early in the court processes assist the efficient management of the criminal justice system. To this end, the court processes are intended to work in conjunction with the legislative framework which provides encouragement to offenders to acknowledge their guilt, and to do so early in the proceedings. That encouragement is found in the regime of sentence reductions granted in recognition of the pleas of guilty. The major indictable system must, throughout, provide an offender with the access to appropriate prosecution personnel

in order to investigate and negotiate the possible resolution of charges through pleas of guilty, or other means such as the withdrawal or reduction of major indictable charges to summary charges.

[180] In addition, all jurisdictions recognise two features that are essential in encouraging early pleas of guilty:

- First, that there be certainty of charges. Experience in NSW has demonstrated that if offenders and their legal representatives are aware of a common practice resulting in charges originally laid being changed later in the proceedings, there is a tendency to defer entering a plea of guilty.
- Secondly, all jurisdictions recognise that provision of relevant evidence to an accused person, as soon as reasonably possible after the charge is laid, encourages consideration of the benefit of pleading guilty. This process of providing relevant evidence to an accused is often identified as “discovery”.

[181] All jurisdictions recognise that the DPP is not an investigator. It is the role of police to investigate and gather evidence for presentation to the DPP, and for discovery to every accused person. However, it is also well accepted that the efficient operation of the criminal justice system is enhanced by the early involvement of the DPP in providing assistance to police with advice as to appropriate charges and evidence required to support the charges. The early involvement of the DPP also assists in providing both certainty of charges and an avenue for negotiations aimed at early resolution.

[182] Once an accused person has been charged, the laws in every jurisdiction require that the charged person be brought before a Local/Magistrates Court without delay. The Local/Magistrates Court is required to progress each matter to resolution or committal to a superior court as expeditiously as reasonably possible, and in a manner which is fair to an accused person.

[183] As a criminal matter progresses through the lower court, the prospects of resolution are enhanced not only by early and comprehensive discovery of evidence, but also by

communication between the DPP and legal representatives of accused persons. To that end, the regimes in NSW and Victoria require case conferences and case conference certificates before committal for trial.

[184] At the superior court end, matters which possess prospects of withdrawal or resolution should have been removed before committal to the superior court.

[185] Finally, the system aims to move each matter through the superior courts as efficiently as reasonably possible. To this end, court processes seek to ensure that at or soon after committal to the superior court, the parties are ready for trial and real issues are identified.

[186] It is in the context of this general background that the issues raised concerning the Major Indictable Reforms, and the processes initiated by those reforms, need to be considered. In particular, throughout consideration of these matters, it is essential to bear in mind that all systems necessarily involve a compromise between competing public interests. It is in the public interest that the criminal justice system move matters through the system efficiently and in a manner which is fair to persons facing criminal charges. It is also in the public interest that crimes are thoroughly and competently investigated. At times, criminal investigations are complex and time consuming, as are court trials. Inevitably court processes endeavour to achieve an appropriate balance between the need for efficient progress and the reasonable requirements of both a proper investigation and a trial.

No Tsunami

[187] Contrary to a few alarmist statements made prior to this Review, there is "no tsunami" of cases building in the Magistrates Court waiting to swamp the District Court. It was inevitable that the change from the old system to the operation of the new reforms would cause an interruption to the flow of cases to the superior courts. It is misleading to refer only to the drop in the number of cases flowing to the superior courts as

demonstrating that cases are taking longer to resolve or progress and the system is a failure.

[188] Immediately following the commencement of the reforms in March 2018, matters already in progress under the old system continued through the Magistrates Court processes under the old system with regular adjournments of declaration dates and, ultimately, committal to the superior courts. As those matters progressed and moved out of the Magistrates Court, matters charged under the new system came into the Magistrates Court, but were inevitably adjourned for lengthy periods between the first and second appearances. Commonly, second appearances were further adjourned. As the number of ongoing old matters reduced, the new matters had not reached the stage of committal to the superior courts. In addition, under the new system, more matters are being removed from the major indictable stream prior to committal. Hence the interruption to the flow of matters to the superior courts.

[189] Notwithstanding that interruption, there is no tsunami of cases about to descend *en masse* upon the District Court. First, the new cases are not all at the same stage in the Magistrates Court processes. They will not all be committed to the superior court at the same time. Secondly, since January 2019, there has been a steady and increasing flow of cases committed to the superior courts for trial and sentence. The number committed under the new system is slowly building.

[190] The following table, which does not distinguish between cases under the old and new systems, demonstrates a continuing flow of cases into the Supreme and District Courts:

		2014/2015	2015/2016	2016/2017	2017/2018	2018/2019
Supreme Court						
	Sentence	2	1	6	4	3
	Trial	20	30	19	20	17
District Court						
	Sentence	507	547	607	527	433
	Trial	1235	1070	1088	818	427

[191] Significantly, during the period of decreased flow to the superior courts, those courts have been able to reduce the trial lists. In particular, the District Court has been able to reduce the waiting times for trials. Importantly, in view of the previous waiting list for trial in the District Court of up to 12 months, the interruption to the flow of cases into the District Court has not interfered with the listing and disposal of trials. The length of the waiting list has been reduced, but the ongoing listing and hearing of trials was not affected.

Magistrates Court - Overall Efficiency

[192] At the outset of the new system, there were practical issues that needed to be resolved. In particular, police prosecutors sometimes sought excessively long periods between the first and second appearances. However, overall, and bearing in mind the limitations of the statistics, it appears that the number of hearings in the Magistrates Court, and the overall time taken to finalise major indictable matters in the Magistrates Court, might have decreased under the new system. The signs are positive in the regard. Again, these statistics and trends contradict some of the alarmist statements made prior to the commencement of, and during, this Review.

[193] I emphasise that these broad conclusions are based upon trends emerging from limited statistics. In my view, operation of the system for at least another 12 months is required before any conclusions in this regard can safely be drawn. If amendments are made, significantly more than 12 months will be required.

Conclusions

[194] In discussing conclusions arising from this Review, it is necessary to keep in mind the Terms of Reference guiding the Review:

- What efficiencies, if any, have been realised as a result of the Amendment Act;
- The extent to which the Amendment Act has achieved the intended outcomes, as stated by the former Attorney-General;
- Any factors that exist, or have existed, which are, or have been, an impediment to the Amendment Act achieving the intended outcomes;
- Relevant statutory regimes in other jurisdictions regarding how major indictable matters are dealt with in the criminal justice system;
- Recommendations to improve the operation of the *Criminal Procedure Act 1921* to realise the efficiencies sought by the Amendment Act or to otherwise improve how major indictable matters are dealt with within the criminal justice system;
- Any other recommendations arising from your inquiry.

[195] The ultimate purpose of the reforms was undoubtedly to improve the efficiency of the criminal justice processes, but encompassed by that ultimate purpose are a number of individual steps. The second point in the terms of reference directs attention to the "intended outcomes, as stated by the former Attorney-General." In summary, these outcomes were:

- Reduction of unnecessary appearances in the Magistrates Court.
- Introduction of a system of tiered disclosure resulting in earlier disclosure of evidence.
- Encouragement of early resolution.
- Ensuring certainty of charges before commencement of committal proceedings thereby reducing the incentive to delay pleading.
- Reduction of the amount of investigatory work undertaken between arraignment and trial.

- Reduction of the number of matters listed for trial which resolve by way of late pleas and withdrawals.
- Through case statements, identification of matters genuinely in dispute, thereby enabling courts, police forensic services and prosecution resources to focus on those genuine issues.
- Reduction of over-listing in the criminal courts.
- Reduction of the backlog of cases waiting for trial.
- Refining the sentence reduction scheme and introducing an incentive to co-operate with the court in the conduct of the defence case.

[196] Assessment of the impact of the reforms requires consideration of key indicators such as:

- The operation of the initial adjudication process, including the number of matters removed at adjudication from the major indictable stream.
- The number of matters in which pleas of guilty are entered in the first four weeks.
- The operation of the first appearance system, involving the fixing of dates for the provision of the preliminary brief and the making of a charge determination.
- The success or otherwise of the preliminary brief/charge determination aspects of the system.
- The success or otherwise of the discovery processes, either through delivery of the preliminary brief or by other means.
- The overall time taken from first appearance to completion of proceedings in the Magistrates Court; and the times occupied at various stages of the processes in the Magistrates Court.
- The number of appearances in the Magistrates Court.
- The number pleading guilty in the Magistrates Court; and the timing of those pleas.
- Following committal, the state of the court file and the readiness of the parties for

trial.

- The operation of the case statement system in the trial court.
- The number of matters withdrawn, or resolved by plea, after arraignment.
- Whether the efficiency of the pre-trial procedures, and trial proceedings, has been improved.
- Whether over-listing in the District Court, and trial waiting lists, have been reduced.

[197] As discussed, although the terms of reference encompass procedures in the Supreme and District Courts, the criticisms of the Major Indictable Reforms have primarily focussed on the processes in the Magistrates Court. In some respects that criticism is well founded, but a number of the complaints have been exaggerated and ill informed. Too many generalisations are apt to mislead.

[198] Significantly, although 12 months operation of the reforms might superficially appear to be sufficient to form a judgement on the impact of the reforms, and the efficacy or otherwise of those reforms, upon closer examination it can readily be seen that 12 months operation is insufficient time to enable firm conclusions to be drawn safely with respect to the key indicators. However, a few broad and tentative conclusions are possible, and some trends can be discerned.

[199] It must clearly be understood that because existing cases continued under the old system following the introduction of the new system, and only a limited number of cases have proceeded through the Magistrates Court under the new system, statistical comparison is, in many respects, an exercise which cannot lead to any safe conclusions.

[200] Having regard to those limitations, although deficiencies have been exposed, in my view it is reasonable to conclude that the doom and gloom perpetrated by some critics is not well founded. Similarly, as I commented earlier, the suggestions that the reforms have resulted in massive delays, and will result in a “tsunami” of cases descending

upon the District Court, are inaccurate and misleading. Overall, in a number of respects the emerging trends are positive and consistent with the fundamental aims of the reforms.

[201] In this context, it is important to bear in mind that under the pre-reform system, prior to committal there were repeated appearances at shorter intervals. When the reforms resulted in lengthy adjournments, and less appearances, a misleading impression of delay was created. The critical issue in this regard is the impact on the reforms on the overall time taken from first appearance to committal. Signs to date are positive.

[202] Subject to limitations with respect to statistics, the following broad and tentative conclusions have emerged:

- The initial reduction in the flow of cases from the Magistrates Court to the superior courts was an inevitable consequence of the changes brought about by the major indictable reforms ([187] - [191]). That reduction in flow does not, however, indicate that the system is fundamentally flawed.
- The adjudication process at the outset is now removing from the major indictable stream significantly more matters prior to the first appearance than occurred under the old system.
- In addition, more matters are now being removed from the major indictable stream by MIBU prior to the second appearance, and by the DPP at the charge determination stage.
- The number of appearances in the Magistrates Court appears to have decreased under the reforms, but the statistics might be affected by matters where original charges are withdrawn and replacement charges laid.
- The median number of weeks taken to finalise major indictable matters in the Magistrates Court appears to have decreased under the reforms.
- It is too early to draw safely any conclusions concerning the impact of the reforms on the sentence reduction scheme, but it is my impression that any

impact has been minimal.

- The preparation of committal briefs and case statements is a positive aspect of the reforms which will result in matters for trial being in a better state than under the pre-reform system.
- The limited data tends to suggest that there is a downward trend in the number of matters being withdrawn at late stages in the District Court.
- While the change from the pre-reform system to the system brought about by the reforms resulted in a temporary reduction in the flow of cases for trial from the Magistrates Court to the District Court, the flow is now steadily building.
- The temporary reduction in the flow of cases for trial to the District Court has enabled the District Court to reduce the number of cases in the trial list waiting for trial. It has also resulted in a reduction in the length of time that matters in the District Court trial list are waiting for trial. Importantly, the listing of cases for trial, and the hearing of trials, have not been delayed or otherwise adversely affected.
- Trends to date suggest that, overall, the reforms in major indictable processes have not resulted in accused persons, victims or witnesses having to wait longer for completion of Magistrate Court proceedings. As JPD concluded (subject to data limitations):

  > In summary, with the exception of the reduction in the proportion of matters committed for sentence, the findings are consistent with the aims of the reforms to facilitate earlier resolution of matters and improve the flow of matters in the Magistrates Court. Further time is required to assess the impact of the reforms on the District or Supreme Court.

[203] In my view, the basis on which the reforms were constructed is sound. Following an arrest on a major indictable charge, almost invariably investigators require time to pursue the investigation and gather evidence to be presented to the court at the time the prosecution seeks that an accused person be committed to the superior court. While that investigation is undertaken, the Magistrates Court awaits receipt of the

evidence upon which the prosecution will rely for a committal. The Court retains overall supervision and control of progress of matters to committal, and possesses the ultimate discretion to dismiss a charge if the DPP fails to make a charge determination. The court endeavours to ensure that matters are progressed to committal within a reasonable period.

[204] The reforms leave responsibility for investigating and gathering evidence with SA Police. Speaking generally, the DPP provides advice as to the evidence required and is ultimately responsible for laying the charge upon which the matter is to proceed to trial. The reforms place the DPP in a better position to decide what charge should proceed to committal. A charge filed after consideration of all relevant evidence is less likely to be altered or withdrawn subsequently than occurred under the pre-reform system.

[205] Within this framework, the number of appearances in the Magistrates Court is reduced. To a greater extent than under the pre-reform system, wasted court time is reduced. At the final step of committal to the superior court, the “file” is in a significantly better state than under the pre-reform system.

[206] Finally, but importantly, before the DPP makes a charge determination, the accused is provided with the evidence obtained to that date. Additional evidence is provided prior to committal to the superior court.

Adjudication Process

[207] As always, while underlying concepts may be sound, the efficacy and fairness of any system depends on how the procedures operate in practice. From a court perspective, the procedures commence with the appearance of a person charged with a major indictable offence. It is from the first appearance that the major indictable reforms come into play. However, before that appearance, bearing in mind that at the first

appearance a Magistrate will be asked to fix dates for the provision of a preliminary brief and the making of a charge determination, in arrest cases it is necessary for SA Police to put their prosecutors in a position to assist the court in fixing those dates. In a sensible administrative arrangement, therefore, the DPP undertakes the adjudication process in the limited time between arrest and the first appearance. The adjudication process is explained at [80].

[208] The first consequence of the adjudication process has been an increase in the number of matters removed from the major indictable stream. The increase is significant. In the 12 month period prior to the reforms, an average of 13.09% of matters originally charged as major indictable offences were the subject of advice by the DPP to SA Police to proceed with only minor indictable or summary offences. Following the commencement of the reforms, that figure of 13.09% increased to 23.65%.

[209] Importantly, in the adjudication process the DPP provides advice to SA Police as to the appropriate charge and the evidence likely to be required to support the charge. In this way, the DPP plays a critical role in guiding the future direction of an investigation and the gathering of evidence. In turn, SA Police provide submissions to a Magistrate which influence the future course of court proceedings.

[210] The adjudication process is currently undertaken within a short period and decisions are made on the basis of limited information. While this process should be encouraged and properly resourced, it is apparent that the existing time constraints mean that SA Police prosecutors appear on the first occasion without knowledge of the individual circumstances of each case. Requests for particular periods of adjournments are made on the basis of brief advice from the DPP concerning the type of evidence likely to be required, and the time likely to be required to gather that evidence. Understandably, police prosecutors are not armed with sufficient information to answer questions from Magistrates. The accused has little information as to the evidence.

[211] In arrest matters, in a few hours before the first appearance, and based upon limited information, the DPP is required to “adjudicate” by advising SA Police as to the

appropriate charges and providing advice as to the evidence required to support the charge. The advice concerning the evidence includes advice as to whether particular types of evidence are required; for example, forensic or other types of specialist evidence. This is a very short time within which, based on limited information, the adjudication sets the course for the following investigation and the basis of applications to the Magistrates Court.

[212] Although the DPP believes that the system is working well, and there are obvious advantages in requiring the adjudication process to be undertaken as quickly as reasonably possible, in my view there is a strong case for adjustments. It is important, however, that any adjustments do not lead to a reduction in the tempo of the initial investigation.

[213] First, there may be circumstances in which it would be advantageous to permit the DPP to delay the adjudication for a few days. For example, in complex matters the DPP might reasonably require additional time to complete the necessary assessment for an adjudication. If a crime scene is under active investigation after a suspect has been charged, there may be advantages in permitting the DPP to delay adjudication until the initial investigation of the scene has been completed. In these types of circumstances, even under the current system, the DPP should be able to request further time before the "first appearance" sets the court processes and timelines in motion. Perhaps up to seven days would be appropriate.

[214] Secondly, irrespective of particular types of circumstances, in my view there is merit in the suggestion that following arrest, a delay of a few days before the "first appearance" should be standard procedure. In this period investigators should continue to gather evidence. Importantly, evidence obtained in these few days should be made available to both the DPP and the accused. For example, CCTV or bodycam footage could be obtained. In this way the DPP would be better informed about the evidence when making the adjudication. Similarly, if the accused is provided with evidence in the first few days, the accused would be better informed and able to engage in meaningful

discussions with the DPP before the adjudication process is completed. Such discussions could include topics such as the appropriate charge, possible resolution and, in cases likely to involve a trial, the important issues, matters not in dispute and evidence required for the trial.

[215] In making this suggestion, I am mindful of the legitimate aim of getting the court processes moving as quickly as possible and with a minimum number of appearances before the court. However, in my view, a delay of a few days at the outset is not important in the context of proceedings which, if not resolved, are likely to occupy many months of the courts' time. In addition, the potential benefits of a delay for a few days far outweigh any potential disadvantage.

[216] In my view it is obvious that, in other than straightforward cases, decisions which set the future course of matters in the major indictable stream should not be made in the space of a few hours, particularly when based on limited information. Haste and lack of relevant evidence make a good recipe for error. They encourage a cautious approach to deciding, at adjudication, the nature and volume of evidence required for a charge determination. Such a cautious approach can result in decision makers seeking the maximum time possible to prepare the preliminary brief, rather than making an assessment of the individual circumstances of each case.

[217] It is important to allow a short time for the DPP to be informed of available evidence and to make the adjudication. Regardless of whether discussions occur with an accused, better informed decisions by the DPP are likely to result in more discerning decisions as to the amount of evidence, or type of evidence, required for the preliminary brief. In turn, prosecutors will be better informed at the time of the first appearance as to the type of evidence required and the time reasonably needed for the preparation and service of the preliminary brief. Prosecutors will be in a better position to answer the "why" questions posed by Magistrates.

[218] In addition, on the understanding that any evidence gathered in the few days between arrest and adjudication must be provided to the DPP and to the accused, the parties

should be encouraged to engage in discussions prior to adjudication with a view to resolving the prosecution entirely or, in obvious trial matters, to narrowing the issues and identifying matters not in dispute.

[219] This suggestion is made on the basis the police investigators understand, and act upon, the need to obtain as much evidence as is reasonably possible in the first few days after arrest.

[220] The system I have suggested can readily be applied to report cases which are currently adjudicated by SA Police prosecution section. In my view these adjudications should also be undertaken by the DPP.

[221] First, it is the DPP who, ultimately, will be responsible for the prosecution. Secondly, the DPP possesses the expertise and experience to undertake an assessment as to the appropriate charge and evidence likely to be required.

[222] Thirdly, and importantly, consistency is a significant feature of the approach to decisions made at the adjudication stage. This can only be achieved if the DPP is responsible for all adjudications.

[223] Finally with respect to adjudications, should they be governed only by administrative arrangements between SA Police and the DPP, or would other forms of directions be appropriate?

[224] The current administrative arrangements are working well, but they require only brief information being provided by an investigator to the DPP within a short time of arrest. If my suggestion is adopted, investigators will be required to continue investigations and provide evidence to the DPP and the accused over a few days following arrest. In these types of circumstances, administrative arrangements are easily ignored or excuses are readily found for non-compliance.

[225] I favour adding the weight of court authority to the administrative arrangements through a Rule or Practice Direction. For example, the Rule or Direction could:

- identify the adjudication and evidence gathering purposes of the seven day period;

- specify the expectation that investigators will continue investigations, particularly if evidence such as CCTV or bodycam footage is available;
- specify that evidence obtained is to be provided to the DPP and the accused within a specified period;
- encourage the DPP and accused to consult; and
- specify the time by which the DPP is to advise SA Police and the accused of the adjudication.[24]

[226] Finally with respect to the adjudication process, I emphasise the importance of investigators treating this period as an opportunity to give priority to investigation and the gathering of evidence. If evidence gathered in this period is given immediately to the DPP and the accused, in my view the criminal justice processes will commence on a sounder footing. The DPP will be in a position to make better informed decisions. Police prosecutors will be better informed and able to assist Magistrates in fixing dates for the provision of the preliminary brief and the making of a charge determination. Accused persons will be better informed as to relevant evidence and able to give early consideration to a plea of guilty or some other form of resolution. In respect of matters destined for trial, at the outset it might be possible for the parties to reach agreement as to evidence required and/or likely trial issues.

Pleas - First Four Weeks

[227] As to the number of pleas entered in the first four weeks, it appears that the reforms have not had any impact. In stage two of the JPD report for the Sentence Reduction Scheme Review (Annexure 10), JPD reported that with the exception of 2016/17, between 2014/15 and the first six months of 2018/19, the proportion of major indictable

[24] The DPP advice to police concerning evidentiary requirements is privileged.

matters in which a plea was entered in the first four weeks has been “relatively stable”.

First to Second Appearance

[228] Members of the legal profession who act for accused persons appear to be unanimous in their view that the period between the first and second appearances is, in some respects, time wasted. Accepting that an investigation and gathering of evidence must be undertaken, those practising in the criminal law believe that the lack of communication between the DPP and defence legal representatives, and the failure of investigators to provide relevant materials to the DPP and the defence legal representatives prior to the presentation of the preliminary brief, deprives the system of valuable opportunities for early resolution. It leaves the accused person in a state of uncertainty for many months. During that period of many months, there is no oversight by the DPP or the court as to the progress of investigations. Unless SA Police instigate discussion with the DPP, there is no consideration by anyone other than SA Police as to the direction of investigations. Evidence requirements often change as evidence is unearthed during investigations, but under the current system, unless MIBU seeks DPP advice, there is no occasion for consideration of these matters by the DPP until the DPP is provided with the preliminary brief. Similarly, unless the accused is in custody, there is no occasion or incentive for an accused person to address the question of a plea or the likely issues at trial. During this period the percentage reduction of sentence available for a plea does not alter.

[229] Again, I am mindful of the reasons for introducing this part of the court process. The DPP is not an investigator and time is needed to enable the police to discharge their responsibility of investigating and gathering evidence.

[230] Secondly, while the progress of the matter is under the control of SA Police, there is logic in the view that SA Police should undertake the responsibility of accounting to the

court for progress or otherwise in the investigation and gathering of evidence.

[231] Thirdly, under the old system there were too many court appearances while the investigation was ongoing and the gathering of evidence was incomplete. Many of those appearances were of little practical benefit. While, to some extent, there might have been a "drip feed" of relevant material to an accused, in practice very few matters were resolved during, or as a consequence of, the repeated appearances.

[232] The period between the first and second appearances is intended to allow reasonable time for completion of investigations, gathering of evidence and discovery of relevant material to the DPP and the accused. In addition, the DPP is required to consider the preliminary brief and make the charge determination. In many cases, this period is likely to involve significant delays of numerous months. It is important, therefore, that from the outset police prosecutors are properly informed of the evidence to be gathered and the reasonable time needed to complete the investigation and serve the preliminary brief. Hence my earlier recommendation concerning the adjudication process.

[233] In addition, magistrates must be properly informed of the reasonable requirements of the prosecution in order to arrive at an independent decision as to the time needed between the first and second appearances. Contrary to the current position, police prosecutors should be fully informed of the individual circumstances of each case and able to impart the relevant circumstances to Magistrates.

[234] The DPP and SA Police accept that in the early stages of the reforms, on some occasions police prosecutors sought excessive adjournment periods from the first to the second appearances. However, it appears that this problem has, to a large degree, been rectified.

[235] Notwithstanding this improvement in the approach to adjournment periods, in my view there is merit in the proposal for statutory time limits or for the prescription of time limits by way of practice direction. These limits would apply unless the prosecutor is able to persuade the magistrate that the individual circumstances of a particular case

require additional time. There is no suggestion that these types of prescribed time limits cause problems in other jurisdictions.

[236] Another advantage of prescribed time limits is the impact on those persons who are required to comply with the time limits. Prescribed times send a message that the community has set the general rule and expects compliance unless a magistrate is persuaded that the circumstances justify an exception.

[237] In advancing a case for prescribed time limits, I recognise the difficulties caused by cases that involve forensic and other specialist evidence. Police investigators have no control over the time taken to complete forensic or other specialist examinations and reports. However, this difficulty does not detract from the fundamental premise that prescribed limits send a message to investigators and require that the prosecution justify any departure from those limits.

[238] In NSW, at the first appearance the matter is adjourned for eight weeks to allow for service of the “early brief”. However, the early brief is a mini brief containing short-form statements and reports. It is not the purpose of the mini brief to provide evidence in an admissible form.

[239] In Victoria, it is common for orders to be made that the hand-up brief be served within six weeks of the date of charge, but in certain types of cases that period may be extended to as long as 15 weeks.

[240] Assuming that seven days is allowed following the initial appearance to provide adequate time for assessment and adjudication by the DPP, in my view there is merit in fixing a standard period of eight weeks from the first appearance as the period during which the police are to prepare and serve the preliminary brief on both the DPP **and** the accused. Similarly, there is merit in prescribing an additional period of four weeks within which the DPP is to make the charge determination.

[241] As to the form of the preliminary brief, I favour the NSW position. It is a “preliminary” brief, the purpose of which is to enable the DPP to make a charge determination and to provide discovery of relevant evidence to an accused person. Those aims can be

achieved without requiring that the entire contents of the preliminary brief be presented in an admissible form.

[242] In suggesting a prescribed period of eight weeks, I have not overlooked the time issues when forensic and other specialist evidence is required. Each case must be assessed according to its particular circumstances and, if necessary, properly informed prosecutors will be able to explain to Magistrates why the standard period of eight weeks is inadequate.

[243] Further, if a period longer than eight weeks is fixed for the provision of the preliminary brief to the DPP and the accused, in my view police investigators should not be "left to their own devices" without any form of "outside" oversight as to the progress or direction of an investigation. Similarly, the DPP and the accused should not simply put the matter aside until the preliminary brief is received. There is a need for a "progress check" about halfway through the period between the first and second appearances. This check should occur under the supervision of the court, but I suggest that it is not necessary to involve magistrates. Perhaps the task would be more suited to a "judicial registrar". Not less than four days before the progress check, SA Police should provide any relevant material obtained to that date to the accused and the DPP. At the hearing, SA Police would be obliged to explain the progress or otherwise of investigations and whether the date for provision of the preliminary brief is likely to be met.

[244] In making this suggestion, I am mindful of the resource implications and the understandable reluctance of the DPP to be "involved" in investigations. I am also mindful of the aim of keeping court appearances to a minimum. However, there are a number of advantages attached to a progress check of this nature.

[245] First, notwithstanding lengthy periods between the first and second appearances, investigators would understand that their work, and the progress of their work, will be under review by the court, DPP and the accused. This type of check would focus the minds of all those involved, not only on the progress of the investigation, but on the

issues such as changing evidentiary requirements.

[246] Secondly, it would provide an opportunity for an accused to be informed of evidence gathered to date and to consider possible early resolution of the matter. The tendency for matters to "drift" would be curtailed and the prospects of early resolution would be enhanced. In addition it would provide an opportunity for an accused to identify issues not in dispute which might alter evidentiary requirements.

[247] Thirdly, the progress check would provide an opportunity for the DPP and accused to confer.

[248] Finally, consideration by the DPP, prior to the progress check, of the evidence obtained and future evidentiary requirements would enable the DPP to provide further advice to SA Police. In appropriate cases, SA Police could seek adjustments of second appearance dates.

[249] If a progress check is introduced, I suggest that the date for the check be fixed by a Magistrate at the "first appearance". This process would provide everyone involved with a degree of certainty and incentive to progress each matter.

[250] In addition, I suggest the Magistrate at the first appearance be empowered to delete the requirement for a progress check if the circumstances justify such an order.

Preliminary Brief

[251] In its submission SA Police suggested that "in terms of the Director's general expectation", since March 2018 the preliminary brief "has been one-size-fits-all". The DPP strongly disagrees. From the DPP perspective, the contents of the brief are determined by the circumstances of each case and can change as evidence emerges.

[252] The DPP also disagrees with the SA Police submissions that "<u>every</u> major indictable investigation requires a close to trial-ready brief just to reach charge determination". Obviously the reforms require a more advanced preparation of evidence earlier than

often occurred under the old system, but the "trial-ready" brief is the committal brief, not the preliminary brief.

[253] As discussed, the suggestion has been made that the DPP is applying a standard for preliminary briefs that is too high. This criticism relates both to the contents of the brief and the legal test being applied by the DPP.

[254] The response of the DPP is summarised in [95] - [100]. Overall, there is force in the DPP's view, but as the brief is "preliminary" I suggest there is room for compromise. As mentioned, in NSW it is not a requirement that the first brief contain material in an admissible form. In my view this is a sensible approach. Secondly, mere technical or minor deficiencies in the preliminary brief (for example, a birth certificate) should not delay provision of the brief to the DPP and the accused. Nor should such deficiencies prevent the DPP from making a charge determination. Technical or minor deficiencies can be rectified during preparation of the committal brief.

[255] In making this suggestion I emphasise that I am not encouraging investigators to "take the easy way out". It should not be difficult for the DPP and SA Police to reach an understanding or protocol covering most cases.

[256] As to the legal test to be applied to the preliminary brief, I agree with the DPP that, subject to the type of technical deficiency mentioned, the brief should contain apparently reliable evidence of each element of the offence. In my view, not only is there no need for guidelines to be imposed with respect to the standard of preliminary brief or the test for a charge determination, the introduction of guidelines would be inappropriate. Determination of charges upon which accused persons are to be tried is a core function of the independent DPP. Assessment of the adequacy or otherwise of evidence to support a charge is exclusively the function of the DPP. Legislative or court interference with the independent discharge of the DPP's duties in this regard would be inappropriate.

[257] In respect of the suggestion that police prosecutors have been unable to explain to magistrates why, following delivery of a preliminary brief, a charge determination has

not been made, the DPP has pointed out that in these situations it provides detailed advice to MIBU. That advice should provide ample information for prosecutors to explain a situation to the court. On the other hand, if a preliminary brief has not been provided by SA Police to the DPP before the charge determination date, the DPP is unable to comment on the information given to magistrates.

[258] In the context of the issues surrounding the preliminary briefs and charge determinations, the suggestion was made that there is a "divide and/or disconnect" between SA Police and the DPP.

[259] The SA Police submission referred to occasions when SA Police has "challenged the Director's threshold in regards to charge determination".

[260] It is apparent that there have been, and will be, occasions when different views are held as to the required standard of the preliminary brief, but from information provided to me, clearly there is no divide or disconnect between the two organisations. The DPP has undertaken extensive consultation and training with SA Police. A member of the DPP staff is seconded to MIBU. In addition, for approximately nine months officers from MIBU and the DPP have been meeting monthly to discuss various issues. Charge determinations is an agenda item. There is extensive consultation and co-operation which is ongoing.

[261] It was also suggested that there is movement of preliminary briefs between SA Police and the DPP "numerous times before it is finalised". This is not the experience of the DPP. There is now a common understanding of the standard applied by the DPP and significantly less preliminary briefs are rejected by the DPP.

[262] Finally in respect of the current system relating to the preliminary brief, as mentioned it was a common complaint that legal representatives of accused persons are not being provided with the preliminary brief at the same time as it is given to the DPP. If the complaint is well founded, this situation should be rectified without delay.

[263] It is not appropriate to delay providing the brief to an accused. Even if a preliminary brief provided to the DPP might be returned to SA Police for additional work, in my

view that preliminary brief should be provided to the accused at the same time as it is given to the DPP.

[264] If the preliminary brief is provided to an accused at the same time as it is given to the DPP, not only does this give the accused the opportunity to consider their position with respect to possible resolution, it provides the opportunity for an accused to make representations to the DPP as to resolution or, if the matter is to proceed, the charge or charges upon which it should proceed. In addition, the accused is then in a position to make submissions as to any further adjournment should the DPP reject the preliminary brief and insist upon further work being undertaken.

[265] Further, possession of the preliminary brief in advance of the hearing at which the DPP requests time for preparation of the committal brief enables an accused to make informed submissions to the court. Putting an accused in this informed position enables an accused to identify the issues in dispute and, therefore, potentially to reduce the amount of work required for preparation of the committal brief.

[266] In making these observations concerning the importance of providing the preliminary brief to an accused at the same time as it is given to the DPP, I do not intend to convey the impression that I have concluded that SA Police have failed in this regard. Although complaints have been made, SA Police do not accept the accuracy of those complaints. The response from SA Police was as follows:

> The implication that MIBU prosecutors are not meeting disclosure obligations from recommendation 3 is not consistent with SAPOL experience. As routine, with SAPOL transmission of the preliminary brief to the Director, a copy is made available for defence. Prosecutors will communicate as soon as practicable with defence to arrange collection/delivery of the preliminary brief. The logistics in regards to transmission of a preliminary brief to defence varies in nature due to the relative sensitivity of the material contained therein. In the case of unrepresented defendants disclosure is assessed on a case-by-case basis. Anecdotally, it is the regular experience of MIBU prosecutors (without keeping records of frequency) that

> communications of this nature to defence often go unacknowledged. Where it is clear that the preliminary brief is not going to reach the charge determination threshold set by the DPP, by the respective date, the preliminary brief is not sent to the Director and therefore not disclosed to defence. When this circumstance arises prosecutors communicate to defence as soon as practicable.

[267] It is not necessary or desirable for me to embark on an investigation of this issue. It is sufficient to emphasise the importance of providing the brief to the accused at the same time as it is given to the DPP. I also emphasise that defence practitioners should understand that MIBU resources limited, and practitioners should not place unnecessary demands on MIBU in respect of delivery of preliminary briefs or other material.

Charge Determination

[268] First, notwithstanding views to the contrary, I suggest the test applied by the DPP for a charge determination is appropriate ([101] - [102]). This is a matter within the discretion of the DPP who bears the responsibility for conducting the prosecution after determining the charge. SA Police accept this fundamental premise. For the reasons earlier discussed in respect of the standard for preliminary briefs, in my view interference with the DPP's independent role in this regard through legislative or court based guidelines would be inappropriate.

[269] Having made that observation, as mentioned, I suggest that the DPP give careful consideration to making charge determinations notwithstanding the existence of technical or minor deficiencies in the preliminary brief. It is a "preliminary" brief and such deficiencies can be rectified before the presentation of the committal brief.

[270] Similarly, I suggest that as the brief is "preliminary", it is not necessary for all of the evidence in this brief to be in an admissible form. Consideration should be given to

types of evidence which would be acceptable for the purposes of the preliminary brief if presented in an alternative form.

[271] As discussed ([103]), the DPP has advised that it does not have the capacity to make charge determinations before the second appearance if the preliminary brief is provided less than four weeks before the date of the second appearance. I have not attempted to explore this situation with the DPP. Nor have I discussed it with SA Police. However, I offer the following observations.

[272] Investigators should not leave completion of the preliminary brief to the “last minute” or seek to present incomplete briefs in the belief that they will be accepted late. However, minor delays in straightforward matters should not automatically lead to extensive delays.

[273] In order to operate effectively, all systems require administrative flexibility. An appropriate balance is needed which avoids unnecessary delay without encouraging a slack approach. A “docket system” for prosecutors might assist in this regard (discussed at [330] – [334]).

[274] In this context, if a preliminary brief has been assessed as inadequate, and returned to MIBU, nevertheless the DPP solicitor will have had an opportunity to assess the evidence provided in the brief and to consider potential charges. In these situations, there are likely to be occasions when inadequacies can be resolved in a short period and the additional evidence provided to the DPP within the original four week period allowed for the charge determination, or within a short additional period. If the same solicitor remains in control of the matter, in many cases it should not be unduly difficult for the solicitor to assess quickly the additional evidence and make the charge determination.

[275] There is a further aspect of the charge determination process that merits attention. By implication s 106 of the CPA requires the DPP to advise the Magistrates Court that it has made a charge determination. The committal proceedings cannot commence until such advice has been given. However, the CPA is silent as to when such advice is to

be given and does not mention informing the accused of the determination.

[276] Rule 20.01 of the Magistrates Court Rules 1992 (Criminal) directs that the DPP must advise the Court and the accused, in writing, "as to whether a charge determination has been made not later than two working days" prior to the second appearance. In my view this rule is inadequate.

[277] First, the rule does not require the DPP to identify the charge or charges. It merely requires advice as to whether a determination has been made. In my view the rule should require the DPP to specify the charge or charges which the DPP has determined should be laid, or the fact that the DPP has declined to make a determination for a major indictable defence.

[278] Secondly, two days before the second appearance is too short. It leaves no realistic opportunity for an accused to obtain advice and consider resolution. In my view seven days would be an appropriate period.

[279] In making this suggestion, I emphasise that I have not endeavoured to explore the implications with the DPP. I understand the DPP firmly believes that it could not meet a seven day notification. It would reduce the time for the DPP to make a charge determination to three weeks after delivery of the preliminary brief. The DPP maintains three weeks is insufficient time given current resources.

[280] Timing adjustment may well be necessary, but I suggest this option should be explored.

Early Discovery

[281] Underlying many reforms of criminal justice processes is recognition that the efficiency and fairness of the system is significantly enhanced by early discovery of relevant material to an accused. In this regard, it appears that the system is not working smoothly. Members of the legal profession report that requests for material prior to

delivery of the preliminary brief go unanswered, or the response is delayed.

[282] In my view, if an accused requests provision of specific material between the first and second appearances, that material should be provided without delay. Similarly, if an accused requests all relevant material gathered to date be provided, such a request should be met without delay. In making this suggestion I recognise that compliance with such requests adds to the workload of SA Police, but in my opinion both in principle and practice this course is strongly supported.

[283] In its supplementary submission, the DPP has indicated that in training MIBU staff, the DPP "conveyed to SAPOL that although the CPA only mandates service of a preliminary brief on the defendant as soon as practicable after its provision to the DPP, in the event of a request for specific disclosure of evidence or material which is in the possession of MIBU before that time, it should be provided." Further, SA Police has agreed to comply with such requests.

[284] SA Police agree it is bound by an ongoing duty of disclosure, but do not agree that there has been a failure to respond to requests for provision of relevant material outside of providing the preliminary brief. Rather, SA Police suggest that there has been a lack of cooperation by defence counsel and the following example was provided in a communication received after the SA Police submission:

> Mr A [defence counsel] rang MIBU (on Tuesday this week) and requested disclosure be made on a particular matter to him at AMC on the next day (being Wednesday 14 August) as he (Mr A) would be in AMC at 9.30am. The prosecutor explained to Mr A she would be in court 12 and she took the bundle of disclosure to court 12 on Wednesday as requested.
>
> Mr A failed to attend court 12 and collect the material which sat in court 12 with the prosecuting sergeant from 10.00am to 1.00pm. We have still not heard back from defence on this matter.
>
> Our attempts to assist in this way unfortunately are not infrequently met with the same/similar responses.

[285] In its submission, SA Police make the valid point that a continuing obligation of disclosure “is not the same as the idea of drip-feeding material to defence as it becomes available”. As the submission states, it makes more “administrative sense to bundle disclosure rather than release bits and pieces ad hoc” and a drip-feed system is unworkable. I agree. Such a process would place an intolerable burden on SA Police.

[286] I also emphasise that my suggestion that SA Police respond positively to requests is directed to “genuine” and “reasonable” requests. In the majority of cases, particularly if my suggestions as to prescribed time limits and progress checks are adopted, there will be no occasion for a genuine and reasonable request between the first and second appearances. Abuse of this procedure should not be permitted.[25]

[287] Again, it is unnecessary for me to embark on an inquiry concerning this dispute. It is sufficient to emphasise the importance of responding promptly to reasonable requests.

[288] For these reasons, I do not recommend any legislative prescription in this regard. Administrative arrangements should be sufficient.

[289] Regardless of any disclosure prior to provision of the preliminary brief, I emphasise the view expressed earlier that the preliminary brief must be given to an accused at the same time as it is given to the DPP. There is no excuse for delay. Immediate provision of the brief to the accused is reflected in s 106(1)(c) of the CPA which directs that SA Police give a copy of the preliminary brief to the accused “as soon as practicable” after providing the brief to the DPP.

[25] For example, I would regard a request, at the outset, for provision of all relevant material as it is gathered as unreasonable.

Second Appearance - SA Police or DPP?

[290] It is understandable that the DPP prefers that during an investigation, and prior to the provision of the preliminary brief, as SA Police are in charge and in possession of material relevant to the prosecution, SA Police should be responsible for reporting to the court. If my suggestions concerning the adjudication process are adopted, at the first appearance SA Police prosecutors should be better informed and able to assist the court. Similarly, at a progress check, although the DPP will have been updated and able to give further advice, SA Police should be in a position to inform the court of progress and future requirements.

[291] Assuming SA Police continue to appear in the Magistrates Court at the initial and first appearances, and at the progress check, should SA Police or the DPP appear at the second appearance? Currently, if a charge determination has been made, the DPP appears at the second appearance. However, if a charge determination has not been made because a preliminary brief has not been provided to the DPP, or if it has been rejected by the DPP and returned to SA Police, SA Police appear at the second appearance.

[292] In my view, there is force in the submission that the DPP should appear at all second appearances. In the vast majority of cases, by this time investigations should be well advanced and the future course of investigations clear. Evidentiary inadequacies and future requirements should be obvious. If a preliminary brief has been rejected by the DPP, obviously the DPP will have been informed of the evidence obtained to date and of the likely course of future investigations. In that situation there is no impediment to the DPP retaining the inadequate brief, or a copy of it, and advising SA Police of the inadequacies etc.

[293] Importantly, if a brief has been rejected, it is the DPP who is in the best position to explain why to the court.

[294] Under the current system, if a preliminary brief has not been provided to the DPP by

the relevant date, the DPP has no knowledge of the circumstances and there is no occasion for the DPP to make an inquiry in this regard. In the vast majority of cases the DPP does not retain an “ongoing” file after the adjudication; the DPP awaits the preliminary brief.

[295] In my view the system should change. If SA Police are unable to meet the date for provision of the preliminary brief, SA Police should:

1) Not later than the date fixed for the provision of the preliminary brief, provide to the DPP **and** the accused all relevant material gathered to date; and

2) Not later than the date fixed for the provision of the preliminary brief, report to the DPP the fact that SA Police are unable to meet the date and explain the reasons for the delay and the time likely to be needed to complete the brief.

[296] If this suggestion is adopted, accountability would be improved. Investigators, and outside agencies providing evidence, would be aware that their conduct will be the subject of consideration by the DPP, defence counsel and the court. The DPP would be able to consider the inadequacies that led SA Police to a decision not to give the brief to the DPP, and to provide advice concerning future evidentiary requirements. Informed discussions could occur between the accused and the DPP prior to the second appearance. Importantly, the DPP would be fully informed of relevant circumstances and able to assist the court in deciding whether to grant an adjournment or dismiss the prosecution. The accused would also be in an informed position and able to make submissions in this regard.

[297] I appreciate the DPP concern that if SA Police has provided an inadequate brief which has been rejected, or has not provided a completed brief, control of the situation rests with SA Police. Understandably, the DPP suggests SA Police should, therefore, be responsible for accounting to the court.

[298] However, if my suggestions are adopted, the DPP will have received all the evidence gathered to date and will be fully informed of the reasons for the inadequacies. The DPP will be able to inform the court of the inadequacies, and of the nature and extent

of additional evidence required before a charge determination can be made.

[299] Importantly, it is the DPP who decides that, by reason of the inadequacies, a charge determination cannot be made. It is the DPP who should explain to the court why the inadequacies prevent the DPP from making a charge determination.

[300] In my view, the second appearance is more appropriately within the domain of the DPP rather than SA Police and the DPP should conduct all second appearances on behalf of the prosecution.

Duty of Disclosure

[301] The Legal Services Commission submission suggests that prior to the involvement of the DPP, SA Police are not under a general duty of disclosure. The DPP has, correctly, challenged this proposition. As SA Police is discharging a prosecutorial function, it is bound by the common law duty of disclosure. SA Police accept this position.

[302] Further, it is appropriate to note that SA Police are under a statutory duty of disclosure to the DPP pursuant to s 10A of the *Director of Public Prosecutions Act 1991*.

[303] In this context, the DPP has referred to training undertaken by the DPP with members of MIBU which included “prosecutorial obligations and the duty of disclosure”. In addition, the DPP solicitor seconded to MIBU has provided further “ongoing guidance” with respect to the obligations of disclosure.

Committal Brief

[304] As to criticism of the time requested by the DPP for the gathering of additional material to complete the committal brief, views in this regard will differ according to an

assessment of the purpose of the committal brief.

[305] In my view, the approach of the DPP is reasonable and accords with the aims of the legislation. In particular, if a matter is to proceed to trial in the superior court, it is appropriate that the committal brief be as complete as reasonably possible. In the words of the DPP, “trial ready”. Obviously there may be circumstances in which this is not possible, for example, delayed forensic evidence, but it is not appropriate to treat the preliminary and committal briefs as intended to achieve the same purpose.

[306] In addition, it should not be overlooked that s 111 of the CPA is a mandatory direction to the prosecution concerning the contents of the committal brief. Section 111 is comprehensive in its ambit. Further a complete committal brief is important to the parties in the preparation of the detailed case statements that must be filed following committal to the superior court for trial.

Committal for Sentence

[307] As to matters committed for sentence, once an accused pleads guilty, there should be no delay between the plea and the offender’s appearance in the superior court. Committal for sentence should occur forthwith and, within a short period, the offender should appear in the sentencing court.

[308] In many cases, facts for the purposes of sentencing will have been apparent from evidence gathered before committal for sentence occurs. In some matters, however, additional time will be required to establish the facts. For example, analysis of telephones or computers might be required before the true role of an offender can be established.

[309] In my view, even if additional evidence is required, immediate committal for sentence should occur and it should be left to the sentencing court to determine whether the prosecution should be permitted additional time to carry out further investigations

relevant to the facts of the offending. Committal for sentence should not be delayed because additional investigations are required.

[310] Rule 49A of the Criminal Supplementary Rules of both the Supreme and District Courts provides that where a matter has been committed for sentence, within 35 days of committal the DPP should file, and serve on the offender, a written summary on the factual basis alleged by the prosecution in respect of the charge. In my view, if reasonably possible, a statement of facts agreed between the parties should be filed before the sentencing hearing. To that end, I would add a rule that requires an offender to respond to the written summary filed by the DPP specifically identifying which facts asserted in the summary are agreed or otherwise.

[311] If an offender does not agree with any facts asserted in the DPP summary, I suggest it be mandatory for the DPP and the offender to confer with respect to any facts in dispute. The obvious point of the conference would be to reach agreement as to the disputed facts. If agreement is reached, obviously the presentation of an agreed statement of facts eases the burden on the sentencing court. An agreed statement of facts does not relieve the sentencing court of responsibility for determining the facts for the purpose of sentence, but agreement as to facts between the parties obviously assists the court in this regard.

[312] The DPP has submitted that such a statement would be “incompatible with the principle that a sentencing judge is to decide what inferences will be drawn from the evidence and upon what factual basis a defendant is to be sentenced”. It is undoubtedly correct that the sentencing judge decides the factual basis for sentence, including what inferences are to be drawn from proven facts. But this principle does not detract from the right of an offender to admit facts (which the prosecution also agree are accurate). It is then a matter for the sentencing judge whether the judge finds such facts proven for the purpose of sentence.

[313] The DPP referred to three authorities.[26] In my view these authorities do not prevent or discourage the filing of a statement of facts upon which the parties agree. In *The Queen v Perre*, King CJ accepted that there may be cases in which the prosecution and the offender put forward an agreement as to the facts upon which the parties suggest sentence should be imposed:[27]

> It is for the judge to decide what inferences he will draw from the primary facts and to decide the basis upon which he will impose sentence. **Even in cases in which the prosecution joins with the defence in asking for sentence to be imposed upon an agreed basis** which differs from the depositions or inferences which the judge may be disposed to draw from the depositions, it is for the judge to decide whether he is prepared to act upon that agreed basis. (my emphasis)

[314] In my view presenting the sentencing court with a statement of facts upon which the parties agree is a sensible and efficient course to follow. It works well in the Northern Territory where it is a common practice.

[315] Finally with respect to committal for sentence, I suggest consideration be given to shortening the period within which the DPP is required to provide a summary of the facts alleged by the prosecution. In many cases, the prosecution view of the facts will be well known to the DPP at the time of committal for sentence. Frequently, the factual basis of the plea will have been discussed with counsel for the accused.

[316] I have not attempted to investigate this issue. Obviously the views of the DPP and the sentencing courts will be important. However, I suggest every effort should be made to expedite sentencing matters and the time prescribed by Rule 49A is an aspect worthy of consideration. In addition there may be other aspects of the processes in the sentencing courts which could be reviewed with expedition of sentencing matters in mind.

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[26] *The Queen v Perre* (1986) 41 SASR 105; *R v Lobban* (2001) 80 SASR 550; *R v Nemer* (2003) 87 SASR 168.
[27] At 106.

Case Statements

[317] As discussed ([117] - [124]), although it is very early in the operation of the case statement regime, it is apparent that case statements serve a useful purpose. Those members of the legal profession who appear to be resistant to this procedure should be encouraged to co-operate fully.

[318] Two experienced members of the legal profession expressed concern that the prosecution case statements are labour intensive and too detailed. There is no doubt that preparation of the statements consumes significant time, but in my view the benefits outweigh that disadvantage.

[319] The same two practitioners suggested that the Legal Services Commission does not provide specific funding for the accused's solicitor to prepare the defence case statement. I have not made an inquiry of the Commission, but as the case statement is an important aspect of the new system, I encourage the Commission to ensure that practitioners are adequately remunerated for this work.

[320] Similarly, if my recommendations concerning the progress check and counsel conferring at various stages are adopted, appropriate funding for defence practitioners will be essential.

[321] In addition, for the reasons discussed ([125] - [128]), one minor amendment to s 123(4)(b) concerning admissions by an accused is appropriate.

[322] I suggest there is a further feature of the superior court system, of which the case statement procedure is one aspect that merits attention. It concerns the time between committal for trial and arraignment.

[323] Section 120 of the CPA directs a Magistrate committing an accused for trial to fix a date for arraignment in the trial court. Significantly, in substance s 120(1)(c) and s 123 require the Magistrate to ensure that the date fixed allows at least six weeks for completion of the prosecution case statement, plus an additional period of at least six

weeks for the completion of the defence case statement.[28] The minimum period between committal for trial and arraignment is, therefore, 12 weeks, regardless of the complexity or otherwise of the case.

[324] I appreciate that the legislative requirements place burdens on the DPP and the accused which are not without complexities. However, I suggest more flexibility should be built into the system to allow for reduced timetables in straightforward cases, particularly if the parties agree.

Capacity to Negotiate

[325] The Legal Services Commission submission stated that "a significant deterrent to the early resolution of major indictable matters under the current system is the inability by police prosecutors to negotiate regarding charges." To the extent that this submission suggests there is no route by which an accused can enter into negotiations for resolution of charges, that impression is incorrect. Procedures have been in existence since the commencement of the major indictable reforms and are summarised in [108]. In addition, prior to the commencement of the reforms, the DPP produced a document providing a detailed guide to the processes and procedures to be implemented under the reforms. It was, and is, a publicly available document. It identified the procedures to be followed with respect to negotiations for early guilty pleas:

> **3.3 Early Guilty Pleas/Negotiations**
>
> SAPOL will have carriage of major indictable matters up until a charge determination has been made by the DPP, at which point the DPP will assume conduct of the matter.
>
> All offers of resolution or other negotiations on major indictable matters prior to a charge determination being made by the DPP should be directed to the SAPOL Major

[28] A Magistrate may allow longer.

Indictable Brief Unit SAPOLMajorIndictableBriefUnit@police.sa.gov.au.

All offers of resolution should be made by way of the *Notification of Defence Offer of Resolution/Early Guilty Plea* form and contain details as to the proposed charges and factual basis of the plea. The sentencing discount applicable at the time of the negotiations should also be identified.

A copy of the *Notification of Defence Offer of Resolution/Early Guilty Plea* form can be found in Attachment B of this document.

Once the form has been received by the SAPOL Major Indictable Brief Unit, the following procedure will apply:

- In the event that offers of resolution or early guilty pleas involving minor indictable or summary offences only, negotiations will be conducted by the SAPOL Major Indictable Brief Unit who will retain carriage of the matter.
- Should a defendant wish to plead guilty as charged, the matter can be called on in the relevant court at any time in accordance with the Court rules. It is not necessary for the *Notification of Defence Offer of Resolution/Early Guilty Plea* form to be submitted in these circumstances.
- Offers of resolution to major indictable offences involving amended major indictable charges, will be forwarded by SAPOL upon receipt of the Notification of Defence Offer of Resolution/Early Guilty Plea to the DPP.
    - In the event that a resolution has not been reached, the DPP will return the file to the SAPOL Major Indictable Brief Unit until such time as a charge determination is made.
    - In the event that a matter is successfully resolved to a major indictable offence(s), the DPP will retain conduct and appear on sentencing submissions.

Offers of resolution and/or negotiations after the making of a charge determination should be forwarded directly to the DPP who will have assumed conduct.

3.4 Guilty Pleas - Notice to Have Matter Called On - s110(3)

Pursuant to section 110(3), defence may request that the matter be called on in the Magistrates Court 4 weeks after the committal appearance for the purpose of entering

> a guilty plea. The court must be notified in writing using Form 9B of any such application (see Attachment C).

[326] As to the case study identified at page 4 of the Legal Services Commission submission, advanced as an example of the inability of police prosecutors to negotiate regarding charges, the DPP provided a detailed response at pages 3 and 4 of its second submission. It is not appropriate for me to enter into a detailed consideration of the particular circumstances of that matter, but the response of the DPP appears to justify the DPP's position that the particular case study "does not fairly illustrate an inability on the part of SAPOL prosecutors to negotiate charges."

[327] In my view, the administrative processes put in place by the DPP and SA Police are sound and provide a practical and sensible approach to the issue of negotiations for resolution. There may be an issue, however, as to whether the procedures are working smoothly in practice.

[328] As to the Legal Services Commission submission concerning the capacity to negotiate, SA Police suggested that this proposition "seems to rub up against observed practice". The submission observed that the case study referred to a choking matter, an area which is new and "continues to be developed in policy and practice". The submission continued:

> As experience and confidence grows the willingness of MIBU prosecutors to engage in resolution discussions with defence and the Brief Assessment Team appears to be expanding. The initial approach was perhaps cautious, but the expertise within MIBU is growing. It is natural to expect that over time MIBU process will develop expertise through interaction with the Brief Assessment Team. The volume of negotiated downgrades seen through the discontinuance process seems to contradict the suggestion that MIBU prosecutors cannot or will not negotiate sensible proposals, and this can only be expected to expand as confidence builds.

[329] In my view, subject to the suggestion that the DPP introduce a "docket system", there is no occasion for interference with the current policy and administrative processes.

Everyone involved is well aware of the need to ensure that there is no impediment to the ability of accused persons and their legal representatives entering into negotiations for resolution with both SA Police and the DPP.

Role of DPP - Docket System

[330] It is obvious that in any criminal justice system, the DPP undertakes a critical role. As discussed, underlying the current system is the understanding that although it appropriate for the DPP to give advice concerning evidence, the DPP is not an investigator and should not be put in the position of giving directions to investigators as to how an investigation should be conducted. The trained investigators are SA Police.

[331] Notwithstanding these separate roles, it must be recognised that because the DPP personnel are trained in recognising and understanding the evidentiary requirements relating to particular charges, the DPP inevitably has an important role to play in providing advice concerning those evidentiary requirements. It is also inevitable that, if the DPP is involved from the outset, the opportunities for early resolution or, at least, narrowing the issues, are significantly enhanced. The “common wisdom” in this regard is well founded.

[332] It is also an inescapable fact that involving the DPP extensively from the outset is an expensive process. If my suggestions are adopted, additional staff with appropriate experience might be required, but additional expense in the early stages is likely to be off-set by later savings. Greater involvement of the DPP at the early stages, coupled with earlier discovery to accused persons of relevant evidence, is likely to result in savings through earlier resolution of matters in the major indictable stream and improved efficiency with respect to matters that proceed to trial. Early narrowing of the issues has the potential to produce considerable savings in the costs of investigations and trials.

[333] As to the suggestion that the DPP introduce a “docket system” under which

prosecutors are allocated files from the outset, I have not endeavoured to investigate or analyse the internal administrative arrangements of the DPP. Bearing in mind this limitation, I make the following observations:

- It is a common complaint by defence practitioners that they cannot readily find “someone to talk to”. By the complaint practitioners are referring to difficulties in finding prosecution personnel who are familiar with a particular matter and possess sufficient authority to undertake useful discussions concerning resolution or other issues.
- If a solicitor in BAT receives a file for adjudication, there are obvious advantages in that solicitor obtaining the file throughout the Magistrates Court processes and into the superior courts (the docket system).
- For example, a solicitor who has undertaken an adjudication will possess a degree of familiarity with the file if a progress check occurs. Similarly, such familiarity will exist at later stages such as assessment of the preliminary brief, charge determination and assessment of the committal brief.
- Significantly, if the solicitor retains the file throughout, there would be no occasion to “brief” another solicitor for the purposes of the committal brief and procedures at or following committal. Duplication of effort would be avoided. The solicitor who retains the file throughout would possess a distinct advantage in preparing the prosecution case statement and briefing a prosecutor for trial.
- Familiarity gained in this way would also enable the solicitor to assist the Magistrates Court at various stages.
- Importantly, a docket system of this nature would provide continuity, consistency and a single point of contact for both SA Police and defence practitioners.

[334] In my view there are obvious advantages and efficiencies to be gained from this type of docket system. I encourage the DPP to give consideration to introducing such a system.

Defence Co-operation - Conferences

[335] Finally in the context of the role of the DPP, I emphasise the need for “defence” co-operation. Early discussions, and early involvement of the DPP, will not significantly enhance the operation of the system without corresponding co-operation of the legal profession practising in the criminal jurisdiction. The importance of defence co-operation can be seen in the Best Practice Model ([15] Annexure 7). The relevant paragraphs, supported by the recommendations of the Deliberative Forum ([16]) are:

1. The DPP should have responsibility for the prosecution of matters at committal.
2. Legal aid should be made available to all indigent accused facing committal on serious indictable offences as soon as possible after charge.
3. Grants of legal aid should be structured to encourage resolution of matters prior to committal.
4. Counsel with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.
5. Both Counsel should have authority to make decisions or be able to expeditiously obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.
6. Both Counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.

[336] In other jurisdictions, legislation, Rules of Court or practice directions require both parties to confer in specified periods (and report to the court). In my view this process should occur in SA. If my suggestions are adopted, possible times for mandatory conferring are:

- During the seven day adjudication period, before the initial appearance.
- Prior to the progress check (between the first and second appearances).
- After receipt of the preliminary brief and before the charge determination.
- After receipt of the committal brief and before the answer charge hearing.

[337] The aims of these conferences would include early resolution, narrowing of issues and

agreements as to evidence or facts to be admitted at trial. Defence co-operation with respect to these matters is crucial.

[338] I appreciate that adding the progress check and conferences possesses resource implications for everyone involved. However, I suggest that these processes are important features which possess the potential to save costs and concentrate resources on essential matters.

[339] Bearing in mind the need to maintain an appropriate balance, and to avoid unnecessary appearances and conferences, in my view the parties should be encouraged to confer during the seven day adjudication period, but such a conference should not be mandatory. I suggest mandatory conferences should occur:

- Prior to the progress check;
- After receipt of the preliminary brief and before the charge determination; and
- After receipt of the committal brief and a few days prior to the answer charge hearing.

Bail

[340] The Law Society submission expresses “serious concern” about the “remanding of defendants in custody for very long periods of time without charge”. Read literally, this statement is plainly incorrect. As the DPP points out, it would be unlawful to hold any person in custody without charge. It does not occur. The initial charges are laid by SA Police. Presumably the Law Society meant to express concern that defendants are remanded in custody for long periods prior to the charge determination being made.

[341] In the context of delays, the Law Society identified three case studies which it suggested “demonstrate the fundamental flaws in the current system including excessive delays, the gathering of unnecessary evidence and the lack of information being provided to defendant lawyers by MIBU”. The DPP has dealt with these case

studies in the supplementary submission.

[342] It is not appropriate for me to embark upon an investigation of these particular case studies. However, as is often the case, the matters are not simple or open to any obvious conclusion on the material provided to me.

[343] Unfortunately, on occasions lengthy remands in custody are unavoidable, but every effort should be made to avoid this situation. As discussed [74], of particular concern to the magistrates are "prescribed applicants" in "choking" cases.

[344] *The Bail Act 1985* specifies that bail is not to be granted to a prescribed applicant unless the applicant establishes "special circumstances justifying their release". A prescribed applicant is a person charged with any one of a number of specified offences, including choking, suffocation or strangulation in a domestic setting contrary to s 20A of the *Criminal Law Consolidation Act 1935*. This offence was introduced to the South Australian criminal law on 31 January 2019.

[345] Complainants in criminal matters involving offences alleged to have been committed in domestic circumstances commonly face a particularly difficult and traumatic experience when engaged in the processes of the criminal law. It is not uncommon for criminal charges in these types of cases to be withdrawn or resolved, rather than complainants enduring lengthy and distressing delays and the daunting prospect of undergoing the trauma of giving evidence. If a charge is withdrawn after an accused has spent many months in custody because they are a prescribed applicant, the damage caused to the accused is obvious. The DPP has indicated that, in some circumstances, lengthy delays can amount to "special circumstances" justifying release on bail.

[346] Given these concerns I considered whether these and other types of cases should be given priority in court procedures.

Priority Procedures

[347] In a number of jurisdictions, including South Australia, through legislation, rules of court and practice directions, priority is given to the listing of trials involving complainants who are regarded as "vulnerable". In South Australia, the priority provisions relate to trials of sexual offences where the alleged victim of the offence is a child or a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions. These priority provisions apply to trials in the Magistrates Court, District Court and Supreme Court.[29] Rules are in place to expedite priority proceedings.

[348] Although s 48B of the Magistrates Court Act directs that priority be given to sexual assault trials involving these types of alleged victims, Criminal Practice Direction 3.13(b) of the Magistrates Court specifies that in major indictable matters, the Court is to ensure that "priority is given to the listing of the answer charge date and completion of the committal proceedings consistent with compliance with the requirements of the *Summary Procedures Act 1921*." On one view, this direction might be viewed as wide enough to encompass all procedures from the first appearance onwards, but it does not appear that such a view has been acted upon in practice.

[349] In Victoria matters involving sexual offences are subject to the same committal processes, but shorter time limits are prescribed. The shorter time limits apply only if the complainant is a child or a person with a cognitive impairment, and a witness other than the complainant is to be cross-examined in the committal hearing.

[350] As mentioned, in Victoria, within seven days of the charge been filed, a "filing hearing" must be held at which a magistrate fixes a period for service of the hand-up brief and for the committal mention hearing. In other than these prescribed sexual cases, the committal mention hearing must be held within six months of the commencement of

[29] *Magistrates Court Act 1991*, s 48B; *District Court Act 1991*, s 50B; *Supreme Court Act 1935*, s 126A.

the proceedings. In these sexual cases, the committal mention hearing must be held within three months of the commencement of the proceedings. In addition, the court is directed to determine a committal proceeding in such cases within two months after the committal mention hearing. The shortened time limits prescribed in Victoria are all open to extension by a magistrate.

[351] The difficulties confronting complainants in sexual assault cases are now well recognised and documented. These difficulties are exacerbated when children are involved. The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that each jurisdiction seek to ensure that delays are reduced and kept to a minimum in prosecutions for child sexual abuse offences.[30] If priority in trial listing is justified for particular types of cases, there is a strong argument that, in such cases, priority in the processes that precede trial is also justified.

[352] At my request, the DPP and SA Police provided submissions concerning this issue. The DPP submission helpfully identifies relevant Rules and summarises the reason the DPP suggests that these types of cases involving children should not be given priority in the Magistrates Court processes:

> <u>The present Rules</u>
>
> Section 50B of the *District Court Act* 1991 requires the District Court to give the necessary directions to ensure that a trial of a sexual offence where the alleged victim is a child or a person with a disability that adversely affects the person's capacity to give a coherent account of their experiences or to respond rationally to questions is given priority over any less urgent criminal trial and is dealt with as expeditiously as the proper administration of justice allows.
>
> Rule 25A of the *District Court Criminal* Rules *2014* provides that at arraignment for a priority proceeding the parties are to address the means by which the proceeding may be expedited.

[30] Criminal Justice Report, August 2017, Recommendation 72.

Rule 10(2) of the *District Court Criminal Supplementary* Rules *2014* provides that the system of case flow management in priority proceedings is to be administered with the aims that:

a) cases for trial are disposed of or come to trial in Adelaide within 4 months after first arraignment and in Port Augusta and Mount Gambier within 6 months after first arraignment; and

b) cases committed for sentence are disposed of or sentenced within 4 months after first appearance in Court.

Rule 11 requires that priority proceedings are to be listed in accordance with the aims of Rule 10.

The reason for the priority listing

These matters therefore get priority in the following circumstances:

1) the brief is ready,

2) the defendant has determined to plead not guilty after considering the whole brief, and

3) the complainant will have to give evidence.

This therefore balances the need to ensure the brief is properly prepared, the need to ensure that delays in the child giving evidence should be minimised (particularly given there will often have been a delay in reporting to the authorities) and the need to only prioritise matters which in fact should be prioritised.[31] To prioritise too many matters may have the consequence of diluting the benefits of this process.

[31] "In a different context, priority is given to proceedings involving an accused who is a serious and organised crime suspect, in acknowledgement of the operation of the presumption against bail contained in s1 0A of the *Bail Act* 1985".

The reasons against prioritising matters in the Magistrates Court

I assume it is envisaged that such "prioritisation" may involve placing time limits on SAPOL to provide the brief, time limits on the ODPP to perform its functions and time limits within which the Magistrates Court must commit for trial or sentence. Different issues may arise as regards each of these possibilities however I note the following matters may be relevant to prioritising matters where the complainant is a child:

1) Whilst not every child complainant participates in a video interview, most do. I note that this process invariably occurs close in time to police being notified. This process and the ability to play the video to the jury means that although any delay may impact a child's ability to recall all the details, there will nonetheless be evidence of their account before the jury which was given at a time much closer to the incident than any trial - whensover that trial is listed.

   Whilst prioritising such files after they are committed for trial and there is certainty that the child will give evidence is clearly preferable and achievable, I query whether the benefit of such a process for all matters in the Magistrates Court is sufficiently identifiable and outweighs the possible disadvantages. Prioritising this many files may not be an efficient use of resources.

2) A process which may result in imperfect briefs at the time of committal will not encourage pleas of guilty and is also likely to result in the discontinuation of proceedings close to the trial if the ODPP receives important information late in the process. This is not to the advantage of the complainant, their family or the community. The system presently in place in the CDCC assumes a need to prioritise because as best can be known, the child will be giving evidence. At committal that cannot be assumed. To elevate the need to hasten the file through the process as the primary consideration does not give sufficient

weight to the other considerations in the balancing exercise and potentially does so to the detriment of the complainant.

3) Whilst not insurmountable, the significant factual variability between cases makes the imposition of specific time limits potentially problematic. Where a case involves a large volume of evidence and/or reliance upon detailed forensic evidence, prioritisation which is not tailored to the requirements of the particular case has the potential to result in matters being committed to the superior court before they are ready for disposition by way of trial or sentence as the case may be. For example, a child sexual offence brief may consist of the pre-recorded interview of one child, evidence of initial complaint and little more. A case involving multiple complainants will be more involved and require consideration of matters affecting joinder of charges. A case may or may not involve forensic evidence (DNA, paediatric medical, toxicology, etc) or electronic evidence (computer or mobile downloading or telephone call/text analysis).

4) Whereas the Court can manage its trial allocation processes once a matter is at the arraignment stage (once the evidence has been gathered, assessed and related to charges which are presented in the information), it may be more difficult to achieve within an operational policing environment. This is obviously a matter for the Commissioner of Police to comment upon, but we recognise that this may present challenges for police responding to, and investigating, a broad spectrum of serious crimes. Within SAPol, many of the investigations involving children are investigated by the Public Protection Branch (formerly known as Special Crimes Investigation Branch) or Child and Family Violence Sections. Given most of their files relate to such victims, prioritisation of one file over another may not be possible.

> 5) In terms of forensic science agencies conducting exhibit analysis, there are plainly broader criminal justice system implications involved in prioritising the examination of child/adult sexual offence exhibits with the consequence of exhibits pertaining to other serious matters (homicides, robberies, drug offences, etc) being given a lower priority and thereby delayed.

[353] SA Police were also reluctant to embrace priority procedures in the Magistrates Court for cases involving child complainants. Acknowledging the “sensitivities” of victims of domestic and sexual offences, SA Police advise that, wherever possible, these cases are given priority “through normal business practice and process (a risk managed approach)”. The submission continued:

> Broadening the scope of mandated prioritisation will place further pressure on what already is a complex environment. Prior to enacting further mandated priorities in trial listing, SAPOL would welcome analysis of the benefits and impacts for not only victims, but across the investigative and prosecutorial functions of the criminal justice system.

[354] I agree that the “environment” is complex, but I feel compelled to suggest that a proposal to undertake an “analysis of the benefits and impacts” imparts an air of bureaucratic reluctance and delay. There is no doubt about the deleterious impact of delay on the welfare of child complainants. Such cases demand priority.

[355] I am similarly unimpressed by some of the objections raised by the DPP. In my view, the fact that a child complainant has usually participated in a video interview is irrelevant. Under the current system and practices, there are lengthy delays before the child is able to give evidence in a trial.

[356] Further, if priority procedures result in early resolution, they will have achieved an important purpose.

[357] The DPP suggests priority procedures might result in “imperfect briefs at the time of committal”. Why should that result ensue? If priority is mandated by legislation, everyone involved, including police, DPP, forensic and other specialist services, and

courts, will be obliged to respond appropriately.

[358] The DPP also referred to the "significant factual variability between cases" as making the imposition of specific time limits "problematic". Again, I disagree. Obviously, in complex cases, a Magistrate would exercise the discretion to allow additional time.

[359] The community is deeply disturbed by crimes against children and by the impact upon children of criminal proceedings. Delay exacerbates the impact and encourages offenders to "wait and see" whether the child will be able to give evidence and, if so, the quality of the evidence.

[360] It is obvious that if one type of case is given priority, other types of cases will be affected. But this tension between competing demands is not uncommon. The community, through Parliament, makes choices and determines priorities.

[361] I repeat my view that, from the outset, major indictable sexual assault cases involving child complainants should be given priority in the procedures of the Magistrates Court. I doubt that such priority procedures would cause a significant additional delay in other types of cases.

[362] I suggest that if eight weeks is fixed as the standard period for preparation and service of the preliminary brief in other types of cases, six weeks should apply to sexual assault cases involving child complainants. If a Magistrate fixes longer than six weeks, the same system of a progress check should apply ([243] - [250]).

[363] In addition, I suggest that consideration be given to shortening other times such as the periods allowed for the DPP to make the charge determination and for preparation of the committal brief. Similarly, the periods to the answer charge hearing and for the preparation of case statements should be shortened. In other words, priority for these types of cases should be built into the Magistrates Court processes from the outset through to committal to the superior court.

[364] In addition to a possibility of giving priority to sexual assault matters involving children, I also sought the views of the DPP and SA Police as to whether priority could or should be given to all sexual assault cases. Obviously, all criminal proceedings cause

significant anxiety and distress for the vast majority of victims. However, it is well recognised that delay in the resolution of criminal proceedings causes great distress and ongoing mental anguish for complainants in sexual assault cases. Psychological trauma in these circumstances often results in physical symptoms.

[365] As to the possibility of giving priority to all sexual assault matters, the DPP added the following observations to the specific submissions to which I have referred:

> 1) Serious sexual offence files frequently involve delay between the offence and charging in the order of months or years. It cannot therefore be assumed that reducing the time spent in the Magistrates Court by a few months will have any impact on the complainant's memory or ability to give a coherent account of their experiences. In those circumstances prioritising such matters may be said to be diverting resources from those matters most in need of such a process.
>
> 2) It can readily be assumed that other victims also have an interest in finalising their matters. It may also be assumed that the family of a victim killed in a motor vehicle accident may have a real need to be able to move on from the judicial process. To justify a process of prioritisation for one offence at the expense of another would ordinarily require the identification of real and substantial benefits. I do not consider those real benefits can be assumed at large for serious sexual offences.
>
> 3) The significant factual variability between cases will make it difficult to apply one rule to all matters.

[366] SA Police also opposed priority being given to all sexual assault cases, and referred to the difficulties faced by SA Police investigators caused by other “operational influences” and “resource constraints” on providers of expert evidence.

[367] In my view, while priority for all matters involving sexual assaults is desirable, the case for priority is not strong enough to warrant legislative or other prescription of priority in the Magistrates Court procedures.

[368] As to the possibility of priority being given to choking type cases, the DPP provided the following submission:

> Section 20A CLCA came into operation on 31 January 2019, in conjunction with an amendment to s10A of the *Bail Act* making the offence of choking, strangulation or suffocation in a domestic setting (`choking') a prescribed offence. I have not commented on the appropriateness of choking offences being prescribed offences for bail purposes as this is a matter of policy.
>
> Being a major indictable offence, a charge of choking is subject to adjudication by this office in accordance with the internal procedure set out in the DPP MIR Review Background Document at para 6.1. Our views are predicated upon an acceptance that adjudicated charges are appropriate in light of the allegations contained in the SAPOL facts of charge.
>
> Between 31 January 2019 and 24 July 2019 the ODPP adjudicated approximately 250 matters involving a charge of choking. Over 90% of those matters were maintained as major indictable choking charges.
>
> Between 12 March and 24 July 2019 the ODPP received approximately 26 preliminary briefs for charge determination involving a charge of choking. Those matters were dealt with by the ODPP as follows:
>
> - 9 matters - major indictable charge determination made (DPP to assume conduct).
> - 6 matters - minor/summary charge determination made (SAPOL to assume conduct).
> - 2 matters - no charge determination made.
> - 1 matter - defendant pleaded guilty to alternate major indictable charge.
> - 8 matters - charge determination is pending / work in progress.

> In a different context it has been suggested that there is CAA data which indicates that 73 matters had been `finalised' in the Magistrates Court in a corresponding period. Beyond the 26 matters noted above, the ODPP is unable to comment as to the manner in which those matters were finalised. It may be assumed that the matters about which the ODPP is unable to comment were being conducted by SAPOL and therefore outside of this office's knowledge and control. I note that in such matters, alleged victims will sometimes refuse to sign their statement or indicate that they will no longer cooperate with police.
>
> It is therefore possible that the matters to which the Magistrates were referring as being `not infrequently resolved at the time of charge determination' involve this type of consideration however SAPOL will be better placed to provide that information.

[369] SA Police provided statistics with respect to choking cases. Although choking cases comprise only 6.43% of briefs received by MIBU since 5 March 2018, such cases have only been counted since the enactment of this offence on 31 January 2019. Since that date, the choking/strangulation offence accounts for almost 16% of offences with which the MIBU has dealt.

[370] SA Police advised that if a complainant does not wish to continue, “all reasonable endeavours” are made to have the matter listed early for withdrawal. The observation was made that the specific choking offence is frequently accompanied by other offences which proceed.

[371] The concerns of the Magistrates are well founded, but there is a limit to the number of cases which warrant priority. In my view priority procedures are not justified for choking and other cases of violence committed in domestic circumstances.

Delays-Sanctions

[372] One of the issues raised in submissions concerned the possibility of sanctions being imposed on the prosecution for failure to meet time limits. In my view, such a course is both unnecessary and inappropriate.

[373] First, in court, the work of both SA Police and the DPP is under constant public scrutiny. In itself, such scrutiny provides a strong incentive to comply with court orders.

[374] Secondly, both organisations are publicly answerable to the Court.

[375] Thirdly, in many cases the failure to meet time limits fixed by the court is beyond the control of SA Police and/or the DPP.

[376] Finally, the ultimate sanction rests with a Magistrate who, in the event of non-compliance, is empowered to dismiss a charge.

Victim Assistance

[377] The Witness Assistance Service (WAS) was established by the DPP in 1995 and is jointly funded by the DPP and the Victims of Crime Compensation Fund (the Fund). The SA Police submission identified difficulties with respect to providing assistance to victims, witnesses and their families that have arisen since the commencement of the Major Indictable Reforms:

> The Attorney-General has an absolute discretion to make payments from the Fund to a government or non-government organisation or agency for a purpose that will, in the Attorney-General's opinion, assist in the prevention of crime or advance the interests of victims of crime.[32] At the inception of MIBU while much of the major indictable workload shifted to SAPOL a commensurate number of social workers did not follow the work.

[32] *Victims of Crime Act 2001* s 31(1).

Specialist social workers would provide practical and emotional support to victims and witnesses throughout their experience with the Criminal Justice System during the time that SAPOL is the prosecuting authority. This is different from the current SAPOL Victim Contact Officers who focus on the high-volume matters (ie, summary and minor indictable) to ensure information flow to victims.

The activities would be guided by the need to provide timely, responsive and quality services to victims, witnesses and their families. Services would include:

- Providing Information and Education (regarding court procedures, court outcomes, victim rights and responsibilities, SAPOL's role, OPP role and function, etc).
- Acting as a key point of Liaison and Communication between SAPOL staff and victims (i.e. attend meetings, assist in the communication of legal decisions made by SAPOL, assist victim/ witnesses to represent their needs, questions and concerns, etc).
- Attending Pre-Committal Meetings between SAPOL and victims and witnesses.
- Undertaking Social Work Assessments (regarding the impact of crime on individuals; their coping & well-being, mental health concerns, support structures, practical assistance, etc).
- Providing Crisis Support & Referral Information (i.e. crisis intervention; support through the legal process, debriefing support, and referral as appropriate).
- Advocating for victims needs within SAPOL; advise victims of their rights, responsibilities and avenues for complaints.
- Liaising with external agencies {i.e. ODPP BRIEF ASSESSMENT TEAM, ODPP WAS, Victim Contact Officers, Victims support service, Yarrow Place Rape & Sexual Assault Service, Respond SA, Families SA, etc).
- Providing Education and Training to SAPOL staff, external agencies, other professionals and members of the community.

In order to comply with their obligations under VOCA, MIBU prosecutors are expected to perform those functions listed above. In many cases they are not performing those functions due to lack of time, experience or knowledge of SAPOL's obligations. When they are attempting to comply with their obligations it has, on numerous occasions, led to less than ideal outcomes.

Considerable time is spent updating witnesses of court hearings - a function that could appropriately be performed by social workers whilst prosecutors focus their attention on their core function.

Having social workers engaging with witnesses at an early stage will lead to witnesses being engaged with the arrest to trial process. Prior to 5 March 2018 victims of serious offences (in particular vulnerable witnesses) were engaged with WAS from an early stage. Typically a referral would be made when the file was first allocated to a solicitor at the ODPP. Under Major Indictable Reform SAPOL is the prosecuting authority until such time as the ODPP make a charge determination. It may be many months until a file is received by the ODPP and a referral to WAS is made. In most cases there will be a long adjournment between the first and second appearance when there will be very little contact with the victim. There will be matters that are dismissed and will need to be re-laid. It is anticipated that during that time witnesses will become disengaged from the prosecution. Some will lose interest; others will become frustrated that they are not being appropriately consulted; others will not have the benefit of referrals to essential services. This will undoubtedly have an impact on their willingness to attend court and the success of the prosecution.

It is at the very beginning and end of a prosecution that a victim is most vulnerable. It is essential that proper engagement begins as soon as possible.

[378] I invited the DPP to comment on the SA Police submission. In preparation for the reforms, the DPP advised SA Police of the need for victim support and understood SA

Police were making appropriate arrangements.

[379] It is unnecessary for me to embark upon an investigation of the history or current position. It is sufficient to observe that this is an important issue to which attention should be given. Every effort should be made to ensure that, at each stage, appropriate services are being provided to victims.

Sentence Reduction Scheme

[380] There is a close relationship between the stages of processes under the major indictable reforms and the tiers of reductions available pursuant to the sentence reduction scheme. Currently the relationship is as follows:

Reduction	Period for Guilty Plea
Up to 40%	Not more than 4 weeks after first court appearance.
Up to 30%	More than 4 weeks after first court appearance, but on or before the committal appearance.
Up to 20%	From the day after the committal appearance to before committal for trial.
Up to 15%	From committal for trial to immediately after arraignment appearance in the Supreme or District Court.
Up to 10%	From immediately after the arraignment appearance to the commencement of the trial.

[381] If the recommendations in my Report of 5 June 2019 are adopted, the percentage at each stage would be reduced, but the stages would not be altered.

[382] A suggestion was advanced that the guilty plea reduction timeframes should be

"uncoupled" from the timeframes applicable to the processes under the major indictable reforms. The nature of the regime which would replace the current scheme was not explained.

[383] In my view, the tiers of sentence reductions for pleas of guilty cannot be "uncoupled" from the stages of the court processes. Apart from the four week time limit to qualify for up to 40% (or 35% if my recommendation is adopted), the remaining tiers must be linked to the stage of the process during which the plea is entered. For example, after the initial four week period, the next key point in the process is the provision of the preliminary brief to the accused. Until an accused is given relevant evidence in the preliminary brief, the accused is at a disadvantage in considering options and obtaining legal advice. The next step is the committal appearance and, in my view, it is appropriate that the second tier period (up to 30%) expire at the committal appearance.

[384] The third tier (up to 20%) expires immediately before committal for trial. Again, in my view this is appropriate. Speaking broadly, it is appropriate to use these points as distinguishing pleas made earlier before the additional work is undertaken.

[385] As to the impact of the major indictable reforms on the sentence reduction scheme, there is no doubt that the reforms interrupted the flow of cases to the Supreme and District Courts. Statistical information is limited. While some trends can be identified, it is too early in the operation of the reforms to draw with confidence any conclusions concerning the impact the reforms might have had on the sentence reduction scheme. Operation of the reforms for at least another 12 months is needed.[33]

[386] For what it is worth, I have gained the overall impression that the introduction of the major indictable reforms has not had a significant impact on the operation of the sentence reduction scheme.

[33] Even after another 12 months, if in that period the maximum percentage reductions are reduced, it may not be possible to say whether those reductions or the major indictable reforms have impacted upon the scheme.

Overall Impact

[387] In the submissions and various observations made publicly and to me, there is a general complaint that, throughout the new processes, matters are taking longer and are less likely to resolve. This broad assertion is not supported by the limited statistics which suggest trends to the contrary. As mentioned on more than one occasion, by reason of the short period of operation, and other external factors, the statistics in this regard are insufficient to found a sound conclusion concerning the impact of the reforms. However, the limited trends appearing in this early period suggests that, in a number of areas, a positive view of the impact of the reforms is justified. For example, contrary to some submissions and observations, the median number of hearings appears to be lower in cases commenced under the reforms. Similarly, the median number of weeks to finalise matters in the Magistrates Court appears to be less for cases commenced since the reforms.

[388] As noted earlier, caution must be exercised in this area, but these trends give cause for optimism that the reforms will improve the flow of matters through the Magistrates Court.

[389] As to trends in other areas, such as pleas entered in the Magistrates Court, and committals for sentence and trial, the inability to draw any conclusions at this time is explained in JPD's reports and discussed earlier [129] - [144].

[390] The impact of the reforms in the superior courts cannot be assessed at this time. Very few matters have reached those courts and proceeded to trial. However, in my view it can be assumed safely that the case statement process will assist the trial court in the conduct of trials. In addition, early statistics suggest that fewer matters are now being withdrawn in the District Court which is a positive sign that the processes in the Magistrates Court might be working as intended in this regard.

[391] As to trial lists, and over listing, it is too early to draw any conclusions or to discern any trends.

[392] In reaching these conclusions I am mindful of the point made by the DPP that some of the suggestions advanced in submissions are tantamount to returning to the old system. As I have said, in my view the underlying concept of the major indictable reforms is sound and it would be a backwards step to revert to the old system.

DPP/SA Police - Roles and Resourcing

[393] As discussed earlier, I have been mindful of the separation of roles and responsibilities between the DPP and SA Police. There is a fundamental separation which should be maintained.

[394] The separation of roles does not mean, however, that the DPP should not have an active role from the outset in giving advice with respect to charges and evidence. In my view the current system achieves this purpose to a degree and would be enhanced by the changes I have suggested.

[395] In this context, if the changes I have recommended are adopted, the DPP believes it will require additional resources. There may also be resource implications for SA Police. I emphasise that I have not endeavoured to assess the extent of the financial implications of my recommendations, nor to balance the financial implications against gains in other areas.

[396] Although I have not endeavoured to undertake a financial analysis of my recommendations, in my view the following observations are appropriate:

- Speaking generally, efficiencies in the early stages of proceedings possess the potential to result in significant savings later in the criminal justice processes.
- Early resolution is the obvious means of achieving major savings in all respects.
- At the other end, significant savings will be achieved if over-listing of trials is reduced; if late prosecution withdrawals are avoided; and if the efficiency of trials is improved through measures such as the narrowing of issues and agreements

concerning facts.

- Understandably, SA Police are concerned about the impact of diverting resources to preparation of evidence for court proceedings. However, if police investigators act diligently during the adjudication period, and early in preparation of the preliminary brief, the number of matters resolved is likely to increase. Work undertaken in the early stages is likely to be carried out more efficiently than if it is delayed and should reduce future investigatory time if matters do not resolve.
- Similarly, while the resource concerns of the DPP are also understandable, experience has demonstrated that early involvement of the DPP produces positive results which reduce future demands on DPP personnel. Further, if the DPP solicitor who undertakes an adjudication remains responsible for the file through the progress check, assessment of preliminary brief, charge determination and beyond ("a docket system"), efficiencies will be improved and duplication of effort avoided.

Not Recommended

[397] In view of the criticisms and suggestions advanced in submissions and discussions, I have endeavoured to identify the main areas in which I disagree with the submissions. In broad summary, I do not recommend:

- The introduction of any legislative direction or guidelines with respect to the test for a charge determination or the standards of the preliminary and committal briefs.
- Any legislative definition or prescription concerning early discovery or the duty of discovery owed by SA Police.
- Legislative sanctions on the prosecution for failure to comply with time limits or court orders.

- "Uncoupling" sentence reduction tiers from various stages of the processes in the Magistrates Court.
- Amendments to legislation concerning the DPP giving directions to SA Police.
- The introduction of priority procedures in respect of cases involving violence committed in domestic circumstances or in sexual assault cases other than those involving child complainants.

Encouraged

[398] As is clear from this Report, there are areas that I have not investigated fully and involve internal DPP/SA Police procedures. In this context I encourage the following:

- An appropriate type of "docket system" within the office of the DPP which, in the majority of cases, enables the same DPP officer to have the conduct of a file from adjudication through to committal for trial and the preparation of the case statement.
- Clarification of negotiating procedures involving SA Police.
- In the absence of abuse of process, SA Police responding promptly to requests for relevant material made between the first and second appearances.
- The DPP being prepared to make charge determinations notwithstanding minor or technical deficiencies in preliminary briefs, which can readily be rectified during preparation of the committal brief.
- The DPP, having returned a brief, in appropriate cases being prepared to consider additional evidence and make a charge determination within the original four week period allowed for making the determination; or seeking only a short adjournment of the second appearance to make the determination.
- The Legal Services Commission ensuring that practitioners are adequately compensated for involvement in progress check appearances and preparation of

case statements.

Recommendations

[399] In arriving at the recommendations that follow, I have endeavoured to recognise and maintain the distinction between the roles of the DPP and SA Police. I have also endeavoured to avoid creating a system which is unduly complicated or lacking in the necessary flexibility required to meet the infinite variety of circumstances. However, to the extent that I recommend legislative prescription and court oversight, in my opinion these are necessary adjustments in order to avoid excessive delays which are prone to occur if parties are left entirely to their own devices.

[400] I recommend the following adjustments to the processes introduced by the major indictable reforms:

1. The DPP should undertake adjudications in all matters involving major indictable charges.
2. In arrest cases, at the "initial appearance" before a Magistrate, unless the Magistrate is persuaded otherwise, the matter should be adjourned for at least seven days to allow the adjudication to occur:
   - Investigators should actively pursue investigations and the gathering of evidence following the initial appearance and, at the first appearance, SA Police will be expected to identify evidence gathered to date.
   - Not less than four days before the "first appearance", all relevant material obtained in the investigation must be provided by SA Police to the DPP and the accused.
   - Not less than two days before the first appearance the DPP must advise SA Police and the accused of the DPP's adjudication as to the charge, and advise SA Police as to evidence likely to be required and the period which the DPP recommends SA Police seek between the first and

second appearances.

3. Appropriate timing adjustments should be made in report cases.

4. These administrative arrangements for the adjudication process should be bolstered by Rules of Court or practice directions.

5. Subject to appropriate adjustments of other times, Rule 20.01 of the Magistrates Court Rules should be amended to require the DPP to advise the Court and the accused of the specific charge or charges to be laid not less than seven days before the second appearance.

6. In cases other than those involving child complainants in sexual assault cases, a time limit of eight weeks should be prescribed as the standard period following the first appearance for service of the preliminary brief upon the DPP and the accused; and a further four weeks should be prescribed for the making of the charge determination.

7. The court should be empowered to enlarge or contract these periods.

8. If a period of longer than eight weeks is fixed for the provision of the preliminary brief to the DPP and the accused, at the first appearance the court should fix a date for a progress check before a "judicial registrar" unless persuaded that such a check is not appropriate in the particular circumstances. The standard date for the check appearance should be prescribed as about halfway between the first and second appearances.

9. At least four days before the progress check appearance, SA Police must provide all relevant material obtained to date to the DPP and the accused.

10. At the progress check appearance,[34] SA Police should be required to advise

[34] The accused should also be required to attend the progress check hearing.

the court of matters such as the progress or otherwise of an investigation and whether the date for the preliminary brief is likely to be met.

11. The judicial officer presiding at the progress check hearing should be empowered to amend the dates for the preliminary brief and charge determination.

12. Rule 20.01 of the Magistrate Court Rules should be amended to require the DPP to advise the court and the accused of the nature of the charge the DPP has determined should be laid, not just the fact that a decision has been made.

13. The DPP should also advise in writing if the DPP has decided not to make a charge determination for a major indictable offence.

14. Subject to other timing amendments, Rule 20.01 should be amended to require the advice to be given seven days prior to the second appearance.

15. The DPP and legal practitioners acting for accused persons should be encouraged to confer after the initial appearance and prior to adjudication and, unless the court otherwise orders, required to confer:

    - prior to the progress check;
    - after receipt of the preliminary brief and before the charge determination; and
    - after receipt of the committal brief and prior to the answer charge hearing.

16. Following each of the mandatory conferences, at the next court hearing the parties should be required to report to the court as to the result of the

conference.[35]

17. The DPP, rather than SA Police, should appear at all second appearances and thereafter:

18. If SA Police have been unable to meet the date for provision of the preliminary brief, SA Police should:

    1) Not later than the date fixed for the provision of the preliminary brief, provide to the DPP and the accused all relevant material gathered to date; and

    2) Not later than the date fixed for the provision of the preliminary brief, report that fact to the DPP and explain the reasons for the delay and the time likely to be needed to complete the brief.

19. Priority be given to sexual assault cases involving child complainants. In such cases the standard period for service of the preliminary brief be prescribed as six weeks and, if longer than six weeks is fixed, the progress check system earlier recommended apply. Other periods through to committal should be reduced.

20. Amendment to s 123(4)(b) to remove the words “in accordance with s 34 of the *Evidence Act 1929*”.

21. Amendment to the legislation to provide, specifically, that immediately following a plea of guilty the offender is to be committed to the superior court for sentence.

22. Amendment to the legislation to provide that, following committal for

[35] Anything said at such conferences, or at court hearings concerning such conferences, generally should not be admissible, but consideration should be given to limited exceptions. For example, if, for the purpose of sentencing, the accused subsequently seeks to establish that an offer to plead was made during a conference.

sentence, within an appropriate time after service by the DPP of a Crown statement of facts, the offender is required to respond to the Crown statement of facts, specifically identifying any area of dispute.

23. If any of the facts asserted by the Crown are disputed by an offender, the DPP and the offender's legal representative be required to confer and, if possible, to present to the Court an agreed statement of facts.

24. With a view to expediting matters committed for sentence, consideration be given to shortening the period for provision of the prosecution summary of facts for sentence pursuant to Rule 49A; and to other aspects of the processes in the sentencing courts.

25. Amendments to ss 120 and 123 of the CPA to incorporate flexibility with respect to the timetable between committal for trial and arraignment.

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Brian Martin AO QC

13 September 2019

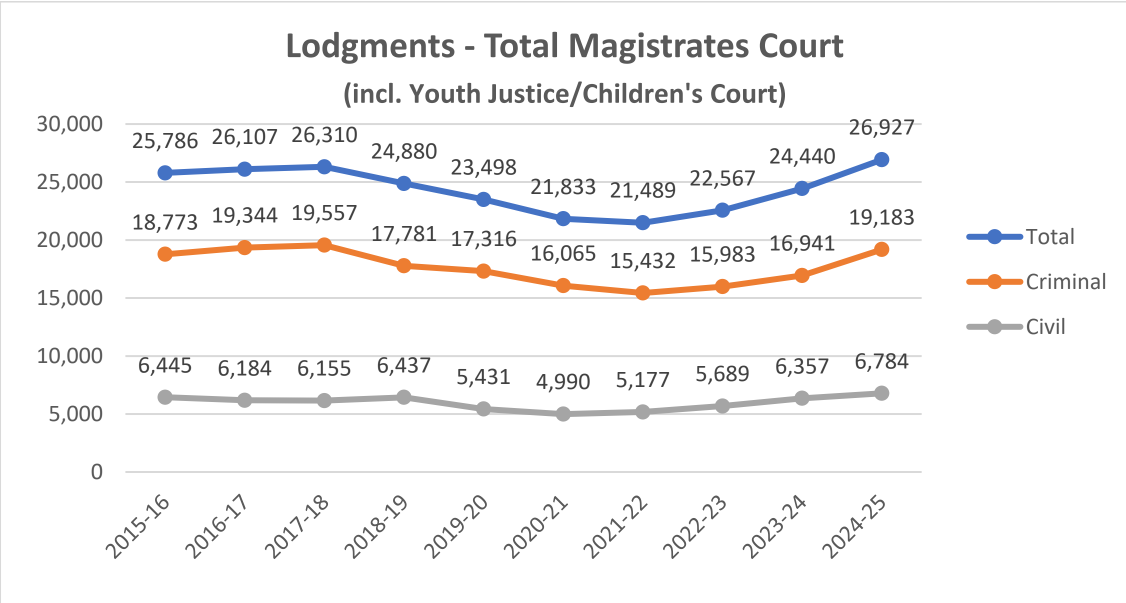
ANNEXURE 5

Productivity Commission, Report on Government Services 2026 Data, graphs and discussion

Magistrates Court

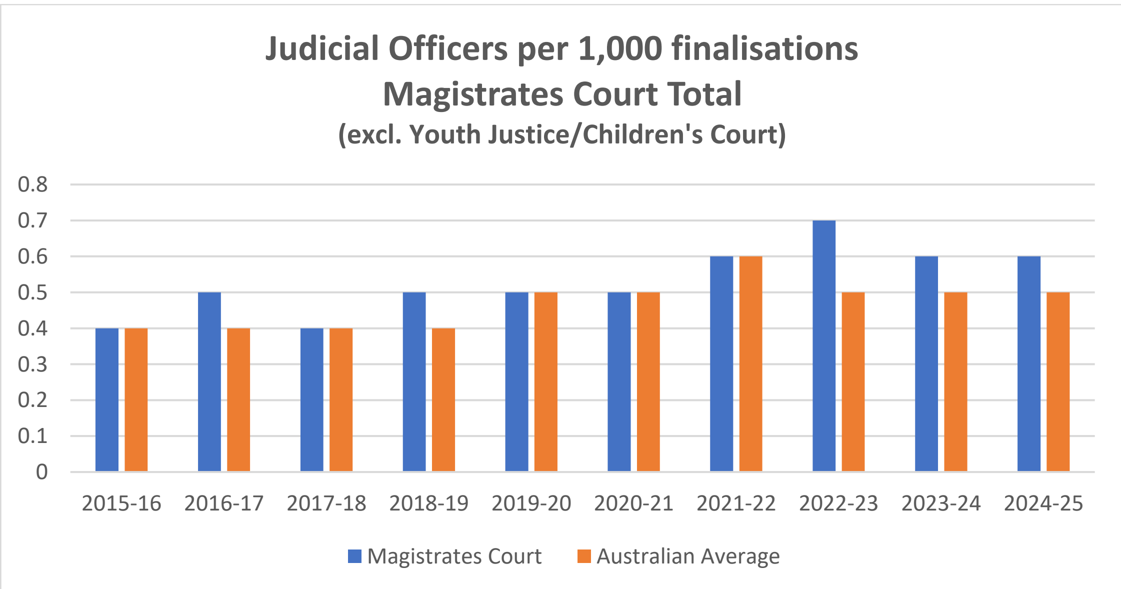
Lodgments

In the Tasmanian Magistrates Court, the number of lodgments over the last decade has remained relatively steady. In 2015/16 there were 25,786 lodgments (including the Youth Justices/Children's Court). In 2024/25 there were 26,927 lodgments. This equates to a 4.42 per cent increase.



Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.1 and 7A.2.

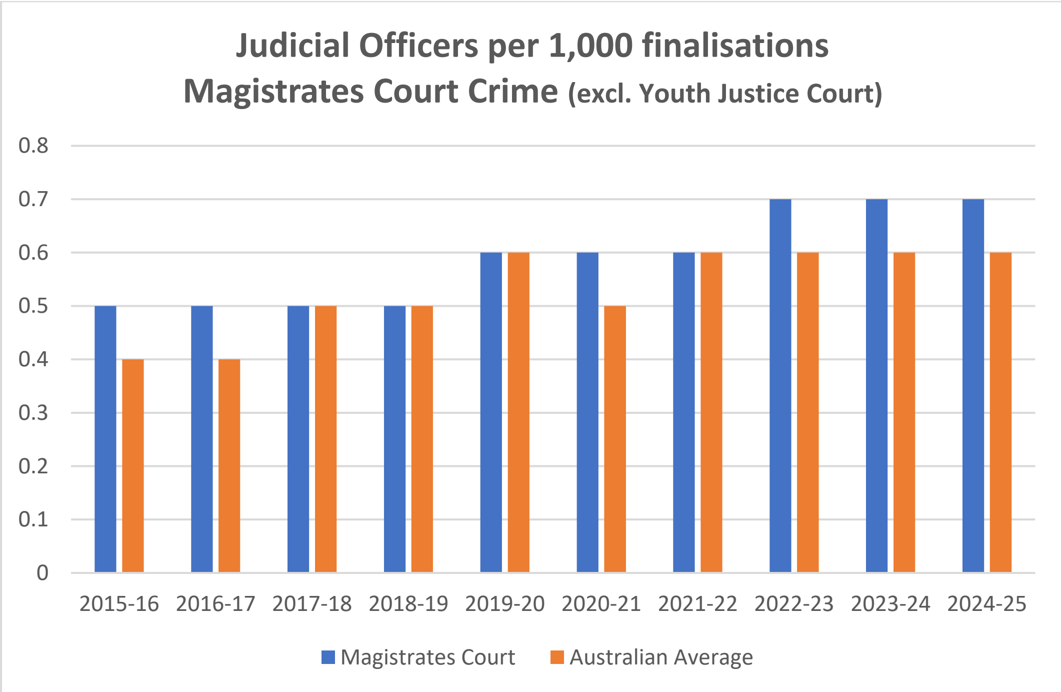
Judicial officers per finalisation



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

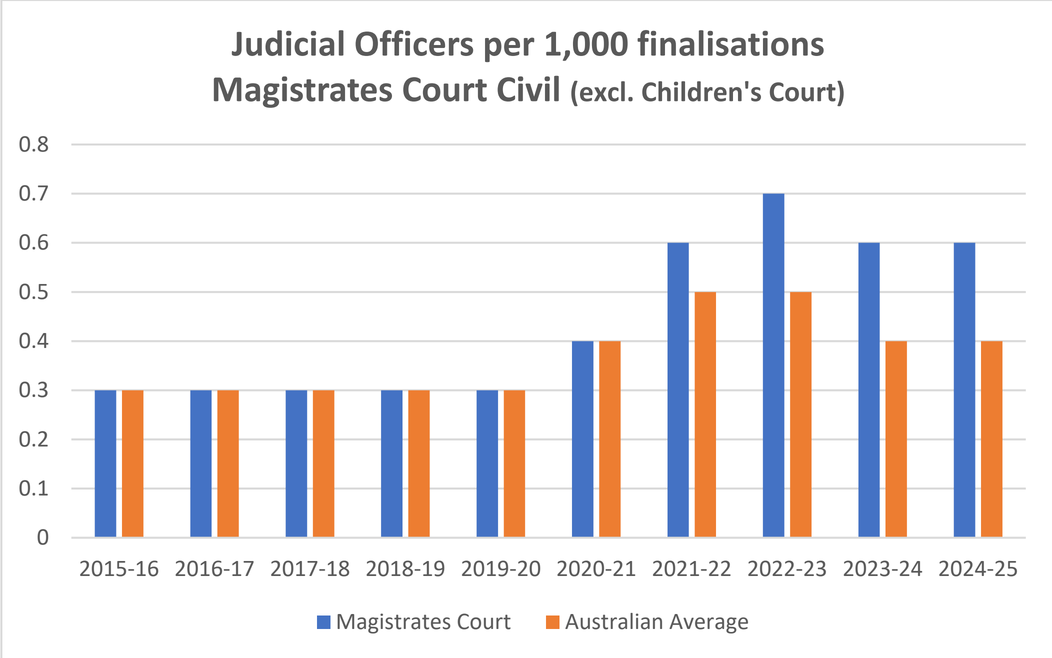
The number of FTE judicial officers per 1000 finalisations in the Magistrates Court can also be broken down by criminal and civil finalisations respectively.

Magistrates Court – criminal – Judicial Officers per finalisation
For criminal finalisations, in 2024/25 Tasmania utilised 0.7 FTE judicial officers per 1000 finalisations in the Magistrates Court. This was above the national average of 0.6 FTE judicial officers per 1000 finalisations in the Magistrates Court.



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

Magistrates Court – civil – judicial officers per finalisation
For civil finalisations, in 2024/25 Tasmania employed 0.6 FTE judicial officers per 1000 finalisations in the Magistrates Court. This was above the national average of 0.4 FTE judicial officers per 1000 finalisations in the Magistrates Court.

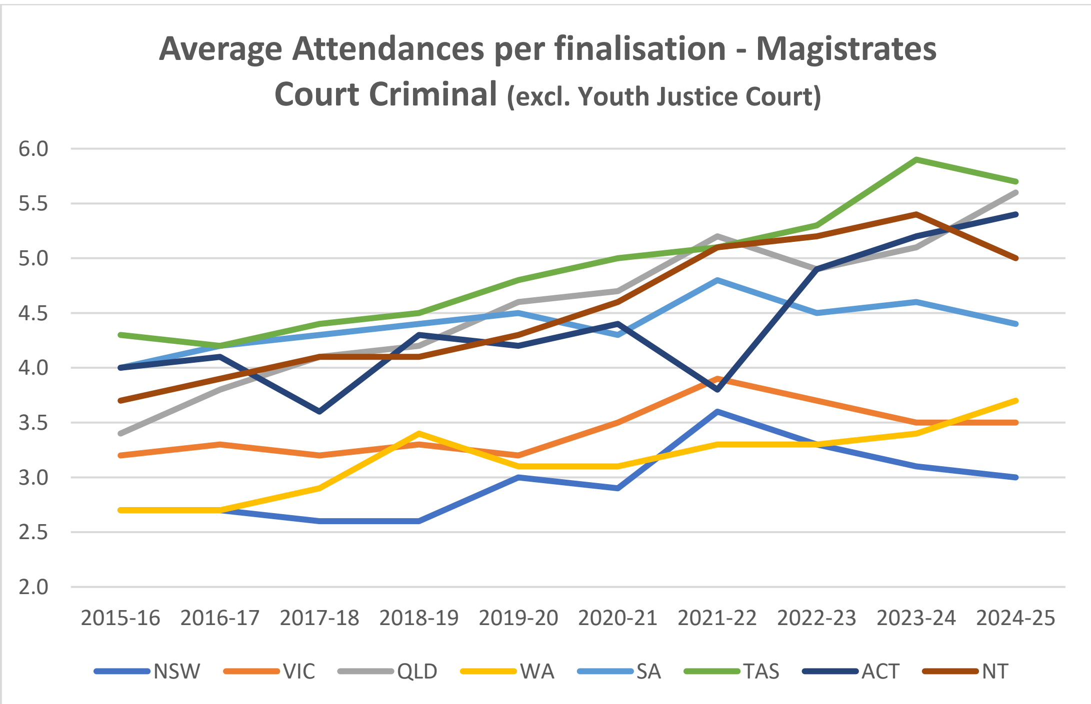


Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

Attendances

Magistrates Court - criminal

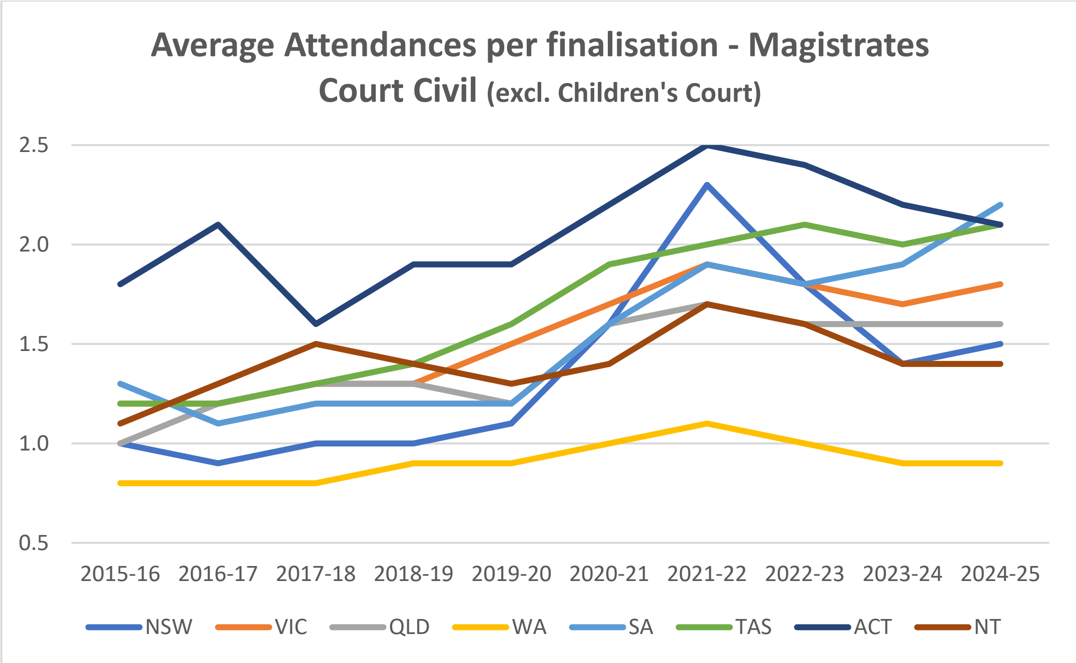
In the Magistrates Court, there are on average 5.7 attendances per finalisation for criminal matters, a 33 per cent increase from a decade ago. As well, over the last decade, Tasmania has consistently had the highest number of attendances per finalisation for criminal matters in the Magistrates Court (excluding the Children's Court) of any jurisdiction in Australia.



Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

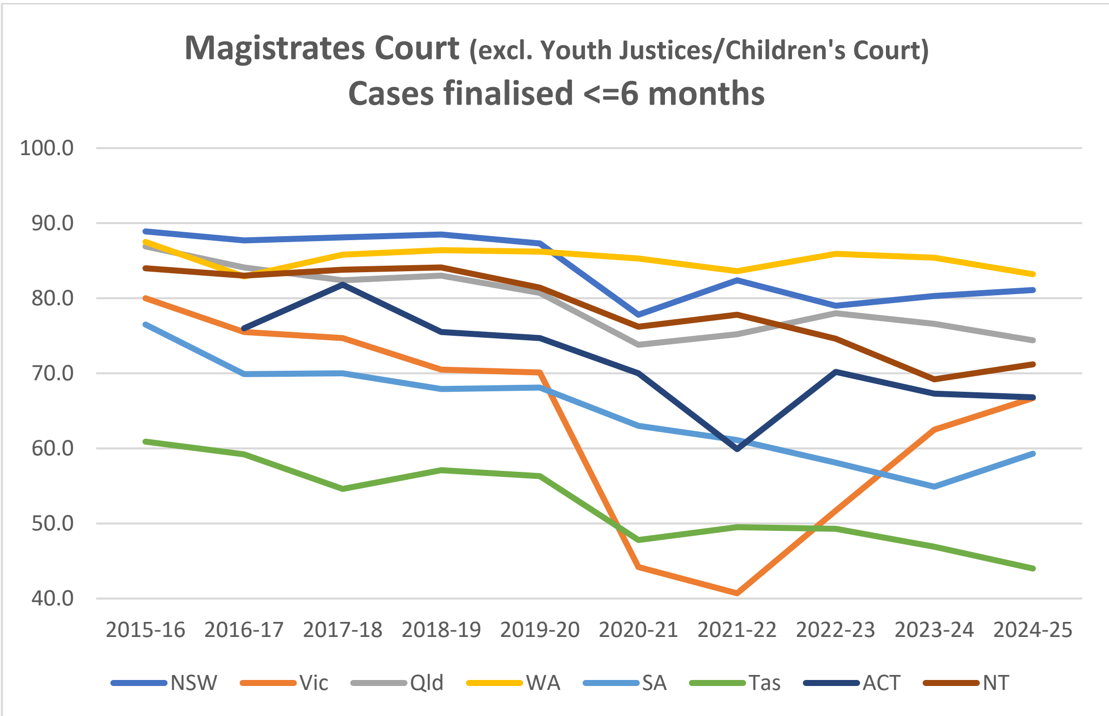
Magistrates Court - civil

In the Magistrates Court civil jurisdiction, Tasmania has 2.1 attendances per finalisation, the equal second highest number of attendances per finalisation in Australia. South Australia has the highest number of attendances per finalisation at 2.2.



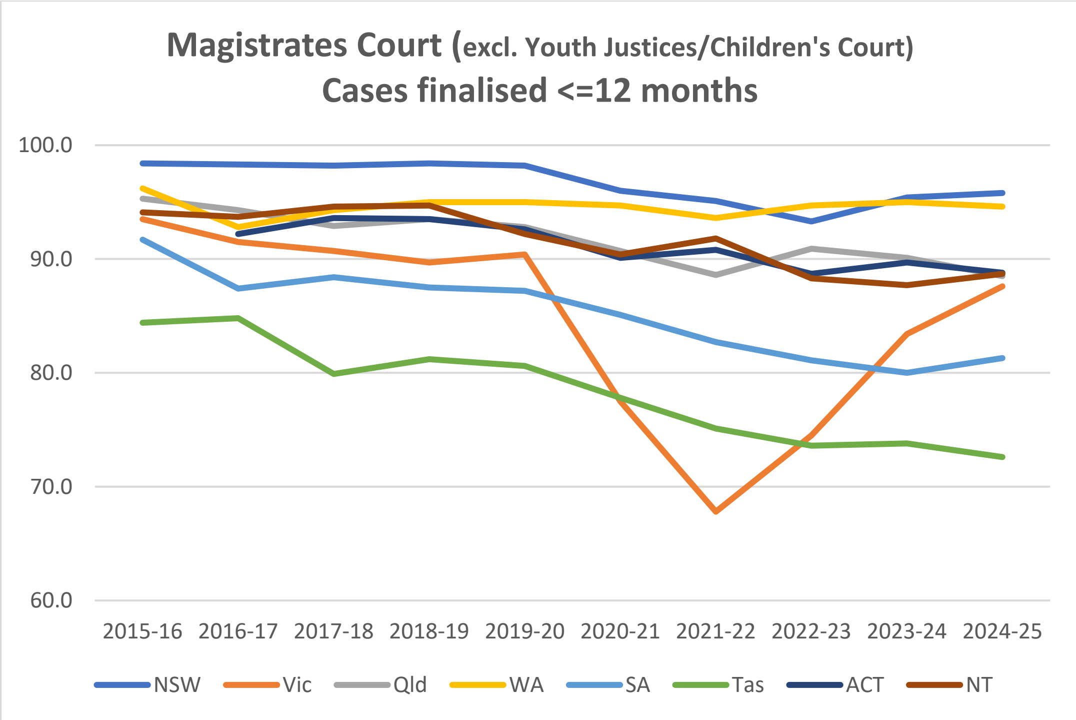
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

Finalisations



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.22

As well, the number of cases finalised within 12 months in Tasmania's Magistrates Court has dropped from 84.4 per cent to 72.6 per cent.

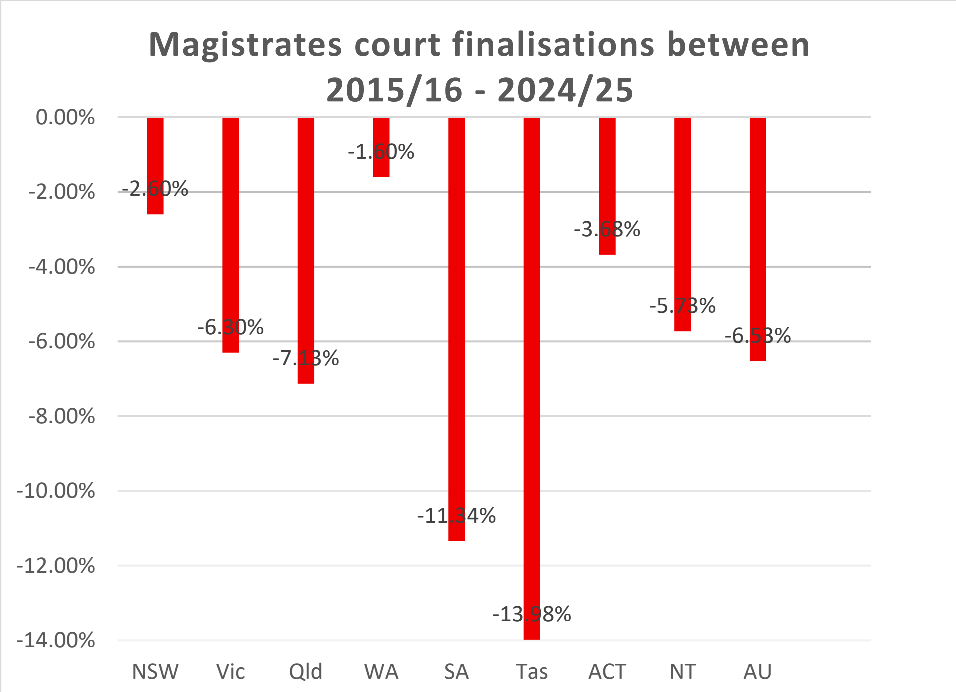


Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.22

The data noted above is particularly noteworthy because, but for the Victorian outlier in 2020-21 and 2021-22, Tasmania has had the worst Magistrates Court finalisation rates of any State or Territory in Australia.[1]

Whilst it must be acknowledged that over the last decade, Magistrates Courts in all States and Territories have experienced declines in the number of cases finalised within 12 months, the decline has been most significant in Tasmania as the following graph highlights.

[1] The Victorian outlier in 2020-21 and 2021-22 was the result of COVID-19 lockdowns and other restrictions which impacted in-person court appearances and resulted in online-only cases able to be heard: Magistrates' Court of Victoria, *Annual Report 2021–22* (Report, 2022) https://www.mcv.vic.gov.au/news-and-resources/court-data Also see Bridget Rollason, 'Victorian courts plagued by delays as tens of thousands of criminal cases wait to be heard', *Australian Broadcasting Corporation*, 7 February 2023. As found at https://www.abc.net.au/news/2023-02-08/victorias-court-backlog-as-thousands-of-cases-delayed/101942714 (accessed 12 April 2025).

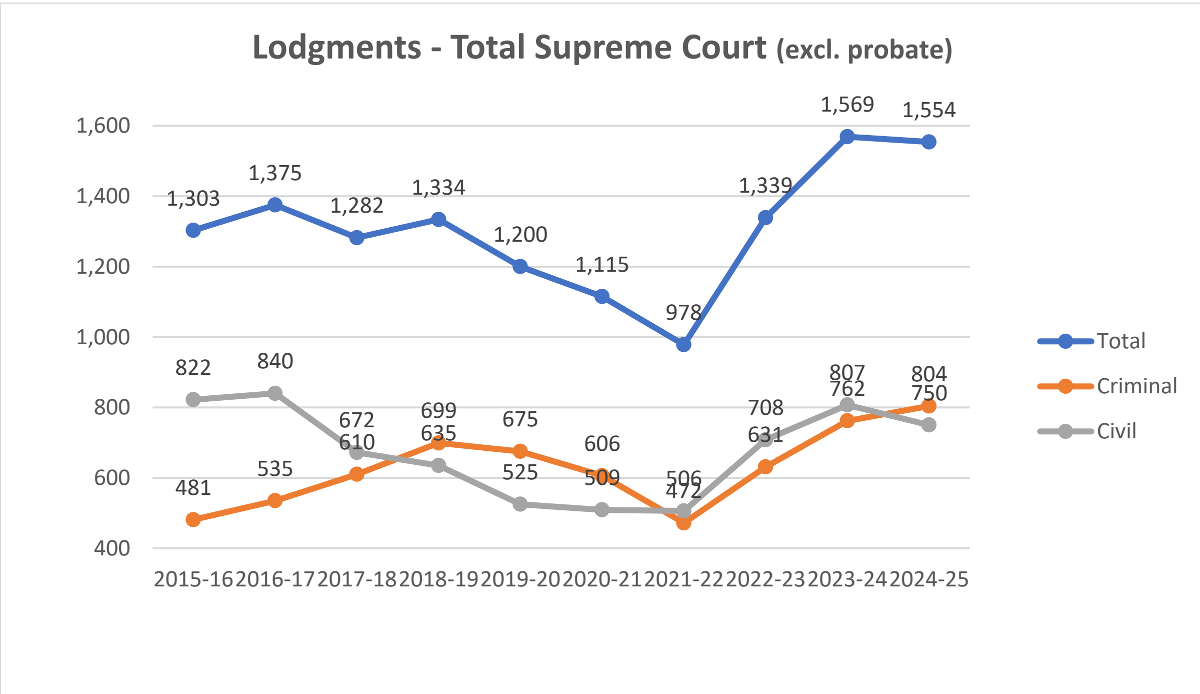


Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.22

Supreme Court

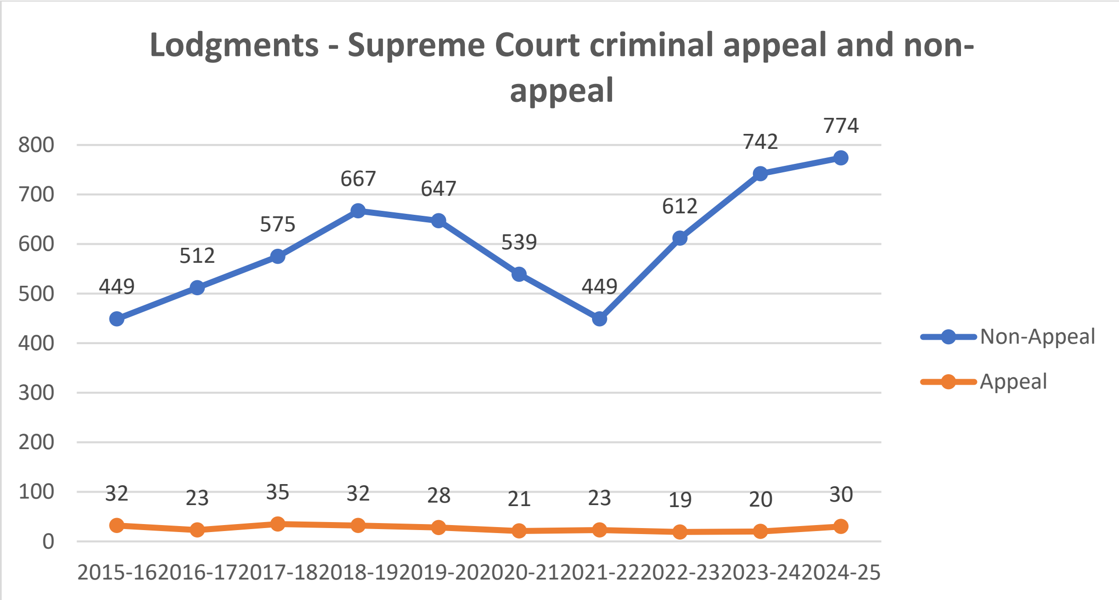
Lodgments

In the Supreme Court, the number of lodgments over the last decade has increased by almost 20 per cent (19.26%). In 2014/15 there were 1303 lodgments (excluding probate). In 2024/25 there were 1,554 lodgments (excluding probate).

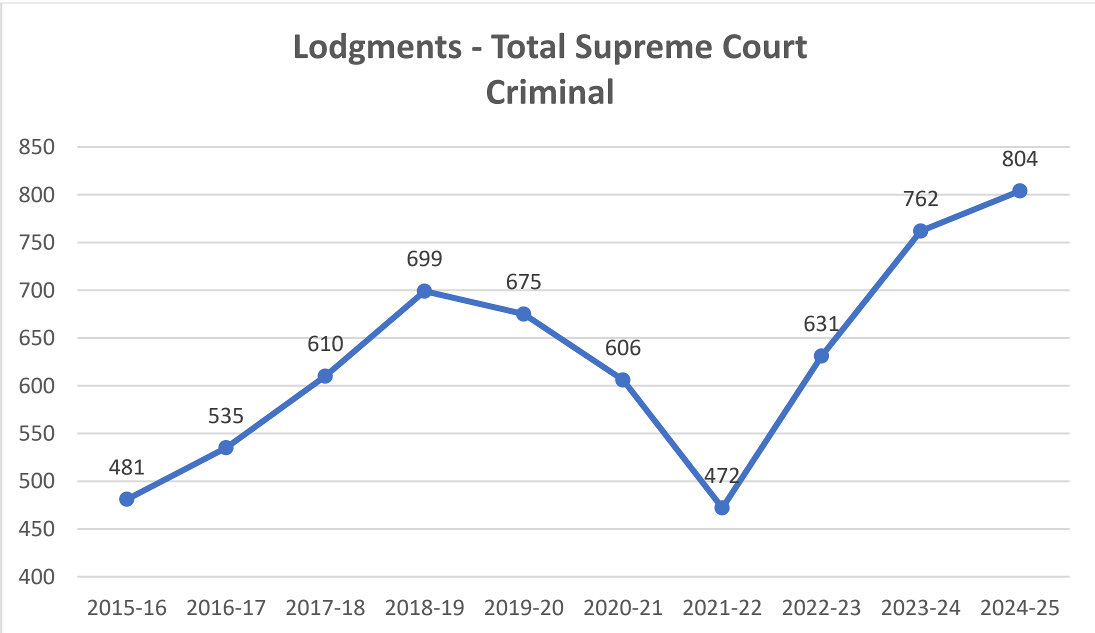


Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.1 and 7A.2.

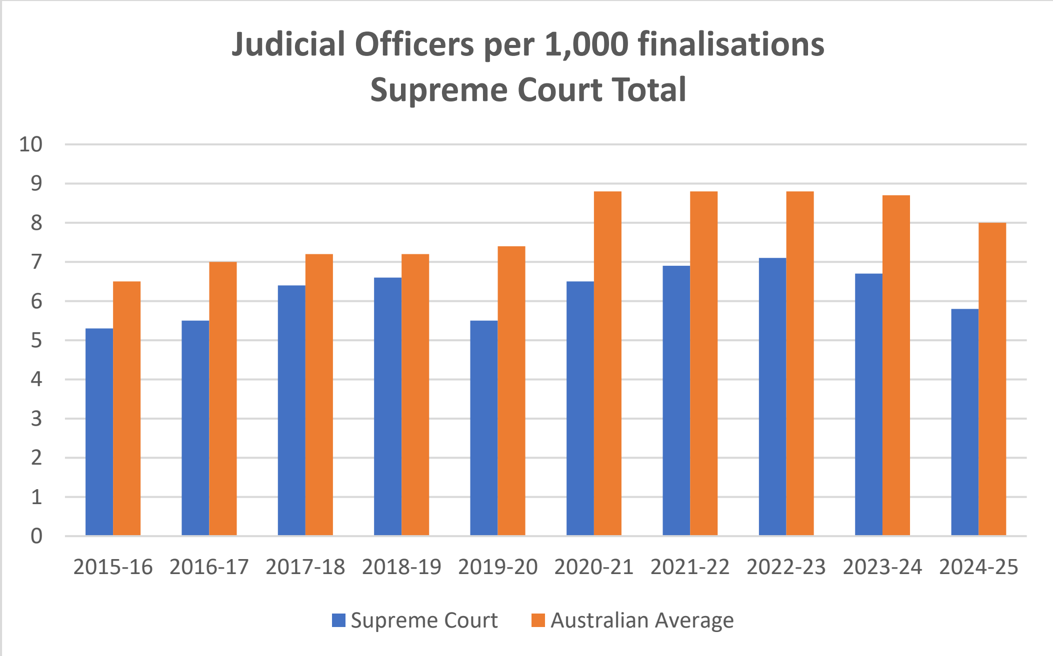
The increase in lodgments is largely attributable to more criminal matters being lodged in the Supreme Court, particularly since 2021-22. In the three years between 2021-21 and 2024-2025 the number of lodgments in the Supreme Court increased by 59 per cent.



Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.1.



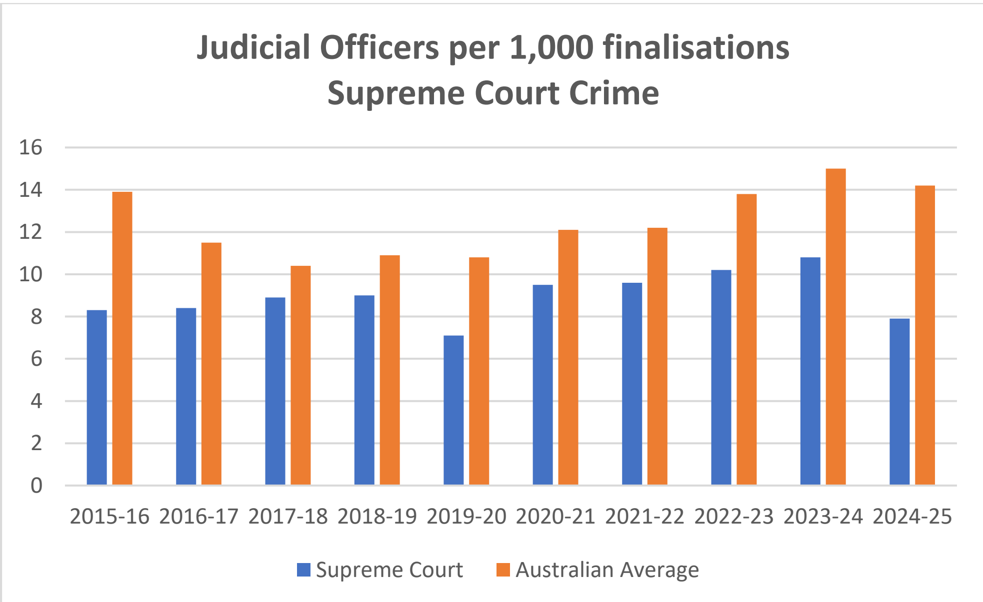
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.1.



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

Supreme Court - criminal

n the criminal jurisdiction, the number of FTE judicial officers per 1000 criminal finalisations has decreased by 5 per cent (4.81%) from 8.3 in 2015/16 to 7.9 in 2024/25. The Supreme Court's 7.9 FTE judicial officers per 1000 finalisations is also 44 per cent (44.37%) less than the Australian average of 14.2 FTE judicial officers per 1000 criminal finalisations.

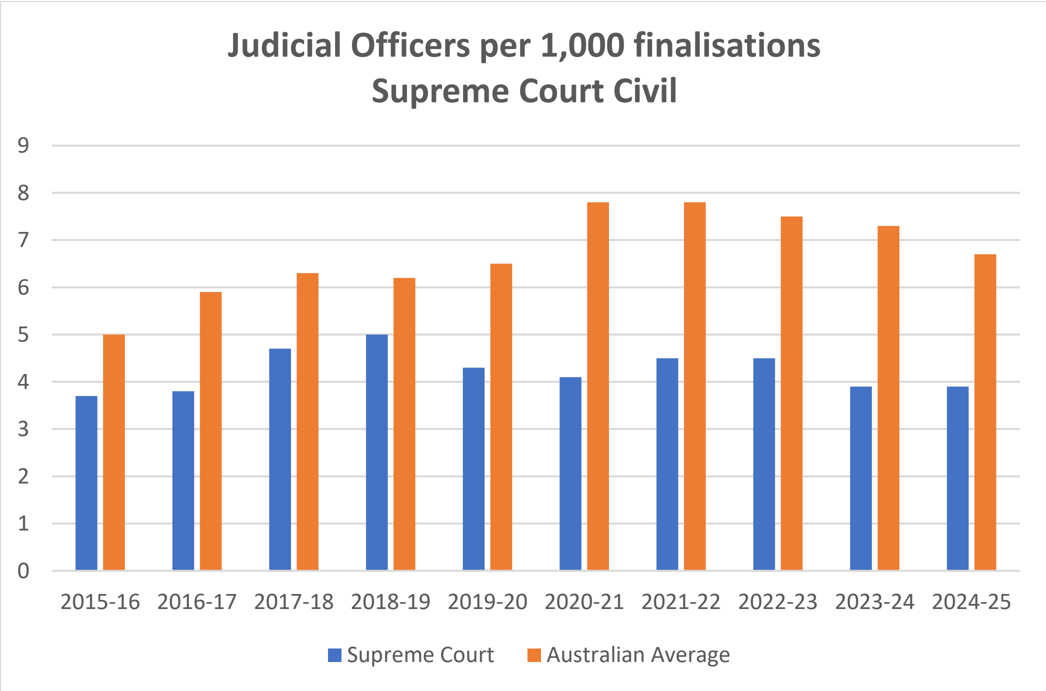


Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

Supreme Court - civil

In the Supreme Court's civil jurisdiction, the number of FTE judicial officers per 1000 finalisations has increased by 5 per cent over the last decade, from 3.7 FTE judicial officers per 1000 finalisations in

2015/16 to 3.9 in 2024/25. Australia wide, the average increase in FTE judicial officers per 1000 civil finalisations was 34 per cent, from 5.0 in 2015/16 to 6.7 in 2024/25.

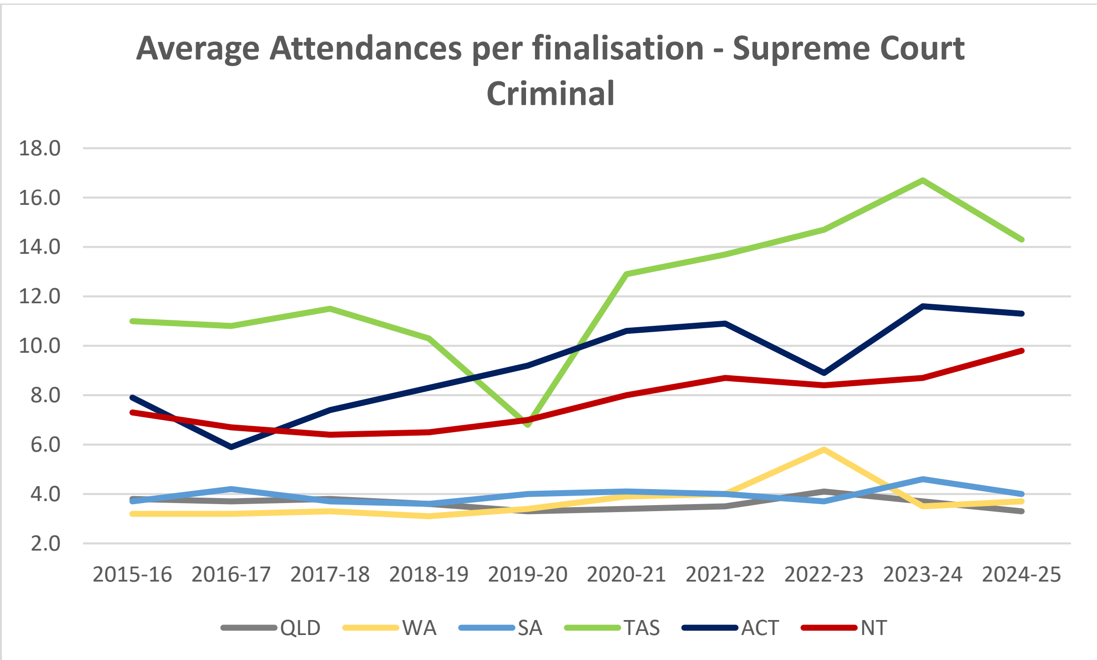


Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

Attendances

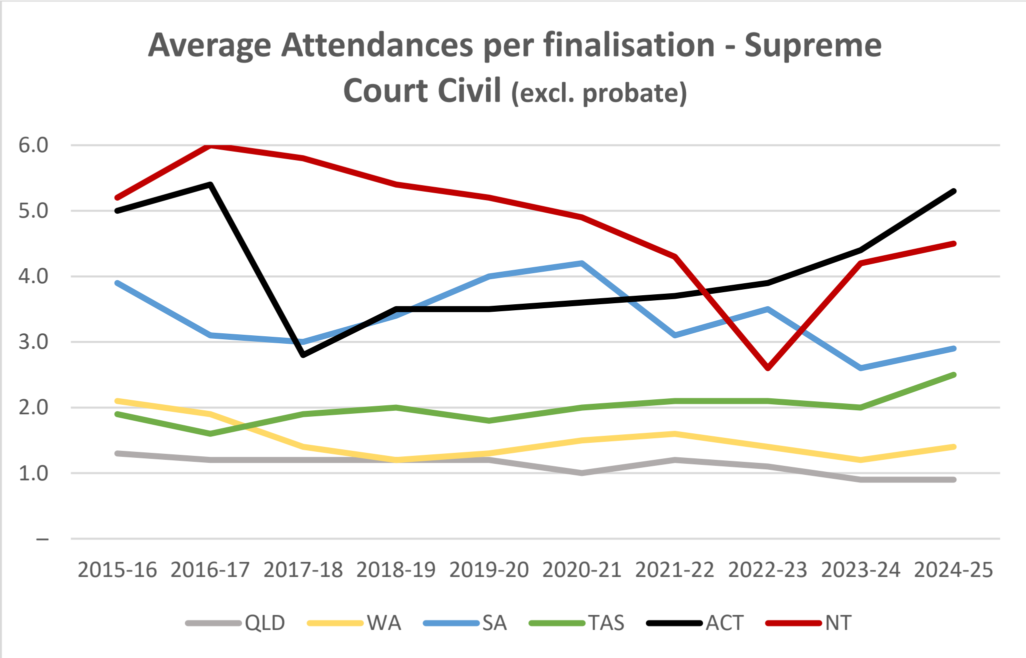
Supreme Court - criminal

In the Tasmanian Supreme Court there is an average 14.3 attendances per finalisation for criminal matters. This is the highest in Australia and a 30 per cent increase compared with a decade ago. Tasmania also had the highest number of attendances a decade ago.



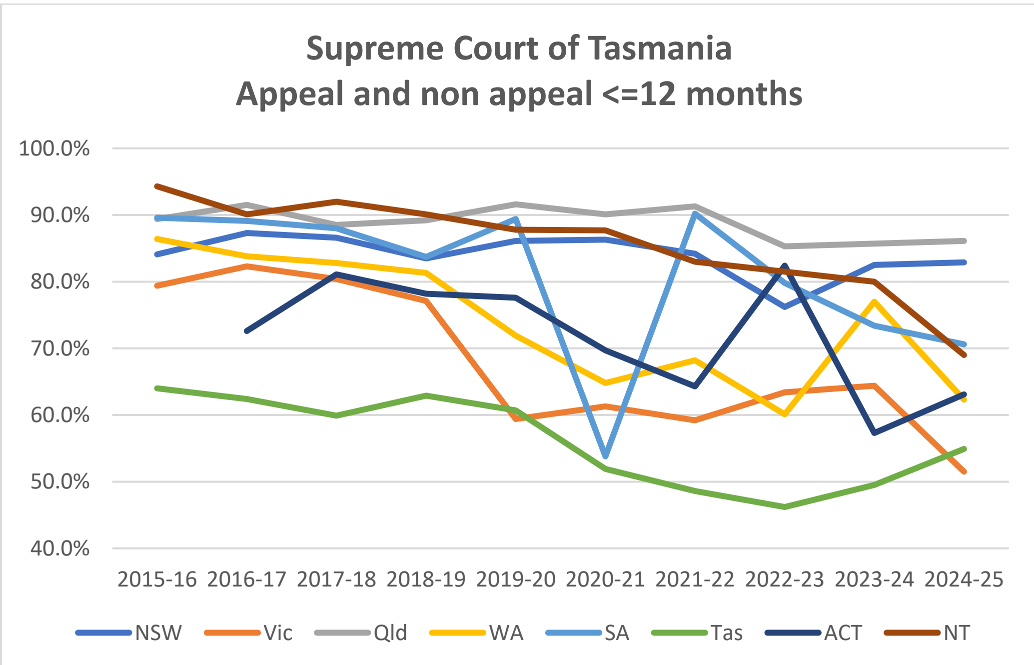
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

Supreme Court - civil
In the Supreme Court civil jurisdiction, Tasmania has an average 2.5 attendances per finalisation,



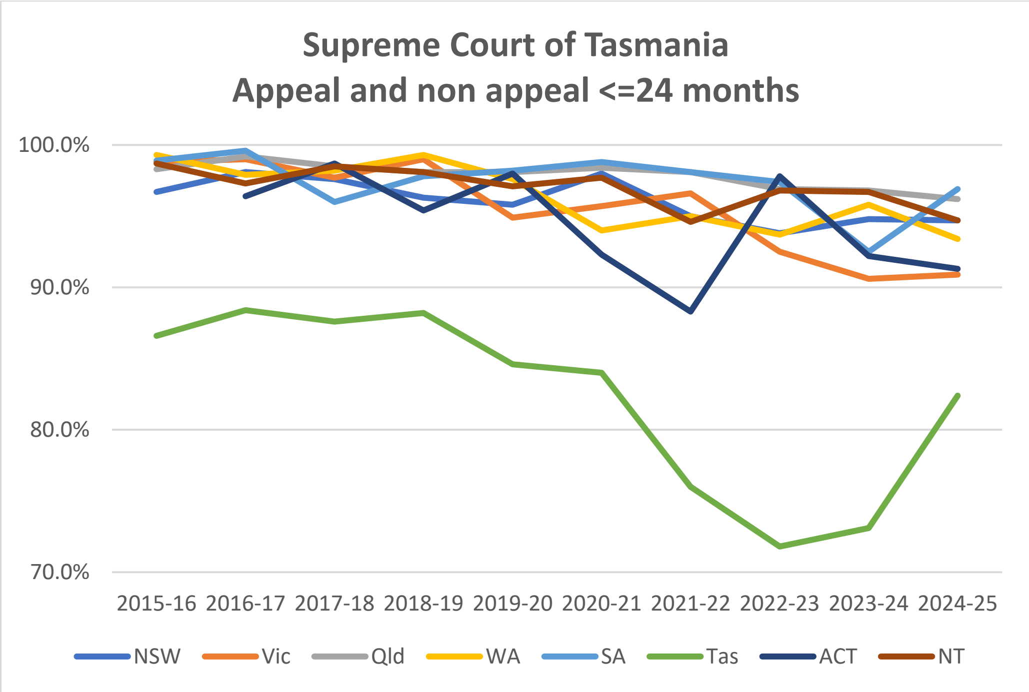
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

On time case processing
Tasmania's Supreme Court consistently ranks amongst the jurisdictions with the lowest finalisation rates within 12 months in Australia. In 2015/16, 64 per cent of Tasmanian cases were finalised within 12 months. In 2024/25 it had dropped to 55 per cent.



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.22

The data is particularly glaring for Supreme Court cases finalised within 24 months as the following graph highlights. In 2015/16, 87 per cent of Tasmanian cases were finalised within 12 months. In 2024/25 it had dropped to 82 per cent.



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.22

SUMMARY – SUPREME COURT

While there has been a small decrease over the last decade in the number of appeals to the Full Court/Court of Criminal Appeal (-6%), and civil lodgements (-2%) there has been a 56% increase in criminal (non-appeal) lodgements. The number of FTE judicial officers per 1000 criminal finalisations has *decreased* by 5 per cent (-4.81%) from 8.3 in 2015/16 to 7.9 in 2024/25. In the civil jurisdiction, the number of FTE judicial officers per 1000 finalisations was 3.7 FTE judicial officers per 1000 finalisations in 2015/16 compared to 3.9 in 2024/25. The average 14.3 attendances per finalisation for criminal matters. This is a 30 per cent increase compared with a decade ago. Unsurprisingly, this has resulted in Tasmania's on time case processing rates consistently ranking amongst the worst in Australia.

<u>Children's/Youth Justice Court</u>

The Productivity Commission data refers to 'Children's Courts' for both criminal and civil matters. However, in Tasmania the Youth Justice Court handles criminal offences allegedly committed by young people under the age of 18,[2] whereas the Children's Court handles child protection matters, such as care and protection orders and assessment orders.[3]

Over the last decade there has been a 38 per cent increase in lodgments in the Youth Justice/Children's Court although the increase has been solely in the Youth Justice Court. In the Children's Court, there

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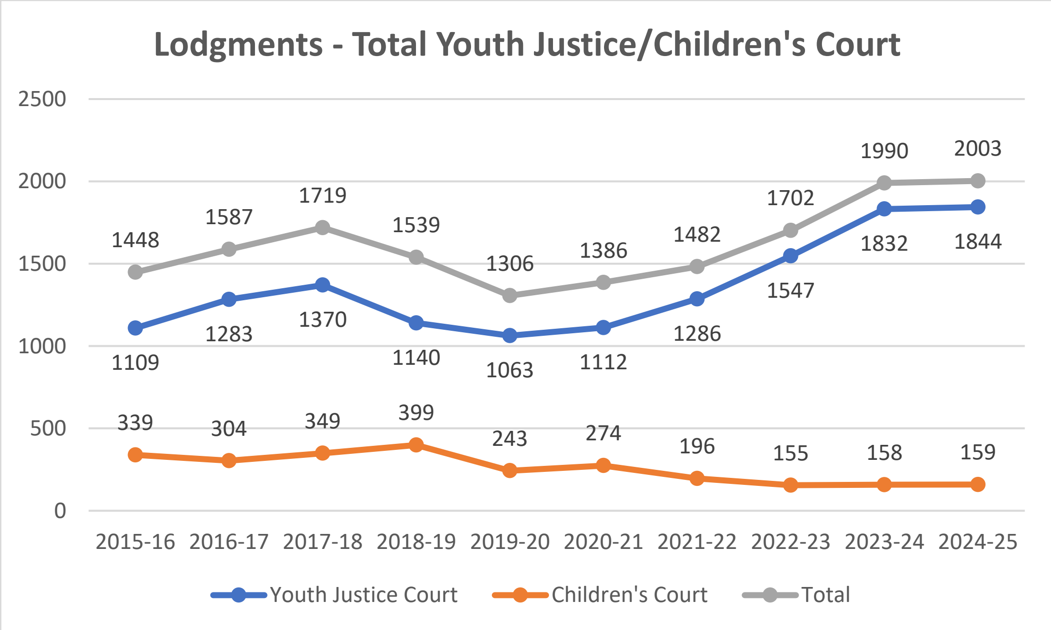
[2] Magistrates Court of Tasmania, 'Going to Court as a young person. As found at https://www.magistratescourt.tas.gov.au/going_to_court/young_offender (accessed 1 June 2026).

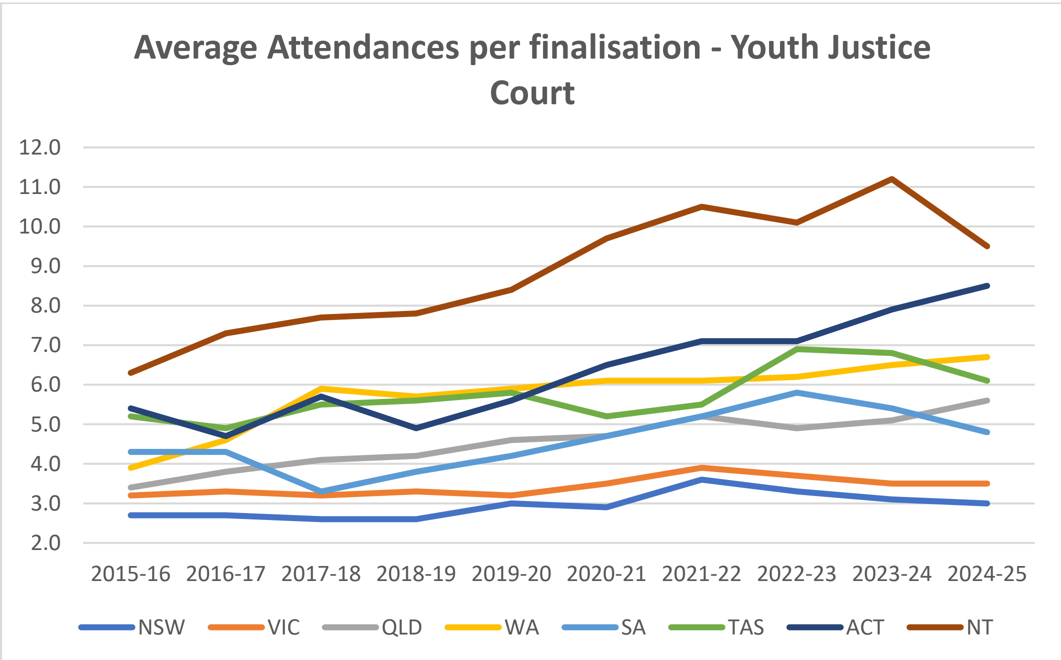
[3] Magistrates Court of Tasmania, 'Children's Court'. As found at https://www.magistratescourt.tas.gov.au/about_us/childrens_division (accessed 1 June 2026).

has been a 53 per cent decrease (from 339 lodgments in 2015/16 to 159 in 2024/25 whereas in the Youth Justice Court there has been a 66 per cent increase from 1109 in 2015/16 to 1844 in 2024/25.



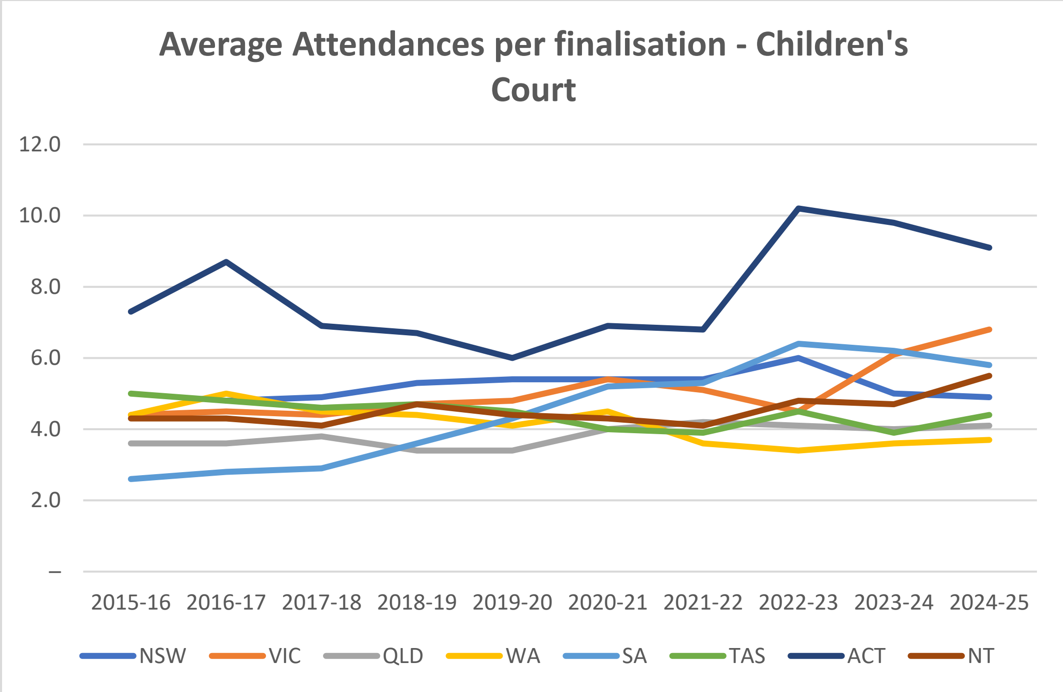
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.1 and 7A.2.

Attendances in the Youth Justices Court have increased from 5.2 in 2015/16 to 6.1 in 2024/25 however Tasmania sits in the middle when compared against other Australian jurisdictions.



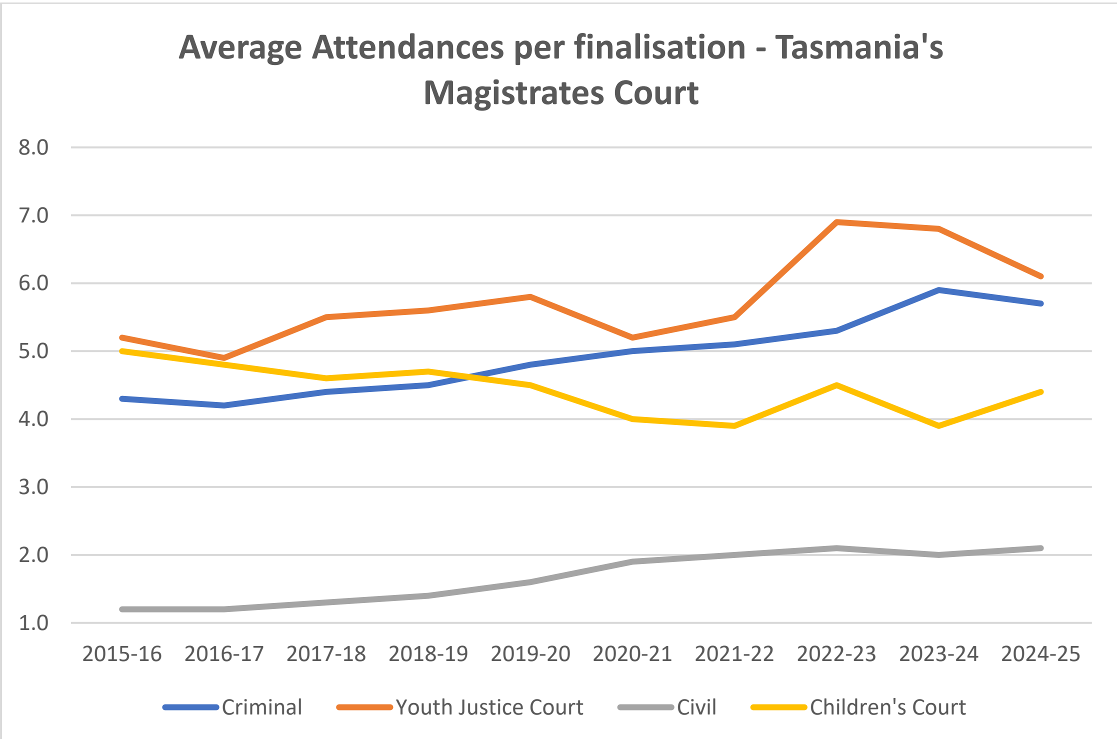
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

Attendances in the Children's Court have decreased from 5.0 in 2015/16 to 4.4 in 2024/25 with Tasmania sitting in the middle when compared against other Australian jurisdictions.



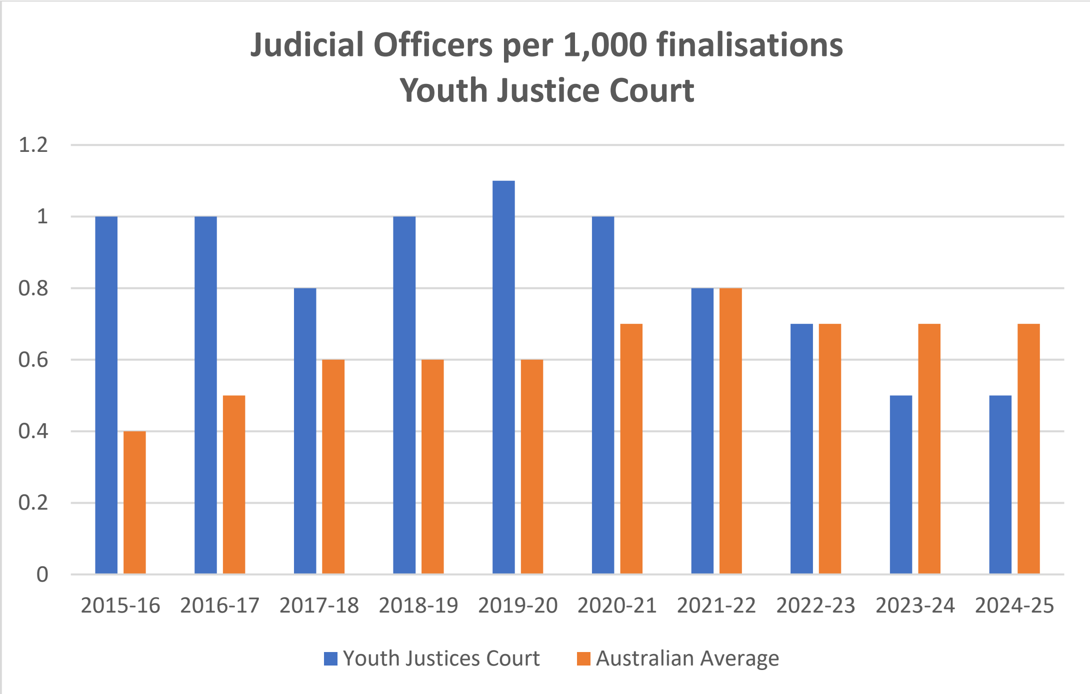
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

Despite attendances in Tasmania's Youth Justice/Children's Court being comparable to other Australian jurisdictions, they remain high when compared against attendances for other Tasmanian Magistrates Court matters.



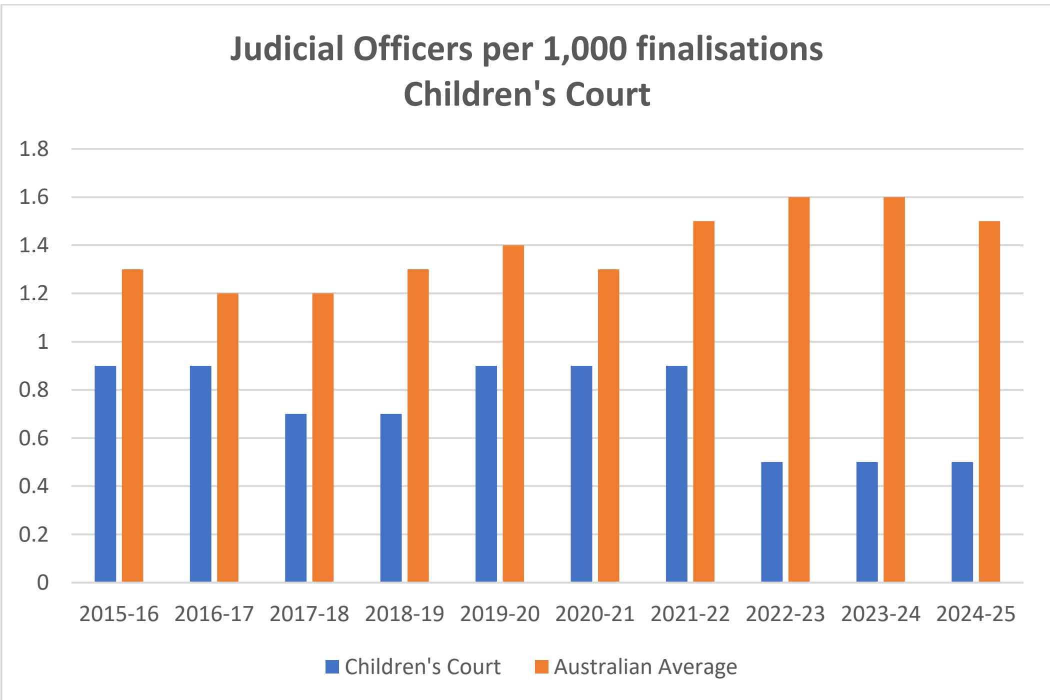
Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

The number of FTE judicial officers per 1000 finalisations in the Magistrates Court has *increased* over the last decade with a decrease from 1 FTE judicial officer per 1000 finalisations in 2015/16 to 0.5 in 2024/25.



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

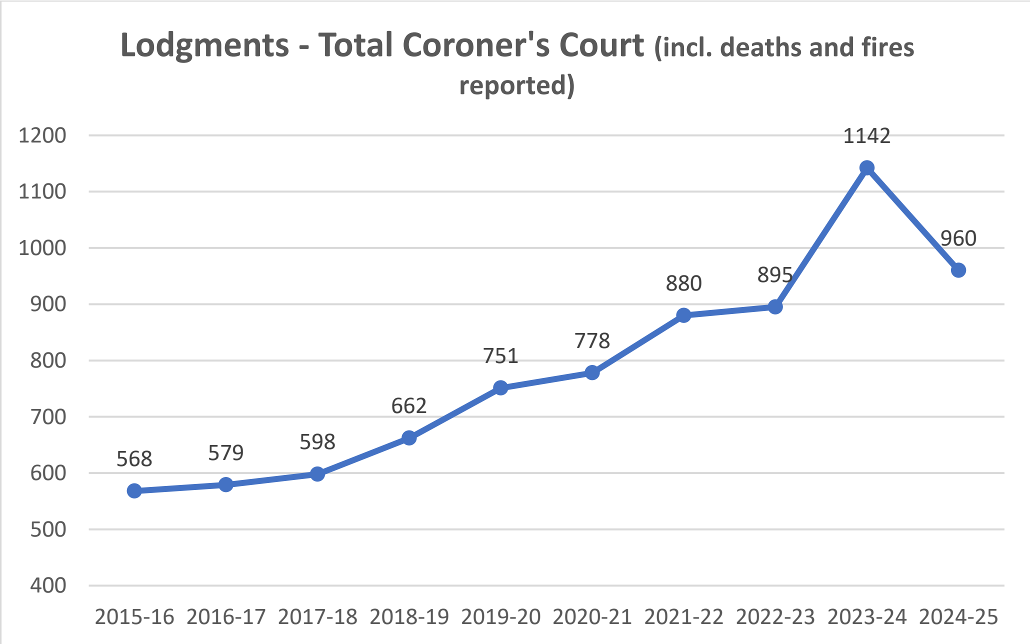
Similarly, in the Children's Court there has been a decrease from 0.9 FTE judicial officer per 1000 finalisations in 2015/16 to 0.5 in 2024/25. Over the same decade, the Australian average increased from 1.3 to 1.5 FTE judicial officer per 1000 finalisations.



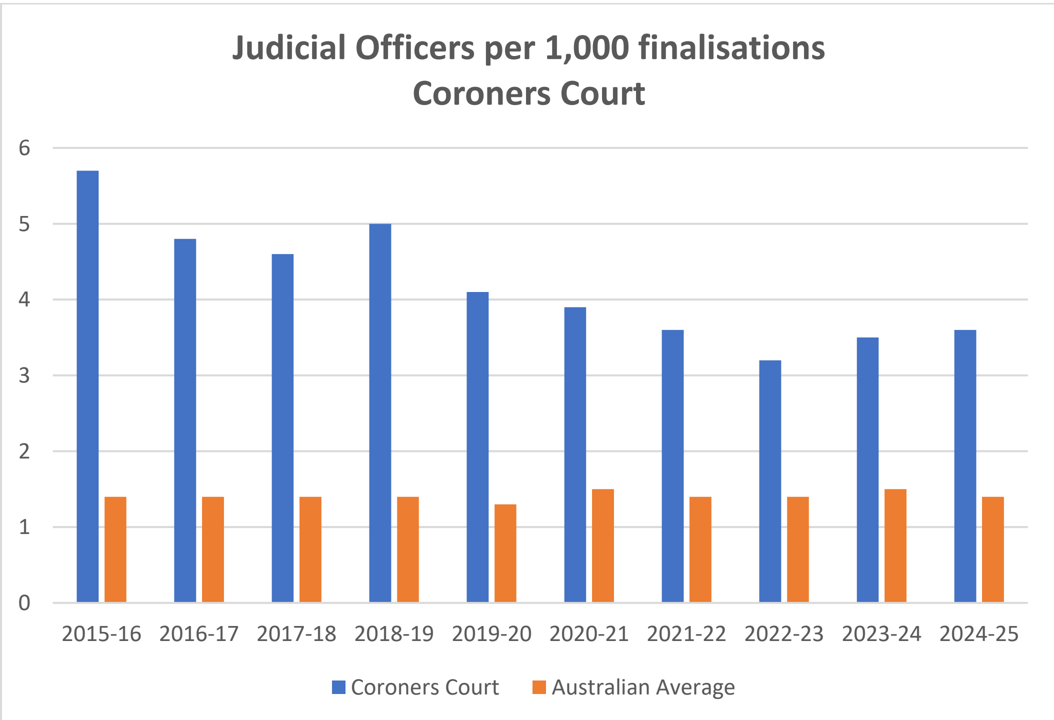
Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29

Coroners Court

Over the last decade, there has been a 69 per cent increase in the number of lodgments for reportable deaths/fires in the Coroners Court from 568 in 2015/16 to 960 in 2024/25.

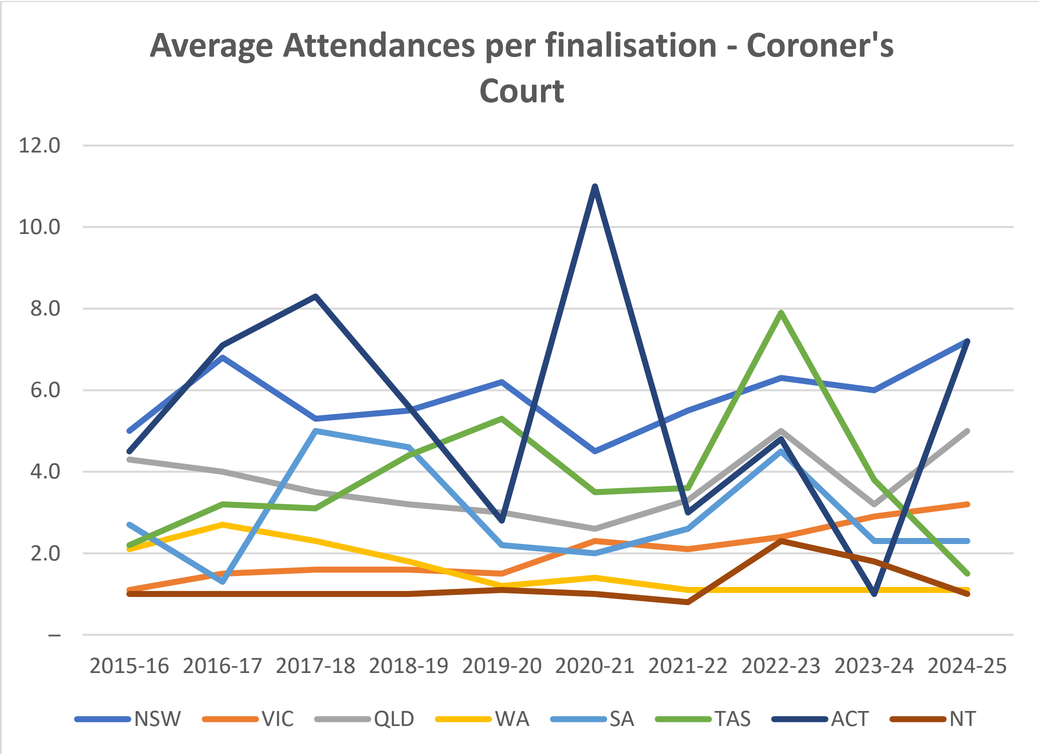


Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.2.



Source: Productivity Commission, Report on Government Services 2026, Courts, Table 7A.29.

Attendances in the Coroners Court are also at the lower end of Australian jurisdictions with an average of 1.5 attendances.



Source: Productivity Commission, Report on Government Services 2026, Courts, Tables 7A.24.

A BEST PRACTICE MODEL FOR THE DETERMINATION OF INDICTABLE CHARGES NATIONAL LEGAL AID, AND THE CONFERENCE OF AUSTRALIAN DIRECTORS OF PUBLIC PROSECUTION

Mr Richard Coates, Chairman, National Legal Aid

The Directors of Public Prosecutions and National Legal Aid (the Directors of Legal Aid Commissions) are working co-operatively to identify measures which will contribute to the more efficient determination of indictable charges without diminishing the presumption of innocence.

Criminal procedure is, and should remain, fundamentally accusatorial, that is the state accuses the citizen of a criminal offence and must prove guilt without the enforced assistance of the accused. While there is a public interest in improving the efficiency of criminal proceedings by reducing delay and costs, this must proceed in the context of the accusatorial framework.

Whereas the committal has long been regarded as an important cornerstone of our criminal justice system it has, through an evolutionary process, become more concerned with eliciting the full extent of the Crown case than determining whether there is sufficient evidence to put the accused on trial. The implementation of new and effective mechanisms which ensure full prosecution disclosure will justify a fresh approach to committals.

Whilst recognising that a number of jurisdictions have limited the right to cross-examine witnesses at committal, Directors also acknowledge that the opportunity to cross-examine key prosecution witnesses prior to trial often leads to the early resolution of matters and therefore believe that some opportunity for pre-trial cross-examination of prosecution witnesses should be retained.

Directors believe that the operation of the criminal justice system could be improved by treating the committal as part of the overall trial instead of regarding it as the first step in a two stage process. If the amount of time between committal and first mention in the superior court were to be reduced to a matter of days or even hours and there was better interface between the committing court and the superior court through the use of technology, a more efficient determination of matters could be achieved.

One aspect of the accusatorial process is that, before trial, the accused should be informed of the substance of the accusation and the evidence on which the accusation is based. In respect of the disclosure of the accusation, it must be fully particularised, so that the accused knows precisely the nature of the accusation.

Directors of Public Prosecutions will implement disclosure guidelines aimed at requiring police to provide the DPP with all material relevant to the guilt or innocence of the accused and the prosecution will in turn provide disclosure to the defence, prior to committal, in accordance with those guidelines.

Whilst acknowledging that each jurisdiction has particular local issues and procedures with which to contend, Directors have identified the following as elements of a best practice approach to dealing with indictable crime.

1. The DPP should have responsibility for the prosecution of matters at committal.[1]

2. Legal aid should be made available to all indigent accused facing committal on serious indictable offences as soon as possible after charge.

3. Grants of legal aid should be structured to encourage resolution of matters prior to committal.[2]

4. Counsel[3] with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.

5. Both Counsel should have authority to make decisions or be able to expeditiously obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.

6. Both Counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.

7. Where a guilty plea has been identified prior to committal and the matter cannot be dealt with summarily, agreement should be reached on the indictment and facts constituting the offence so that the accused can enter a plea of guilty at committal.

8. At the earliest possible stage after committal the matter should be set down for mention in the Supreme or District Court before a judicial listing officer.

9. Mentions before the judicial listing officer should be able to be held before or after normal court hours so that both prosecution and defence can keep appropriate counsel involved.

10. Provided the prosecution has made full disclosure, at the listing mention counsel for the defence would be required to advise which witnesses were not required for trial and what facts were admitted. The fact that an accused has made admissions prior to trial, or failed to make admissions of fact which are

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1 This proposal recognises the need for an independent and experienced prosecutor to be involved at this stage of the criminal trial not only to make decisions on disclosure but also to take responsibility for the other tasks in this document (for example those in points 4,5,6 and 7).

2 The terms and conditions upon which legal aid is made available will obviously depend on the circumstances of each case and therefore great flexibility is required. We recognise however that at least 60% of all matters committed to the trial courts are determined by plea of guilty and that an earlier identification of these pleas will produce efficiencies across the board.

3 The term "Counsel" used throughout this document does not preclude the use of appropriately experienced solicitor advocates in those jurisdictions which do not have a fused profession.

ultimately not in contention, could be taken into account in sentencing where the accused is subsequently convicted. [4]

11. Where the prosecution has fully disclosed all relevant material, counsel for the accused should be asked by the judicial listing officer to disclose the essence of the defence and the facts in dispute in order that the issues alive at trial might be further confined. Where the defence responds, the prosecution would be required to confirm whether there was any further material possibly relevant as a consequence of defence disclosure. [5]

12. At the latest there should be disclosure by the defence of the issues relevant to the trial immediately following the prosecution opening and before any evidence is adduced.[5]

13. Those accused committed for sentence should have their pleas dealt with expeditiously.

14. Where a plea of guilty was entered at committal, the sentencing court should impose a penalty which can be objectively seen to be below that which its criminal gravity would otherwise demand but for that early indication of plea.

15. Grants of legal aid should include a requirement that following conviction and sentence, counsel should identify and certify as valid (not merely arguable) any proposed grounds of appeal, as well as providing a brief outline of the arguments in support of those grounds, with transcript references where applicable.

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4 The prosecutor should indicate to defence counsel that due recognition of the benefit of any admissions and savings to the "system" will be acknowledged at the time of sentence.

5 Whilst acknowledging the procedures and proposals identified in this document are best practice goals, we anticipate that competent and experienced defence counsel aided by full and timely prosecution disclosure will not only have addressed the issues of the defence in advance of trial, but also discussed or canvassed them with the prosecutor. We also recognise that the best practice points in this document are unlikely to be implemented contemporaneously and the first and essential step is to strive to obtain credible prosecution disclosure. Unless defence Counsel has confidence that there has been full prosecution disclosure, it is unlikely that there will be any specific defence disclosure. The prosecution would only be able to adduce evidence which had not been disclosed to the defence with the leave of the court on the basis that it was necessary in the interests of justice.