

Committal proceedings essentials¹

What is a committal?

A committal proceeding is an administrative proceeding in the Local Court to determine whether or not a person charged with an indictable offence should be committed for trial or sentence in the Supreme or District Court.²

Committal proceedings do not constitute a judicial inquiry. They are an exercise of an executive or ministerial function.

The fundamental objective of committal proceedings is to facilitate a fair trial in the event the accused is so committed – *Hanna v Kearney*; NSWSC, 28.5.98; unrep.

Originally, all prosecution witnesses were called to give oral evidence at a committal hearing. This has been substantially curtailed in recent years so that the vast majority of committal 'hearings' are only determined on the brief of evidence i.e. a "paper committal".

Is/are the offence(s) strictly indictable?

There is no definition of a *strictly indictable offence*. In practice, a strictly indictable offence is an indictable offence³ that is not included in Schedule 1 of the Act (i.e. not a Table 1 or Table 2 offence).

Practitioners should carefully check the Court Attendance Notice(s) as most sets of charges (referred to by an 'H number' with one or more 'Sequences' as charges) will contain 'back-up' and 'related' summary charges or offences which are Table 1 or 2 offences under Schedule 1 of the Act.

Table 1 offences are indictable offences which "are to be dealt with summarily unless the prosecutor or person charged elects otherwise" and almost always carry a higher maximum penalty than Table 2 offences that "are to be dealt with summarily unless the prosecutor elects otherwise".⁴

Usually the police on-line charge system will categorise offences as SI, T1 or T2 which is indicated next to the Sequence/charge no. However, sometimes there is no reference at all, or if

¹ All references to sections are references to the Criminal Procedure Act 1986 (NSW) unless otherwise indicated. References to clauses are references to the Criminal Procedure Regulation 2010 (NSW) unless otherwise indicated.

² s.3

³ ss.3, 5 and 6 of the Act define 'indictable' and 'summary offences'. In short, an indictable offence is an offence punishable by *more than 2* years imprisonment; *Hosseini v R* [2009] NSWCCA 52

⁴ Schedule 1 of the Act.

there is it is incorrect, so it is important to always check for yourself. Indeed, Schedule 1 even seems to include some offences which are not by definition indictable eg. s.53 Crimes Act – Injuries Causing Bodily Harm While Driving etc (T1) and s. 61 - Common Assault (T2).

Nearly all property offences can be dealt with in the Local Court irrespective of the value of ‘the property, matter or thing, or the damage, or the amount of money or reward’, in respect of which the offence is charged. Where this amount exceeds \$5,000, it is usually a Table 1 offence. Previously, the Local Court generally had a jurisdictional limit of \$15,000.

Note that for offences under ss.109(1) and 112 of the Crimes Act - where the strictly indictable offence alleged is stealing or maliciously destroying or damaging property - there is a jurisdictional limit of \$60,000.

Children

Where an accused is being dealt with in the Children’s Court, carefully check the Children (Criminal Proceedings) Act 1987 and Regulations. Just because it is a strictly indictable offence does not mean that the child will be dealt with “according to law” necessitating committal proceedings, as the court has jurisdiction to hear many strictly indictable offences to finality e.g. Robbery. Section 28(1) of the *Children (Criminal Proceedings) Act 1987* provides that the Children’s Court has jurisdiction to hear and determine:

(a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children’s indictable offence, and

(b) committal proceedings in respect of any indictable offence (including a serious children’s indictable offence),

if the offence is alleged to have been committed by a person:

(c) who was a child when the offence was committed, and

(d) who was under the age of 21 years when charged before the Children’s Court with the offence.

“Serious children’s indictable offence” is defined as:

(a) homicide,

(b) an offence punishable by imprisonment for life or for 25 years,

(c) an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the *Crimes Act*

1900 (or under section 61B of that Act before the commencement of Schedule 1 (2) to the *Crimes (Amendment) Act 1989*),

(c1) an offence under the *Firearms Act 1996* relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years,

(d) the offence of attempting to commit an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the *Crimes Act 1900* (or under section 61B of that Act before the commencement of Schedule 1 (2) to the *Crimes (Amendment) Act 1989*), or

(e) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.⁵

Where there are 2 or more co-defendants who are not all children, practitioners should refer to s.29 of the *Children (Criminal Proceedings) Act*.

Importantly, even if an offence is indictable but not a Serious Children's Indictable Offence, s.31 of the *Children (Criminal Proceedings) Act* provides:

(1) If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence shall be dealt with summarily.

(2) Notwithstanding subsection (1):

(a) if a person is charged before the Children's Court with an indictable offence (other than an offence that is punishable summarily without the consent of the accused)⁶, and

(b) if the person informs the Children's Court (at any time during, or at the close of, the case for the prosecution) that the person wishes to take his or her trial according to law,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Divisions 2-4 (other than sections 60 and 61) of Part 2 of Chapter 3 of the *Criminal*

⁵ Currently defined in cl.29 as (a) an offence arising under section 78I of the *Crimes Act 1900* (now repealed) and (b) an offence arising under section 80A of that Act (Sexual Assault by forced manipulation) but only if the victim of the offence was under the age of 10 years when the offence occurred.

⁶ This is the language of the repealed sections of the legislation relating to elections/Table 1 and 2 offences. It is presumed this would include Table 1 offences.

Procedure Act 1986 in the same way as if a court attendance notice had been issued in accordance with that Act.

(3) Notwithstanding subsection (1):

(a) if a person is charged before the Children's Court with an indictable offence, and

(b) if the Children's Court states that it is of the opinion, after all the evidence for the prosecution has been taken:

(i) that, having regard to all the evidence before the Children's Court, the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence, and

(ii) that the charge may not properly be disposed of in a summary manner,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Divisions 2-4 (other than sections 60 and 61) of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* in the same way as if a court attendance notice had been issued in accordance with that Act and as if the Children's Court had formed the opinion referred to in section 62 of that Act.

(4) If, in the circumstances referred to in subsection (3), the Children's Court commits a person for trial, the Children's Court shall forthwith furnish to the person a statement of the reasons for its decision to commit the person for trial instead of dealing with the matter summarily.

(5) Notwithstanding subsection (1):

(a) if a person is charged before the Children's Court with an indictable offence, and

(b) if, at any stage of the proceedings, the person pleads guilty to the charge, and

(c) if the Children's Court states that it is of the opinion that, having regard to all the evidence before it (including any background report of a kind referred to in section 25), the charge may not properly be disposed of in a summary manner,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Division 5 of Part 2 of Chapter 3 of the *Criminal*

Procedure Act 1986 as if the offence were a serious children's indictable offence in respect of which the person had pleaded guilty as referred to in that section.

Commonwealth matters

The *Crimes Act 1914 (Cth)* also does not define strictly indictable offences. Section 4G defines indictable offences as offences punishable by imprisonment for a period exceeding 12 months unless the contrary intention appears. Significantly, s.4J relevantly provides that:

(1) Subject to subsection (2), an indictable offence (other than an offence referred to in subsection (4)) against a law of the Commonwealth, being an offence punishable by imprisonment for a period not exceeding 10 years, may, unless the contrary intention appears, be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.

(2) Subsection (1) does not apply in relation to an indictable offence where, under a law of the Commonwealth other than this Act, that offence may be heard and determined by a court of summary jurisdiction.

(3) Subject to subsection (6), where an offence is dealt with by a court of summary jurisdiction under subsection (1), the court may impose:

(a) where the offence is punishable by imprisonment for a period not exceeding 5 years--a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both; or

(b) where the offence is punishable by imprisonment for a period exceeding 5 years but not exceeding 10 years--a sentence of imprisonment for a period not exceeding 2 years or a fine not exceeding 120 penalty units, or both.

(4) A court of summary jurisdiction may, if it thinks fit, upon the request of the prosecutor, hear and determine any proceeding in respect of an indictable offence against a law of the Commonwealth if the offence relates to property whose value does not exceed \$5,000.

(5) Subject to subsection (6), where an offence is dealt with by a court of summary jurisdiction under subsection (4), the court may impose a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both.

(6) A court of summary jurisdiction shall not impose under subsection (3) or (5):

(a) a sentence of imprisonment for a period exceeding the maximum period that could have been imposed had the offence been tried on indictment;

(b) a fine exceeding the maximum fine that could have been imposed had the offence been so tried; or

(c) both a sentence of imprisonment and a fine if the offence is punishable on trial on indictment by a sentence of imprisonment or a fine, but not both.

(7) This section does not apply to an offence against:

(a) section 24AA or 24AB or subsection 79(2) or (5) of this Act; or

(b) Division 80 or section 91.1 of the *Criminal Code* .

Curiously, s.4JA provides that indictable offences *not* punishable by imprisonment but fine only⁷ can be dealt with summarily where the prosecution and defendant consent.

Table 1 and 2 offences – must know rights of election.

Chapter 5 of the Act covers Summary Disposal of Indictable Offences by a Local Court requiring Table 1 and 2 offences to be dealt with in the Local Court unless the relevant election is made.

Rarely, if ever, would you advise an accused to elect to be dealt with on indictment. There are 2 important reasons for this:

- The accused is then exposed to higher maximum penalties; and
- Appeals rights and processes are significantly diminished i.e. in the Local Court there is an appeal as of right to the District Court whereas leave to appeal is almost always required for an appeal from either the District or Supreme Court to the Court of Criminal Appeal⁸. It is also harder to get bail on a pending appeal to the CCA.⁹

⁷ Under s.4JA (1) (b) the pecuniary penalty for the offence is not more than 600 penalty units for an individual or 3,000 penalty units for a body corporate

⁸ s.5(1) *Criminal Appeal Act 1912*

⁹ s.30AA *Bail Act 1978* – “special or exceptional circumstances” must exist

The DPP elect from time to time but now that the Local Court's sentencing jurisdiction has been increased to 5 years this is becoming less frequent. The *general* rule for elections by the DPP is where the Director is of the view that if convicted of the offence(s) the accused would get greater than the maximum penalty available to the Local Court. Strictly speaking, both the DPP and accused have an unfettered right to make an election – without giving reasons - although the DPP's Prosecution Guidelines set out a number of factors to be considered when the prosecution is considering whether or not to elect. Where an election is made, practitioners should carefully check Chapter 5 of the Act, especially s.263 which sets out important restrictions on when an election can be made:

- (1) An election to have an offence dealt with on indictment must be made within the time fixed by the Local Court.
- (2) An election may, with the leave of the Local Court, be made after the time so fixed if the Court is satisfied that special circumstances exist.
- (3) However, an election may not be made after the following events:
 - (a) in the case of a plea of not guilty—the commencement of the taking of evidence for the prosecution in the summary trial,
 - (b) in the case of a plea of guilty—the presentation of the facts relied on by the prosecution to prove the offence.

...

Local Court Practice Note 1 of 2010 imposes time frames on the making of elections.

Some Magistrates will ask whether an accused has been advised about his or her rights of election. It is submitted that this is inappropriate as it is a matter for the practitioner to decide what advice is to be given and any advice given is ordinarily subject to legal professional privilege.

Procedure in Committals

Part 2 of Chapter 3 of the Act covers the procedure for committal hearings. Practitioners should also refer to Local Court Practice Note No 1 of 2010 which stipulates time frames and other administrative requirements.

A magistrate must set a timetable for the prosecution to serve a copy of the brief (including statements of all witnesses) on the defendant, and for the defendant to indicate which witnesses are required to give oral evidence.¹⁰

Where a strictly indictable charge is being defended there is no formal requirement or practice to enter a plea of Not Guilty at any stage of the proceedings.

Brief is rarely complete on 1st reply date

Practitioners should generally ensure that the brief is complete esp. DAL Certificates, DNA analysis etc before formally advising a client about whether or not to plead guilty, offer pleas to lesser charges etc. Even “merely corroborative” statements can turn out to provide fertile ground for a ss.91/93 application.

Once the brief is complete, consider the need to issue subpoenas to produce. For example in large and complex investigations police ‘running notes’ can reveal significant information such as lines of inquiry, other persons of interest etc. Media reports and police media releases can also be useful especially in terms of what witnesses knew and when. Consideration might also be given to utilizing a private investigator e.g. alibi inquiries.

Once all material is served/subpoenaed/gathered, always prepare a chronology of events including when witness statements were made. It is amazing what you can gain from doing this.

For matters where the *Criminal Case Conferencing Trial Act 2008* applies, ensure that the DPP has served a Disclosure Certificate. This is not merely an administrative document as it includes such information as the unavailability of witnesses. If a complainant or key witness is unwilling to give evidence or unable to be contacted, this will generally be disclosed to the defence. It would be unwise to start making plea offers if the prosecution is unable to prove their case due to the unavailability of key witnesses; the more appropriate course in the circumstances might be a No Further Proceedings application.¹¹

¹⁰ s.60

¹¹ See also s.35A of the *Crimes (Sentencing Procedure) Act* which provides that a court cannot take into account an agreed set of facts etc unless the prosecutor has filed a certificate verifying that the prosecutor has consulted with the victim and the police officer in charge or reasons why they have not done so.

Pleading guilty to a strictly indictable charge in the Local Court

Although an accused can plead guilty at any stage of committal proceedings¹², it would be a rare case where you would advise your client to do so, and unlikely that a Magistrate would accept the plea, without at least a partial brief of evidence. A Magistrate has an explicit power to reject a guilty plea.¹³

Generally, it is prudent not to enter a plea of guilty until the whole brief has been served. Nonetheless, there will be occasions where practitioners can and perhaps should enter into plea negotiations, especially with a view to keeping the matter in the Local Court. These will include cases where the evidence is obviously weak from the outset, essential elements of the offence(s) cannot be made out, or where it appears that police have ‘over-charged’.

By their very nature strictly indictable offences very often carry lengthy terms of imprisonment so it is crucial to get the plea right. Nonetheless, some accused may want to plead guilty to the offence(s) on the first mention date. In many of these cases the accused will be in custody, somewhat ‘tired and emotional’ and will insist on you entering a plea of guilty even on a charge of murder (it has happened). They should be given stern advice as to the dangers and risks of doing so.

An accused can change their plea of Guilty to Not Guilty *as of right* in the District or Supreme Court. In some circumstances the Judge can remit the matter to the Local Court to ‘recommence’ committal proceedings. Practitioners should check s.106 carefully as there is a substantial risk that if a plea of guilty is erroneously entered in the Local Court and the matter is not remitted, the accused would lose the opportunity to cross-examine witnesses at committal. Although a Basha inquiry¹⁴ might be of some benefit, there are distinct tactical advantages in having the pre-trial cross-examination of a witness as long as possible before any trial examination.

In most cases, the DPP will insist that the accused sign an agreed set of Facts in the Local Court. This is especially so where co-accused are to be tried. The Facts must be checked carefully as your client may then be compellable as a witness for the prosecution¹⁵. In any event, as a defence lawyer it is prudent to have your client sign the agreed set of facts *for your own records* - especially after protracted negotiations - to avoid any suggestion that they were forced into pleading guilty.¹⁶

¹² s. 99

¹³ s.100

¹⁴ Pre-trial cross-examination of a witness - *Basha* (1989) 39 A Crim R 337.

¹⁵ s.17 *Evidence Act* and Dictionary

¹⁶ *Loury v Regina* [2010] NSWCCA 158

Must carefully determine whether or not to plead guilty in the Local Court as this will substantially affect any discount for the plea

In *R v Robert Borkowski* [2009] NSWCCA 102, Howie J stated at para 31:

“As a matter of general practice, the maximum discount for the utilitarian value of the plea of guilty should be awarded only to those accused persons who plead guilty in the Local Court and continue that plea of guilty in the District Court. There may be a valid reason in the exercise of discretion for awarding the maximum discount where the plea of guilty does not occur until the District Court but that would be exceptional and arise from the peculiar factual situation in a particular case. The amount of the discount cannot depend upon the practice of the particular court based upon its administrative arrangements. It is difficult to see how, in the usual case, a plea of guilty on arraignment could justify a discount of more than about 15 per cent...”

Indeed, the Criminal Case Conferencing Trial Act 2008 specifically provides that if an offender pleads guilty at any time *after* being committed for trial, the sentencing court may allow a discount for the guilty plea of up to 12.5% less than the term, fine, work or bond that it would otherwise have imposed.¹⁷

Moreover, it is very important to get the plea right re strictly indictable offences as many carry a Standard Non Parole Period i.e. running and losing a trial in the District or Supreme Court will invariably substantially increase the penalty imposed.

¹⁷ s.17(2)

THE DECISION WHETHER OR NOT TO MAKE A SS.91/93 APPLICATION.

A s.91/93 application is an application to have a person who made a written statement attend to give evidence. Importantly, it must be a statement (or evidence) that the prosecution *intends to tender as evidence* in the committal proceedings – in some cases the DPP may say that they are ‘not relying’ on certain evidence thereby preventing an application.¹⁸ Where this is the case, practitioners should ensure that the evidence is not subsequently relied on by the DPP by ensuring that it is removed from the brief and submissions aren’t made referring to the evidence ‘not relied upon’.

Do not prepare such an application until all material has been served/ subpoenaed/gathered.

Sometimes it may be prudent *not* to make such an application as the application itself necessarily flags weaknesses in the prosecution case. Sometimes it is best to wait until trial. This can be a very difficult assessment; counsel’s advice may be needed. In this regard it is important to note that if a witness is not required to give oral evidence i.e. no application and direction is made, the witness’ statement will invariably be tendered at committal. The statement can then be tendered at trial if that witness later dies or is so ill that he/she cannot give evidence.¹⁹

“As a result, if a witness gives damaging evidence against an accused, which evidence is in dispute, it is always preferable to require that witness to give evidence at committal. Even if nothing is achieved in cross-examination, the simple fact of the witness having to give an account on oath creates a potential prior inconsistent statement”.²⁰

In some circumstances, giving evidence at committal may indeed bolster the confidence of a witness especially considering that the scope of cross-examination will invariably be restricted by the terms of the s.91 or 93 order. Conversely, being cross-examined at committal may lead to a reluctance to give evidence at trial which can assist in plea negotiations or even a No Bill application.

Special/substantial reasons –the law is very settled in this regard. However, ALWAYS check the legislation for which offences are “offences involving violence”. It can be surprising what is not an ‘offence involving violence’ e.g. ss.33B(2) – Use or Possess Weapon To Prevent Arrest In Company.

Remember that the test is not simply ‘substantial’ or ‘special’ reasons. The phrases must be read in conjunction with “in the interests of justice” and applications must adequately deal with this.

Even if there are what you consider to be special/substantial reasons, perhaps an application that the charge(s) be lessened or withdrawn is more appropriate. Tactically however, it can be

¹⁸ *Spratt v DPP* [2010] NSWSC 355

¹⁹ s.285.

²⁰ John Stratton SC; *Criminal Law Survival Kit*

prudent to get orders for the attendance of witnesses as this may improve your ‘bargaining’ position. On the other hand if witnesses ‘are coming anyway’ the DPP may be less willing to lessen/withdraw charges. Remember on any application for lessening/withdrawing charges, you should refer to the DPP Guidelines.

On any charge negotiation, try and keep the matter in the Local Court as the maximum and actual penalties are usually far less serious and there is an automatic right of appeal against sentence from the Local to the District Court.

A s.91/93 direction may not be given for complainants in prescribed sexual offence proceedings that are ‘cognitively impaired’²¹ or child sexual assault offences where the complainant was under 16yo at the time of the ‘earliest date’ of offences and *currently* under 18yo²². ‘Child sexual offence’ is defined within the section and as with ‘offences involving violence’ *always* double check that the offence(s) fall within the definition.

ss.91/93 applications

As noted above, the law is very well settled in this area as to what constitutes “special” and “substantial” reasons. Practitioners should nonetheless always check for new cases esp. those that distinguish previous authorities. Moreover, it is important to state the law in written submissions in case relief is later sought in the Supreme Court against a Magistrate’s refusal to direct the attendance of witnesses.²³ Always remember the fundamental objective of committal proceedings - to facilitate a fair trial. The phrase ‘in the interests of justice’ has been held to incorporate ‘as a paramount consideration that an accused person should have a fair trial’.²⁴

Other authorities and submissions that may assist are listed below:

- The calling of witnesses at committal can benefit the prosecution as much as the defence:
“While a successful attempt to undermine the credit of a Crown witness would benefit the defence, an unsuccessful attempt to do so could result in the decision of an accused person to plead guilty”.²⁵
- The calling of Crown witnesses at committal can also benefit the prosecution by forewarning them of the likely criticisms of evidence by the defence and potential

²¹ s.91(7A)

²² s.91(8)

²³ For appellate and prerogative relief see *DPP v O’Conner* (2006) 181 A Crim R 294.

²⁴ *Chapman v Gentle* (1986) A Crim R 29.

²⁵ *JW v DPP* [1999] NSWSC 1244 at para. 8 per Simpson J applying *DPP v Losurdo* (1998) 44 NSWLR 618.

avenues of cross-examination. Moreover, the prosecution is provided with an opportunity to gauge the performance of the witness under cross-examination and the witness is not giving evidence for the first time should the matter proceed to trial.

- A Basha inquiry²⁶ inquiry is no justification for not permitting cross-examination at committal.²⁷
- Given the above potential advantages to the Crown of calling witnesses at committal, it is prudent to negotiate with them re same as once the Crown and defence consent to the calling of a witnesses or witnesses at committal – who are not alleged victims of an offence involving violence, a Magistrate *must* make a direction for their attendance²⁸. For alleged victims of an ‘offence involving violence’, a Magistrate must still be satisfied there are ‘special reasons in the interests of justice’ the witness should attend to give oral evidence.²⁹
- While a Magistrate must not exercise his or her discretion to exclude evidence under s.90 or Part 3.11 of the Evidence Act,³⁰ the likelihood that those discretions will be exercised at trial is a matter that the Magistrate can properly take into account in deciding whether or not to commit the person for trial.³¹
- A Court should also consider the frailties of the recording of witness statements by the police. It has been noted that the taking of witness statements is ‘relatively informal, open to improper pressures, productive of a summary only of things said by a witness and prone to omission, misunderstanding and inaccuracy.’³²

Waiver of committal – an accused has a right to ‘waive’ their right to committal with the consent of the prosecutor. This can be done at any time of the proceedings.³³ It is hard to see any tactical benefits in doing so although if there are to be no ss.91/93 applications or submissions on whether or not the accused should be committed for trial, there would be no disadvantage in doing so.

²⁶ Pre-trial cross-examination of a witness - *Basha* (1989) 39 A Crim R 337.

²⁷ *Dawson v DPP* [1999] NSWSC 1147.

²⁸ s.91(2)

²⁹ s.93(1)

³⁰ s.70 *Criminal Procedure Act 1986*.

³¹ *Dawson v DPP & Anor* [1999] NSWSC 1147.

³² Heaton-Armstrong, A and Wolchover, D; *Recording Witness Statements* [1992] Crim LR 160.

³³ s.68

Defence of mental illness/substantial impairment/fitness to plead issues

It would be rare to raise these issues on a strictly indictable charge in the Local Court. Nonetheless, it would be prudent to have assessments undertaken during the committal stage in order to be properly prepared for higher court proceedings.

Committal hearings

Generally, committal proceedings are to be in open court, that is open to the public and the media.³⁴ However, there are a number of exceptions to this:

- courts can make suppression or non-publication orders as to the identity of the accused, a witness, or any party to proceedings, or as to the evidence in proceedings, for a limited period, under the *Court Suppression and Non-Publication Orders Act 2010*; and
- In sexual assault cases the court can close the court³⁵ but may still allow media access³⁶.

Prior to commencing the hearing proper it is important to know what you are trying to achieve. For example are you:

- merely ‘testing’ the evidence of a witness so you’re not taken by surprise at trial;
- Cross-examining to raise doubts and inconsistencies about damaging evidence;
- Setting the foundation for a No Bill application or plea negotiations;
- Attempting to have your client discharged at committal?

Until recently, a witness’ statement was not admissible if a s.91 direction had been given. This was an important tactical advantage for the defence as it forced the witness to give another version (subject to applications to refresh memory etc). However, s.91(4) now provides that:

The written statement may be admissible in evidence in the proceedings after the direction is given if:

- (a) the accused person and the prosecutor consent to the statement being admitted, or
- (b) the Magistrate is satisfied that there are substantial reasons why, in the interests of justice, the statement should be admitted.

³⁴ s.56

³⁵ s.291

³⁶ s.291C

Although Magistrates usually feel under pressure to have strictly indictable matters either committed or discharged in accordance with the time frames imposed, it is submitted that the mere saving of court time would not constitute ‘substantial reasons in the interests of justice’ to justify the statement being tendered as a witness’ evidence in chief. Moreover, merely because the statement is admissible in evidence, does this then excuse the witness from giving their evidence in chief orally?

Importantly, never “put” your case to prosecution witnesses in committal hearings.

The tests to be applied by a Magistrate in determining whether or not to commit for trial.

s. 62 Prosecution evidence and initial determination

- (1) The Magistrate must take the prosecution evidence in accordance with Division 3 and must determine whether the prosecution evidence is capable of satisfying a jury, properly instructed, beyond reasonable doubt that the accused person has committed an indictable offence.

-i.e. is there a prima facie case? Can the essential elements of the offence(s) be made out?

-note that it is whether the accused person has committed an indictable offence – IT DOESN’T HAVE TO BE THE INDICTABLE OFFENCE CHARGED OR THE SUBJECT OF COMMITTAL. Conceivably, on a committal for murder, a Magistrate might be satisfied that an offence of Assault Occasioning Bodily Harm has been committed and commit on that offence even though an election has not been made. There seems to be no explicit provision for a Magistrate to specifically identify which indictable offence has been committed in such circumstances.

- (2) The Magistrate must discharge the accused person in relation to the offence if, in any committal proceedings, after all the prosecution evidence is taken and after considering all the evidence before the Magistrate, the Magistrate is not of the opinion that, having regard to all the evidence before the Magistrate, the evidence is capable of satisfying a reasonable jury, properly instructed, beyond reasonable doubt that the accused person has committed an indictable offence.

s. 63 Where prosecution evidence sufficient to satisfy jury

- (1) If in any committal proceedings, after all the prosecution evidence is taken and after considering all the evidence before the Magistrate, the Magistrate is of the opinion that, having regard to all the evidence before the Magistrate, the evidence is capable of satisfying a reasonable jury, properly instructed, beyond reasonable doubt that the accused person has

committed an indictable offence, the Magistrate must give the accused person an opportunity to answer the charge and a warning in the form prescribed by the rules.

-this is where the accused has an opportunity to call evidence. THIS IS RARELY IF EVER DONE AND GREAT CARE SHOULD BE TAKEN BEFORE DOING SO.

- (2) The Magistrate must proceed to take any statement by or any evidence adduced by the accused person in accordance with Division 4.
- (3) If the accused person is not present, the Magistrate may make a decision under section 64 without complying with subsection (2).
- (4) If the accused person is a corporation and the corporation appears by a representative, the representative may answer the charge on behalf of the corporation.

s.64 Decision about committal

When all the prosecution evidence and any defence evidence have been taken in committal proceedings, the Magistrate must consider all the evidence and determine whether or not in his or her opinion, having regard to all the evidence before the Magistrate, there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence.

-this is the reasonable prospect of conviction test. The court can make their own assessment of the evidence and of the credibility of witnesses.³⁷ The assessment can take into account a prediction of whether the trial judge will exclude evidence in the exercise of his discretion³⁸. Accordingly, practitioners need to be able to address on these points where appropriate.

s. 65 Committal

- (1) If the Magistrate is of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence, the Magistrate must commit the accused person for trial.

³⁷ *Saffron* (1989) 16 NSWLR 397

³⁸ *Grassby v The Queen* (1989) 168 CLR 1

(2) In the case of an accused person that is a corporation, the Magistrate may, if of that opinion, make an order authorising an indictment to be filed for the offence named in the order or for such other offence as the Attorney General or Director of Public Prosecutions considers proper.

(3) The making of an order under subsection (2) is taken to be committal for trial.

s. 66 Discharge

If the Magistrate is not of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence, the Magistrate must immediately order the accused person to be discharged in relation to the offence.

-Note that the DPP can still file an ex-officio indictment although in practice this is only done after careful consideration of the reasons for the discharge in the Local Court.

Committed for trial

You can still negotiate charges or make a No Bill/NFP application to the DPP.

If there are “back-up offences”³⁹ or “related offences”⁴⁰, the prosecution should file a s.166 Certificate. This gives the court to which the accused is committed jurisdiction to deal with those matters at the conclusion of the offence(s) for which he or she was committed.⁴¹ The higher court has the power to remit the charge(s) to the Local Court where it is in the interests of justice to do so.⁴² Practitioners should avoid the situation where a prosecutor asks that the back up or related summary charges be adjourned in the Local Court until the completion of the higher court proceedings as this can cause a number of unnecessary mentions in the Local Court.

Costs

Importantly, under s.116 costs can be awarded after committal where the accused is discharged, the charge withdrawn or:

³⁹ Defined in s.165(1).

⁴⁰ *ibid.*

⁴¹ Division 7 of Chapter 3 of the Act

⁴² s.169(1).

(b) the accused person is committed for trial or sentence for an indictable offence which is not the same as the indictable offence the subject of the court attendance notice.⁴³

There are similar restraints to summary hearings on the awarding of costs in committals against a prosecutor.⁴⁴ An application for costs must be made on the day when the charge is dismissed.⁴⁵ and there is no power to award costs in committals under the *Costs in Criminal Cases Act*.⁴⁶

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⁴³ See *Cth DPP v Barnes* [2010] NSWSC 1040.

⁴⁴ s.117

⁴⁵ *Fosse* (1989) 42 A Crim R 289

⁴⁶ *DPP v Howard* (2005) 64 NSWLR 139