Evaluating the Committal

David Brereton
Senior Lecturer
and
John Willis
Senior Lecturer
Department of Legal Studies
La Trobe University, Victoria

As the title of this conference suggests, the future of the committal hearing is now under something of a cloud. Calls to abolish, or substantially truncate, committal hearings have been loudest in New South Wales, where caseload pressures on the criminal justice system have been greatest (NSW Law Reform Commission 1987—the *Byrne Report*, p. 299ff; Coopers & Lybrand W.D. Scott 1989, pp. 19-39; The NSW White Paper 1989, pp. 19-39; Bishop 1989, Ch.3). In other states the emphasis has been more on streamlining committal hearings than on replacing them altogether, but in these jurisdictions also, a growing number of interested parties are asking whether committals serve any useful purpose. At the same time, as indicated by the intense debate now taking place in New South Wales, there is still a substantial body of opinion which favours the retention of committals and sees them as an indispensable safeguard for the protection of defendants.

In late 1988, in response to the increasing attention being paid to this issue, the Australian Institute of Judicial Administration (AIJA) commissioned us to undertake an Australia-wide study of committal proceedings. Our brief was to: provide a descriptive overview of how committals are conducted in the various jurisdictions; evaluate the adequacy of existing arrangements, and develop a set of policy recommendations on the basis of this analysis. As part of this project, we visited all jurisdictions except the Northern Territory, conducted a wide range of interviews with relevant personnel, and accumulated a large amount of comparative data. The present paper summarises the main findings of this research and in the light of these findings briefly considers some proposals for reform.

The argument to be advanced in this paper is that, rather than being costly anachronisms, committals still play a useful role in the criminal justice system, and could be made even more effective with some modifications. Specifically, it is argued that committals:

- are more effective at filtering-out weak cases than their critics claim;
- are a potentially useful forum for the early identification of guilty pleas;

- provide a reasonably effective mechanism for disclosing the Crown's case to the accused; and

- particularly in large and complicated cases, perform a useful management function.

The paper also presents data indicating that the amount of court time consumed by committals, their contribution to overall delay, and the adverse effects which they have on witnesses, have been substantially exaggerated.

Before moving to a consideration of this data, it may be helpful if a brief description of how committal proceedings are currently conducted in Australia is provided.

Committal Procedures in Australia: A Brief Overview

It is evident that the traditional committal hearing is no longer the norm in Australia. In the traditional hearing evidence of witnesses was given orally and the function of the presiding justice or magistrate was to determine, on the basis of this evidence, whether there was a prima facie case against the accused. In this system the prosecution had the absolute discretion as to which prosecution witnesses would be called at the hearing. Current practices depart from this model in a number of important respects.

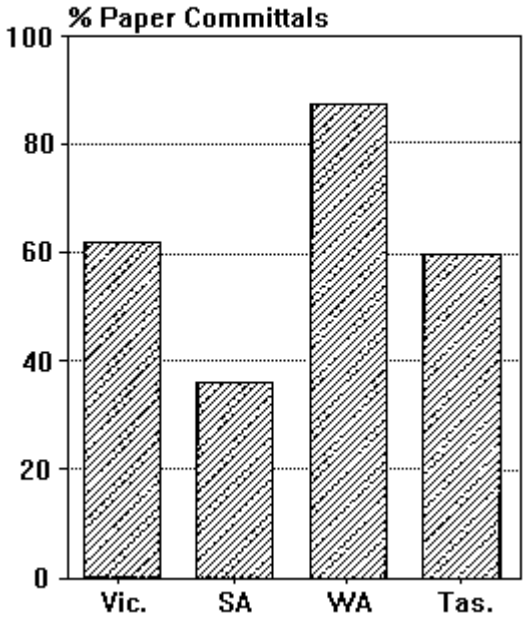
Firstly, in nearly all jurisdictions the use of paper committal procedures has become the norm. Broadly speaking, in paper committals copies of statements of witnesses which the prosecution proposes to tender at the committal hearing are served on the defendant in advance of the hearing. Unless there is an objection these statements are then tendered as the evidence of the witnesses concerned. There are provisions in the various jurisdictions enabling the defendant to require the presence of some or all prosecution witnesses for cross-examination, but in most jurisdictions it is quite common for the committal to proceed without any oral evidence being taken.

Of the four states for which firm data could be obtained, South Australia was the only jurisdiction in which less than 50 per cent of committals were dealt with as full 'hand-up briefs', requiring no oral evidence or cross-examination (Figure 1). In New South Wales, according to the 1989 White Paper, committals without oral evidence are 'relatively rare' (New South Wales White Paper 1989, p. 21). However, several magistrates to whom we spoke felt that an increasing number of cases were now proceeding as full 'hand-up briefs'. It should also be noted that approximately one third of New South Wales defendants plead guilty at the committal stage. If these cases are counted as 'full hand-ups', on the grounds that few if any, involve the presentation of oral evidence (Bishop 1989, p. 80), then the assessment offered by the White Paper must be substantially qualified. In addition, it is possible that the full effect of recent amendments to the New South Wales *Justices Act 1902* (s.48AA), requiring the use of 'hand-up brief' procedures, is yet to be felt.

Secondly, in certain jurisdictions restrictions have been imposed on the defendant's right to cross-examine prosecution witnesses. Thus, in South Australia victims of sexual assaults cannot be cross-examined at the committal unless there are 'special reasons' (*Justices Act 1921* (SA) s.106(7)). Similar provisions limiting the right to cross-examine victims of violent assault, both sexual and non-sexual, were enacted in New South Wales in 1987 but have not been proclaimed (*Justices Act 1902* (NSW) s.48EA). In Victoria, magistrates can refuse to allow a prosecution witness to attend for cross-examination if they are satisfied that such attendance would be 'frivolous, vexatious or oppressive in all the circumstances' (*Magistrates (Summary Proceedings) Act 1975* (Vic.) s.45B). There has also been further streamlining in some jurisdictions with regard to the evidence-in-chief of witnesses. For example, in Victoria, unless the magistrate gives leave, the witness 'must confine his or her evidence-in-chief to identifying himself or herself and attesting to the

Figure 1

Use of Paper Committals



Notes:
1. This figure shows the proportion of all committal proceedings in which no oral evidence was taken.
2. Victorian figures are for Melbourne City Court only, Western Australian figures are for Perth Court of Petty Sessions only and Tasmanian figures are for Hobart Police District only.

Sources:
Victoria: Unpublished data provided by the Victorian Criminal Delay Reduction Program, covering all committals in the City Court for the period September 1989-March 1990. South Australia: Unpublished data provided by the Office of Crime Statistics for 1987. Western Australia: Unpublished data provided by Perth Clerk of Petty Sessions for 1988. Tasmania: Unpublished data for 1988 provided by Prosecutions Division, Tasmanian Police.

truthfulness of the statement' (*Magistrates (Summary Proceedings) Act 1975* (Vic.) s.46(1)). The same result is achieved in other jurisdictions by agreement between prosecution and defence.

Thirdly, it is no longer the case that the prosecution has a complete discretion as to which witnesses to call. An increasingly influential view is that in a paper committal the prosecution should be required, at a minimum, to provide the defence with statements of all material witnesses. As a consequence, the committal is now operating as a form of substantial disclosure (see below). This change has been brought about in various ways: for example, in Queensland by a direction and set of guidelines by the Director of Prosecutions (Guidelines of the Director of Public Prosecutions to the Commissioner of Police and Crown Prosecutors appearing as prosecutors at an examination of witnesses in relation to an indictable offence, presented 7.7.88 to apply from 15.8.88). In other cases, by court

decisions (*R v. Harry, ex parte Eastway* (1986) 39 SASR 203; *Houston v. Crannage* [1990] WAR 2); and more generally by a growing awareness of the fairness and efficiency advantages of disclosure. In all jurisdictions there appears to be much greater disclosure by the prosecution at committal than was formerly the case.

Fourthly, the standard of proof to be used by magistrates in deciding whether or not to commit has recently been modified in the two most populous jurisdictions. The original criterion was whether there was a prima facie case or whether the evidence was sufficient to put the defendant on trial for an indictable offence. In Victoria, concern that this standard did not filter out enough weak cases led to the adoption of a different test: 'Is the evidence of sufficient weight to support a conviction?' (*Magistrates (Summary Proceedings) Act 1975* (Vic.) s.56; Advisory Committee on Committal Proceedings, Report on Committal Proceedings 1986, pp. 14-15). In applying this test, the magistrate is required to focus on the issue of conviction as opposed to trial, and in addition is permitted to consider the credibility of witnesses (Advisory Committee on Committal Proceedings 1986, p. 15). In New South Wales, the decision of the Court of Appeal in *Wentworth v. Rogers and West* ((1984) 15 A Crim R 376; (1984) 2 NSWLR 422) severely limited the power of magistrates to discharge defendants. As a result of that decision the criterion for committal was amended by legislation. Under the new standard, it would appear that the defendant should be committed for trial unless 'the magistrate forms the opinion that there is no real chance or prospect of a conviction' (*Carlin v. Thawat Chidkhunthod and Another* (1985) 20 A Crim R 332 at 350). As with the Victorian criterion, the magistrate, in applying this test, must make an assessment of the credibility of the witnesses and the strength of the evidence.

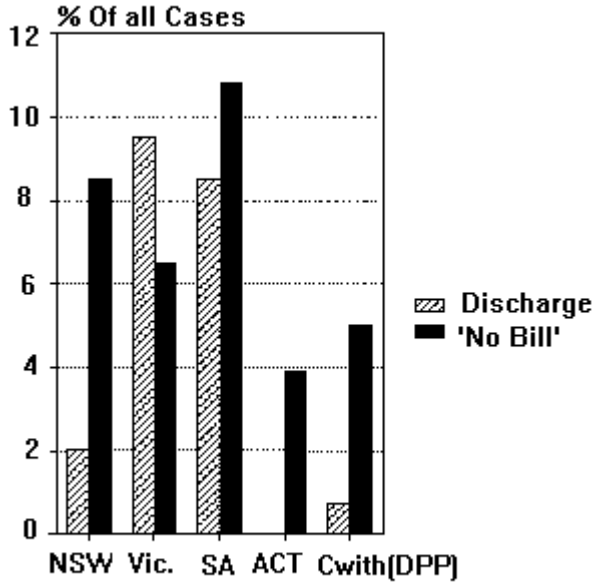
The Filter Function of Committals

The traditional view is that the primary function of the committal hearing is to ensure that no-one stands trial unnecessarily (*see* Gibbs and Mason J.J. in *Barton v. R* (1980) 147 CLR 75 at 99). In recent years a number of reports have questioned whether committal proceedings are performing this function effectively (Advisory Committee on Committal Proceedings 1986, pp. 9-10; the NSW Law Reform Commission 1987, pp. 262-3; the NSW White Paper 1989, pp. 22-5; Bishop 1989, pp. 90-99). In support, these studies have presented data showing that the discharge rate at committals is typically very low, especially when compared to the proportion of matters which are 'nolleed' or 'no billed' by the Crown after a defendant has been committed. However, on closer examination committals—at least in some jurisdictions—prove to be substantially more effective as filters than their critics claim. (In this discussion, the term discharge means discharged on all charges).

Data on discharge rates is available for Victoria, New South Wales, South Australia, the ACT, and all cases prosecuted by the Commonwealth Director of Public Prosecutions (DPP) (*see* Figure 2). Matching data on 'no bills' is available for each of these jurisdictions, although only the New South Wales and Commonwealth DPPs provide a breakdown of reasons for the 'no bills'. The discharge rate estimates appear to be reliable for all jurisdictions except New South Wales. The New South Wales figure of 2 per cent was initially published in the *Coopers Lybrand Report* and

Figure 2

Discharge and 'No Bill' Rates



Notes:

1. The discharge rate is the number of defendants discharged on all charges stated as a percentage of all defendants subject to committal proceedings.
2. The 'no bill' rate is the number of 'no bills' stated as a percentage of total higher court dispositions.
3. In some jurisdictions there may be a considerable delay between committal for trial and the filing of a 'no bill'; hence 'no bill' and discharge rates for any one year are not directly comparable except for cases conducted by the Commonwealth DPP.

Sources:

Victoria: Discharge rate calculated from unpublished data provided by the Victorian Criminal Delay Reduction Program, covering all committals in the City Court for the period September 1989-March 1990 (960 defendants). 'No bill' rate based on 1565 defendants disposed of in the Melbourne County Court in 1989: data provided by Management Information Section, Courts Division, Attorney General's Department. SA: Discharge rate obtained from unpublished data for 1987 provided by the Office of Crime Statistics (based on 681 defendants). The 'no bill' rate is from Office of Crime Statistics, Crime and Justice in South Australia 1987, Table 4.1; based on 1273 defendants appearing before the Supreme and District Courts. New South Wales: Discharge rate quoted in *Coopers Lybrand Report*, p. 100. This data was provided to Coopers Lybrand by the New South Wales Bureau of Crime Statistics. The number of cases or defendants on which this rate is based is not stated. The 'no bill' rate was calculated from data published in the Office of the Director of Public Prosecutions, *Annual Report 1988-89*, Appendices 5-6, and is based on 5220 defendants disposed of by the District and Supreme Courts in 1988-89. ACT: Discharge rate obtained from the Commonwealth Director of Public Prosecutions, Annual Report 1989, Table 6(a). 'No bill' data provided by Canberra office of the Commonwealth DPP. Both rates are based on 129 defendants disposed of in the ACT Supreme Court in 1988-89. Commonwealth DPP: Discharge rate obtained from the Commonwealth Director of

Public Prosecutions, *Annual Report 1989*, Table 6(a). 'No bill' data from *Annual Report 1989*, pp. 18-19. Both rates are based on 541 defendants disposed of Australia-wide in 1988-89.

was subsequently cited in the 1989 White Paper, but is now widely acknowledged (including by the New South Wales Bureau of Crime Statistics and Research) as being too low (communication from Mr Ian Crettenden, Manager, Justice Information System, BCSR 13 November 1989). We reproduce it here only because it remains the best available official estimate[1]. It should also be noted that the New South Wales 'no bill' rate shown in Figure 2 is well below that quoted in the DPP's *Annual Report*[2]. This discrepancy arises because the New South Wales DPP states the 'no bill' rate as a percentage of trial committals only, whereas we include sentence committals in the base figure. The implications of excluding sentence committals when calculating 'no bill' rates are particularly significant in the case of New South Wales, because of the comparatively high proportion of defendants in this state who plead guilty at the committal stage (*see* Figure 2).

In both Victoria and South Australia, discharges appear to be relatively common events. In the Melbourne City Court, where the bulk of Victorian committals are conducted, 9.5 per cent of committal matters completed between September 1989 and March 1990 were discharged. A slightly higher rate of 13 per cent was obtained for the period February-July 1989. (This estimate was obtained from a monitoring study of 675 committals conducted at the Melbourne Magistrates Court between February and July 1989 by the Criminal Delay Reduction Program). Notably, the 'no bill' rate in Victoria for 1989 was well below the discharge rate: a strong indication (even without a breakdown of 'no bill' figures) that more weak cases were screened-out at the committal stage than subsequent to it.

In South Australia the discharge rate for the state as a whole was around 8 per cent in 1987. The comparatively high 11 per cent 'no bill' rate may be partly a product of restrictions on the cross-examination of complainants in sexual assault cases, which forces the Crown to 'no bill' matters which might otherwise have been discharged had a full committal hearing been held. Thus in 1987 full nolle prosequis were entered for 19 per cent of defendants presented to the higher court on sexual offence charges, compared to an average nolle rate of 9 per cent for all other offence categories (Office of Crime Statistics, South Australia 1987). By contrast, in New South Wales, where no such restrictions apply, the 'no bill' rate for sexual assault cases in 1989 was identical to the overall 'no bill' rate (unpublished data provided by NSW Bureau of Crime Statistics and Research).

In comparison to Victoria and South Australia, the discharge rate for committals conducted by the Commonwealth DPP is very low. Of the 129 defendants dealt with by the ACT Magistrates Court in 1988-89, all were committed. A statistically more robust finding is that discharges were ordered by magistrates in only 4 (0.7 per cent) of the 592 committal proceedings initiated by the Commonwealth DPP in Australia in 1988-89—despite the considerable complexity of a number of these cases and the variety of jurisdictions in which they were conducted.

The very low discharge rate in cases conducted by the Commonwealth DPP does not necessarily mean that the committal has failed to act as an effective filter, as the 'no bill rate both for the ACT and Australia as a whole, is also low by the standards of the other jurisdictions (3.9 per cent and 5.0 per cent respectively). Rather, what this data may indicate is that where the Crown has sole responsibility for the conduct of committals, there is a greater likelihood that weak cases will be weeded-out prior to commencement of the committal hearing.

The impact of evidentiary standards

Data from Victoria suggests that the wording of the tests which magistrates use in determining whether to commit a defendant may also have an impact on the discharge rate.

Prior to 1987, the *Magistrates (Summary Proceedings) Act 1975* (Vic.) defined two different standards of proof, with the key test being whether the evidence was 'sufficient to put the accused upon trial for any indictable offence' (s.59(7)). Following the recommendations of the Coldrey Committee, early in 1987 this test became whether the evidence is 'of sufficient weight to support a conviction' (Advisory Committee on Committal Proceedings 1986, p. 14). In the view of the Committee this standard permitted magistrates to assess the credibility of individual witnesses (Advisory Committee on Committal Proceedings 1986, pp. 15-16). Just as importantly, adoption of the new standard sent a signal to magistrates that it was acceptable for them to play a more active role in screening out weak cases.

Implementation of this new standard appears to have corresponded with a marked increase in the committal discharge rate. As noted above, the discharge rate in 1989 exceeded 10 per cent. By contrast, a study of committals held at the Melbourne City Court in 1984 found that only 4.4 per cent of defendants were discharged (Advisory Committee on Committal Proceedings 1986, p. 9).[3] Changes in the 'no bill' rate have also been in the predicted direction. Thus since 1987 the Victorian 'no bill' rate has averaged only 6.5 per cent, compared to a rate in excess of 8 per cent for the previous three years—indicating that fewer weak cases are now getting past the committal stage (unpublished data provided by Management Information Section, Courts Division, Victorian Attorney-General's Department).

Whether similar legislative changes in other jurisdictions would have the same effect is not so clear. One important consideration is the preparedness of the magistracy to enforce any new standards which might be introduced, and the degree to which these standards have the support of prosecuting authorities. In this regard, it cannot be assumed that the level of commitment to enhancing the committal's filter function will be as great in all jurisdictions as it has been in Victoria (for example, the current DPP, Mr John Coldrey QC, chaired the committee which recommended the adoption of the amended evidentiary standard in Victoria). However, the Victorian evidence does suggest that, provided the conditions are right, relatively subtle changes in wording can have a significant effect on magisterial decision-making.

Withdrawals before and after committal

The data presented so far has related only to the direct screening effect of committals. Arguably, the committal also acts as a screening mechanism in two less direct, but nonetheless potentially significant, ways.

First, the anticipation that a matter will be discharged at a committal may be sufficient to prompt the prosecution to withdraw some charges prior to the committal. In the case of Victoria, the withdrawal rate for cases booked for a committal at Melbourne City Court between May and July 1989 was a substantial 8 per cent (unpublished data provided by the Victorian Criminal Delay Reduction Program)—up from 3 per cent in 1984, when the old evidentiary standard still applied (Advisory Committee on Committal Proceedings 1986, p.

9). No quantitative data on withdrawal rates is available for other jurisdictions, although Bishop (1989, p. 47) has suggested that in New South Wales 'the withdrawal of indictable charges so as to withdraw the 'case' against the accused is most uncommon'.

The second way in which committals may have an indirect screening effect is by prompting the filing of a 'no bill' subsequent to the committal hearing. This can occur when a hearing, while not producing a discharge, has nonetheless exposed serious weaknesses in the prosecution case. According to the New South Wales DPP: 'the decision to terminate is hardly ever based on material elicited during cross-examination at the committal proceedings' (*Annual Report 1988-89*, p. 12). However, some other prosecution authorities, including the Commonwealth DPP, see committals as performing a more useful role in this regard (Submission by Mr Mark Weinberg QC, Commonwealth Director of Public Prosecutions, to the NSW Attorney-General, June 1989). Unfortunately there is no data available with which to test these competing claims, but it would be surprising if 'prompted no bills' were as rare as suggested by the New South Wales DPP.

Reasons for 'no bills'

Aggregate 'no bill' rates give a somewhat distorted picture of the effectiveness of committals as filters, because they include cases in which the Crown has dropped charges for reasons unrelated to the strength of the case presented at the committal hearing. If a case is dropped because of considerations personal to the accused or victim, or because the offence is trivial or stale, this is obviously no reflection on the correctness of the magistrate's decision to commit. Similarly, magistrates can hardly be held accountable for 'no bills' which are filed because of the loss of key witnesses, or a change in evidence subsequent to the committal. Only the Commonwealth and New South Wales DPPs provide information on the reasons for entering 'no bills'. This data is summarised in Table 1. Given the small number of cases 'no billed' by the Commonwealth DPP, and the fact that identification of 'predominant reasons' by DPP personnel is a somewhat subjective process, care must be taken in interpreting these results. Nonetheless, the following conclusions seem warranted.

First, it is apparent that in only a minority of cases was a matter 'no billed' because the DPP had concluded that the magistrate had made an erroneous decision. In New South Wales 23 per cent of the 'no bills' in 1988-89 were filed on the grounds that 'on the assessment of facts and law there was no case to be tried by a jury'. In the Commonwealth jurisdiction the proportion 'no billed' on these grounds was higher, but only a very small number of cases was involved.

Second, in New South Wales there were 220 cases (43 per cent of the total) in which the predominant reason for entering a 'no bill' was that there was 'no reasonable prospect of a conviction'. According to the DPP: 'these are cases where I have determined that although a jury might convict on the evidence the chances of that happening are not such as to justify the time and expense of a jury trial'. In other words, these cases were filtered out not because of any obvious error on the part of a magistrate, but because the New South Wales DPP uses a higher evidentiary standard than that which magistrates are required to apply. Interestingly, in 1987-88 there were only 72 cases which failed the 'reasonable prospect of conviction' test. The 300 per cent increase in the number of cases in this category in 1988-89 may be a reflection of changes in the way in which the DPP classifies the reasons for 'no bills', but it may also indicate that the evidentiary standard has been informally raised in response to mounting concern about court delays.

Third, in both jurisdictions there were a substantial number of cases in which the predominant reason for filing the 'no bill' was ostensibly unrelated to the strength of the prosecution case at the time of the committal. These included cases where there had been a change in evidence or the loss of witnesses, some matters deemed to be trivial or 'stale', and others in which a 'no bill' had been filed because of considerations personal to the victim or

the accused. Clearly, as indicated above, none of these 'no bills' reflected adversely on the quality of decision-making at the committal hearing.

Table 1

Reasons for 'No Bills'

	Jurisdiction			
	New South Wales		*Commonwealth*	
Predominant Reason Given	No. of 'no bills'	% of total	No. of 'no bills'	% of total
No Case	118	23.1	11	40.7
No reasonable prospect of conviction	220	43.1	3	11.1
Change in evidence/ loss of witnesses	58	11.4	5	18.6
Other	114	22.4	8	29.6
Total 'no bills'	510	100.0	27	100.0

Note:
This table excludes cases where the reason given for filing the 'no bill' was that the criminality involved was adequately covered by other charges or sentences. Even with the exclusion of these cases, the New South Wales figure includes 65 partial 'no bills', i.e. cases in which only some charges were dropped. It is not possible to tell from the report of the New South Wales DPP how these cases are distributed amongst the above categories.

Sources: New South Wales: Director of Public Prosecutions, *Annual Report 1988-89*, p. 30. Commonwealth: Director of Public Prosecutions, *Annual Report 1989*, pp. 18-19.

It is apparent, therefore, that use of aggregate 'no bill' rates gives a misleading impression of the effectiveness of committals as filters. (Some partial 'no bills', in which defendants are not proceeded against on the more serious charges, may also be due to incorrect decisions by magistrates although they could also be indicative of charge bargaining by indicting authorities). Magistrates have arguably failed to perform the filter function assigned to them by the law only in those cases where the DPP has subsequently found that there was no prima facie case against the accused. If this is the case, then of all defendants committed for trial or sentence in New South Wales in 1988-89, only 2.1 per cent were wrongly committed, with the equivalent figure for the Commonwealth DPP being 1.9 per cent. By some standards these error rates may be too high; however, they are certainly much lower than implied by many of the critics of committals.

Ex-officio indictments

Magistrates can err not only in committing when they should have discharged, but also in discharging when they should have committed. The best indicator of the frequency with

which significant errors of this second type occur is the proportion of cases in which an ex-officio indictment is filed following a discharge. (Strictly speaking, this test underestimates the number of errors because for an ex-officio indictment to be filed, a committal decision must be wrong not only in terms of the standard applied by the Crown. However, the test does identify the errors which matter.)

It would appear that ex-officio indictments following the discharge of a defendant at a committal hearing are quite uncommon. In New South Wales in 1988-89, only twelve matters were referred to the DPP after discharge at Local Court and not all of these resulted in an indictment being filed. (Unpublished information provided by the NSW DPP's Office) (Office of the Director of Public Prosecutions, Victoria *Annual Report 1988-89*, p. 12, which indicates that notices of trial were issued by the Director on a total of 29 occasions, with only a minority being authorised following discharge at a committal). The equivalent Victorian figure for the same period was less than fourteen cases, and the Commonwealth DPP filed only one ex-officio indictment in 1988-89 (Commonwealth Director of Public Prosecutions, *Annual Report 1989*, p. 26). In all other jurisdictions, although no data was available, the consensus was that ex officios were quite rare events.

It would seem, then, that magistrates, if they err, tend to err on the side of caution in deciding whether to commit. This may be because magistrates regard an ex-officio indictment as a more serious reflection on their decision-making capabilities than a 'no bill', and so are more concerned to avoid the former than the latter. An alternative, and possibly more plausible, interpretation is that caution is a natural consequence of the fact that the committal is not a final decision: hence, the easier course of action to follow, when in doubt, is to send the case further down the line for someone else to decide.

Summary

The gist of the above analysis is that committals play a more significant role as a filter than is commonly realised, especially when their indirect effects are taken into account. Moreover, to the extent that committals are not more effective in screening out weak cases, this in good part is because the relevant legislation does not require, nor permit, magistrates to play a more active role. Consistent with this view, the Victorian evidence suggests that, where the evidentiary test for committal is made more rigorous, the effectiveness of the committal can be enhanced considerably, provided that some other conditions are also met.

Early Identification of Guilty Pleas

Given that the great majority of defendants dealt with by Australian higher courts ultimately plead guilty to one or more charges, there are obvious advantages in being able to identify pleas of guilty at the committal stage. As pointed out by the Victorian Criminal Delay Reduction Program, 'pleas of guilty "at the door of the court" are among the major causes of uncertainty in the listing system and inefficient use of court time' (The Attorney-General's Steering Committee on Delays in Criminal Proceedings, *Newsletter*, May 1989, p. 3). The early ascertainment of a guilty plea also:

> enables the anxieties of potential witnesses to be allayed, and similarly, eliminates the prolonged anxiety of both the victim of crime and the persons accused of criminal acts. Furthermore by enabling sentencing to occur at a date more proximate to the commission of the crime, any undermining of the deterrent effect of the criminal justice system is prevented (Advisory Committee on Committal Proceedings 1986, p. 26).

Whatever their potential, in most jurisdictions committal proceedings have not, to date, been a very effective mechanism for the early identification of pleas. As Figure 3 indicates, with the notable exception of New South Wales and the ACT, committals for sentence make up only a small proportion of total committals. Anecdotal evidence suggests that there is also a very low guilty plea rate at committals in Western Australia.

The low guilty plea rate is an indication that traditionally there have been few inducements for defendants to plead guilty at the committal. In most jurisdictions, charge negotiations, if any occur, do not take place until after a matter has been taken over by the DPP.[4] From a bargaining perspective, defendants thus have had little to gain from 'showing their hand' at the committal and may even run the risk of being worse off if they do. This point is well illustrated by some data collected by the Victorian Criminal Delay Reduction Program, indicating that charges were much more likely to be dropped for defendants who had changed to a plea of guilty after committal than for those who had pleaded guilty at the committal stage (Wright 1989, p. 26).

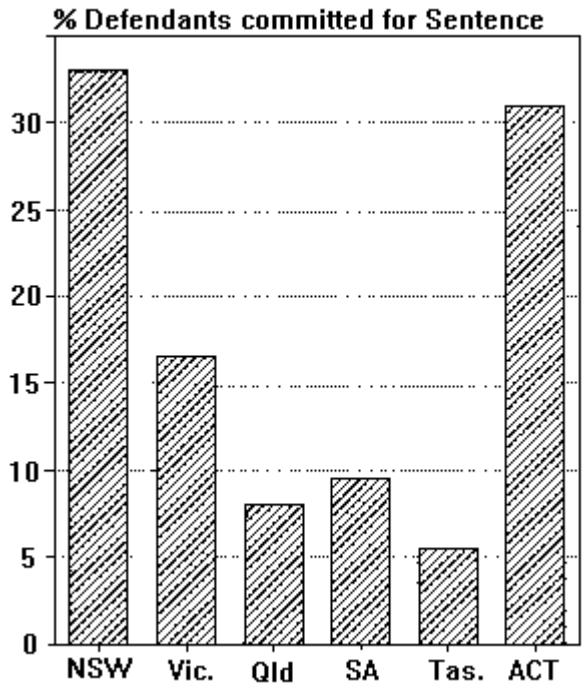
Another significant consideration is that in many cases defendants are simply not in a position to make an informed decision about plea at the committal hearing. For example, rules governing the granting of legal aid mean that a substantial number of defendants are unrepresented, or are represented for the day only through a duty solicitor.[5] Also, in the past the prosecution material available to the defence was often limited and so did not enable any proper appraisal of the prosecution case, although this situation has improved considerably in recent years.

Not only are there few incentives to plead guilty at the committal hearing, but in some states a defendant who does take this course of action is placed at a significant procedural disadvantage. For instance, in Western Australia a presumption against the granting of bail is created once a defendant has been committed for sentence (*Bail Act 1982*, Sch.cl.4). In Queensland and Western Australia, defendants who have pleaded guilty at the committal cannot subsequently change their plea without the approval of the presiding judge (Queensland Criminal Code, s.600; Western Australian Criminal Code s.618), and in South Australia and the Northern Territory, defendants normally cannot alter their plea less than seven days prior to the commencement of the session to which they have been committed (*Justices Act 1901* (SA) s.141(10); *Justices Act 1928* (NT) s.141(1)). These rules obviously make it very difficult for a defendant who has pleaded guilty at the committal to take advantage of any new evidence, or of a late discovery of weaknesses in the Crown's case. By comparison, in New South Wales and the ACT—the two jurisdictions with the highest proportion of sentence committals—defendants who plead guilty at the committal are placed at less of a disadvantage than their counterparts in other jurisdictions. Specifically:

- in contrast to most other jurisdictions, guilty pleas can be formally indicated at any stage of proceedings;

Figure 3

Guilty Plea Rate at Committals



Note:
The guilty plea rate is the number of defendants committed for sentence expressed as a proportion of all defendants committed for trial or sentence. It would be preferable to include discharges in the base figure, but the relevant data is not available for all jurisdictions.

Sources:
Victoria: Unpublished data provided by the Victorian Criminal Delay Reduction Program, covering all committals in the Melbourne City Court for the period September 1989-March 1990. SA: Office of Crime Statistics, *Crime and Justice in South Australia* 1987, Table 3.47. Tasmania: Unpublished data for Hobart Police District for year 1988, provided by Prosecutions Division, Tasmanian Police. Queensland: *Annual Report* of the Director of Prosecutions for the Year ended 31 December 1989, Appendix III. New South Wales: Office of the Director of Public Prosecutions, *Annual Report 1988-1989*, Appendix 7. ACT: Commonwealth Director of Public Prosecutions, *Annual Report 1989*, Table 6(a).

- there are no restrictions on the accused changing to a plea of not guilty after s/he has been committed for sentence ; and

- these are the only two Australian jurisdictions in which a defendant who changes his or her plea has the option of going back for a committal hearing—this being an absolute right in the ACT and subject to the discretion of the presiding judge in New South Wales (where it was also an absolute right prior to 1983).

It is worth noting that the committal guilty plea rate in Victoria has increased significantly since the proclamation of an amendment to s.4 (1) of the *Penalties and Sentences Act 1985* in mid-1989. The original version of this section directed judges, when fixing sentence, to have regard to the fact that the defendant had pleaded guilty, but did not differentiate between early and late guilty pleas. The 1989 amendment corrected for this omission by declaring that a court, in passing sentence, could also take into account 'the stage in the proceedings at which the person pleaded guilty or indicated an intention to plead guilty'. Magistrates at committal must now inform defendants of this fact before they enter a plea.

As a matter of law the amendment to s.4 was arguably unnecessary, because appellate courts had already acknowledged that the timing of the plea should be taken into account in fixing a sentence. However, as a matter of practice, the amendment, by clarifying and emphasising that there is a discount for an early plea of guilty, appears to have had some impact on defendant decision-making. Thus in the six months from February to July 1989, the guilty plea rate in committal hearings at Melbourne City Court averaged 12 per cent, whereas the average rate for September 1989-March 1990 was 16.5 per cent, rising to 20 per cent in the first 3 months of 1990 (unpublished data provided by the Victorian Criminal Delay Reduction Program). The rate for 1989 was, in turn, much higher than the estimated guilty plea rate of 'less than 1 per cent' quoted in the Coldrey Committee's 1986 Report (Advisory Committee on Committal Proceedings 1986, p. 27).[6]

Indirect effects

An argument put to us by a number of defence counsel was that even if defendants did not plead guilty at the committal hearing, the committal—by highlighting the strength of the prosecution case—often prompted a later plea of guilty from reluctant accused. Consistent with this view, the Commonwealth DPP, Mr Mark Weinberg QC, has also argued that:

> in practice, in a number of cases, pleas of guilty are forthcoming after committal which would not be offered if matters were to go to trial without there being preliminary hearings (Letter to the Hon. John Dowd, MP, NSW Attorney-General, 29 June 1989).

The magnitude of this effect is not quantifiable, although presumably it will be greatest where there has been an oral hearing and the evidence of the key prosecution witnesses has been tested by cross-examination.

Summary

In summary, for whatever reasons, it is clear that in the ACT and New South Wales the committal is still a reasonably effective mechanism for the early identification of guilty pleas—although this fact seems to have been ignored by the critics of the present system in New South Wales. There are also indications that in Victoria the committal is beginning to play a more important role in this regard. As far as the other jurisdictions are concerned, committals, as they currently operate, do little to aid the early identification of guilty pleas. However, there are some fairly obvious ways in which the proportion of guilty pleas could be increased substantially, for example by making it easier for defendants to withdraw pleas of guilty, by not discriminating against guilty pleaders in decisions concerning bail, and by

adopting legislation along Victorian lines to reward early pleas of guilty. Arguably, if there were greater involvement by the Crown and legal aid at the committal stage, both sides would also be in a much better position to engage in serious negotiation over charges.

Committals as a Disclosure Mechanism

Proper and early disclosure of the prosecution's case against the accused is desirable not only to ensure fairness to the accused, but also because it contributes to the efficient operation of the criminal justice system. In particular, early disclosure can lead to shorter trials by enabling the accused to focus defence against the prosecution case with greater precision (New South Wales White Paper 1989, p. 46; Advisory Committee on Committal Proceedings 1986, pp. 10-11; UK Royal Commission on Criminal Procedure 1981, pp. 175-6). To the extent that committal procedures facilitate disclosure, they can therefore be said to be performing a useful function, even if, as some argue, this role is only incidental to that of filtering out weak cases (NSW Law Reform Commission 1987, p. 263).

In the past, the effectiveness of the committal as a disclosure mechanism was certainly open to question. However, as noted earlier, the position has improved considerably in recent years—an assessment supported by most of the defence counsel interviewed as part of this project. Moreover, whatever the past and present shortcomings of committals as a disclosure mechanism, one very important role which they perform is to provide a date, well in advance of the trial itself, by which a substantial part of the prosecution's evidence must be made available to the defence (UK Royal Commission on Criminal Procedure 1981, pp. 175-6). The same result can probably be achieved without a committal if prosecution authorities set and adhere to their own disclosure dates (as proposed in the NSW White Paper 1989, p. 47), but arguably, externally enforced deadlines will be complied with more consistently.

Management Functions

Committals, particularly those in which there is cross-examination of witnesses, are seen by many senior counsel as serving some useful management purposes, especially in the longer and more complex cases. For both the prosecution and the defence, an oral committal provides a means of checking the strength of key witnesses, discovering gaps and deficiencies in a case, and assembling and structuring the evidence. In this way, a well run committal can clarify and refine issues, and so shorten the resultant trial. Admittedly, this is not an effect which can be measured, short of abandoning committals and undertaking a 'before and after' comparison of average trial lengths, but the possibility that trials might take significantly longer in the absence of committals certainly should not be ignored.

Committals and Court Time

Every jurisdiction has its horror stories of committal hearings which have run for months or even years. For example, in his most recent report the Commonwealth DPP refers to the case of *Goldsmith and Ors*, conducted by his Office in New South Wales, which 'commenced on 2 September 1985 but did not conclude until 5 May 1989 . . . with the matter taking up 146 hearing days within that period' (Commonwealth DPP *Annual Report*

1989, p. 124). Another recent New South Wales case (*Chapman and Ors*), conducted by the state DPP, took 17.5 months to complete (NSW Attorney-General's Department 1989, p. 21), the infamous 'Forsyth Saga' in Victoria lasted 155 sitting days, and in Western Australia committal proceedings in 1988 arising out of the Fremantle Gaol riot took up 46 sitting days (information obtained from Perth Court of Petty Sessions Rosters).

It is important, however, not to treat these cases as being in any way typical. In most jurisdictions a large proportion of cases are dealt with by means of 'hand-up briefs' which usually take up only a few minutes of court time (*see* Figure 1, p. 7). Moreover, of those matters which do involve some oral examination, the great majority are normally disposed of within a day or less and very few last for longer than four sitting days (Table 2). Even in the Commonwealth jurisdiction, which has a reputation for complex cases, only 14 per cent of contested committals in 1988-89 took five days or more to be heard.

Table 2

Length of Oral Committal Hearings

	Hearing Length		
Jurisdiction	% lasting 1 day or less	% lasting 2-4 days	% lasting 5 days or more
Victoria	64.1	30.6	5.3
SA	79.4	16.2	4.4
WA	88.5	9.0	2.5
Cwth (DPP)	73.1	12.9	14.0

Note:
Table refers only to hearings in which there was oral cross-examination of at least one witness.

Sources:
Victoria: Unpublished study by the Coordinating Magistrate, covering the Melbourne Magistrates Court for the period May-October 1987 (the Mason Report); based on 265 cases. South Australia: Unpublished data provided by the Office of Crime Statistics for 1987; based on 368 cases. Western Australia: Analysis of Perth Court of Petty Sessions 1988 rosters, undertaken by the authors; based on 204 cases. Commonwealth (DPP): Commonwealth Director of Public Prosecutions, *Annual Report 1989*, Table 6(b); based on 171 cases (cases brought by the DPP in New South Wales and the ACT not included).

It also should not be assumed that lengthy committals are invariably a waste of time. While some hearings may be needlessly drawn-out by repetitive cross-examination of large numbers of witnesses, others take a long time to complete primarily because the issues involved are complex. For example, the Fremantle Gaol riot case involved a large number of defendants and the other cases cited above were all extremely complex commercial fraud or tax evasion matters. Moreover, as put to us by a number of experienced counsel, the time spent on a committal may well be recouped if it leads to the subsequent trial being run on tighter lines, or to a trial being avoided altogether because material produced at the hearing prompts a discharge, or the later entry of a 'no bill' or guilty plea.

To be sure, there is probably scope in most jurisdictions for further reducing the amount of time taken up by committals. This could be done, for example, by facilitating the use of paper committals, and exercising greater control over the calling and cross-examination of witnesses. However, even in their present form committals do not appear to represent a major drain on lower court resources. For example, our analysis of the Perth Court of Petty Sessions rosters for 1988 showed that only 10 per cent of scheduled hearing time on criminal matters was allocated to committal hearings. We were informed that in Western Australia a substantial number of scheduled oral committals either did not proceed, or finished earlier than anticipated. If anything a figure of 10 per cent is therefore an overestimation. In Victoria the great bulk of committals for the Melbourne region are conducted at the City Court in Russell Street. Only around 15 per cent of the magistrates who sit in the metropolitan area are based at this court, and not all of their time is spent on committal matters (Estimate provided by the then Chief Magistrate, Mr Dugan). In the ACT Magistrates Court in 1988-89, contested committals accounted for only 6 per cent of all contested committal matters (Commonwealth Director of Public Prosecutions, *Annual Report 1989*, pp. 57, 93). In New South Wales, committal matters (contested and uncontested) represented only 4.6 per cent of all the criminal matters processed by Local Courts in 1988. Even if the average committal matter in New South Wales took twice as long to be dealt with as a summary matter, committals would still have accounted for less than 10 per cent of all Local Court sitting time.

Arguably, even if the abolition of committals produced only a 10 per cent reduction in lower court time, this would represent a substantial saving. However, cost reductions at the lower court level would not necessarily translate into savings for the system as a whole, especially given that lower court time is much less expensive than higher court time. (As a rough guide, the Victorian Legal Aid Commission works on the assumption that the cost per day of funding a committal hearing is about half that for a County Court trial—and this takes no account of the higher salaries of judges, or the larger overheads associated with the higher courts.)

Committals and Delay

Another criticism of committals is that they are responsible for substantial delays in the disposition of cases. For example, the New South Wales White Paper attributes 'about one third of the delay between charge and trial . . . to committal proceedings' (p. 21). The argument here is that lower court backlogs, scheduling problems (especially for longer hearings) and legal manoeuvring by defendants, have often prevented matters from being processed within a reasonable time frame. By implication, if there was no need to hold a committal first, a matter would enter the higher court lists much more quickly and the overall elapsed time between charge and trial would be reduced proportionally.

We have been able to obtain broadly comparable elapsed time statistics for defendants on bail in New South Wales, Victoria and the ACT (Table 3).

This data indicates as follows: in the ACT Magistrates Court, which apparently has the longest delays of any lower court in Australia, in 1989 contested criminal matters took an average of 8-9 months to be determined; in Victoria in 1988, the median time between charge and committal was 5 months; and, in the Sydney and Sydney Western District Courts, in the July to September quarter of 1988, the average period between arrest to trial committal for bail cases was over 6 months.

Although these delays appear to be considerable, several observations should be made. First, in Victoria and New South Wales delays pre-committal are clearly less substantial than those which occur post-committal. In Victoria, the period from charge to committal accounts for less than one-third of total elapsed time between charge and trial; in New

South Wales, the equivalent proportion, on the basis of data provided by Coopers Lybrand, is only 21 per cent. (This proportion is substantially lower than the figure quoted by the NSW White Paper. It is unclear how the White Paper estimate was calculated.)

Table 3

Hearing Delays for Defendants on Bail

Jurisdiction	Average days from arrest to committal	Average days from committal to verdict	Arrest to committal as % of total elapsed time
NSW (Dist. Ct.)	198	753	20.8
Victoria	150	319	32.0
ACT	270	290	48.2

Notes:
1. Figures relate only to defendants on bail who were committed for trial.
2. Victorian figures are medians, not averages.

Sources:
New South Wales: *Coopers Lybrand Report*, pp. D42-D47. Based on a study of cases reaching finality during the September quarter of 1988 in the Sydney and Sydney Western District Courts. Victoria: Unpublished data on median total elapsed time for Supreme and County Court cases in 1989, provided by Management Information Section, Courts Division, Attorney-General's Department. Data on median time from arrest to committal is from a 1988 survey of the City Court, reported in the Criminal Delay Reduction Program Newsletter May 1989. ACT: Data on average time from charge to committal obtained from the ACT Magistrates Court Working Party, *Review*, July 1989, Appendices K and L. Data on time from committal to verdict is from Commonwealth DPP, *Annual Report 1989*, p. 81.

Second, it is a mistake to assume that all, or even most, of the time between arrest and committal could be saved if only committals were abolished. Rather, a substantial part of this time is used to carry out tasks which have to be performed regardless of whether a committal is required or not. For instance, the Victorian Criminal Delay Reduction Program found that in 1988 the median time taken to complete 'hand-up briefs' was between 1-2 months for most offence categories, rising to 4 months for homicide and drug offences, and 3.75 months for deception offences (unpublished data provided by the Victorian Criminal Delay Reduction Program). There is no reason to believe that this task would have been completed more quickly had a committal not been required. Decisions about legal aid funding are also usually taken in the period between charge and committal. Certainly, committals often take longer to finalise than they should, due to inefficient scheduling practices, inadequate resourcing of police and the courts, and a failure to take time standards more seriously. But apart from the ACT, it is difficult to see how the abolition of

committals could reduce the average time between charge and listing for trial or sentence by much more than two or three months—even assuming that the replacement arrangements do not generate their own delays.

Third, even if it was possible to list matters for trial or sentence more quickly, there would still be no guarantee that total elapsed time would be reduced as a consequence. For example in New South Wales, according to the *Coopers Lybrand Report*, cases are continuing to enter the District Court lists at a higher rate than they are being cleared (pp. 51-2). Under these circumstances, the main effect of a reduction in listing time would probably be a proportionate increase in the backlog of cases, brought about by a surge of new matters entering the lists.

In short then, claims that committals are clogging-up the lower courts, and that their abolition would lead to substantial time and money savings do not, in their present form, withstand close empirical scrutiny. Certainly, there are unnecessary delays in the pre-committal period in some jurisdictions, but the reductions in overall case processing time which might result from the abolition of committals are likely to be modest, especially if nothing is done about delays elsewhere in the system.

Witnesses and Cross-Examination

According to the New South Wales DPP, committals not only impose unnecessary financial and emotional costs on witnesses, but also create particular problems for the prosecution.

> Cross-examiners ask questions they would not ask before juries, witnesses are intimidated by the proceedings and victims feel harassed—so much so that in over 100 cases in the last 12 months I terminated the prosecution of the trial because of the wishes of the victim. There were other cases where I was not prepared to accede to the wishes of victims because of the seriousness of the offence or the community interest in its prosecution. It is understandable that the victims of personal violence, including children and women who have been sexually assaulted, are reluctant to submit themselves to public exposure on two separate occasions (*Annual Report 1988-89*, p. 12).

The New South Wales Attorney-General, Mr John Dowd, has also been quoted in the press as saying that:

> enter the dock again if the matter was committed for trial . . . and a lot of victims don't come forward knowing they may have to go for days in a witness box at committal proceedings (*Sydney Morning Herald*, 19 February 1990).

In response to these assertions, we offer the following brief observations.

First, it is beyond doubt that witnesses who have to attend committals are often inconvenienced, and that some of them, especially complainants in sexual assault cases, find the experience extremely stressful. However, it is important not to exaggerate the numbers so affected. In most jurisdictions, as has been seen, the use of 'hand-up briefs' is now widespread, and even where oral hearings are held, often only one or a few witnesses are called. Moreover, because the majority of defendants committed for trial end up pleading guilty, many of those witnesses who have to give oral evidence at a committal do not have to undergo the ordeal twice.

Second, it must be emphasised that if committals are to perform the filter function effectively, it is inevitable that some witnesses, particularly those whose testimony is central to the prosecution's case, will be subject to a vigorous, and possibly traumatic, cross-

examination. However unpleasant this might be for the witnesses concerned, the benefits for the system may sometimes be considerable, especially if cross-examination provides the basis for a discharge, or the filing of a 'no bill' by the Crown, or convinces the defence that there is no point in persisting with a plea of not guilty. In addition, the quality of evidence which a witness gives at a trial may sometimes be enhanced by virtue of having had a 'rehearsal' at the committal (*see* Law Reform Commission of Victoria 1988, p. 90, which makes this point in relation to victims in child sexual assault cases).

Third, suggestions that more witnesses would come forward if committals were abolished must be treated with some caution. Contrary to the proposition advanced by the New South Wales Attorney-General, it seems unlikely that members of the public have much knowledge about what goes on at committals, or indeed are more than dimly aware of their existence: hence, it is difficult to see how the fear of being cross-examined at a committal can act as a significant deterrent to potential witnesses.

Fourth, although some victims may not want to give evidence at a trial because of their experiences at the committal, the New South Wales DPP's estimate of the number of cases which are 'no billed' for this reason appears inflated. According to data presented elsewhere in the DPP's 1988-89 Report, there were 69 cases, not 'over 100', in which 'considerations personal to victim/witness' was given as the predominant reason for 'no billing' a case (Appendix 3 of the DPP's report: in another 49 cases 'considerations personal to victim/accused' was given as a reason for not proceeding but was not considered to be the dominant factor). Moreover, this category included not only cases where the victim did not want to endure another cross-examination, but 'cases of minor assault in a matrimonial or de facto situation where the rift has subsequently healed' (Office of Director of Public Prosecutions, *Annual Report 1987-88*, p. 15). It is significant also that the 'no bill' rate in New South Wales for sexual assault cases is well below that for South Australia, where there are tight limits on the cross-examination of sexual assault victims at committals (*see* above). Such evidence would seem to contradict the claim that more cases would go ahead if witnesses, and sexual assault victims in particular, were saved the trauma of cross-examination at a committal. Although arguments about the undesirable consequences of cross-examination at committals would seem to have been overstated, there is certainly scope for improving the treatment of witnesses at committal hearings. The most obvious starting point here would be Queensland, where it is still common practice for all prosecution witnesses to be present at the committal hearing, even though most, if not all of them, will not be required to give oral evidence. Such cases clearly involve a great waste of time and money and considerable, pointless inconvenience to witnesses. More generally, a strong case can be made out that magistrates in all jurisdictions should be able to disallow notices of witnesses where appropriate, and should have clarified their power to curtail irrelevant or repetitive cross-examination.

Three Approaches

Against this factual background, we now seek to assess three major approaches that can be adopted with respect to committals. These are firstly, the retention of committals in all cases (full retention); secondly, their retention in certain restricted cases only (partial retention); and thirdly, their abandonment (abolition).

In assessing these approaches we have adopted the criteria of fairness, openness, accountability and efficiency proposed by the UK Royal Commission on Criminal Procedure:

> Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted (that is, tried by a court) rather than dealt with in another way (by cautioning, for example) and secondly in that it does not display arbitrary and

> inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and accountable in the sense that those who make the decisions to prosecute most can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objectives that are set for it with the minimum use of resources and the minimum delay? (Royal Commission on Criminal Procedure 1981, pp. 127-8).

These goals, of course, are not always compatible. In particular, there is frequently in practice a tension between the goal of efficiency and the other goals of fairness, openness and accountability. Put simply, ensuring fairness, openness and accountability will generally require the expenditure of time, resources and money—expenditures often seen as contributing to inefficiencies in the system. It is important, therefore, not only to list the desired general goals of the system but also to assign priorities to these goals. Ultimately, priorities are matters of judgment, but in our view the goal of efficiency should generally be subordinated to the goals of fairness, openness and accountability. These latter three goals are closely interrelated—consistent and fair policies being far more likely where prosecution decisions are open to scrutiny and review. Hence, proposals that could lead to a significant increase in private decision-making by prosecution authorities would need in our opinion very powerful justification.

Abolition of committals

This proposal contemplates that there be no committal proceedings. Such a proposal would require considerable changes in the way in which cases proceed from initial charging to indictment before a higher court and there are a range of ways in which these changes could be made. But, however these changes are made, the major decision as to charges would be with the indicting authority.

On the assumption that the initial charges would be laid by the police, it could be expected on the basis of current data that a considerable number of cases would be nolleed. These decisions would be made in private and in many cases without the benefit of the added insight generated by cross-examination of major witnesses. The lack of openness in such a procedure is a powerful reason for rejecting it.

The aim of full disclosure could in theory be achieved without any committal hearing. However, defendants would not be able to test the adequacy of disclosure at an early stage through subpoena or cross-examination of police informants. It is not clear whether a system without a committal hearing could or would promote the goal of early identification of guilty pleas. Reward for early pleas would doubtless be an inducement, as under the committal regime. Likewise, the early involvement of the indicting authority should be of assistance in this regard. However, to use the expression of the UK Royal Commission on Criminal Procedure there would not be the discipline of a hearing date to have paperwork prepared and charging decisions worked out. No doubt there could be time frames imposed, but it is not at all clear without public court appearances that they would be very effective. There are other policy reasons for concern at the abolitionist proposal. It will be seen as a major change in the criminal justice system and one that removes defendants' rights. The implementation of such a scheme could well be attended with considerable hostility from professional participants in the criminal justice system—a hostility that is not

likely to help in getting over any early teething problems. Paradoxically, too, the success of such a scheme in a jurisdiction which has a substantial backlog of cases in the higher courts may well prove its undoing; if such a scheme were to move cases much more quickly to the higher court stage, it could well add to the backlog already existing. In our view, the case for abolition with its attendant increase in private decision-making by prosecution authorities has not been made out. More generally, the case for the abolition of committal proceedings has been based in large measure on assumptions about the failings of the present system of committals that are not borne out by the evidence.

Partial retention of committals

This approach contemplates the continued existence of committal hearings but with considerable restrictions on the right to have prosecution witnesses cross-examined. The nature of the restrictions imposed will determine to some extent the assessment of the approach.

- Right to cross-examine available only for certain specified offences, generally very serious offences.

This is the position in Hong Kong. In effect, committal proceedings are not available for most offences. If there are to be restrictions on the right to cross-examine prosecution witnesses it is difficult to see why the sole criterion should be the nature of the offence charged. In this respect, we would agree with the conclusion of the New South Wales White Paper:

> We do not favour such a system where committal proceedings are available as of right for some offences and not others. The usefulness of committal proceedings does not depend on the particular offence but rather depends on the issues to be raised at the trial (New South Wales White Paper 1989, p. 34).

- Right to cross-examine prosecution witness in certain specified cases.

The New South Wales White Paper proposed that there be no right to cross-examine a witness unless:

(a) the witness gave evidence of identification of the defendant; or
(b) the witness was an accomplice; or
(c) the witness was an expert scientific witness; or
(d) there were special or exceptional reasons which required the cross-examination of a particular witness; or
(e) the other party consented (New South Wales White Paper 1989, pp. 38-9).

The first three categories are cases where cross-examination can be most useful in determining the strength of a case. However, there are other categories and other cases where cross-examination would also often be very useful. No doubt, in part, this is the reason for the residual category (d) above of 'special or exceptional' cases. If, as seems likely, this category is supposed to be interpreted very narrowly, it is likely that deserving cases will be excluded. It is, moreover, as a matter of principle, difficult to understand why consent of the opposing party of itself confers the right of cross-examination. More generally, applications to magistrates for the right to cross-examine under this proposal are likely to be a source of legal demarcation disputes of little utility. In summary, this proposal implicitly concedes that cross-examination of prosecution witnesses at committals can be of

benefit to the criminal justice system. The technique adopted to limit and channel that cross-examination is not likely to promote a fairer and more efficient process.

- General right to cross-examine witnesses save for one or two special exceptions.

This in essence is the current position in South Australia where alleged victims of sexual offences cannot be compelled to be cross-examined at a committal unless they consent, or the magistrate is satisfied that there are 'special reasons' why they should be so required. This position accepts the utility of cross-examination at committals generally but exempts one particular class of witness from liability for cross-examination, essentially because of the distress that can be caused by excessively harsh cross-examination at committal, where there are not the restraints imposed by the presence of a jury at a trial. However, it is precisely in cases of sexual assault that cross-examination at committals is arguably most useful. Moreover, on the available evidence (see above), failure to allow the complainant to be cross-examined at committal will lead to an undesirable increase in the number of cases privately 'no billed' by the indicting authority. On balance, we are therefore of the opinion that there are other means of protecting witnesses and controlling cross-examination short of total or near total bans. In particular, the restrictions on questions about previous sexual history, the requirement that informants be represented by legally qualified counsel, and restrictions on reporting, should offer considerable protection to such witnesses. (This was the view adopted by the Law Reform Commission of Victoria in its 1988 report, *Rape and Allied Offences¾Procedure and Evidence*, Report No. 13 p. 23).

In summary, the various proposals for partial retention all in varying degree concede that cross-examination of witnesses can be worthwhile. In our view, particularly in light of the fact that so many committals now proceed without any witnesses being required for cross-examination, the case for only partial retention of committals has not been made out.

Full retention of committals

The option of full retention contemplates the situation where the defendant has the right to cross-examine prosecution witnesses. It does not contemplate that this right will be exercised in all, or indeed even most, cases.

On the available evidence, it seems undoubted that present procedures are more effective in achieving their objectives than is often claimed by the critics of committals. Moreover, the benefits of committal proceedings cannot, in our view, be realistically achieved by other means. Furthermore, important considerations of openness and fairness in the operation of a criminal justice system militate against any increase in the private decision-making of prosecution authorities.

A Suggested Approach

Although our conclusion is that committals should be retained, there is in our view considerable scope for improving the conduct of committal proceedings so that they can best achieve their objectives at the lowest cost in terms of money, resources and individuals, including witnesses and defendants. The following is an outline of the procedures which we believe will be most likely to satisfy these requirements.

In the first place, it is important that committal proceedings be instituted only for those cases which are in fact going to be finally dealt on indictment. For offences which must be heard on indictment there is no problem. For indictable offences which can be heard summarily the decision whether to proceed summarily or by indictment should be made by the informant. If the informant determines that the matter is to proceed summarily, the case should commence and proceed as a summary matter. The defendant will retain his or her current entitlements to opt for jury trial and the Magistrate's Court will retain the discretion to refuse to hear a case if deemed too serious to be dealt with summarily. It would be desirable if the DPP or the Crown produced in conjunction with the police guidelines to assist the police in deciding whether a case should be dealt with summarily or on indictment.

For cases which are to proceed by way of indictment, it should be the responsibility of the informant to prepare the 'hand-up brief' and serve a copy of the 'hand-up brief' on both defendant and the prosecuting authority for indictments (DPP or Crown). In addition, a copy of the 'hand-up brief' should be filed with the court which will hear the committal.

It should be mandatory to use the 'hand-up brief' procedures, save to the extent that it is impossible where a witness is not prepared to sign a statement in the appropriate form for tender at a committal.

As one of the purposes of the committal is disclosure by the prosecution, the 'hand-up brief' should contain the statements of all material witnesses whether or not it is proposed to call any particular witness. There should be an ongoing duty on the prosecution to disclose any further information, if and as it becomes available. To clarify the duties of informants with regard to disclosure, it would be desirable, if it has not already been done, if the DPP or the Crown produced a careful and complete set of guidelines setting out the proper rules of disclosure.

Cross-examination of prosecution witnesses is a most important aspect of the committal hearing. At the same time, there will be in many 'hand-up briefs' statements of witnesses whose evidence is largely formal or uncontroversial and who will generally not be required for cross-examination. Provision should be made (as in many jurisdictions) to enable the defence to decide which, if any, prosecution witnesses are required for cross-examination. The onus of requiring witnesses should be on the defence who must firstly be given sufficient time upon receipt of the 'hand-up brief' to make decisions about the calling of witnesses and who must then give the prosecution sufficient time to produce the witnesses required for cross-examination by defence. To meet these requirements, it should be necessary for the 'hand-up brief' to be served on the defendant at least twenty-eight days before the committal hearing date and for the defence to give notice stating which witnesses are required at least fourteen days before the committal hearing date.

There should be provision for the magistrate, as in the Victorian legislation, to set aside a request for the attendance of a prosecution witness if satisfied that the request is frivolous, vexatious or oppressive.

It is desirable that the prosecuting authority responsible for deciding on indictments should have the management and running of committal hearings. The authority can assess at any early date the appropriateness of the changes originally laid, can amend those changes, and has the authority to negotiate meaningfully with the defence.

For most defendants, proper decisions about calling witnesses at a committal hearing and about choice of plea cannot be made without legal assistance. It would be most desirable that all persons facing a committal hearing should have at the least legal advice well in advance of the hearing. Such advice and, where appropriate, representation, will not only materially assist a defendant but may in many cases prove economically rational by negotiating an early guilty plea perhaps on reduced charges and/or by clarifying the issues in the case through cross-examination of prosecution witnesses.

As a general rule, committal hearings can be expedited by having the evidence in chief of prosecution witnesses called for cross-examination confined to attesting to the accuracy of their statement. In some cases it may be advisable to have evidence in chief given in the normal way, orally through question and answer, but this should require leave of the presiding magistrate.

It seems undoubted that magistrates conducting a committal have ample powers to restrain oppressive, irrelevant and repetitive cross-examination. However, the enactment of legislation clearly stating this power may prove of assistance in the more efficient hearing of cases.

The criterion for determining whether to commit or discharge should give the magistrate some discretion to assess the credibility of witnesses. There is inevitably some tension between the committal operating as a real filter of weak cases and concerns about the magistrate at a committal usurping the function of a jury. However, the common criterion used by prosecution authorities in deciding whether to indict is 'reasonable prospects of conviction'. Such a criterion involves an assessment of the strength and credibility of witnesses. Whatever form of words is used to define the criterion, it is desirable in the interests of simplicity that the formulation be the same both at the end of the prosecution case and at the conclusion of all the evidence.

In some jurisdictions in sexual offences there are substantial limitations on the right of the defence to cross-examine the alleged victim. In our view, on balance, other methods of protecting alleged victims should be attempted such as insistence on legally qualified prosecutors, restrictions on reporting, and restrictions, that are enforced, on cross-examination as to previous sexual behaviour. At this stage, it is not clear that the more radical approach of substantially limiting the right to cross-examine the alleged victim has been demonstrated to be necessary.

The determination at an early stage of guilty pleas is an important function of committals. There is evidence that clear legislative provision of a sentencing discount for pleading guilty early can assist in generating early guilty pleas. Subject to the retention by sentencers of their general sentencing discretion, a moderate degree of incentive to plead guilty early through a sentencing discount has some merit.

It would appear that provisions making it very difficult for a defendant who has pleaded guilty at committal to change that plea have the effect of significantly limiting the number of early guilty pleas. There should not be any limitation on defendants changing their plea to not guilty.

To assist defendants who wish to plead guilty whether before or after committal there should be provision for persons wishing to plead guilty to apply to the relevant sentencing court whose Registrar will arrange for that defendant to be brought before the court as soon as practicable for sentence.

Subject to the right of a defendant to insist on indictment and to the power of a Magistrate's Court to refuse to hear a case because of its seriousness, there should be a power in the prosecuting authority to have a defendant who has been committed for trial or sentence returned to the Magistrate's Court for summary disposition of the case.

The power of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* to review decisions relating to committal hearings in cases involving Commonwealth law should be removed.

There should be a discretion for a defendant who is discharged at a committal hearing to be awarded costs.

There should be greater restriction on the ability of the news media to publish reports of proceedings at committal hearings. In particular there should be a general prohibition on reporting the opening address of the prosecution at a committal hearing.

Conclusion

It is a truism of policy analysis that one does not expect anything like 100 per cent success. Policy seeks the implementation of realisable objectives, not the achievement of ideals. Similarly, the existence of deficiencies in current practices, even if substantial, is not of itself reason for rejection of these practices. Proposed alternatives must be subjected to an

equally rigorous process of evaluation, as they may prove to be even more defective than the arrangement to be replaced.

In line with this argument, it needs to be said that the current committal systems are by no means as unsatisfactory as some critics have suggested. Thus, in some jurisdictions a substantial number of weak prosecution cases are being filtered out; in at least two jurisdictions (New South Wales and the ACT) a large number of guilty pleas are being identified at the committal stage. The present arrangements also seem to be operating reasonably well as disclosure mechanisms. Furthermore, there appear to have been somewhat exaggerated perceptions of the amount of time in Magistrate's Courts which is expended on committal hearings and of the extent to which committals have contributed to delays in the whole system. Claims about the impact of committal proceedings on witnesses also appear to have been overstated.

In short, on the available evidence, there is reason to believe that the present committal system provides a basis for a system that is fair, open, accountable and efficient. What is needed is modification and streamlining. The appropriate adjustments may well vary from jurisdiction to jurisdiction. Our suggested approach represents in general terms the direction we believe that any such modification should take.

Endnotes

1. We have been informed that a recent analysis of statistics maintained by the Police Prosecution Branch indicates a discharge rate of 11 per cent, but have been unable to obtain details on how this estimate was obtained. According to Bishop, in *Prosecution Without Trial* (1989, p. 96) estimates of the discharge rate made by the magistrates, police prosecutors and defence lawyers who he interviewed varied from 1 per cent to 20 per cent. Given the range of responses, and the difficulty which people have in making accurate quantitative estimates, his conclusion that the discharge rate is 'quite small' must be treated with some scepticism.

2. In his 1988-89 *Annual Report*, the NSW DPP refers to a 'no bill' rate of around 14 per cent (p. 12). Interestingly, the 1989 White Paper quotes a 'no bill' rate of 17 per cent for 1987-88 (at p. 24), whereas using our estimation technique the 'no bill' rate for that year was only 6 per cent. The White Paper obtains this figure by excluding sentence committals from the base figure and including partial 'no bills' in the numerator.

3. The report itself cites a slightly lower discharge rate of 3.7 per cent. The difference arises because the committee included in its denominator withdrawn cases, and matters ultimately determined summarily, whereas our estimate of the discharge rate is based only on those matters for which committal proceedings were completed.

4. Bishop (1989, p. 48) describes the situation in New South Wales as follows:

   > A police prosecutor (has) no discretion whatsoever to enter into discussions about the substitution of one charge for another in return for a guilty plea. In practice discussions do occur, and may lead to some variation of the charges laid, but rarely on a matter of substance.

5. In Queensland, particular problems are created by the fact that defence work in the criminal courts is split between the Legal Aid Office, which has responsibility for the Magistrate's Court, and the Public Defender, who does all the legal aid work in the superior courts. According to the Queensland Director of Prosecutions:

   > With such divided responsibility it is only to be expected that there will be few early decisions about any case in which an indictable offence is charged other than the decision to advise the defendant he should claim the right of trial by jury (*Annual Report 1989*, p. 20).

6. See, for example, the comments of the Chief Prosecutor in South Australia:
   I have always looked on the lower courts as a very good sieve of rape cases . . . I think it does not operate as a sieve in a lot of cases, but it did in rape cases (quoted in *Rape Law Reform in South Australia*, (eds) P. Sallmann & D. Chappell, in 'Adelaide Law Review Research Paper No. 3' 1989, p. 62).

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