The Future of Committals

Bryan J. Clothier
Deputy Chief Magistrate
Victoria

In 1986 the Attorney-General asked the Director of Public Prosecutions, Mr Coldrey, to convene a committee to evaluate the role of committal proceedings. The committee was of the unanimous view that

> the committal hearing constituted a vital cog in the machinery of the criminal law. Properly conducted, it had the capacity to filter out inadequate prosecutions, to refine the issues to be contested at any subsequent trial (thereby reducing its length) and to facilitate pleas of guilty by demonstrating the strength of the Crown case (Advisory Committee on Committal Proceedings 1986).

It is my view that committal proceedings, as we know them in Victoria, do not fulfil the high promise behind the view that committals should be retained. This is said even though the standard of proof in committals has been substantially raised.

This paper will not be replete with references to cases, articles (learned or otherwise) or statistics as to the outcome of committal hearings. Rather, it is a personal view about the course of prosecutions of persons charged with indictable offences.

It is time to move away from the idea that a 'tested' prosecution case is available as of right in every case. In the majority of cases the prosecution witnesses are not tested because the order of the court follows the mere reading of the brief by the magistrate. The straight 'hand-up brief' procedure does demonstrate the strength of the police case and leads to a decision:

- not to contest police evidence at committal;
- to accept the evidence in the brief without contest and plead guilty or not guilty;
- to negotiate a summary plea or contest; or
- to contest the evidence at committal.

Even in those 'hand-up brief' cases where witnesses are called, many go as straight 'hand-up briefs' without witnesses on the day or at some stage, either on the day of hearing or before agreement is reached to reduce the number of witnesses called. Even though there are cases where the prosecution and/or defence derive a benefit from the hearing that is not justification for retaining a right to call for witnesses in every case.

The committal proceeding, after all, is no more than another step in the preparation of a case for trial before a superior court. It should be seen to be no more than that.

Even if a defendant is committed for trial a decision must still be made for the matter to proceed to trial or a nolle prosequi entered. If a defendant is discharged at committal that person can still be presented for trial. If the accused is not subject to committal there can still be a direct presentment. Of late, more and more defendants are waiving committal proceedings after being served with a 'hand-up brief'.

All of this leads me to the view that there should be no right to a committal for trial hearing. I would advocate the serving of a 'hand-up brief' with no right to call witnesses except on application to a magistrate.

A magistrate, on perusing the 'hand-up brief' would refer the matter to the Director of Public Prosecutions with a recommendation for a trial or order that the defendant be discharged.

I do not espouse any particular grounds for granting an application for witnesses. Contested admissions, contested identification evidence, assault in company type offences, and drunken brawls could be the type of cases when applications would be appropriate.

The time honoured justifications for retention of the committal proceedings are one thing, but the delay in bringing a person to trial is another. The time limits between committal and filing the presentment and the filing of presentment and trial can be 18 months (or more by leave) and, quite obviously, less. But where there are rules as to the time permitted for taking a step in the prosecution process the tendency is for action to take place at that time.

What I espouse will do little to enable the Director of Public Prosecutions (DPP) to present for trial in a lesser time than he is able at the present time. What it will do is reduce the time between charge and commencement or preparation in the DPP's Office. Thus it will reduce the time between charge and trial.

In the old days, that is in the '70s, when Justices of the Peace dealt with committals, they were often contested. The cross-examination though was succinct but testing. The theory seemed to be 'don't let the prosecution know what the defence is'. It could have been that even if one had the best of defences in the world one would still be committed for trial anyway. At that time there was no 'hand-up brief'.

Justices of the Peace went out of the system and magistrates dealt with committals. Many were contested and some defendants were discharged. From a purist's point of view those committals could be said to be justified. Those 'contested' before justices or magistrates were in the minority (and they still are). Some figures referred to below later will demonstrate the point about the number of contested committals.

Committals for trial are not what people say they are. The Magistrate's Court should be used, if at all, as nothing more than the means to ensure that the prosecution prepares the 'hand-up brief' early and well.

The Position in Victoria

The subject of this portion of the conference is entitled 'Current Implementation and Proposed Changes in the States'. The practice that operates in Victoria and will operate pursuant to statute in the near future is such that leads me to the view espoused earlier in the paper.

Current Position

The following is a short exposition of the present procedure in committals and the new procedure in the *Magistrates Court Act 1989*.

The present committal procedure is as follows:

- an informant may serve a 'hand-up brief' containing all the material upon which the informant relies;

- the 'hand-up brief' must be served personally within 28 days of the date of hearing;
- no witnesses are required at the hearing unless a witness notice is provided at least 14 days before the date of hearing;
- a magistrate may set aside the witness notice in whole or in part;
- a witness called merely identifies the statement and attests to its truthfulness unless the court otherwise orders;
- there are special provisions relating to 'hand-up briefs' in respect of certain offences involving rape, none of which is pertinent because the 'hand-up' procedure is still used but the hearing must be commenced within three months of charge;
- if the informant does not serve a 'hand-up brief', the evidence in chief must be given in the form of a statement and the witness identifies the statement and attests to its truthfulness;
- the standard of proof that is required is 'is the evidence of sufficient weight to support a conviction for the offence charged';
- even if there is not evidence to reach the standard with reference to the offence charged, the defendant may only be discharged if there is no evidence of sufficient weight to support a conviction for **any** indictable offence (my emphasis).

The new *Magistrates Court Act 1989*, mirrors those provisions of the present Act with the addition of a provision permitting time limits to be prescribed between commencement of proceedings for the offence and a hearing. If there is no compliance with that time limit the defendant must appear and the court must order that the defendant not stand trial for the offence or offences charged. There are exceptions to that. There is a similar procedure in respect to rape offences.

Apart from anything else, this procedure means that if a defendant is discharged on the merits he or she may still be presented, but if there is a failure to comply with the time standards the defendant cannot be presented for trial.

A Criminal Delay Reduction Committee was set up some time ago by the Attorney-General. It included the heads of the three jurisdictions and representatives of other participants in the system. The Working Party of that Committee agreed to certain proposals involving the early intervention of a Crown Prosecutor and the Legal Aid Commission. For certain reasons those proposals, all of which were worthy, could not be implemented. The magistracy and the police though agreed on a new system of listing and hearing committals. Although one could, in theory, have a committal listed at a very early date, the number of adjournments was enormous so the actual date of hearing was many, many months after the first listing date.

The listing system that operated from the 1 October 1989 was that police informants had to serve 'hand-up briefs' within fixed time limits or seek extensions of the time from a listing magistrate in court. Initially, the accused is remanded to appear four months after the charge, when the accused is on bail, three months after charge when a person is in custody and two months after charge where the accused is charged with rape. The 'hand-up brief' must be served 28 days before that 'committal mention date'. Thus where the accused is on bail (except for rape) the 'hand-up brief' must be served within three months of charge,

when remanded in custody (other than rape) within two months of charge and in rape cases within one month of charge.

The procedure on the committal mention date is that every committal mention case is listed in the one court. If there are no witness notices and the Act is complied with, a defendant is either discharged or committed for trial. If there is a witness notice the matter is adjourned for a fixed date of hearing after the magistrate obtains from the informant and defence any information available as to the duration of the hearing. The defendant's legal representative must be present, if there is one, as does the informant. It is on that date that directions can be given for the conduct of pre-hearing conferences, and for the hearing of show cause proceedings as to the necessity for calling certain witnesses. For example, business people concerning bankcard offences, or householders as to burglaries, are called as witnesses and invariably are not required on the day of the hearing.

Before referring to some figures of the mention system this paper will digress slightly and refer to pleas of guilty at committal hearings. If a person pleads guilty to all charges at the committal a date for hearing of the plea is obtained from the Criminal Trial Listing Directorate and the person is committed to the commencement of the sittings but at the same time is remanded or bailed with a condition that the defendant appear on a fixed date for sentence which will be usually within three months of the committal hearing.

The first of the cases listed from 10 October 1989 came before the listing magistrate on 8 January 1990. The figures in Table 1 are for the periods 8th of January 1990 to 9th of February 1990, 12th of February 1990 to the 2nd of March 1990, and the 5th of March 1990 to the 30th of March 1990. After the 30th of April all figures will be calculated on the usual monthly basis from the beginning to the end of each month.

These figures represent the number of adjournments for further mention where the 'hand-up brief' was not served or was served late.

In my experience, even with cases listed for full committal, few proceed as booked by the parties. They proceed as straight 'hand-up briefs' without witnesses, with reduced witnesses, or are dealt with summarily and some, of course, are dealt with as full committals as booked. However, when some do proceed they last longer than the original time estimate.

Discharged cases were either discharged on the merit, or as a result of failure to observe the accepted time guidelines.

These figures support my view that in the large proportion of cases no court intervention by the legal profession is warranted because the essence of the system is the 'hand-up brief'. Those figures suggest that there should be no right to call witnesses, without the leave of the court, either by application or on the court's own motion.

The committal mention court system is only in its infancy and it can be rightly said that the numbers being dealt with either by way of straight 'hand-up brief' or dealt with summarily as a total of cases listed is reducing—approximately 49 per cent, 39 per cent and 33 per cent.

Table 1

Committals - 8 January-30 March 1990, Victoria

	8 January-9 February	12 February-2 March	5 March-30 March
Total Cases Listed	**241**	**273**	**338**
Committals (Straight HUB)	98	80	83
Dealt with Summarily	21	27	29
Adjourned for Further Mention	55	69	116
'Hand-up brief' not Served	(41)	(53)	(97)
Adjourned for Full Committal Hearing	39	78	87
Discharged	8	7	8
Withdrawn and Discharged	1	3	1
Failed to Appear	19	9	14

As noted earlier, in the cases adjourned for further mention, the great majority are adjourned for the reason that there is no 'hand-up brief' served or it was served late. In days prior to the committal mention system these would have been listed for a day without any real court control. Under the new system they are adjourned but to a time to enable service to be regularised or to be carried out. In these latter cases if the brief is still unserved by the next mention date the court, unless good cause is shown by the informant, may discharge the defendant. So far this has happened in twelve cases.

It can be noticed that the number of cases adjourned for full committal was 39 of 241 cases, 78 of 273 and 87 of 338. It was commented earlier about how these cases proceed. I do not have figures that demonstrate what I contend, but why have a system that permits as a right the production of witnesses in every case when it is only a small proportion where witnesses are called and eventually give evidence?

If the practice were to be that the defence had to show cause why witnesses should be called, amongst other things, it would require an early appraisal of the brief by the legal practitioner, which does not happen in many cases at present. There is a practice amongst the profession to put in a witness notice naming every witness on the 'hand-up brief'. That practice then gives the defence breathing space for proper perusal of the brief to see whether some, if not all, of the witnesses are required for the contested committal. It also gives the defence time to decide whether or not to contest the matter or elect for a summary hearing.

Finally, the new *Magistrates Court Act 1989* reduces the number of cases that may be dealt with only by trial. The range of offences has been increased but there has been no increase in the term of imprisonment that can be imposed. The present system of summary hearing which can only be on the application of the prosecution will be altered in the Act to permit a court to offer summary jurisdiction and the informant or defendant to apply for summary jurisdiction. The Act also permits a court to refuse summary jurisdiction if an application is made by the prosecution or the defence. Unfortunately the Act does not

permit a court to force summary jurisdiction on a person who will not consent to summary jurisdiction.

Conclusion

In conclusion it is suggested that the present system of committals, with a right to call witnesses, should be removed. It should be replaced with a procedure that requires the prosecution to serve 'hand-up briefs' on the person charged as is done at the present. At the hearing, in the absence of any application to call witnesses, the defendant would be dealt with on the merits of the 'hand-up brief' and an order made that the defendant be discharged or a recommendation that the defendant should stand trial. If an application is made to call witnesses and is refused, the matter should proceed as a 'hand-up brief'. If the application is granted the court should direct which witnesses are to be called and when the hearing should proceed.

I have deliberately not used the expression 'direct a defendant to stand trial at the County/Supreme Court at Melbourne' because I have tried to get away from the traditional view that the committal is a hearing. In my view, it should be nothing more than a delay reducing procedure to ensure that at the earliest possible date the defendant is aware of the whole of the prosecution case. At that point the defendant's legal representative will have to decide to accept or contest the 'hand-up brief' or whether or not there should be an application for summary jurisdiction.

Reference

Advisory Committee on Committal Proceedings 1986, *Report on Committal Proceedings, (*the *Coldrey Committee Report),* Melbourne, Preface Page (i).