# Committals in Victoria—a Police Perspective

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In February 1985 the Attorney-General requested the Director of Public Prosecutions, Mr John Coldrey, QC, to examine the role of committal proceedings in Victoria. The Committee unanimously concluded that committal hearings constituted 'a vital cog in the machinery of the criminal law' (Report of Advisory Committee on Committal Proceedings, Melbourne, Victorian Government Printer, February 1986 at (i)).

During the second reading speech on the *Crimes (Proceedings) Bill* Mr Matthews, the Minister responsible, made it clear that the amendments in that legislation were intended to give effect to the recommendations of the Committee (Victoria Parliamentary Debates, Legislative Assembly, 7 October 1986 at 996).

## Terms of Reference of Committee

The terms of reference of the Committee were:

- the perceived purposes of committal hearings, and whether the present procedures achieved these purposes wholly or in part;
- whether existing procedures should be continued or modified, and if the latter, the modifications and method of implementation thereof; and
- the costs associated with the existing procedures, together with a comparison of such costs with the costs which would be involved in any modified procedures.

Each of these terms of reference is important. However any decision on the future of committal hearings is really linked to the first term of reference, that is, establishing the purpose of such hearings.

## Perceived Purposes of Committal Hearings

It is worth noting the use of the words 'perceived purposes' in the first term of reference. It would seem that when determining the terms of reference it was accepted that the purpose of committals is somewhat nebulous. The Committee was however able to agree that there are three basic purposes of committal hearings (Victoria 1986, pp. 7-8). These purposes

were succinctly stated during the second reading speech on the *Crimes (Proceedings*) Bill as being:

- to determine whether the evidence is sufficient to put the accused on trial;
- to give the accused notice of the case against him or her; and
- to give the accused an opportunity to test the evidence of the prosecution witnesses (Victoria Parliamentary Debates 1986).

The first two of these purposes can be adequately achieved by providing a copy of all statements and details of all exhibits to the accused and then having that material assessed by a magistrate, or alternatively by the Office of the Director of Public Prosecutions. The reality is that the evidence is assessed by both.[1]

The only basic purpose attributed to committals by the Committee which is not addressed is the opportunity to test the evidence of witnesses by cross-examination. Indeed, this is the crux of the whole debate. Should defendants be able to cross-examine witnesses prior to trial? In order to answer this question it is necessary to determine the advantages and disadvantages of allowing cross-examination.

## Benefits of Cross-Examination

According to the Committee the benefits of cross-examination are:

> Issues in the case could be refined and perhaps eliminated, with the result (if the accused is not discharged) of a shortened trial or a plea of guilty. Cross-examination of witnesses may also assist the Crown in preparing the case, should it proceed to trial, by identifying shortcomings at an early stage (Advisory Committee on Committal Proceedings 1986, p. 9).

## Disadvantages of Cross-Examination

Alternatively, and this is the view of police, the defence may use the committal hearing as an opportunity to gain tactical advantages. In *Barton v. R* (1980) 147 CLR 75, Wilson J specifically made the point that whilst a committal proceeding is not designed to aid an accused person in the preparation of his defence it will ordinarily do so (p. 112). In *Moss v. Brown* (1979), NSWLR 114, Moffitt P., in delivering the judgment of the court, went further and acknowledged that committal proceedings are often used for improper purposes. He stated:

> The inquiry is often availed of to have a kind of dress-rehearsal for the trial, so that risky questions are asked at the inquiry, to the intent that unfavourable answers given during the cross-examination of a Crown witness will be filtered from the evidence put before the jury. The inquiry is often used for other tactical purposes unconnected with persuading the magistrate not to commit for trial (Advisory Committee on Committal Proceedings 1986, p. 125).

*Dress-Rehearsal Approach*

Lord Widgery also identified one of the problems associated with committals in *R v. Epping and Harlow Justices: ex parte Massaro* [1973] QB 433. In that case the prosecution at the committal had not called the young victim of a sexual assault. Notwithstanding that fact there was still sufficient evidence for the defendant to be committed to stand trial. The defendant applied to have that order quashed on the basis that he had not had the opportunity to hear the evidence of the complainant or to cross-examine her. Lord Widgery stated:

> The question which is posed for us . . . is simply this: when committal proceedings are being undertaken in a case such as this, is it open to the prosecution, if they wish, to support the application for committal by calling other supporting evidence and not calling the child at all? . . .
>
> Thus stated, this as a point is a very short one: what is the function of the committal proceedings for this purpose? Is it . . . simply a safeguard for the citizen to ensure that he cannot be made to stand his trial without a prima facie case being shown; or is it . . . a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court at a later stage? . . .
>
> For my part I think that it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out (Advisory Committee on Committal Proceedings, pp. 434-5).

In Australia it would now be unwise for a prosecutor not to inform the defence of all material witnesses (*R v. Sloan* (1988) 32 A Crim R 366).

*Adjournments*

Defence manoeuvring is not restricted to the 'dress rehearsal' approach. Defendants can and do request the attendance of witnesses and then seek adjournments on the day committal proceedings are due to commence. This tactic is designed to annoy and frustrate prosecution witnesses and is very successful in achieving that aim. In order to overcome problems occasioned by requests for adjournments a new system of Committal Mention hearings has been introduced at the Melbourne Magistrates Court. Those responsible are to be congratulated on their foresight in introducing the new system, which is designed to ensure that the date of commencement of the committal is agreed upon by the parties and that the committal actually commences on that date. The committal prosecutors at Melbourne have indicated that the system is generally working well and consequently the major difficulties occasioned by adjournments may be a thing of the past.

*Calling of all Witnesses*

Because it is necessary for the defence to notify the informant 14 days before the hearing (*Magistrates (Summary Proceedings) Act 1975*, s.45B(2)) of the names of witnesses it is desired to cross-examine, many solicitors have adopted a practice of requiring the attendance of all witnesses. This approach seems to have developed as a result of barristers either not being briefed prior to the relevant date or not giving consideration to the brief prior to that date. Solicitors are often unsure which witnesses are required and adopt a 'play safe' approach and call all witnesses. The Victorian legislation does provide a procedure whereby the notice requiring the attendance of witnesses can be set aside (ss45B(4) and

(7)); however, this is a time-consuming process which in many instances it should not be necessary to invoke.

*Pressure*

Giving evidence in court can be a very traumatic experience for complainants and witnesses alike. The experience of witnesses can be made even more unpleasant by the use of further tactical ploys. For example, filling the courtroom with friends and relatives of the accused person. This tactic is designed to make complainants and witnesses feel uncomfortable. The rationale being that nervous witnesses are more likely to forget or make mistakes when giving evidence.

*Availability of Witnesses*

It is already a difficult task to locate witnesses who are prepared to give evidence in court and this difficulty is exacerbated by the necessity in many cases to arrange the attendance of witnesses at both the committal and subsequent trial. This difficulty was acknowledged by Wilson J in *Barton v. R* (1980) 147 CLR 75, when he stated:

> The fact that the power to indict without prior committal proceedings has rightly been sparingly used in past years cannot make its use an abuse of process per se. Indeed, one cannot rule out the possibility that with changing circumstances there may be justification for the power to be resorted to with greater frequency. The advent of corporate crime, given the increasing complexity of company structures and transactions, may make the task of prosecution a difficult, lengthy and costly one. Given the mobility of business and professional people in modern times, a prosecutor may face enormous difficulties in getting witnesses together for the necessary time for both a committal proceeding and a trial. In such a case, a decision in particular circumstances to proceed by way of ex-officio indictment may be the only decision consistent with the sensible and efficient administration of justice. It must then be recognised, of course, that the accused person will have been denied the advantage that a committal proceeding would have afforded him, and the trial judge is under a duty to ensure that he be given such particulars and other material and allowed such time as will enable him to meet the charge in a fair trial (Advisory Committee on Committal Proceedings 1986, pp. 113-4) .

The difficulties discussed by Wilson J are not restricted to complex white collar crime and police experience similar difficulties across the range of indictable offences.

*Delay*

In *Barton's* case Murphy J stated:

> The desirability of committal proceedings in modern times is doubtful, at least in certain kinds of cases. A trend has developed in New South Wales in which conspiracy, fraud, and various corporate charges become delayed because of committal proceedings which go on for months or years. These are often interrupted with excursions into the Supreme Court for rulings on points of law or procedure. This not only tends to improperly frustrate prosecutions, but also can result in embarrassment and oppression to defendants. While I do not criticise the magistrates who unfortunately have to preside over them, such committal proceedings have become a disgrace to the administration of criminal justice in New South Wales (Advisory Committee on Committal Proceedings 1986, p. 108).

*Right to Cross-Examine*

The Advisory Committee in concluding that the right to cross-examine prosecution witnesses was an integral part of the committal procedure referred to the comments of Stephen J in *Barton v. R* (Advisory Committee on Committal Proceedings, pp. 105-6) that the loss of the opportunity would be irremediable (Advisory Committee on Committal Proceedings 1986, p. 5). That observation was, however, taken out of context because it was made during an assessment of the disadvantages suffered by an accused person who had not had the benefit of *any* committal proceeding.

In *Barton v. R* (1980) 147 CLR 75, Gibbs ACJ, and Mason J also noted the value of accused persons having the opportunity to cross-examine witnesses (Advisory Committal Proceedings, p. 99). Their Honours went on to observe that:

> To deny an accused the benefit of committal proceedings available to other accused persons, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial (Advisory Committee on Committal Proceedings 1986, pp. 100-1).

This observation is, of course, true. The question to be determined is whether the existing uniform right to cross-examine witnesses should be retained. Gibbs ACJ and Mason J went on to say:

> It is for the courts, not the Attorney-General, to decide in the last resort whether the justice of the case requires that a trial should proceed in the absence of committal proceedings (Advisory Committee on Committal Proceedings 1986, p. 101).

On the other hand, it is for the Parliament to determine the composition of committal proceedings because the courts are primarily concerned with the protection of the existing rights of accused persons. This observation is not meant as a criticism of the approach of the judiciary on this point, because it is acknowledged that the courts exist to enforce the law and to protect the right of citizens. The Parliament has different considerations and, given the changing social conditions and the finite economic resources available to the criminal justice system, must determine the proper balance between the rights of victims and the general community against the rights of accused persons.

*Abuse of Right to Cross-Examine*

In *Carlin v. Thawat Chidkhunthod* (1985) 4 NSWLR 182, O'Bryan, CJ stated:

> . . . it is rare in this state that the defendant elects to call any evidence and committal proceedings have in many cases, at least in this state, gone beyond their intended legitimate purpose in the interests of the community and the defendant and have degenerated into a prolonged contest, intended almost exclusively to design and set up a basis for the conduct of a trial regarded as inevitably justified. They have come to involve for this purpose persistent, repetitive and much irrelevant cross-examination as well as long debates upon the admissibility of evidence, the conduct of voir dire examinations, the exercise of discretions and the like, much of it appropriate only to an actual trial. The process has therefore come under substantial criticism as subjecting the community to unjustified inconvenience, delay and expense and amounting in itself almost to an actual trial in which the fundamental role of the jury as the only constitutional tribunal for the determination of issues of fact and the role of the presiding judge in the determination of questions of law and of the issues to be left to the jury tends to be forgotten (p. 190).

The abuse of the right to cross-examine has also recently received judicial condemnation in Victoria. Prior to delivering his actual reasons for judgment in the case of *Potter v. Tuppen & Nieves*, (unreported, Victorian Supreme Court, 25 January 1989) Marks J made the following observations:

> . . . there is a very big issue relating to committal proceedings. For some reason the practice has grown up, for reasons of which I know nothing, and which I find difficult to comprehend, of allowing cross-examination of a roaming investigative and inquisitive nature which has no necessary relation to any defence or to whether there is a prima facie case. The cross-examination quite often occurs because the defence are roaming through all fields in order to find whether there is some avenue that they might explore to raise a defence. That, as I understand it, has never been and ought not to be the function of a committal proceedings. Magistrates seem to be permitting that today, for reasons which are unknown to me. Until, of course, the matter is fairly and squarely taken up in this court, no final pronouncement can be made about it. However, that problem is quite clearly interwoven with the present problem. It may be open to some doubt whether the questioning by Mr Kent directly would lead to the disclosure of the identity of an informer, but the questions, in any event, ought not be allowed because they were quite irrelevant and obstructive of the process. Here the transcript reveals pages and pages of cross-examination which has got no relation whatever to the existence or otherwise of a prima facie case . . . (unreported, Victoria Supreme Court, Case No. 88/4777, 26 January 1989, p. 10).

Marks J went on to say:

> I have made certain observations which are on the transcript, and they can be used in whatever manner you feel might properly be used. But I make it clear that they are not considered reasons for a judgment of this court: they are merely observations of a member of the court which have got no binding effect. I think until the question of the conduct of the administrative function of the magistrate on committal proceedings is properly before this court, no authoritative guidance can unfortunately be given. But looking at the transcript of this case, it is a matter of some concern that the process which has traditionally been fairly economical as to time is now being used and allowed to be used in a way which is not conducive to the legal process or the administration of justice (unreported Victoria Supreme Court, Case No. 88/47, p. 13; *also* Byrne 1988, p. 296).

It seems clear from these observations that defence counsel are abusing the committal process and magistrates are at the very least giving tacit approval to such conduct. For example, charges against two policemen and one ex-policeman of accepting bribes and conspiracy to pervert the course of justice were recently withdrawn at the Melbourne Magistrates Court after a ten-month long committal. In that time only 10 of the 40 to 50 witnesses to be called had given evidence. The prosecutor, in withdrawing the charges, stated that:

> the 'protracted committal' would be a 'futile exercise' if allowed to run its full course.
> The advice which the director has received, all of that which he has accepted, is that these committal proceedings have been and are likely to continue to be an abuse of process of the court.
> He (the Director) has concluded that the continuation of this protracted committal cannot be in the public interest and if these proceedings were to run their full course, which would be to approximately the end of 1989, it will proved [sic] to have been a futile exercise as nothing which emerges from this committal can lead to a fair and just trial of the issues between the Crown and the accused (Pinder 1988).

That is, the committal hearing itself would have run for over two years. The cost to the Police Association in defending the accused was estimated at that stage at $1.4 million (Pinder 1988).

From a police point of view the observations of Marks J are an accurate reflection of the present unsatisfactory state of committals in Victoria. Moreover, the removal of an automatic right to call witnesses for the purpose of cross-examination, which is one of the approaches to be recommended, is not as radical a step as may first appear. As Murphy, J stated in *Barton*'s case:

> There were no committal proceedings in England for several hundred years until 1933. The grand jury met in private and heard evidence in the absence of the suspect who was not notified and therefore had no opportunity to hear, let alone examine, witnesses ((1980) 147 CLR 75 at 108).

## Restriction on Right to Cross-Examine Accused Persons

It is interesting to note that at present in Victoria an accused has a right to cross-examine witnesses at a committal hearing and at any subsequent trial. On the other hand an unrepresented accused person can make an unsworn statement, and a represented accused give unsworn evidence, without being subject to cross-examination (*Evidence Act 1958* (Vic.) s.25).

The Law Reform Commission of Victoria, in supporting the retention of the right of accused persons to give unsworn evidence, raised one of the most common arguments advanced for retention of the right, namely, the inability of some 'innocent' accused to withstand skilled cross-examination without creating the false impression that they are lying. The Law Reform Commissioner, in supporting his view that the right to make an unsworn statement should be retained, relied, at least partly, on the comments of a retired Supreme Court judge who had asserted that:

> In a great number of criminal trials the accused is in his teens or early twenties, has a limited education and a poor command of English, and has no experience or skill in the handling of hostile questioning (Law Reform Commission of Victoria 1989) .

Many honest prosecution witnesses are likewise ill-equipped for the rigours of cross-examination. The law, rather than acknowledging the difficulties of witnesses, demands that they be subject to the experience not once but at least twice. This can, of course, increase if trials are aborted or re-trials ordered upon appeal. The unfairness of this requirement is just another example of a criminal justice system balanced too heavily in favour of accused persons.

*Failure of Defendant to Enter Defence*

At the moment the defendant is not required to enter his defence, yet he or she can still engage in wide-ranging cross-examination in an attempt to find weaknesses in the prosecution case and to discredit witnesses. If defence counsel only see the committal as a dress rehearsal for the trial, the committal is really a waste of time in so far as the administration of criminal justice is concerned. It would not be a waste if defendants were also required to go into their defence.

The failure of defendants to enter defences is one of the reasons that committals are not as good a filter as may otherwise be the case. As Carruthers J noted in *DPP (NSW) v. Saffron & Allen* (1988) 39 A Crim R 64, a magistrate in reaching a decision on whether to commit:

> Will have regard to the cross-examination of the witnesses called by the prosecution, and where as here, the defendant declines to make full answer and defence and himself give evidence, the assessment will be made from the point of view of a jury, which is presented with no more than the evidence for the prosecution, with no response save the plea of the general issue. It may be suggested that there is an element of unreality about such an assessment, because it would be a rare case indeed where an accused stood mute before judge and jury (p. 73).[2]

Magistrates would be in a much better position to determine whether defendants should be committed if given an opportunity to assess the strength of the defence case.

*Issues to be Determined at Trial*

In most cases issues relating to the admissibility of evidence need not be canvassed at committal hearings because magistrates should not reject, except in the clearest cases, evidence which would normally require a voir dire at trial (*Clayton v. Ralphs & Manos* (1987) 26 A Crim R 43; *R v. Horsham Justices, ex parte Bakkari* [1982] Crim LR 178). More importantly, cross-examination for the purpose of discrediting prosecution witnesses is a matter which should more properly be left for the trial itself. As Carruthers J pointed out in *DPP(NSW) v. Saffron & Allen* (1988) 39 A Crim R 64 at 73:

> The task, which a magistrate is required to discharge under the *Justices Act* s.41(6), involves an assessment of the effect which all the evidence before him would have upon a reasonable jury, properly instructed and a forecast of the possibility of conviction upon that evidence. This is a task which is to be performed in so far as that is possible in an objective fashion. A magistrate must be astute to avoid conducting a preliminary trial, with himself as the tribunal of fact, for that would be a usurpation of the function of the jury and a departure from his statutory duty.

Thus, in *Grassby* 15 NSWLR 119 at 76, the Court of Criminal Appeal said:

> Despite what often seems now to demonstrate every indication to the contrary, committal proceedings do not constitute (and they should not be allowed to develop into) a mini-trial in advance of the trial upon indictment.

*Strain on Police Resources*

At the present time the Victoria Police Force is losing a record number of personnel as a result of early retirement and resignations. In these circumstances it is inappropriate to have personnel involved in committals which, as acknowledged by the judiciary in various

jurisdictions, are excessively long. The involvement of members in such matters results in the duties which they would otherwise have been performing being carried out less efficiently. This occurs as a result of these members being required to perform the duties in less time or alternatively by other members being required to perform those duties in addition to their normal workload.

### *Legislative Intervention*

In view of the preparedness of defence counsel to abuse the committal process and the failure of magistrates to stop that abuse it is time for the legislature to take the lead and restrict the right to cross-examine.

## New South Wales Proposals

The New South Wales Government is presently considering amending the committal procedure in that state to remedy problem areas. At a recent seminar the Attorney-General discussed the problems and the proposed solutions (Dowd 1990). In his paper the Attorney-General acknowledged witnesses often find the experience of cross-examination harrowing and that changes would be introduced to reduce the number of witnesses required to submit to such examination.

The Attorney-General pointed out that in New South Wales a defendant has an unlimited right to require a witness to attend committal proceedings to be cross-examined. As he observed this can result in witnesses being called unnecessarily to prove formal points (Dowd 1990, pp. 14-15). In Victoria this problem is addressed by providing the prosecution with a right to apply for the setting aside of a notice, either in full or in part, from a defendant requesting the attendance of witnesses for cross-examination (s.45B(4) *Magistrates (Summary Proceedings) Act 1975*). The requirement for a witness to attend the committal can be set aside if the magistrate is satisfied that it would be frivolous, vexatious or oppressive to require that witness to attend (s.45B(7)). Whilst the procedure is not utilised as much in Victoria as it should be, a procedure is in place to overcome the problem elucidated by the New South Wales Attorney-General with respect to formal and less important witnesses.

In so far as major witnesses are concerned the New South Wales approach is to provide defendants with a right to cross-examination where:

- the witness gives evidence as to identification of the defendant;
- the witness is an accomplice;
- the witness gives evidence of an opinion based on scientific examination; or
- the defendant is able to demonstrate special or exceptional circumstances which require the cross-examination of a particular witness (Dowd 1990, p. 16).

Under the proposals approved by cabinet the defendant will have a right of cross-examination 'where there are reasonable grounds to suspect that cross-examination will either affect the assessment of the reliability of the witness or would adduce further material to support a defence' (Dowd 1990, p. 17).

Given the grounds upon which a defendant can, as of right, require a witness to undergo cross-examination, and the admittedly wide test to be employed in other cases, it is

difficult to envisage any matters in which defendants will not be able to require the attendance of other than purely formal witnesses for the purpose of cross-examination. The procedure does, however, have the potential to be very time-consuming for both the defence and the prosecution. In view of the fact that the end result will almost certainly be that defendants will be granted the right of cross-examination there seems no benefit in the changes.

The other major area of controversy with the New South Wales changes is that magistrates will no longer decide whether or not to commit a person for trial. That decision will be made by the Director of Public Prosecutions. The role of the magistrate will apparently be to 'ensure that the rules of evidence are applied and that the proceedings are conducted fairly, as he or she does now' (Dowd 1990, p. 9).

The fact that the decision to commit will not be made by the magistrate is surprising because one of the advantages for an accused in having a committal is that at the conclusion of the hearing he or she might be discharged. Observing the demeanour of witnesses under cross-examination obviously assists in assessing their credibility. It is, therefore, strange to say the least that a judicial officer with the benefit of first-hand knowledge of the demeanour of witnesses should be reduced to a child minding role while a bureaucrat, quite removed from the proceedings, is provided with the decision-making power.

Moreover, whilst the decisions of magistrates at committal proceedings are reviewable (Campbell 1985) the decision of the Director of Public Prosecutions is not (Phillips 1984). The potential lack of accountability is a matter of concern.

## Conclusion

In *Barton v. R* (1980) 147 CLR 75 at 109, Murphy, J noted that:

> The Law Reform Commission of Canada in 1974 recommended the abolition of the committal proceeding, describing it as a cumbersome and expensive vehicle for obtaining discovery, which could be achieved by procedures specifically designed for that purpose (*see* J Seymour, *Committal for Trial, an Analysis of Australian Law together with an Outline of British and American Procedures*, Australian Institute of Criminology (1978)). It also proposed that the function of screening out these cases where there is no prima facie evidence of guilt be dealt with by a simple motion procedure based on the statements of evidence supplied to the accused.

There is no opposition to full discovery in Victoria. Indeed, in so far as the defendant is concerned, that is already taking place under the 'hand-up brief' procedure, supplemented by the requirement for prosecutors to provide copies of any additional evidence located after the committal hearing.

In a recent article, Byrne concluded that:

> Before we can do away with committals, there should at least be a comprehensive system of pre-trial disclosure by the prosecution, a sensible system of pre-trial hearings and a procedure which, by enabling the decision to prosecute to be effectively challenged, provides a real safeguard against misconceived or oppressive prosecution (Byrne 1988, p. 297).

Police agree that a balanced approach is required, however, in order to achieve that balance the present cross-examination procedure will need to be altered.

## Recommended Approaches

One of the reasons advanced for adopting the present committal procedure is that it is allegedly less expensive to canvas issues at the committal stage than at trial. This can only occur if issues are resolved at the committal. In practice that does not occur. The approaches recommended are designed to provide a proper and cost-effective balance between the right of defendants, complainants and witnesses.

In order to restore a proper balance between the rights of defendants and the rights of complainants and witnesses it is recommended that the following approaches be considered:

### *Removal of Automatic Right to Cross-Examine*

The first approach is the removal of the automatic right which an accused person possesses to require the attendance of prosecution witnesses for the purpose of cross-examination. As previously discussed that right is being abused with little or no benefit to the overall administration of criminal justice.

It is recommended that the committal hearing should in general only be a 'hand-up brief' procedure. This would provide defendants with adequate knowledge of the particulars alleged and the evidence to be led at the trial. The only exception to this approach would be where a defendant made application to a magistrate to cross-examine a prosecution witness on the basis that there were reasonable grounds for believing the witness had knowledge of evidence relevant to the matter which had not been disclosed via the 'hand-up brief' procedure. The onus would be on the defendant to establish the reasonable grounds.

### *Full Discovery*

The alternative, or perhaps cumulative, approach is to retain the present procedure and provide defendants with an unlimited right to cross-examine prosecution witnesses. This right would, however, be subject to the defendant giving an undertaking to go into his or her defence as a condition of being able to cross-examine witnesses. A defendant who gave such an undertaking would not be permitted to lead evidence of a kind not led at the committal unless exceptional circumstances existed and the trial judge granted special leave.

The benefit would be that magistrates could make a realistic assessment of the strength of the case against an accused. The committal would then operate as a genuine filtering system. Moreover, the committal would cease to be a proceeding which in practice only provides a forum for defendants to gain whatever benefits may flow from engaging in the numerous tactical ploys presently being employed.

### *Combination of Approaches*

It would also be possible to combine the two approaches into one overall package.

## Endnotes

1. As has been pointed out by the Attorney-General for New South Wales, the Director of Public Prosecutions can decide not to proceed with matters even after a successful committal and can file an ex-officio indictment notwithstanding that there has not been a committal or a successful committal (Dowd, J. 1990, Committal Reform; Radical or Evolutionary Change, paper presented at Sydney Law School Seminar, 11 April, pp. 11-12).

2. The failure of defendants to go into their defence was also noted by O'Bryan CJ in *Carlin v. Thawat Chidkhunthod* (1985) 4 NSWLR 182 at 190; 20 S Crim.

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