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Representing the defendant at committal proceedings

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REPRESENTING THE DEFENDANT AT COMMITTAL

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Resources

It is suggested that reference be made to the following resources when reading this chapter:

Bail Act 1980

Criminal Code

Justices Act 1886

Penalties and Sentences Act 1992

The Duty Lawyer Handbook (Legal Aid Office (Qld) and Queensland Law Society, 1987)

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Representing the defendant at committal proceedings

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This chapter, to the best of the authors' knowledge, reflects the law and practice
as at 1 June 2003.

REPRESENTING THE DEFENDANT AT COMMITTAL PROCEEDINGS

Introduction

[5.10] Coverage of chapter

This chapter seeks to provide some practical guidelines for representing defendants at committal proceedings. It briefly discusses the purpose and nature of such proceedings, the responsibilities that should be embraced by defence lawyers in representing the defendant and sets out the practical steps that might be taken to ensure that the defendant's interests are adequately protected. It is not a complete guide and should be supplemented by reference to the substantive law surrounding the offence/s under consideration. The principal suggestion in the chapter is that preparation is the key to effective representation.

Committal hearings

[5.15] Purpose and nature of committal hearings

The committal proceeding is a significant step in the criminal prosecution process. A properly conducted committal can be integral to the prospect of a fair trial: *Barton v The Queen* (1980) 147 CLR 75 at 100 per Gibbs ACJ and Mason J:

It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.

See also *R v Sloan* (1988) 32 A Crim R 366, per Kneipp J:

It was made clear by a majority in that case [Barton] that while what was called the primary function of committal proceedings was to ascertain whether there was a prima facie case against an accused person, an important secondary function is to enable the accused person to know what will be the evidence against him on his trial, to see the witnesses who will be giving that evidence give evidence on oath, and to cross-examine those witnesses.

In *Director of Public Prosecutions (Cth) v Bayly* (1994) 126 ALR 290 at 304 the South Australian Supreme Court observed:

In their joint judgement in *Barton* Gibbs ACJ and Mason J (as he then was) emphasised that committal proceedings, in the context of the then current legislation of New South Wales, constituted an important element in the protection which the criminal process gave to an accused person. Whilst conceding that the primary purpose was to ascertain whether there was sufficient evidence to warrant an accused being put on trial, their Honours considered that the ordinary course of the committal process also conferred on an accused:

- knowledge of what the Crown witnesses say on oath
- the opportunity of cross-examining them
- the opportunity of calling evidence in rebuttal
- the possibility that the magistrate will hold the evidence insufficient to put the accused on trial.

The Court in *Bayly* at 305 notes that the principles in *Barton v The Queen* (1980) 147 CLR 75 should be read as ensuring procedural fairness no matter what the statutory framework in question might be. Despite the absence of any retreat by any member of the High Court from the observations in *Barton*, and further observations such as in *Sloan* and *Bayly*, some magistrates, many prosecutors and even some defence lawyers have been reluctant to fully embrace these propositions. This may in part be due to an under-appreciation of the value of a properly conducted committal hearing. For example many magistrates and police prosecutors understandably will not have much, if any, experience in the prosecution and defence of criminal charges before a jury in the superior courts. Also, restrictions in current Legal Aid guidelines in respect of funding of representation at committal hearings (outside of the Brisbane and Ipswich Courts: see [5.40]) means that it is often more expedient and profitable to not expend resources at that stage of the prosecution. This has meant that this important and integral step is not being properly made available or administered in respect of many indigent defendants. It is also a short-sighted approach to overall efficiency in the criminal justice system.

Numerous courts throughout Australia have acknowledged that the denial of a “proper committal” can, and usually does, amount to a serious injustice to an accused. The committal proceeding thus remains an important mechanism in the criminal justice system and there is a greater likelihood of an accused person receiving a fair trial if one is properly conducted than if one is not. A thorough understanding of the purpose and function of committal proceedings is an essential prerequisite to adequately representing an accused person.

For example, in Queensland, the statutory procedures governing committals are such that a lawyer can consent to a “hand-up” committal (s 110A, *Justices Act 1886*: see [5.35]) with no cross-examination of any witness. It is an attractive course to many, including the court, due to its brevity. However, if this is done in respect of a case where the defendant ultimately defends the charge at trial, a great disservice is almost axiomatically done to the defendant except in rare cases. This “hand-up” procedure in such cases performs a useless function and wastes a valuable opportunity to properly prepare for trial. In fact in some respects the defendant is probably better off unrepresented as an unrepresented defendant cannot “consent” to the admission of statements in lieu of oral testimony nor to the committal for trial. When a defendant is unrepresented the presiding magistrate must hear and consider the evidence to determine, as a matter of law, whether there is a case sufficient to warrant committal for trial (s 104(2), *Justices Act 1886*).

A contemporary discussion of the nature of committal hearings should include an appreciation that the magistracy, before whom such hearings are conducted, is somewhat rapidly changing from one dominated by former clerks of the court (with limited, if any, experience in the defence or prosecution of indictable crimes) to many who have extensively practised as prosecutors and defence lawyers. This has meant that the magistracy is being challenged within its own ranks as to its historic approaches and practices, its former “relationships” with the police officers and prosecutors, as well as the limitations of experience which only entails employment in the public service. The judicial independence of magistrates and perhaps more

importantly their own recognition of this independence has been the subject of extensive recent judicial treatment in Queensland. See in particular,

- *Payne v Deer* [2000] 1 Qd R 535;
- *Chief Magistrate and Magistrate Thacker* (unreported) [2002] Judicial Committee Determination;
- *Cornack v Fingleton* [2002] QSC 391 (Mackenzie J);
- *Gribbin v Fingleton* [2002] QSC 390 (Mackenzie J) and extra-judicial comments;
- Gleeson CJ *Public Confidence in the Judiciary* 6th Colloquium of the Judicial Conference of Australia, Launceston 26 April 2002;
- de Jersey CJ, *Opening Address*, Queensland Magistracy Annual Conference 2003, 7 April 2003;
- Shetreet S “The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986” (1987) 10 UNSW Law Journal 3; and
- Lowndes J “The Australian Magistracy: From Justices of the Peace to Judges and Beyond” (2000) 74 ALJR 509-612..

These recent developments have probably had some impact upon the role of magistrates at the committal stage. For example, the function to be performed at a committal hearing by magistrates under s 104 of the *Justices Act 1886*, that is, whether to commit a defendant to trial or not on the evidence adduced by the prosecution, is now more frequently approached from a considered and legal perspective than might have been the case in the past. The judicial function of making this determination is deceptively complex and its due performance is not only important for the accused but also designed to reduce the overall costs and delays within the criminal justice system in the prosecution of indictable offences by ensuring that only cases that establish a prima facie case to answer proceed to the trial stage.

Practitioners might embrace these developments and encourage magistrates to more precisely perform the filter that committals are designed to be. This should be done by reference to the relevant case law to counter the often intuitive approach that has been historically embraced within the magistracy. Also and perhaps most importantly, if a matter is not to proceed to trial, a determination at the committal stage will mean that complainants will have had the benefit of a public and judicial examination of the evidence and the availability of published reasons for their complaint not proceeding and not the (often and much maligned, privately performed) exercise of prosecutorial discretion by a Crown Prosecutor to enter a no true bill or nolle prosequi. Complainants and defendants are entitled to have their case properly disposed of by the courts in this way.

It is also perhaps timely for further discussion as to whether the s 104 test for committal should be amended. The present test permits cases to proceed to trial even when, in the opinion of the independent magistrate, the state of the evidence is such that a jury is likely, if not certain, to acquit or even if they were to find that any further prosecution is unlikely or would inevitably lead to a conviction that is unsafe and unsatisfactory.

[5.20] Practical benefits

The practical benefits that flow from a properly conducted committal proceeding can be summarised as follows:

- To ensure that an accused person is not placed on trial unless there is sufficient prima facie evidence such that a jury properly instructed could find the person guilty of the charge/s. This sometimes provides judicial protection from over-zealous or even malicious prosecution, which is as much in the community's interest as it is in the accused's.
- To provide the accused and a court an opportunity to know the full nature of the evidence held by the prosecution to support a charge. This is important for the following reasons:
 - The accused can fully assess the weight and nature of the evidence that could be produced at trial and make a considered decision as to the appropriate plea to be entered.
 - Cross-examination of the Crown witnesses at an early stage can be undertaken to test the cogency and obtain particulars of the allegations.
 - The accused can assess what evidence in reply should be collated for trial.
 - Submissions can be more sensibly prepared as to the evidentiary issues at trial.
 - The trial listing process will be better informed, particularly as to the likely duration and the issue/s in contest at the trial.
 - If the accused pleads guilty, the sentencing judge can be fully apprised of the nature of the case by reading the depositions from the committal.
- To permit the Director of Prosecutions to more fully assess the prosecution case, in particular the veracity of Crown witnesses and determine whether the matter is, in fact, a proper one to bring to trial notwithstanding that there may be a prima facie case. Also, matters relevant to public policy considerations, for example, can be explored from witnesses at the committal. See the DPP Prosecution Policy of the State of Queensland, 17 May 1995, reproduced at [145,001] – [145,100] in Volume 2 of Carter's *Criminal Law of Queensland* (Butterworths, looseleaf service).

Applicable legislation

[5.25] Justices Act

In Queensland the *Justices Act 1886* ("the Act") provides the statutory basis for the conduct of committal hearings. In particular, s 104(2) of the Act provides:

When, upon such an examination all the evidence to be offered on the part of the prosecution has been adduced and the evidence, in the opinion of the justices then present, is not sufficient to put the defendant upon his trial for any indictable offence, the justices shall order the defendant, if he is in custody, to be discharged as to the charge the subject of the examination; but if in the opinion of the such justices (...) the evidence is sufficient to put the defendant upon his trial.

[5.30] Sufficiency of evidence to place a defendant on trial

To determine whether "the evidence is sufficient to put the defendant upon his trial" (s 104(2)), primary reference should be made to *Doney v The Queen* (1990) 171 CLR 207 and *Purcell v Venardos (No 2)* [1997] 1 Qd R 317. An appreciation of the subtleties within this test will assist in determining what cross-examination, if any, should be embarked upon. Prosecutors often

refer to the decision in *May v O'Sullivan* (1955) 92 CLR 654 where the court said (at 658):

When, at the close of the case for the prosecution, a submission is made that there is “no case to answer”, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. This is really a question of law.

The law applicable to determining if there is a “case to answer” and whether a person should be committed to trial is essentially the same.

In *R v Sutton* [1986] 2 Qd R 72, the approach in *May v O'Sullivan* (1955) 92 CLR 654 was adopted by the court with a careful analysis of the relevant authorities. An important passage in *Sutton* is the unqualified “adoption” by the Queensland Court of Criminal Appeal (at 78–79) of the following passage from the judgment of Lord Lane in *R v Galbraith* [1981] 1 WLR 1039:

How then should a judge approach a submission of “no case”?

- (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
- (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
 - (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
 - (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

The High Court in *Doney v The Queen* (1990) 171 CLR 207 refined its view of the appropriate tests to be applied (at 212):

There is no doubt that it is a trial judge's duty to direct such a verdict [not guilty] if the evidence cannot sustain a guilty verdict or, as is commonly said, if there is no evidence upon which a jury could convict: see, for example, *Plomp v The Queen* (1963) 110 CLR 234; *R v Prasad* (1979) 23 SASR 161; *R v R* (1989) 18 NSWLR 74. And it may sometimes happen (although it should be rarely) that evidence is withdrawn because it becomes apparent that, although technically admissible, it has no or insignificant probative value in comparison with its prejudicial effect, with the consequence that, if the remaining evidence will not support a guilty verdict, a verdict of not guilty must be directed.

Doney's case bears careful reading. The authors have found the case difficult to completely intrinsically reconcile. One view that can be taken from *Doney* is that proper submissions at the committal stage of whether there is “sufficient evidence” against the accused, are not limited to asserting that there is a lack of implicating evidence in respect of the accused. Rather, submissions can, and should, be made on evidence which, whilst technically admissible, should be withdrawn from the jury because the “tenuous character” or “inherent weakness or vagueness” of the particular evidence “has no or insignificant probative value in comparison with its prejudicial effect” in circumstances where, upon its withdrawal, no evidence would remain upon which a verdict of guilty could be returned.

In any event, there is much scope in many cases for defence lawyers to make such submissions to not commit in these circumstances. This is so particularly where the only evidence alleged against an accused is circumstantial or confessional or reliant on identification evidence, which is so flawed that it would probably be withdrawn from the jury at any trial.

However, the court in *Doney's case* at 214 made it clear that "if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty" it must go to the jury. This direction has since been explicitly followed by other courts. See for example *R v Browning* (1991) 103 FLR 425 at 444:

It is not for the trial judge to direct the jury to acquit on the ground that the judge thinks that a verdict of guilty would be unsafe or unsatisfactory. Where, on one possible view of the facts, the evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision, although the evidence is tenuous, weak or vague.

Thus inconsistency is no bar to evidence going to a jury. That is, if there exist competing inferences in a circumstantial case and the Crown version at its highest could support a conviction, a no-case application on the basis of inconsistency would fail. As noted earlier, the same test will be generally applied at committal. In *Doney* the court (at 214) also noted, with reference to the passage quoted above from *R v Galbraith* [1981] 1 WLR 1039: "that there is some difficulty in reconciling proposition 2(a) (which has some similarity with the position earlier adopted in Victoria) with proposition 2(b)." And further: "That means that not only is proposition 2(b) in *Gailbraith* correct but, so far as it refers to 'inconsistent' evidence, proposition 2(a) cannot be accepted." *Case Stated by Director of Public Prosecutions (No 2 of 1993)* (1993) 70 A Crim R 323 at 327 per King CJ.

Finally, the test for a judge or magistrate on a no-case application is not whether a verdict of guilty would be unsafe or unsatisfactory: see *Doney v The Queen* (1990) 171 CLR 207 at 215; *Case Stated by Director of Public Prosecutions (No 2 of 1993)* (1993) 70 A Crim R 323 at 326; *Rozenes v Beljajev* (1994) 126 ALR 481 at 502. This aspect of the "test" was revisited by the Supreme Court of Queensland in *Purcell v Venardos (No 2)* [1997] 1 Qd R 317. It was observed by Ambrose J at 325 that:

There is a very long line of authority to support the proposition that in determining whether the prosecution has adduced sufficient evidence to put a defendant on trial, a committing magistrate should have regard to the reliability of the evidence not for the purpose of determining whether he personally is persuaded of guilt but for the purpose of determining whether any reasonable jury properly instructed could return a verdict of guilty upon it.

Reference was made to *R v Schwarten; Ex parte Wildschut* [1965] Qd R 276. Ambrose J then went on to say:

In my view, the observation approved in that the committal proceedings may only be conducted in a satisfactory way by one who has heard the case throughout "and heard and seen for himself the witnesses and their demeanour" makes it impossible to contend that the assessment of the credibility/reliability of a witness called in such proceedings is not a matter which has some relevance in determining whether evidence there adduced is sufficient to put an accused person on trial before a jury. One object of testing the evidence of a witness upon committal proceedings is to test the strength of the case brought against the defendant to see if it justifies putting him on trial.

This approach is clearly a sensible one. Since however it is contrary to the approach historically taken by many magistrates it may be necessary to specifically point to the relevant authorities supporting this decision in appropriate cases.

[5.35] “Hand-up” committal

The term “hand-up” committal is a shorthand reference to the procedure provided for in s 110A of the Act. Its proper use can be of advantage to all parties and the court, in particular in reducing the length of the hearing. However, its abuse or the lack of proper safeguards in the section can cause extreme injustice to an accused. A careful consideration of the section is necessary.

Under s 110A(2) written statements of police witnesses may be admitted into evidence upon compliance with s 110A(5) instead of oral testimony. Most importantly this procedure requires the *consent* of both the prosecution and the defence. Obviously, a lawyer should never seek to admit or give this consent unless the statement has been read and its evidentiary value understood. There are obviously circumstances where such consent should not be given. These usually arise where there is a real prospect of your client not being committed to trial, including situations such as the following:

- where your client instructs, or you otherwise assess, that the particular witness is unlikely to give a credible account;
- where there is a significant divergence between your instructions and the version given by a witness; or
- where there is a significant divergence between the version given by several witnesses of the same event; or
- where the police are not willing to produce the witness for cross-examination under s 110A(8).

The defence is entitled to accept some statements being put into evidence under s 110A and to require full oral evidence from other witnesses. The Act and, in particular, the remaining subsections of s 110A include important provisions which are not often invoked. Knowledge of them will be helpful in some cases.

Preparing for the hearing

[5.40] Legal aid

The policy decision to impose guidelines in the funding by Legal Aid appears to ignore the notion (as expressed in *Barton v The Queen* (1980) 147 CLR 75) that an accused will be unlikely to receive a fair trial without a committal hearing. Some of these guidelines are also unworkable in practice. For example, in order to establish some of the “circumstances” to obtain legal aid, you need, at least, to have a copy of the police brief to discover the extent of the police allegations. Since briefs of evidence are often only provided just before the hearing, it is often impractical to apply for aid at that late stage. Further, some of the “circumstances” which would fall within the guidelines will indeed only become apparent during the course of cross-examination, eg flaws in identification evidence.

In any event, any application for legal aid should be accompanied by correspondence seeking to bring the matter within the guidelines imposed by that office.

In conjunction with a Practice Direction issued by the Brisbane Magistrates Court (see [5.45]), there is a Committals Project underway at that court (and also now at the Ipswich Magistrates Court). The LAO and the DPP are part of this project. Guidelines determining conditions that

must be met before legal aid will be granted for committal proceedings have been relaxed. In relation to committal proceedings in respect of which the charges carry a maximum penalty of *less* than 14 years, a merit test was previously applied whereby certain factors had to be met or legal aid would not be granted. Currently, these matters (known as non-prescribed matters), will be granted legal aid solely on the basis of the applicant's financial eligibility.

[5.45] Commencement of committal proceedings

On 30 June 1995, the Chief Stipendiary Magistrate of the Brisbane Magistrates Court issued Practice Direction 2 of 1995 relating to proceedings leading up to and including committal hearings. Certain innovations to the system were introduced as follows:

- Persons granted bail by a Police Officer do not appear until 14 days after arrest. At that time they appear in Court 1.
- At the first mention, whether it be 14 days after arrest or the day following arrest (where bail is not granted by Police), an indication is given as to how the matter is to proceed. Courts are eager to seek an early indication of this. Pleas of guilty will be dealt with then and there.
- An indication that a matter is to go by way of committal will mean that the defendant is remanded to a committal mention date approximately six weeks hence. Further remands will only be granted where circumstances show that there is good cause for remand.

According to the Practice Direction, the Director of Public Prosecutions will be responsible for the conduct of all committal hearings and will deliver to the defence a copy of the QP9 and bench charge sheets within six days of arrest and a copy of the complete brief within 14 days of the committal mention date (see Appendix 1 at [5.235] for request for committal brief and Appendix 2 at [5.245] for follow-up letter). At the committal mention date the defence is to disclose to the court which witnesses, if any, will be required for cross-examination at the committal hearing. The matter is then set down for committal hearing for a date generally two weeks after the committal mention date. For purely management reasons, the maximum allocation of hearing time for committals is three days, after which time, a further adjourned date is set by the hearing magistrate.

On 19 July 2002, the *Criminal Law Amendment Act 2002* came into force to amend the *Bail Act 1980* and the *Justices Act 1886* to permit the non-appearance by a defendant at certain hearings for indictable charges if represented by a solicitor or counsel (see ss 8, 20(3) and 20(3AA) of the *Bail Act 1980* and s 84 of the *Justices Act 1886*). Section 84 of the *Justices Act 1886* lists circumstances where a defendant will still need to be present, namely if a Magistrate orders the defendant's appearance, a charge is being determined, an examination of witnesses is being conducted or a penalty is being imposed. In practice, therefore, a defendant is not required to appear at any mention or committal mention in respect of any indictable offence save for the initial appearance to enter into a bail undertaking.

Proceedings in other Magistrates Courts

The above procedure followed in the Brisbane Magistrates Courts applies in so much as the court will want as early an indication as possible as to how a matter will proceed. If it is to be contested then it is set down for a full hand-up committal date. The police brief should be requested (see Appendix 1 at [5.235] and Appendix 2 at [5.245] for follow-up letter if brief is

not received by your office seven days before the next date) and provided before that next date. A full hand-up committal [see [5.35] above] can be done on the next date, otherwise a date for cross-examination is set.

[5.65] First interview with client

The following matters should be discussed with the client at the first interview:

- the charges faced and the availability of any election of jurisdiction;
- details of all interaction between the accused and the police;
- the circumstances surrounding and police interaction issues relating to funding and the guidelines that apply to legal aid;
- the purpose of committal proceedings; and
- if applicable, full instructions in relation to bail.

Copies of the bench charge sheet and QP9 should be obtained and if undertaken, the tape of any recorded police interview. The degree of information which might be sought from an accused as to the circumstances surrounding the allegations will vary significantly from case to case. Different approaches are necessary for clients who:

- wish to plead guilty;
- wish to plead not guilty;
- are uncertain.

The criminal justice system is an adversarial one where the prosecution must establish at this stage a prima facie case in order for the prosecution to proceed and your client is entitled to the benefit of knowing what that case is before considering entering any plea. There is often a need to test the evidence to assess the strength of the prosecution case. There are obvious exceptions to this, including offences against the person and, in particular, sexual offences (rape, indecent dealing, serious assaults, etc), where mitigation by an immediate acknowledgment of guilt might require a different approach in certain circumstances. Refer to s 9(2) of the *Penalties and Sentences Act 1992* (Qld). Only experience and care will help determine whether or not to seek such specific instructions about the offence on the first interview.

If, however, the client has made a full confession to police or has indicated that he/she wishes to plead guilty or is seriously considering it, it is desirable to explore as soon as possible whether the facts at sentence can be resolved with the DPP or whether an ex officio indictment is required. Despite financial disincentives to the contrary, the early resolution of a criminal litigation has enormous benefits for the client and the system as a whole. See for example s 13 of the *Penalties and Sentences Act 1992* and the observations in *Cameron v The Queen* (2002) 209 CLR 339; 76 ALJR 382 at 385-6. Focus should then be applied to settling the facts surrounding the offence to ensure that they best reflect your client's account of what occurred. The committal is a useful means of settling disputed facts or setting up the process of fact determination in the superior courts. A strategic course at this stage makes it much easier to promote agreement with the Crown Prosecutor later. There is of course some value, in these circumstances, of getting out of court agreement of facts for sentence after the brief is at hand and before an actual hearing so that only the matters in dispute are agitated in the hearing.

[5.70] Election of jurisdiction

The first decision to be made is whether the charge is to be dealt with summarily or upon indictment. This can be determined by reference to the legislation under which the charge is

brought (for example, the *Criminal Code 1899*, the *Crimes Act*, the *Drugs Misuse Act 1986*, etc). A guide of the available options is in the appropriate chapter in the Duty Lawyer Handbook. However, it is only a shortcut, and final reference should always be made to the relevant legislation. Sections 552A and 552B of the *Criminal Code 1899* cover most of the offences. Where it is the election of the accused, consideration of all the circumstances is necessary, particularly if there is a likelihood, or indeed a possibility, that a custodial sentence might be imposed. Where a plea of not guilty is entered, the preferred election, when one is available, has historically been to proceed by indictment. Some of the relevant considerations as to whether to elect summary jurisdiction might include:

- Money. Obviously, to proceed by indictment is ultimately more expensive. Also, legal aid is less likely to be granted for a summary hearing than a committal hearing in the Brisbane and Ipswich Magistrates Courts, and vice versa in other areas.
- Early resolution of the matter. Enthusiasm to dispose of a matter quickly can sometimes lead to injustice. It should always be pointed out to the client that proper preparation cannot be done without careful analysis of the case. A good way to do this is at a properly conducted committal. Also, time is often necessary to prepare a defence and for the accused to get some order in her/his life, such as obtaining employment, admission to a drug rehabilitation program, obtaining psychiatric assessments and reports, etc.
- Legislation permitting election of summary jurisdiction usually prescribes lesser maximum penalties if the charge is disposed of summarily. While this is true, it is unlikely that a superior court would impose a greater sentence than a magistrate on the same facts, indeed, the anecdotal evidence is that in respect of some offences the contrary is true.
- Consistency. There is at least anecdotal evidence to suggest that magistrates are less consistent at sentencing than superior courts. It remains a mystery why, despite technological advances, the Magistrates Courts do not see value, if not a need, to record its sentences on a database accessible by practitioners and the public.

The conventional wisdom has been that, except in the most minor cases, where election is available to the accused, it should usually be to proceed by indictment after a proper committal. However, as noted above, the Magistracy has undergone significant change over the last five years or so and more and more practitioners with significant practical and legal experience are being appointed. Sentencing is now more considered, generally. For example, Chief Magistrate Fingleton has promoted more summary determinations and encouraged the Magistracy to increase the time allocated to sentencing. In the Central Courts for example, a “lengthy plea” procedure has been initiated, with reported success, where sentences taking 30 minutes or more can be accommodated.

There are charges where the election of summary jurisdiction is reposed in the magistrate. This election can be made by the magistrate at any stage in the hearing. Proceedings commence and remain a summary trial until such time as the magistrate determines that s/he cannot deal with the matter summarily (see *Peiffer v Mossop; Ex parte Peiffer* [1952] St R Qd 137). The magistrate should be asked to indicate when and if s/he has decided on the issue of jurisdiction, as the manner and nature of cross-examination will have to be altered to accommodate this. For example *Jones v Dunkel* (1959) 101 CLR 298 and *Browne v Dunn* (1893) 6 R 67 considerations may arise. The prosecutor should also be requested to produce any witnesses whose evidence will have an impact on this election first as their evidence will facilitate the election.

[5.75] Details of police/client interaction

It is important to obtain an immediate written account of all interactions between the police and the accused. Its relevance will not only be apparent in respect of allegations as to admissions or confessions, but also in respect of being able to establish co-operation with the police as a mitigating circumstance if necessary. More and more police are tending to covertly tape and/or take notes of these conversations and they should be sought before and at committal hearings for completeness.

[5.80] Copies of the bench charge sheet/s

It is not sufficient to rely on oral instructions from the accused or information provided by the police to confirm the charges faced by the accused. An accused is entitled to be fully advised of the charges s/he faces and should be provided with a copy of the bench charge sheets by the police. The usual course is to write to the prosecutor and ask for the provision of the bench charge sheets or the summonses. If, for any reason, this request is not complied with, an approach can be made to the clerk of the court or, when the matter is next mentioned at the court, the charge(s) will be read to the accused by the magistrate.

[5.85] Record of interview

The current policy of the police is to provide a copy of any taped record of interview to the accused at the conclusion of the interview. It should be obtained and transcribed expeditiously. If your client has misplaced it, a further copy can be obtained from the police, usually by providing a blank audio tape or by paying for it. Where resources allow, a video copy of the interview should also be obtained and viewed.

The recording is the evidence and not the transcript. The client should be asked to carefully check the transcript and, particularly in contentious cases, you should check it yourself.

[5.90] Legal fees

A client should always be fully advised of the actual cost of representation as well as her/his entitlement to legal aid in relevant circumstances. Uncertainty in relation to legal fees is the most frequent cause of unnecessary complaint by clients. Some explanation should be given as to the likely costs post-committal, as there is no point in utilising all of the client's resources at the committal and leaving him/her without representation for the trial. A sensible approach and open discussion should take place and at an early stage.

[5.95] Explanation of purpose of committal proceedings

The purpose of the committal proceeding has been outlined above at [5.15] – [5.20]. The duty of the defence lawyer is to ensure that all the benefits and protective measures available to the client are provided to the client. This includes a full explanation of the procedure and purpose of committal proceedings, including the procedure under s 110A.

[5.100] Full instructions about bail

If bail has already been granted by the Magistrates Court, it will be necessary to seek further bail at the conclusion of the committal hearing in the event that the accused is committed to trial. Thus, full instructions about bail must be obtained. If Supreme Court bail has been obtained, a photocopy of the sealed duplicate original issued by the court should be at hand at

the committal. Importantly, if a surety is required under bail granted by the Magistrates Court which needs to be renewed at the end of the committal, the sureties should be arranged to be available at the end of the committal hearing to sign fresh surety requirements, otherwise the accused will be kept in custody until that is done.

On a practical level, the committal hearing is a good opportunity to develop a relationship with the arresting officer to assist in the provision of supplementary material and information. Also, prosecutors and the Magistrates Court place a degree of emphasis on the attitude of the arresting officer as to bail.

[5.105] Plea

Section 13 of the *Penalties and Sentences Act 1992* prescribes that a guilty plea must be taken into account in determining sentence. In *R v Corrigan* [1994] 2 Qd R 415; (1993) 70 A Crim R 53 and *R v McQuire* (2000) 110 A Crim R 348, the Court of Appeal held that the criminal justice system recognises that a plea of guilty is a mitigating factor even when not accompanied by remorse. In *Cameron v The Queen* (2002) 209 CLR 339; 76 ALJR 382, the High Court held that in addition to remorse, a plea of guilty “may also indicate acceptance of responsibility and a willingness to facilitate the course of justice”. The High Court also confirmed that sentencing was not a “mathematical” or “rigid” exercise although transparency in terms of what benefit, if any, is given for the entry of a plea of guilty was encouraged. The timing of the entry of any plea would also be taken into account. Generally a plea entered “at the first reasonable opportunity” would obtain a maximum benefit in terms of reduction of sentence.

Accordingly, defence counsel are obliged to confront this issue with their clients at an early stage. Opinions will differ as to whether this discussion needs to be had prior to the committal hearing or not. In some centres there is in place a committal mention system which requires the police to provide a brief before the matter is listed for committal hearing. It is suggested that the discussion as to the merits of a timely or ex officio plea takes place as soon as the strength of the police case is at hand. For further detail see [5.165] – [5.170].

[5.110] Pre-hearing interaction with the prosecutor

Most prosecutors are anxious to proceed under s 110A of the Act and they will usually make a genuine attempt to provide the brief to you in sufficient time to be prepared to facilitate this course. If you are experiencing non-cooperation and receiving briefs only on the day before, or the day of, the committal hearing, consider not providing your consent to statements being tendered into evidence. Prosecutors will soon realise that it is in the interests of the administration of justice, when dealing with you, to cooperate and provide police briefs to you as soon as they receive them. If the matter involves serious charges and, for example, a large police brief with numerous statements is delivered with insufficient time for you to read it properly, you should of course seek an adjournment. The correspondence exchanged with the prosecutor should be tendered.

Once the brief is received it should be carefully read. The following is a checklist of preparing for the hearing from a brief:

- Highlight assertions by witnesses that appear in statements not admissible in evidence, and note the basis of such inadmissibility.
- Prepare a chronology of the functional events.
- Summarise the evidence that implicates your client.

- If identification is in issue, note the description that is given by the particular witness to police of the alleged offender. Also note that you should ask specific questions in cross-examination in relation to this. In these circumstances reference should be made to *R v Turnbull* [1977] QB 224 at 228:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given.

Bear in mind that an application may be made at trial in relation to unreliable identification evidence for the trial judge to exercise her/his discretion to exclude that evidence in line with the direction by Gibbs CJ in *Alexander v The Queen* (1981) 145 CLR 395 at 402–403:

a trial judge has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge was of the opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused ... it seems to me proper for a trial judge, in deciding how he should exercise his discretion, to take every precaution reasonably available to guard against the miscarriages of justice that can occur, and have in fact occurred, because of honest but mistaken evidence of identification.

Note the names of the witnesses that you will require for cross-examination. Do not rely on the index that is often provided with the brief. There may be statements attached to the brief that are not on the index and vice versa. There may also be witnesses who are referred to in the statements from whom statements have not been, but should be, obtained.

Forward a written list of the witnesses that you will require for cross-examination. Suggested forms for this letter are at Appendix 3 at [5.255].

If there are legal issues such as admissibility upon which a magistrate ought rule: cf *Coco*, then there is considerable utility in preparing a written note or submission of the argument. The *Criminal Law Amendment Act 2002* inserted s 84 of the *Justices Act 1886* which provides for a magistrate on his or her own initiative or upon application by one of the parties, to direct that a “direction hearing” be held for a magistrate to “give a direction he or she is entitled to make at law about any aspect of the conduct of the proceeding” prior to any committal hearing or summary hearing. This is an available avenue for putting before the court any difficulties in the provision of materials, joinder of defendants or charges or admissibility issues.

If it is thought that there is no proper basis for committal on a charge, a written submission is useful way of presenting the argument. Some magistrates have a resistance to written submissions but the process and rigour associated with articulating and argument in writing will be useful even if circumstances arise where the submission is not handed up.

[5.115] Duty of the prosecutor to produce witnesses

It may be useful to develop an understanding of the obligations and duties of prosecutors regarding the production of witness. First, refer to the current guidelines provided by the DPP to prosecutors, set out at Appendix 4 at [5.265]. These guidelines do not have the force of law. However, magistrates seem to accept them as similar to a practice direction in their courts. There are also a number of judicial comments on the duties of the prosecutor at committals. In particular, see *R v Sloan* (1988) 32 A Crim R 366 per Kneipp J and *R v Harry; Ex parte Eastway* (1985) 39 SASR 203 at 211–212; 20 A Crim R 63 at 70–71 per King CJ.

It is somewhat fundamental that material witnesses are produced for cross-examination when required. The failure to assert this right may greatly prejudice the right of your client to be fully prepared at trial. The committal hearing is the only guaranteed opportunity for an accused to fully cross-examine without having to be concerned that the answers that might be received from a particular witness are inadmissible. It ensures that surprises are less likely at the trial before the jury. The evidence of a particular witness may materially alter the complete nature of the Crown case at trial.

The appropriate remedy if material witnesses are not produced is unclear. It was stated in *Sloan* that the Magistrates Court has the power to stay proceedings to prevent an abuse of power. This has also been confirmed (although in a different context) by the High Court in *Jago v District Court (NSW)* (1989) 168 CLR 23. In practice, magistrates will be reluctant to recognise that power, and even less likely to invoke it. It is still desirable, and perhaps even necessary, however, to make such an application before the magistrate if the prosecutor is not prepared, without good reason, to produce material witnesses at the committal hearing so that the accused's position in the matter has been placed on record. If refused, an application can then be made to the District or Supreme Court, according to which court your client has been committed to, to stay an indictment that is then presented, until such time as a "proper and full committal" is convened. Instances of this occurring in Queensland are in unreported decisions of the District Court in *R v Walker* (unreported, Dist Ct, Brisbane, Helman DCJ, August 1990) and *R v Jeffers* (unreported, Dist Ct, Brisbane, Boyce DCJ and Healy DCJ in separate unreported decisions, November 1991).

Since 1989, a form of proceedings known as a "Basha Inquiry" has arisen following comments by Hunt CJ at CL in *R v Basha* (1989) 39 A Crim R 337, where his Honour referred to his practice of permitting an accused to conduct a voir dire style of examination of witnesses not available at committal hearing, prior to the empanelment of the jury. The conditions necessary for a Basha inquiry were further discussed by Hunt CJ at CL in *R v Sandford* (1994) 72 A Crim R 160 at 190–191. A "Basha Inquiry" was considered to be permissible:

provided (and these are important provisos) that the accused has demonstrated – in advance – the particular issue which he intends to pursue, that the judge is satisfied that there is at least a serious risk of an unfair trial if the accused is not given the opportunity to do what otherwise would have been done at the committal proceedings, that the procedure is not used inappropriately in order to try out risky questions which may otherwise prove to be embarrassing in the presence of the jury, and provided also that such an examination is not permitted to interrupt the trial itself significantly.

There are of course greater costs expended by pursuing these remedies in the superior courts and therefore it is important to utilise the committal hearing for this purpose.

The hearing

[5.135] Before the hearing commences

Before court commences, you should approach the prosecutor handling your matter and find out whether all witnesses that you require are available. If there are any that are not, you should find out the reason for their non-attendance.

[5.140] Preliminary submissions to the court on procedure

When the hearing commences and the prosecutor makes application to proceed under s 110A of the *Justices Act*, you should *there and then* make it quite clear to the court what your position is regarding the manner in which the matter is to proceed. For example, state for the record the following:

- when the matter was originally set down for hearing and, if set for more than one occasion, set down the reasons for any previous adjournment;
- when you sought the police brief (tender your letter if necessary);
- when you informed the police prosecutor of the witnesses that you require for cross-examination;
- which witnesses you are prepared to allow to give their evidence by statement and which you require to give their evidence in full. You should caveat your consent to statements with the requirement that the particular witness be presented for cross-examination;
- if any particular witness that you require is not produced, then you should require the prosecutor to provide full reasons and details of their whereabouts and, further, whether they will be available at the trial;
- you should also state to the court where there are any inadmissible assertions in any particular statement so that those passages are not admitted into evidence.

Generally, you should not permit the prosecutor to tender statements in bulk. An exception might be where you are consenting to a full hand up. Each witness should attest to her/his statement and you should only give your consent after that is done. There may be circumstances where exceptions to this rule might be permissible, but that should be rare.

[5.145] Strategy

If there is clearly insufficient evidence in the police brief and you have found out that no further evidence will be brought, you might consider not cross-examining any witness and merely making submissions as to why there is insufficient evidence to place the accused upon her/his trial.

If you hold clear written instructions to enter a plea of guilty, you might limit any cross-examination to establish mitigating factors such as:

- co-operation with the police (see s 9(2)(j), *Penalties and Sentences Act 1992*);
- remorse;
- lack of *actual* violence in charges such as armed robbery, rape, etc and other mitigating factors relating to the offence (s 9(2)(cc), *Penalties and Sentences Act 1992*). Make sure you have cogent and reasonable instructions in writing before cross-examining on this point.

The *Penalties and Sentences Act 1992* was enacted in 1992 “to consolidate and amend the law relating to the sentencing of offenders”. Under s 9(2)(a) to (p) of the Act, the sentencing court must have regard to a range of factors including:

- the nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim (s 9(2)(c));
- the extent to which the offender is to blame for the offence (s 9(2)(d));
- the presence of any aggravating or mitigating factor concerning the offender (s 9(2)(g)).

This is particularly necessary where an important fact is disputed by your client as to the commission of the offence. If the issue is not conceded by the prosecutor, the foundation for any submission should be laid. A thorough knowledge of this Act is essential for any lawyer making submissions on sentence before a Queensland court. It includes the full range of penalties available to a judge or magistrate.

In these circumstances, that is, where a plea of guilty is certain or likely, you should not cross-examine civilian witnesses, who might be further distressed as a result of your cross-examination, unless absolutely necessary.

In every other circumstance, full cross-examination should be undertaken of every material witness. The purpose of your cross-examination should be to find out fully all evidence held and ascertain the complete prosecution case. In some instances you might need to be speculative in your approach if you believe that there are areas of evidence which have not been placed before the court by the arresting officer. The only rule you should not usually contravene is the rule that you do not put your client’s instructions or version of events to any witness. However, in some instances, this general rule may need to be breached if you have a compliant witness or one that you know will agree with any particular assertion. There is considerable merit in these circumstances to seek to confer with the witness out of court beforehand, particularly those purporting to give expert evidence.

[5.150] Cross-examination of witnesses

Each advocate has a different style in cross-examination. Only experience will increase proficiency. Some guidelines are as follows:

- A proper committal can be necessary in order for there to be a fair trial.
- Remember that your primary objective is to have a complete record of all the evidence the police hold against your client so that you can fully consider its effect and scope and then prepare a defence to it. A balance must be struck to ensure that evidence that might never be led at trial is not unduly elicited at the committal.
- Unless there is a real prospect of the matter not being committed to trial, you should not be greatly concerned with the inclusion of hearsay evidence. Indeed, its inclusion at the preliminary hearing will often assist in determining how the police allegations originally arose. There is, seldom, therefore, any point in taking objections to the admission.
- Aside from the exceptions noted above you should not put any assertions to any witness. The hearing is to find out the police case, not to foreshadow the intended line of defence. Putting your client’s instructions, if you have taken any, to any witness should be done with great care and circumspection.

- With police witnesses, ensure that all records of conversation that they assert against your client are produced and tendered to the court. Thus, copies of all police notes should be tendered. Also, details of your client's co-operation, if any, should be canvassed with the witness and stated for the record.
- You should also ask the arresting officer to outline to you the police case against your client and the evidence that s/he alleges against your client. This should be noted by you to assist in any submission you might have in relation to the evidence. It also amounts to a sort of "opening" of the police case and you can thus use it to anticipate the evidence and also prepare your final submission.
- Where identification is in issue, full particulars of the means of identification should be obtained from the arresting officer. Where the entirety of a police case is based on identification by a witness, police briefs and statements in them will be remarkable for their brevity. For example, police officers will often leave out reference in a witness's statement to the witness having been shown a police line-up of the accused if the particular witness did not select or recognise the accused. Develop a good understanding of the law in relation to identification, in particular photographic line-ups, before embarking on cross-examination. In addition to the cases mentioned earlier, refer to *Alexander v The Queen* (1981) 145 CLR 395; *R v Currie* (unreported, Ct of Cr App, 28 November 1990); *R v Garland* (unreported, Ct of Cr App, 27 August 1991); and *R v Medway* (unreported, Ct of Cr App, 1 April 1992).
- Full details should be elicited of the interaction between the police and the accused leading up to any conversation attributed to the accused, including whether any warning was given and also the particular "status" of the accused at such time. An understanding of the "Judges' Rules" applicable to the particular witness should be obtained to cross-examine effectively in this area. This will be helpful in any voir dire that might be held at the trial on the admissibility of such evidence. Find out the times involved between apprehension, interview and arrest.
- Scientific evidence can sometimes be daunting to understand. You should not hesitate from embarking on lengthy cross-examination so that you fully understand the nature of it.

Examples of the need for full details include fingerprint and other identifying evidence. There is usually a tremendous benefit if you take the time to speak to the scientific expert out of court beforehand to better understand their evidence, process and conclusions. A visit to the forensic laboratory is also helpful. Where funding permits, briefing an independent expert with the materials to get an inside look at the evidence helps in distilling the matters that are likely to be important at trial. Where warranted, details of the expert's basis for asserting expertise and the manner of reaching his/her conclusions will be useful in attacking the conclusions later.

The above is a guide only. Each charge and particular circumstance will obviously require different cross-examination.

It is useful to look at the operation of s 101 of the *Evidence Act 1977* (Qld). In some cases, its operation can be very useful in determining the facts forensically. See in particular *R v Drury* [1984] 1 Qd R 356 and *Suresh v The Queen* (1998) 102 A Crim R 18.

Also, s 11 of the *Justices Act 1886* (Qld) bears careful examination. In some cases, its impact can be devastating for the accused at trial.

[5.155] Defence submission

Often there will clearly be sufficient evidence adduced and there is no point in making any submission. Indeed, you can properly give your consent to the committal of the accused to trial

in such cases. However, when there is insufficient evidence a submission is obviously necessary. It need only be brief, with a short summary of the facts and references to the law applicable to the particular charge. Reducing the submission into writing also helps in disciplining the submission and assisting the magistrate.

[5.160] Address to client by magistrate

If the magistrate commits the accused to trial, s 104(2)(b) requires the magistrate to address the accused. You should take instructions from your client and answer on her/his behalf. However, make sure your client understands the procedure. Court proceedings are a harrowing experience for most people and you should limit your client's involvement wherever possible.

Ex-officio indictment

[5.165] By-passing committal proceedings

Section 561 of the *Criminal Code* ("the Code") provides:

A Crown Law Officer may present an indictment in any court of criminal jurisdiction against any person for any indictable offence, whether the accused person has been committed for trial or not.

Section 1 of the Code provides that the Attorney-General and the Director of Prosecutions are the "Crown Law Officers". It is therefore open to the accused to bypass the committal proceeding and consent to the presentation of an indictment in either the District Court or the Supreme Court. This procedure is most often invoked to save costs and time and, in the instances where a guilty plea is entered, the sentencing judge might consider it a mitigating circumstance in favour of the accused.

It might also be the appropriate course to take if the case has attracted, or is likely to attract notoriety or publicity through media coverage of its facts at committal hearing. This publicity may affect the prospect of the accused to subsequently receive a fair trial as a result of that pre-trial publicity. Surveys conducted before trials demonstrate the real prejudice jurors can develop against an accused on the basis of evidence reported from committal hearings. This is a factor in determining whether or not to bypass the committal stage. For examples of cases where applications for stays have been brought as a result of pre-trial publicity, see *Glennon* (1992) 60 A Crim R 18; *R v Milat* (unreported, NSW Sup Ct, Hunt CJ, 5 September 1996); *R v Connell, Lucas & Carter (No 3)* (1993) 8 WAR 542 and *R v Long; Ex parte A-G (Qld)* [2003] QCA 77.

As noted above, s 13 of the *Penalties and Sentences Act 1992* should be considered. It becomes particularly important to take advantage of the discount that is usually given to a timely plea of guilty being entered. It is becoming more readily accepted that the saving of resources is a material basis for reducing a sentence that might otherwise be imposed. For further detail see the cases above as well as the Practice Direction noted at [5.45].

There is considerable utility in settling the facts for sentence with the DPP on an ex officio indictment.

[5.170] Practical procedures

The following practical procedures might be noted:

- If the accused was originally charged in the Magistrates Court, the presentment of the ex officio indictment does not automatically dispose of the matter before the lower court. The appropriate procedure is to have the matter mentioned in the lower court after the matter has been dealt with in the higher court, and the police prosecutor will offer no evidence to dispose of the matter.
- As the presentment of the indictment requires the appearance of the accused person, arrangements for bail should be made either before or at the time of its presentment, otherwise a warrant will issue.

There has now been put into place a procedure in the Brisbane Central Courts to alleviate the necessity for an accused to reappear after being dealt with on an ex officio indictment, however practice will vary in different courts. Magistrates Court Practice Direction 6 of 2001 provides for the practitioners to advise the Court of their client's consent to an ex officio indictment when the matter is either in Court 1 or Court 5, at which time the matter is adjourned for a remand date in a month's time in Court 5 for liaison with the DPP for the indictment to be presented and a factual basis to be prepared.

Pre-trial preparation

[5.175] Legal aid

Legal aid for an accused, if given for the committal hearing, lapses at its conclusion. Therefore, if the accused is committed to trial, a new application should be obtained immediately.

Similarly, you should organise private funding for trial as soon as possible and regard should be had to the Practice Direction noted at [5.45].

[5.180] Notice of alibi

Section 590A(1) of the Code provides:

An accused person shall not upon his trial on indictment, without the leave of the court, adduce evidence in support of an alibi unless, before the expiration of the prescribed period, he gives notice of particulars of the alibi.

The "prescribed period" is within 14 days of committal hearing. The accused should be specifically advised of this and full instructions taken and implemented as soon as possible after the committal hearing. In practice evidence of an alibi will be admitted where a notice of alibi has been served outside this period, provided the prosecution are not disadvantaged by the delay. It is advisable to seek the Crown's permission for an extension of time in which to serve the notice if it is to be late. In any event, the Crown can waive the time requirement although this may result in an adjournment of the trial to allow investigation by the Crown of your alibi witnesses. Ultimately, it is within the trial judge's discretion to allow alibi evidence after late service. It is not advisable to name any witness unless you have a signed statement or a sworn version from her/him.

[5.185] Further advice to client

Ensure that the following further matters are discussed (as soon as possible after the committal hearing) with the accused person who has been committed to trial:

- that s/he fully understands her/his bail conditions and the effect of any breaches in relation to subsequent sentencing or forfeiture of recognisance or surety;
- that the client is informed of the time and place of trial and that her/his further appearance is required in the court to which s/he has been committed. Specifically, some explanation of the meaning of the “sittings of the District/Supreme Court” should be given;
- that instructions as to names, addresses, place of employment, and contact numbers for all potential witnesses should be obtained;
- whether a psychiatric or psychological assessment is required. Specific legal aid approval will be necessary for these reports.

[5.190] Director of Public Prosecutions

Immediately the committal hearing is over, a written request should be sent to the Director of Public Prosecutions for copies of indictment, depositions, transcripts of records of interview, and exhibits, relating to both the client and also any co-accused. Also request copies of any criminal history of the client and the co-accused, if not already obtained. An example of the letter is at Appendix 5 at [5.270]. The sample letter is obviously a general request, and additions and deletions will apply, depending on the particular circumstances of the case.

[5.195] Listing for trial/sentence

The District and Supreme Courts hold regular “call-overs”, at which time matters committed to that court are then listed for trial and sentence. It is necessary to appear on behalf of the accused at such call-overs, otherwise bail may be revoked. It is also necessary to liaise with the criminal listing clerks of these courts on a regular basis.

There is a growing concern that practitioners are postponing consideration of matters until after an indictment is to be presented. Given that the DPP are now given six months to present an indictment, delaying consideration of a matter in that way is injudicious unless there is good reason to postpone sentence (eg where your client is in rehabilitation). You will secure advantages for your client if the preparation for trial/sentence is commenced immediately after the committal hearing.

[The next text page is 5-1073]

APPENDIX 1 - WRITTEN REQUEST FOR POLICE
BRIEF FOR MATTERS OUTSIDE BRISBANE
MAGISTRATES COURT

[5.235]

Jennifer Rumpole & Associates

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BRISBANE QLD 4000

DX: 9763 Brisbane

3 June 2003

Officer-in-Charge
Queensland Police Service Police Prosecution Corps
GPO Box 1440
BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We act for Robert Cook.

We understand that the committal hearing of the following charge(s) against our client is set down for hearing at Brisbane Magistrates Court 5 on ...

The charges are:

1. ...

Please advise if any of this information is incorrect.

We request that you provide to us the police brief in relation to these charges immediately upon your receipt of same from the relevant investigating officer. We note that the present guidelines from the Director of Public Prosecutions include the requirement to provide the police brief at least seven (7) days before the hearing date.

We undertake to cooperate with you by advising as soon as possible upon our receipt of the police brief as to the witnesses that will *not* be required for cross-examination.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

APPENDIX 1A - WRITTEN REQUEST FOR POLICE BRIEF FOR MATTERS IN BRISBANE MAGISTRATES COURT

Written request for police brief (for matters in Brisbane
Magistrates Court)

[5.240]

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Tel: (07) 3212 3456

Fax: (07) 3210 6543

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3 June 2003

Director of Public Prosecutions (Queensland)

GPO Box 2403

BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We act for Robert Cook.

We understand that the committal mention of the following charges against our client is set down for 200 at Brisbane Magistrates Court 5 on ...

The charges are:

1. ...

Please advise if any of this information is incorrect.

We request that you provide to us the committal brief in relation to these charges immediately upon receipt of same from the relevant investigating officer.

We note that by Practice Direction 2 of 1996 of the Brisbane Magistrates Court, your office is required to provide the committal brief at least fourteen (14) days prior to the above committal mention date.

We will advise at the committal mention date as to the witnesses that will *not* be required for cross-examination.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

APPENDIX 2 - FOLLOW-UP LETTER FOR MATTERS OUTSIDE BRISBANE MAGISTRATES COURT

[5.245]

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3 June 2003

Officer-in-Charge
Queensland Police Service Police Prosecution Corps
GPO Box 1440
BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We enclose a copy of our letter dated ... seeking the police brief in this matter.

If you do not intend to provide the brief sought, please advise accordingly and further advise:

- (a) the reason/s for the refusal;
- (b) whether you will be in a position to proceed on ...; and
- (c) whether you are seeking an adjournment and if so for what reasons.

We confirm that if the brief is not provided by ... we will assume that it is not intended by you to provide same and will take instructions from our client on that basis.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

APPENDIX 2A - FOLLOW-UP LETTER (FOR MATTERS IN BRISBANE MAGISTRATES COURT)

Follow-up letter for matters in Brisbane Magistrates Court [5.250]

Jennifer Rumpole & Associates

Solicitors

1st Floor

1 Margaret Street

BRISBANE QLD 4000

Tel: (07) 3212 3456

Fax: (07) 3210 6543

DX: 9763 Brisbane

3 June 2003

Director of Public Prosecutions (Queensland)
Committal Project Section
GPO Box 2403
BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We enclose a copy of our letter dated seeking the committal brief in this matter.

If you do not intend to provide the brief sought, please advise accordingly and further advise:

- (a) the reason/s for the refusal;
- (b) whether you will be in a position to proceed on; and
- (c) whether you are seeking an adjournment and if so for what reasons.

We confirm that if the brief is not provided by we will assume that it is not intended by you to provide same and will take instructions from our client on that basis.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

APPENDIX 3 - LETTER RE WITNESSES
REQUIRED FOR CROSS-EXAMINATION, FOR
MATTERS OUTSIDE BRISBANE MAGISTRATES
COURT

[5.255]

Jennifer Rumpole & Associates

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DX: 9763 Brisbane

3 June 2003

Officer-in-Charge
Queensland Police Service Police Prosecution Corps
GPO Box 1440
BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We refer to the brief of evidence delivered to us in this matter on ... The brief comprises statements of the following:

We advise that subject to the acceptance of *all* of the following requirements we are prepared to give our client's consent to the procedure in s 110A of the *Justices Act* in respect of all witnesses except:

The abovementioned witnesses will be required to give their evidence *in full*.

We do *not* require the following witnesses to be produced for cross-examination:

Each and every other witness must be produced for cross-examination. We give this conditional consent on the understanding that the brief as received comprises the entirety of the police evidence alleged against our client and thus that no further statements or evidence from any person will be adduced. If any of the witnesses we require are not to be produced or it is intended to adduce any further evidence, our consent is withdrawn and we will consider the matter further.

We further note that we will be asking witnesses to produce any documentary or other evidence upon which their respective evidence relies upon or relates to. Accordingly, please ensure that same is sought by you and is available for production.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

**APPENDIX 3A - LETTER RE WITNESSES
REQUIRED FOR CROSS-EXAMINATION, FOR
MATTERS IN BRISBANE MAGISTRATES COURT**

[5.260]

Jennifer Rumpole & Associates

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1st Floor

Tel: (07) 3212 3456

1 Margaret Street

Fax: (07) 3210 6543

BRISBANE QLD 4000

DX: 9763 Brisbane

3 June 2003

Director of Public Prosecutions (Queensland)
GPO Box 2403
BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We refer to our mutual attendance before the Brisbane Magistrates Court on 200... for a committal mention of this matter. We confirm our indication to the court in relation to witnesses was as follows:

Subject to the acceptance of all of the following requirements we are prepared to give our client's consent to the procedure in s 110A of the *Justices Act* in respect of all witnesses except:

The abovementioned witnesses will be required to give their evidence in full.

We do not require the following witnesses to be produced for cross-examination:

Each and every other witness must be produced for cross-examination.

We give this conditional consent on the understanding that the brief as received comprises the entirety of the police evidence alleged against our client and that no further statements or evidence from any person will be adduced.

If any of the witnesses we require are not to be produced or it is intended to adduce any further evidence, our consent is withdrawn and we will consider the matter further.

We further note that we will be asking witnesses to produce any documentary or other evidence upon which their respective evidence relies upon or relates to. Accordingly, please ensure that same is sought by you and is available for production.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

APPENDIX 4 - DIRECTOR OF PROSECUTIONS' GUIDELINES FOR POLICE PROSECUTORS

[5.265] *Guidelines of the Director of Prosecutions are issued to the Commissioner of Police and to police and Crown prosecutors appearing as prosecutors at an examination of witnesses in relation to an indictable offence.*

1. Subject to the exceptions set out in paragraph 2, all admissible evidence collected by the investigating police officers should be produced at committal proceedings.
2. Evidence need not be produced when:
 - (a) it is unlikely to influence the result of the committal proceedings and it is contrary to the public interest to disclose it, eg –
 - (i) it deals with a matter affecting national security;
 - (ii) it contains details that, if they became known, might facilitate the commission of another offence or alert someone not charged with an offence that he is a suspect;
 - (iii) it discloses or is likely to disclose a method of surveillance or detection of offences or a means of gathering evidence;
 - (iv) it contains information likely to lead to the identification of an informant;
 - (v) it contains matters of considerable private delicacy to the person who can give the evidence or matters that, if published, would be likely to cause violence or serious domestic disharmony;
 - (b) it is unlikely to influence the result of the committal proceedings and the person who can give the evidence is not reasonably available or his appearance would result in unusual expense or inconvenience or produce a risk of injury to his physical or mental health, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;
 - (c) it would be unnecessary and repetitive in view of other evidence to be produced, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;
 - (d) it is reasonably believed the production of the evidence would lead to a dishonest attempt to persuade the person who can give the evidence to change his story or not to attend before the court of trial, or to an attempt to intimidate or injure any person;
 - (e) it is reasonably believed the evidence is untrue or there is such doubt attaching to the evidence it ought to be tested upon cross-examination, provided the defence is given notice of the person who can give the evidence and such particulars of it as will allow the defence to make its own inquiries regarding the evidence and reach a decision as to whether it will produce the evidence;
 - (f) it is reasonably believed the evidence is the result of a contrivance of the defendant or some person acting in the interests of the defendant, eg it takes the form of a false, self-serving statement of the defendant.

3. Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.
4. Copies of written statements to be given to the defence, including copies to be used for the purposes of an application under s 110A of the *Justices Act*, are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them; whenever possible they should be given at least seven clear days before the commencement of the committal proceedings.
5. In all cases where admissible evidence collected by the investigating police officers has not been produced at the committal proceedings, a note of what has occurred and why it occurred should be made and included in the police brief delivered to the office of the Director of Prosecutions; if a copy of a statement containing evidence not produced at the committal proceedings has been given to the defence, the note should record that fact.
6. These guidelines shall apply as from Monday, 15 August 1988.

Director of Prosecutions

7 July 1988

[The next text page is 5-1081]

APPENDIX 5 - WRITTEN REQUEST FOR COPIES OF DEPOSITIONS, INDICTMENT, ETC

[5.270]

Jennifer Rumpole & Associates
Solicitors

1st Floor
1 Margaret Street
BRISBANE QLD 4000

Tel: (07) 3212 3456
Fax: (07) 3210 6543
DX: 9763 Brisbane

3 June 2003

Director of Prosecutions (Queensland)
GPO Box 2403
BRISBANE 4001

Dear Sir/Madam

RE: ROBERT COOK

We act for Robert Cook.

We appeared at the committal hearing at ... Magistrates Court on ... Our client was committed to the sittings of the ... Court commencing ...

We request a copy of the depositions (including statements, if any) immediately upon their availability.

In addition to the depositions would you kindly forward to us:

- (a) a copy of the indictment;
- (b) copies of all exhibits in your possession whether or not they were either tendered at the committal or will be alleged against our client;
- (c) copies of any confessional material alleged to have been made by our client;
- (d) copies of any record of interview conducted with our client (video, audio and written);
- (e) copies of statements from any persons, not mentioned or admitted at the committal, from whom you might seek to lead evidence at the trial;
- (f) a complete copy of the criminal history (if any) that will be alleged against our client; and
- (g) a complete copy of the criminal history (if any) of each of the witnesses.

If there are any exhibits that cannot be physically copied, would you kindly make the original available for examination by us.

Yours faithfully

J Rumpole

Jennifer Rumpole & Associates

[The next text page is 6-1]