NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON COMMITTALS

Report No.34 – September 2009

(Suffolk) "I here commit you in his highness' name,
And hand you over to my Lord Cardinal
To keep until your further time of trial".

(K.Hen VI) "My Lord of Gloster, 'tis my special hope
That you will clear yourself of all suspect".
(2 H VI Act 3 Sc.1)

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

The Hon Austin Asche AC QC	Mr Nikolai Christrup
Ms Jenny Blokland CM	Ms Alison Worsnop
Ms Carolyn Richards	Mr John Hughes
Mrs Barbara Bradshaw	Mr Glen Dooley

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE COMMITTALS SUB-COMMITTEE

The Hon Austin Asche AC QC	Ms Jenny Blokland CM
Mr Rex Wild QC	Mr Richard Coates
Mr Glen Dooley	Mr Nikolai Christrup
Mr Mark O'Reilly	Mrs Barbara Bradshaw
Superintendant Daniel Bacon	Mr Ian Read
Senior Sergeant Stuart Davis	

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1. TERMS OF REFERENCE

a) On 3 June 2009, the Attorney-General the Honourable Delia Lawrie MLA provided the following Terms of Reference to the Northern Territory Law Reform Committee (NTLRC):

"The terms of reference to the inquiry are as follows:

Consider the Department of Justice Discussion Paper on Committals and provide comments and recommendations in respect of issues raised in the Discussion Paper. The NTLRC should address the question, should the committal proceeding process be reformed? For example to:

- Abolish committal proceedings.
- Abolish the full hand-up committal proceeding, however retain committal proceedings with cross-examination.
- Abolish committal proceedings but introduce enhanced prosecutorial disclosure obligations.
- Abolish committal proceedings but introduce an election to cross-examine witnesses in a pre-trial hearing by agreement or ordered by the higher court.
- More closely align the committal test with the test applied by the prosecution in deciding whether to present an indictment.

The Northern Territory Law Reform Committee is asked to report back to the Attorney-General within three months of receipt of the Discussion Paper from the Department of Justice Northern Territory".

b) The Department of Justice Discussion Paper (the DP), was received by the NTLRC on 23 June 2009 (Appendix A).

c) The date for the delivery of the Report of the NTLRC to the Honourable Attorney-General is therefore 23 September 2009.

d) The procedure suggested is to commence with a consideration of the DP and provide comments on the issues raised, answer the particular questions posed in the Terms Of Reference and make recommendations based on the answers and such other material as the committee might feel is relevant to the broad question as to if and if so how, the committal process is the NT should be reformed.

2. SUBCOMMITTEE

The usual practice of the NTLRC when a reference is given is to appoint a small sub-committee to draft a preliminary report to be submitted to all members of the NTLRC and in the light of comments and submissions received from all members, draft a final report. In this case, however, it was felt that since the matter is of immediate and practical importance to all those involved in the process (e.g., Director of Public Prosecutions (DPP), Defense lawyers, Police and Magistrates) there should be a larger and more representative sub-committee.

The members of the sub-committee are:

- Honourable Austin Asche AC QC, Chair;
- Mr Glen Dooley, North Australian Aboriginal Justice Agency (NAAJA);
- Ms Jenny Blokland, Chief Magistrate;
- Mrs Barbara Bradshaw, Law Society Northern Territory;
- Mr Nikolai Christrup, NT Bar Association;
- Mr Richard Coates, Director, Office of the Director of Public Prosecutions;
- Mr Ian Read, Northern Territory Legal Aid Commission;
- Mr Rex Wild QC;
- Superintendent Danny Bacon, NT Police, Fire and Emergency Services.
- Senior Sergeant Stuart Davis, NT Police, Fire and Emergency Services; and
- Mr Mark O'Reilly, Central Australian Aboriginal Legal Aid Service (CAALAS)

The NTLRC members record their gratitude for the willing and able assistance given by the abovenamed.

3. THE DISCUSSION PAPER (THE DP)

The DP points to the development of committal proceedings in recent times in the terstates of Australia, compares the differences and similarities between them; sets out the present NT position; and inquires whether there should be any and if so what changes in the NT procedures.

For the purposes of this Report the DP is necessary preliminary reading and its contents are an integral part of this Report.

4. THE NORTHERN TERRITORY POSITION

The Northern Territory position is:

a) similar to all other terstates in that certain witnesses cannot be cross-examined in any committal proceedings. In the NT these witnesses are referred to in section 105AA of the *Justices Act*.

105AA Evidence of child witness in sexual offence matter

(1) If a preliminary examination involves a charge of a sexual offence or a serious violence offence (either as the only charge, or one of a number of charges, subject to examination), the evidence of a child must be given by written or recorded statement.

(2) a child who gives evidence by written or recorded statement need not attend the preliminary examination and cannot be cross-examined in relation to his or her evidence.

See also section105(B)(11)

b) Provision still exists in the NT *Justices Act* for what might be called the "old" procedures of a full oral committal where all witnesses for the prosecution may be called and be cross-examined (section 106).

In the paper produced by the Queensland Government and titled "the Queensland Governments Response to the Review of the Civil and Criminal Justice System in Queensland", the comment is made that, "Queensland and the NT are now the only Australian Jurisdictions that have retained an unrestricted right of an accused to cross-examine prosecution witnesses" (p 12). This statement is not correct insofar as both Queensland and the Northern Territory legislation do restrict cross-examination of certain classes of cases, particularly children and complainants in sexual allegations. Subject to that exception however, it is correct to say that Queensland and the Northern Territory are the only Australian jurisdictions that otherwise retain the unrestricted right of an accused to cross-examine prosecution witnesses.

The "Response" makes it clear that the Queensland Government intends to repeal this procedure in line with all other terstates, leaving only the NT in the wake (p13).

c) In practice, however, the "old" procedure is not used in the NT and the procedure is by hand up or "paper" committal with the defendant having the right to give notice requiring the attendance of witnesses listed by the prosecution (See DP pp 5, 6).

The problems associated with this procedure are set out in pp 7-10 of the DP. Note also the comments of the Review of the Civil and Justice System in Queensland (December 2008).

d) In all other terstates (except Queensland and the NT) the previously unrestricted right of the defendant (subject to the exceptions noted) to require witnesses for cross-examinations is now restricted.

1. In NSW, VIC, SA and the ACT, unless the prosecution consents, the defendant must now satisfy the court that there is some reason why a particular witness should be cross-examined on a preliminary hearing. The test which the court is directed to apply varies. NSW applies tests of "substantial" or "special" reasons. In VIC, the court must be satisfied that the cross-examination is "justified". In SA the reason must be "special". In the ACT the test is whether the interest of justice would not be satisfied if leave to cross examine were not granted. In all cases certain classes of witnesses are excluded from cross-examination. While there are varying degrees of particularity in these tests, the salient feature is that the onus is placed on the defendant to satisfy the court that certain witnesses should be cross-examined in a preliminary hearing.

2. In WA and Tasmania committals are virtually abolished. In WA, provided the magistrate is satisfied that the prosecution has complied with statutory requirements, the magistrate must commit the defendant to the appropriate court. In Tasmania the defendant is committed directly to the Supreme Court for trial or sentence but the court may order cross-examination before a magistrate or JP of particular witnesses if satisfied that there are "special circumstances" in sexual offence cases, or if is "necessary in the interest of justice" in other cases. (See DP pp 10-13). Note – see later para 6(f) (p 9).

e) The above procedures are now becoming designated as "case management" on the basis that the court has a firmer control of the proceedings than heretofore.

5. THE QUEENSLAND (MOYNIHAN) REVIEW

In July 2008, the Honourable Martin Moynihan AO QC, a retired judge of the Supreme Court, was appointed by the Queensland Government to "examine and report on the working of Queensland Courts in the civil and criminal jurisdictions with a view to making more effective use of public resources".

His Honour delivered to the Government his "Review of the civil and criminal justice system in Queensland" (the Moynihan Review) in December 2008. The Moynihan Review is an extensive and carefully researched document which, inter alia, contains a chapter headed "Reform of the Committal Proceedings Process" (Chapter 9). This chapter is of considerable relevance and importance to the NT.

a) it contains an up-to-date discussion of the position relating to committals in all terstates of Australia. It refers to development in England, Wales, New Zealand and Canada.
b) Subject to specific exceptions Queensland and the Northern Territory otherwise retain the unrestricted right of the accused to cross-examine prosecution witnesses.
c) The Moynihan Review proposes to change that position in Queensland and bring Queensland in line with the other terstates in the sense that the defense can only cross examine a witness with leave of the court based on "substantial" reasons (see Moynihan Report Recommendation 45 at p 13).
d) the Queensland Government has already indicated its general agreement with the recommendations in respect of committals and has expressed its intention to implement them by statutory amendment (see "the Queensland Government's Report July 2009 – pp 12 – 13). If this occurs it will leave the NT in some form of "splendid isolation", using that expression in its pejorative or ironic sense of "standing aloof in giant ignorance".
e) Moynihan traces the historical development of the committal proceedings from the days of the Grand Jury to the present and observes:

"Although there is a deep attachment to the current form by many in the legal profession, in my view the current form has been overtaken by social, technological and other developments ....."

The important question is not whether the committal should be abolished but how to meet the essential purposes of the committal in a more effective way, consistent with principles of fairness and access to justice. I consider these questions later, but in my view such an approach is not inconsistent with the judicial statements about the role of committals referred to earlier. It is not the particular form of process that is sacrosanct but the outcome that delivers justice". (p 166)

The Moynihan Review notes that "the committal process has been substantially reformed in all common law jurisdictions (p 178). Later Moynihan observes:

"I am however convinced that unfettered access to the courts without having to provide a reason can no longer be sustained. It is both inefficient and ineffective. It causes delay and is costly but gives a poor return. Inefficiencies impact on all users of the system, for example witnesses are too often called unnecessarily to give evidence or are cross-examined with no genuine purpose served." (p 182)

The Moynihan Review argues for a new committal process for Queensland.

"9.7 A new committal process for Queensland

I reiterate:
The principal purposes of the committal process are to ensure:

- *the accused knows the case against him or her; this is dealt with in Chapter 5: Disclosure; and*
- *a committal of the matter for trial in the Supreme or District Court is justified (in effect, an evidentiary threshold has been met before a person is required to stand trial).*

The committal process also serves a number of additional functions by providing an opportunity for the parties to:

- *test evidence;*
- *filter out weak cases;*
- *refute evidence;*
- *identify early pleas;*
- *refine changes; and*
- *clarify issues before trial.*

It also provides a mechanism for the independent review of the prosecution case by the committing magistrate....

I propose that the process be reversed so that administrative committal is the default position and a committal hearing with examination and cross-examination of witnesses is only conducted where justified. In the absence of agreement witnesses can only be called by the order of a magistrate or by the ODPP". (pp 183 – 4)

f) Note also the comments of the ACT Department of Justice and Community Safety Discussion Paper, May 2008. "The use of paper committals will reduce stress to victims of crimes, avoid unnecessary examination, and save further court time (as well as that of the witnesses and counsel) as, in the majority of cases, witnesses will not be required to attend court for cross-examination during the committal. However it is still recognised that in some very limited circumstances it may be appropriate for a witness to be called at the committal to be cross-examined about a limited area of evidence". (p11)

6. THE VIEWS OF THE NTLRC SUB-COMMITTEE

a) As previously stated the sub-committee comprises people of practical experience in the day-to-day workings of the committal process in the NT.

b) The observations of the Moynihan review are generally agreed by the number of the sub-committee as applying to NT situations, but it was emphasised by the defense and prosecution representation that the present system of paper committals in the NT works reasonably well in the hands of experienced practitioners and that there is presently in the NT a high degree of sensible co-operation on both sides.

c) The committee was of the view that well conducted committals promote efficiencies in the criminal process. The adequate disclosure by the prosecution at an early stage defines the issues and enables defendants to be properly advised and encourages early resolution often summarily or early indication of plea upon committal. The process of giving oral evidence and the preparation therefore requires the proofing and early assessment of a proceeding as to its prospects. This is particularly so in the NT where many witnesses are indigenous and language is a real issue. The committal process encourages early disposal rather than last minute resolution in a superior court. Early resolution is particularly important from the perspective of victims and witnesses.

d) Nevertheless, it was recognised that some "tightening up" of the rules was necessary particularly to avoid the situation where witnesses are unnecessarily assembled or requests for their presence being made without adequate reasons being given. Some forms of case management, by the court, (as in all other terstates save Queensland and the NT) are accepted as necessary.

e) It is, however, acknowledged and must be kept in mind, that certain witnesses are now exempt from committal procedures, or cross- examination before trial.

f) In considering what procedures to adopt there was no support for the WA or Tasmanian systems where, as the DP observes, "committals have been effectively abolished" (p10). These systems are, as yet, still experimental, appear to be experiencing some "growing pains" and may be more usefully examined later.

g) There was general support for the NSW or Victorian models, which gives courts control over the procedure by requiring reasons to be given for the court to consider whether to permit cross-examination on a preliminary hearing. Otherwise the committal procedure remains as a "hand-up" committal.

h) The DP summarises the NSW and Victorian procedures as follows:-

"In New South Wales, children cannot be called to give oral evidence if they are the alleged victim of a child sexual assault matter.[1] *Other witnesses can be cross-examined if the parties consent.*[2] *Otherwise the defence must apply to the court and provide "substantial reasons" why, in the interests of justice, the*

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[1] Section 91(8) of the *Criminal Procedure Act 1986* (NSW); providing witness is under 18 at the time of the committal proceeding and was under 16 at the time of the commencement of the sexual offence(s).

[2] Section 91(2) of the *Criminal Procedure Act 1986* (NSW). The court must grant leave in such circumstances.

witness is required to give oral evidence[3]*. If the defendant is charged with an offence involving violence, the court must be satisfied that there are "special reasons" why the alleged victim should be required to give oral evidence.*[4] *The test for "special reasons" is a higher one than that for "substantial reasons".*[5]

In Victoria, children and mentally impaired people cannot be cross-examined if they are the complainant in a sexual assault matter.[6] Other witnesses can only be cross-examined if the prosecution consents to the court granting leave[7] or where the defence has identified an issue to which the proposed questioning relates; provides a reason why the evidence of the witness is relevant to that issue and the court is satisfied that the cross-examination is justified.[8] There are a number of factors the court must take into account in determining whether the cross-examination is justified.[9] If the witness is a child there are a number of additional factors.[10] There are detailed case management procedures in the *Criminal Procedure Act.*[11]" (p 12)

i) This raises the questions for the NT:

(i) which court should control the proceedings?
(ii) what test or tests should the court apply where a request is made to cross-examine a witness on a preliminary hearing?
(iii) What amendments to the NT *Justices Act* should be made?

These questions should be answered after considering the questions specifically raised in the DP.

7. THE QUESTIONS IN THE DP

The Terms of Reference specifically asks the NTLRC to "consider the Department of Justice's Discussion Paper on committals and provide comments and recommendations in respect of the issues raised in the Discussion Paper".

In the light of this direction the sub-committee has examined the questions in the DP and provides the following answers and comments:

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[3] Section 91(3) of the *Criminal Procedure Act 1986* (NSW)
[4] Section 93(1) of the *Criminal Procedure Act 1986* (NSW)
[5] See for example, Murphy v Director of Public Prosecutions [2006] NSWSC 965 per Whealy J at [45] and Sim v Corbett [2006] NSWSC per Whealy J at [19]
[6] Section 123 of the *Criminal Procedure Act 2009* (Vic)
[7] Section 124(2) of the *Criminal Procedure Act 2009* (Vic). The court must grant leave in such cases.
[8] Section 124(3) of the *Criminal Procedure Act 2009* (Vic)
[9] Section 124(4) of the *Criminal Procedure Act 2009* (Vic)
[10] Section 124(5) of the *Criminal Procedure Act 2009* (Vic)
[11] Sections 118 – 127 of the *Criminal Procedure Act 2009* (Vic)

a) Should preliminary examinations be retained or effectively abolished, as in WA and Tasmania?

Answer – Preliminary examinations should be retained and should not be effectively abolished as in WA and Tasmania. The WA and Tasmanian model should not be followed at least for the present, in the NT for the reason already set out.

b) If they should be retained:

i. Should there be provision for a single preliminary examination to be held in matters involving both adults and youths?

Answer – Yes. This is an anomaly recognised as such by all members of the sub-committee.

Youth and Adult charged with the same offence

The DP (p 8) points out that "there is no provision in the *Justices Act* or the *Youth Justice Act* that allows a youth and an adult both charged with the same offence to be committed for trial in the one proceeding. This can mean two essentially identical proceedings being run with the resulting increases in cost, consumption of resources and stress for witnesses".

All members of the sub-committee agreed that this was an anomaly which should be corrected by amendment.

Section 137 of the *Youth Justice Act* provides, in effect, that if a youth defendant is before a court other than a Youth Justice Court, the court may either proceed as if it were the Youth Justice Court or stay the proceedings until that can be arranged.

Section138 of the *Youth Justice Act* provides for the opposite situation that where proceedings are before the Youth Justice Court but should have been instituted in the Court of Summary Jurisdiction (i.e. presumably where the "youth" is in fact an "adult"), the Youth Justice Court may either proceed as a Court of Summary Jurisdiction or stay the proceedings until that can be arranged.

These sections sufficiently provide for the situation where it appears that a "youth" is being treated as an "adult" or an "adult" being treated as a "youth" and allows for transfer to the proper jurisdiction.

The sections do not, however, provide for the situation mentioned in the DP where one or more of the defendants is a "youth" and one or more of the defendants is an "adult". The difference, as pointed out by the Chief Magistrate, is that 'the

Youth Justice Court has a much more significant jurisdiction than the Court of Summary jurisdiction'.

The appropriate amendment should therefore be along the lines that where a "youth" and an "adult" are charged with the same offence, the matter should proceed in the Youth Justice Court with that Court applying the appropriate procedure for the separate categories.

ii. Should paper or hand-up committals be mandatory?

Answer - Yes. As previously mentioned the earlier "full" committal procedure is rarely used in NT courts. If used, it would, nowadays be inefficient and a waste of resources. The Moynihan Review comments (at p 183) that "there is a consistent and steady trend towards reform of the committal process in all common law jurisdictions both in Australia and overseas. None of the submissions have pointed to any systemic injustice that has arisen in these jurisdictions".

iii. If hand-up committals are mandatory should witnesses be able to be called for cross-examination at a preliminary examination?

Answer - Only with leave of the court on a specific application by the defendant.

iv. If so, should leave of the court be required for the oral examination of witnesses?

Answer – See answer to (iii).

v. On what grounds should the court make its decision to grant leave?

Answer –

a) As previously mentioned, various jurisdictions have adverted to the question, once paper committals have become mandatory, as to what tests a Court should apply in deciding whether to give leave for witnesses to be cross-examined.

b) All such jurisdictions commence with the assumption that such leave should not be given automatically. This is the basic distinction between those jurisdictions and the NT and QLD where all that is necessary is a request by the defendant.

c) The jurisdictions where leave is required to cross-examine a witness commence with a threshold test whereby the prosecution is first required to disclose all relevant matters.

d) That being done in paper form, the defendant may then seek leave to cross-examine a witness.

e) Jurisdictions where leave is required to cross-examine a witness have stipulated certain tests for a court to apply before granting such leave (See DP pp11-13).

I. In all cases, save where particular witnesses are expressly excluded from cross-examination – with consent of the prosecutor.

II. Where no such consent is given, and the case does not fall into the category of those where cross-examination is not permitted, the defendant must seek leave of the court to cross examine specified witnesses.

f) The tests which a court should apply in granting leave to cross-examine have been stated in various forms:

I In NSW the court must be satisfied of "substantial" or "special" reasons, the latter being a higher test than the former.

II In SA – "special" reasons.

III ACT – That the interests of justice would not be satisfied if leave to cross-examine were not granted.

IV In VIC, and subject to the prosecution making full disclosure, that the cross-examination sought is "justified".

g) All these tests really boil down to the same thing, that cross-examination of a witness is not to be allowed automatically, but for some reason deemed appropriate by the court. Whether one uses the term, "special", "substantial", "in the interests of "justice" and so on, seems to depend on the choice of the particular draftsman of the legislation. Whatever term is chosen there does not seem to be any dissatisfaction with it in the particular jurisdiction to which it applies.

h) Taking the Victorian *Criminal Procedure Act 2009* as the most recent legislation on the subject, and assuming that the 'most potent grave and reverent signiors' of the District of Port Philip, have no doubt carefully considered earlier versions, it may be sufficient to follow their lead.

i) Victorian *Criminal Procedure Act 2009*

124 Leave required to cross-examine other witnesses

1) A witness (other than a witness referred to in section 123) cannot be cross-examined without leave being granted under this section.

2) If the informant consents to leave to cross-examine a witness being granted, the Magistrates' Court must grant leave unless the court considers that it is inappropriate to do so.

3) If the informant does not consent to leave to cross-examine a witness being granted, the Magistrates' Court must not grant leave unless the court is satisfied that—

(a) the accused has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue; and

(b) cross-examination of the witness on that issue is justified.

4) In determining whether cross-examination is justified, the Magistrates' Court must have regard to the need to ensure that—

(a) the prosecution case is adequately disclosed; and

(b) the issues are adequately defined; and

(c) the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged; and

(d) a fair trial will take place if the matter proceeds to trial, including that the accused is able adequately to prepare and present a defence; and

(e) matters relevant to a potential plea of guilty are clarified; and

(f) matters relevant to a potential discontinuance of prosecution under section 177 are clarified; and

(g) trivial, vexatious or oppressive cross-examination is not permitted; and

(h) the interests of justice are otherwise served.

(i) For clarification of section 124(1) of the Victorian *Criminal Procedure Act,* it should be noted that the reference to section 123 is a reference to those witnesses protected from cross-examination which, for NT purposes, is contained in the NT *Justices Act* section 105AA, and the test set out in section 124(4)(c) of the Victorian *Criminal Procedure Act* is similar though not in precisely the same terms, to the tests set out in section 109(1) and section 112 of the NT *Justices Act.* These would require appropriate alterations to equate with the NT legislation. Section 124(5) of the Victorian *Criminal Procedure Act* relates to further tests to be applied if a witnesses is under 18 years of age, but, with respect, it is considered that

these are matters which a Magistrate would necessarily take into consideration and which do not therefore require to be specifically defined.

k) The relevant provisions of the NSW *Criminal Procedure Act 1986* are directed to the same end as the Victorian legislation, namely that in committal proceedings, the defendant (absent consent) must seek leave of the court to cross-examine any particular witness. While, in the NSW legislation, such leave can be granted only for "substantial" (section 91(3)), or "special" (section 93(1)) reasons, and in Victoria, the test is "interests of justice" there would appear to be little difference in practice in applying them. Some suggestion was made that the NSW legislation be adopted rather than the Victorian.

Certainly, for the present purpose, it may be of little consequence whether one travels on the North side of the Murray or the South, since both lead in the same direction.

On the whole however, the Victorian version should be chosen as the model, as the most recent, and least differentiated in its terms.

vi. Should oral examination be limited to the grounds on which the leave to question was granted or, once leave is granted, should the oral examination be unlimited?

Answer – This is a matter for the discretion of the court governed by questions of relevance.

vii. If leave is required for the oral examination of witnesses should all witnesses be subject to the same considerations or should there be extra considerations for some witnesses (as in NSW) and if so what extra considerations?

Answer – there seems no reason to differentiate between witnesses. The overriding test is relevance.

viii. **To what categories of witnesses should such extra considerations apply?**

Answer – See answer to (vii)

ix. **Should there be categories of witnesses who cannot be required to give oral evidence, as is currently the case for children who are witnesses in matters involving a sexual offence or serious violence offence and complainants in matters involving a sexual offence? Should these categories be expanded?**

Answer – The category should remain as set out in the present NT legislation. There seems no present reason for expanding the categories of witnesses who cannot be required to give oral evidence.

x. **Is there a need for increased case management prior to the date of the preliminary examination?**

Answer - Yes. The Chief Magistrate has suggested certain lines of case management. The committee approves of this in principle.

The case management Rules should govern all appropriate procedures for case management of committals. Some doubt was expressed as to whether the Rule-Making Powers given the Court of Summary Jurisdiction under the *Justices Act* might not be sufficient (c.f. section 47(1) of the *Justices Act*). Consequently any necessary amendments to the *Justices Act* should be made to give the Magistrates full power to make all appropriate rules and directions as to committal proceedings.

xi. **Should a timetable be imposed (in the *Justices Act* or in rules), setting time periods for prosecution disclosure; notice of which witnesses are required; the grounds for requiring them? What period of time should be allowed between these stages and then what period of time before the matter is mentioned in court?**

Answer – Yes. The sub-committee suggested certain time limits while appreciating that there will always be exceptional cases where the timetable will need to be altered because insistence on strict adherence might cause injustice to defendants. However the difficulties of enforcing timetables by fining indigent defendants are obvious and unless their behavior amounts to a contempt of court it is plain that imprisonment is not an option.

xii. Is there need for a formal mention or case direction date before the matter is listed for preliminary hearing? (For example, in Victoria detailed procedures are set out in the *Criminal Procedure Act 2009* (Vic) for case direction, committal mention and case conferences).

Answer – Yes. As with the Victorian model.

The reference in the DP is to sections 125 -127 of the Victorian Act which provides for a "committal mention" and a "committal case conference" to be held, where practicable at the same time. The relevant sections of the Victorian Criminal Procedure Act 2009 are:

Part 4.6—Committal Mention and Case Conference

125 Committal mention hearing

(1) At a committal mention hearing, the Magistrates' Court may—

a) immediately determine the committal proceeding in accordance with section 141 or 142;

b) offer a summary hearing or determine an application for a summary hearing in accordance with section 30;

c) hear and determine an application for leave to cross-examine a witness;

d) fix a date for a committal hearing;

e) hear and determine any objection to disclosure of material;

f) fix another date for a committal mention hearing;

g) make any other order or give any direction that the court considers appropriate.

(2) In considering whether to fix another date for a committal mention hearing to enable the accused to obtain legal representation, the Magistrates' Court must have regard to whether the accused has made reasonable attempts to obtain legal representation.

126 Time for holding committal mention hearing

(1) A committal mention hearing must be held—

a) in the case of a sexual offence, within 3 months after the commencement of the criminal proceeding for the offence; or

b) in the case of any other offence, within 6 months after the commencement of the criminal proceeding for the offence—

or any other period fixed by the Magistrates' Court under subsection (2).

Note

Section 6(1) sets out how a criminal proceeding is commenced.

(2) The Magistrates' Court may fix a longer period for the holding of a committal mention hearing if the court is satisfied that it is in the interests of justice that another period should be fixed having regard to—

a) the seriousness of the offence; and

b) the reason a longer period is required.

(3) Subsection (1) does not apply—

a) if the accused has failed to attend in accordance with the conditions of his or her bail; or

b) if a warrant to arrest the accused has been issued and at the end of the period referred to in subsection (1)(a) or (b) (as the case requires) the accused has not been arrested; or

c) if the accused requests that a committal mention hearing be held after the period referred to in subsection (1)(a) or (b) (as the case requires) and the Magistrates' Court is satisfied that in the interests of justice the request should be granted.

(4) If a committal mention hearing has not been held before the expiry of the period referred to in subsection (1)(a) or (b) (as the case requires), or any longer period fixed under subsection (2), the Magistrates' Court, on the application of the accused, may order the accused to be discharged.

127 Committal case conference

(1) The Magistrates' Court may direct the parties to a committal proceeding to appear at a committal case conference to be conducted by a magistrate.

(2) Wherever practicable, a committal case conference should be conducted on the date of the committal mention hearing.

(3) Evidence of—

a) anything said or done in the course of a committal case conference; or

b) any document prepared solely for the purposes of a committal case conference—

is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given before any court or person acting judicially, unless all parties to the committal case conference agree to the giving of the evidence.

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xiii. Should there be any sanctions for failure to comply with requirements within timeframes?

Answer – Yes, but the difficulties of dealing with unrepresented defendants have already been referred to. Improper behavior of legal representatives can be referred to the appropriate legal body. Cases of

deliberate maneuvers for delay, or flagrant misbehavior may constitute contempt of court (see NT *Justices Act* sections 46 - 108AA). Otherwise recalcitrant cases may be set down despite defendant's objection, with the result that he would lose the right to cross-examine witnesses. In some cases revocation of bail might be an appropriate sanction. In case of prosecution mismanagement the ultimate sanction can be to discharge the defendant. This would be sufficiently salutary without being over-dramatic because it does not deprive the prosecution from proceeding again.

xiv. Should magistrates retain the power to discharge? Should the power only be retained if oral evidence is heard or upon defence application for discharge but not if there is a full hand-up committal?

Answer – Yes. The magistrate should have full discretion in the procedure.

xv. If magistrates do retain a power to discharge, should the test/standard remain as it currently is (whether a reasonable jury could convict on the prosecution evidence before the magistrate) or should it be aligned with the test applied by the DPP in deciding whether to prosecute (reasonable prospects of conviction and in the public interest)? How could such alignment be achieved?

Answer – Yes. The test should remain as it presently is. Some suggestion is made that the power be broader to allow the magistrate to discharge obviously weak cases which nevertheless pass the present test of whether a reasonable jury could convict (the DP). (More precisely whether the evidence is "sufficient to put the defendant upon his trial") (sections 109 – 112). It would be difficult to frame such a test. In some cases a Magistrate might wish to comment, but normally a Magistrate would be reluctant to usurp the powers of the jury. The discretion of the DPP, however, gives the defendant a somewhat broader protection in some cases but this should remain special to the DPP who necessarily has a different perspective of public interest. .

c) If preliminary hearings should be effectively abolished:

i What disclosure provisions would be required to achieve full disclosure of the prosecution case (section 105A of the Justices Act only requires disclosure of material the prosecution proposes to tender at the preliminary examination; compare section 42 of the Criminal Procedure Act (WA) which requires disclosure, inter alia, of all statements and recordings that are relevant to the charge)?

Answer – The procedures set out in Part V Division 1 of the NT *Justices Act* appear to be working adequately. In appropriate cases a Magistrate can give directions. The procedure may be further clarified by Rules of Court made by the Magistrate.

ii. **How would weak cases be filtered out? Can this most effectively and fairly be achieved by full prosecution disclosure and scrutiny of the sufficiency of evidence and public interest issues by the DPP?**

Answer – The combination of the DPP's discretion and the ruling of the court on committal hearings appears to be working satisfactorily in the NT.

iii. **Should the Supreme Court take over case management as in Tasmania?**

Answer – No. The Supreme Court should not be fettered with the task of, in effect, conducting a preliminary enquiry. In appropriate cases the Supreme Court may still constitute a voir dire but it would be hoped that the committal proceedings before a Magistrate would have "filtered out" many preliminary objections.

8. SUB-COMMITTEE RECOMMENDATIONS

Arising from these answers, and from general discussion, and subject to the approval of the other members of the NTLRC, the sub-committee makes the following recommendations.

RECOMMENDATIONS

1. Paper Committal Hearings should be mandatory.

2. For the purposes of Recommendation 1, the NT *Justices Act,* (in particular section 106) should be appropriately amended.

3. Preliminary examinations should be retained.

4. The Court conducting the preliminary examination should be the Court of Summary Jurisdiction.

5. The Court of Summary Jurisdiction should also be the Court conducting case management procedures for committals.

6. Case Management Procedures should be conducted in accordance with the Rules and Directions drawn up by the Court of Summary Jurisdiction under its rule-making powers. In drawing up the said rules the court should consider but is not bound by sections 125 - 127 of the Victorian *Criminal Procedure Act 2009*.

7. Insofar as practicable, case management procedures and committal case conference procedures should be heard at the same time.

8. In committal procedures, the test for the court to determine whether to discharge or commit, either at the conclusion of the prosecutions case or at the conclusion of the defendant's case, should be and remain the same as now provided in the NT *Justices Act,* namely, whether the evidence is sufficient to put the defendant upon his trial (sections 109 and 112).

9. Section 105 AA of the NT *Justices Act*, protecting a child from cross-examination in a sexual or serious violence offence should be retained.

10. Subject to section 105AA, a witness need only attend for cross-examination in committal proceedings:

a) If the informant consents, or

b) The defendant applies to cross-examine a particular witness and the Court is satisfied within the tests set out in section 124 of the Victorian *Criminal Procedure Act 2009* that the cross-examination is justified and in the interests of justice. Otherwise the Court should refuse leave.

11. That, consequently, all the provisions of section 124 of the Victorian *Criminal Procedure Act 2009* should be included in the NT *Justices Act* , with the exception that where the words "other than a witness referred to in section 123" of the Victorian *Criminal Procedure Act* appear, they should be substituted

in the NT *Justices Act,* by the words, "other than a witness referred to in section 105 AA".

12. That the tests set out in section 124 of the Victorian *Criminal Procedure Act* should apply to all applications to cross-examine (that is, there should not be separate categories of witnesses as in NSW).

13. The NT *Justices Act* and the NT *Youth Justices Act* should be amended to provide the where a "youth" and an "adult" are charged together with the same offence, the proceedings should be held together in the Youth Justice Court, with the Magistrate applying the appropriate tests in relation to each category as are provided in the NT *Justice Act* and the NT *Youth Justices Act.*

14. That, if deemed necessary, the NT *Justices Act* should be amended to give the Court of Summary Jurisdiction full power to make all Practice Directions which the Magistrates deem necessary for proper case management of committal proceedings.

APPENDIX A

DEPARTMENT OF JUSTICE

COMMITTALS IN THE NORTHERN TERRITORY: OPTIONS FOR REFORM

DISCUSSION PAPER

Submissions should be in writing directed to:

xxxxxxx

Telephone enquiries should be directed to xxxxxxx

Closing date for submissions: xxxxxxx

Note: Any views or legal opinions expressed in this issues paper do not necessarily represent the policies of the NT Government or the Minister for Justice and Attorney-General.

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Introduction

In a committal hearing a magistrate determines whether a person, charged with an indictable offence, should be sent to stand trial. In the Northern Territory the statutory term for this proceeding is a "preliminary examination".[1]

Historically, the primary function of a preliminary examination is to "screen charges" to ensure that a defendant does not stand trial unless there is a sufficient case against him or her.

Over the past two decades there have been a number of reviews of the committal process in Australia and most Australian jurisdictions have implemented significant changes. The Northern Territory has implemented some changes, in particular prohibiting the cross-examination of certain categories of witnesses.

This discussion paper does not seek to duplicate the research that has already been done or extensively reiterate arguments made in earlier reviews. Rather, its purpose is to consider what functions the committal process fulfils in the Northern Territory and to explore what, if any, further reforms are merited. The paper:

- Provides a brief overview of the functions and objectives of the committal process;
- Outlines the current system in the Northern Territory;
- Discusses perceived problems with the current system;
- Outlines the processes in other Australian jurisdictions; and
- Presents questions about reform in the Northern Territory.

Functions and objectives of the committal process

A screening device

The primary function of the committal process is as a mechanism to assess whether the evidence is sufficient to justify committal. In other words it is a screening device to filter out weak cases. This benefits both the accused person by providing an

[1] *Justices Act* (NT) Part V Div 1

opportunity for early discharge and the community by saving the costs of trials where there is no real prospect of conviction.

Testing the evidence

The committal process offers both the defence and the prosecution an opportunity to test the evidence. The defence can: try out lines of cross–examination; tie the witness to particular testimony that if departed from at trial can provide the ground for making adverse comment; and observe and assess witnesses.

The prosecution can: identify parts of the case that are deficient and then have the opportunity to supplement the proof by calling further evidence at trial; and assess and observe witnesses.

Discovery/disclosure of the prosecution case

Fairness demands that accused persons know the case against them. The committal process facilitates the disclosure of the prosecution case. There are statutory regimes in all Australian jurisdictions regarding disclosure of the prosecution case. In the Northern Territory this is section 105A of the *Justices Act*. Prosecutorial guidelines also impose disclosure obligations on the Crown.[2]

Case management

This function is really collateral to the ones mentioned above. Through disclosure and the testing of evidence, the committal process can:

- Refine and clarify issues, thus saving resources at trial;
- Lead to early pleas of guilty (where prosecution case is revealed to be strong);
- Lead to withdrawal of charges (where prosecution case is revealed as weak);
- Provide an opportunity for plea negotiation (strengths and weaknesses of both sides being revealed)

It also imposes deadlines on the parties to address issues before trial.

[2] Guidelines of the Office of the Director of Public Prosecutions Northern Territory, Guideline 8

The committal process in the Northern Territory

The committal procedure for indictable offences is governed by Part V of the *Justices Act*. Three types of committal proceedings are permitted:

1. A full hand up or "paper" committal[3]. This occurs when the prosecution gives notice (known as a section 105A notice) to the defendant of its intention to rely on written and recorded statements rather than calling witnesses to give evidence orally. Section 105A(2) lists the material that needs to be filed along with the notice (the section 105A Brief), namely a copy of the information; a list of the witnesses who have made written or recorded statements that the prosecution proposes to tender; copies of the written statements; transcripts of the recorded statements (and an invitation to view/listen to the actual recording); a list of all documents and things that the prosecution proposes to tender; a copy of the documents; and photographs of the things, if they cannot be adequately described in the list. The *Justices Act* does not mandate the service of a section 105A brief (in other words paper committals are not mandatory in the Northern Territory) although in practice it is invariably served, whether or not a matter is intended to proceed by way of hand-up or oral committal.

   If the committal proceeds by way of hand up the prosecution tenders the section 105A Brief. Some detail of the contents of some or all of the statements might be given to the magistrate, but not necessarily.

   The magistrate then considers whether the evidence is sufficient to commit the defendant to trial either on the charge on the information or on any other indictable offence[4]. If it is not sufficient then the defendant is discharged.

2. A fully oral committal[5]. This occurs when all witnesses give evidence (examination in chief, cross examination and re-examination) and a section 105A notice has not been served. As noted above, in practice a section 105A notice is invariably served.

[3] Section 105B of the *Justices Act*
[4] Section 109
[5] Section 106 of the *Justices Act*

3. A partly oral, partly hand up committal. This occurs when some statements are tendered under section 105B and some witnesses are called to give oral evidence. In practice, this is the form that an oral committal takes in the Northern Territory.

   The defendant, having received the section 105A Brief can give notice, not less than five days before the day set for the preliminary examination, requiring the attendance of the witnesses (or any of them) listed in the section 105A notice[6].

   If a defendant fails to give notice within the prescribed time, the defendant can still object to the tendering of a written or recorded statement at the preliminary examination. The magistrate may uphold the objection and require the witness to attend to give evidence in person[7]. The magistrate is also entitled, of their own motion, to require the witness to give evidence in the preliminary examination, regardless of the prosecution's application to admit the evidence in a written or recorded form[8].

   There are some restrictions placed on which witnesses can be required to give oral evidence. Children cannot be called if the preliminary examination involves a charge of a sexual offence or serious violence offence[9], nor can sexual assault complainants be called[10].

   There are, however, no restrictions on defence requiring any other witness to give oral evidence. There are no restrictions on the subject matter that can be explored in cross-examination.

Preliminary examinations for adults are conducted in the Court of Summary Jurisdiction and those for youths are conducted in the Youth Justice Court. There is no provision that allows a youth and an adult both charged with the same offence to be committed for trial in the one proceeding. For example, if a youth and an adult were both charged with the manslaughter of a person, a preliminary examination for the youth would be conducted in the Youth Justice Court and another preliminary examination for the adult in the Court of Summary Jurisdiction.

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[6] Section 105B(3) of the *Justices Act*
[7] Section 105B(6) of the *Justices Act*
[8] Section 105B(7) of the *Justices Act*
[9] Sections 105AA and 105B(11) of the *Justices Act*
[10] Section 105B(11) of the *Justices Act*

Perceived problems

Problems and shortcomings of the committal process have been well documented[11].

In the context of the Northern Territory process, the following concerns have arisen:

1. Defence failure to comply or adequate comply with section 105B(3)

   Despite the statutory requirement that defence give not less than 5 days notice if a witness is required to attend a preliminary examination to give oral evidence, in many cases the defence does not inform the prosecution of the names of witnesses required within the timeframe or advises that "all witnesses" are required, including for example police officers who have handled exhibits, been crime scene guards or have had other such peripheral involvement with the matter.

   Given the uncertainty of which witnesses will be required along with the logistics of locating witnesses and then arranging transport and accommodation, prosecutors need to summon all witnesses to the preliminary examination. They cannot wait until just 5 days before the preliminary examination to commence making these arrangements.

   A great deal of police time is spent in locating witnesses, serving summonses and arranging travel for people who are often not required at the court.

   It is also often difficult for Police themselves to attend committal proceedings, in particular where they have moved interstate or been transferred to another area in the Northern Territory. Again, travel for these officers to attend court is costly and often unwarranted (in the sense that they are often not required) and absence from their jobs potentially is detrimental to the communities in which they work.

   Witnesses who attend Court on the day set down for the preliminary examination, often at great inconvenience and expense (in particular where the

[11] For example: Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report, September 1999, (http://www.lrc.justice.wa.gov.au/092g.html); Brereton, David & Willis, John, 'Evaluating the Committal' in *The Future of Committals* (Conference Proceedings, Australian Institute of Criminology, 1 – 2 May 1990)

alleged offence took place in remote areas of the NT), are sometimes told on the day, or several days into the proceeding, that they are not required to give evidence. In a number of recent cases witnesses have not only been excused, but the matters have proceeded by way of a hand-up without any advance notice to the prosecution.

2. The inability to deal in one proceeding with a youth and an adult charged with the same offence

There is no provision in the *Justices Act* or in the *Youth Justice Act* that allows a youth and an adult both charged with the same offence to be committed for trial in the one proceeding. This can mean two essentially identical proceedings being run with the resulting increases in cost, consumption of resources and stress for witnesses.

3. Weeding out weak cases

During the period 1 July 2007 – 30 June 2008 there were 267 preliminary examinations in the Northern Territory (246 in the CSJ and 21 in the YJC). Only two defendants were not committed.[12] Yet 9 No True Bills and 39 Nolles Prosequi were filed. So, it could be argued that the "weeding out" has substantially been carried out by the Director of Public Prosecutions (DPP) himself, whether at his own instigation or following representations made by defence (although what emerges during the course of a preliminary examination may influence the DPP's decision whether or not to indict).

The majority of the preliminary examinations during this period were listed for oral committal.[13] The available statistics do not reveal how many of the oral committals proceeded as oral committals on the day of hearing, as it is not uncommon for matters to proceed by way of hand-up on the day of the preliminary examination. Nor do the statistics reveal which witnesses were called and whether these witnesses were relevant to the magistrate's function of determining the sufficiency of the evidence.

The preliminary examination has, arguably, little function in sexual assault matters or in other matters where a child is the complainant as children and

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[12] Both in the CSJ, one following an oral committal and the other following a hand-up committal.

complainants in sexual offences are prohibited from giving oral evidence at the preliminary examination stage. The defendants in such matters will invariably be committed if an offence is disclosed in the complainant's written or recorded statement.

The committal process can be by-passed as the DPP has the power to file an ex officio indictment.[14] In the period 1 July 2007 – 30 June 2008, 65 ex officio indictments were filed.[15] In other words, nearly 20% of defendants who were dealt with in the Supreme Court got there without going through the committal process. Reasons for filing an ex officio indictment could be that the DPP decides to proceed on different charges to those on which the defendant has been committed or that the prosecution and defence have agreed to use the ex officio indictment to "fast track" a matter to the Supreme Court.

4. Undue burden on witnesses

Giving evidence on more than one occasion increases the trauma for victims, particularly if they are the alleged victim. The absence of restrictions on the subject matter of cross-examination and the absence of the moderating influence of a jury are factors that can increase the stress for witnesses at the preliminary examination stage.[16] The experience of giving evidence at a preliminary examination may deter witnesses from giving evidence at trial. For indigenous witnesses, kinship loyalties may make giving evidence once hard enough – giving evidence more than once just adds to the difficulty.

Giving evidence multiple times can also affect the quality and reliability of the evidence. This is particularly so for indigenous witnesses who may not speak English with any degree of proficiency. For example, an interpreter might not be available when the witness gives evidence at the preliminary hearing but is available at trial. This could have an effect on the evidence given by the witness. The witness can be cross-examined at trial about that evidence, to the extent it is inconsistent with evidence given at trial. This cross-examination can be confusing to the witness and add to his or her stress, even if the inconsistencies are in fact non-material and can be explained.

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[13] CSJ: 170 oral and 76 hand-up. YJC: 17 oral and 4 hand-up.
[14] Section 300 of the Criminal Code
[15] This was down from 100 in the previous 12 month period.
[16] This has been noted, for example by the. Law Reform Commission of Western Australia report, supra n13.

5. The committal process probably adds to cost and delay

This is difficult to quantify but the following is noted:

- Listing sexual offences matters for an oral committal will generally cause delay as the evidence in the complainant's written or recorded statement will almost inevitably be "sufficient" for a magistrate to commit;
- As it is not always clear at the time of listing an oral committal what witnesses will be required and how long their oral evidence will take, the required time for a preliminary examination is sometimes underestimated. This means that further dates will be required, maybe several months later, to complete the proceeding;
- As noted at (1) not knowing which, if any, witnesses will actually be required can have the effects of incurring unnecessary expense for travel etc and a strain on resources with professional witnesses not being able to attend to other duties.
- As noted at (2) if youths and adults are charged with the same offence, the committal process might be almost completely replicated in two separate courts.

Committal proceedings in other Australian jurisdictions

There has been extensive reform of committal proceedings throughout Australian jurisdictions over recent years. Commencing in the 1970s and 1980s legislation in all jurisdictions was amended to allow for paper committals. In the Northern Territory this was done in 1974.[17]

More recently the reforms have followed three models:

1. Effective abolition of committal proceedings

   In Western Australia and Tasmania committals have been effectively abolished.

[17] *Justices Ordinance (No 2) 1974*

In 2002 Western Australia introduced an administrative committal process in response to Law Reform Commission of WA recommendations [18] which suggested the abolition of the committal hearing process, to be replaced by provisions requiring full prosecution disclosure in advance of trials on indictment. The procedure was further refined with the introduction of the *Criminal Procedure Act* (WA) in 2004.

The prosecution is required to provide a committal brief to the defendant 14 days before the committal hearing. At the hearing, if the magistrate is satisfied that the prosecution has complied with its statutory disclosure obligations, the defendant is required to plead and the magistrate to commit the defendant to a superior court for sentence or trial. The magistrate has no decision making role in relation to the sufficiency of the evidence.

In Tasmania, a new regime commenced on 1 February 2008. There are no paper committals or testing of the sufficiency of the evidence. A defendant is committed directly to the Supreme Court for trial or sentence. The Supreme Court can then hear an application for a pre-trial hearing to cross-examine witnesses before a magistrate (for homicide and sexual offence cases) or a justice of the peace (for other matters). Such applications will only be granted if there are "exceptional circumstances" in the case of witnesses in sexual offence cases and if it is "necessary in the interests of justice" in other cases.[19]

2. Mandatory hand up committals with statutory disclosure and the right to cross-examine witnesses in prescribed circumstances

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[18] Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report. The recommendation for this reform was based on a view that the preliminary hearing serves no practical purpose in the progression of a criminal matter through the Courts. In WA it was found that of approximately 85,000 police charges laid per annum, only 2,500 matters were committed to the higher Courts for trial on indictment. Of these committed matters, only 10% utilised a preliminary hearing process.

The LRCWA argued that the fact of the low hearing rates, combined with the fact that the DPP has power to indict independent of the committal process (through ex-officio indictment), and with arguably a more rigorous decision-making process, made the preliminary hearing process redundant.

[19] Section 331B(3) of the Criminal Code (Tas)

South Australia, New South Wales, Victoria and the Australian Capital Territory have each adopted a system of mandatory paper committals accompanied by a statutory right to cross-examine witnesses in certain circumstances.

In South Australia the court may grant leave to call a witness for oral examination if satisfied there are "special" reasons for doing so[20] Defence must give notice to the court and the prosecution no later than 7 working days prior to the court date of which witnesses they wish to cross-examine and a brief outline of the reasons the witness is required.[21] It is extremely rare for oral evidence to be heard.

In New South Wales, children cannot be called to give oral evidence if they are the alleged victim of a child sexual assault matter.[22] Other witnesses can be cross-examined if the parties consent.[23] Otherwise the defence must apply to the court and provide "substantial reasons" why, in the interests of justice, the witness is required to give oral evidence[24]. If the defendant is charged with an offence involving violence, the court must be satisfied that there are "special reasons" why the alleged victim should be required to give oral evidence.[25] The test for "special reasons" is a higher one than that for "substantial reasons".[26]

In Victoria, children and mentally impaired people cannot be cross-examined if they are the complainant in a sexual assault matter.[27] Other witnesses can only be cross-examined if the prosecution consents to the court granting leave[28] or where the defence has identified an issue to which the proposed questioning relates; provides a reason why the evidence of the witness is relevant to that issue and the court is satisfied that the cross-examination is justified.[29] There are a number of factors the court must take into account in

[20] Section 106(1) of the *Summary Procedure Act* (SA)
[21] See Magistrates Court Rules, rule 20.02
[22] Section 91(8) of the *Criminal Procedure Act 1986* (NSW); providing witness is under 18 at the time of the committal proceeding and was under 16 at the time of the commencement of the sexual offence(s).
[23] Section 91(2) of the *Criminal Procedure Act 1986* (NSW). The court must grant leave in such circumstances.
[24] Section 91(3) of the *Criminal Procedure Act 1986* (NSW)
[25] Section 93(1) of the *Criminal Procedure Act 1986* (NSW)
[26] See for example, Murphy v Director of Public Prosecutions [2006] NSWSC 965 per Whealy J at [45] and Sim v Corbett [2006] NSWSC per Whealy J at [19]
[27] Section 123 of the *Criminal Procedure Act 2009* (Vic)
[28] Section 124(2) of the *Criminal Procedure Act 2009* (Vic). The court must grant leave in such cases.
[29] Section 124(3) of the *Criminal Procedure Act 2009* (Vic)

determining whether the cross-examination is justified.[30] If the witness is a child there are a number of additional factors.[31] There are detailed case management procedures in the *Criminal Procedure Act.*[32]

In the Australian Capital Territory mandatory paper committals were introduced in 2008, following a review of the committal process.[33] Prior to then, the provisions were almost identical to those in the Northern Territory.

In the ACT, if the committal hearing relates to a sexual offence, the complainant cannot give oral evidence.[34] In other cases, a witness must not be cross-examined unless the court is satisfied that the party seeking to cross-examine has identified an issue to which the proposed questioning relates; provided a reason why the evidence of the witness is relevant to the issue; explained why the evidence disclosed by the prosecution does not address the issue and identify the purpose and general nature of the proposed questioning; and the interests of justice would not be satisfied if leave to cross-examine was not granted.[35]

3. Exemption of categories of witnesses from having to give oral evidence

The reforms in the Northern Territory and Queensland have been to exempt certain categories of witnesses from having to give oral evidence, but not otherwise limit the calling of witnesses or restrict the subject matter of cross-examination. As noted above, in NSW, Victoria and the ACT in addition to the general tests required to be satisfied before a court will grant leave for a witness to be called to give oral evidence, there are also exempt categories of witnesses.

In the Northern Territory children cannot be called if the preliminary examination involves a charge of a sexual offence or serious violence offence[36], nor can sexual assault complainants be called.[37]

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[30] Section 124(4) of the *Criminal Procedure Act 2009* (Vic)
[31] Section 124(5) of the *Criminal Procedure Act 2009* (Vic)
[32] Sections 118 – 127 of the *Criminal Procedure Act 2009* (Vic)
[33] See Discussion Paper: Reforms to Court Jurisdiction, Committal Processes and the Election for Judge Alone Trials, ACT Department of Justice and Community Safety, May 2008
[34] Sections 90AA(8) and 90AB(1) of the *Magistrates Court Act* (ACT)
[35] Section 90AB(2) of the *Magistrates Court Act* (ACT)
[36] Sections 105AA and 105B(11) of the *Justices Act*
[37] Section 105B(11) of the *Justices Act*

In Queensland, child witnesses are exempted from giving evidence-in-chief. They can only be cross-examined if unless the court is satisfied that the party seeking to cross-examine has identified an issue to which the proposed questioning relates; provided a reason why the evidence of the witness is relevant to the issue; explained why the evidence disclosed by the prosecution does not address the issue and identify the purpose and general nature of the proposed questioning; and the interests of justice would not be satisfied if leave to cross-examine was not granted.[38] There are no special rules for complainants in sexual offences.

In August 2008 the Queensland Department of Justice and Attorney-General released a Discussion Paper entitled *Reform of the Committals Proceedings Process.* The final report is expected soon.[39]

Questions about reform

In preparing submissions, the following questions are designed to provide guidance on the issues relating to reform of the committal process. However, they are not intended to limit the scope of submissions.

a) Should preliminary examinations be retained or effectively abolished, as in WA and Tasmania?

b) If they should be retained:

   i. Should there be provision for a single preliminary examination to be held in matters involving both adults and youths?

   ii. Should paper, or hand-up committals, be mandatory?

   iii. If hand-up committals are mandatory should witnesses be able to be called for cross-examination at a preliminary examination?

   iv. If so, should leave of the court be required for the oral examination of witnesses?

   v. On what grounds should the court make its decision to grant leave?

[38] Section 21AG of the *Evidence Act 1977* (Qld). This is the same test as that for the cross-examination of any witness in the ACT.

vi. Should oral examination be limited to the grounds on which the leave to question was granted or, once leave is granted, should the oral examination be unlimited?

vii. If leave is required for the oral examination of witnesses should all witnesses be subject to the same considerations or should there be extra considerations for some witnesses (as in NSW) and if so what extra considerations?

viii. To what categories of witnesses should such extra considerations apply?

ix. Should there be categories of witnesses who cannot be required to give oral evidence, as is currently the case for children who are witnesses in matters involving a sexual offence or serious violence offence and complainants in matters involving a sexual offence? Should these categories be expanded?

x. Is there a need for increased case management prior to the date of the preliminary examination?

xi. Should a timetable be imposed (in the *Justices Act* or in rules), setting time periods for prosecution disclosure; notice of which witnesses are required; the grounds for requiring them? What period of time should be allowed between these stages and then what period of time before the matter is mentioned in court?

xii. Is there need for a formal mention or case direction date before the matter is listed for preliminary hearing? (For example, in Victoria detailed procedures are set out in the *Criminal Procedure Act 2009* (Vic)[40] for case direction, committal mention and case conferences.)

xiii. Should there be any sanctions for failure to comply with requirements within timeframes?

[39] As advised by the Queensland Department of Justice and Attorney-General, 10 June 2009.
[40] See n34

xiv. Should magistrates retain the power to discharge? Should the power only be retained if oral evidence is heard or upon defence application for discharge but not if there is a full hand-up committal?

xv. If magistrates do retain a power to discharge, should the test/standard remain as it currently is (whether a reasonable jury could convict on the prosecution evidence before the magistrate) or should it be aligned with the test applied by the DPP in deciding whether to prosecute (reasonable prospects of conviction and in the public interest)? How could such alignment be achieved?

c) If preliminary hearings should be effectively abolished:

i. What disclosure provisions would be required to achieve full disclosure of the prosecution case (section 105A of the *Justices Act* only requires disclosure of material the prosecution proposes to tender at the preliminary examination; compare section 42 of the *Criminal Procedure Act* (WA) which requires disclosure, inter alia, of all statements and recordings that are relevant to the charge)?

ii. How would weak cases be filtered out? Can this most effectively and fairly be achieved by full prosecution disclosure and scrutiny of the sufficiency of evidence and public interest issues by the DPP?

iii. Should the Supreme Court take over case management as in Tasmania?