

A BEST PRACTICE MODEL FOR THE DETERMINATION OF INDICTABLE CHARGES

The Directors of Public Prosecutions and National Legal Aid (the Directors of Legal Aid Commissions) are working co-operatively to identify measures which will contribute to the more efficient determination of indictable charges without diminishing the presumption of innocence.

Criminal procedure is, and should remain, fundamentally accusatorial, that is the state accuses the citizen of a criminal offence and must prove guilt without the enforced assistance of the accused. While there is a public interest in improving the efficiency of criminal proceedings by reducing delay and costs, this must proceed in the context of the accusatorial framework.

Whereas the committal has long been regarded as an important cornerstone of our criminal justice system it has, through an evolutionary process, become more concerned with eliciting the full extent of the Crown case than determining whether there is sufficient evidence to put the accused on trial. The implementation of new and effective mechanisms which ensure full prosecution disclosure will justify a fresh approach to committals.

Whilst recognising that a number of jurisdictions have limited the right to cross-examine witnesses at committal, Directors also acknowledge that the opportunity to cross-examine key prosecution witnesses prior to trial often leads to the early resolution of matters and therefore believe that some opportunity for pre-trial cross-examination of prosecution witnesses should be retained.

Directors believe that the operation of the criminal justice system could be improved by treating the committal as part of the overall trial instead of regarding it as the first step in a two stage process. If the amount of time between committal and first mention in the superior court were to be reduced to a matter of days or even hours and there was better interface between the committing court and the superior court through the use of technology, a more efficient determination of matters could be achieved.

One aspect of the accusatorial process is that, before trial, the accused should be informed of the substance of the accusation and the evidence on which the accusation is based. In respect of the disclosure of the accusation, it must be fully particularised, so that the accused knows precisely the nature of the accusation.

Directors of Public Prosecutions will implement disclosure guidelines aimed at requiring police to provide the DPP with all material relevant to the guilt or innocence of the accused and the prosecution will in turn provide disclosure to the defence, prior to committal, in accordance with those guidelines.

Whilst acknowledging that each jurisdiction has particular local issues and procedures with which to contend, Directors have identified the following as elements of a best practice approach to dealing with indictable crime.

1. The DPP should have responsibility for the prosecution of matters at committal.¹
2. Legal aid should be made available to all indigent accused facing committal on serious indictable offences as soon as possible after charge.
3. Grants of legal aid should be structured to encourage resolution of matters prior to committal.²

¹ This proposal recognises the need for an independent and experienced prosecutor to be involved at this stage of the criminal trial not only to make decisions on disclosure but also to take responsibility for the other tasks in this document (e.g., 4,5,6 and 7)

² The terms and conditions upon which legal aid is made available will obviously depend on the circumstances of each case and therefore great flexibility is required. We recognise however that at least 60% of all matters committed to the trial courts are determined by plea of guilty and that an earlier identification of these pleas will produce efficiencies across the board.

4. Counselⁱⁱⁱ with sufficient experience to deal with the issues likely to arise at trial should be engaged prior to committal by both prosecution and defence.
5. Both Counsel should have authority to make decisions or be able to expeditiously obtain instructions regarding the ultimate resolution of the case and should ordinarily be expected to carry the matter through to completion.
6. Both Counsel should actively canvass the possibility of resolving matters in dispute prior to committal, including the potential for summary determination.
7. Where a guilty plea has been identified prior to committal and the matter cannot be dealt with summarily, agreement should be reached on the indictment and facts constituting the offence so that the accused can enter a plea of guilty at committal.
8. At the earliest possible stage after committal the matter should be set down for mention in the Supreme or District Court before a judicial listing officer.
9. Mentions before the judicial listing officer should be able to be held before or after normal court hours so that both prosecution and defence can keep appropriate counsel involved.
10. Provided the prosecution has made full disclosure, at the listing mention counsel for the defence would be required to advise which witnesses were not required for trial and what facts were admitted. The fact that an accused has made admissions prior to trial, or failed to make admissions of fact which are ultimately

ⁱⁱⁱ The term "Counsel" used throughout this document does not preclude the use of appropriately experienced solicitor advocates in those jurisdictions which do not have a fused profession.

not in contention, could be taken into account in sentencing where the accused is subsequently convicted.^{iv}

11. Where the prosecution has fully disclosed all relevant material, counsel for the accused should be asked by the judicial listing officer to disclose the essence of the defence and the facts in dispute in order that the issues alive at trial might be further confined. Where the defence responds, the prosecution would be required to confirm whether there was any further material possibly relevant as a consequence of defence disclosure.^v
12. At the latest there should be disclosure by the defence of the issues relevant to the trial immediately following the prosecution opening and before any evidence is adduced.^v
13. Those accused committed for sentence should have their pleas dealt with expeditiously.
14. Where a plea of guilty was entered at committal, the sentencing court should impose a penalty which can be objectively seen to be below that which its criminal gravity would otherwise demand but for that early indication of plea.

^{iv} The prosecutor should indicate to defence counsel that due recognition of the benefit of any admissions and savings to the "system" will be acknowledged at the time of sentence.

^v Whilst acknowledging the procedures and proposals identified in this document are best practice goals, we anticipate that competent and experienced defence counsel aided by full and timely prosecution disclosure will not only have addressed the issues of the defence in advance of trial, but also discussed or canvassed them with the prosecutor. We also recognise that the best practice points in this document are unlikely to be implemented contemporaneously and the first and essential step is to strive to obtain credible prosecution disclosure. Unless defence Counsel has confidence that there has been full prosecution disclosure, it is unlikely that there will be any specific defence disclosure. The prosecution would only be able to adduce evidence which had not been disclosed to the defence with the leave of the court on the basis that it was necessary in the interests of justice.

15. Grants of legal aid should include a requirement that following conviction and sentence, counsel should identify and certify as valid (not merely arguable) any proposed grounds of appeal, as well as providing a brief outline of the arguments in support of those grounds, with transcript references where applicable.

National Legal Aid, and

The Conference of Australian Directors of Public Prosecution