

# **Contested Committals**

## **- A Defence Perspective**

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The paper endeavours to state the law of New South Wales as at 11 July 2012.

## 1. THE NATURE OF COMMITTAL PROCEEDINGS

Committal proceedings are not judicial proceedings. They are administrative proceedings in nature [see *ex parte Coffey Re Evans* (1971) 1 NSWLR 434, *Connor v Sankey* (1976) 2 NSWLR 570 and the High Court in *Sankey v Whitlam* [1978] HCA 43, 142 CLR 10]. They are, however conducted in a similar way to judicial proceedings in the Local Court.

Because committal proceedings are administrative rather than judicial, an accused may be “discharged”, but this does not mean they have been found “Not Guilty” and are therefore protected from further prosecution (on the grounds of *autrefois acquit*).

The Director of Public Prosecutions may disagree with the decision of the presiding magistrate and find an “ex-officio indictment”. Similarly, the DPP may take the view that some or all of the charges for which the accused was committed for trial are inappropriate, and find a bill of indictment in relation to different charges for one or more of the counts to be proceeded with at trial.

The tension between the legal theory of a committal from the perspective of the magistrate, and the tactical considerations of a defence practitioner is perhaps best encapsulated in the judgment of the Court of Appeal in *Moss v Brown* [1979] 1 NSWLR 114.

### ***Moss v Brown* [1979] 1 NSWLR 114**

Moffitt P delivered the judgment of the court. He stated at 125:

“...the nature and purpose of a magisterial inquiry which, as already indicated, is to receive, examine and permit the testing of, evidence introduced by a prosecutor before the inquiring magistrate, in order to determine whether there is sufficient evidence to warrant the person charged being put on trial and, if not, to discharge that person. That this is so is clear from s.41. It is true that in practice the occasion, or the evidence given, is often used for other purposes. Thus the inquiry is often availed of to have a kind of a dress rehearsal for the trial, so that the risky questions are asked at the inquiry, to the intent that unfavourable answers given during the cross-examination of a Crown witness will be filtered from the evidence put before the jury. The inquiry is often used for other tactical purposes unconnected with persuading the magistrate not to commit for trial. It is also true that, as Jordan CJ pointed out in *Cousens* case (1946) 47 SR (NSW) 145, the depositions may provide the Attorney General with “useful material” to enable him to decide whether he will file an indictment, whatever the magistrate’s decision might have been. However, it is no part of function of an inquiry, or the duty of the committing magistrate,

to ensure that these uses are served, so that it is not open to argue that the inquiry, or its conduct, is unjust, because these uses are not served, or not served in a way most beneficial to the person charged.”

Though an administrative proceedings, the proceedings must still be conducted with a view to ensuring that the accused ultimately receives a fair trial. In that regard, the remarks of the High Court of Australia in *Barton v The Queen* [1980] HCA 48, 147 CLR 75 should be considered.

***Barton v The Queen* [1980] HCA 48, 147 CLR 75**

Gibbs ACJ and Mason J in their joint judgment at 99 state:

“...the principal purpose of that examination [i.e. oral evidence at committal] is to ensure that the accused will not be brought to trial unless a prima facie case is shown or there is sufficient evidence to warrant his being put on trial....For this reason, apart from any other, committal proceedings constitute an important element in the protection which the criminal process gives to an accused person.”

Stephen J in the same decision at 105 spoke of cross-examination at committal as:

“...the opportunity of gaining a relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of the testing that evidence by cross-examination”.

It should be noted that this authority pre-dates committals legislation requiring “special” or “substantial” reasons to require the attendance of a witness at committal. However, as stated by Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 at 167; “The modern procedure of service upon the defendant of statements of prosecution witnesses has not, in my view, diminished the force of Stephen J’s remarks.”

## **2. THE FUNCTION OF A COMMITTAL – FROM THE DEFENCE PERSPECTIVE**

From the defence perspective, the role of a committal may include one or more of the following:

1. Seeking to have your client discharged; or
2. Important preparation for an inevitable contested trial including;
  - i. creating a transcript for the trial advocate; or
  - ii. gaining a greater understanding of expert witnesses and their opinions; or
  - iii. exploring areas for potential discretionary exclusion at trial; or
  - iv. narrowing of issues; or
  - v. gaining a better understanding of the nature and detail of the prosecution case
3. An important opportunity to assess the strength of an uncertain prosecution case, with a final decision as to plea being influenced by the course of the committal proceedings; or

4. A last opportunity to plea bargain with the DPP to have the matter dealt to finality in the Local Court. Note that the DPP are often more willing to plea bargain than their police prosecutor counterparts.
5. To establish or strengthen grounds for a “no bill” application.

### **3. CRIMINAL PROCEDURE ACT SECTIONS 91 AND 93 – A BRIEF HISTORICAL DIVERSION**

The above sections deal with the grounds upon which a witness may be required to attend and give evidence at committal.

A brief historical diversion will help in an understanding of some of the older cases that you read on the topic, as well as how and why NSW law in this area has its origins in other jurisdictions.

Prior to 29 March 1992, there was no such legislative provision to be found in the statutes of NSW. You could obtain witnesses as of right, simply by requesting them when you “replied to the brief”.

The position changed as the legislature bowed to the growing pressures of both “victims rights” (even “alleged” victims in evidence against presumed innocent accused!!) as well as the mounting costs of running the judicial system in NSW.

From 29 March 1992 until 24 February 1997 the former *Justices Act 1902 (NSW)* contained a Section 48EA. This was in very similar terms as the current *Criminal Procedure Act* s.93 and concerned the need to establish “special reasons” in the interests of justice in order to have the alleged victim of an “offence involving violence” attend to give evidence at committal. You could still have other witnesses called at committal as of right, simply by requesting their attendance when replying to the brief.

From 25 February 1997 until 6 July 2003 we had the provisions of the former *Justices Act* ss.48E(2)(a) and 48E(2)(b). Section 48E(2)(a) dealt with alleged victims of “offences involving violence” and required “special reasons in the interests of justice” before such a witness could be called to give evidence at committal. Section 48E(2)(b) dealt with all other witnesses; for which “substantial reasons in the interests of justice” had to be established. These former provisions were in very similar terms to the current *Criminal Procedure Act* ss. 91 and 93.

On 7 July 2003 the former *Justices Act* was repealed and sections 91 and 93 of the *Criminal Procedure Act 1986 (NSW)* came into effect.

Thus, when you read these “48EA” cases or 48E(2)(a) cases, know that you are in essence reading about *Criminal Procedure Act* s.93, and that such cases are relevant as to what constitutes “special reasons”.

Similarly, when you read cases on s.48E(2)(b), know that you are in essence reading about *Criminal Procedure Act* s.91, and that such cases are relevant to what constitutes “substantial reasons”.

#### 4. SO WHAT DO CRIMINAL PROCEDURE ACT ss.91 AND 93 SAY?

[Section 91\(1\)](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) empowers a magistrate to give a direction requiring the attendance of witnesses who have made statements that have been served on the accused. The following subsections of [s.91](#) and the provisions of [s.93](#) both qualify this general power.

For the sake of easy reference for the reader, the relevant provisions of ss.[91](#) and [93](#) are extracted below:

##### **91 *Witness may be directed to attend***

- (1) The Magistrate may direct the attendance at the committal proceedings of the person who made a written statement that the prosecution intends to tender as evidence in the committal proceedings. The direction may be given on the Magistrate's own motion or on the application of the accused person or the prosecutor.*
- (2) The Magistrate must give the direction if an application is made by the accused person or the prosecutor and the other party consents to the direction being given.*
- (3) In any other circumstance, the Magistrate may give a direction only if satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.*
- (3A) A direction may not be given for the reasons referred to in subsection (3) if the written statement has already been admitted in evidence. This does not prevent a direction being given merely because the written statement is tendered to the Magistrate for the purpose of determining an application for a direction under this section.*
- (4) The written statement may be admissible in evidence in the proceedings after the direction is given if:
  - (a) the accused person and the prosecutor consent to the statement being admitted, or*
  - (b) the Magistrate is satisfied that there are substantial reasons why, in the interests of justice, the statement should be admitted.**
- (5) A direction given on the application of the accused person or the prosecutor may be withdrawn only:
  - (a) on the application, or with the consent, of the applicant, or*
  - (b) if the applicant fails to appear, on the application of the other party.**
- (6) The regulations may make provision for or with respect to the determination of substantial reasons under subsections (3) and (4).*
- (7) If a person attends to give oral evidence because of a direction under this section, the Magistrate must not allow the person to be cross-examined in respect of matters that were not the basis of the reasons for giving the direction, unless the Magistrate is satisfied that there are substantial reasons why, in the interests of justice, the person should be cross-examined in respect of those matters.*
- (7A) A direction may not be given under this section so as to require the attendance of the complainant in proceedings for a prescribed sexual*

*offence if the complainant is a cognitively impaired person (within the meaning of Part 6 of Chapter 6).*

- (8) *A direction may not be given under this section so as to require the attendance of the complainant in proceedings for a child sexual assault offence if the complainant:*
- (a) *was under the age of 16 years:*
    - (i) *on the earliest date on which, or*
    - (ii) *at the beginning of the earliest period during which, any child sexual assault offence to which the proceedings relate was allegedly committed, and*
  - (b) *is currently under the age of 18 years.*
- (9) *For the purposes of subsection (8):*

***child sexual assault offence means:***

- (a) *a prescribed sexual offence, or*
- (b) *an offence that, at the time it was committed, was a child sexual assault offence for the purposes of subsection (8), or*
- (c) *an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a) or (b).*

***complainant***, *in relation to any proceedings, means the person, or any of the persons, against whom a prescribed sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed, and includes:*

- (a) *in relation to an offence under section 80E of the Crimes Act 1900, the person who is alleged to have been the subject of sexual servitude, and*
- (b) *in relation to an offence under section 91D, 91E or 91F of the Crimes Act 1900, the person under the age of 18 years who is alleged to have participated in an act of child prostitution, and*
- (c) *in relation to an offence under section 91G of the Crimes Act 1900, the person under the age of 18 years who is alleged to have been used for the production of child abuse material.*

### **93 *Victim witnesses generally not to be directed to attend***

- (1) *Despite section 91 (other than subsection (8) of that section), in any committal proceedings in which the accused person is charged with an offence involving violence, the Magistrate may not, under that section, direct the attendance of an alleged victim of the offence who made a written statement (even if the parties to the proceedings consent to the attendance) unless the Magistrate is satisfied that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence.*
- (2) *The regulations may make provision for or with respect to the determination of any such special reasons.*

## 5. SECTION 91 – “SUBSTANTIAL REASONS”

Section 91 of the *Criminal Procedure Act* requires the establishment of “substantial reasons” in the interests of justice before a contested direction will be made for a witness who is a witness other than an alleged victim of an “offence involving violence”.

### *Losurdo v DPP (1998) 101 A Crim R 162*

This case represents the first occasion upon which Justices Act s.48E(2)(b) [the legislative predecessor of Criminal Procedure Act s.91] was considered by the superior courts of NSW. The case involved a search of a motor vehicle by police resulting in the discovery of a quantity of prohibited drugs. The lawfulness of the search was in issue.

Hidden J stated at 166-167:

“...substantial does not mean “special”, and to establish substantial reasons for the attendance of witnesses at committal proceedings it is not necessary to show that the case is exceptional or unusual. It may be that substantial reasons could be shown in a majority of cases. Nor is it necessary to show that cross-examination might lead to the discharge of the defendant under s.41(2) and (6) of the Justices Act.”

Later at 167 Hidden J stated:

“It will be remembered that one of the purposes of cross-examination of witnesses in this case was to explore the lawfulness of the search. What was elicited by that cross-examination might bear upon the discretion of a trial judge under s.138 of the Evidence Act 1995 (NSW) to reject evidence of the search. Counsel for the Director submitted that this is not a legitimate reason to cross examine witnesses at committal because a magistrate has no power to exercise such a discretion in those proceedings: s.41(8A) of the Justices Act. In my view, that is not the point. It may be appropriate to cross-examine witnesses at committal with an eye to the exercise of a discretion by a trial judge, even though the magistrate has no such discretion: particularly in a case, such as this, where the rejection of the evidence at trial may be fatal to the Crown case. In this regard, it should not be forgotten that a properly conducted committal can benefit the prosecution as much as the defence. Cross-examination about a matter giving rise to discretionary rejection might elicit material in support of an objection and assist to bring the relevant issues into focus. Equally, it might establish that there is no foundation for such an objection.”

### *Hanna v Kearney & DPP(Cth), Mileskin v DPP(Cth) [1998] NSWSC 227*

This case is commonly referred to as *Hanna v Kearney*

In this case Studdert J referred to the Second Reading Speech introducing the relevant amendment which created the “substantial reasons” test. He also outlined a number of examples as to what may amount to substantial reasons.

At 6-7 Studdert J quoted the following passages from the Second Reading Speech:

“As I have indicated, the phrase “substantial reasons” is intended to bring about a less stringent test than that which has been developed under the current section 48EA. The precise scope of the phrase will of course be subject to judicial interpretation. It would be unhelpful to attempt to exhaustively define it in the bill.”

“It is envisaged however that if cross-examination would be likely to result in the discharge of the defendant pursuant to section 41(2) or 41(6) that this would amount to “substantial reasons....in the interests of justice”. Similarly the phrase would be expected to apply where there is a likelihood that cross-examination would demonstrate grounds for a no-bill application.”

“Another situation where substantial reasons may be held to apply would arise where it appears that cross-examination is likely to substantially undermine the credit of a significant witness....”

“...It may be that in a given case “the interests of justice” require that cross-examination of certain witnesses be allowed to avoid the defendant being taken by surprise at trial.”

Studdert J made the following remarks at 11-12:

“It may be useful for me to make the following additional observations in the context of the present applications, although I emphasise that I am not intending what I am about to say to be treated as an attempt to state all factors that may be relevant to these applications or other applications under s.48E:

1. Section 48E(2)(b) plainly has as a primary aim the limitation of time occupied in committal proceedings. Such proceedings are not to provide the opportunity for a full dress rehearsal for the trial. Cross-examination is to be eliminated unless it is required in the interests of justice for reasons that are reasons of substance.
2. There can be no rigid or exhaustive definition of what constitutes “substantial reasons” and it would be undesirable to attempt to give one. Relevant issues inevitably vary from case to case. However, any statement served has to be considered with reference to the issues it addresses and the charge to which it relates. The application to cross-examination requires identification and consideration of the objective of the cross-examiner, and the framework of the prosecution case. To require a witness for cross-examination without a definite aim but in the hope of eliciting some evidence that might prove useful to the defence would not constitute “substantial reasons”. It is for the applicant to clearly define the purpose or purposes of cross-examination which he seeks.
3. It would be wrong to limit “substantial reasons” to situations where cross-examination is likely to result in the discharge of the defendant or to establish grounds for a no-bill application. Equally, it would be wrong to limit “substantial reasons” to situations where cross-

examination is likely to undermine the credit of an important witness. “Substantial reasons” may well be found elsewhere.

4. On any application under s.48E the fundamental objective of the committal proceedings must be borne in mind, namely the objective of facilitating a fair trial in the event that the person charged is committed and later stands trial. This may mean that there are substantial reasons for requiring a witness for cross-examination for a proper understanding of the nature of the prosecution case or for an understanding of the basis of a relevant opinion held by a witness. I do but give those instances, I certainly do not intend them to be exhaustive.
5. “Substantial reason” may be shown for cross-examination where this may lead to a narrowing of the matters in dispute: see *Goldsmith v Newman* supra at 411. This is a consideration of particular importance where the prospect exists of a lengthy trial, as it does in the present cases.”

### ***DPP v Losurdo* (1998) 103 A Crim R 189**

In this case, the NSW Court of Appeal dealt with an appeal from the decision of Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 referred to above. The decision in *Hanna v Kearney* was handed down after the judgement of Hidden J at first instance, but prior to the Court of Appeal considering the appeal from the decision of Hidden J.

Priestley JA, Handley JA and Sheppard A-JA delivered a joint judgment. In this judgment the Court:

- affirmed Studdert J in *Hanna v Kearney* (at 198)
- affirmed Hidden J in *DPP v Losurdo* (1998) 101 A Crim 162 (at 202)
- discussed the meaning of “substantial reasons”; concluding that (at 193): “The word [substantial] is an ordinary English word and must be given its ordinary meaning in the context in which it appears.”

### ***Micallef v DPP* [2001] NSWSC 1172**

In this matter a key prosecution witness spoke to the accused’s legal representative and asserted that a statement made to police that significantly implicated the accused was untrue.

The accused’s legal representative included the above assertion in written submissions in seeking to establish “substantial reasons” why the witness should be required to give evidence at committal. The assertion made by the accused’s representative was not challenged by the DPP.

The magistrate at first instance held that the material did not constitute “substantial reasons”. On appeal to the Supreme Court Common Law Division, Hidden J held that it was arguable that the material established substantial reasons. Hidden J was of the view at para[10] that:

“...On the face of it, it raised a serious question about the reliability of Ms Bonello’s account to the police and pointed to the desirability of that account being tested in cross-examination.”

It is suggested that the above scenario, (which is not uncommon when a witnesses is in a domestic relationship with an accused) would also satisfy the “special reasons” test for an alleged victim, as such a scenario would disclose two different versions of events – a ground established in the decision of Studdert J in *B v Gould* (1993) 63 A Crim R 297.

***JW v DPP [1999] NSWSC 1244***

In this case, Simpson J noted the potential benefit to the prosecution of a successful application under s.91. Her Honour also noted that an application for an individual witness had to be considered on its own merits (and not as one overall assessment of an applicaiton for a number of witnesses) and the purpose of seeking the witness at committal may vary from one witness to another. Simpson J satted:

“8 ] There may well be other reasons, that qualify as substantial, for a direction that a witness attend for cross-examination. It has to be borne in mind, as Hidden J pointed out in *Losurdo* at first instance, that a properly conducted committal might benefit the prosecution as much as the defence. While a successful attempt to undermine the credit of a Crown witness would benefit the defence, an unsuccessful attempt to do so could result in the decision of an accused person to plead guilty. In my opinion exploring the strength of the Crown case is, at least to a point, a legitimate objective of cross-examination at committal, although defendants plainly cannot be given the unbridled rein they previously had. The significance of the evidence to be adduced from a particular witness in the Crown case is clearly a relevant consideration.

[9 ] Assessment of what is sought to be achieved by cross-examination is an important aspect of the decision making process. This is because the objective may vary in relation to different witnesses. That is why it is necessary for the magistrate to consider the reasons advanced in support of the application individually in relation to each of the witnesses in respect of whom a direction is sought. Balanced against those reasons must be the clear intention of the legislature to limit the excessive time taken and inconvenience to witnesses that had, it has been said, in the past attended the conduct of committal proceedings uninhibited by the regime provided by s 48E.”

***Sim v Magistrate Corbett & Anor [2006] NSWSC 665***

In this matter Whealey J made a number of general observations as to matters of principle concerning “substantial reasons”. The qualification to the effect that this paragraph does not represent a complete statement of all relevant principles should be noted. Notwithstanding, the authority is of some assistance. His Honour stated at [20]:

“[20] I shall now set out, in summary form, my understanding of a number of the relevant principles. Because of its brief nature, this statement will not be as elegantly expressed as the full statement of the principles in earlier decisions. Secondly, I will not attempt to summarise every principle arising from previous authority. Thirdly, I will emphasise, where necessary, matters that are of significance to the present dispute. I take the relevant principles to be as follows: -

1. The purpose of the legislation is to avoid delays in the criminal process by unnecessary or prolix cross-examination at committal.
2. The onus is on the defence to satisfy the Local Court that an order should be made directing the attendance of witnesses
3. The process is an important part of the committal proceedings. The refusal of an application may have a significant impact upon the ability of the defendant to defend himself. As well, the prosecution has a real interest in ensuring only appropriate matters are sent for trial.
4. In relation to matters falling within s 91 of the Criminal Procedure Act 1986, the defendant must show that there are reasons of substance for the defendant to be allowed to cross-examine a witness or witnesses.
5. The obligation to point to substantial reasons is not as onerous as the reference to “special reasons” in s 93; nevertheless it raises a barrier, which must be surmounted before cross-examination will be permitted.
6. Each case will depend on its own facts and circumstances. It is not possible to define exhaustively or even at all what might, in a particular case, constitute substantial reasons. It may be a situation where cross-examination may result in the discharge of the defendant or lead to a successful no-bill application; it may be a situation where cross-examination is likely to undermine substantially the credit of a significant witness. It may simply be a situation where cross-examination is necessary to avoid the defendant being taken by surprise at trial. The categories are not closed and flexibility of approach is required in the light of the issues that may arise in a particular matter.
7. Substantial reasons might exist, for example, where the attendance of a witness is sought to enable cross-examination in respect of a matter which itself might give rise to a discretion or determination to reject evidence at trial.
8. The expression “substantial reasons” is not to be ascertained by reference to synonyms or abstract dictionary definitions.

The reasons advanced must have substance in the context of the committal proceedings, having particular regard to the facts and circumstances of the particular matter and the issues, which critically arise or are likely to arise in the trial.”

***Murphy v DPP [2006] NSWSC 965***

In this matter Whealey J noted the difference between “special reasons” and “substantial reasons”. His Honour noted that “substantial reasons” are matters that must have substance in the context of the issues that are likely to arise in the particular proceedings. His Honour also emphasised the need to consider the application for each witness separately. His Honour stated:

“[61].... First, although the Magistrate’s identifies that she is dealing with “substantial reasons” in this part of her decision, the decision does not appear to me to identify adequately the significant difference between the test in the two sections. Secondly, the Magistrate’s statement “it is clearly not distinguishable from the other matters that go up to the Court”, indicates to me that her Honour has fallen into the error of considering that s 91 requires that there be something “out of the ordinary” or “unusual” so as to warrant a finding of “substantial reasons”. The authorities make it clear that this is not so. The reasons simply must have substance in the context of the issues that are likely to arise in the particular proceedings (*Losurdo* (1998) 103 A Crim R 189 at 193). In addition, substantial reasons may be found for cross-examination in the need for a proper understanding of the prosecution case (*Hanna v Kearney* at pages 11-12). Thirdly, apart from John Killeen, the learned Magistrate failed to examine the situation of each of the witnesses and the evidence they were to give individually. This needs to be done with some precision and care and the Magistrate has failed to do so in the present matter....

***Abdel-Hady v Magistrate Freund [2007] NSWSC 1247, 177 A Crim R 517***

Rothman J considered the meaning of “substantial reasons and noted that in the context of the legislation it meant reasons that are more than “nominal or ephemeral” and bear in mind the purposes of the legislation.

His Honour also noted that the need to avoid a Basha inquiry at trial would constitute “substantial reasons”, and it was necessary for the Magistrate to take into account the implications at trial of not allowing the application. His Honour stated:

“[35] In my view, and in accordance with the meaning given to the term in *Kennedy*, supra, and *Losurdo*, the words “substantial” in section 91 of the Act is used to qualify “reasons” in a way which makes clear that it is not “any reasons” but substantial or significant reasons that are required. In that sense the term is used to mean reasons other than reasons which would be described as ephemeral or nominal. In any analysis they are not required to be “special” which generally seems to imply a unique situation or one which pertains only to that individual. “Special” is defined by the Macquarie Dictionary as “relating or peculiar to a particular person, thing, instance; having a particular

function, purpose, of a distinct or particular character; being a particular one; extraordinary or exceptional.” However the term “special” is often used in contra-distinction or in conjunction with the word “extraordinary”.

[36] In the scheme of this Act, it is clear that “substantial reasons” requires reasons that are more than nominal or ephemeral and bear in mind the purpose of the Act and its promulgation.”

Later, his Honour stated:

“[44] If the magistrate committed the accused for trial in the absence of a direction for these witnesses to attend, the necessary result will be that, at trial, there will need to be a *Basha* inquiry, because the details of the evidence are unknown to the accused. The avoidance of a *Basha* inquiry must, without more, be a substantial reason in the interests of justice. It is far better for witnesses to attend at a committal hearing and be cross-examined (even in the risk that they will be cross-examined twice) than have a jury stand down for a trial within a trial with the consequent delay and inconvenience that then occurs. That inconvenience, which is to judge, practitioners and jury, is also felt by the witness, who will, in any event be cross-examined twice, and the victims who must wait around. Ultimately the evidence, and details of it, must be known to the accused.”

....

“[49] ...her Honour does not disclose that her Honour has taken into account the necessary implications at trial of not requiring the witnesses to attend pursuant to section 91. In those circumstances, her Honour has failed to take into account a relevant circumstance and has erred in so doing. Failure to take into account a relevant circumstance is an error of law that strikes at the heart of the process being undertaken.”

So what is a *Basha* inquiry? This term of art takes its name from the NSWCCA decision in *Basha* (1989) 39 A Crim R 337. In that matter, the prosecution called a number of witnesses at committal with the exception fo an undercover police officer, who did not attend to give evidence as he was said to still be undercover. After committal and before trial, the prosecution served a statement made by the undercover officer and indicated that they intended to call him at trial. The trial Judge held that this was unfairly prejudicial to the accused at trial and remitted the matter back to the Local Court for fresh committal proceedings. The NSCCA held that the trial Judge did not have power to do this. They noted that any trial court has power to stay proceedings until such time as any prejudice is overcome. They noted that an efficient way to overcome the prejudice in the case before them was to call the undercover officer on the voir dire in the District Court prior to the commencement of the trial, and permit the accused to cross-examine him at that stage in order to overcome the prejudice.

## 6. SECTION 93 – “SPECIAL REASONS”

Section 93 operates in conjunction with section 91, however creates certain exceptions to the “substantial reasons” test. Broadly, an application concerning a witness who is an alleged victim of an “offence involving violence” (which has a very specific and somewhat nonsensical test) will require “special reasons” to be demonstrated before they can be cross-examined at committal. Further, there are prohibitions against cross-examination of alleged victim of prescribed sexual offences who are cognitively impaired, as well as alleged victims of child sex offences.

Note that there have been no regulations (to date at least) pursuant to section 93(2) as to what constitutes “special reasons”.

Outlined below are a number of decisions that offer guidance as to what constitutes “special reasons” for the purposes of Criminal Procedure Act s.93.

### **Special Reasons - Generally**

#### ***B v Gould (1993) 67 A Crim R 297***

This case was the first decision to be handed down in NSW in relation to what constituted “special reasons” for the purposes of the committals legislation. It remains the foundational authority in NSW.

Studdert J considered the Second Reading Speech and a number of authorities from both South Australia and New Zealand. Studdert J determined at 303 - 304:

“There can be no rigid definition as to what may constitute “special reasons” in the setting of s.48EA and “the interests of justice”, whilst necessitating careful consideration of the interests of the defendant, cannot be limited to a consideration of his interests alone.”

“A defendant who wishes to cross-examine an alleged victim on committal must satisfy the magistrate to whom the application is to be made that there are special reasons for this course to be adopted.”

“The reasons must be special to the particular case. There must be some feature of the particular case by reason of which it is out of the ordinary and by reason of which it is in the interests of justice that the alleged victim should be called to give oral evidence. It cannot be enough that the defendant would be prejudiced if the alleged victim is not called. Plainly there would be prejudice to the defendant in every case where the offence is denied and where the defendant does not have the opportunity of cross-examining the alleged victim at committal.”

“The apparent strength or weakness of the prosecution case is a relevant matter. If the material placed before the magistrate suggests that there is a real possibility that if the alleged victim is subject to cross examination the defendant will not be committed, that may in the particular circumstances

afford special reasons to require the alleged victim's attendance for cross-examination. For instance, where identification of the offender is a live issue and it depends solely upon the alleged victim this may constitute special reasons to require cross examination of the alleged victim at committal."

"Again, if the alleged victim has given more than one version of an alleged offence and those versions are inconsistent, this may warrant that the alleged victim attend for cross examination under the section. I would caution however that the possibility always exists that a witness will be discredited and his or her testimony may be broken down in cross-examination. A recognition of that possibility and the confidence that the cross-examiner may express as to what may happen if he is given the opportunity to cross-examine could not of itself suffice to afford "special reasons"."

"It may be that the particular alleged victim is willing to give evidence at committal and desirous of doing so. In such a case a magistrate might readily find "special reasons" exist."

"I do not however propose to attempt to catalogue what may or may not constitute "special reasons". I agree entirely with the observations of Wells J in Gun previously cited that the decision must depend upon the circumstances of the particular case."

#### ***Goldsmith v Newman (1992) 59 SASR 404***

In this earlier South Australian authority King CJ at 411 cited a number of examples as to what may amount to "special reasons" under similar South Australian legislation:

"It may be helpful to magistrates to indicate some circumstances which may amount to special reasons:

1. It may appear that there is sound reason to suppose that some degree of cross-examination will eliminate possible areas of contention and refine the matters really in dispute.
2. Cross-examination may be desirable to establish important facts as the foundation of a defence or to eliminate any possibility of a particular defence. For example, it may be important to ascertain from witnesses in advance of trial whether the defendant showed signs of intoxication or irrationality at relevant times.
3. It may be necessary for a fair trial that the defence have a limited opportunity to explore in advance of trial key issues which may be relevant to possible defences such as bona fide claim of right or duress.
4. In some cases some limited questioning of scientific witnesses may be necessary to explore possible avenues of inquiry as to alternative hypotheses, or the need for further testing or analysis.
5. There may be reason for dissatisfaction with the extent of prosecution disclosure by filing statements and documents pursuant to s.104 or otherwise, and such cross-examination may appear to be the best way to obtain such disclosure."

***R v Anderson* NSWCCA 15/2/94 unrep.**

The fact that the prosecution case depends heavily upon the evidence of the alleged victim of an offence involving violence does not, of itself, constitute “special reasons”.

Gleeson CJ at 3:

“It seems to me that, in the ultimate analysis, the most that can be said in favour of the merits of the application before the magistrate is that this is a case where the Crown case heavily depends upon the complainant’s account of certain events, and the applicant is anxious to have the opportunity to cross-examine her about those events. There is, it hardly need be said, nothing special or unusual about a circumstance such as that.”

***W v Attorney General, P v Wellington District Court* [1993] 1 NZLR 1**

This case is a decision of the New Zealand Court of Appeal concerning a similar provision in their committals legislation as to whether it is “necessary in the interests of justice” for an alleged sexual assault victim to attend the preliminary hearing. The NZ Court of Appeal is the equivalent of the High Court of Australia (except that New Zealand still allows appeals to the Privy Council).

The court held that special reason to suspect collusion between witnesses would be a sufficient basis for a successful application.

Cooke P delivered the judgment of the Court. He stated at 7:

“We accept too that there could be good reason for cross-examination where there is special ground to suspect collusion or to contend for that reason that severance of trials should be ordered; or some special factor relating to the admissibility of a complaint which should be explored in cross-examination.”

***O’Hare v DPP* [2000] NSWSC 430**

In this decision of the NSW Supreme Court O’Keefe J surveys a range of authority from NSW, Victoria and South Australia before summarising his view of what may constitute special reasons in the interests of justice. He states at para [52]:

“In summary the decided cases in New South Wales and in Victoria and South Australia indicate that the facts or situations that constitute “special reasons” should not be confined by precise legal definition, are not a closed category, should not be approached in an unduly restrictive way and need to be:

- Special in relation to the particular case;
  - Solid, that is substantial, in nature;
  - Not common or usual;
  - Out of the ordinary;
  - Unusual or atypical;
  - Clearly distinguishable from the general run of cases;
- and must be relevant to the interests of justice. In this regard the relevance to the interests of justice will involve a consideration of the interests of the defendant and the interests

of the complainant as well as other wider considerations of justice. In this context:

- the strength or weakness of the prosecution case;
- that there will be a real risk of an unfair trial should oral evidence not be permitted;
- the prospect of prejudice to the defendant beyond the ordinary in such event;
- the real possibility that a defendant may not have to stand trial if oral evidence is permitted
- the existence of inconsistent statements by or different versions from a complainant or witness;

will be material considerations in the exercise of function by a Magistrate under s.48E(2)(a).

### ***DPP v Paterson* [2004] NSWSC 693**

In this matter the magistrate at first instance made an order pursuant to s.93 for the complainant to attend and give evidence at committal as a result of an undertaking given by the accused that he would give evidence in the committal proceedings.

Dowd J held that the magistrate was in error. He stated at [30]:

“There is nothing in the Act which gives the power to make an order to direct attendance of a witness for cross-examination conditional upon the Defendant giving evidence. The magistrate cannot oblige the Defendant to override his fundamental right to remain silent, by the pressure of the imposition of such a condition. A magistrate must use the discretion in the Act to determine the issue of special reasons absent such a condition.”

### **Special Reasons – Identification Evidence**

#### ***B v Gould* (1993) 67 A Crim R 297**

The following passage from the judgment of Studdert J at 303 is the main authority in NSW:

“The apparent strength or weakness of the prosecution case is a relevant matter. If the material placed before the magistrate suggests that there is a real possibility that if the alleged victim is subject to cross examination the defendant will not be committed, that may in the particular circumstances afford special reasons to require the alleged victim’s attendance for cross-examination. *For instance, where identification of the offender is a live issue and it depends solely upon the alleged victim this may constitute special reasons to require cross examination of the alleged victim at committal.*”

It should be noted that some DPP advocates will often seek to take a narrow view of this basis as constituting “special reasons” arguing that unless the evidence of identification “solely depends” on the evidence of the alleged victim then special reasons should not be found. This argument is easily countered by the following authority: *R v Gun; ex parte Stephenson* (1977) 17 SASR 165.

***R v Gun; ex parte Stephenson (1977) 17 SASR 165***

Wells J at 187-188 gives an example of the need to cross-examine a witness at an early stage on identification evidence as sufficient to constitute “special reasons”

“...the occasions for making an order under the sub-sections must depend not only upon the practical need to examine the prosecutrix upon the subject matter to be relied on, but upon the need to examine her at the stage of the preliminary examination. For example, the defence may be directed, not to the corpus delicti, but to identity. If defence counsel has good grounds for supposing that the identification of his client is shaky, he might be justified in asking to cross-examine the prosecutrix before she convinces herself, in hindsight, that the accused was undoubtedly her assailant.”

**Special Reasons – The Need for Further and Better Particulars*****R v Kennedy (1997) 94 A Crim R 341***

This case involved allegations of child sexual assault. The complainant gave no indication as to the precise dates of the alleged assaults, which were said to have occurred over a period of some five months. Hunt CJ at CL made the following points in relation to “special reasons”:

- The desire for two cross-examinations in order to find material to discredit the witness at trial does not constitute special reasons.
- Special reasons are constituted if there is a serious risk of an unfair trial
- The need for better particulars as to times and dates of offences is important to a fair trial so that the defence can pursue something other than a mere blanket denial.

Hunt CJ at CL at 352:

“There must be some feature of the particular case by reason of which it is out of the ordinary and which establish that it is in the interests of justice that the complainant be called to give oral evidence. Two cross-examinations are not justified simply in order to find material in order to discredit the witness at trial.”

Later at 352:

“...The clear message conveyed by all of the cases which I have read is that cross-examination at the committal proceedings will be permitted only where there is at least a serious risk of an unfair trial if it is not. That is, incidentally, the test to be applied before permitting a *Basha* inquiry, and it is not without significance that this Court’s decision in *Basha* has been cited as relevant to the interpretation of the similar South Australian provision. It has already been held\* that a cross-examination at the committal would be justified where the complainant’s statement was vague as to the dates upon which the assaults were alleged to have taken place and where cross-examination was limited to pinning the witness down so far as possible in relation to those dates. That decision is directly applicable in the present case.”

[\* Note: The decision Hunt CJ at CL is referring to in this passage is the South Australian decision of *S v Metanomski (1993) 65 A Crim R 352 at 355,356*]

at 353:

“The need to know with some specificity just when the offences are alleged to have occurred is important to a fair trial so that a defence other than a mere blanket denial may be pursued.”

***Leahy v Price* NSW Supreme Ct 28/9/98 unrep Adams J BC9804950**

This decision further affirms the decision of Hunt CJ at CL in *Kennedy* (above) regarding the need for better particulars as constituting special reasons.

Further, Adams J gave a clear message to investigating police in relation to obtaining comprehensive statements in order to ensure that committal proceedings function effectively and efficiently:

At 11:

“The existence of s.48E makes it more important than ever that the investigating police obtain comprehensive statements from all material witnesses, if necessary reinterviewing them when new facts come to light. Of course, leading questions must be avoided, if at all possible. This not only has the benefit of capturing the most recent recollections of events and conversations but will fully disclose the nature of the case for the purposes of the committal proceedings. It will help also to reduce the number of cases where witnesses, whether victims or others, will need to be called.”

***Faltas v McDermid* NSW Supreme Ct 30/7/93 unrep Allen J**

The presence or absence of co-operation between the parties in the obtaining of particulars will be a relevant factor in determining whether special reasons are to be found.

In this case, the complainant in a sexual assault matter was said to have written a number of love letters to the accused over the period of time in which the assaults were alleged to have occurred.

Allen J made the following remarks at 8-9:

“... I would consider it wholly proper for a Magistrate to take into account that counsel for the accused has indicated to the legal representative for the prosecution that prejudice would be suffered unless a statement were obtained from the victim and put in evidence by the prosecution on some matter not dealt with in the statement already obtained from the victim, yet the legal representative for the prosecution has declined to co-operate in the obtaining of and tendering of such a statement.”

“The reverse side of the coin is that it would be wholly proper, also for the Magistrate to take into account that the legal representative for the accused has declined to make available to the legal representative for the prosecution documentation in his possession which would enable him to procure and put in evidence a statement by the victim which would meet, at least in substantial

measure, the special prejudice which it is urged for the accused that he would suffer through inability to cross-examine the victim at committal.”

“I add these remarks because in the present case counsel appearing for the accused (the defendant at committal) merely read to the Magistrate part of one of the several letters written by the victim. Further, he did not make available and has not made available those letters to the legal representative for the prosecution. He has not sought that the prosecution furnish any additional statement by the victim acknowledging or denying authorship of the letters, explaining why she wrote them and giving such detail as to her reason or reasons for writing them as would enable the accused to prepare to meet those reasons at the trial. Whilst there is no need to speculate that the Magistrate took that course of conduct into account in coming to his decision, it would be a material factor.”

“It remains open to the accused to take that approach now, namely to furnish letters to the prosecution on the basis that an appropriate statement will be obtained from the victim, made available to the accused’s legal representative and put into evidence at the committal should he so require. Should the prosecution spurn such an offer, that conduct would be a material factor to be taken into account in any renewed application for an order directing the young lady to attend for cross-examination.”

### **Special Reasons – Two Alleged Victims in One Alleged Incident**

#### ***McKean v DPP, Hyde and Splithof* NSW Supreme Ct 23/4/93 unrep Grove J**

In this matter Grove J considered the issue of “special reasons” in the situation where there is one accused and two alleged victims of different offences charged, with each victim being simultaneously a witness in respect of the charge involving the other alleged victim.

Grove J considered whether “special reasons” extended to protect the witness in respect of cross-examination where they were merely a witness and not an alleged victim. Grove J was of the view that such protection was indeed extended in these circumstances.

Grove J stated:

“...the construction contended by the plaintiff could have the oblique effect in some cases of requiring such committal hearings to deal with charges one at a time. I see no reason to conclude that the Legislature did not anticipate that there may be cases of multiple victims who would be likely to make statements relevant to happenings to each other as well as to themselves and that they would be dealt with at a single committal hearing. The immunity is available to each victim of a relevantly charged offence and a protection against unfair operation exists in the jurisdiction to give a direction if special reasons are shown.”

***Loubatie v DPP (1994) 77 A Crim R 28***

In this case, the NSW Court of Appeal considered the application of “special reasons” in the situation where there are two accuseds and two alleged victims, with each victim being simultaneously a witness to the offence involving the other alleged victim.

Dunford J as the primary Judge had ruled that the section afforded each witness full protection, and that special reasons would have to be established for a witness in this situation to give evidence at all, even in respect of the matter where they were a witness and not the alleged victim. In this regard, he followed Grove J in McKean v DPP, Hyde and Splithof cited above.

On appeal to the NSW Court of Appeal from the decision of Dunford J, Kirby P declined to interfere with the judgment of Dunford J due to the procedural deficiencies in the manner in which the case had been presented before the Court of Appeal. He did, however make a number of obiter remarks that suggested he may have decided the matter differently had the matter been properly before him. These obiter remarks may leave the question open for re-consideration in the future at the Court of Appeal level.

Kirby P at pp.34-35:

“Parliament, for competing reasons of high policy, may take away the right of an accused person, including in a committal, to question witnesses whose evidence is offered as relevant to his or her guilt of the offence charged. Clearly, Parliament has done so in the case of the “victim” of an accused offender. It is less clear that it has done so in the case of a person who, though the alleged “victim” of one accused, is a mere witness to the offence involving the other. To deprive that other of the right of questioning a relevant witness, without a clear statutory provision authorising that course, appears to offend the principle of the common law that criminal statutes, potentially diminishing liberty, are to be strictly construed. It also appears to offend the more modern principle of construction that, in the event of ambiguity, an Australian statute will be construed so as to accord with fundamental human rights, such as stated in the *International Covenant on Civil and Political Rights*, and not to breach those rights: see *Young v Registrar; Court of Appeal (No 3)* (1993) 32 NSWLR 262 at 247ff; *Sandford* (1994) 33 NSWLR 172 at 177ff; 72 A Crim R 160 at 165ff.”

“A future case may arise where that issue is properly posed for reconsideration in this Court. However, for a number of reasons, there are defects and difficulties in the present proceedings which make them an inappropriate vehicle to tender the point of construction which Mr Loubatie wished to urge.”

## Special Reasons – A Mixture of “Offences Involving Violence” and Other Offences

### *L v DPP* NSW Supreme Ct 26/8/94 unrep Smart J

In *L v DPP* NSW Supreme Ct 26/8/94 unrep. Smart J considered the position in respect of an number of sexual offences were charged. Some charges were within the old s.48EA (as they were “prescribed sexual offences”), and others were not. It was held that s.48EA would apply in respect of the witness, and that special reasons would need to be established before the witness could be required to attend to give evidence in respect of ANY of the matters.

Smart J at 14-15 stated:

“Committal proceedings often involve a number of offences affecting the one victim. On the true construction of s.48EA, if a defendant has been charged with a number of offences comprising both prescribed and non prescribed sexual offences involving the same victim and such offences are the subject of the one committal hearing or proceedings, s.48EA applies. I do not consider the case where there are different victims.”

It should be noted that the definition of “prescribed sexual offence” has been significantly widened since this decision was handed down.

### Special Reasons? – The Reluctant Witness Who Expresses An Unwillingness To Give Evidence At Court?

There are two cases dealing with reluctant witnesses who express an unwillingness to give evidence at court. These are *B v Gould* (1993) 67 A Crim R 297 and *Foley v Molan* NSWSC 20/8/93 Levine J unrep. Both cases involved the accused appealing to the Common Law Division of the Supreme Court on the basis that the magistrate was in error in failing to order the attendance of an alleged victim witness to give oral evidence at committal. In each case the appellant sought relief in the nature of mandamus. In each case the Supreme Court declined to intervene. The relief sought (mandamus) was only available on the basis that the magistrate had failed (actually or constructively) to exercise jurisdiction. In both matters the appeals were determined on the basis of this jurisdictional issue rather than the correctness or otherwise of the merits of the magistrate’s decision within jurisdiction. This point is made very clear by Studdert J in *B v Gould* (1993) 67 A Crim R 297 at 306-307 and by Levine J in *Foley v Molan* at 12. Defence practitioners should not allow these decisions to be misused as supposed authority for the proposition that reluctance of a witness does not constitute special reasons.

It is suggested that the reluctance of a witness *may* constitute “special reasons in the interests of justice” in the exercise of a magistrate’s discretion based on the following arguments:

1. Where the evidence of the witness is essential to the prosecution case, and a failure to receive that evidence would otherwise lead to the accused being discharged at committal; it can be argued that the reluctance of the witness presents a “...real possibility that if the alleged victim is subject to cross-examination the defendant will not be committed, that may in particular

circumstances afford special reasons...” – see *B v Gould* (1993) 67 A Crim R 297 at 303.

2. If the reluctance includes giving a different version of events; this will constitute special reasons – see *B v Gould* (1993) 6 A Crim R 297 at 303-304.
3. It should be noted that two different attitudes to giving evidence without more does not constitute a “different version of events”.
4. The unwillingness of the DPP to clarify the apparent reluctance of the alleged victim by way of a request for further and better particulars on this issue may bring the matter within this grounds of “special reasons”; relying on *R v Kennedy* (1997) 94 A Crim R 341 and *Faltas v McDermid* NSW Supreme Ct 30/7/93 unrep. Allen J.
5. The need to secure relevant testimony has been held to be in “the interests of justice” – see Mason P. in *Witness v Marsden* (2000) 49 NSWLR 429 at [3]. It should be noted that this authority does not concern committals legislation. The question therefore becomes one of whether there are “special reasons” or not. The foregoing authority should be relied upon in conjunction with *O’Hare v DPP* [2000] NSWSC 430 at [52] wherein “special reasons” are said to include matters that are; not common or usual, out of the ordinary, clearly distinguishable from the ordinary run of cases, that there will be a real risk of an unfair trial.
6. It is suggested that one of the basic tenets of a fair trial is that the accused know in advance the case which he or she must meet; and the content of the prosecution evidence to be presented at trial. It is suggested that it would be unfair to commit the accused for trial without clarification of the apparent reluctance of the witness. Support can be found in the High Court decision of *Barton v The Queen* (1980) 147 CLR 75 where Gibbs ACJ and Mason J in their joint judgment at 99 state:

“...the principal purpose of that examination [i.e. oral evidence at committal] is to ensure that the accused will not be brought to trial unless a prima facie case is shown or there is sufficient evidence to warrant his being put on trial....For this reason, apart from any other, committal proceedings constitute an important element in the protection which the criminal process gives to an accused person.”

Stephen J in the same decision at 105 spoke of cross examination at committal as:

“...the opportunity of gaining a relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of the testing that evidence by cross examination”.

It should be noted that this authority pre-dates committals legislation requiring “special” or “substantial” reasons to require the attendance of a witness at committal. However, as stated by Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 at 167; “The modern procedure of service upon the defendant of statements of prosecution witnesses has not, in my view, diminished the force of Stephen J’s remarks.”

Tactically, it may be wise to firstly seek further and better particulars by way of a further statement to clarify the issue. If the DPP are not forthcoming you can then argue that the matter is within ground 4 above.

If further statement is not obtained it may be worth considering making a limited application to cross examine the witness only on the question of whether they intend to give evidence at any trial. This would put viva voce evidence before the magistrate of the reluctance of the witness and make for a strong submission at section 64. Such a decision should, however, be carefully evaluated on a case by case basis as there is always the risk that a successful application of this nature may serve to embolden a previously reluctant witness.

Another avenue is to simply seek the agreement of the DPP advocate and have the s.91 order made by consent pursuant to s.91(2). This takes the matter out of the hands of the presiding magistrate. Reminding the DPP advocate of the work and public expense in preparing for a trial that never proceeds can sometimes help persuade them on this issue.

**Special Reasons – Not Established By Two Different Attitudes to Giving Evidence, Nor By Delay.**

A case that deals with this issue is *KT v DPP* [2009] NSWSC 1126

In that matter, the complainant alleged that she was sexually assaulted in August 1995 when aged 15 years. She made a statement to the police at that time about what had allegedly happened, but said that she did not wish to give evidence at court.

In March 1997, the complainant approached police and made a further statement indicating that she now wished to give evidence for the prosecution.

The DPP consented to the defence application that the complainant give evidence at committal. Note that [this was prior to the prohibition against child sex offence complainants giving evidence at committal now found in s.91(8)].

The complainant gave evidence at committal in December 1997, but did not complete that evidence. The matter was adjourned part-heard. On a subsequent occasion the complainant did not attend court and the accused was discharged.

In November 2007 the complainant was interviewed by police and indicated that she wished to give evidence against the accused. The proceedings were re-instituted. The DPP resisted an application that the complainant give evidence in the fresh committal proceedings. The magistrate declined the accused's application at s.93; an application based in part on the issue of delay, and the differing attitudes to giving evidence.

Kirby J held that it was open to the Magistrate to make this determination and no error had been demonstrated.

**Special Reasons? – The Competence of the Witness?**

A question as to the competence of a witness to give evidence is not, of itself, a “special reason”, according to the following authority:

***V v McDonald* NSW Supreme Ct 23/12/94 unrep Barr AJ BC9403475**

This case involved an allegation of child sexual assault where the alleged victim was four years old both at the time of making the statement to police and at the time the matter came to be considered by the Supreme Court.

Barr AJ at 15-16 stated:

“The plaintiff argued that the very age of the plaintiff (sic), in the context of the need for him to understand the difference between the truth and a lie and to be able to give a rational account, was a special reason why he should be required to attend for cross-examination. I do not think that the magistrate was incorrect in coming to the view that the age of the child in those circumstances was not a special reason....”

The above authority must now be read subject to the provisions of *Criminal Procedure Act* s.91(8). Under the current legislative regime, as an alleged victim of a child sexual assault offence, the complainant in this matter would not be able to be called to give evidence at committal. The authority is still of some relevance, however, on the general question of whether competence is an issue going to establish “special reasons”.

It is well established in the various authorities, that a real prospect of discharge at committal constitutes “special reasons”. Studdert J in *B v Gould* (1993) 67 A Crim R 297 makes this clear in the foundational NSW authority, and has been affirmed on a number of occasions. It is the author’s view that notwithstanding this authority, where a lack of competence in a critical witness gives rise to a real prospect of discharge, then the above authority can be distinguished.

**7. SO WHAT IS AN “OFFENCE INVOLVING VIOLENCE”?**

This term (“offence involving violence”), which appears in *Criminal Procedure Act* s.93, requires that alleged victims of such offences are not to be called at committal pursuant to a contested application under section 91 unless there are “special reasons”, as opposed to merely “substantial reasons” in the interests of justice as to why the witness should be called.

As a defence lawyer you need to determine whether you are seeking the alleged victim on the grounds of either “special” or “substantial” reasons. In order to ascertain this, you will need to examine whether the offence charged comes within the definition of an “offence involving violence”.

Special reasons are often harder to establish than substantial reasons. The definition therefore assumes some importance.

Section 94 of the *Criminal Procedure Act* 1986 (NSW) defines “offence involving violence” as follows:

**94 Meaning of “offence involving violence”**

- (1) The following offences are **offences involving violence** for the purposes of section 93:
- (a) *a prescribed sexual offence,*
  - (b) *an offence under sections 27–30 of the Crimes Act 1900 (attempts to murder),*
  - (c) *an offence under section 33 of the Crimes Act 1900 (wounding etc with intent to do grievous bodily harm or resist arrest),*
  - (d) *an offence under section 35 (b) of the Crimes Act 1900 (infliction of grievous bodily harm),*
  - (e) *an offence under sections 86–91 of the Crimes Act 1900 (abduction or kidnapping),*
  - (f) *an offence under sections 94–98 of the Crimes Act 1900 (robbery),*
  - (f1) *an offence the elements of which include the commission of, or an intention to commit, an offence referred to in any of the above paragraphs,*
  - (g) *an offence that, at the time it was committed, was an offence involving violence for the purposes of section 93,*
  - (h) *any other offence that involves an act of actual or threatened violence that is prescribed by the regulations for the purposes of this section.*
- (2) *An offence that may be dealt with summarily under Chapter 5 is not an offence involving violence for the purposes of section 93.*

**Be careful in analysing the definition.**

Not all offences which on their face appear to be “offences involving violence” fall within the definition. Examples of matters which fall outside the definition, include the following:

1. Crimes Act s.33A(1)(a) – Discharge Loaded Firearm With Intent to Cause Grievous Bodily Har4
2. Crimes Act s.33B – Use Weapon to Prevent Apprehension
3. Crimes Act s.35(4) - Reckless Wounding
4. Crimes Act s.37 – Attempt to Choke, Garroting etc
5. Crimes Act s.59 – AOABH (if the DPP elects)
6. Crimes Act s.60 – Assaults on Police (if the DPP elects)
7. Crimes Act s.110 – Break Enter + Assault with Intent Murder
8. Aggravated Break Enter (Intentionally inflict actual bodily harm)
9. Aggravated Break Enter (use corporal violence)
10. Special Aggravated Break Enter (Intentionally inflict GBH / Wound)

Note that the “Regulations” referred to in s.94(1)(h) have never (to date at least) made any provision for adding further to the definition.

As can be seen from the above, many of the “bread and butter” type matters of violence which are the day to day reality of criminal defence practice are outside the definition. Matters which one would expect to be there have simply been left out.

Curiously, an offence under Crimes Act s.35(b) (infliction of grievous bodily harm) satisfies the definition of an “offence involving violence” by virtue of section 94(1)(d) [save for the fact that “s.35(b)” no longer exists and has been replaced by s.35(2)], and yet is excluded from the definition by virtue of section 94(2) as it is a matter that may be dealt with summarily under Chapter 5 of the Criminal Procedure Act.

The definition contained in s.94 is in a sorry state of disrepair. It was poorly drafted in the first place. It has remained poorly drafted ever since. Amendments to other legislation have failed to consider relevant consequential amendments to s.94.

As a defence practitioner, you should grab the forensic advantage presented by this poor drafting.

## **8. DPP CONSENT TO SECTION 91.**

Section 91(1) empowers a magistrate to order that a witness be required to attend to give evidence at committal.

It is important to note that the wording of the Section 91(2) requires that the Magistrate must give the direction if the parties agree to the direction being given.

The DPP may not oppose your application. Indeed, they may consent to the application you are making, in effect making it a joint application. Intelligent DPP solicitors who have read the brief will realise when you have a good basis for a grant under s.91 and will be prepared to save court time by conceding that your application has merit. This can either wholly or substantially narrow the matters in contest at the section 91 application. It is worth ringing your DPP opponent in advance to discuss the issues, to see what is being conceded.

The appropriate form to record applications by consent was previously Form 1 attached to Local Court Practice Note 9/2003. Curiously, this Practice Note has been abolished, and yet the form remains in use. You can obtain the form by clicking on this hyperlink below:

[http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/localcourts/m40155115/practicenote9-2003attach.pdf](http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/localcourts/m40155115/practicenote9-2003attach.pdf)

Read before you sign!! Make sure that the basis that you are seeking s.91 is the same as what is on the form – otherwise you may find your cross-examination unexpectedly limited when you get to the day of committal. Be sure you keep a copy of what is handed up for your file.

## **9. NO MAGISTRATE’S DISCRETION AT SECTION 91**

The decision in *O’Hare v DPP* [2000] NSWSC 430 makes it plain that there is no residual discretion permitting a magistrate from making an order under Section 91.

Once the grounds for substantial reasons or special reasons have been established, the order for the attendance of the witness must be made.

***O'Hare v DPP* [2000] NSWSC 430**

O'Keefe J at para [17] states:

“...there is no residual discretion created by the section. When special reasons are shown why in the interests of justice an order should be made for the attendance of a witness then the justice is obliged to make an appropriate order.”

**10. MAGISTRATE'S DISCRETION AT SECTION 93**

It is important to note at in respect of a section 93 application, it is insufficient that the parties to the proceedings agree upon the existence of “special reasons”. Whilst this, of itself may influence a magistrate's thinking, ultimately the magistrate (and not merely the parties) must be satisfied that there are “special reasons” in the interests of justice. This is made so by the important difference in the wording of section 93(1) which reads as follows (emphasis added):

*(1) Despite section 91 (other than subsection (8) of that section), in any committal proceedings in which the accused person is charged with an offence involving violence, **the Magistrate may not, under that section, direct the attendance of an alleged victim of the offence who made a written statement (even if the parties to the proceedings consent to the attendance) unless the Magistrate is satisfied that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence.***

**11. SECTION 91, 93 AND RES JUDICATA**

“There is no res judicata”. So stated Bray CJ in *R v Gun; ex parte Stephenson* (1977) SASR 165 at 166 when discussing a similar provision to s.91 in the equivalent South Australian committals legislation. Res judicata basically means that once an issue has been litigated and decided between the parties, the decision is final. “No res judicata” means, in other words, an initial determination as to the granting of an application under s.91 can, in principle, be revisited at a later stage in the committal proceedings.

However, in the NSW context this authority must be read subject to s.91(3) and s.92. Section 91(3) prohibits a magistrate making a direction for a witness to attend and give oral evidence at committal if the statement has already been admitted in evidence in the committal proceedings.

Further, section 92 requires that an application under section 91 can only be made if the accused has served on the prosecutor the notice requiring the attendance of the witness being sought. The section states that the last date for service of such notice must be at least 14 days before the time set by the Magistrate for the taking of prosecution evidence in the matter (see s.92(3)).

There is still some limited value to be gleaned from this principle in that if you think of something extra after your initially unsuccessful section 91 application, and that

something is going to make a difference on a subsequent application, then you are not prohibited from making that subsequent application, so long as you make it before the subject witness has their statement tendered in the committal proceedings proper and no later than 14 days prior to the commencement of the taking of evidence. Re-list the matter as fast as you can and put the court and the DPP on notice.

## **12. LIMITING THE ORIGINAL GRANT OF APPLICATION TO CROSS EXAMINE UNDER SECTIONS 91 & 93.**

In making a finding of special or substantial reasons under ss.91 or 93, a magistrate is entitled to limit the areas in which cross-examination will be permitted. That this is so is clear from the wording of s.91(7) of the Criminal Procedure Act.

Section 91(7) of the Criminal Procedure Act 1986 (NSW) clearly implies that magistrates can and should make only limited grants of applications to cross examine witnesses. The legislative predecessor of this sub-section (i.e. Justices Act s.41(10)) was the subject of comment in *DPP v Losurdo* (1998) 103 A Crim R 189. [Note also that Justices Act s.41(9) is the predecessor of Criminal Procedure Act s.69].

### ***DPP v Losurdo* (1998) 103 A Crim R 189**

The Court (Priestley and Handley JA, Sheppard AJA) in discussing ss.41(9) and (10) stated (at p.203):

“These provisions emphasise the legislature’s intention to limit cross examination in committal proceedings. The two subsections are designed to bring home to magistrates and those who practice before them the fact that the new legislation has wrought substantial changes which should have the effect of reducing the time occupied by committal proceedings notwithstanding that some cross-examination is allowed. Even where the cross-examination is relevant to matters taken into account by the magistrate as the reason why cross-examination should be allowed, the cross-examination need not be exhaustive. Once it has served its purpose it should come to an end. Magistrates should be astute to exercise the discretion they have to bring that about in appropriate cases.”

Applications under section 91 are often given an enhanced prospect of success if it is made clear that the defence wishes to cross examine the witness only in respect of a specific area of their evidence. Applications on specified limited grounds are supported not only by the wording of s.91(7), but also by the decision in *Faltas v McDermid* NSW Supreme Ct 30/7/93 unrep Allen J.

### ***Faltas v McDermid* NSW Supreme Ct 30/7/93 unrep Allen J**

The facts of this matter were that the accused was charged with a number of counts of sexual intercourse without consent. The alleged victim was his fiancé and the alleged offences were said to have taken place over a period of time during which the parties were engaged. The accused had in his possession a number of love letters which he contended had been written by the complainant during the period of time in which it

was alleged that the offences had occurred. It was contended on behalf of the accused that special reasons could be found in his need to cross examine the complainant to ascertain whether she admitted authorship of the letters, and if so what explanation she may proffer as to their content (given their apparent amorous content). At the Local Court level, there had apparently been a lack of co-operation between the prosecution and defence legal representatives.

The Magistrate did not find special reasons. Allen J declined to find that the magistrate had erred in so doing. Having reached this decision, Allen J went on to make the following obiter remarks at 8:

“For my part, I would consider it wholly proper, for example, for a Magistrate to take into account an undertaking proffered on behalf of the accused that the alleged victim would be cross-examined in respect only of a particular matter.”

### **13. EXPANDING THE ORIGINAL GRANT OF APPLICATION TO CROSS EXAMINE UNDER SECTIONS 91& 93.**

#### **Section 91(7) of the Criminal Procedure Act 1986 (NSW)**

This sub-section states in essence that the Magistrate must not allow cross-examination of a witness on matters which were not the basis upon which the witness was ordered to attend to give evidence unless there are “...substantial reasons why, in the interests of justice...”

It would seem, therefore that once the witness is in the box at committal, if something unexpected is forthcoming which warrants further exploration by the defence, the areas permissible in cross examination can be expanded on the basis of substantial reasons, even if the witness is an alleged victim of an “offence involving violence” and was only ordered to attend to give evidence on the basis of “special reasons”.

Hence, it may be easier to expand the basis for cross-examination once the witness is in the witness box and has given some evidence.

### **14. NO DISCRETIONARY EXCLUSION AT COMMITTAL**

It is important for defence practitioners to be aware of the provisions of section 70 of the Criminal Procedure Act 1986 (NSW). The section reads as follows:

*70 A Magistrate in committal proceedings may not exclude evidence on any of the grounds set out in section 90 (Discretion to exclude admissions) or Part 3.11 (Discretion to exclude evidence) of the Evidence Act 1995.*

Part 3.11 is of course constituted by sections 135 – 139 inclusive of the Evidence Act.

## 15. TACTICS AT COMMITTAL

### What about the rule in *Browne v Dunn*?

The rule in *Browne v Dunn* is not applicable in committal proceedings. The proceedings are an administrative inquiry, and are not judicial proceedings (even though they are of a judicial nature).

The essence of the rule in *Browne v Dunn* is that witnesses should have put to them the basis upon which their evidence is to be contradicted such that they have an opportunity to answer that contradiction. This rule is said to have procedural fairness as its basis. It has the practical effect, in a summary defended matter or trial on indictment, of putting the prosecution on notice as to the nature of the defence case.

The difficulty in observing *Browne v Dunn* at committal proceedings is that you telegraph to the prosecution the nature of the defence case and / or the evidence that the accused would rely upon at trial. This hands to the prosecution the tactical advantage of having time (perhaps several months) to prepare in anticipation of such evidence, perhaps to the extent of sending out the police to find more evidence to refute whatever it is your client has given to you by way of instructions.

### Not Disclosing the Defence Case

The manner in which many experienced advocates deal with the above issue, is that they simply do not observe *Browne v Dunn* at committal proceedings. This has the advantage of eliciting evidence from prosecution witnesses without giving anything away to the prosecution as to what they might expect from the defence at any subsequent trial.

In doing this you can maintain the tactical advantage of surprise (or at least an element of surprise). Surprise can make a prosecutor's job harder.

### Instructions Sometimes Change

The other difficulty with observing *Browne v Dunn* at committal is that defence practitioners must be mindful of the fact that, regrettably, instructions sometimes change. Transcripts of what is said at committal are not necessarily to the sole advantage of the defence at the time of any subsequent trial. A poorly conducted committal can deliver a real advantage to the prosecution. One of the very worst examples of this is when the client changes some aspect of their instructions between committal and trial.

Assume your questions at committal have disclosed significant detail in the defence case. Some months later at trial, your client is under cross-examination. It becomes apparent that some of the detail in the instructions has changed. You should expect a competent prosecutor to conduct a cross-examination of your client in a fashion similar to the following:

- Why did your lawyer ask that question at committal?
- You were there at the committal. Did you tell your lawyer that question was wrong?

- Why didn't you tell your lawyer that question was wrong?
- Did you tell your lawyer not to pursue that line of questioning?
- Why didn't you tell your lawyer not to ask questions along those lines?
- Did you tell your lawyer anything to encourage them or make them ask that question?
- So do you tell this court that at no time did you give your lawyer instructions that in effect said.....?
- So your lawyer just made up those questions?
- With no help at all from you?
- And you did nothing to stop him / her ?

This type of cross-examination can be devastating to the credit of your client. Just as defence practitioners throw the committal transcript of evidence back in the faces of prosecutions witnesses, there is no reason why the Crown can't do the same to an accused at trial on the basis of questions that were put on his or her behalf by the legal representative at committal. Claiming client legal privilege may be of little practical benefit. If the same lawyers that had carriage of the matter at committal also have carriage at trial, the ethical issues may present considerable discomfort.

Not observing the rule in *Browne v Dunn* at committal will contribute significantly to avoiding at least some of the difficulties that such a change in instructions may give rise to.

### **But what if you have your “colours nailed to the mast” anyway?**

What about *Browne v Dunn* when the central issue or issues are clearly defined?

An example might be in the case of a sexual assault with no corroborating witnesses. Your client has given an electronically recorded interview admitting that intercourse took place but saying that it was consensual. You have taken careful instructions in relation to the interview. There are no issues as to its admissibility. Your client adheres to the content of the interview in giving instructions about the matter.

In a case such as this there is perhaps little to lose in observing Browne v Dunn in a minimalist sense, if the alleged victim is required to give evidence and the prosecution may already have the essential outline of the defence case via the content of the interview. Putting the essential features, whilst not revealing anything further of the detail of the defence case may be of little detriment. Further, there may be some unexpected benefit from such cross-examination in evidence being elicited in relation to material not contained in any statement.

It is important however, to bear in mind that every time you observe *Browne v Dunn*, you are “nailing your client's colours to the mast” even further. Remember the perils if instructions should change.

### **Seeking a Discharge at Committal?**

It is important to make an informed and dispassionate decision about what you are trying to achieve in committal proceedings. Are you seeking a discharge at committal, or are you simply preparing for the inevitable trial? The answer to this question must

be arrived at absent judgment being clouded by your bounding enthusiasm for the task at hand. The answer is important as it may well affect the manner in which you conduct the committal.

If you are seeking to have your client discharged at committal, you may well adopt different tactics. You might be slightly more inclined to observe the rule in Browne v Dunn. You may bring out issues which you might otherwise leave as “sleepers” for the trial in the hope of taking the prosecution by surprise at trial (and with no opportunity for the prosecution to fix their problem).

### **Calling Defence Evidence at Committal?**

You may even decide to call defence evidence at committal. This only happens very rarely and is considered a very brave move by a capable and experienced defence practitioner. Regrettably, it is too often done as an act of sheer madness by an ego driven advocate who thinks they are demonstrating to their fellow practitioners how wise and brave they are. The decision, if ever taken, should NEVER be taken lightly. Even very experienced advocates will often seek several “second opinions” from other experienced advocates before they take this step. Should you be contemplating such a course, the seeking of such further opinions from experienced colleagues is both extremely wise and highly recommended.

The problem with calling evidence at committal is that if you don't get discharged (or you do get discharged but are made the subject of an ex-officio indictment), then you have, together with the willing assistance of the DPP solicitor at committal, created a transcript of the defence case in advance of the trial. Crown prosecutors and investigating police will thank you for the opportunity of allowing better preparation and perhaps even further investigation ahead of the trial. The transcript thus created will be thrown back in the faces of the defence witnesses whenever an inconsistency arises in their later evidence at trial.

In considering the above, it is therefore of great importance to assess the reputation or your experience with the presiding magistrate. Do they have a doubt? Are they prepared to make a brave decision? Are they likely to fully understand the law and their role at Criminal Procedure Act s.64? Unless the answer to all three of the preceding questions is “Yes” then you are in extremely dangerous waters no matter what the merits of your case may be.

Practitioners should consider whether they have a “guaranteed win” before making this decision. Calling defence evidence at committal is extremely dangerous. Unless you are certain of what you are doing, then don't do it. It is suggested that it is wise to talk to a number of experienced colleagues first, no matter how extensive your own experience.

### **Creating a Transcript for the Trial Advocate**

One of the greatest advantages from a defence tactical perspective is that the defence can create a transcript at the committal in readiness for the trial.

At trial prosecution witnesses will often have a different recollection of events. Inconsistencies will be thrown back at them from the committal transcript, severely impeaching their credit in front of a jury.

Similarly, prosecution witnesses can be tied down to the details of a version of events or surrounding circumstances. They look bad when these seemingly inconsequential matters change when they give evidence for a second time at trial.

Another benefit of a good transcript is that the trial advocate may know the answers to risky questions because they have been asked at committal. Again, caution must be exercised here in not conveying something about the defence case to the prosecution, or inadvertently causing a significant strengthening the prosecution case.

Defence advocates at committal can thus make an extremely important contribution in that a well-run committal with a good transcript often represents the cornerstone of a subsequently successful trial. The committal advocate can rightly share substantially in the credit for any subsequent verdict of Not Guilty.

## 16. TERMINATING CROSS-EXAMINATION

It is important for defence practitioners to note that the magistrate has the power under Criminal Procedure Act s.69 to terminate examination or cross examination of any witness where to allow further questioning would not assist the magistrate in forming the opinions in Criminal Procedure Act ss.62, and 64. Cross examination should be framed carefully so as to avoid such an occurrence. Always be ready with an answer to the question from the bench: “How does this help me at section 62 or section 64?”

The language of ss.62 and 64 must however be read in light of the decision in *R.O. v DPP* NSWSC 20 Sept 1999 unrep. Dowd J. For reasons that remain unclear, this decision has never found its way into any volume of reported cases, nor is it to be found on the internet. It is therefore a little known decision. As such, it is wise to attend court armed with 3 copies of the decision when conducting a contested committal, in the event that the relevant issue should arise and you seek to rely on it. (Copies of the judgment in *R. O. v DPP* can be obtained from either Richard Leary of the Legal Aid Commission, the author of this paper, the LAC Library, or the Supreme Court library, the last of whom will no doubt charge you for the privilege).

### ***R.O. v DPP* 20 Sept. 1999 NSWSC Common Law Division, unrep. Dowd J**

It should be noted that this decision dealt with Justices Act s.41(9) [now see Criminal Procedure Act s.69] as well as Justices Act ss.41(2) and 41(6) [now see Criminal Procedure Act ss.62 and 64 respectively].

In this decision Dowd J in effect said that s.69 must now be read subject to the range of decided cases on s.91. At 4-5 Dowd J stated:

“In short, the regime of the Evidence Act 1995 and the acknowledgement of this court in a number of decisions of the proper place of cross-examination at committal proceedings, now makes the wording of s.41(9) difficult to read in the context of the wider cross-examination which may be permitted by s.48E.

That is not to say s.41(9) can be disregarded, as there must be limit on the extent to which cross-examination can occur if there appears to be no forensic purpose. However, it is clear that section cannot be used by a magistrate to confine the cross-examination at the committal proceedings, whether under s.48E or otherwise, to simply restrict to the determination of issues under s.41(2) and s.41(6) of the Justices Act....”

“...Section 41(9) of the Justices Act in my view, whether there be restrictions imposed on a s48E grant or not, must be used if there is an abuse of that s.48E power, but cannot be used as the learned magistrate did, simply to restrict cross examination to the purposes of s.41(2) and s.41(6) of the Act.”

## **17. AT THE END OF THE PROSECUTION CASE**

### **– CRIMINAL PROCEDURE ACT ss. 62, 63, 64, 65 and 66.**

#### **Section 62 – Prosecution Evidence and Initial Determination**

This section of the Criminal Procedure Act requires the magistrate to consider whether the “prosecution evidence is capable of satisfying a jury”, properly instructed, beyond reasonable doubt that the accused has committed an “indictable offence”.

Note that the words “evidence capable of satisfying a jury” are taken directly from the decision in *Wentworth v Rogers* [1984] 2 NSWLR 422.

#### ***Wentworth v Rogers* [1984] 2 NSWLR 422**

In this decision, the NSW Court of Appeal dealt with an earlier form of Section 62 [under the former Justices Act s.41(2)], which required the magistrate to determine whether there was “a prima facie case”. In reference to the relevant test at prima facie, Glass JA stated at p.429:

“Another formulation of the question is whether the evidence adduced by the prosecution is capable of producing satisfaction beyond reasonable doubt in the minds of a reasonable jury.”

It can be seen from the passage above that the term “evidence capable of satisfying a jury beyond reasonable doubt” as now contained within Section 62, and the term “prima facie case” are conceptual equivalents. In considering the test at s.62 a magistrate is therefore guided by the principles relating to a prima facie case as outlined in the first limb of *May v O’Sullivan* (1955) 92 CLR 654 at 658. This essentially involves taking the prosecution case at its highest, with the full weight of the evidence accorded to the favour of the prosecution, and no weight given to issues of credit etc. which are favourable to the defence.

Magistrates will typically ask the legal representative for the accused whether they “wish to address at section 62”. This question is generally asked even when it is abundantly clear that the prosecution case will satisfy the test. For this reason, often the invitation to address at section 62 is politely declined.

If there is evidence capable of satisfying a jury, the Magistrate will then move on to deal with section 63. If not, then the accused will be discharged in accordance with section 62(2).

### **Section 63 – Where Prosecution Evidence Sufficient to Satisfy a Jury**

Section 63 provides the accused with an opportunity to answer the charge. This may take the form of an unsworn statement, to give evidence if they wish, and also to call any witnesses that they wish to call on their behalf. It is something that the magistrate should take into account in determining the proceedings at s.64. A transcript can be taken of any such statement and used in evidence at any subsequent trial.

Any statement (whether or not under oath) at this stage of proceedings is likely to be given much less weight than sworn evidence that was subject to cross examination. Such a statement may also unnecessarily reveal details of the defence case in advance of trial. The accused may unwittingly tie him or herself down to a detailed version of events.

It is generally considered unwise for the accused to make any statement or call any evidence at Section 63.

Prior to the taking of any statement or the calling of any evidence from or by the accused, the Magistrate is required to give a warning to the accused. Section 63(1) requires the warning must be in the form prescribed by the Local Court Rules 2009 (NSW). The relevant rule is to be found in Local Court Rule 3.3, and is extracted below:

#### **3.3 Warning where prosecution evidence sufficient to satisfy jury**

*For the purposes of section 63 (1) of the 1986 Act, the warning given by a Magistrate is to be in the following form:*

*“Before you say anything in answer to the charge, you should know that you do not have to say anything unless you want to. However, if you do say something, it may be recorded and used against you at your trial.*

*You should understand that, if a promise of favourable treatment has been made to you if you make admissions as to your guilt, that promise cannot be relied on. Similarly, you have nothing to fear from any threat that may have been made to you to persuade you to make any admission as to your guilt. However, even if you have received any such threat or promise, anything you say now may still be used against you at your trial.*

*Do you want to say anything in answer to the charge? Do you want to give any evidence in relation to the charge? Do you want to call any witnesses on your behalf?”*

Prior to saying words to this effect, the magistrate will have invited the accused to stand at a microphone in the body of the court (usually the “unrepresented” microphone is used). The legal representative is usually invited to “assist” the accused and should (whether invited to or not) stand next to their client. It is often wise to guide the client as to what to say. A simple statement to the effect of “No” to each of the three questions posed at the end of the warning will generally suffice.

For a more detailed discussion as to why the defence generally does not go into evidence at committal, refer to “Tactics at Committal” earlier in this paper, and in particular the subheading “Calling Defence Evidence at Committal?”

### **Section 64 – Decision About Committal**

After dealing with Section 63 the magistrate will then deal with the test laid down at s.64. The defence legal representative will be invited to address the magistrate on this issue. There is no point addressing at s.64 unless your client has a prospect of being discharged at committal.

Section 64 requires a magistrate to commit the accused for trial if there is “a reasonable prospect” that a jury would convict the accused of an indictable offence. If so, the Magistrate will commit the accused for trial in accordance with section 65. Alternatively, if there is no reasonable prospect that a jury would convict the accused of an indictable offence, then the magistrate should discharge the accused in accordance with section 66.

Important principles in relation to the manner in which this test should be applied by a magistrate are to be found in the decided cases. Note that the test found in Criminal Procedure Act s.64 was formerly found in Justices Act s.41(6). The decided cases on Justices Act s.41(6) therefore offer guidance.

### ***Carlin v Thawat Chidkunthod (1985) 20 A Crim R 332***

This case is commonly referred to as *Chid’s Case*.

In this case, O’Brien CJ of the Criminal Division stated at 346:

“...the magistrate must give attention to the weight and acceptability of the evidence in relation to the character of the evidence itself and the credibility of the witnesses who gave it. But he is to do so from the point of view of a reasonable jury...presented with the evidence, and neither more nor less than the evidence, he has heard.”

### ***Allen & Saffron v DPP (1989) 43 A Crim R 1***

In this case the NSW Court of Appeal considered the process of reasoning that the magistrate must adopt when dealing with s.41(6).

Gleeson CJ made the following remarks:

At 3:

“The section, as everyone agrees, calls for an attempt at a prediction. Like Priestly JA, I consider that, in forming an opinion as to whether “a jury would not be likely to convict”, a magistrate may have to go through a process of reasoning which involves to some extent his own assessment of witnesses as a basis for the performance of his exercise in prediction.”

At 6:

“A magistrate is not equipped with any formal information which might assist him or her in forming an opinion about the likelihood of the hypothetical jury taking a particular view of the evidence. It can hardly be intended that the magistrate should apply anecdotal evidence or folklore of the legal profession which supposes how a jury approaches its fact finding role. Accordingly, no magistrate can truly divine the likely reaction of the hypothetical jury. The only intellectual entrails he can examine are his own.”

Later at 6:

“...I find it difficult to see how a magistrate can sensibly do other than make his own examination of the evidence, arrive at his own conclusions, express them in the form required by s.41(6)(a) and attribute to the hypothetical jury, rather than to himself, the negative response for which the paragraph provides. I cannot imagine any other plausible way of proceeding.”

[Note that the above passages deal with a previous form of s.41(6) of the now repealed *Justices Act 1902 (NSW)*, however the authority is still good law for the propositions expressed regarding the magistrate’s own views concerning the correct application of s.64 of the *Criminal Procedure Act 1986 (NSW)*].

Later at 7:

“...the reality is that the magistrate, although formally invoking the statutory formula, will form the required opinion in accordance with the impression which the evidence makes upon his own mind. That is to say it will be, and can only be, his view of the weight of the evidence which will prevail; I take it that, in *Chid* at 349-350, O’Brien CJ of Criminal Division is dealing with the formula which the subsection establishes. That being so, the exercise necessarily involves an wholly subjective assessment of the credibility of witnesses for the prosecution, though the product will be expressed in terms of the statutory formula.”

### **Sections 62 and 64 – Any Indictable Offence**

It is important to recognise that the tests in both Sections 62 and 64 refer to “an indictable offence” and DO NOT refer simply to THE indictable offence. The effect of the language of the sections is to greatly expand the tests that the magistrate is considering. The test at each stage refers not only to the charge or charges before the court considered alone, but to any indictable offence, whether or not presently charged.

The practical consequence of this may be that the accused is discharged at committal in respect of the offence for which they were charged at the commencement of the proceedings, but may be committed for trial in relation to different charges which have been disclosed by the evidence.

Defence practitioners need to consider this principle carefully both during the course of conducting the committal proceedings, and also when addressing at either s.62 or s.64. You may well succeed in achieving discharge at committal in respect of the original charges, only to find that the evidence has presented a strong case in respect of some other charge. A magistrate does not fall into error by committing the accused for trial on an indictable charge that was not before the court during the course of the committal proceedings.

The above matters are borne out by the decision of the High Court of Australia in *Kolalich v DPP* (1991) 173 CLR 222.

### **Discretionary Exclusion of Evidence – does it apply at ss. 62 and 64?**

Section 70 of the Criminal Procedure Act does not allow the magistrate to exclude evidence on discretionary grounds during the course of the committal proceedings.

However, the magistrate is entitled to consider the likelihood of evidence being excluded by the trial judge when considering the tests at ss. 62 and 64. This is supported by the judgment of Hulme J in *Dawson v DPP* [1999] NSWSC 1147 where Hulme J affirms Deane J in *Grassby v R* (1989) 168 CLR 1. Note that whilst the judgment is cast in the language of the former Justices Act provisions, the principle remains good law.

### ***Dawson v DPP* [1999] NSWSC 1147**

Hulme J at para [23] – [24]:

“Sub-sections 41(2) and 41(6) of the Justices Act provides that, in committal proceedings, the magistrate shall form opinions whether the evidence before him or her is capable of satisfying a jury that the defendant has committed an indictable offence and whether there is a reasonable prospect that a jury would convict the defendant. Relevant to those questions is the competence of the witness and it is not open to a magistrate to simply ignore that issue and say it will be looked at by the trial judge. Sub-section 41(8A) precludes a magistrate in a committal proceedings from excluding evidence on the discretionary grounds contained in Part 3.11 of the Evidence Act 1995. Neither that sub-section nor any other provision, precludes a magistrate, in forming the opinions to which I have referred, from taking account of any likelihood – in some cases, perhaps the near certainty – that a trial judge will exercise those discretions so as to exclude evidence. The endorsement by the Court of Appeal in *DPP v Losurdo* (at 15-16) of the remarks of Hidden J (quoted at 7), the Court’s rejection of the argument advanced in reliance on the sub-section 41(8A), and the endorsement of the following remarks of Deane J in *Grassby v R* (1989) 168 CLR 1 makes that clear. Deane J said:

“If, for example, a magistrate were of the view that the only incriminating evidence would clearly be excluded by the trial judge in the exercise of a judicial discretion, he or she would, in my view, necessarily be of the opinion that, having regard to all the evidence before him or her, a jury would not be likely to convict the Defendant of an indictable offence....A magistrate cannot intelligibly address the

question whether a jury would not be likely to convict without deciding, to the best of his or her ability and on the material before him or her, what the evidence before the jury would be.”

“Deane J’s remarks were made in the context of the Justices Act as it stood prior to the amendments made in 1996 coming into force but, with proper allowance for the current form of the tests to be applied by magistrates under sub-sections 41(2) and (8), His Honour’s remarks are still applicable.”

## 18. WRITTEN SUBMISSIONS AT SECTIONS 91 AND 93

Magistrates will typically ask or expect that contested applications under ss. 91 or 93 be submitted in writing. This will save court time (but increase your desk time). It also means that the basis of the application will be recorded and placed on the court’s papers. Often the magistrate who hears the section 91 application will not be the one who presides at the committal itself. A written record of the application assists in leaving at least some record as to the basis of the grant under section 91.

Practitioners should be mindful of the need to be thorough in their written submissions such that can be no mistake as to the basis upon which the application is made. Practitioners have an obligation to assist the court in this regard. Practitioners should note the criticisms made of poor written submissions at first instance found in *McKirdy v McCosker* (2002) 127 A Crim R 217 at paras [29], [30] and [32].

Applications which are agreed between the parties can be recorded in writing using the standard form. It is available on the following link:

[http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/localcourts/m40155115/practicenote9-2003attach.pdf](http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/localcourts/m40155115/practicenote9-2003attach.pdf)

There is nothing prescribed as to the manner in which such contested applications must be written. There is a suggested format annexed to this paper.

## 19. A WORD ABOUT PAPER COMMITTALS

The focus of this paper is on contested committal hearings. However, there are a number of committal proceedings where witnesses are not called but where submissions are made by defence counsel in relation to the tests set out in section 62 and section 64. For this reason, brief mention will be made of this procedure.

You may consider a paper committal with submissions in situations such as:

- When the brief does not establish the offence charged as a matter of law.
- When important statements are inadmissible (for example, statements not served pursuant to s 177 *Evidence Act*)
- Where there are technical defects in relation to the evidence sought to be adduced by the prosecution.

In such matters, the brief of evidence is tendered (subject to any objections you may have about statements contained within it) and you then address on the evidence. If the application is made pursuant to section 62, technically the prosecutor addresses first, as the prosecution have to establish a prima facie case. Whether your application is made under section 62 or 64, the Magistrate will hear your submissions and those of the prosecutor.

Several of the issues detailed in this paper (such as the decision to commit on any indictable offence) are relevant to the procedure when submissions are made following a paper committal and you should be thoroughly familiar with them.

As with all contested committals, there are strategic decisions that need to be made when embarking on this procedure.

## **20. WAIVER OF COMMITTAL FOR TRIAL**

Section 68 of the Criminal Procedure Act 1986 (NSW) permits an accused person to waive a committal proceedings and apply to have the magistrate commit them for trial. Note that the prosecutor must consent.

It is also important to note that section 68 DOES NOT permit waiver of committal for matters being committed for sentence.

The Local Court website provides a relevant form that can be filled out making formal application for waiver of committal for trial. The form can be found by following the link below:

[http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/localcourts/m40155115/forms\\_procedure\\_applicationtowaivecommittal.pdf](http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/localcourts/m40155115/forms_procedure_applicationtowaivecommittal.pdf)

Section 289 of the *Criminal Procedure Act* permits statements tendered at committal to be tendered at trial in certain limited circumstances. In the event that the accused has waived committal, then there have been no committal proceedings. That being the case, the Crown is unable to utilise the provisions of section 289 in a manner detrimental to an accused at trial. This issue is borne out by the obiter remarks of Simpson J in *Vickers v R* [2006] NSWCCA 60 at [96]-[99] (James J concurring at [12]).

In order to overcome the provisions of section 289 of the Criminal procedure Act and the effect of the decision in *Vickers v R* [2006] NSWCCA 60, the DPP will in practice not consent to waiver of committal for trial unless the defence also consents to the tendering of the brief immediately prior to waiver.

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## 21. ACKNOWLEDGEMENTS

The paper was first published in 2001 and is now in its fifth edition. Many colleagues have assisted in the review and updating of various editions over the years.

With respect to the 2012 Edition, I would particularly like to thank Stephen Lawrence and Silas Morrison from the Western Zone of the ALS for their considerable assistance.

All errors and omissions remain the sole responsibility of the author.

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I am happy to answer any questions concerning the content of this paper if you are having difficulties. I am best caught on my mobile – **0408 277 374**. Alternatively, feel free to email me, as I will nearly always get back to you within 24 hours. My email address is:

[dark.menace@forbeschambers.com.au](mailto:dark.menace@forbeschambers.com.au)

**Mark Dennis**  
**Forbes Chambers**

IN THE LOCAL COURT  
AT GLENROWAN

**DIRECTOR OF PUBLIC PROSECUTIONS (NSW)**

v

**EDWARD KELLY**

**Charged with: Robbery**

**Applications under Criminal Procedure Act Sections 91 and 93 to Require  
Witnesses to Attend and Give Evidence at Committal**

For the purposes of this application only, the accused has no objection to the tendering of the brief of evidence as served on the accused.

The accused reserves his defence. Everything remains in issue.

**Application under s.93 for Noah Idea**

Idea is the alleged victim in the matter. He alleges that he was walking in Glenrowan Street when robbed by an unknown assailant. He attends Glenrowan police station immediately after the incident to report his wallet stolen. He provides a statement to Detective Headlock. He provides a description of his assailant as “short, about 150cm tall, stocky, brown hair, looked a bit Indian, had a moustache.”

The next day, Idea is shown an array of photographs. He selects the accused, recording in his second statement that “this is the one that most resembles my attacker.”

It is noted for the information of the court that the accused is of Malaysian background, as noted on the custody management records.

It is submitted that the identification evidence of the alleged victim is in issue and that therefore “special reasons” are established such as to require the attendance of the alleged victim to give evidence at committal. Reliance is placed on *B v Gould* (1993) 67 A Crim R 297 at 303. Additionally, the accused relies on Wells J in *R v Gun, ex parte Stephenson* (1977) 17 SASR 165 at 187-188 in that the accused wishes to cross examine the alleged victim as to identification at this early stage and prior to the alleged victim convincing himself, in hindsight that the identification made to police is correct.

**Applications under Criminal Procedure Act s.91 for Witnesses to Attend and Give Evidence at Committal**

The accused makes application under s.91 for the attendance at committal of Fairlie Unreliable, Detective Headlock, and Doctor Witchcraft.

**Fairlie Unreliable**

Fairlie Unreliable is an eyewitness to the alleged robbery. She attends Glenrowan police station the next day and provides a statement. She states that she is shown a single photograph (of the accused) by Detective Headlock who says to her “This would be the bloke you saw wouldn’t it?” Unreliable then proceeds to identify the accused.

It is apparent from the statement of Detective Headlock that at the time of speaking with Fairlie Unreliable the accused is in police custody. He is not offered the opportunity of an identification parade. Nor is Fairlie Unreliable shown any array of photographs.

It is submitted that the identification evidence of Fairlie Unreliable is made contrary to the provisions Section 114 of the Evidence Act and is therefore inadmissible. It is submitted that such exclusion would give the accused a real prospect of discharge at committal. It is submitted that such prospects establish special reasons and is certainly sufficient to constitute substantial reasons under Section 91 – see Studdert J in *Hanna v Kearney* [1998] NSWSC 227.

Even if a trial judge established some initial basis for the admission of such evidence, it is submitted that the trial judge would exclude such evidence in the exercise of his or her discretion as the circumstances for the identification are such that it was unlawfully or improperly obtained. Further the prejudicial effect of the evidence clearly outweighs its probative value. Substantial reasons are found in the need to cross examine the witness with an eye to discretionary exclusion by a trial judge: see Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 at p.167 as affirmed on appeal in *DPP v Losurdo* (1998) 103 A Crim R 189.

Even if the evidence were not to be excluded at trial, cross-examination of Fairlie Unreliable would substantially undermine the credibility of her identification evidence (and may influence the formulation of the warning given to the jury regarding her evidence pursuant to Evidence Act s.116). That cross-examination is likely to substantially undermine her credit is of itself sufficient to constitute substantial reasons: see *Hanna v Kearney* [1998] NSWSC 227.

It is further submitted that cross examination of Fairlie Unreliable, when taken together with the evidence and cross examination of other witnesses may demonstrate grounds for a no-bill application and thus substantial reasons should be found: see *Hanna v Kearney* (supra) at pp.6-7.

**Detective Headlock**

Headlock makes no reference in his statement to failing to show an array of photographs to Fairlie Unreliable. Headlock is responsible for compiling the array of photographs shown to the alleged victim Noah Idea. It is noted that the array contains only four photographs, and only one person of non-Anglo appearance (the accused) and only one person who is wearing a moustache (again the accused).

It is submitted that substantial reasons are established for Detective Headlock to attend and give evidence at committal. Cross-examination of Headlock will have a substantial bearing on the credibility of Fairlie Unreliable as a witness: see *Hanna v Kearney* (supra).

Further, the array of photographs is such that a trial judge may exclude the identification evidence of Noah Idea (assuming that it is held to be otherwise admissible) on discretionary grounds, as it is both improperly obtained (due to the inherent unfairness of the array) and its prejudicial effect outweighs its probative value – see the NSW CCA decision in *Blick* (2000) 111 A Crim R 326. Cross-examination of Headlock with an eye to such discretionary exclusion is sufficient to constitute substantial reasons: See Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 as affirmed in *DPP v Losurdo* (1998) 103 A Crim R 189.

**Doctor Witchcraft**

Doctor Witchcraft sees the alleged victim Noah Idea at Glenrowan General Hospital shortly after Idea finishes giving his statement to police. Witchcraft is a psychiatrist.

Witchcraft states that he observed bruising to the victim “of recent origin” and further states that “having administered certain psychometric tests and personality assessments to Mr Idea I have no doubt whatsoever that Mr Idea was robbed in the main street of Glenrowan. Based on a séance and voodoo principles, tests indicate that the perpetrator is highly likely to be of East Asian descent and is probably left handed. The perpetrator would have low self esteem and probably came from a broken home.”

Objection is taken on behalf of the accused to the relevance of these opinions. Further, the accused seeks to cross-examine Doctor Witchcraft to ascertain the exact basis of his expertise and qualifications.

Even if such opinions were held to be relevant and admissible, it is submitted that the accused should have the opportunity of cross-examining Doctor Witchcraft to ascertain an understanding of the basis upon which these opinions have been formed. In that regard the accused relies upon Studdert J in *Hanna v Kearney* (supra).

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Submitted for the information and assistance of the court.

***Dark Menace***

Dark Menace  
Counsel for the Accused