Committals again under the Microscope

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It is not surprising that the use of committal hearings in the processing of indictable criminal cases is again under close scrutiny. The traditional committal hearing was one at which the witnesses for the police case, or at least most of them, appeared at the Magistrate's Court, gave oral evidence, and were cross-examined by the defence. After the evidence, and any submissions made by the parties, the judicial officer decided whether the accused had a case to answer, and if so, committed the person for trial by judge and jury.

During the 1970s and '80s all Australian jurisdictions carried out a variety of investigations into their committal hearing systems. As a result of the adoption of recommendations made by many of those inquiries, the systems have changed dramatically. The modern committal system has become largely a paper shuffling exercise; the statements of witnesses are collected, collated, sent back and forth between the parties and then bundled up for assessment by the Magistrate's Court. But in various ways the right to call witnesses to give oral evidence and to be cross-examined on that evidence has been retained.

The vast majority of Australian committals are now of this paper, or 'hand-up brief', type. In comparison with the system of yesteryear, it might well be argued that what we have now is the 'Claytons' committal system; that is, the committal system you have when you don't really have a committal system. Generally, today's committal is not so much a judicial and forensic exercise as a bureaucratic, procedural and administrative one.

The main impact of the new 'paper' approach has been to save a good deal of time and expense; yet there are still a number of very long, complicated and expensive committal hearings, especially in states such as New South Wales and Victoria. The fact that the great bulk of committals are now paper shuffling exercises—yet there are still some which cause headaches because of their length and expense—has led governments to question very seriously, especially on the grounds of cost-benefit efficiency, whether committal hearings have any future as part of the criminal justice system.

The New South Wales Initiative

This is a bullet which the government of New South Wales has well and truly bitten. In that state there is a legislative proposal effectively to abolish committal proceedings. The Director of Public Prosecutions will make the decision whether to commit for trial, and if so, upon what charges. It will still be possible, however, for certain witnesses to be called to give oral evidence and to be cross-examined in the presence of a magistrate. The function of the magistrate, it seems, will be limited to refereeing the process of examining and cross-examining the witnesses.

There is a great deal of controversy and unhappiness in New South Wales about this proposal. Whatever the outcome might be, it can be suspected that its impact will not be limited to New South Wales because there is likely to be catalytic effect in other states, which will now be looking at their own systems on a first principles basis. My suspicion is that governments in other states have toyed quite seriously with the abolition of committal proceedings but, anticipating significant opposition, have decided against it.

A Personal View

While much of the conference content assumes that committal hearings will be retained in one form or another, the threshold question—stimulated so forcefully by the New South Wales initiative—is whether committal proceedings should be abolished or retained in their present, or some other, form. I am in the retentionist camp. It strikes me that charging a person with an indictable criminal offence is one of the most serious things that can happen to anyone in our society and when the power to do that is in the hands of agencies of the state, I believe that we should tread, as we have in the past, very warily.

It seems to me that a person charged by the police or some other law enforcement agency with an indictable criminal offence (leaving aside for the moment the important question of which offences are, and which should be, indictable) should have the right to go before an independent judicial officer, in an open court, represented by a lawyer and argue that there is an insufficient basis to justify subjecting him to the trauma, and often, expense, of a criminal trial before judge and jury. What precise form that hearing takes is another question which will no doubt be the subject of discussion at this conference.

Clearly, many people who intend to plead not guilty will wish to avoid having a trial at all; and would be very keen to preserve their present entitlement to make a no case submission to a magistrate at a committal hearing. But committal proceedings should be retained for cases of people who wish to plead guilty, and also for those who only make up their minds about plea at a late stage in the criminal process. I do, however, agree with suggestions now being made that additional steps should be taken to identify guilty pleas much earlier than at present. In these cases, a highly streamlined procedure can be used, but I would still be unhappy with the elimination of judicial involvement and leaving the matter entirely to the police and prosecution officials.

The great majority of people charged with criminal offences do eventually plead guilty but many have difficulty making up their minds about plea and do not decide until a fairly late stage in the process. I do not believe that just because, statistically, most people are likely to plead guilty one should deny a committal hearing to a person who has not made up his or her mind about a plea. To my mind, there should be a mechanism in the criminal process between charging and the trial court by means of which a person can get further and better particulars of a case and challenge the case, or at least aspects of it; and this process should be under the control of a judicial officer who should have the power to make the key decisions.

I do not base my case in favour of retaining some form of committal proceedings purely on justice and fairness grounds. It seems that there are also efficiency reasons for doing so. Even if police officers and prosecution officials are skilled and conscientious, the absence of a careful sifting of the material, detailed cross-examination of key witnesses, and independent judicial supervision paves the way for much less efficient, more protracted and perhaps even unnecessary trials; and it is suggested that this is not a one-sided process. I have been told by experienced defence counsel that unnecessary trials have been avoided by the operation of the committal hearing process, at which severe weaknesses in the Crown case have been exposed by cross-examination and other means. Equally, I have been told by experienced Crown Prosecutors that committal hearings often serve the purpose of strengthening the Crown case for the subsequent trial. They say that the committal process is a very important factor in trial preparation and in the efficient conduct of the trial itself.

The AIJA Project on Committals

Apart from the privilege of making a few introductory remarks at this conference, my main reason for being here is to listen to the paper to be delivered by Dr Brereton and Mr Willis and to observe the reactions to it. Dr Brereton and Mr Willis have just completed a major, national study of committal hearings in Australia on behalf of the Australian Institute of Judicial Administration (AIJA). The conclusion of their work on this study is another reason why this conference is so timely.

The study commenced at the beginning of last year with the support of all Australian Attorneys-General and Chief Magistrates. It is the first study of committals on a national scale and is primarily concerned with issues of policy rather than strictly legal and procedural matters. It has involved the collection of an impressive amount of novel, hard, empirical data. I have had the benefit of seeing in draft form the paper which they are to present today and I must say that, while undoubtedly I have a vested interest in the matter, the paper is one of the best pieces of legal policy research I have read. It combines new data on a national basis with a very hard-headed analysis of the key policy questions. I hope that it might be possible for those responsible for formulating policy in this area in New South Wales to have a look at the paper before finally making up their minds about what they propose to do.

The project has certainly confirmed the great value of conducting research into aspects of the judicial system on a national, comparative basis. All too often, important initiatives are taken in one jurisdiction in ignorance of what is going on in other comparable places or after some mere, passing reference to those related developments. The significance of the sort of work done by Brereton and Willis on behalf of the AIJA is that neither they, nor the Institute, has an axe to grind on the issue and that, when the report on the study is published in the next couple of months, those interested will have available a comprehensive national analysis of this important aspect of our criminal justice system.

Evaluating the Committal

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As the title of this conference suggests, the future of the committal hearing is now under something of a cloud. Calls to abolish, or substantially truncate, committal hearings have been loudest in New South Wales, where caseload pressures on the criminal justice system have been greatest (NSW Law Reform Commission 1987—the *Byrne Report*, p. 299ff; Coopers & Lybrand W.D. Scott 1989, pp. 19-39; The NSW White Paper 1989, pp. 19-39; Bishop 1989, Ch.3). In other states the emphasis has been more on streamlining committal hearings than on replacing them altogether, but in these jurisdictions also, a growing number of interested parties are asking whether committals serve any useful purpose. At the same time, as indicated by the intense debate now taking place in New South Wales, there is still a substantial body of opinion which favours the retention of committals and sees them as an indispensable safeguard for the protection of defendants.

In late 1988, in response to the increasing attention being paid to this issue, the Australian Institute of Judicial Administration (AIJA) commissioned us to undertake an Australia-wide study of committal proceedings. Our brief was to: provide a descriptive overview of how committals are conducted in the various jurisdictions; evaluate the adequacy of existing arrangements, and develop a set of policy recommendations on the basis of this analysis. As part of this project, we visited all jurisdictions except the Northern Territory, conducted a wide range of interviews with relevant personnel, and accumulated a large amount of comparative data. The present paper summarises the main findings of this research and in the light of these findings briefly considers some proposals for reform.

The argument to be advanced in this paper is that, rather than being costly anachronisms, committals still play a useful role in the criminal justice system, and could be made even more effective with some modifications. Specifically, it is argued that committals:

- are more effective at filtering-out weak cases than their critics claim;
- are a potentially useful forum for the early identification of guilty pleas;

- provide a reasonably effective mechanism for disclosing the Crown's case to the accused; and

- particularly in large and complicated cases, perform a useful management function.

The paper also presents data indicating that the amount of court time consumed by committals, their contribution to overall delay, and the adverse effects which they have on witnesses, have been substantially exaggerated.

Before moving to a consideration of this data, it may be helpful if a brief description of how committal proceedings are currently conducted in Australia is provided.

Committal Procedures in Australia: A Brief Overview

It is evident that the traditional committal hearing is no longer the norm in Australia. In the traditional hearing evidence of witnesses was given orally and the function of the presiding justice or magistrate was to determine, on the basis of this evidence, whether there was a prima facie case against the accused. In this system the prosecution had the absolute discretion as to which prosecution witnesses would be called at the hearing. Current practices depart from this model in a number of important respects.

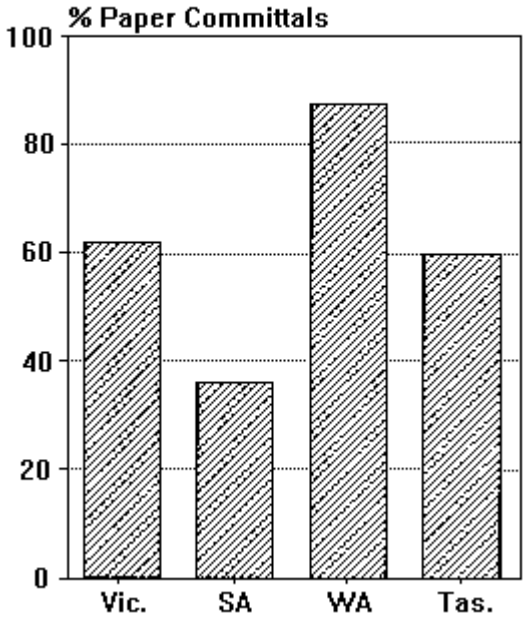
Firstly, in nearly all jurisdictions the use of paper committal procedures has become the norm. Broadly speaking, in paper committals copies of statements of witnesses which the prosecution proposes to tender at the committal hearing are served on the defendant in advance of the hearing. Unless there is an objection these statements are then tendered as the evidence of the witnesses concerned. There are provisions in the various jurisdictions enabling the defendant to require the presence of some or all prosecution witnesses for cross-examination, but in most jurisdictions it is quite common for the committal to proceed without any oral evidence being taken.

Of the four states for which firm data could be obtained, South Australia was the only jurisdiction in which less than 50 per cent of committals were dealt with as full 'hand-up briefs', requiring no oral evidence or cross-examination (Figure 1). In New South Wales, according to the 1989 White Paper, committals without oral evidence are 'relatively rare' (New South Wales White Paper 1989, p. 21). However, several magistrates to whom we spoke felt that an increasing number of cases were now proceeding as full 'hand-up briefs'. It should also be noted that approximately one third of New South Wales defendants plead guilty at the committal stage. If these cases are counted as 'full hand-ups', on the grounds that few if any, involve the presentation of oral evidence (Bishop 1989, p. 80), then the assessment offered by the White Paper must be substantially qualified. In addition, it is possible that the full effect of recent amendments to the New South Wales *Justices Act 1902* (s.48AA), requiring the use of 'hand-up brief' procedures, is yet to be felt.

Secondly, in certain jurisdictions restrictions have been imposed on the defendant's right to cross-examine prosecution witnesses. Thus, in South Australia victims of sexual assaults cannot be cross-examined at the committal unless there are 'special reasons' (*Justices Act 1921* (SA) s.106(7)). Similar provisions limiting the right to cross-examine victims of violent assault, both sexual and non-sexual, were enacted in New South Wales in 1987 but have not been proclaimed (*Justices Act 1902* (NSW) s.48EA). In Victoria, magistrates can refuse to allow a prosecution witness to attend for cross-examination if they are satisfied that such attendance would be 'frivolous, vexatious or oppressive in all the circumstances' (*Magistrates (Summary Proceedings) Act 1975* (Vic.) s.45B). There has also been further streamlining in some jurisdictions with regard to the evidence-in-chief of witnesses. For example, in Victoria, unless the magistrate gives leave, the witness 'must confine his or her evidence-in-chief to identifying himself or herself and attesting to the

Figure 1

Use of Paper Committals



Notes:
1. This figure shows the proportion of all committal proceedings in which no oral evidence was taken.
2. Victorian figures are for Melbourne City Court only, Western Australian figures are for Perth Court of Petty Sessions only and Tasmanian figures are for Hobart Police District only.

Sources:
Victoria: Unpublished data provided by the Victorian Criminal Delay Reduction Program, covering all committals in the City Court for the period September 1989-March 1990. South Australia: Unpublished data provided by the Office of Crime Statistics for 1987. Western Australia: Unpublished data provided by Perth Clerk of Petty Sessions for 1988. Tasmania: Unpublished data for 1988 provided by Prosecutions Division, Tasmanian Police.

truthfulness of the statement' (*Magistrates (Summary Proceedings) Act 1975* (Vic.) s.46(1)). The same result is achieved in other jurisdictions by agreement between prosecution and defence.

Thirdly, it is no longer the case that the prosecution has a complete discretion as to which witnesses to call. An increasingly influential view is that in a paper committal the prosecution should be required, at a minimum, to provide the defence with statements of all material witnesses. As a consequence, the committal is now operating as a form of substantial disclosure (see below). This change has been brought about in various ways: for example, in Queensland by a direction and set of guidelines by the Director of Prosecutions (Guidelines of the Director of Public Prosecutions to the Commissioner of Police and Crown Prosecutors appearing as prosecutors at an examination of witnesses in relation to an indictable offence, presented 7.7.88 to apply from 15.8.88). In other cases, by court

decisions (*R v. Harry, ex parte Eastway* (1986) 39 SASR 203; *Houston v. Crannage* [1990] WAR 2); and more generally by a growing awareness of the fairness and efficiency advantages of disclosure. In all jurisdictions there appears to be much greater disclosure by the prosecution at committal than was formerly the case.

Fourthly, the standard of proof to be used by magistrates in deciding whether or not to commit has recently been modified in the two most populous jurisdictions. The original criterion was whether there was a prima facie case or whether the evidence was sufficient to put the defendant on trial for an indictable offence. In Victoria, concern that this standard did not filter out enough weak cases led to the adoption of a different test: 'Is the evidence of sufficient weight to support a conviction?' (*Magistrates (Summary Proceedings) Act 1975* (Vic.) s.56; Advisory Committee on Committal Proceedings, Report on Committal Proceedings 1986, pp. 14-15). In applying this test, the magistrate is required to focus on the issue of conviction as opposed to trial, and in addition is permitted to consider the credibility of witnesses (Advisory Committee on Committal Proceedings 1986, p. 15). In New South Wales, the decision of the Court of Appeal in *Wentworth v. Rogers and West* ((1984) 15 A Crim R 376; (1984) 2 NSWLR 422) severely limited the power of magistrates to discharge defendants. As a result of that decision the criterion for committal was amended by legislation. Under the new standard, it would appear that the defendant should be committed for trial unless 'the magistrate forms the opinion that there is no real chance or prospect of a conviction' (*Carlin v. Thawat Chidkhunthod and Another* (1985) 20 A Crim R 332 at 350). As with the Victorian criterion, the magistrate, in applying this test, must make an assessment of the credibility of the witnesses and the strength of the evidence.

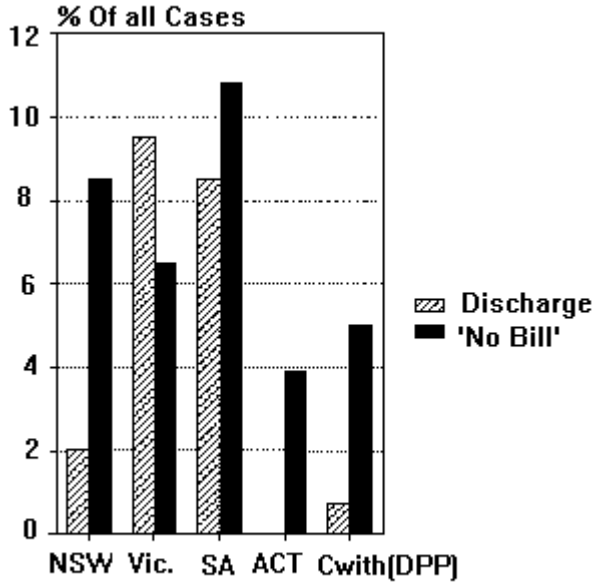
The Filter Function of Committals

The traditional view is that the primary function of the committal hearing is to ensure that no-one stands trial unnecessarily (*see* Gibbs and Mason J.J. in *Barton v. R* (1980) 147 CLR 75 at 99). In recent years a number of reports have questioned whether committal proceedings are performing this function effectively (Advisory Committee on Committal Proceedings 1986, pp. 9-10; the NSW Law Reform Commission 1987, pp. 262-3; the NSW White Paper 1989, pp. 22-5; Bishop 1989, pp. 90-99). In support, these studies have presented data showing that the discharge rate at committals is typically very low, especially when compared to the proportion of matters which are 'nolleed' or 'no billed' by the Crown after a defendant has been committed. However, on closer examination committals—at least in some jurisdictions—prove to be substantially more effective as filters than their critics claim. (In this discussion, the term discharge means discharged on all charges).

Data on discharge rates is available for Victoria, New South Wales, South Australia, the ACT, and all cases prosecuted by the Commonwealth Director of Public Prosecutions (DPP) (*see* Figure 2). Matching data on 'no bills' is available for each of these jurisdictions, although only the New South Wales and Commonwealth DPPs provide a breakdown of reasons for the 'no bills'. The discharge rate estimates appear to be reliable for all jurisdictions except New South Wales. The New South Wales figure of 2 per cent was initially published in the *Coopers Lybrand Report* and

Figure 2

Discharge and 'No Bill' Rates



Notes:

1. The discharge rate is the number of defendants discharged on all charges stated as a percentage of all defendants subject to committal proceedings.
2. The 'no bill' rate is the number of 'no bills' stated as a percentage of total higher court dispositions.
3. In some jurisdictions there may be a considerable delay between committal for trial and the filing of a 'no bill'; hence 'no bill' and discharge rates for any one year are not directly comparable except for cases conducted by the Commonwealth DPP.

Sources:

Victoria: Discharge rate calculated from unpublished data provided by the Victorian Criminal Delay Reduction Program, covering all committals in the City Court for the period September 1989-March 1990 (960 defendants). 'No bill' rate based on 1565 defendants disposed of in the Melbourne County Court in 1989: data provided by Management Information Section, Courts Division, Attorney General's Department. SA: Discharge rate obtained from unpublished data for 1987 provided by the Office of Crime Statistics (based on 681 defendants). The 'no bill' rate is from Office of Crime Statistics, Crime and Justice in South Australia 1987, Table 4.1; based on 1273 defendants appearing before the Supreme and District Courts. New South Wales: Discharge rate quoted in *Coopers Lybrand Report*, p. 100. This data was provided to Coopers Lybrand by the New South Wales Bureau of Crime Statistics. The number of cases or defendants on which this rate is based is not stated. The 'no bill' rate was calculated from data published in the Office of the Director of Public Prosecutions, *Annual Report 1988-89*, Appendices 5-6, and is based on 5220 defendants disposed of by the District and Supreme Courts in 1988-89. ACT: Discharge rate obtained from the Commonwealth Director of Public Prosecutions, Annual Report 1989, Table 6(a). 'No bill' data provided by Canberra office of the Commonwealth DPP. Both rates are based on 129 defendants disposed of in the ACT Supreme Court in 1988-89. Commonwealth DPP: Discharge rate obtained from the Commonwealth Director of

Public Prosecutions, *Annual Report 1989*, Table 6(a). 'No bill' data from *Annual Report 1989*, pp. 18-19. Both rates are based on 541 defendants disposed of Australia-wide in 1988-89.

was subsequently cited in the 1989 White Paper, but is now widely acknowledged (including by the New South Wales Bureau of Crime Statistics and Research) as being too low (communication from Mr Ian Crettenden, Manager, Justice Information System, BCSR 13 November 1989). We reproduce it here only because it remains the best available official estimate[1]. It should also be noted that the New South Wales 'no bill' rate shown in Figure 2 is well below that quoted in the DPP's *Annual Report*[2]. This discrepancy arises because the New South Wales DPP states the 'no bill' rate as a percentage of trial committals only, whereas we include sentence committals in the base figure. The implications of excluding sentence committals when calculating 'no bill' rates are particularly significant in the case of New South Wales, because of the comparatively high proportion of defendants in this state who plead guilty at the committal stage (*see* Figure 2).

In both Victoria and South Australia, discharges appear to be relatively common events. In the Melbourne City Court, where the bulk of Victorian committals are conducted, 9.5 per cent of committal matters completed between September 1989 and March 1990 were discharged. A slightly higher rate of 13 per cent was obtained for the period February-July 1989. (This estimate was obtained from a monitoring study of 675 committals conducted at the Melbourne Magistrates Court between February and July 1989 by the Criminal Delay Reduction Program). Notably, the 'no bill' rate in Victoria for 1989 was well below the discharge rate: a strong indication (even without a breakdown of 'no bill' figures) that more weak cases were screened-out at the committal stage than subsequent to it.

In South Australia the discharge rate for the state as a whole was around 8 per cent in 1987. The comparatively high 11 per cent 'no bill' rate may be partly a product of restrictions on the cross-examination of complainants in sexual assault cases, which forces the Crown to 'no bill' matters which might otherwise have been discharged had a full committal hearing been held. Thus in 1987 full nolle prosequis were entered for 19 per cent of defendants presented to the higher court on sexual offence charges, compared to an average nolle rate of 9 per cent for all other offence categories (Office of Crime Statistics, South Australia 1987). By contrast, in New South Wales, where no such restrictions apply, the 'no bill' rate for sexual assault cases in 1989 was identical to the overall 'no bill' rate (unpublished data provided by NSW Bureau of Crime Statistics and Research).

In comparison to Victoria and South Australia, the discharge rate for committals conducted by the Commonwealth DPP is very low. Of the 129 defendants dealt with by the ACT Magistrates Court in 1988-89, all were committed. A statistically more robust finding is that discharges were ordered by magistrates in only 4 (0.7 per cent) of the 592 committal proceedings initiated by the Commonwealth DPP in Australia in 1988-89—despite the considerable complexity of a number of these cases and the variety of jurisdictions in which they were conducted.

The very low discharge rate in cases conducted by the Commonwealth DPP does not necessarily mean that the committal has failed to act as an effective filter, as the 'no bill rate both for the ACT and Australia as a whole, is also low by the standards of the other jurisdictions (3.9 per cent and 5.0 per cent respectively). Rather, what this data may indicate is that where the Crown has sole responsibility for the conduct of committals, there is a greater likelihood that weak cases will be weeded-out prior to commencement of the committal hearing.

The impact of evidentiary standards

Data from Victoria suggests that the wording of the tests which magistrates use in determining whether to commit a defendant may also have an impact on the discharge rate.

Prior to 1987, the *Magistrates (Summary Proceedings) Act 1975* (Vic.) defined two different standards of proof, with the key test being whether the evidence was 'sufficient to put the accused upon trial for any indictable offence' (s.59(7)). Following the recommendations of the Coldrey Committee, early in 1987 this test became whether the evidence is 'of sufficient weight to support a conviction' (Advisory Committee on Committal Proceedings 1986, p. 14). In the view of the Committee this standard permitted magistrates to assess the credibility of individual witnesses (Advisory Committee on Committal Proceedings 1986, pp. 15-16). Just as importantly, adoption of the new standard sent a signal to magistrates that it was acceptable for them to play a more active role in screening out weak cases.

Implementation of this new standard appears to have corresponded with a marked increase in the committal discharge rate. As noted above, the discharge rate in 1989 exceeded 10 per cent. By contrast, a study of committals held at the Melbourne City Court in 1984 found that only 4.4 per cent of defendants were discharged (Advisory Committee on Committal Proceedings 1986, p. 9).[3] Changes in the 'no bill' rate have also been in the predicted direction. Thus since 1987 the Victorian 'no bill' rate has averaged only 6.5 per cent, compared to a rate in excess of 8 per cent for the previous three years—indicating that fewer weak cases are now getting past the committal stage (unpublished data provided by Management Information Section, Courts Division, Victorian Attorney-General's Department).

Whether similar legislative changes in other jurisdictions would have the same effect is not so clear. One important consideration is the preparedness of the magistracy to enforce any new standards which might be introduced, and the degree to which these standards have the support of prosecuting authorities. In this regard, it cannot be assumed that the level of commitment to enhancing the committal's filter function will be as great in all jurisdictions as it has been in Victoria (for example, the current DPP, Mr John Coldrey QC, chaired the committee which recommended the adoption of the amended evidentiary standard in Victoria). However, the Victorian evidence does suggest that, provided the conditions are right, relatively subtle changes in wording can have a significant effect on magisterial decision-making.

Withdrawals before and after committal

The data presented so far has related only to the direct screening effect of committals. Arguably, the committal also acts as a screening mechanism in two less direct, but nonetheless potentially significant, ways.

First, the anticipation that a matter will be discharged at a committal may be sufficient to prompt the prosecution to withdraw some charges prior to the committal. In the case of Victoria, the withdrawal rate for cases booked for a committal at Melbourne City Court between May and July 1989 was a substantial 8 per cent (unpublished data provided by the Victorian Criminal Delay Reduction Program)—up from 3 per cent in 1984, when the old evidentiary standard still applied (Advisory Committee on Committal Proceedings 1986, p.

9). No quantitative data on withdrawal rates is available for other jurisdictions, although Bishop (1989, p. 47) has suggested that in New South Wales 'the withdrawal of indictable charges so as to withdraw the 'case' against the accused is most uncommon'.

The second way in which committals may have an indirect screening effect is by prompting the filing of a 'no bill' subsequent to the committal hearing. This can occur when a hearing, while not producing a discharge, has nonetheless exposed serious weaknesses in the prosecution case. According to the New South Wales DPP: 'the decision to terminate is hardly ever based on material elicited during cross-examination at the committal proceedings' (*Annual Report 1988-89*, p. 12). However, some other prosecution authorities, including the Commonwealth DPP, see committals as performing a more useful role in this regard (Submission by Mr Mark Weinberg QC, Commonwealth Director of Public Prosecutions, to the NSW Attorney-General, June 1989). Unfortunately there is no data available with which to test these competing claims, but it would be surprising if 'prompted no bills' were as rare as suggested by the New South Wales DPP.

Reasons for 'no bills'

Aggregate 'no bill' rates give a somewhat distorted picture of the effectiveness of committals as filters, because they include cases in which the Crown has dropped charges for reasons unrelated to the strength of the case presented at the committal hearing. If a case is dropped because of considerations personal to the accused or victim, or because the offence is trivial or stale, this is obviously no reflection on the correctness of the magistrate's decision to commit. Similarly, magistrates can hardly be held accountable for 'no bills' which are filed because of the loss of key witnesses, or a change in evidence subsequent to the committal. Only the Commonwealth and New South Wales DPPs provide information on the reasons for entering 'no bills'. This data is summarised in Table 1. Given the small number of cases 'no billed' by the Commonwealth DPP, and the fact that identification of 'predominant reasons' by DPP personnel is a somewhat subjective process, care must be taken in interpreting these results. Nonetheless, the following conclusions seem warranted.

First, it is apparent that in only a minority of cases was a matter 'no billed' because the DPP had concluded that the magistrate had made an erroneous decision. In New South Wales 23 per cent of the 'no bills' in 1988-89 were filed on the grounds that 'on the assessment of facts and law there was no case to be tried by a jury'. In the Commonwealth jurisdiction the proportion 'no billed' on these grounds was higher, but only a very small number of cases was involved.

Second, in New South Wales there were 220 cases (43 per cent of the total) in which the predominant reason for entering a 'no bill' was that there was 'no reasonable prospect of a conviction'. According to the DPP: 'these are cases where I have determined that although a jury might convict on the evidence the chances of that happening are not such as to justify the time and expense of a jury trial'. In other words, these cases were filtered out not because of any obvious error on the part of a magistrate, but because the New South Wales DPP uses a higher evidentiary standard than that which magistrates are required to apply. Interestingly, in 1987-88 there were only 72 cases which failed the 'reasonable prospect of conviction' test. The 300 per cent increase in the number of cases in this category in 1988-89 may be a reflection of changes in the way in which the DPP classifies the reasons for 'no bills', but it may also indicate that the evidentiary standard has been informally raised in response to mounting concern about court delays.

Third, in both jurisdictions there were a substantial number of cases in which the predominant reason for filing the 'no bill' was ostensibly unrelated to the strength of the prosecution case at the time of the committal. These included cases where there had been a change in evidence or the loss of witnesses, some matters deemed to be trivial or 'stale', and others in which a 'no bill' had been filed because of considerations personal to the victim or

the accused. Clearly, as indicated above, none of these 'no bills' reflected adversely on the quality of decision-making at the committal hearing.

Table 1

Reasons for 'No Bills'

	Jurisdiction			
	New South Wales		*Commonwealth*	
Predominant Reason Given	No. of 'no bills'	% of total	No. of 'no bills'	% of total
No Case	118	23.1	11	40.7
No reasonable prospect of conviction	220	43.1	3	11.1
Change in evidence/ loss of witnesses	58	11.4	5	18.6
Other	114	22.4	8	29.6
Total 'no bills'	510	100.0	27	100.0

Note:
This table excludes cases where the reason given for filing the 'no bill' was that the criminality involved was adequately covered by other charges or sentences. Even with the exclusion of these cases, the New South Wales figure includes 65 partial 'no bills', i.e. cases in which only some charges were dropped. It is not possible to tell from the report of the New South Wales DPP how these cases are distributed amongst the above categories.

Sources: New South Wales: Director of Public Prosecutions, *Annual Report 1988-89*, p. 30. Commonwealth: Director of Public Prosecutions, *Annual Report 1989*, pp. 18-19.

It is apparent, therefore, that use of aggregate 'no bill' rates gives a misleading impression of the effectiveness of committals as filters. (Some partial 'no bills', in which defendants are not proceeded against on the more serious charges, may also be due to incorrect decisions by magistrates although they could also be indicative of charge bargaining by indicting authorities). Magistrates have arguably failed to perform the filter function assigned to them by the law only in those cases where the DPP has subsequently found that there was no prima facie case against the accused. If this is the case, then of all defendants committed for trial or sentence in New South Wales in 1988-89, only 2.1 per cent were wrongly committed, with the equivalent figure for the Commonwealth DPP being 1.9 per cent. By some standards these error rates may be too high; however, they are certainly much lower than implied by many of the critics of committals.

Ex-officio indictments

Magistrates can err not only in committing when they should have discharged, but also in discharging when they should have committed. The best indicator of the frequency with

which significant errors of this second type occur is the proportion of cases in which an ex-officio indictment is filed following a discharge. (Strictly speaking, this test underestimates the number of errors because for an ex-officio indictment to be filed, a committal decision must be wrong not only in terms of the standard applied by the Crown. However, the test does identify the errors which matter.)

It would appear that ex-officio indictments following the discharge of a defendant at a committal hearing are quite uncommon. In New South Wales in 1988-89, only twelve matters were referred to the DPP after discharge at Local Court and not all of these resulted in an indictment being filed. (Unpublished information provided by the NSW DPP's Office) (Office of the Director of Public Prosecutions, Victoria *Annual Report 1988-89*, p. 12, which indicates that notices of trial were issued by the Director on a total of 29 occasions, with only a minority being authorised following discharge at a committal). The equivalent Victorian figure for the same period was less than fourteen cases, and the Commonwealth DPP filed only one ex-officio indictment in 1988-89 (Commonwealth Director of Public Prosecutions, *Annual Report 1989*, p. 26). In all other jurisdictions, although no data was available, the consensus was that ex officios were quite rare events.

It would seem, then, that magistrates, if they err, tend to err on the side of caution in deciding whether to commit. This may be because magistrates regard an ex-officio indictment as a more serious reflection on their decision-making capabilities than a 'no bill', and so are more concerned to avoid the former than the latter. An alternative, and possibly more plausible, interpretation is that caution is a natural consequence of the fact that the committal is not a final decision: hence, the easier course of action to follow, when in doubt, is to send the case further down the line for someone else to decide.

Summary

The gist of the above analysis is that committals play a more significant role as a filter than is commonly realised, especially when their indirect effects are taken into account. Moreover, to the extent that committals are not more effective in screening out weak cases, this in good part is because the relevant legislation does not require, nor permit, magistrates to play a more active role. Consistent with this view, the Victorian evidence suggests that, where the evidentiary test for committal is made more rigorous, the effectiveness of the committal can be enhanced considerably, provided that some other conditions are also met.

Early Identification of Guilty Pleas

Given that the great majority of defendants dealt with by Australian higher courts ultimately plead guilty to one or more charges, there are obvious advantages in being able to identify pleas of guilty at the committal stage. As pointed out by the Victorian Criminal Delay Reduction Program, 'pleas of guilty "at the door of the court" are among the major causes of uncertainty in the listing system and inefficient use of court time' (The Attorney-General's Steering Committee on Delays in Criminal Proceedings, *Newsletter*, May 1989, p. 3). The early ascertainment of a guilty plea also:

> enables the anxieties of potential witnesses to be allayed, and similarly, eliminates the prolonged anxiety of both the victim of crime and the persons accused of criminal acts. Furthermore by enabling sentencing to occur at a date more proximate to the commission of the crime, any undermining of the deterrent effect of the criminal justice system is prevented (Advisory Committee on Committal Proceedings 1986, p. 26).

Whatever their potential, in most jurisdictions committal proceedings have not, to date, been a very effective mechanism for the early identification of pleas. As Figure 3 indicates, with the notable exception of New South Wales and the ACT, committals for sentence make up only a small proportion of total committals. Anecdotal evidence suggests that there is also a very low guilty plea rate at committals in Western Australia.

The low guilty plea rate is an indication that traditionally there have been few inducements for defendants to plead guilty at the committal. In most jurisdictions, charge negotiations, if any occur, do not take place until after a matter has been taken over by the DPP.[4] From a bargaining perspective, defendants thus have had little to gain from 'showing their hand' at the committal and may even run the risk of being worse off if they do. This point is well illustrated by some data collected by the Victorian Criminal Delay Reduction Program, indicating that charges were much more likely to be dropped for defendants who had changed to a plea of guilty after committal than for those who had pleaded guilty at the committal stage (Wright 1989, p. 26).

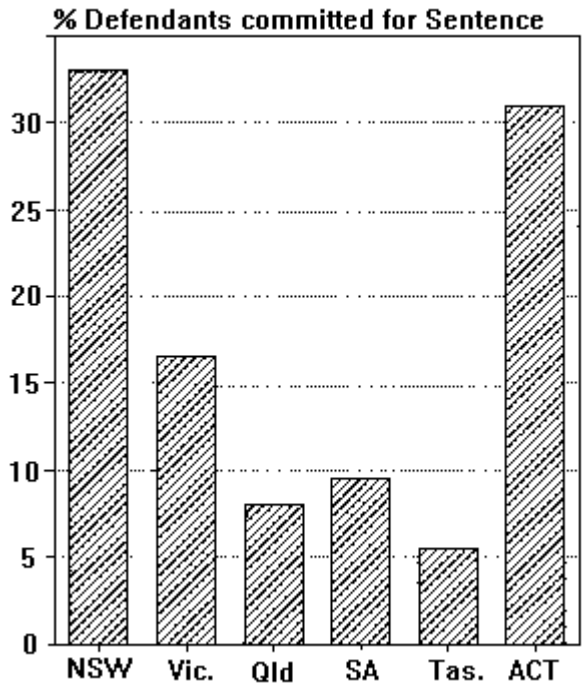
Another significant consideration is that in many cases defendants are simply not in a position to make an informed decision about plea at the committal hearing. For example, rules governing the granting of legal aid mean that a substantial number of defendants are unrepresented, or are represented for the day only through a duty solicitor.[5] Also, in the past the prosecution material available to the defence was often limited and so did not enable any proper appraisal of the prosecution case, although this situation has improved considerably in recent years.

Not only are there few incentives to plead guilty at the committal hearing, but in some states a defendant who does take this course of action is placed at a significant procedural disadvantage. For instance, in Western Australia a presumption against the granting of bail is created once a defendant has been committed for sentence (*Bail Act 1982*, Sch.cl.4). In Queensland and Western Australia, defendants who have pleaded guilty at the committal cannot subsequently change their plea without the approval of the presiding judge (Queensland Criminal Code, s.600; Western Australian Criminal Code s.618), and in South Australia and the Northern Territory, defendants normally cannot alter their plea less than seven days prior to the commencement of the session to which they have been committed (*Justices Act 1901* (SA) s.141(10); *Justices Act 1928* (NT) s.141(1)). These rules obviously make it very difficult for a defendant who has pleaded guilty at the committal to take advantage of any new evidence, or of a late discovery of weaknesses in the Crown's case. By comparison, in New South Wales and the ACT—the two jurisdictions with the highest proportion of sentence committals—defendants who plead guilty at the committal are placed at less of a disadvantage than their counterparts in other jurisdictions. Specifically:

- in contrast to most other jurisdictions, guilty pleas can be formally indicated at any stage of proceedings;

Figure 3

Guilty Plea Rate at Committals



Note:
The guilty plea rate is the number of defendants committed for sentence expressed as a proportion of all defendants committed for trial or sentence. It would be preferable to include discharges in the base figure, but the relevant data is not available for all jurisdictions.

Sources:
Victoria: Unpublished data provided by the Victorian Criminal Delay Reduction Program, covering all committals in the Melbourne City Court for the period September 1989-March 1990. SA: Office of Crime Statistics, *Crime and Justice in South Australia* 1987, Table 3.47. Tasmania: Unpublished data for Hobart Police District for year 1988, provided by Prosecutions Division, Tasmanian Police. Queensland: *Annual Report* of the Director of Prosecutions for the Year ended 31 December 1989, Appendix III. New South Wales: Office of the Director of Public Prosecutions, *Annual Report 1988-1989*, Appendix 7. ACT: Commonwealth Director of Public Prosecutions, *Annual Report 1989*, Table 6(a).

- there are no restrictions on the accused changing to a plea of not guilty after s/he has been committed for sentence ; and

- these are the only two Australian jurisdictions in which a defendant who changes his or her plea has the option of going back for a committal hearing—this being an absolute right in the ACT and subject to the discretion of the presiding judge in New South Wales (where it was also an absolute right prior to 1983).

It is worth noting that the committal guilty plea rate in Victoria has increased significantly since the proclamation of an amendment to s.4 (1) of the *Penalties and Sentences Act 1985* in mid-1989. The original version of this section directed judges, when fixing sentence, to have regard to the fact that the defendant had pleaded guilty, but did not differentiate between early and late guilty pleas. The 1989 amendment corrected for this omission by declaring that a court, in passing sentence, could also take into account 'the stage in the proceedings at which the person pleaded guilty or indicated an intention to plead guilty'. Magistrates at committal must now inform defendants of this fact before they enter a plea.

As a matter of law the amendment to s.4 was arguably unnecessary, because appellate courts had already acknowledged that the timing of the plea should be taken into account in fixing a sentence. However, as a matter of practice, the amendment, by clarifying and emphasising that there is a discount for an early plea of guilty, appears to have had some impact on defendant decision-making. Thus in the six months from February to July 1989, the guilty plea rate in committal hearings at Melbourne City Court averaged 12 per cent, whereas the average rate for September 1989-March 1990 was 16.5 per cent, rising to 20 per cent in the first 3 months of 1990 (unpublished data provided by the Victorian Criminal Delay Reduction Program). The rate for 1989 was, in turn, much higher than the estimated guilty plea rate of 'less than 1 per cent' quoted in the Coldrey Committee's 1986 Report (Advisory Committee on Committal Proceedings 1986, p. 27).[6]

Indirect effects

An argument put to us by a number of defence counsel was that even if defendants did not plead guilty at the committal hearing, the committal—by highlighting the strength of the prosecution case—often prompted a later plea of guilty from reluctant accused. Consistent with this view, the Commonwealth DPP, Mr Mark Weinberg QC, has also argued that:

> in practice, in a number of cases, pleas of guilty are forthcoming after committal which would not be offered if matters were to go to trial without there being preliminary hearings (Letter to the Hon. John Dowd, MP, NSW Attorney-General, 29 June 1989).

The magnitude of this effect is not quantifiable, although presumably it will be greatest where there has been an oral hearing and the evidence of the key prosecution witnesses has been tested by cross-examination.

Summary

In summary, for whatever reasons, it is clear that in the ACT and New South Wales the committal is still a reasonably effective mechanism for the early identification of guilty pleas—although this fact seems to have been ignored by the critics of the present system in New South Wales. There are also indications that in Victoria the committal is beginning to play a more important role in this regard. As far as the other jurisdictions are concerned, committals, as they currently operate, do little to aid the early identification of guilty pleas. However, there are some fairly obvious ways in which the proportion of guilty pleas could be increased substantially, for example by making it easier for defendants to withdraw pleas of guilty, by not discriminating against guilty pleaders in decisions concerning bail, and by

adopting legislation along Victorian lines to reward early pleas of guilty. Arguably, if there were greater involvement by the Crown and legal aid at the committal stage, both sides would also be in a much better position to engage in serious negotiation over charges.

Committals as a Disclosure Mechanism

Proper and early disclosure of the prosecution's case against the accused is desirable not only to ensure fairness to the accused, but also because it contributes to the efficient operation of the criminal justice system. In particular, early disclosure can lead to shorter trials by enabling the accused to focus defence against the prosecution case with greater precision (New South Wales White Paper 1989, p. 46; Advisory Committee on Committal Proceedings 1986, pp. 10-11; UK Royal Commission on Criminal Procedure 1981, pp. 175-6). To the extent that committal procedures facilitate disclosure, they can therefore be said to be performing a useful function, even if, as some argue, this role is only incidental to that of filtering out weak cases (NSW Law Reform Commission 1987, p. 263).

In the past, the effectiveness of the committal as a disclosure mechanism was certainly open to question. However, as noted earlier, the position has improved considerably in recent years—an assessment supported by most of the defence counsel interviewed as part of this project. Moreover, whatever the past and present shortcomings of committals as a disclosure mechanism, one very important role which they perform is to provide a date, well in advance of the trial itself, by which a substantial part of the prosecution's evidence must be made available to the defence (UK Royal Commission on Criminal Procedure 1981, pp. 175-6). The same result can probably be achieved without a committal if prosecution authorities set and adhere to their own disclosure dates (as proposed in the NSW White Paper 1989, p. 47), but arguably, externally enforced deadlines will be complied with more consistently.

Management Functions

Committals, particularly those in which there is cross-examination of witnesses, are seen by many senior counsel as serving some useful management purposes, especially in the longer and more complex cases. For both the prosecution and the defence, an oral committal provides a means of checking the strength of key witnesses, discovering gaps and deficiencies in a case, and assembling and structuring the evidence. In this way, a well run committal can clarify and refine issues, and so shorten the resultant trial. Admittedly, this is not an effect which can be measured, short of abandoning committals and undertaking a 'before and after' comparison of average trial lengths, but the possibility that trials might take significantly longer in the absence of committals certainly should not be ignored.

Committals and Court Time

Every jurisdiction has its horror stories of committal hearings which have run for months or even years. For example, in his most recent report the Commonwealth DPP refers to the case of *Goldsmith and Ors*, conducted by his Office in New South Wales, which 'commenced on 2 September 1985 but did not conclude until 5 May 1989 . . . with the matter taking up 146 hearing days within that period' (Commonwealth DPP *Annual Report*

1989, p. 124). Another recent New South Wales case (*Chapman and Ors*), conducted by the state DPP, took 17.5 months to complete (NSW Attorney-General's Department 1989, p. 21), the infamous 'Forsyth Saga' in Victoria lasted 155 sitting days, and in Western Australia committal proceedings in 1988 arising out of the Fremantle Gaol riot took up 46 sitting days (information obtained from Perth Court of Petty Sessions Rosters).

It is important, however, not to treat these cases as being in any way typical. In most jurisdictions a large proportion of cases are dealt with by means of 'hand-up briefs' which usually take up only a few minutes of court time (*see* Figure 1, p. 7). Moreover, of those matters which do involve some oral examination, the great majority are normally disposed of within a day or less and very few last for longer than four sitting days (Table 2). Even in the Commonwealth jurisdiction, which has a reputation for complex cases, only 14 per cent of contested committals in 1988-89 took five days or more to be heard.

Table 2

Length of Oral Committal Hearings

	Hearing Length		
Jurisdiction	% lasting 1 day or less	% lasting 2-4 days	% lasting 5 days or more
Victoria	64.1	30.6	5.3
SA	79.4	16.2	4.4
WA	88.5	9.0	2.5
Cwth (DPP)	73.1	12.9	14.0

Note:
Table refers only to hearings in which there was oral cross-examination of at least one witness.

Sources:
Victoria: Unpublished study by the Coordinating Magistrate, covering the Melbourne Magistrates Court for the period May-October 1987 (the Mason Report); based on 265 cases. South Australia: Unpublished data provided by the Office of Crime Statistics for 1987; based on 368 cases. Western Australia: Analysis of Perth Court of Petty Sessions 1988 rosters, undertaken by the authors; based on 204 cases. Commonwealth (DPP): Commonwealth Director of Public Prosecutions, *Annual Report 1989*, Table 6(b); based on 171 cases (cases brought by the DPP in New South Wales and the ACT not included).

It also should not be assumed that lengthy committals are invariably a waste of time. While some hearings may be needlessly drawn-out by repetitive cross-examination of large numbers of witnesses, others take a long time to complete primarily because the issues involved are complex. For example, the Fremantle Gaol riot case involved a large number of defendants and the other cases cited above were all extremely complex commercial fraud or tax evasion matters. Moreover, as put to us by a number of experienced counsel, the time spent on a committal may well be recouped if it leads to the subsequent trial being run on tighter lines, or to a trial being avoided altogether because material produced at the hearing prompts a discharge, or the later entry of a 'no bill' or guilty plea.

To be sure, there is probably scope in most jurisdictions for further reducing the amount of time taken up by committals. This could be done, for example, by facilitating the use of paper committals, and exercising greater control over the calling and cross-examination of witnesses. However, even in their present form committals do not appear to represent a major drain on lower court resources. For example, our analysis of the Perth Court of Petty Sessions rosters for 1988 showed that only 10 per cent of scheduled hearing time on criminal matters was allocated to committal hearings. We were informed that in Western Australia a substantial number of scheduled oral committals either did not proceed, or finished earlier than anticipated. If anything a figure of 10 per cent is therefore an overestimation. In Victoria the great bulk of committals for the Melbourne region are conducted at the City Court in Russell Street. Only around 15 per cent of the magistrates who sit in the metropolitan area are based at this court, and not all of their time is spent on committal matters (Estimate provided by the then Chief Magistrate, Mr Dugan). In the ACT Magistrates Court in 1988-89, contested committals accounted for only 6 per cent of all contested committal matters (Commonwealth Director of Public Prosecutions, *Annual Report 1989*, pp. 57, 93). In New South Wales, committal matters (contested and uncontested) represented only 4.6 per cent of all the criminal matters processed by Local Courts in 1988. Even if the average committal matter in New South Wales took twice as long to be dealt with as a summary matter, committals would still have accounted for less than 10 per cent of all Local Court sitting time.

Arguably, even if the abolition of committals produced only a 10 per cent reduction in lower court time, this would represent a substantial saving. However, cost reductions at the lower court level would not necessarily translate into savings for the system as a whole, especially given that lower court time is much less expensive than higher court time. (As a rough guide, the Victorian Legal Aid Commission works on the assumption that the cost per day of funding a committal hearing is about half that for a County Court trial—and this takes no account of the higher salaries of judges, or the larger overheads associated with the higher courts.)

Committals and Delay

Another criticism of committals is that they are responsible for substantial delays in the disposition of cases. For example, the New South Wales White Paper attributes 'about one third of the delay between charge and trial . . . to committal proceedings' (p. 21). The argument here is that lower court backlogs, scheduling problems (especially for longer hearings) and legal manoeuvring by defendants, have often prevented matters from being processed within a reasonable time frame. By implication, if there was no need to hold a committal first, a matter would enter the higher court lists much more quickly and the overall elapsed time between charge and trial would be reduced proportionally.

We have been able to obtain broadly comparable elapsed time statistics for defendants on bail in New South Wales, Victoria and the ACT (Table 3).

This data indicates as follows: in the ACT Magistrates Court, which apparently has the longest delays of any lower court in Australia, in 1989 contested criminal matters took an average of 8-9 months to be determined; in Victoria in 1988, the median time between charge and committal was 5 months; and, in the Sydney and Sydney Western District Courts, in the July to September quarter of 1988, the average period between arrest to trial committal for bail cases was over 6 months.

Although these delays appear to be considerable, several observations should be made. First, in Victoria and New South Wales delays pre-committal are clearly less substantial than those which occur post-committal. In Victoria, the period from charge to committal accounts for less than one-third of total elapsed time between charge and trial; in New

South Wales, the equivalent proportion, on the basis of data provided by Coopers Lybrand, is only 21 per cent. (This proportion is substantially lower than the figure quoted by the NSW White Paper. It is unclear how the White Paper estimate was calculated.)

Table 3

Hearing Delays for Defendants on Bail

Jurisdiction	Average days from arrest to committal	Average days from committal to verdict	Arrest to committal as % of total elapsed time
NSW (Dist. Ct.)	198	753	20.8
Victoria	150	319	32.0
ACT	270	290	48.2

Notes:
1. Figures relate only to defendants on bail who were committed for trial.
2. Victorian figures are medians, not averages.

Sources:
New South Wales: *Coopers Lybrand Report*, pp. D42-D47. Based on a study of cases reaching finality during the September quarter of 1988 in the Sydney and Sydney Western District Courts. Victoria: Unpublished data on median total elapsed time for Supreme and County Court cases in 1989, provided by Management Information Section, Courts Division, Attorney-General's Department. Data on median time from arrest to committal is from a 1988 survey of the City Court, reported in the Criminal Delay Reduction Program Newsletter May 1989. ACT: Data on average time from charge to committal obtained from the ACT Magistrates Court Working Party, *Review*, July 1989, Appendices K and L. Data on time from committal to verdict is from Commonwealth DPP, *Annual Report 1989*, p. 81.

Second, it is a mistake to assume that all, or even most, of the time between arrest and committal could be saved if only committals were abolished. Rather, a substantial part of this time is used to carry out tasks which have to be performed regardless of whether a committal is required or not. For instance, the Victorian Criminal Delay Reduction Program found that in 1988 the median time taken to complete 'hand-up briefs' was between 1-2 months for most offence categories, rising to 4 months for homicide and drug offences, and 3.75 months for deception offences (unpublished data provided by the Victorian Criminal Delay Reduction Program). There is no reason to believe that this task would have been completed more quickly had a committal not been required. Decisions about legal aid funding are also usually taken in the period between charge and committal. Certainly, committals often take longer to finalise than they should, due to inefficient scheduling practices, inadequate resourcing of police and the courts, and a failure to take time standards more seriously. But apart from the ACT, it is difficult to see how the abolition of

committals could reduce the average time between charge and listing for trial or sentence by much more than two or three months—even assuming that the replacement arrangements do not generate their own delays.

Third, even if it was possible to list matters for trial or sentence more quickly, there would still be no guarantee that total elapsed time would be reduced as a consequence. For example in New South Wales, according to the *Coopers Lybrand Report*, cases are continuing to enter the District Court lists at a higher rate than they are being cleared (pp. 51-2). Under these circumstances, the main effect of a reduction in listing time would probably be a proportionate increase in the backlog of cases, brought about by a surge of new matters entering the lists.

In short then, claims that committals are clogging-up the lower courts, and that their abolition would lead to substantial time and money savings do not, in their present form, withstand close empirical scrutiny. Certainly, there are unnecessary delays in the pre-committal period in some jurisdictions, but the reductions in overall case processing time which might result from the abolition of committals are likely to be modest, especially if nothing is done about delays elsewhere in the system.

Witnesses and Cross-Examination

According to the New South Wales DPP, committals not only impose unnecessary financial and emotional costs on witnesses, but also create particular problems for the prosecution.

> Cross-examiners ask questions they would not ask before juries, witnesses are intimidated by the proceedings and victims feel harassed—so much so that in over 100 cases in the last 12 months I terminated the prosecution of the trial because of the wishes of the victim. There were other cases where I was not prepared to accede to the wishes of victims because of the seriousness of the offence or the community interest in its prosecution. It is understandable that the victims of personal violence, including children and women who have been sexually assaulted, are reluctant to submit themselves to public exposure on two separate occasions (*Annual Report 1988-89*, p. 12).

The New South Wales Attorney-General, Mr John Dowd, has also been quoted in the press as saying that:

> enter the dock again if the matter was committed for trial . . . and a lot of victims don't come forward knowing they may have to go for days in a witness box at committal proceedings (*Sydney Morning Herald*, 19 February 1990).

In response to these assertions, we offer the following brief observations.

First, it is beyond doubt that witnesses who have to attend committals are often inconvenienced, and that some of them, especially complainants in sexual assault cases, find the experience extremely stressful. However, it is important not to exaggerate the numbers so affected. In most jurisdictions, as has been seen, the use of 'hand-up briefs' is now widespread, and even where oral hearings are held, often only one or a few witnesses are called. Moreover, because the majority of defendants committed for trial end up pleading guilty, many of those witnesses who have to give oral evidence at a committal do not have to undergo the ordeal twice.

Second, it must be emphasised that if committals are to perform the filter function effectively, it is inevitable that some witnesses, particularly those whose testimony is central to the prosecution's case, will be subject to a vigorous, and possibly traumatic, cross-

examination. However unpleasant this might be for the witnesses concerned, the benefits for the system may sometimes be considerable, especially if cross-examination provides the basis for a discharge, or the filing of a 'no bill' by the Crown, or convinces the defence that there is no point in persisting with a plea of not guilty. In addition, the quality of evidence which a witness gives at a trial may sometimes be enhanced by virtue of having had a 'rehearsal' at the committal (*see* Law Reform Commission of Victoria 1988, p. 90, which makes this point in relation to victims in child sexual assault cases).

Third, suggestions that more witnesses would come forward if committals were abolished must be treated with some caution. Contrary to the proposition advanced by the New South Wales Attorney-General, it seems unlikely that members of the public have much knowledge about what goes on at committals, or indeed are more than dimly aware of their existence: hence, it is difficult to see how the fear of being cross-examined at a committal can act as a significant deterrent to potential witnesses.

Fourth, although some victims may not want to give evidence at a trial because of their experiences at the committal, the New South Wales DPP's estimate of the number of cases which are 'no billed' for this reason appears inflated. According to data presented elsewhere in the DPP's 1988-89 Report, there were 69 cases, not 'over 100', in which 'considerations personal to victim/witness' was given as the predominant reason for 'no billing' a case (Appendix 3 of the DPP's report: in another 49 cases 'considerations personal to victim/accused' was given as a reason for not proceeding but was not considered to be the dominant factor). Moreover, this category included not only cases where the victim did not want to endure another cross-examination, but 'cases of minor assault in a matrimonial or de facto situation where the rift has subsequently healed' (Office of Director of Public Prosecutions, *Annual Report 1987-88*, p. 15). It is significant also that the 'no bill' rate in New South Wales for sexual assault cases is well below that for South Australia, where there are tight limits on the cross-examination of sexual assault victims at committals (*see* above). Such evidence would seem to contradict the claim that more cases would go ahead if witnesses, and sexual assault victims in particular, were saved the trauma of cross-examination at a committal. Although arguments about the undesirable consequences of cross-examination at committals would seem to have been overstated, there is certainly scope for improving the treatment of witnesses at committal hearings. The most obvious starting point here would be Queensland, where it is still common practice for all prosecution witnesses to be present at the committal hearing, even though most, if not all of them, will not be required to give oral evidence. Such cases clearly involve a great waste of time and money and considerable, pointless inconvenience to witnesses. More generally, a strong case can be made out that magistrates in all jurisdictions should be able to disallow notices of witnesses where appropriate, and should have clarified their power to curtail irrelevant or repetitive cross-examination.

Three Approaches

Against this factual background, we now seek to assess three major approaches that can be adopted with respect to committals. These are firstly, the retention of committals in all cases (full retention); secondly, their retention in certain restricted cases only (partial retention); and thirdly, their abandonment (abolition).

In assessing these approaches we have adopted the criteria of fairness, openness, accountability and efficiency proposed by the UK Royal Commission on Criminal Procedure:

> Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted (that is, tried by a court) rather than dealt with in another way (by cautioning, for example) and secondly in that it does not display arbitrary and

> inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and accountable in the sense that those who make the decisions to prosecute most can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objectives that are set for it with the minimum use of resources and the minimum delay? (Royal Commission on Criminal Procedure 1981, pp. 127-8).

These goals, of course, are not always compatible. In particular, there is frequently in practice a tension between the goal of efficiency and the other goals of fairness, openness and accountability. Put simply, ensuring fairness, openness and accountability will generally require the expenditure of time, resources and money—expenditures often seen as contributing to inefficiencies in the system. It is important, therefore, not only to list the desired general goals of the system but also to assign priorities to these goals. Ultimately, priorities are matters of judgment, but in our view the goal of efficiency should generally be subordinated to the goals of fairness, openness and accountability. These latter three goals are closely interrelated—consistent and fair policies being far more likely where prosecution decisions are open to scrutiny and review. Hence, proposals that could lead to a significant increase in private decision-making by prosecution authorities would need in our opinion very powerful justification.

Abolition of committals

This proposal contemplates that there be no committal proceedings. Such a proposal would require considerable changes in the way in which cases proceed from initial charging to indictment before a higher court and there are a range of ways in which these changes could be made. But, however these changes are made, the major decision as to charges would be with the indicting authority.

On the assumption that the initial charges would be laid by the police, it could be expected on the basis of current data that a considerable number of cases would be nolleed. These decisions would be made in private and in many cases without the benefit of the added insight generated by cross-examination of major witnesses. The lack of openness in such a procedure is a powerful reason for rejecting it.

The aim of full disclosure could in theory be achieved without any committal hearing. However, defendants would not be able to test the adequacy of disclosure at an early stage through subpoena or cross-examination of police informants. It is not clear whether a system without a committal hearing could or would promote the goal of early identification of guilty pleas. Reward for early pleas would doubtless be an inducement, as under the committal regime. Likewise, the early involvement of the indicting authority should be of assistance in this regard. However, to use the expression of the UK Royal Commission on Criminal Procedure there would not be the discipline of a hearing date to have paperwork prepared and charging decisions worked out. No doubt there could be time frames imposed, but it is not at all clear without public court appearances that they would be very effective. There are other policy reasons for concern at the abolitionist proposal. It will be seen as a major change in the criminal justice system and one that removes defendants' rights. The implementation of such a scheme could well be attended with considerable hostility from professional participants in the criminal justice system—a hostility that is not

likely to help in getting over any early teething problems. Paradoxically, too, the success of such a scheme in a jurisdiction which has a substantial backlog of cases in the higher courts may well prove its undoing; if such a scheme were to move cases much more quickly to the higher court stage, it could well add to the backlog already existing. In our view, the case for abolition with its attendant increase in private decision-making by prosecution authorities has not been made out. More generally, the case for the abolition of committal proceedings has been based in large measure on assumptions about the failings of the present system of committals that are not borne out by the evidence.

Partial retention of committals

This approach contemplates the continued existence of committal hearings but with considerable restrictions on the right to have prosecution witnesses cross-examined. The nature of the restrictions imposed will determine to some extent the assessment of the approach.

- Right to cross-examine available only for certain specified offences, generally very serious offences.

This is the position in Hong Kong. In effect, committal proceedings are not available for most offences. If there are to be restrictions on the right to cross-examine prosecution witnesses it is difficult to see why the sole criterion should be the nature of the offence charged. In this respect, we would agree with the conclusion of the New South Wales White Paper:

> We do not favour such a system where committal proceedings are available as of right for some offences and not others. The usefulness of committal proceedings does not depend on the particular offence but rather depends on the issues to be raised at the trial (New South Wales White Paper 1989, p. 34).

- Right to cross-examine prosecution witness in certain specified cases.

The New South Wales White Paper proposed that there be no right to cross-examine a witness unless:

(a) the witness gave evidence of identification of the defendant; or
(b) the witness was an accomplice; or
(c) the witness was an expert scientific witness; or
(d) there were special or exceptional reasons which required the cross-examination of a particular witness; or
(e) the other party consented (New South Wales White Paper 1989, pp. 38-9).

The first three categories are cases where cross-examination can be most useful in determining the strength of a case. However, there are other categories and other cases where cross-examination would also often be very useful. No doubt, in part, this is the reason for the residual category (d) above of 'special or exceptional' cases. If, as seems likely, this category is supposed to be interpreted very narrowly, it is likely that deserving cases will be excluded. It is, moreover, as a matter of principle, difficult to understand why consent of the opposing party of itself confers the right of cross-examination. More generally, applications to magistrates for the right to cross-examine under this proposal are likely to be a source of legal demarcation disputes of little utility. In summary, this proposal implicitly concedes that cross-examination of prosecution witnesses at committals can be of

benefit to the criminal justice system. The technique adopted to limit and channel that cross-examination is not likely to promote a fairer and more efficient process.

- General right to cross-examine witnesses save for one or two special exceptions.

This in essence is the current position in South Australia where alleged victims of sexual offences cannot be compelled to be cross-examined at a committal unless they consent, or the magistrate is satisfied that there are 'special reasons' why they should be so required. This position accepts the utility of cross-examination at committals generally but exempts one particular class of witness from liability for cross-examination, essentially because of the distress that can be caused by excessively harsh cross-examination at committal, where there are not the restraints imposed by the presence of a jury at a trial. However, it is precisely in cases of sexual assault that cross-examination at committals is arguably most useful. Moreover, on the available evidence (see above), failure to allow the complainant to be cross-examined at committal will lead to an undesirable increase in the number of cases privately 'no billed' by the indicting authority. On balance, we are therefore of the opinion that there are other means of protecting witnesses and controlling cross-examination short of total or near total bans. In particular, the restrictions on questions about previous sexual history, the requirement that informants be represented by legally qualified counsel, and restrictions on reporting, should offer considerable protection to such witnesses. (This was the view adopted by the Law Reform Commission of Victoria in its 1988 report, *Rape and Allied Offences¾Procedure and Evidence*, Report No. 13 p. 23).

In summary, the various proposals for partial retention all in varying degree concede that cross-examination of witnesses can be worthwhile. In our view, particularly in light of the fact that so many committals now proceed without any witnesses being required for cross-examination, the case for only partial retention of committals has not been made out.

Full retention of committals

The option of full retention contemplates the situation where the defendant has the right to cross-examine prosecution witnesses. It does not contemplate that this right will be exercised in all, or indeed even most, cases.

On the available evidence, it seems undoubted that present procedures are more effective in achieving their objectives than is often claimed by the critics of committals. Moreover, the benefits of committal proceedings cannot, in our view, be realistically achieved by other means. Furthermore, important considerations of openness and fairness in the operation of a criminal justice system militate against any increase in the private decision-making of prosecution authorities.

A Suggested Approach

Although our conclusion is that committals should be retained, there is in our view considerable scope for improving the conduct of committal proceedings so that they can best achieve their objectives at the lowest cost in terms of money, resources and individuals, including witnesses and defendants. The following is an outline of the procedures which we believe will be most likely to satisfy these requirements.

In the first place, it is important that committal proceedings be instituted only for those cases which are in fact going to be finally dealt on indictment. For offences which must be heard on indictment there is no problem. For indictable offences which can be heard summarily the decision whether to proceed summarily or by indictment should be made by the informant. If the informant determines that the matter is to proceed summarily, the case should commence and proceed as a summary matter. The defendant will retain his or her current entitlements to opt for jury trial and the Magistrate's Court will retain the discretion to refuse to hear a case if deemed too serious to be dealt with summarily. It would be desirable if the DPP or the Crown produced in conjunction with the police guidelines to assist the police in deciding whether a case should be dealt with summarily or on indictment.

For cases which are to proceed by way of indictment, it should be the responsibility of the informant to prepare the 'hand-up brief' and serve a copy of the 'hand-up brief' on both defendant and the prosecuting authority for indictments (DPP or Crown). In addition, a copy of the 'hand-up brief' should be filed with the court which will hear the committal.

It should be mandatory to use the 'hand-up brief' procedures, save to the extent that it is impossible where a witness is not prepared to sign a statement in the appropriate form for tender at a committal.

As one of the purposes of the committal is disclosure by the prosecution, the 'hand-up brief' should contain the statements of all material witnesses whether or not it is proposed to call any particular witness. There should be an ongoing duty on the prosecution to disclose any further information, if and as it becomes available. To clarify the duties of informants with regard to disclosure, it would be desirable, if it has not already been done, if the DPP or the Crown produced a careful and complete set of guidelines setting out the proper rules of disclosure.

Cross-examination of prosecution witnesses is a most important aspect of the committal hearing. At the same time, there will be in many 'hand-up briefs' statements of witnesses whose evidence is largely formal or uncontroversial and who will generally not be required for cross-examination. Provision should be made (as in many jurisdictions) to enable the defence to decide which, if any, prosecution witnesses are required for cross-examination. The onus of requiring witnesses should be on the defence who must firstly be given sufficient time upon receipt of the 'hand-up brief' to make decisions about the calling of witnesses and who must then give the prosecution sufficient time to produce the witnesses required for cross-examination by defence. To meet these requirements, it should be necessary for the 'hand-up brief' to be served on the defendant at least twenty-eight days before the committal hearing date and for the defence to give notice stating which witnesses are required at least fourteen days before the committal hearing date.

There should be provision for the magistrate, as in the Victorian legislation, to set aside a request for the attendance of a prosecution witness if satisfied that the request is frivolous, vexatious or oppressive.

It is desirable that the prosecuting authority responsible for deciding on indictments should have the management and running of committal hearings. The authority can assess at any early date the appropriateness of the changes originally laid, can amend those changes, and has the authority to negotiate meaningfully with the defence.

For most defendants, proper decisions about calling witnesses at a committal hearing and about choice of plea cannot be made without legal assistance. It would be most desirable that all persons facing a committal hearing should have at the least legal advice well in advance of the hearing. Such advice and, where appropriate, representation, will not only materially assist a defendant but may in many cases prove economically rational by negotiating an early guilty plea perhaps on reduced charges and/or by clarifying the issues in the case through cross-examination of prosecution witnesses.

As a general rule, committal hearings can be expedited by having the evidence in chief of prosecution witnesses called for cross-examination confined to attesting to the accuracy of their statement. In some cases it may be advisable to have evidence in chief given in the normal way, orally through question and answer, but this should require leave of the presiding magistrate.

It seems undoubted that magistrates conducting a committal have ample powers to restrain oppressive, irrelevant and repetitive cross-examination. However, the enactment of legislation clearly stating this power may prove of assistance in the more efficient hearing of cases.

The criterion for determining whether to commit or discharge should give the magistrate some discretion to assess the credibility of witnesses. There is inevitably some tension between the committal operating as a real filter of weak cases and concerns about the magistrate at a committal usurping the function of a jury. However, the common criterion used by prosecution authorities in deciding whether to indict is 'reasonable prospects of conviction'. Such a criterion involves an assessment of the strength and credibility of witnesses. Whatever form of words is used to define the criterion, it is desirable in the interests of simplicity that the formulation be the same both at the end of the prosecution case and at the conclusion of all the evidence.

In some jurisdictions in sexual offences there are substantial limitations on the right of the defence to cross-examine the alleged victim. In our view, on balance, other methods of protecting alleged victims should be attempted such as insistence on legally qualified prosecutors, restrictions on reporting, and restrictions, that are enforced, on cross-examination as to previous sexual behaviour. At this stage, it is not clear that the more radical approach of substantially limiting the right to cross-examine the alleged victim has been demonstrated to be necessary.

The determination at an early stage of guilty pleas is an important function of committals. There is evidence that clear legislative provision of a sentencing discount for pleading guilty early can assist in generating early guilty pleas. Subject to the retention by sentencers of their general sentencing discretion, a moderate degree of incentive to plead guilty early through a sentencing discount has some merit.

It would appear that provisions making it very difficult for a defendant who has pleaded guilty at committal to change that plea have the effect of significantly limiting the number of early guilty pleas. There should not be any limitation on defendants changing their plea to not guilty.

To assist defendants who wish to plead guilty whether before or after committal there should be provision for persons wishing to plead guilty to apply to the relevant sentencing court whose Registrar will arrange for that defendant to be brought before the court as soon as practicable for sentence.

Subject to the right of a defendant to insist on indictment and to the power of a Magistrate's Court to refuse to hear a case because of its seriousness, there should be a power in the prosecuting authority to have a defendant who has been committed for trial or sentence returned to the Magistrate's Court for summary disposition of the case.

The power of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* to review decisions relating to committal hearings in cases involving Commonwealth law should be removed.

There should be a discretion for a defendant who is discharged at a committal hearing to be awarded costs.

There should be greater restriction on the ability of the news media to publish reports of proceedings at committal hearings. In particular there should be a general prohibition on reporting the opening address of the prosecution at a committal hearing.

Conclusion

It is a truism of policy analysis that one does not expect anything like 100 per cent success. Policy seeks the implementation of realisable objectives, not the achievement of ideals. Similarly, the existence of deficiencies in current practices, even if substantial, is not of itself reason for rejection of these practices. Proposed alternatives must be subjected to an

equally rigorous process of evaluation, as they may prove to be even more defective than the arrangement to be replaced.

In line with this argument, it needs to be said that the current committal systems are by no means as unsatisfactory as some critics have suggested. Thus, in some jurisdictions a substantial number of weak prosecution cases are being filtered out; in at least two jurisdictions (New South Wales and the ACT) a large number of guilty pleas are being identified at the committal stage. The present arrangements also seem to be operating reasonably well as disclosure mechanisms. Furthermore, there appear to have been somewhat exaggerated perceptions of the amount of time in Magistrate's Courts which is expended on committal hearings and of the extent to which committals have contributed to delays in the whole system. Claims about the impact of committal proceedings on witnesses also appear to have been overstated.

In short, on the available evidence, there is reason to believe that the present committal system provides a basis for a system that is fair, open, accountable and efficient. What is needed is modification and streamlining. The appropriate adjustments may well vary from jurisdiction to jurisdiction. Our suggested approach represents in general terms the direction we believe that any such modification should take.

Endnotes

1. We have been informed that a recent analysis of statistics maintained by the Police Prosecution Branch indicates a discharge rate of 11 per cent, but have been unable to obtain details on how this estimate was obtained. According to Bishop, in *Prosecution Without Trial* (1989, p. 96) estimates of the discharge rate made by the magistrates, police prosecutors and defence lawyers who he interviewed varied from 1 per cent to 20 per cent. Given the range of responses, and the difficulty which people have in making accurate quantitative estimates, his conclusion that the discharge rate is 'quite small' must be treated with some scepticism.

2. In his 1988-89 *Annual Report*, the NSW DPP refers to a 'no bill' rate of around 14 per cent (p. 12). Interestingly, the 1989 White Paper quotes a 'no bill' rate of 17 per cent for 1987-88 (at p. 24), whereas using our estimation technique the 'no bill' rate for that year was only 6 per cent. The White Paper obtains this figure by excluding sentence committals from the base figure and including partial 'no bills' in the numerator.

3. The report itself cites a slightly lower discharge rate of 3.7 per cent. The difference arises because the committee included in its denominator withdrawn cases, and matters ultimately determined summarily, whereas our estimate of the discharge rate is based only on those matters for which committal proceedings were completed.

4. Bishop (1989, p. 48) describes the situation in New South Wales as follows:

   > A police prosecutor (has) no discretion whatsoever to enter into discussions about the substitution of one charge for another in return for a guilty plea. In practice discussions do occur, and may lead to some variation of the charges laid, but rarely on a matter of substance.

5. In Queensland, particular problems are created by the fact that defence work in the criminal courts is split between the Legal Aid Office, which has responsibility for the Magistrate's Court, and the Public Defender, who does all the legal aid work in the superior courts. According to the Queensland Director of Prosecutions:

   > With such divided responsibility it is only to be expected that there will be few early decisions about any case in which an indictable offence is charged other than the decision to advise the defendant he should claim the right of trial by jury (*Annual Report 1989*, p. 20).

6. See, for example, the comments of the Chief Prosecutor in South Australia:
   I have always looked on the lower courts as a very good sieve of rape cases . . . I think it does not operate as a sieve in a lot of cases, but it did in rape cases (quoted in *Rape Law Reform in South Australia*, (eds) P. Sallmann & D. Chappell, in 'Adelaide Law Review Research Paper No. 3' 1989, p. 62).

References

Advisory Committee on Committal Proceedings 1986, *Report on Committal Proceedings*, (the *Coldrey Committee Report*), Victorian Government Printer, Melbourne.

Bishop, J. B. 1989, *Prosecution Without Trial*, Butterworths, Sydney, Ch. 3.

Law Reform Commission of Victoria 1988, *Sexual offences against Children*, Report No. 18, Melbourne.

New South Wales Attorney-General's Department 1989, *Report on a Review of the New South Wales Court System*, (the NSW White Paper) May, pp. 19-39.

New South Wales Law Reform Commission 1987, *Procedures from Charge to Trial: Specific Problems and Proposals*, Vol.1, DP14, (*the Byrne Report*), Sydney, p. 299ff.

New South Wales White Paper, *see* New South Wales Attorney-General's Department.

Coopers & Lybrand W.D. Scott 1989, *Report on a Review of the New South Wales Court System*, (the *Coopers Lybrand Report*), May, Sydney, pp. 19-39.

South Australia, Office of Crime Statistics 1987, *Crime and Justice in South Australia*, Adelaide.

United Kingdom Royal Commission on Criminal Procedure 1981, *Report*, Her Majesty's Stationery Office, London.

Wright, E. W. 1989, 'Victoria's Approach to Reducing Criminal Case Delays: Specific Initiatives', Paper presented to the AIJA Annual Seminar, Sydney, August.

The Future of Committal Proceedings in New South Wales

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You may be forgiven for thinking that I could deal with this matter very shortly—by saying that committals have no future in New South Wales. It is true that the New South Wales Government proposed to make significant changes to the system by which a person is committed for trial but the proposed system preserves the benefits of the existing committal proceedings whilst doing away with many of the inefficiencies in the present system. Let me make it perfectly clear, committal proceedings are not being abolished in New South Wales.

Before giving a brief outline of the scheme which the NSW Government proposes to introduce in place of the present committal system, I should like to apologise for the absence of the NSW Attorney-General who was unable to be here today. His absence shows how timely this conference is, because he intends shortly to give notice to Parliament of a Bill entitled 'The Criminal Procedure (Committal Proceedings) Amendment Bill 1990'. This Bill is expected to pass through Parliament in the next few weeks and come into force later this year.

The Bill represents the culmination of a project which commenced in the Criminal Law Review Division of the Attorney-General's Department in the early part of last year. At that time the Division began an assessment of the role of committal proceedings in the prosecution process and began examining firstly whether any changes were needed, and secondly what those changes should be.

The Discussion Paper

It was decided that, rather than proceed directly to legislation, a Discussion Paper should be issued which would set out a number of preferred options. It was recognised that any substantial change to the prosecution process was a matter in which the input of lawyers and the general community would be helpful in evaluating the need for, and determining the nature of, any changes.

The Division examined the role of committal proceedings in the light of authority and the experience of those working in the Division. (The Criminal Law Review Division has always been staffed by lawyers who come into the Division from positions where they are practising

law.) The Director of the Division at the time was a Public Defender and I was asked to provide some input as a Crown Prosecutor. All staff work in the Division for a maximum of about two years, after which there is the danger of losing touch with how matters actually operate in practice. Although the major part of the Discussion Paper was prepared by the Criminal Law Review Division, it would be quite wrong, and probably even dangerous, not to mention the input that the Attorney-General himself had in the preparation of the Discussion Paper.

Early on, the choice was seen to be either simple retention of committal proceedings with minor amendments to procedure, or complete abolition. As matters progressed, however, work began on ways to retain the best aspects of committal proceedings whilst overcoming the problems perceived to exist in the present system.

The Discussion Paper therefore proposed that committal proceedings as we now know them be replaced by a new system of committal for trial, with the decision as to whether or not to commit becoming an administrative function of the Director of Public Prosecutions.

However, the proposed scheme retained an important benefit which current committal proceedings have, by proposing that certain categories of witnesses could be cross-examined in the Local Court. The idea was that this cross-examination would allow the opportunity for the defence to probe the strengths and weaknesses of the Crown case, so that if the matter went to trial the issues would be more clearly defined. Cross-examination would also give the accused the opportunity to assess the strength of the Crown case and, if appropriate, enter a plea of guilty. Finally, an opportunity to cross-examine was considered important because it could reveal that the matter should not go to trial if there was no case in law or because a jury would be unlikely to convict. It could also assist the Director of Public Prosecutions in exercising his general discretion to terminate proceedings under his published guidelines.

In the Discussion Paper the circumstances in which a witness could be cross-examined were as follows:

- where the witness gives evidence of identification of the accused;
- where the witness is an accomplice;
- where the witness gives opinion evidence following scientific examination or tests and the defence require more details of the witness' expertise or the nature of the examination and tests;
- where the party is able to demonstrate special or exceptional circumstances which require the cross-examination of a particular witness; and
- where the other party consents.

The proposal would therefore have significantly restricted the circumstances in which a defendant could cross-examine a prosecution witness. This would have been a major change to the present system in New South Wales where the defendant has an unlimited right to cross-examine all prosecution witnesses.

So the scheme proposed in the Discussion Paper released in May 1989 contained two important elements—the decision to commit or not was no longer the magistrate's, and the defendant's right of cross-examination was restricted. Reform of the committal system was not the only matter contained in the Discussion Paper. Many other changes to the prosecution process were put forward, such as proposals to allow a trial court to deal with 'back-up' summary matters at the completion of a trial, removing the prosecution's right to force the adjournment of a trial by refusing to present an indictment and, of particular

importance to the proposals regarding committals, providing for a comprehensive, compulsory scheme of prosecution disclosure of both the prosecution case and material helpful to the defence.

In the months that followed the Discussion Paper's release a total of thirty-two responses were received from various individuals and groups. Some of the proposals in the Discussion Paper were strongly supported, whilst others were strongly criticised. An example of the former was the proposal to allow a judge not to sum up the facts in a short trial, whilst an example of the latter was the Discussion Paper's proposal regarding plea bargaining, where many of the submissions pointed out that the proposals would significantly hamper the acceptable charge bargaining that currently goes on.

However, it has to be recognised that by far the most controversial recommendation in the Discussion Paper was the proposal regarding the replacement of committals.

At around the same time the Discussion Paper was released, a report from a firm of consultants who were examining the criminal justice system was also released. That report recommended the complete abolition of committal proceedings. This proposal was immediately rejected by the Attorney-General and his Department. There is no doubt that the abolition of committal proceedings would result in more trials and longer trials. An early examination of witnesses is fundamental to any fair and efficient criminal justice system.

In the months that followed the release of the Discussion Paper, the preferred option was considered afresh in the light of the many responses which had been received. Additionally, the NSW Court of Appeal handed down an important decision concerning a magistrate's decision to commit for trial which required a re-appraisal of the rationale for the proposed changes (*Allen & Saffron v. Director of Public Prosecutions, Court of Appeal, Unreported, 7 June 1989*).

Many of the responses to the Discussion Paper made the point that any savings of Local Court time through the excessive restriction of cross-examination at committal would be more than paid for by longer trials. So, once it was decided to press ahead with the replacement of committals, the categories of witnesses who could be cross-examined were widened. Before discussing this matter further an outline of the scheme finally settled on should be given. It is emphasised that the Bill is not yet in its final form, but the finishing touches are now being applied. However, the scheme contained in the Bill is basically as follows.

The Proposed Bill

After an accused is arrested or summonsed for an offence which may only be dealt with on indictment and bail determined in the usual way, all statements of witnesses taken by police will be forwarded to the Director of Public Prosecutions who will firstly decide whether the proceedings should continue and, if they will, the appropriate charge.

Some matters which can be dealt with summarily will also be included in the scheme. They will not be dealt with on indictment unless the Director of Public Prosecutions or, in appropriate cases, the defendant does not consent to summary jurisdiction. This is another change from the present system where the question of jurisdiction is in the hands of the magistrate. This change will be explained later.

After jurisdiction and the appropriate charge is determined, the prosecution evidence will then be disclosed to the defence within a period set by the magistrate when the matter first comes before the court. The prosecution will also have to disclose to the defence the names, if any, of witnesses it intends to call to be examined at the pre-committal hearing.

The defence will inform the prosecution of those witnesses it wishes to cross-examine. The prosecution will consider whether to consent to cross-examination of those witnesses, if there is any dispute as to whether a witness can be cross-examined.

Prosecution witnesses may only be cross-examined without the consent of the prosecution if they fall into an appropriate category. These categories will be dealt with later. Should there be a dispute as to whether a witness falls into a particular category and the prosecution does not consent to the cross-examination, then the magistrate will resolve the matter.

A 'pre-committal hearing' will then be held. This hearing has three purposes:

- to more fully inform the prosecution and defence about the evidence;
- to clarify the issues at any later trial; and
- to enable further consideration to be given as to whether a person is to be committed for trial.

The magistrate will ensure that the rules of evidence are applied and that the proceedings are conducted fairly, but, because of the nature of the proceedings, the court will only be able to exclude prosecution evidence at the request of the defendant. The defendant will have the right to give or call evidence.

Magistrates will be given power to prevent cross-examination which would unjustifiably harass or intimidate the witness.

After the conclusion of the pre-committal hearing the evidence will be considered and the Director of Public Prosecutions will make a further decision as to whether the matter should proceed to trial. A bill will be found, if appropriate, at this stage. Once a bill has been found the Director of Public Prosecutions will advise the Local Court. This will operate as a committal for trial and the Local Court will then transfer jurisdiction in the matter to the higher court. A bill must be found, if practicable, within 30 days of the completion of the pre-committal hearing although often it will be found as soon as the pre-committal hearing is completed. From the moment of transfer, the higher court will have jurisdiction in the matter and the trial will take place in the usual way.

If the Director of Public Prosecutions decides not to find a bill after a person has been charged with an offence, the legislation will specifically require that reasons for this decision must be given on request.

Where the Director of Public Prosecutions decides not to find a bill, an order from the Director of Public Prosecutions will release a defendant in custody immediately without the need for the intervention of a court. This will ensure that people are not kept in custody after a decision has been made that they will not be put on trial.

There will be two important changes which will be brought about by the legislation.

Perhaps the most important aspect of the new scheme is that a magistrate will no longer decide whether or not to commit a person to trial. That decision will now be made by the Director of Public Prosecutions when a bill of indictment is found. It is this aspect that has received most criticism since the public announcement of the proposal.

These criticisms proceed along the lines that it is inappropriate for a party to criminal proceedings, in this case the Crown, to decide whether a person should be put on trial.

What these criticisms fail to address is the correct role of the Director of Public Prosecutions. The Director of Public Prosecutions, together with the Crown Prosecutors, has been making the decision as to whether a person should go to trial since the *Director of Public Prosecutions Act* came into operation on 13 July 1987. Before then, where there was a 'no bill' application, a similar decision was made by the Attorney-General of the day. This has been the case since soon after the colony of New South Wales was established.

At present, simply because a magistrate has committed a person for trial, does not mean that the person will stand his or her trial. Before a case can proceed to trial after committal, a Crown Prosecutor must consider the matter and, if appropriate, find a bill of indictment. The Crown Prosecutor does not have to find a bill simply because the person was committed for trial. He or she can recommend to the Director of Public Prosecutions that no bill be found. Similarly, even after a bill has been found, a Crown Prosecutor can recommend that there be no further proceedings although the final decision will be that of the Director of Public Prosecutions.

It must be remembered also that the charge for which a bill is found by a Crown Prosecutor is often different to the charge on which a person was committed for trial.

Similarly, just because a person has not been committed for trial by a magistrate, does not mean the person will not stand his or her trial. The Director of Public Prosecutions has the power to file an ex-officio indictment, as does the Attorney-General of the day. A recent example of this occurred in Victoria where an ex-officio indictment was filed before the completion of committal proceedings.

So whether a person is committed for trial or not by a magistrate, the Director of Public Prosecutions has the power to 'overrule' the magistrate's decision. Thus criticisms of the proposal which suggest that the Director of Public Prosecutions, as a party to proceedings, should not have the power to put someone on his or her trial, fail to recognise that the Director of Public Prosecutions has had this power since the creation of the office.

This power to terminate criminal proceedings even where the person has been committed for trial is vested in the Director of Public Prosecutions as a natural consequence of that person being given the responsibility to prosecute. Prosecutions in New South Wales are brought in the name of the Director of Public Prosecutions on behalf of the Crown.

Of course the Director of Public Prosecutions is responsible to Parliament for the exercise of those powers (he must file an annual report which is subject to debate in the Parliament) and the Attorney-General retains the power to file ex-officio indictments or 'no bill' a matter despite the Director of Public Prosecutions' decision. This will not change under the new scheme.

It is interesting to note that the Law Society of New South Wales issued a press release containing this statement: 'The matter of greatest concern is the proposal to have the prosecutor, a Government employee, decide whether or not an accused person goes to trial'. As the *Director of Public Prosecutions Act* makes clear, the Director is an independent statutory appointee and is no more a 'Government employee' than magistrates are under the *Local Courts Act 1982* (NSW). The press release also fails to recognise that the Director of Public Prosecutions already decides 'whether or not a person goes to trial.'

One result of the removal of the need for a magistrate to make a decision will be that it will no longer be necessary for the same magistrate to hear the cross-examination of all the witnesses. This will allow improvements to the listing arrangements in the Local Court.

The second important aspect of the new scheme concerns the restrictions on cross-examination of prosecution witnesses.

The draft Bill gives the defendant the right to cross-examine witnesses who fall into the following categories:

- a witness who gives evidence as to the identification of the defendant may be cross-examined concerning that identification;

- a witness who is alleged to have been an accomplice of the defendant or has received an indemnity from prosecution may be cross-examined in respect of any matter;

- a witness who gives evidence of an opinion based on scientific or medical examination may be cross-examined on that opinion and the methods used to reach that opinion;

- a witness who is examined in chief by the prosecution may be cross-examined in respect of any matter;

- a witness whose cross-examination is likely to adversely affect the assessment of the witness' reliability or likely to adduce further material to support a defence may be cross-examined in respect of reliability or the further material; and

- a witness to whose cross-examination the prosecution consents may be cross-examined about the matters to which the consent relates.

A comparison of what might be called the general category proposed in the Discussion Paper, with the general category in the Bill, will reveal just how much the right of cross-examination was widened. No longer will there need to be special or exceptional circumstances before cross-examination is allowed.

Of course, it is recognised that the categories of witnesses who may be cross-examined are now quite wide, however, as argued above, this is necessary to ensure that the efficiency gains which will be brought by the scheme are not swept away by having longer and more trials.

You may then ask: 'If the categories are so wide why bother having categories at all?' One reason, and an important one, is that this will require defence counsel and solicitors to at least give some thought to exactly why a witness is required for cross-examination.

There is no doubt that some people will dispute this, but my experience—as a person who in finding bills of indictment, reviewed hundreds of committal proceedings where the defendant was represented by a variety of legal practitioners—has been that all too often, prosecution witnesses are required to attend court by the defence simply because no consideration has been given to whether it is necessary to the defence case to cross-examine that witness. Often it is just a case of the defence lawyers ignoring basic case preparation until the day before the hearing.

At present the defendant is served with a form containing a list of witnesses together with their statements. The defendant must then advise which witnesses he or she wishes to cross-examine. Unfortunately it is all too easy when the lawyer is flat out running a practice, to simply write 'all witnesses required' and send the form back. This ensures that the defendant's right to cross-examine is reserved, but the result is that witnesses are required to attend court only to be sent away or asked the most superficial questions when the defendant's lawyer realises that it is not necessary to cross-examine that witness after all.

The second reason to limit the circumstances in which a witness may be cross-examined is that this will prevent the wide-ranging 'fishing expeditions' which are too common under present committals. Under the new scheme we should see pre-committal proceedings being conducted on reasonably clearly defined issues. The restrictions will mean that fewer witnesses will be called for cross-examination, and for those that are, the cross-examination itself will be shorter.

These two factors, the reduction in the number of witnesses cross-examined and the narrowing of issues, should lead to significant reductions in Local Court time.

The restrictions on cross-examination are such that these savings will be achieved without any subsequent increase in the length of any actual trial.

Having outlined the nature of the scheme, the following is an explanation of the benefits which can be expected from its implementation.

Benefits from Implementing the Proposed Changes

The Discussion Paper noted that the Local Court appeared to be an inefficient filter in taking out from the prosecution system those matters which should not go to trial. Referring to the figures then available, the Discussion Paper found that 17 per cent of matters which magistrates had committed for trial were 'no billed' by the Director of Public Prosecutions. Looking at the figures from the Director of Public Prosecutions' 1988-89 Annual Report we find that the corresponding figure is now 16.3 per cent, a rate far in excess of the rate in other states of Australia. Of particular concern is the fact that over 10 per cent of matters were 'no billed' because the Director of Public Prosecutions concluded that there was either

no prosecution case to be met or there was no reasonable prospect of conviction. Both of these decisions were the responsibility of the magistrate at committal. But the Director of Public Prosecutions has come to a different conclusion in over 10 per cent of cases committed for trial. Of course, this is not to say that the Director of Public Prosecutions is always right and the magistrate is always wrong in these situations, but that is not the point when the Director of Public Prosecutions must, as the prosecuting authority, have the power to overrule the magistrate's decision. It must be of concern that there is such a disparity between the conclusions of the magistracy and the conclusions of the Director of Public Prosecutions.

There will always be a number of matters which are terminated after magistrates have committed for trial because the Director of Public Prosecutions' responsibilities as the prosecuting authority require a consideration of factors which are much broader than those which are properly for the consideration of magistrates. Such things as the health and age of the accused should never be taken into account by a magistrate but should be considered by the Director of Public Prosecutions. These broader considerations account for about 6 per cent of matters which were committed for trial in 1988-89.

So the current committal system is an ineffective filter for two reasons. Firstly, magistrates are still committing for trial in many cases where the Director of Public Prosecutions, in effect, decides that the person should not have been committed for trial in the first place. Secondly, even where the Director of Public Prosecutions agrees that the magistrate's decision to commit for trial was exercised properly, the Director of Public Prosecutions may not proceed to trial for reasons which the magistrate was not able to take into account. It would be far better if these matters were terminated at the beginning of the prosecution process rather than after the person has been committed for trial.

Further evidence of the need for change can be found in a study by John Bishop carried out in 1982-83. He examined the attitudes of magistrates and Crown Prosecutors to their functions in deciding whether a person should go to trial or not. Although his study was undertaken some time ago, the fact remains that the basic decisions to be made in the prosecution process are still similar. His findings are therefore very relevant to us today. At a Seminar held recently by the Institute of Criminology at the Sydney University Law School, Mr Bishop concluded:

> The awareness by the magistrates that the real decision to prosecute is that of the Attorney-General and Crown Prosecutors may indicate that in evaluating the prosecution evidence they are not merely casual about the precise charge for committal, but also about the strength of the evidence required for committal. There would be a very strong temptation to fix the standard of evidence required for committal at a very low level and commit for trial in all but the weakest cases, an approach consistent with views expressed by the Crown Prosecutors, defence counsel and solicitors (The Abolition of Committal Proceedings, paper delivered 11 April 1990, by Dr John B. Bishop).

His view was that committal proceedings were failing to perform their primary function of filtering out cases which should not go to trial. He believed that there was a strong case for complete abolition of committals. I agree that committal proceedings are failing to perform their primary function, but rather than abolish them completely the scheme in the draft Bill preserves that part of the committal proceedings which is necessary for an accused person to have a fair trial.

Conclusion

As you are no doubt aware, New South Wales has a significant backlog of criminal cases awaiting hearing in the Supreme and District Courts. Individuals spend an average of nine

months in custody between committal and trial in the District Court. Many of these people will be later acquitted. It is by no means an overstatement to say that this is a shameful situation.

A clear factor contributing to these problems is that too many cases are going to trial because too many are being committed for trial in the first place. The changes to committal proceedings to be introduced in New South Wales will significantly alleviate this problem.

The bottleneck in the system at present is in the higher courts but no one could deny that Local Courts are extremely busy places.

The new scheme of pre-trial committals will result in a saving of Local Court time. Pre-committal hearings will be completed in less time than is currently taken for committal proceedings. This will lead to a small, but significant improvement in the time which elapses between arrest and trial. However this is by no means the primary objective of the changes.

The new pre-committal scheme is not the only step which is being taken to reduce the number of matters going to trial unnecessarily. In New South Wales, magistrates have the jurisdiction to deal with many indictable matters summarily with the maximum term of imprisonment, in general terms, being two years.

Yet, many magistrates are committing for trial when the defendant requests summary jurisdiction, even where there is no likelihood that a penalty even approaching two years in prison would be appropriate. Recently, by way of illustration, I was given a brief to appear for the Crown in a District Court trial before a judge and jury where the accused was charged with stealing two pairs of jeans from a retail store—shoplifting in other words. No doubt a serious crime in the eyes of some, but one which was never going to require a penalty of more than two years' imprisonment.

Of course in some cases of shoplifting it may be quite proper for the matter to be dealt with on indictment but this was not one of them.

There are other examples. Common assault in New South Wales may be dealt with on indictment or summarily at the magistrate's discretion. In either case the maximum penalty is the same, two years' imprisonment, yet we consistently see magistrates committing for trial rather than dealing with the matter themselves—even where the defendant indicates a wish to be dealt with summarily. From one Local Court 33 per cent of matters committed for trial to the District Court were for offences which could be dealt with summarily without the consent of the accused. These are the least serious matters which can be dealt with on indictment. If even half of those had been dealt with by the magistrate the new trial registrations from that court would have been cut significantly.

As a result of these findings, the Bill to go before Parliament provides that the decision as to jurisdiction will be made by the Director of Public Prosecutions with the consent of the defendant where appropriate. This will further reduce the number of committals to the higher courts and should allow the higher courts to reduce the enormous backlog of cases awaiting hearing.

There are other reforms contained in the Bill which cannot be described in detail here. One of the most important, referred to earlier, is the introduction of compulsory disclosure by the prosecution of both the prosecution case and material which may be helpful to the defence. The scheme regarding committals could only really operate successfully in conjunction with comprehensive disclosure by the prosecution.

It is hoped that this paper has given you some idea of the way in which committal proceedings will change in New South Wales following commencement of the legislation.

No doubt the New South Wales scheme will be attacked on two fronts. There will be those who maintain that the scheme goes too far. Others will put forward the view that the scheme does not go far enough. The scheme is, I believe, a novel approach which attempts to maintain the fundamental advantages committals have to both defence and prosecution, while doing away with the inefficiencies.

The Case for the Retention of Committals in their Present Form is Overwhelming

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As the debate sparked by the Attorney-General's determination to strike down our long-established system of committal hearings has progressed, the value of retaining those hearings in their present form has become clearer by degrees. It is as if one had a gemstone of known quality at the outset, but uncut and unpolished. As the debate has proceeded, we have been able more and more to see the full lustre and beauty of the stone revealed. In the eyes of those of us who know the system, the process of analysis and re-evaluation which the debate has necessitated has had much the same effect as the gem cutter when he cuts and polishes the original stone to elicit its full potential.

When the discussion paper on reforms to the criminal justice system was published in May 1989, the 'reforms' then announced were much more horrendous than the still-unacceptable ones we are debating today. Rightly or wrongly, the debate at that initial stage was seen as one going to the abolition of the system. By degrees, the Attorney-General has had to yield to the outcry those original proposals generated. By January of this year, the Attorney-General was adopting a seemingly more mellow but, still unacceptable approach.

Problems with the Abolition Approach

'Consideration is now being given to not abolishing committal proceedings as such, but replacing these proceedings with a pre-trial hearing', he said in a media release issued that month. In the main, the concessions which he then made, in response to the public consternation created by his proposals, related to the broadening of the scope for cross-examination.

The nub of the problem, however, still remained. That nub is that, under our enlightened system of criminal justice, no person shall be required to stand his trial for a serious criminal offence unless a prima facie case has been established by the prosecution before an independent judicial officer.

It is the insistence of the Attorney-General that the decision-making role as to whether the accused should or should not be committed for trial is to be transferred from the magistrate to the Director of Public Prosecutions that is the cause of much of the anguish this controversy has precipitated.

A significant slur has been cast upon the magistracy by removing from it the decision-making function as to whether the accused should or should not be committed for trial. It is made all the worse by the deliberate argument consistently advanced by the Attorney-General that there is no significant difference from the accused's point of view between a decision made by an independent magistrate and one made, as is proposed by the Attorney-General, by the Director of Public Prosecutions.

It is a monstrous defamation of the magistracy for the Attorney-General consistently to argue that there is no such difference.

However technically correct it may be for the Attorney-General to say that the Director of Public Prosecutions no less than a magistrate is an independent judicial officer, it does scant justice either to the magistracy or to the position of the accused. To imply that an accused is entitled to expect nothing more from a magistrate than he is from an office which is indisputably part of the prosecution very much degrades the record of true independence and impartiality demonstrated by the bench in Local Courts over the years.

This is the aspect of the matter from which solicitors who regularly practice within the criminal justice system will never willingly budge. Of course it is true that in completely exceptional circumstances, it may be appropriate for any of a variety of usually very new reasons that someone who was not sent for trial by a magistrate should be so sent upon the initiative of the Director of Public Prosecutions. Again it is of course true that, perhaps in as many as 17 per cent of cases, persons who were sent to trial by magistrates should not finally be proceeded against upon the initiative of the Director of Public Prosecutions, usually, as before, for reasons newly emerged after the completion of the committal hearings.

The blunt and inescapable fact remains that, for the great generality of criminal cases, it is the full, fair and complete preliminary hearing of the facts before a magistrate at the committal stage which determines whether or not a citizen is required to stand trial. That is the matter which the proposals of the Attorney-General now seek to strike down, by transferring the decision-making function to a functionary of the Crown—the Director of Public Prosecutions.

An independent judicial officer—one of our tried and tested and universally honoured magistrates—is a more fitting person to have entrusted to him the decision-making role as to committal or discharge than any functionary of the prosecution.

We all value the fact that once a magistrate has a committal hearing entrusted to him, he and he alone takes responsibility for it, from commencement to conclusion, from go to whoa! What an ironic contrast these new proposals afford. They openly contemplate that there may be more than one—a multiplicity, in fact—of magistrates who may preside over, in their projected merely supervisory role, any particular committal hearing. What an incredible hotchpotch it is that is proposed.

Court Delays

What is involved here is an issue of the freedom of the individual. It is an issue of the state against the individual. Overwhelmingly it is an issue of fair play. The saddest irony of all is that these changes—quite inappropriately described by the Attorney-General as 'reforms'—are brought forward under the guise of court delay reduction measures. The harsh reality is that they will increase delays rather than reduce them. Such is the all-too-frequent price the beleaguered public is asked to pay through heavy-handed governmental

interference with processes of law which appropriately have evolved over the decades out of the human needs of the times.

The truth of the matter is that the court delays are far greater in the District Court than they are in the Local Court. For whatever reason, the Attorney-General appears to hedge whenever he is confronted with this simple fact, yet practitioners who work in the respective jurisdictions know that there is no room for dispute regarding the matter at all.

It is in the period after committal and before trial that the great bulk of the delay is located. It is not located in or around the committals stage itself. The Attorney-General himself attributes only one-third of the delay between charge and trial as being attributable to the committal process, two-thirds of it lying elsewhere—obviously in the period between committal and trial. Figures obtained from the 1989 Annual Report of the Attorney-General's Department make it clear that, in 1988, less than one-quarter of the delay in bail matters in the Sydney District Court and in all matters in the Western Sydney courts were attributable to the committal stage, three-quarters of the delay being based elsewhere. Accordingly, the real need is to tackle the delay where it is most evident rather than lashing out counter-productively at committal hearings.

These proposals by the Attorney-General, if implemented, mean the end of committal hearings as we know them. The matter cannot be put more succinctly than how the Law Society itself put it in a letter to the Attorney-General in December 1989:

> Without a right for a defendant to cross-examine witnesses without restriction, impeach prosecution witnesses as to credit and without the power by a magistrate to commit or discharge, the pre-trial hearings will have a fundamentally different character to the familiar committal hearings.

The dominant feature of any such implementation will be that court delays will be longer, not shorter, than they are today. The proposed new pre-trial hearing system will mean that many persons who have previously been prepared to change their plea after being committed by a magistrate, will now no longer be prepared to do so. Instead they will exercise their full rights in the District Court. Thus, there will be more jury trials in the District Court. Added to that, those jury trials will take longer to conclude, in part because all of the irrelevancies which are pruned out as a result of committal hearings will be left to be adjudicated in the already over-congested District Court.

Most experienced solicitors practising within the criminal justice system know that so far as most issues are concerned, the best course to take is to run them—that is, to test them out at the committal stage. Such solicitors normally then take the view that if, on those issues, the defence has simply not been credible, it should be strongly recommended to clients that they enter a plea at the District Court level. Implement the new pre-trial hearing system advocated by the Attorney-General, and those solicitors will certainly, quite properly, pursue a very different course. They will then feel obliged to run all of these issues in extenso at the already over-cluttered District Court level.

The existence of a 'I want my day in court' syndrome is undeniable. Part of this is that the accused craves an opportunity to confront his accuser followed by the chance to think carefully about the strength or otherwise of the prosecution case presented against him. If, at that stage, the prosecution case is demonstrably a formidable one, inevitably his lawyers' advice will be predictable. On sober reflection, the accused will tend to plead guilty. However, take away from that accused the opportunity of committal proceedings and it is inevitable he will demand his 'day in court' at the much more costly and over-burdened

District Court level. This will involve a full jury trial with all its expense and delay, instead of the accused pleading guilty before a judge sitting alone.

The reasons why the changes proposed by the Attorney-General will exacerbate rather than cure delays are manifold. For instance, it must be conceded that it is at the stage of committal proceedings that the real issues in the case become clearly defined for the first time. Perhaps more importantly, the matters about which there is no dispute become obvious to both sides. These are just some of the ways in which committals open the door to short cuts at the trial stage. Without committal proceedings as we know them, such short cuts would tend to be impossible. At the trial, in the District Court, the Crown would be obligated to prove strictly every single ingredient of its case. This is because there is no requirement—nor could there ever reasonably be imposed any requirement in criminal litigation—for the defence to disclose its case. Indeed, this is one of the matters which the Attorney-General has felt himself impelled to concede—that there will be no requirement of pre-trial disclosure by the accused.

The cognoscenti who are really familiar with criminal trials know full well that typewritten police statements are no substitute for the depositions obtained from committal proceedings. It is these depositions which provide the foundation from which judge and both counsel later work. Equally, they provide the foundation on which the Director of Public Prosecutions, in deciding whether or not to use the options open to him, such as to issue an ex-officio indictment—a very infrequently exercised option indeed—or go by way of no bill. A study of these depositions will result in warning lights glowing for expert eyes to see—alarm signals pointing to where a trial may have to be aborted; guides that all the relevant parties need to be able to see if that expensive and time-wasting abuse of court facilities is to be avoided at the costly trial stage.

Again—the real delay in the criminal process is not in the Local Courts. It is at the point of trial. Cases currently being tried have normally been committed for trial and awaiting a hearing for 18 months. It was once asserted that this time lag would be reduced following the creation of the office of the Director of Public Prosecutions. This has not eventuated. Neither will the claimed reductions in court delay promised as a result of the Attorney-General's current proposals. (Informed observers will also recall that a criminal registry and a listing directorate were likewise established with a view to reducing delays. Once again, however, the promised reductions did not eventuate.)

In the search for these elusive and, it is conceded, most important reductions in court delays, there is also a risk that the goal of an at-all-times fair system of criminal justice may be overlooked in the quest for delay reduction.

The Attorney-General himself has shown a confusion of mind as between priorities in this area. When he wrote to the Law Society on the 23 November 1989, he managed to get it right. He then wrote:

> The speedier progression to trial is certainly one of the aims of these proposals; however, reduction of delay in the system is certainly not their principal aim.

He went on to state a goal with which none of us could cavil, providing a better system is available. He expressed his ultimate aim, above and beyond the reduction of delay, in the following words:

> I am aiming to achieve a better and fairer system of criminal justice . . .

However, by the time of his recent letter to state parliamentarians on the subject the Attorney-General appeared to have done another somersault. Speaking of the same pre-trial hearing system he is now advocating, he wrote:

> Perhaps the greatest benefit will be through a reduction in delay between charge and trial . . .

We need to keep our basic priorities right. An at-all-times fair system of criminal justice is more important than any marginal whittling down of court delays.

It is not good enough just to make things tidier, easier and cheaper for the prosecution—which means in the long run, of course, for the government of the day.

Neither charge bargaining nor plea bargaining can in any meaningful way go forward without there having previously been committal proceedings. The simple fact is that without such prior committal proceedings, there is no basis from which negotiation can commence and proceed.

Quality and Independence

The issue at the heart of the matter is quality! Without any doubt, NSW's criminal justice system will continue to work if the changes foreshadowed by the Attorney-General are put in place. What will be lost, however, is some degree—an important degree—of that elusive entity which we know as quality. The view of the Law Society of NSW is that the quality of our criminal justice system will be significantly reduced under the proposals. Measured in practical terms, the outcome will be that many people who might, under our existing system, enjoy a discharge will end up deprived of that relief.

For this reason the proposal that the decision to commit for trial be made by, in effect, the prosecution, is worrying. It is true enough that the Director of Public Prosecutions is an independent judicial officer. It is recognised that there are constraints which properly rest upon the prosecution. Under our system, it is never proper that it should see itself as being committed to securing a conviction regardless. Nonetheless, those of us with extensive practical experience within the relevant jurisdiction know full well the force of the proposition that we have to work within an adversarial system. The esteem our system of criminal justice enjoys flows from the fact that the bench and the jury remain gloriously detached from the partisanship of that contest. That can never be said for the participants themselves, however. For them it is an out-and-out confrontation. This applies nearly as much to the prosecution as it does to the defence. The Director of Public Prosecutions is a fragment—the most important fragment—of the prosecution half of that adversarial contest.

That there is a proper measure of restraint which he is called upon to exercise we do not dispute, but, when the chips are down, he is part of the prosecution, independent judicial officer or not. This can never be said of our bench of magistrates, who have always exhibited proper impartiality and true independence.

However much the extent to which it enjoys statutory independence, the prosecution will always tend to remain sensitive to public concerns, attitudes and preoccupations. We can all conceive of situations in which they may be a public expectation regarding any particular prosecution, or type of prosecution. Is it seriously suggested that there will not be some pressure to respond felt within the prosecution? In commercial fraud cases, for example, where there is a great public outcry over many hapless victims having lost their

money, isn't it true that there might be a widespread loss of confidence in a prosecution which declined to prosecute? How much better in such situations if the relevant decision, to discharge or otherwise, is made by a truly independent judicial officer with no associations either with the prosecution or the defence.

Within sections of the community there has been a tendency to see recent reports about the Coledale prosecution as illustrating, if nothing else, the type of criticism attracted where there is a perception that a prosecution is being continued merely to satisfy public expectations.

It is important to ask the question whether or not it is true that individual prosecutors tend to reflect general prosecution policy where choices as to the type of defendants to be brought before the courts are involved. It has been said of the much debated Temby doctrine, which emerged whilst Mr Ian Temby, QC, was the Commonwealth Director of Public Prosecutions, that it was illustrative of this. How much better that the relevant decision should always be made by that much esteemed 'independent judicial officer'—one of our magistrates.

We live in an age when the focus is upon so-called 'open government' or 'Glasnost', to use the Russian alternative. How strange, accordingly, that the current proposal should run so counter to this fashionable and broadly accepted thoughtstream of our time. For at the heart of these proposals is the notion that, in future, the decision to commit or to discharge should not be made in public at all, as it always has been when made by magistrates independent of the prosecution. On the contrary, it will be made in private behind the closed door of a functionary of the prosecution. If this does not raise alarm bells in the minds of lovers of liberty within our community, then something has gone seriously amiss.

It is easy to deride opposition to these proposed changes as the mere knee-jerk reaction of legal professionals with a vest-pocket interest in the preservation of the status quo. Cynicism of this order cannot diminish the rock-solid fact that the liberties of our people depend on the ever-ready existence of courageous advocates, whether solicitors or barristers, prepared and able to defend them without fear or favour when the awesome might of the prosecution is arrayed against them. Cynicism of that kind tends to dissipate very quickly when someone—it might be any one of us—finds himself facing a serious charge and desperately cries out for competent and forceful representation. Across the centuries the truth has remained that the foremost warriors in the cause of civil liberties have been lawyers.

The Future Outlook

So, what does the future hold if these proposals do come to be implemented? So far as the most vital right of all—that of unlimited cross-examination—the prospects for the future are very partial, very fragmentary. Rights of cross-examination of witnesses falling outside of the specific categories is entirely unknown. The signals are no good.

The most demeaning feature of the treatment of magistrates under these proposals, of course, is that they are, in the main, reduced to being mere supervisors of the pre-trial hearings which are offered to us as pale shadows of the full-scale committal hearings we know so well. The idea is that they should simply sit there and supervise. They are deprived entirely of any real decision-making power. Certainly as to the vital issue of whether there will be a discharge or a committal, they are to be impotent.

It seems the only concession in this area that has been wrung from the Attorney-General is that they may have conferred on them a discretion to permit cross-examination of

a witness who does not fall naturally within one of the specified categories 'where there are reasonable grounds to suspect that cross-examination will affect either the assessment or the reliability of the witness, or would elicit further material to support a defence'.

Yet, even where such a slender discretion may be made available, the question of how it can reasonably be expected to be exercised is itself a worry. Where there has already been no cross-examination allowed, on what basis will the magistrate be able to make his assessment that some should be permitted?

It cannot be disputed that magistrates make mistakes. Likewise, it cannot be denied that many magistrates have been too timid and hesitant in the exercise of their powers. A propensity for human error is inbuilt in all human beings, collectively no less than individually. Whether we look at an individual acting as a magistrate, as a District, Supreme or High Court judge, or as a Director of Public Prosecutions, the scope for human error is there. It is likewise there when one looks for justice from a collective body, such as a jury. But one does not discard a tried and tested system which has delivered substantially correct decisions across the course of the centuries merely because of this innate tendency for human error occasionally to show itself. This society, I believe, would never contemplate getting rid of the criminal jury. Equally, I believe that it should be insistent upon retaining the virtues of committal hearings as we know them.

In what has been described as the 'distant past', the courts sometimes heard trials on ex-officio indictments without the benefit of a preliminary examination. The truth is however, that even then, that kind of procedure always generated intense public disquiet. It has generated criticism in our own time, for example in the judgment of Gibbs ACJ and Mason J in *Barton v. R (1981)* 147 CLR 75.

Conclusion

Again and again, however, we are brought back to the issue of delay and the quite unsubstantiated allegation that this is magnified by committal hearings. The argument has some surface plausibility, but it is a plausibility which does not survive the shallowest scratching of its surface.

The committal process has received substantial judicial scrutiny in recent times. It has withstood this scrutiny wonderfully indeed. Just as with the polished as against the original natural gemstone, it has emerged from the process enormously enhanced. It has found many champions in recent times, including Mr Justice Lee whose paper 'In defence of the committal for trial' delivered to the Australian Criminal Lawyers' Conference at Broadbeach in July 1988 stated:

> Those who have been brought into contact with it in a professional capacity can recognise the tremendous part it can play in the proper defence of an accused person's interest, and it is a regrettable fact that those who have not had that experience may see its function and purpose in an entirely different light. Used responsibly by both prosecutor and accused it can be of significant benefit both for the public interest and in ensuring that prosecutions are not brought except on proper material and secondly in safeguarding the rights of an accused person and ensuring his fair trial. Where witnesses are required to give oral evidence and are cross-examined, it can be a valuable aid to a prosecutor in deciding on the proper charge to be laid at the trial and, in many cases, the oral evidence given at committal can induce an accused to plead guilty.

Greg James, QC, of the NSW Bar, has furnished a list of the significant public benefits provided by committals. This list is:

- disclosure of prosecution case;
- testing reliability, credibility and demeanour of witnesses;
- perpetuation of testimony;
- identification of issues between parties;
- enabling the prosecution to properly formulate charges; and
- early disposition of charges.

The statements in defence of committals have flowed from the very highest quarters—from the bench of the High Court in Australia, from Lord Devlin, who has described committal proceedings as 'an essential safeguard against wanton or misconceived prosecutions' in England, from our own Commonwealth, as distinct from our State Director of Public Prosecutions. The case for their retention in their present form is overwhelming.

A Critique of Proposed Committal Reform in New South Wales

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On 11 April 1990, the New South Wales Attorney-General Mr John Dowd delivered a paper entitled 'Committal Reform: Radical or Evolutionary Change', at a seminar organised by the Institute of Criminology in Sydney. He set out in some detail the proposal approved by the cabinet with regard to committal reform in New South Wales At p. 5 of his paper he said:

> I have no doubt that the scheme approved by cabinet is a significant improvement on the present system of sending a person to trial. It does away with the magistrate's function of committing for trial. This is not a step we have undertaken lightly, but is one which had to be taken after the inefficiencies in the present system were so clearly demonstrated.

He went on to indicate that the scheme will, inter alia, do three things:

- it will assist in reducing the delays an accused person now faces in waiting for trial;
- it will reduce the number of witnesses who unnecessarily go through the often harrowing experience of cross-examination; and
- it will allow a more efficient distribution of work between the Local Court and the higher courts.

If in practice it could be guaranteed that the scheme will have these effects, they are good reasons to support implementation of the scheme. However, having read the outline of the scheme provided by Mr Dowd in his paper, I do not believe that these goals will in fact be realised. Additionally, as will be pointed out later in this paper, the scheme is seriously flawed because in the way it attempts to solve the problem of delays, it provides a structural recipe to facilitate expediency in, and manipulation and corruption of, the criminal justice system in New South Wales.

The Present Procedure

In summary the present committal procedure in NSW since April 1988 is as follows:

- section 48AA of the *Crimes Act* (inserted by Act No. 235 of 1987) requires mandatory use of written statements of witnesses to be served on defendants in committal proceedings;

- at an appearance of the defendant in Court in answer to the charge (either by way of arrest or summons), the magistrate will direct that the brief of evidence containing all the statements of prosecution witnesses, be served on the defendant within a stipulated time (for example within one month);

- At the same time the magistrate will direct that if the defendant requires any of those witnesses to be present at the hearing to give oral evidence and be subject to cross-examination, he must serve notice to that effect on the prosecution within a further stipulated time frame (for example within 14 days);

- at the same time the magistrate will fix the case for a committal hearing to take place at a time beyond that indicated in the previous paragraph and the hearing will take place on that date. In long and/or complicated cases a number of consecutive days will be set aside for the hearing of the case, that number being based on an estimate of the length of the case.

This procedure means that if the defendant so wishes, all the witnesses may be required by the defendant to be in attendance at the hearing and all may be required to give their evidence orally and be subjected to cross-examination. It must be conceded therefore that the current scheme still contains deficiencies which prevent it from working as effectively as it might do. Essentially these deficiencies are:

- some committals are still taking too long to hear, adversely affecting delays and costs (however, for an increasingly large number of committals this is no longer the case);

- victims and other innocent witnesses are often still subjected to long and/or harrowing cross-examination; and

- there are still cases where committals for trial are ordered by magistrates and allegedly according to the Director of Public Prosecutions (or, more accurately, solicitors within the DPP) it is said that those committal orders were wrong or inappropriate, or are no longer appropriate for various intervening reasons.

It must be pointed out here that the mandatory paper committal scheme is working much better than it is being given credit for. The time taken for the hearing of committal cases has been substantially reduced. Because the scheme only took effect from 4 April 1988, insufficient time has been given to gauge its ultimate effect. Furthermore many of the criticisms and assessments of the present arrangements are inaccurate or wrong because they use or rely on statistics and data prior to April 1988. The fact of the matter is that delays in the Local Courts in NSW have, since 1988, been substantially reduced and one of the major factors in that reduction has been the effect of the mandatory paper committal scheme. That said, however, there are some valid criticisms to be made:

(a) magistrates still have no power to prevent witnesses being called to give evidence where it is plain they are being called unnecessarily. Unfortunately it is still the

case that many defence counsel continue to call all the prosecution witnesses and this is clearly contrary to the intended spirit of the legislation;

(b) magistrates still have no real power to prevent victims and innocent witnesses being subjected to unnecessarily long and/or harrowing cross-examination. The only power they have in this regard is that provided for in sections 56-58 of the *Evidence Act 1898* (NSW);

(c) magistrates are not clearly given the legal power to refrain from making a committal order in those cases where justice or commonsense would indicate that that should happen despite the existence of a relatively strong prima facie case against the defendant. The test under Section 41 of the *Justices Act 1902* (NSW) is still vague, confused and uncertain in that regard. That particular power is reserved to the DPP when considering whether or not to proceed with a trial.

There are essentially two ways in which the residual problems of the mandatory paper committal scheme might be addressed:

1. Give the magistrates more power to control the proceedings, in particular, to control the abuses which are still occurring;

or

2. Take the power of committal away from judicial officers (that is the magistrates) and make the decision whether or not to proceed with a trial an administrative one, one which is essentially divorced from judicial procedures.

Surprisingly the Attorney-General and the government have opted for the second solution. I agree that if the second solution is the better way to deal with the problem, then any consequential lowering of the future status or role of magistrates should clearly be accepted as necessary in furtherance of the interests of justice. Those interests are always paramount.

However, I have grave fears that the likely practical ramifications of the second option above have been overlooked or not understood, and that these ramifications, quite apart from the question of fundamental principles of justice being abandoned or severely strained, are of sufficient substance and gravity to require consideration. The important question to be asked is what the proposed scheme does in the way of addressing the problems in (a), (b) and (c) above.

The Proposals

As to (a), at p. 17 of his paper Mr Dowd said that:

> Under the proposals approved by Cabinet, the defendant will have a right of cross-examination where there are reasonable grounds to suspect that cross-examination will either affect the assessment of the reliability of the witness or would adduce further material to support a defence . . . I won't take your time by reciting the various formulations that were considered at one time or another but I can assure you that the test approved by Cabinet is the widest of those formulations.
>
> The clear inference is that this test will be likely to mean in practice that all witnesses will be sought to be called by defence counsel. One must therefore expect approximately the same number of witnesses to be called as are being called under present arrangements. Not only is it likely that witnesses will continue to be called unnecessarily, but it is also likely that a great deal of time will be taken up on occasions by counsel endeavouring to persuade the magistrate that certain witnesses

> ought to be made available for cross-examination. Magistrates under the proposal will be charged with the responsibility of deciding whether witnesses fall into the wide criteria to be stipulated in the Act. Inferentially this will sometimes require an additional preliminary hearing prior to the pre-committal hearing itself, at which time these witnesses can be approved or disallowed for cross-examination by the magistrate, allowing sufficient time to call those witnesses who have been approved. The new procedures will not improve the present arrangements; if anything, they are likely to be more time-wasting.

As to (b), at p. 15 of his paper, Mr Dowd sets out his reasons for not proclaiming amendments to the *Justices Act* by the previous government which would have restricted the right of defendants to require the attendance of some witnesses for cross-examination and given magistrates powers to halt cross-examination. As to cross-examination he said:

> A limitation on cross-examination will be provided but this will be basically similar to the existing limitations under the *Evidence Act*.

The practical result to be expected therefore is that there will be no change and the problem will remain.

Furthermore the problem is likely to be exacerbated. Magistrates are to be placed in the uncomfortable position where they have no interest or role to play, in determining whether there is to be a committal for trial. However, because they are judicial officers, they will not want themselves to be seen as an arm of the DPP or to be labelled as being used by the DPP in any way. (From this perspective, of course, magistrates will often find themselves in an intolerable position, one quite antithetical to their recently acquired status as true judicial officers.) Cross-examination is therefore likely to be liberally permitted, even where it offends the provisions of the *Evidence Act*. Why one would want highly skilled and trained magistrates to preside over proceedings of this kind with no powers, save as to admissibility of evidence, is not clear to me.

For the above reasons, committal proceedings are likely to become even lengthier than at present. Certainly they will be at least as long as now. Lawyers will be making every effort and conducting every possible search to find weaknesses in the prosecution case, whether they exist or not, with a view to making detailed submissions to the DPP (not in open court, but in private) that there be no committal for trial. In this regard they will have in mind that they are often dealing with young and inexperienced lawyers in the DPP Office whose views will be crucial in the final decision to be made by the Director whether to file an indictment or not.

As to (c), what is proposed here as a remedy is quite revolutionary for countries enjoying the benefits of the Common Law. Power to commit for trial is taken away from judicial officers in open court (that is magistrates) and given to solicitors behind closed doors in the Office of the Director of Public Prosecutions. It is no answer to say, as the Attorney-General seems to suggest in his paper, that that is what happens now. Certainly it has always been the case that the magistrate's decision to commit for trial is not the final decision. But in the first place, taking the figure of 17 per cent of magistrates' committals allegedly being no-billed at face value (*see* below) even on that figure the DPP is following the magistrates' decisions in 83 per cent of the cases. But more importantly, under present arrangements all the evidence is taken and where necessary, tested before the magistrate, submissions are heard as to whether the evidence warrants a committal order being made and the magistrate provides reasons for his or her decisions. What this amounts to is that a great deal of assistance is given to the DPP when making the final decision to proceed with a trial or not. Under the proposed scheme much of this assistance is removed, leaving the solicitors responsible for that decision in the DPP office to make the decision alone. Even worse, this decision making is then to take place away from public scrutiny.

Decisions by the Director of Public Prosecutions to file a bill or not to proceed will not be able to be tested. In this regard, the Director of Public Prosecutions will assume the mantle of infallibility. It is often stated that magistrates commit too many people for trial (*see* pp. 24-5 of the Attorney-General's Discussion Paper), but which independent body has made any evaluation of the decisions by the Director of Public Prosecutions not to proceed against certain defendants despite a committal by the magistrate? It may be the Director of Public Prosecutions is in error and not the magistrate. It may be too, that the public would be alarmed at the failure to proceed in certain cases. On the other hand, many of these decisions not to proceed despite a committal are made for very good reasons, which reasons only appear subsequent to committal, for example with the experience of a committal proceedings (including cross-examination) behind them, victims change their mind and no longer wish to give evidence, witnesses disappear or new evidence is forthcoming which changes the complexion of the case.

The Attorney's answer to this criticism is quite breathtaking in its audacity, coming from a person with a respected civil libertarian background. He states that 'the new legislation will specifically require the Director of Public Prosecutions to give reasons as to why a person charged with an offence by police will not be sent to trial.'

We remind ourselves that under the proposed scheme:

- the DPP alone will determine the charges to proceed;
- the DPP alone will determine whether they are to proceed summarily or by way of indictment;
- the DPP alone will prosecute those charges; and
- the DPP alone will decide if there is to be a committal for trial before a judge and jury.

Having proposed this totalitarian arrangement, which gives all power (without any checks and balances of any significance) to the DPP, we are told that defendants' concerns and society's concerns are to be protected, not via the checks and balances provided by a judicial procedure, but by the requirement that the DPP give reasons for any decision made by him. This arrangement has parallels with the farcical situation in communist countries where citizens are assured that their rights under a totalitarian government are being safeguarded because a beautifully written constitution with impeccable logic guarantees that. No doubt reasons are given for decisions made there too!

Conclusion

In my view the best answer is not to resort to option 2 above, but to take up option 1 and give to independent judicial officers (that is magistrates) the necessary power they require to control committal proceedings, in particular the power to control the few abuses in the mandatory paper committal system which still remain.

Because magistrates are usually distrusted by those responsible for introducing new procedures, the powers of magistrates remain circumscribed. This is the situation with committal proceedings and it has inevitably produced delays and unduly long hearings. Circumscribing the power of magistrates to control proceedings properly in the fond hope the defendants will thereby be more justly treated and have their rights better maintained, has led to defendants being inordinately punished by long hearings, undue delays and huge expense, and no better off in terms of justice. Most of the residual deficiencies of the present mandatory paper committal procedure can be dealt with by giving magistrates

effective power to control cross-examination. One way of doing this is for the government to proclaim sections 41(9) and 48EA of the *Justices Act*.

What are the advantages of a streamlined paper committal system over a procedure which does away with traditional committal proceedings?

- The structure already exists for this to take place. If it is found that magistrates lack the skills and expertise (which I dispute) to make these decisions, then that ought to be remedied;

- it is consistent with the appearance of justice being done, because it takes place in open court and not behind closed doors;

- it is further consistent with the appearance of justice being done because the person making the decision to commit or discharge in the first instance is a separate person from the prosecuting authority and a judicial officer;

- the sifting which takes place in committal proceedings before a magistrate is a very valuable first screen, serving three major purposes:-

  - it has therapeutic value for the particular community, particularly where that community is a small one;
  - it enables the nature and quality of the evidence against the defendant to be properly assessed; and
  - it assists, sometimes crucially, in the final decision to be taken as to whether a bill should be filed and a trial take place;

- there has always been a big question mark in the mind of members of the public over the 'no bill' procedure and the decisions made not to proceed as the result of a 'no bill' application. A public committal proceedings where the nature and quality of the evidence can be observed and scrutinised by the public and the media, and at least an initial decision given by the magistrate, a judicial officer independent of the prosecuting authority, is very important indeed to ensure that justice is being seen to be done. It should not be lightly taken away;

- abolition of present procedures for committal proceedings will mean that many inappropriate cases will be sent for trial, and some appropriate cases which should be sent for trial will not be sent. Overall, it is likely that the Supreme and District Courts will have more trials rather than fewer, at least initially;

- it is less expensive. Many lawyers and other staff will have to be recruited by the DPP under the proposed scheme and there can be no corresponding reduction in the numbers of police prosecutors who will be still required to prosecute summary matters. (One hears that the Office of the DPP already has 200 lawyers and that that number will have to be increased to approximately 300.) A streamlined paper committal proceeding is certainly more cost-effective than a procedure which means that a veritable empire has to be recruited at the office of the DPP; and

- it will further reduce delays in Local Courts whereas the Attorney-General's solution will not. The latter still requires the use of magistrates and in my judgment, for more time than they presently give to committal proceedings. Also, it is to be pointed out that there are no serious delays in Local Courts, whereas there are in the District and Supreme Courts. It could well be the situation for

the future that all three tiers of courts are seriously in arrears with delays, not just two.

It is ironic that a government which came to power on an anti-corruption platform and which set up an Independent Commission Against Corruption once in power, should now be seen to be introducing procedures in the administration of the criminal justice system which will facilitate expediency, malpractice and even corruption itself in the years ahead. It is quite certain that the reforms proposed by the Attorney-General will mean that there will be criminal trials going ahead which should not be and criminal trials not going ahead which should be. As to the latter I would make these comments:

In recent years the State of New South Wales has passed through a period where serious corruption manifested itself and allegations of corruption were prevalent. Commendable steps have now been taken by past and present governments to deal with corruption and to deter corruption taking place. One certain deterrent is public knowledge that criminal offences, when detected, will be prosecuted through to finality and that prosecution cannot be avoided in any way.

Very often criminal offences by certain individuals are controversial or are of vital interest to criminal organisations. It is important that proper checks and balances are in place to ensure that wrongdoers and their advisers cannot manipulate the system to avoid prosecution.

Under present procedures all criminal charges which are indictable pass through a public inquiry in open court before a magistrate, who at the end of the evidence is required to make a decision whether to commit for trial or not. This decision of the magistrate is reviewable by superior courts and by the Director of Public Prosecutions, the latter official being charged with the final responsibility to proceed or not proceed with a trial. This arrangement provides a system of checks and balances which is not easy to manipulate.

The proposal to vest the decision to prosecute solely in the Director of Public Prosecutions removes all significant checks and balances so that in the course of time it will not be difficult to arrange matters whereby the system can be manipulated to the advantage of professional criminals and wrongdoers.

We have learnt over the centuries that democracy can only survive where checks and balances are in place and they should certainly be provided in the criminal justice system.

If it is intended to continue with the proposal to vest the decision-making power as to trial solely in the Director of Public Prosecutions, this power should at the very least be subject to a review by an appropriate court at the insistence of the informant in all those cases where the Director of Public Prosecutions makes a decision not to present an indictment. The proposal whereby the Director of Public Prosecutions merely provides reasons for not proceeding is simply not sufficient to deal with possible manipulation of the new system in future years by determined individuals or criminal organisations. It is too easy for some official away from public scrutiny to make a determination that the evidence is not of sufficient strength to warrant a trial.

It is my considered view that if parliament permits the scheme outlined by the Attorney-General in his paper to become law, it will have a gravely deleterious effect on the administration of justice in New South Wales.

Committal Proceedings: the Victorian Perspective

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The Current Debate

The role of committal proceedings in the criminal justice system has been the subject of diverse judicial comment. One classical and often quoted view is expressed by the majority of the High Court in the case of *Barton v. R* (1980) 147 CLR 77 at 100:

> It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair . . . To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons which is of great advantage to him, whether in terminating the proceedings before trial or at the trial. (Gibbs ACJ & Mason J, Aickin J. concurring).

In the same case Mr Justice Stephen remarked as to the deprivation of committal proceedings:

> The most obvious detriment is the loss of the opportunity of being discharged by the committing magistrate . . . An accused also loses the opportunity of gaining relatively precise knowledge of the case against him, and as well, hearing the Crown witnesses give evidence on oath and of testing the evidence by way of cross-examination. The court in exercise of its power to ensure a fair trial, can do much to reduce the deleterious effect of the first two of these losses by ensuring that the accused is furnished with particulars of the charge and proofs of evidence. But the loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable.

In recent years, the contrary view has been expressed by Mr Justice Wilson, who at the Australian Legal Convention in Perth in 1987 stated:

> A number of jurisdictions have followed English precedent in placing the responsibility for prosecutions in the hands of Directors of Public Prosecutions, being independent, highly qualified professionals having a status equivalent to a judge. This development should render the committal proceeding unnecessary and pave the way for its abolition . . .

In what may be seen as a reassessment of his previous attitude, the approach of Mr Justice Wilson was supported by the former Chief Justice, Sir Harry Gibbs. When speaking at the Second International Criminal Law Congress at Surfers Paradise in June 1988, Sir Harry identified two main functions of committals. The first was to ensure that the accused was not put on trial unless there was either a probability of conviction or a prima facie case against him, and the second to appraise the accused fully and in detail of the case that has been brought against him. The first function, according to Sir Harry, could now be performed by Directors of Public Prosecutions whilst the second could be done by the provision to the accused, prior to trial, of full statements by all of the witnesses.

Sir Harry concluded:

> The argument in favour of the abolition of committal proceedings is the great costs which the process now entails; costs which the community obviously can no longer bear (Solomon 1988).

Additionally, the more pragmatic concerns about the practical operation of the committals process have been articulated by John Willis, who has stated:

> Committal hearings take up valuable court space, occupy judicial officers, court personnel, witnesses and the police (to say nothing of the accused) and cost money. To the extent that they do not fulfil their objectives, the time, money and resources expended are being inefficiently used. The tight budgets allocated to criminal justice demand the best use of scarce resources. It cannot be said that this is presently occurring. There is a clear and pressing need for a thorough reappraisal of the whole committal system (Potas 1984).

This reappraisal has been ongoing and is reflected in, for example, the New South Wales Law Reform Commission discussion paper, *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals* (Vol. 1), and *Committal Proceedings: A Consultation Paper* (Home Office, Lord Chancellor's Department 1989).

Deliberations of the Advisory Committee on Committal Procedures

Victoria has not been immune from the controversy as to the worth of committals and in 1985 the question of the future of committal proceedings was addressed by a committee which I convened and chaired at the request of the Attorney General, Mr J.H. Kennan QC. The 'Advisory Committee on Committal Proceedings', as it was rather prosaically entitled included representatives of the magistracy, the Bar, solicitors and police force, all of whom were toilers in this field of the law. In its report, a pragmatic document which was published in February 1986, the Committee unanimously supported the retention of committals.

This paper will now briefly advert to the major issues considered by the Committee in arriving at its conclusions.

The Committee's view that properly conducted committals constitute a vital cog in the machinery of the criminal law was based on a number of grounds, not surprisingly the principal ones reflected those identified by the High Court in *Barton's* case.

First, committals have the capacity to act as a screen against what Lord Devlin (1960, p. 92) described as 'wanton and misconceived' prosecutions ensuring that no person needlessly stands trial for indictable offences and providing an opportunity at an early stage for a magistrate to discharge an accused person.

Protagonists for the abolition of committals argue that the small numbers of persons discharged at committal indicate that this proceeding is not effectively fulfilling the function of filtering out inadequate prosecutions.

It is claimed that this is partly due to the fact that the standard applied by the magistrate in order to determine whether sufficient evidence exists to place an accused person upon his trial is too low, and partly because many committals proceed as 'hand-up briefs' without the cross-examination of witnesses and such prosecutions are rubber stamped by the magistrate. In support of the major thesis, reference is made to the number of cases committed for trial in which the Crown subsequently does not proceed.

Such assertions over-simplify the situation and lack validity in the context of current Victorian practice.

In 1985 in Victoria the requisite standard of satisfaction to be attained by a committing magistrate was effectively that of a prima facie case, although several formulations were employed in the *Magistrates (Summary Proceedings) Act 1975*. The Committee regarded the level of this test as insufficient and, in order to increase the capacity of the committal to filter out unwarranted prosecutions, it recommended the application by magistrates of a more stringent test in determining whether or not to commit an accused person for trial. That test was: 'Is the evidence of sufficient weight to support a conviction?' Such a test not only has the virtue of simplicity but it enables the magistrate, in determining the strength of the Crown case to assess the credibility of individual witnesses and to reach a conclusion which does not have the appearance of pre-empting the ultimate jury verdict. The test received legislative recognition in the *Magistrates (Summary Proceedings) Act 1975* section 56 and has been applied by Victorian magistrates since 1st April 1987. It is the standard which applies whether or not the accused adduces any evidence.

It is not easy to gauge how effective the new standard has been. The figures available are somewhat crude and consequently I am uncertain where they lie on the scale of lies, damn lies and statistics.

They may, however, be taken as indicating trends. Of 1369 committals held in the Melbourne Magistrates Court in 1984 (when the old standard was applicable), 3.7 per cent of accused were actually discharged by the court. (An additional 3.2 per cent of cases were withdrawn for reasons which are not readily ascertainable).

The most recent figures from the Melbourne Magistrates Court for the 6 months between the 1st October 1989 and the 31st March 1990 indicate that out of 658 persons subject to preliminary hearings, some 73 or 11 per cent were actually discharged.

It should also be noted that the fact that a committal proceeds solely by way of 'hand-up brief' is not necessarily an impediment to the filtering process. In the six months under review, cases relating to 413 persons (62 per cent of the total) were dealt with in this way, nonetheless 38 persons were discharged.

Insofar as it is sought to argue that the system fails because of the number of nolles prosequi which are entered, it must be remembered that prosecutions are terminated for a variety of reasons apart from the insufficiency of evidence. These may include the death of the accused, the desire of victims that the matter not proceed, the unavailability of relevant witnesses, the inadmissibility of evidence of the pursuit of more serious charges interstate. The entry of a nolle prosequi does, not therefore, necessarily constitute an adverse judgment upon the initial decision of the magistrate to commit for trial. It should also be remembered that the test currently applied by Directors of Public Prosecutions in determining whether a matter will proceed in the superior courts is that of 'a reasonable prospect of conviction' which is a higher standard than that required to be applied by a magistrate.

All this having been said, the figures relating to the entry of nolle prosequis in recent years may be of interest. In the years 1986-87 and 1987-88, at a time when nolle prosequi applications would have largely reflected use of the old test, the number of such applications considered were 216 and 212 respectively with those being granted either wholly or in part numbering 147 and 145. In 1988-89 a total of 170 applications were considered with 94 being acceded to either partially or completely. Without further research it is a matter of speculation as to whether this reduction in numbers is in any way linked with a more effective screening of inadequate cases at the committal hearing.

Perhaps the final word on this aspect of the committal process should be given to Mr Justice Lee of New South Wales Supreme Court who stated, in a paper entitled 'In Defence of the Committal for Trial' delivered at the Second International Criminal Law Congress:

> It is not an argument for abolition of the committal that only a small percentage of those charged are discharged at committal, for the very requirement that a case must be made out at the committal is itself, and has been, a significant factor inhibiting baseless committals.

One of the strengths of the committal hearing lies in its public nature. Whilst the committal is not a judicial proceeding strictly speaking, it nonetheless provides independent public scrutiny of one phase of the exercise of the prosecutorial discretion.

Again I quote Mr Justice Lee:

> . . . the Committal ensures that a person is not put on trial unless it has been shown publicly that there is a prima facie case against him. (I use the phrase 'prima facie case' in a general sense to express whatever is the requirement of the relevant State Justices Act . . . The curb which the committal offers to the enthusiastic prosecutor is plain for all to see. Equally plain to see is the advantage to the public interest of only bringing to trial matters which can pass that test.

The assertion that, having regard to the experience and integrity of Directors of Public Prosecutions they should, in this modern era, take over the task of assessing the viability of prosecutions, may be superficially attractive, even if that attraction is primarily economic. The practical reality, however, is that no matter how competent a Director of Public Prosecutions may be, he or she will only be able to examine a small proportion of proposed prosecutions. Consequently if the initial decision that a person should be placed upon his trial was to be diverted from the public arena of the Magistrate's Court to the private domain of the various Directors of Public Prosecutions, such decisions would, in the vast majority of cases, necessarily be made by officers within those organisations in conjunction, in the Victorian context, with Prosecutors for the Queen.

Moreover, those cases which in fact fall for consideration by a Director of Public Prosecutions will inevitably be contentious ones which, on the scenario proposed by the abolitionists, the Director will necessarily be required to determine without the benefit of the testing by cross-examination of any of the putative witnesses.

The other important functions of committal proceedings identified by the Committals Committee are inextricably interrelated. A preliminary hearing permits an accused to discover the nature of the prosecution evidence and allows both the prosecution and the defence an opportunity to discover and remedy any weaknesses in their cases; such a hearing provides an accused with a vital opportunity to cross-examine prosecution witnesses and constitutes a venue for the exploration and clarification of issues which would otherwise have to be done at the trial itself.

In essence the argument of those who advocate the abolition of committals is that an accused will suffer no palpable prejudice if he is furnished with full particulars of the charges brought against him and is provided with the comprehensive statements of all witnesses (albeit that there will be no occasion for cross-examination).

Whilst the revelation of the Crown case can undoubtedly be accomplished administratively by the production of documents, there is a vast difference between subjecting an accused person to trial on the basis of typewritten statements of unknown reliability and presenting an accused person for trial upon the basis of evidence the potency of which has been tested by cross-examination.

From the perspective of the Crown it could be creating a 'paper tiger' devoid of forensic teeth and it may well be disadvantaged if it is forced to conduct adversarial

proceedings in the superior courts without having had the opportunity to assess the viability of its own case realistically. Directed acquittals may follow.

From the Crown's viewpoint, (and particularly that of a Director of Public Prosecutions faced with a nolle prosequi application) the type of cases where the testing of evidence is extremely important include all those involving issues of identification; sexual offences where the consent of the prosecutrix is in question; complex frauds where the prosecution must establish dishonesty; cases involving the evidence of accomplices whose reliability must be assessed; and crimes of violence where the Crown must ultimately negative self-defence or provocation.

Of course it will usually be absolutely vital for an accused to be able to explore each of these issues. Additionally, it may be desirable to examine the circumstances surrounding the obtaining of an alleged confession or to test the findings of an expert witness.

The inability of an accused to cross-examine on these matters at a preliminary hearing will inevitably result in the lengthening of the trial process as the processes of exploration, clarification and refinement of issues which may currently occur at a preliminary hearing are transferred to the superior courts in the guise of voir dires.

It should not be forgotten that the results of the committal procedure may be the appropriate modification of both the seriousness and the number of charges which may properly be brought against the accused person; whether this be the reduction of a murder charge to that of manslaughter or the re-evaluation of the number of charges of sexual assault which may properly be brought against an alleged offender.

An increase in voir dires or directed acquittals, or the attempted prosecution of cases with no reasonable prospect of conviction all have resource implications in the operation of the criminal justice system. Ironically the costs occasioned by the proposed extinction of the committal process may prove greater than the savings envisaged by the exercise.

Although the Committee found it impossible to quantify the costs of committal proceedings and hence conduct a cost-benefit analysis, it was its view that properly conducted committals would reduce the time occupied by trials in the superior courts thus resulting in a net saving of public monies.

It is perhaps worth noting that the committal procedure in fact, performs functions additional to those already outlined. In Victoria the Chief Magistrate has issued time standards designed to facilitate the early conduct of hearings. Consequently there are deadlines by which time both the prosecution and defence will need to have addressed their case. Committal proceedings may also provide the opportunity for plea negotiation and this is important in Victoria since, pursuant to Section 4 of the *Penalties and Sentences Act 1985*, the earlier a plea of guilty is entered the greater the potential for a discount on the length of any sentence imposed.

Moreover the committal process frequently provides the occasion for the determination that indictable offences triable summarily in fact be dealt with in the Magistrate's Court.

The Legislative Formulation

Whilst supporting the retention of committal proceedings the Committals Committee was not sanguine enough to believe that the procedure was currently fulfilling its purpose with optimum efficiency. Consequently a number of modifications to the process were recommended to facilitate its maximum effectiveness. These recommendations were enshrined within ss 45-56 of the *Magistrates (Summary Proceedings) Act 1975* and have subsequently been transferred to schedule 5 of the soon to be proclaimed *Magistrates Court Act 1989*.

This paper has already referred to the provision of the more stringent test to be applied by magistrates in determining whether or not to commit an accused person for trial. One possible consequence of that formulation may be to increase the length of cross-examination aimed at persuading the court that the standard has not been attained.

Conclusion

In his eloquent defence of committals, Mr Justice Lee remarked:

> Speaking for myself, I cannot feel other than that the preliminary investigation provided by a committal is a protection to an accused against wrongful prosecution of the same order as is the requirement at the trial that the charge against him be proved beyond reasonable doubt.

Those who seek to abolish or curtail the process which has formed an integral part of the criminal justice system for many years bear the onus not only of justifying the necessity for change but demonstrating that the new mechanisms which they advocate do not increase the possibilities of injustice. My present view is that they have failed to discharge that onus.

In conclusion, the current Victorian policies and legislation recognise the potential of the committal hearing to play a significant role in the operation of the criminal justice system. That potential will only be achieved, however, if all the participants in the system responsibly utilise this legal process for the purposes for which it was designed. Inadequate disclosure of the Crown case, shoddy or inept cross-examination and the inappropriate application of the standard of proof are all practices with a capacity to erode the effectiveness of the committal and hence fuel arguments for its replacement by administrative techniques.

References

Devlin, Lord 1960, *Criminal Prosecution in England,* Oxford University Press, London.

Home Office, Lord Chancellor's Department 1989, *Committal Proceedings: a consultation paper*, Home Office, London.

New South Wales Law Reform Commission 1987, *Criminal procedure: procedure from Charge to Trial: Specific Problems and Proposals,* NSW Law Reform Commission, Sydney.

Potas, I. 1984, 'Reflections on Nolles', *Prosecutorial Discretion,* Seminar Proceedings No. 6, Australian Institute of Criminology, Canberra.

Solomon, David 1988, *The Australian*, 22 June.

The Future of Committals

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In 1986 the Attorney-General asked the Director of Public Prosecutions, Mr Coldrey, to convene a committee to evaluate the role of committal proceedings. The committee was of the unanimous view that

> the committal hearing constituted a vital cog in the machinery of the criminal law. Properly conducted, it had the capacity to filter out inadequate prosecutions, to refine the issues to be contested at any subsequent trial (thereby reducing its length) and to facilitate pleas of guilty by demonstrating the strength of the Crown case (Advisory Committee on Committal Proceedings 1986).

It is my view that committal proceedings, as we know them in Victoria, do not fulfil the high promise behind the view that committals should be retained. This is said even though the standard of proof in committals has been substantially raised.

This paper will not be replete with references to cases, articles (learned or otherwise) or statistics as to the outcome of committal hearings. Rather, it is a personal view about the course of prosecutions of persons charged with indictable offences.

It is time to move away from the idea that a 'tested' prosecution case is available as of right in every case. In the majority of cases the prosecution witnesses are not tested because the order of the court follows the mere reading of the brief by the magistrate. The straight 'hand-up brief' procedure does demonstrate the strength of the police case and leads to a decision:

- not to contest police evidence at committal;
- to accept the evidence in the brief without contest and plead guilty or not guilty;
- to negotiate a summary plea or contest; or
- to contest the evidence at committal.

Even in those 'hand-up brief' cases where witnesses are called, many go as straight 'hand-up briefs' without witnesses on the day or at some stage, either on the day of hearing or before agreement is reached to reduce the number of witnesses called. Even though there are cases where the prosecution and/or defence derive a benefit from the hearing that is not justification for retaining a right to call for witnesses in every case.

The committal proceeding, after all, is no more than another step in the preparation of a case for trial before a superior court. It should be seen to be no more than that.

Even if a defendant is committed for trial a decision must still be made for the matter to proceed to trial or a nolle prosequi entered. If a defendant is discharged at committal that person can still be presented for trial. If the accused is not subject to committal there can still be a direct presentment. Of late, more and more defendants are waiving committal proceedings after being served with a 'hand-up brief'.

All of this leads me to the view that there should be no right to a committal for trial hearing. I would advocate the serving of a 'hand-up brief' with no right to call witnesses except on application to a magistrate.

A magistrate, on perusing the 'hand-up brief' would refer the matter to the Director of Public Prosecutions with a recommendation for a trial or order that the defendant be discharged.

I do not espouse any particular grounds for granting an application for witnesses. Contested admissions, contested identification evidence, assault in company type offences, and drunken brawls could be the type of cases when applications would be appropriate.

The time honoured justifications for retention of the committal proceedings are one thing, but the delay in bringing a person to trial is another. The time limits between committal and filing the presentment and the filing of presentment and trial can be 18 months (or more by leave) and, quite obviously, less. But where there are rules as to the time permitted for taking a step in the prosecution process the tendency is for action to take place at that time.

What I espouse will do little to enable the Director of Public Prosecutions (DPP) to present for trial in a lesser time than he is able at the present time. What it will do is reduce the time between charge and commencement or preparation in the DPP's Office. Thus it will reduce the time between charge and trial.

In the old days, that is in the '70s, when Justices of the Peace dealt with committals, they were often contested. The cross-examination though was succinct but testing. The theory seemed to be 'don't let the prosecution know what the defence is'. It could have been that even if one had the best of defences in the world one would still be committed for trial anyway. At that time there was no 'hand-up brief'.

Justices of the Peace went out of the system and magistrates dealt with committals. Many were contested and some defendants were discharged. From a purist's point of view those committals could be said to be justified. Those 'contested' before justices or magistrates were in the minority (and they still are). Some figures referred to below later will demonstrate the point about the number of contested committals.

Committals for trial are not what people say they are. The Magistrate's Court should be used, if at all, as nothing more than the means to ensure that the prosecution prepares the 'hand-up brief' early and well.

The Position in Victoria

The subject of this portion of the conference is entitled 'Current Implementation and Proposed Changes in the States'. The practice that operates in Victoria and will operate pursuant to statute in the near future is such that leads me to the view espoused earlier in the paper.

Current Position

The following is a short exposition of the present procedure in committals and the new procedure in the *Magistrates Court Act 1989*.

The present committal procedure is as follows:

- an informant may serve a 'hand-up brief' containing all the material upon which the informant relies;

- the 'hand-up brief' must be served personally within 28 days of the date of hearing;
- no witnesses are required at the hearing unless a witness notice is provided at least 14 days before the date of hearing;
- a magistrate may set aside the witness notice in whole or in part;
- a witness called merely identifies the statement and attests to its truthfulness unless the court otherwise orders;
- there are special provisions relating to 'hand-up briefs' in respect of certain offences involving rape, none of which is pertinent because the 'hand-up' procedure is still used but the hearing must be commenced within three months of charge;
- if the informant does not serve a 'hand-up brief', the evidence in chief must be given in the form of a statement and the witness identifies the statement and attests to its truthfulness;
- the standard of proof that is required is 'is the evidence of sufficient weight to support a conviction for the offence charged';
- even if there is not evidence to reach the standard with reference to the offence charged, the defendant may only be discharged if there is no evidence of sufficient weight to support a conviction for **any** indictable offence (my emphasis).

The new *Magistrates Court Act 1989*, mirrors those provisions of the present Act with the addition of a provision permitting time limits to be prescribed between commencement of proceedings for the offence and a hearing. If there is no compliance with that time limit the defendant must appear and the court must order that the defendant not stand trial for the offence or offences charged. There are exceptions to that. There is a similar procedure in respect to rape offences.

Apart from anything else, this procedure means that if a defendant is discharged on the merits he or she may still be presented, but if there is a failure to comply with the time standards the defendant cannot be presented for trial.

A Criminal Delay Reduction Committee was set up some time ago by the Attorney-General. It included the heads of the three jurisdictions and representatives of other participants in the system. The Working Party of that Committee agreed to certain proposals involving the early intervention of a Crown Prosecutor and the Legal Aid Commission. For certain reasons those proposals, all of which were worthy, could not be implemented. The magistracy and the police though agreed on a new system of listing and hearing committals. Although one could, in theory, have a committal listed at a very early date, the number of adjournments was enormous so the actual date of hearing was many, many months after the first listing date.

The listing system that operated from the 1 October 1989 was that police informants had to serve 'hand-up briefs' within fixed time limits or seek extensions of the time from a listing magistrate in court. Initially, the accused is remanded to appear four months after the charge, when the accused is on bail, three months after charge when a person is in custody and two months after charge where the accused is charged with rape. The 'hand-up brief' must be served 28 days before that 'committal mention date'. Thus where the accused is on bail (except for rape) the 'hand-up brief' must be served within three months of charge,

when remanded in custody (other than rape) within two months of charge and in rape cases within one month of charge.

The procedure on the committal mention date is that every committal mention case is listed in the one court. If there are no witness notices and the Act is complied with, a defendant is either discharged or committed for trial. If there is a witness notice the matter is adjourned for a fixed date of hearing after the magistrate obtains from the informant and defence any information available as to the duration of the hearing. The defendant's legal representative must be present, if there is one, as does the informant. It is on that date that directions can be given for the conduct of pre-hearing conferences, and for the hearing of show cause proceedings as to the necessity for calling certain witnesses. For example, business people concerning bankcard offences, or householders as to burglaries, are called as witnesses and invariably are not required on the day of the hearing.

Before referring to some figures of the mention system this paper will digress slightly and refer to pleas of guilty at committal hearings. If a person pleads guilty to all charges at the committal a date for hearing of the plea is obtained from the Criminal Trial Listing Directorate and the person is committed to the commencement of the sittings but at the same time is remanded or bailed with a condition that the defendant appear on a fixed date for sentence which will be usually within three months of the committal hearing.

The first of the cases listed from 10 October 1989 came before the listing magistrate on 8 January 1990. The figures in Table 1 are for the periods 8th of January 1990 to 9th of February 1990, 12th of February 1990 to the 2nd of March 1990, and the 5th of March 1990 to the 30th of March 1990. After the 30th of April all figures will be calculated on the usual monthly basis from the beginning to the end of each month.

These figures represent the number of adjournments for further mention where the 'hand-up brief' was not served or was served late.

In my experience, even with cases listed for full committal, few proceed as booked by the parties. They proceed as straight 'hand-up briefs' without witnesses, with reduced witnesses, or are dealt with summarily and some, of course, are dealt with as full committals as booked. However, when some do proceed they last longer than the original time estimate.

Discharged cases were either discharged on the merit, or as a result of failure to observe the accepted time guidelines.

These figures support my view that in the large proportion of cases no court intervention by the legal profession is warranted because the essence of the system is the 'hand-up brief'. Those figures suggest that there should be no right to call witnesses, without the leave of the court, either by application or on the court's own motion.

The committal mention court system is only in its infancy and it can be rightly said that the numbers being dealt with either by way of straight 'hand-up brief' or dealt with summarily as a total of cases listed is reducing—approximately 49 per cent, 39 per cent and 33 per cent.

Table 1

Committals - 8 January-30 March 1990, Victoria

	8 January-9 February	12 February-2 March	5 March-30 March
Total Cases Listed	**241**	**273**	**338**
Committals (Straight HUB)	98	80	83
Dealt with Summarily	21	27	29
Adjourned for Further Mention	55	69	116
'Hand-up brief' not Served	(41)	(53)	(97)
Adjourned for Full Committal Hearing	39	78	87
Discharged	8	7	8
Withdrawn and Discharged	1	3	1
Failed to Appear	19	9	14

As noted earlier, in the cases adjourned for further mention, the great majority are adjourned for the reason that there is no 'hand-up brief' served or it was served late. In days prior to the committal mention system these would have been listed for a day without any real court control. Under the new system they are adjourned but to a time to enable service to be regularised or to be carried out. In these latter cases if the brief is still unserved by the next mention date the court, unless good cause is shown by the informant, may discharge the defendant. So far this has happened in twelve cases.

It can be noticed that the number of cases adjourned for full committal was 39 of 241 cases, 78 of 273 and 87 of 338. It was commented earlier about how these cases proceed. I do not have figures that demonstrate what I contend, but why have a system that permits as a right the production of witnesses in every case when it is only a small proportion where witnesses are called and eventually give evidence?

If the practice were to be that the defence had to show cause why witnesses should be called, amongst other things, it would require an early appraisal of the brief by the legal practitioner, which does not happen in many cases at present. There is a practice amongst the profession to put in a witness notice naming every witness on the 'hand-up brief'. That practice then gives the defence breathing space for proper perusal of the brief to see whether some, if not all, of the witnesses are required for the contested committal. It also gives the defence time to decide whether or not to contest the matter or elect for a summary hearing.

Finally, the new *Magistrates Court Act 1989* reduces the number of cases that may be dealt with only by trial. The range of offences has been increased but there has been no increase in the term of imprisonment that can be imposed. The present system of summary hearing which can only be on the application of the prosecution will be altered in the Act to permit a court to offer summary jurisdiction and the informant or defendant to apply for summary jurisdiction. The Act also permits a court to refuse summary jurisdiction if an application is made by the prosecution or the defence. Unfortunately the Act does not

permit a court to force summary jurisdiction on a person who will not consent to summary jurisdiction.

Conclusion

In conclusion it is suggested that the present system of committals, with a right to call witnesses, should be removed. It should be replaced with a procedure that requires the prosecution to serve 'hand-up briefs' on the person charged as is done at the present. At the hearing, in the absence of any application to call witnesses, the defendant would be dealt with on the merits of the 'hand-up brief' and an order made that the defendant be discharged or a recommendation that the defendant should stand trial. If an application is made to call witnesses and is refused, the matter should proceed as a 'hand-up brief'. If the application is granted the court should direct which witnesses are to be called and when the hearing should proceed.

I have deliberately not used the expression 'direct a defendant to stand trial at the County/Supreme Court at Melbourne' because I have tried to get away from the traditional view that the committal is a hearing. In my view, it should be nothing more than a delay reducing procedure to ensure that at the earliest possible date the defendant is aware of the whole of the prosecution case. At that point the defendant's legal representative will have to decide to accept or contest the 'hand-up brief' or whether or not there should be an application for summary jurisdiction.

Reference

Advisory Committee on Committal Proceedings 1986, *Report on Committal Proceedings, (*the *Coldrey Committee Report),* Melbourne, Preface Page (i).

Moves in the Australian Capital Territory

Ron Cahill
Chief Magistrate
and
Mark O'Neill
Senior Deputy Clerk
Magistrates Court
Australian Capital Territory

Committals in the Australian Capital Territory

It is beyond question that a magistrate conducting a preliminary examination in relation to an indictable offence does not have any general investigatory or inquisitorial function. The discharge of his duty is dependent upon evidence being presented to him by the informant, although he may later receive evidence from the defendant or witnesses for the defendant. If the magistrate were to assume the mantle of investigator or of prosecutor, accused persons would lose the protection which the procedure is designed to secure for them *(R v. Kent; ex parte McIntosh*, 17 FLR at 69 per Fox J).

At the outset, it is appropriate to examine the legislative provisions regulating the preliminary examination procedure in the Australian Capital Territory.

The jurisdiction of the Magistrate's Court is defined at section 19 of the *Magistrates Court Act 1930*. This section provides:

> 19(1) Whenever by any law for the time being in force in the Territory, any offence is punishable on summary conviction or any person is made liable to a penalty or punishment or to pay a sum of money for any offence, act or omission, and no other provision is made for the trial of the person committing the offence, the matter may be heard and determined by the court in a summary manner under the provisions of this Ordinance and the jurisdiction shall be deemed to be conferred on and may be exercised.
>
> (2) Where by any law in force in the Territory pursuant to section 6 of the *Seat of Government Acceptance Act 1909*, any jurisdiction is given to a court of Petty Sessions or of summary jurisdiction . . . or a Childrens Court the jurisdiction shall be deemed to be conferred on, and may be exercised by, the court.

The Supreme Court, the Magistrate's Court and the Childrens Court are the only three courts exercising jurisdiction in criminal matters in the ACT. Hence, the ACT operates under a two-tiered rather than a three-tiered system, in contrast with many of our state

counterparts. As a result, the ACT Magistrates Court has a very wide and unique jurisdiction and hears approximately 98 per cent of criminal matters dealt with in the Territory. The main provisions governing the court in which offences may be dealt with are ss 476 and 477 of the *Crimes Act 1900* (NSW) in its application to the Territory. Criminal proceedings against children are regulated by Part IV of the *Childrens Services Act 1986*. Section 22 of that Act provides that the provisions of the *Magistrates Court Act 1930* apply to and in relation to the Childrens Court in the exercise of its jurisdiction in respect of proceedings under Part IV.

Subject to section 477 of the *Crimes Act 1900* (NSW) only the Supreme Court has power to try offences under that Act which are punishable by imprisonment for a term of 12 months or more (see section 476 *Crimes Act 1900* [NSW]). Committal proceedings take place in either the Magistrate's Court or Childrens Court.

Section 31 of the *Magistrates Court Act 1930* provides that proceedings may be commenced:

> (a) Where the maximum punishment exceeds six months imprisonment for a first offence—at any time;
>
> (b) where the maximum punishment for a first offence does not exceed six months or is a fine—within one year;
>
> (c) where the punishment provided in respect of the offences is a fine only—within one year; or
>
> (d) as prescribed by any other law.

The preliminary examination is governed by ss 89-96 and 106-108 of the *Magistrates Court Ordinance 1930*. These sections correspond very closely with similar legislation found elsewhere and have their origin in Lord Jervis' Act (The Indictable Offence Act 1848 [Eng]).

Indictable offences may be dealt with in one of two ways. Firstly, the committal proceedings may be heard before a magistrate to determine whether there is sufficient evidence against the accused to justify him or her being tried before the Supreme Court.

Section 90AA allows for proceedings for when the defendant is committed for sentence. If a defendant pleads 'guilty' to an indictable offence before a magistrate, the committal proceedings are simplified by allowing the prosecution to tender a 'hand-up brief' composed of witnesses' statements and if the magistrate finds a prima facie case, he may commit the defendant for sentence. This procedure is yet to be utilised.

Where the defendant is charged with an indictable offence before a magistrate, the prosecution must call evidence to establish a prima facie case.

The prosecution may use a 'hand-up brief' under ss 90 and 90AA but the usual practice is for all the witnesses to attend in person to give evidence and be cross-examined.

At the conclusion of the prosecution evidence the magistrate must decide whether there is a prima facie case against the defendant (s.91 *Magistrates Court Ordinance*). If there is, he shall proceed under section 92 of the Ordinance.

The defendant is able to call evidence in the Magistrate's Court to rebut the prosecution case but does not usually do so. If he does, at the conclusion of his evidence and any evidence in reply from the prosecution, the magistrate will proceed under section 94 of the Ordinance. Again, if the magistrate is of the opinion that the evidence is not sufficient to put the defendant upon trial, he will discharge the defendant.

However, if the evidence is sufficient, the magistrate will commit the defendant for trial before the Supreme Court and order his detention in custody or admit him to bail.

In 1989, 106 matters were committed to the Supreme Court for trial from the Magistrate's Court, and 20 matters have been committed for trial this year. In 1989, the

Magistrate's Court dealt with approximately 9,500 criminal matters. To the end of March 1990, the court had dealt with approximately 2,500 criminal matters. Hence, a true committal is relatively rare.

Matters dealt with by committal are usually in the category of murders, serious sexual, drug and fraud offences; those which the interests of justice would require a Supreme Court trial and a jury.

Secondly, under section 477 of the *Crimes Act 1900* (NSW), certain offences may be dealt with summarily. These include any offence against the law of the ACT which is:

- a common law offence; or
- an offence punishable by imprisonment for a term not exceeding 14 years (if the offence relates to money or other property) or 10 years (in any other case);

where:

- the defendant is charged with such an offence;
- the court would not otherwise have jurisdiction to hear and determine the charge summarily; and
- in the case of a charge relating to money or to property other than a motor vehicle, the amount of the money or the value of the property does not (in the opinion of the court) exceed $10,000.

The court may determine the matter summarily. However, before it can exercise this power the court must be of the opinion that the case can properly be disposed of summarily, and the defendant must consent to his case being disposed of as such. At any stage of the hearing, the defendant may consent to the exercise of this jurisdiction; it is not necessary to wait until the conclusion of the Crown case. If the court disposes of the case summarily under section 477 and convicts the defendant the court is then limited in the penalty it may impose. It may not impose a sentence of imprisonment exceeding two years nor a fine exceeding $5,000. Furthermore, if the defendant was not over the age of 18 at the time of the offence, then the court in any case may not impose a sentence of imprisonment exceeding six months nor a fine exceeding $1,000 and it may not impose a penalty greater than that authorised by the terms of the provision creating the offence.

In 1987 the Chief Magistrates Criminal Procedures Committee was formed. One of the main aims of the Committee was to streamline the processes dealing with indictable offences to as to increase the efficiency of the court and decrease the delays in the hearing of criminal matters. The Committee comprises representatives from various areas of the legal profession directly interested and affected by the criminal law. They include the Director of Public Prosecutions, the ACT Legal Aid Office, the Bar Association, the Law Society, Attorney-General's Department, the Magistrate's Court and the Legal Division of the Australian Federal Police.

An early initiative of the Criminal Procedure Committee saw the introduction of a procedure where the first day in court, the Director of Public Prosecutions on behalf of the informant, hands to the defendant personally, or his counsel, a copy of the charge/charges in question plus a copy of a statement of facts and allegations relating to the charge/charges.

The object of the procedure is to remove the need in most cases for the defendant or his legal representative to seek particulars from the Director of Public Prosecutions and/or informant.

Further deliberations of the Criminal Procedure Committee resulted in the introduction of the 'case status inquiry'.

Where a plea of not guilty is entered, unless the court otherwise orders, all matters are to be subject to a case status inquiry not less than five weeks prior to the date fixed for the hearing of the matter. The date for the case status inquiry is fixed by the court at the time the matter is listed for hearing.

Directions prescribing the procedures by which case status inquiries have been made pursuant to section 250A of the *Magistrates Court Ordinance 1930*. That section enables the court to give directions with respect to the procedure to be applied in proceedings.

The case status inquiry was originally conducted by a magistrate in court. Since the latter part of 1989, the inquiry has in most cases been conducted before a magistrate. Similarly, the prosecution or defence may apply to the court or the clerk to have an inquiry conducted before a magistrate.

At the inquiry, matters are called over with the object of ascertaining by 'due and proper' inquiry whether:

- the parties are taking all necessary measures to enable the hearing to take place expeditiously;
- that the matter is ready to proceed to hearing on the date allocated and the time that is likely to be required for the hearing; and
- that information necessary to complete the 'details for case status inquiry form' is available.

The form is to be completed and filed at the inquiry by both the prosecution and the defence. (The form has recently been simplified as a result of practical experience. The form requires both the prosecution and defence to consider matters of relevance including:

- the availability of witnesses;
- whether the defence has been supplied with sufficient particulars;
- the charges upon which the prosecution is to proceed and confirmation of the plea to be entered in relation to those charges where appropriate; and
- the nature of any expert or scientific evidence to be called.

Representatives of the prosecution and the defence are required to attend at the inquiry. The practice of police informants attending at the inquiry has proven to be beneficial. Unrepresented defendants are required to attend in person and are often remanded on bail to ensure their attendance at the case status inquiry.

The inquiry is to be modified by direction to enable the 'Details of Case Status Inquiry' form to be forwarded to the Clerk of the Court by facsimile no later than the Wednesday preceding the inquiry (which is formally held at 2 pm on Mondays and Tuesdays). If the information contained in the form is sufficient and there are no interlocutory matters to be dealt with by the court, the clerk may by notice in writing excuse the representatives of both the prosecution and the defence from attendance at the inquiry.

There are no sanctions prescribed for a failure to attend or provide such relevant information as may be required. It is, however, not uncommon for an inquiry to be adjourned to enable a party to attend, or for the parties to further consider matters arising. The only effective sanction would be through the availability of an order relating to costs subject to the court's discretion. To date no order has been sought.

The case status inquiry has provided an impetus in the development of a co-operative approach in the preparation of matters for hearing before the court. The case status inquiry is directly responsible for reducing court delays in criminal matters from nine months to

approximately seven months. This is a considerable saving in court resources and has occurred within a relatively short period.

The evolutionary process continues. The members of the Chief Magistrate's Criminal Procedure Committee are considering a proposal prepared jointly by the Chief Magistrate and Mr Geoff Holmes of the Attorney-General's Department which further streamlines and develops the concept of a case status inquiry by requiring disclosure by the informant.

It is proposed that the informant, no later than 28 days prior to the inquiry, make available:

- the terms of the information;
- copies of any documents (including audio or videotapes) containing a record of the accused's conversations or statements to the police;
- statements of all witnesses interviewed by the police during the investigation, or statements of all witnesses to be called by the informant at the hearing or statements of all witnesses to be called by the informant at the hearing with a list of other witnesses and a short statement of the content of the statement and why they will not be called;
- copies of documentary exhibits (or access to inspection);
- details of non-documentary exhibits;
- the criminal record of the accused;
- names and addresses of any person who could be called as a witness from whom a statement was not taken, and the reasons why the witnesses might be regarded as material;
- copies of any reports from expert witnesses.

The defendant would also have the right to request the informant make available the criminal record of any witness or victim providing this can be shown to be relevant (privacy aspects on this point need to be considered further).

In certain situations, the informant may consider that the supply of this information may create a danger to the safety of an individual or either interfere with the administration of justice or not be relevant to the proceedings. If this situation arises, the informant shall so inform the defendant (at the time production is required) of the material being withheld and the grounds for doing so. When material is withheld for this reason, it is suggested that either:

- the defendant may apply to the court for a ruling on whether the informant was justified in withholding the material on the grounds relied upon; or
- the informant is to be required to apply to the court for an order authorising the withholding of the material.

Where a written statement of a witness has been served on the defendant, that statement must not disclose the address and telephone number of the person who made the statement unless it is a materially relevant part of the evidence, or the court makes an order permitting the disclosure. An order of this kind should only be made if the court is satisfied that the disclosure is not likely to present any risk to the welfare or protection of any person.

The informant would not, without the leave of the court, be able to call a person as a witness to give oral evidence where it had not served a copy of that witnesses statement on the defendant. Matters to be considered if the court was to grant leave would be that the statement could not reasonably be served on the defendant, or the witness was obtained too late for the statement to be served but the informant made every attempt to do so as soon as practicable.

When a written statement by any person is served on a defendant, the written statement is, if tendered by the informant, admissible in committal proceedings as evidence to the same extent as if it were oral evidence to the like effect given in those proceedings by that person. The court would be empowered to reject the whole or part of a written statement and make appropriate markings on it to this effect.

It is proposed that it would not be compulsory for the informant to tender the written statement in evidence in committal proceedings, but where the informant intends to do so, the defendant is to be notified at the time of service of the statement, and is required to notify the informant before the inquiry hearing of his or her desire that the person who made the statement attend at the hearing. The court is also to have an independent power to direct attendance either of its own motion or on application of the defendant where it considers it necessary to do so in the interests of justice.

Where the defendant requires the attendance of the witness, the written statement of that person is not to be admissible as evidence unless the defendant consents. Where the court orders attendance, the written statement of the witness concerned is not to be admissible unless the court withdraws direction or the statement had already been admitted as evidence. Where no notification of a requirement to attend is received from the defendant and the court has not directed attendance, the informant is not required to have the witness attend court. This is, of course, subject to the power of the court to order attendance at any time.

It is proposed that the foregoing proposal, when settled, be implemented by direction pursuant to section 250A of the *Magistrates Court Ordinance 1930* and subsequently by statutory enactment when the bugs have been ironed out.

The foregoing proposal and the case status inquiry do not change existing law but involves recognition that the court through effective case management practices can assume a greater role in the conduct of matters before the court. In doing so, the committal proceedings still have a role albeit in a substituted form. The procedures recognise the flexibility and involvement essential to the legitimate forensic purposes of committal proceedings and the administration of justice by identifying issues, imposing attainable time limits and conserving scarce resources. As Gibbs J. commented in *R v. Barton* 32 ALR 449 at 462:

> . . . it is one thing to supplement the evidence given before a magistrate by furnishing a copy of a proof; it is another thing to deprive the accused of the benefit of any committal proceedings at all. In such a case the accused is denied (1) knowledge of what the Crown witnesses say on oath; (2) the opportunity of cross-examining them; (3) the opportunity of calling evidence in rebuttal; and (4) the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is no strong or probable presumption of guilt.
>
> The deprivation of these advantages is, . . . a serious departure from the ordinary course of criminal justice.

Disclosure of the Prosecution Case before Trial

Ben Salmon QC
Australian Capital Territory

A great part of the criminal law and the law governing procedure and evidence in England and Australia has developed in the last 150 years. Committal proceedings as we now know them appear to have their origin in Lord Jervis' Act (the Indictable Offences Act 1848 England; (*see R v. Kent, ex parte McIntosh* (1970) 17 FLR 65 at 75).

Section 94 of the *Magistrates Court Ordinance* 1930 (ACT) provides that after all evidence has been called at committal proceedings if a properly qualified person, that is a magistrate 'is of opinion, having regard to all the evidence before . . . (the court) . . ., that a jury would not convict the defendant of an indictable offence' the person charged shall be discharged. If he is not of that opinion, the person accused shall be committed for trial.

This section comes at the end of a series of sections of the Ordinance dealing with the procedure by which a magistrate hears evidence presented by an informant and sometimes on behalf of the person charged. There are two stages at which the magistrate makes a decision. The first stage is at the end of the prosecution case. A decision must be made as to whether there is some evidence which could prove the essential facts which must be made out before the offence alleged would be established. At that stage, the quality of the evidence, its credibility and the existence of other evidence of an exculpatory nature need not be considered. The question only is, 'has some evidence been presented which would prove each ingredient required to constitute the crime?' If there is no evidence which would establish an element, or elements, of the offence charged, the proceedings end with the defendant's discharge. If this question is answered in the affirmative the magistrate proceeds to the next stage.

Whether or not the person charged gives evidence the presiding magistrate must next consider whether or not he is of the opinion described in s.94. At that stage, as is pointed out in *Saffron v. Director of Public Prosecutions* (1989) 16 NSWLR 397 Samuels JA at 403 and Priestly JA at 412, the magistrate must make his own examination of the evidence. He must consider such factors as inconsistencies, alleged bias of witnesses, opportunities to observe of witnesses, the possibilities of innocent explanation and the many other factors which a jury could properly take into account.

Obviously s. 94 does not involve a magistrate in forming an opinion about guilt or innocence, he or she has to determine only whether, taking all the necessary circumstances into account, he is of the opinion that a jury would not convict unless he can form that view he must send the accused person on for trial.

Although the present formulation under s.94 is relatively new, (October 1987), for practical purposes the same procedure for committal proceedings had been followed by magistrates in NSW and the ACT for many years.

In 1969 in Canberra, committal proceedings were commenced for rape against four persons. In January 1970 before any proceedings were heard, the Attorney-General filed an 'ex officio' information in the Supreme Court charging the same offences. This was a procedure allowed by s.53 of the *Supreme Court Act* which had never before been used and resulted in *R v. Kent, ex parte McIntosh* (1970) 17 FLR 65.

In that case Fox J mentioned that the committal proceeding 'can be and often is of advantage both to the Crown and the accused'. He said

> This is apart from the fact that an independent tribunal in the form of a magistrate has to be satisfied that there is a case to go for trial before he (the accused) is committed (p. 77).

Fox J in that judgment mentioned that there had been discussions as to whether some alternative form of procedure should be adopted (p. 77). In the end, having upheld the validity of the Attorney's action in proceeding without committal proceedings, he subsequently discharged the accused without trial and committal proceedings were held.

In the High Court in *Barton v. R* (1980) 147 CLR 75 the absence of committal proceedings was again the subject of consideration. In the joint decision of Gibbs ACJ, and Mason J there appears the following:

> . . . committal proceedings constitute an important element in the protection which the criminal process gives to an accused person (at 99).

In the judgment of Stephen J

> Committal proceedings are an important part of the protection ordinarily afforded to an accused in the criminal process and for the accused to be deprived of them necessarily puts a court upon enquiry.

and

> . . . the loss of the opportunity to cross-examine crown witnesses (at committal) will be irremediable (p. 105).

However, in the *Barton* case Murphy J said:

> the desirability of committal proceedings in modern times is doubtful at least in certain kinds of cases (p. 108).

and Wilson J suggested that in some cases to proceed without committal proceedings might be

> the only decision consistent with the sensible and efficient administration of justice (p. 114).

The Abolition of Committal Proceedings

Since 1980 the question of the abolition of committal proceedings has been constantly considered. It has been suggested both by Sir Harry Gibbs (Australian Criminal Lawyers Conference, Broadbeach, July 1988) and by Sir Ronald Wilson (24th Australian Legal Convention, Perth, 1987) that the creation of independent Directors of Public Prosecution has added a factor which might enable an independent examination of a case to be undertaken and could make the traditional committal proceedings unnecessary.

In addition, there is evidence that committal proceedings have been abused by individual defendants who have used the proceedings to unduly prolong the criminal justice process. We must accept that this happens but there is plenty of room for dispute about the extent of the problem. If committal proceedings are being abused, used as a means of delay or harassment of witnesses, it does not follow that they should be abolished.

One must applaud efforts to prevent any improper use by accused of the criminal justice system but one does not need to take part of the system away because it is the subject of abuse.

Over the last few years the issue of the utility of committal proceedings in their current form has been raised again and again and variations to the existing system suggested.

Reforms needed in the System

Certainly there are some long overdue reforms about which, those genuinely concerned with the protection of the individual's rights, would not seriously quibble.

- A professional witness such as a police officer should not have to exhaust his memory before being entitled to refer to a statement. The need for anything apart from an identification of the statement under our current legislation should be questioned. (As soon as that is done one turns towards the so-called 'paper committal').

- Non-contentious evidence must be admissible by mere tender of a statement. (Again an acknowledgment of the 'paper committal').

- The tribunal conducting the preliminary enquiry must be in a position to prevent cross-examinations which are designed to delay proceedings.

The opportunity for a person accused to cross-examine witnesses at the committal stage should not be lost entirely.

The suggestion that the filtering process should be performed by the independent Director of Public Prosecutions instead of a magistrate seems to me to create a quite invidious position for the DPP. In many instances the DPP has decided that a prosecution should be launched and conducts the prosecution at committal, in some cases, of course, the accused is discharged at that stage.

The decision as to whether there is enough material to prosecute is a different one from whether an accused should be put on trial. It seems to me that it would be preferable if the two decisions were taken by different persons.

There is another reason to be cautious about the proposal that the DPP make the decisions. The discretion reposing in a prosecutor once a trial is in the offing has been emphasised by the High Court in *Richardson v. The Queen* (1974) 131 CLR 116 where (at 119) the personal judgment of the prosecutor as to which witnesses to call, is mentioned. In *R v. Apostilides* (1984) 154 CLR 563 at 575 the High Court referred to the prosecutor's role in forming this decision as 'a lonely one'.

The proposal would involve the DPP making a decision as to which witnesses to rely on and then a further decision as to whether at a trial, a jury would acquit. The decision on the first point could have a substantial bearing on a decision on the second point.

There is another practical difficulty: in most cases the statements are either those of police officers or those prepared by police officers. Unless an officer of the DPP actually cross-examines for himself, he would have to accept what is set out in the statements. An accused person, however, is usually in a position to instruct his lawyer as to the accuracy of many parts of the case against him and crucial matters affecting the decision as to whether there should be a trial can be exposed, if the person accused plays a part.

The interests of justice support the continuation of a procedure under which a judicial officer determines whether or not an accused person should go to trial. Where an accused person has access to proper legal advice I support a streamlining of the procedure, so as to avoid delay but there are two aspects of any procedure which should be drawn to attention.

Firstly, it is very important that at an early stage the accused have the opportunity of knowing at least as much as the investigating police know about the alleged crime. This may be rather more than the prosecuting authorities know. At present the committal procedures enable the person charged to issue summonses for production returnable at committal proceedings. The extent of the power of the magistrate to order production and inspection of documents so produced has been the subject of two decisions of the ACT Supreme Court: *Ex parte McGregor* 61 ACTR 7 and *Ex parte Pullen* 78 ACTR 25.

Suggested new procedures overcome the difficulty faced in relation to the statements of witnesses whose evidence the prosecution intends to call. However, it may well be that an accused wants to pursue matters which have been disclosed to investigating officers which they rightly or wrongly do not wish to follow up or the significance of which has been altogether missed.

It must be appreciated that there are limits to the extent to which the investigating police must disclose information, for example, the identity of informers, security matters the subject of a public interest privilege claim (*see Alister v. The Queen* 154 CLR 404) but unless, at a stage prior to trial, these matters are sorted out by a suitably qualified tribunal, there is enormous scope for trials to be lengthened and sometimes aborted because a presiding judge is left to determine for the first time whether the accused should have access to additional material and the opportunity to call evidence arising from that material.

Secondly, as we move more and more toward the use of paper committals there must be some protection for an accused person from the unexpected. At present in New South Wales, statements prepared for committal include paragraphs designed to indicate that the maker of the statement has told the truth, and appreciates that the statement is to be evidence. However, there is no way of limiting the witness in the witness box in a trial, to what is in the statement. An accused person may see no harm in not cross-examining a witness whose statement will be used at the preliminary enquiry and then at the trial, find that the witness adds to that material very damaging testimony, perhaps utterly unexpected by the accused.

A few simple questions in cross-examination, along the lines 'That was all you saw?' asked at committal, tend to protect an accused person from this sort of surprise.

The statement of the witness could include an additional sentence such as 'What is set out above contains all relevant material which I am able to provide', but where the statement was not obtained by a trained lawyer, such a procedure could be unfair to the potential witness and to the prosecution.

If one is to shorten and streamline committals so as to avoid the need to call oral evidence and subject witnesses to cross-examination, there must be some protection for an accused if, at a hearing, relevant additional prejudicial evidence is disclosed. Some solutions come to mind, the extra material might be inadmissible, or a judge could allow cross-examination in the absence of the jury and then determine whether the trial should proceed.

Conclusion

When reformers come to deal with criminal procedure, it must be remembered that some people charged with a criminal offence will be innocent. While proceedings in the nature of our current committal proceedings remain, an innocent accused has an opportunity of being discharged. Even if not discharged, the accused, having learned about the case against him, can carry out such preparation as is needed to assist his case at a trial or sometimes to persuade the prosecuting authorities not to proceed.

The value of a pre-trial examination has been recognised again and again, the continuation of such a procedure with appropriate improvements is an important safeguard.

Committal Proceedings in the Australian Capital Territory

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If a person is charged with having committed an indictable offence in the Australian Capital Territory, that person may be summoned before the Magistrate's Court 'to answer the information and to be further dealt with according to law' (ss.26 and 89 *Magistrates Court Act 1930*).

The procedure 'according to law', the committal proceeding, is dealt with by Part VI of that Act. It is called 'the preliminary examination' (s. 90). Section 90 also provides a procedure for the informant to serve the accused with statements of witnesses and copies of documents and photographs of exhibits relevant to the matter. Section 90AA provides that the written statement, if in the manner and form provided, shall be admissible in evidence. The accused may render the statement inadmissible by requiring the person who made it to attend to give evidence. That requirement may be imposed by leave otherwise or by the court of its own motion.

Section 90A deals with pleas of guilty tendered in committal proceedings. If s.477 *Crimes Act 1900* applies to the offence then the court may either deal with the matter summarily, with the consent of the accused, or refer the matter to the Supreme Court for sentence.

Assuming no plea of guilty, the matter proceeds to the conclusion of the Crown evidence. At that point, the court is to consider whether it is of the opinion that 'having regard to all the evidence before it, the evidence is capable of satisfying a jury beyond reasonable doubt that the accused person has committed an indictable offence' (s.91 (b) *Magistrates Court Act*).

The accused person is then charged with the offence. It is, however, provided that (s.92 (1)) 'sub-section (1) does not apply in relation to a person charged with an indictable offence if the court has decided to dispose of the case summarily, pursuant to a law in force in the Territory'.

It would seem that if the court has, at or before this time already decided to proceed in accordance with s.477 *Crimes Act 1900*, the court has no power to lay a charge of its own motion. It could, of course, allow an amendment to the then existing charges in that category of cases to which s.28 (*Magistrates Court Act 1930*) applies.

Section 92A (*Magistrates Court Act 1930*) allows the court, even after having heard and determined the matter summarily, to commit the defendant to the Supreme Court for sentence if that is considered desirable by reason of 'the character and antecedents' of the accused.

It is not clear whether the Supreme Court could proceed under s.556A of the *Crimes Act 1900*, in such a case.

If s.477 *Crimes Act 1900* has not been applied, the examining magistrate proceeds under s.94 (*Magistrates Court Act 1930*), at the conclusion of all the evidence, to apply the same test to it, as is set out in s.91 (b) (*Magistrates Court Act 1930*). There does not seem to be any prohibition upon a magistrate determining, even at that stage, to apply s.477 *Crimes Act*. If he does not, however, then the defendant will either be discharged, in which case, s.97 (*Magistrates Court Act*) permits an order for costs to be made in favour of the defendant, or the defendant then becomes the accused and is committed for trial. If the latter, then the accused may be admitted to bail.

Importance of Committal Proceedings

The process of commitment for trial traditionally was capable of being exercised either by a grand jury or by ex-officio indictment. The grand jury was established in 1166 (assize of Clarendon) to encourage and receive accusations of crime. The *Australian Courts Act 1828* provided for presentment by the Attorney-General of indictments. The jurisdiction of justices to present persons to the Attorney for trial after preliminary examination remained. Grand juries had existed in Australia prior to 1828, but played no part in presenting indictments. They were never instituted for that purpose and only the preliminary examination by magistrate (or coroner) with the Attorney-General finding a true bill or the ex-officio information existed as a means of presenting an accused for trial.

In practice, there is, as the Criminal Bar Association's submission of 16 November 1988 notes, great utility in ensuring that only those cases where there is serious issue to be tried between the Crown and accused will be presented. The test in s.91 (b), (*Magistrates Court Act*) expresses that question appropriately. Gibbs and Mason JJ noted in *Barton* (1981) 55 ALJR 31, 36 that, although the Attorney-General has power to lay an information ex officio, abuse of that power might threaten a fair trial. That power may be controlled so as to avoid that result, for example discharge of the accused and a stay of proceedings. It would be unfair, it was noted, to introduce at trial, material evidence not previously placed before the examining magistrate.

Lord Devlin described committal proceedings as an essential safeguard against wanton or misconceived prosecutions.

It is sometimes contended that this purpose may be served by full disclosure of the prosecution brief. Their Honours in *Barton* at page 38 point out that this is a useful supplement but no substitute of knowing:

- what the witnesses will say when sworn;
- what the witnesses will say upon cross-examination;
- what effect upon the decision to prosecute the evidence open to the accused to call will have to an impartial observer; and
- what an independent authority considers as to the existence or not of a prima facie case.

They concluded '. . . a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair'.

Stephen J. noted that the most serious detriment and loss to an accused by denying a committal proceeding was the loss of the right to cross-examine. That loss may be illusory or very serious depending on the nature of the case. However, Wilson and Murphy JJ were not convinced of the indispensability of committals.

It is certainly true that it is no necessary part of a committal that each witness must be called to give oral evidence. The 'paper committal' under which the evidence is presented by way of a formal proof of evidence does no injustice to an accused provided:

(i) the statement is limited to admissible evidence; and

(ii) the witness is, on proper notice, available to an accused to cross-examine.

The right to an independent appraisal of the evidence so adduced would be the subject of question only if (i) it was exercised inappropriately or (ii) the prosecutor's view was invariably correct, or so close to that very little difference was made.

Neither condition exists in my experience. There is a right of review of a decision to commit in the case of Australian Capital Territory or Federal Offences. The Attorney-General can present an ex-officio information if an incorrect decision not to commit is made. In Federal matters, there is currently a right in the prosecution to seek review under the *Administrative Decisions (Judicial Review) Act 1977*.

For the Crown, an advantage of committals is the need to present for public, or at least, judicial scrutiny, its case. Often a case, strong enough when viewed from one point only, is shown conclusively to be weak when exposed to the light of objective scrutiny. Cross-examination, in most cases, is an integral part of that scrutiny. That process enables the Crown to confront the weaknesses of its own case and gives it the opportunity to consider whether those weaknesses can be eliminated.

Prosecutions are frequently altered radically from the original perception as a result of committal proceedings. At best, a complete discharge may follow, at worst, the issues are better defined, the more expeditiously to be disposed of at trial.

Method of Conduct of Committal Proceedings

It does not follow that the traditional method of conducting a committal by viva voce evidence is essential to safeguard the fairness of any subsequent trial. In New South Wales, s.106 of the *Justices Act* provides an alternative system for the receipt of written statements in lieu of oral evidence at committal. This procedure is, as has been noted, available under s.90AA, (*Magistrates Court Act*).

It seems, therefore, that in relation, at least, to indictable offences, considerable time will be saved with no unfairness to an accused if:

(i) by an appropriate time before the committal hearing, the accused, personally or by his counsel is provided with a copy of all proofs of evidence;

(ii) there should also be provided copies of all material in the possession of the prosecution which it is fair to disclose to the accused (for example prior statements of witnesses, statements of relevant witnesses it is not proposed to call but whom the accused might wish to call);

(iii) where it is not practicable to provide copies of, or photographs of, exhibits, inspection should be permitted; and

(iv) that only those witnesses required by the accused to attend for cross-examination should be required to attend in person.

Advantages of Retention of Committals

If committals are retained, allowing for the 'streamlining' of procedures above-mentioned, they do have the advantage:

(i) of avoiding the unfairness referred to in *Barton's* case;

(ii) of enabling the trial to be conducted with greater efficiency, particularly if, coupled therewith, pre-trial interlocutory hearings are available to deal with objections to indictments, separate trials, voir dire rulings on disputed evidence such as confessions; and

(iii) of encouraging the choice of summary trial and earlier pleas of guilty by accused persons (see for example s.477 *Crimes Act 1900* (NSW) and s.4J *Crimes Act 1914* (Cwlth)).

For the reasons outlined above, I would strongly support the retention of the committal process.

References

Submissions to Joint Parliamentary Committee on the National Crime Authority from: Criminal Bar Association of Victoria. Submission 16.11.88; Law Council of Australia. Submission 22.2.89.

A Case for Abolition

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The criminal justice system that exists today is broadly the same as that inherited from the British. It is recognised that it is evolving continually to adapt to local conditions and requirements. However, it is becoming obvious that the criminal procedures currently in place are in part responsible for the significant delays experienced in the disposition of criminal proceedings.

Initiatives have been taken in the past to reform our system of criminal justice administration in the interests of fairness and efficiency. This trend needs to continue if we are to remain in touch with the needs of the community at large. Many of these reforms have taken the form of attempting to reduce court delays by streamlining procedures and improving case management.

The committal hearing constitutes a substantial part of the caseload in the lower courts. Consequently it needs to be the subject of constant procedural review and reform in the interests of continuing efficiency.

It is appropriate to consider the place of the committal proceeding in contributing to the delays which an accused person currently faces while awaiting trial. One of the resolutions passed by the Australasia and South West Pacific Police Commissioner's Conference in 1988 was:

> That the conference supports any strategies by jurisdictions which would overcome delays associated with committal and superior court proceedings.

To operate efficiently, a criminal trial system must not allow itself to become locked into procedures appropriate to an earlier era.

Initially it will be necessary to state several points:

- there are problems with the present system;
- solutions are available; and that
- the proposals recommended are practical, appropriate and necessary.

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1. This paper was researched and prepared by Sergeant S. M. Wood, Administrative Law Branch, Australian Federal Police.

I do not propose to suggest that we turn the criminal process upon its head but rather to push the concept that some changes can be successfully introduced without wreaking havoc with hallowed traditional ideals.

The objective of this paper is to assist in persuading those operating within the existing criminal judicial system of the desirability of adopting new approaches. Any potential changes in the system will require the investment of substantial effort and commitment by all involved.

It is crucial to develop a climate of efficiency. Because of the time and cost consumed by trials and committal proceedings, there is pressure from government to exercise control and reduce the overall expense of this process.

Willis (1984) stated that:

> the tight budgets allocated to criminal justice demand the best use of those resources . . . there is a clear and pressing need for a thorough reappraisal of the whole committal process.

The prime aim of the courts is justice. The legal system needs to be reminded that it is as accountable as any other publicly funded system as to the time and funds it expends to carry out its functions.

To make significant progress in the direction of shorter, cheaper trials, it is necessary to change the attitudes of the people who operate within the system. Those involved must be made aware that there are serious difficulties existing within the system and that steps must be taken to deal with them. Money and effort expended in reducing unnecessary court time is a healthy community investment.

The value and protection of the rights of the individual bestowed by common law may well be eroded unless serious endeavours are embarked upon to reduce the length and cost of the criminal trial process. Steps must be taken to eliminate wastage in time, effort and costs by achieving fewer delays at the pre-trial stage.

The Victorian Shorter Trials Committee in its *Report on Criminal Trials* (Victorian Bar Council 1985), found that there is an imbalance in the amount of time devoted between the pre-trial deliberations and the trial itself. The area of the pre-trial was found to provide the greatest scope for economies in time, effort and resources.

In another part of the same report the Committee went on to say:

> There is no simple way of shortening the time taken by trials. Reduction will come from the combined effect of a number of changes in different areas . . . People realise that in the conditions of today, many of the approaches, practices and procedures appropriate to criminal trials in earlier centuries have the effect of producing a cumbersome, inefficient and ineffective trial system.

Historical Perspective

The early English trials were shorter than today due to several reasons:

- the proximity of the trial to the time of the offence which maintained fresh recall of events by the witnesses;
- the pre-trial process consisted of a justice who interrogated the accused and witnesses which eliminated all inconsequential testimony;
- there were no legal representatives to offer legal argument or cross-examination;
- the accused spoke in his own defence; and

- the judge gave brief instructions to the jury.

The preliminary hearing before the trial is derived from the same historical origins. These hearings were originally held in private. The accused could be questioned without being informed of his rights. He had no right to legal representation and was not allowed to hear what the witnesses had to say.

We like to think we have progressed somewhat from those times. This system has been modified constantly over the years to the form of committal hearing in use today. The view is to ensure that the rights of the individual are protected in the process. Recently this system has attracted further criticism from law reform bodies and other legal authorities.

Justice Murphy J noted in *Barton v. R*, (1980) 32 ALR 449 that:

> the desirability of committal proceedings in modern times is doubtful . . . . it would be much better to abandon committal proceedings and to protect an accused by discovery than to allow trial by jury to be undermined further.

While dramatic changes have occurred over the years to provide us with the current system, changes equally dramatic, have occurred in the nature and complexity of the cases coming before the courts to be tried. Accordingly, there has developed a more involved and sophisticated approach to the conduct of the criminal trial to cope with these trends.

One result is the greatly increased cost of operating the criminal justice system. Another is the increased time consumption of the proceedings. Current developments indicate that this trend toward more complicated cases is going to continue.

Some of the effects of longer trial waiting lists are:

- deterioration of evidence/memory fade;
- prolonged stress on victims of crime;
- unnecessary stress on the accused;
- reduction in deterrent effect of the justice system;
- leniency in sentencing, that is, delays included in penalty;
- inconvenience to witnesses;
- loss of respect for the justice system by society; and
- tendency to rely more on plea bargaining.

Committals Currently

The primary purpose of the committal proceeding is to provide a 'filter' to ensure that no-one stands trial unnecessarily. Its function is to ensure that the defendant is only required to stand trial when a prima facie case has been established against him.

The tests to be applied are:

- the magistrate, after hearing the evidence for the 'prosecution' must be of the opinion that a jury will be satisfied beyond a reasonable doubt that the accused has committed the offence; and

- after hearing the evidence for the 'defence' he should commit the accused for trial unless he or she believes that a jury would not be likely to convict the accused of the offence.

These tests are applied after the Director of Public Prosecutions (DPP) has assessed the available police brief of evidence and determined whether the accused has a case to answer. Thus the first 'filter' stage to sort out the matters which should not proceed is in effect the DPP This area involves some duplication of functions between the DPP and the magistrate.

Coopers and Lybrand W. D. Scott in their report indicated that in New South Wales the average time taken from committal to trial in the Supreme Court was nine months for persons in custody and 12 months for those on bail. The delays in the District Court were even longer. The same report further identifies a lack of adequate case flow management as one of the principle causes of that delay. Shortly after the release of this report, the New South Wales Attorney-General's Department proposed reforms to the justice system in that state.

Both the Coopers and Lybrand (1989) and the New South Wales Attorney-General's (1989) reports recommended replacing the existing committal procedure. The Attorney-General's report recommended that the New South Wales Director of Public Prosecutions be given a greater role in determining whether a matter should go to trial, while Coopers and Lybrand proposed better screening by the prosecution with more emphasis on early discovery and greater use of the 'hand-up brief'. Both reports went on to recommend the adoption of plea bargaining and a system of pre-trial hearings to make preliminary orders. The Attorney-General's report also offered proposals for automatic pre-trial disclosure by both prosecution and defence.

The second purpose of committal proceedings is to test the strength of the prosecution witnesses' evidence.

It is unfortunate that committal proceedings are frequently referred to at the trial for the sole purpose of pointing out discrepancies between the evidence provided by witnesses at the committal and that given by them at the trial. While differences are likely to occur occasionally, they are generally insufficient to affect the jury and can be effectively discounted. Unfortunately this is one area that attracts a disproportionate amount of attention by some counsel who become involved in protracted cross-examination of witnesses which provides little or nothing to assist the jury.

This cross-examination is often used as a 'dress rehearsal' for the actual trial. The process is frequently misused for purposes unrelated to determining whether the accused should be committed or not. The defence conducts exhaustive cross-examination without restriction, as any answer which may be unfavourable will not be heard by the jury. The witnesses are subjected to deliberate aggressive questioning techniques which may not be permitted before the jury and occasionally cause some witnesses to refuse to attend the trial to avoid a repeat performance. While this practice attracts criticism and is discouraged by some magistrates, it persists.

The accused, if legally represented, is presented with proportionally increased costs. A large number of defendants either appear unrepresented or engage legal representation at substantial financial cost to themselves. Effective legal representation is only available in direct proportion to the users' capacity to pay.

The introduction of a system of legal aid has had a large influence on the cost and duration of committal proceedings. The present availability of legal aid is probably one of the greatest contributions towards civil liberties in Australia in recent times. However, its limited availability means that new approaches are necessary to ensure the trial system works efficiently. It is apparent that unfair advantage is provided to some certain sections of the community by this facility.

Accused persons paying for their own legal defence have a strong financial incentive to minimise their legal costs by efficient use of resources. Where the cost of the defence comes from the public purse, that incentive is no longer present. One by-product has been to remove financial incentives to shorten the time taken by the judicial process in some cases.

In view of the Summary Court's workload and the ever-increasing backlog of matters to be heard, magistrates could be better utilised in presiding over these matters. The police investigators are tied up with lengthy court appearances and are unavailable for important investigation duties. Witnesses are inconvenienced and must attend to give evidence which they have already provided in written statements and may be required to present again at some future date before a jury at the actual trial.

Considerable media publicity has been attracted to committal proceedings in many instances, sometimes to the extent of creating difficulty in locating jury members unbiased by preconceptions gained from misguided and sensationalist media coverage.

The third purpose of the committal hearing is to provide the accused with the opportunity of calling evidence to rebut the prosecution case. It is common for this process to be retained by the defence until the actual trial, to avoid being countered by the prosecution.

The need for the accused to go through a committal proceeding is a major contributor to the extensive delay from the time a charge is actually laid against a person to the time that person arrives before a jury.

In the Australian Capital Territory, the Director of Public Prosecutions in his *Annual Report* of 1987-88 described the current situation as:

> a continuing source of concern in the Australian Capital Territory are court delays, particularly in the Magistrate's Court.

Average times between committal and trial are quoted as:

persons in custody: 3.38 months

persons on bail: 6.28 months.

The same report provides a table indicating the number of persons dealt with on indictable matters for all states. Out of a total of 189 defendants actually committed for trial during the period indicated, only 144 were convicted, which indicates that about 23 per cent of those matters were unsuccessful. The suggestion is that the committal as a 'filter' is particularly inefficient if this proportion should perhaps not have gone to trial stage at all.

More recently, Mr C. Crowley, a past President of the Australian Capital Territory Law Society, in September 1989, drew attention to the serious situation developing in the Australian Capital Territory (Crowley 1989). He pointed out that at that time the delay between committals and trial for accused persons had reached a record high of more than 9.5 months for those on bail and 3.4 months for those in custody. It is obvious that this situation is continuing to deteriorate.

One particular problem peculiar to the Australian Federal Police is dealing with Commonwealth offences interstate and having to fight for lower court time and space in direct competition with the local state jurisdiction's requirements. Perhaps there is need for a separate court system for Commonwealth offences.

The Australian Capital Territory has recently set up a consultative committee presided over by the Chief Magistrate which meets to discuss the specific problem of court delays in the Australian Capital Territory The facility of the 'case status inquiry' has been implemented with the full cooperation of police and prosecutors. These fulfil the role of a directions hearing well before summary and committal hearings. These are generally set for a date about six weeks before each court hearing. Representatives of both prosecution and defence are required to attend and be in a position to provide the court with whatever

relevant information or material the court requires to monitor the progress of any particular case.

After the accused is committed for trial, the judge operates a system of directions hearings which follow after the present committal hearing. At such hearings the judge puts questions to both prosecution and defence with the view to determining the principle points contested and to eliminate debate on matters not pertinent to the case.

While this situation has assisted in clarifying issues and providing an early warning system to the parties of the issues to be contended, it does not prevent further extensive debate over aspects of the witnesses and their evidence at the trial itself. It also goes to support the submission that the committal itself is not successful in screening out the contentious issues at an earlier stage. While it may control the flow up to the committal, it does not have the necessary effect of diminishing the duration of the committal itself or the practices that flourish therein.

In Hong Kong, a committal hearing is conducted for a limited number of serious indictable offences only. There may be deficiencies in a scheme which determines whether to hold a committal on the basis of the nature of the offence alone. The decision on the need for a committal hearing is vested entirely within the discretion of the Director of Public Prosecutions when considering if a particular matter should go to trial.

Japan abolished the committal proceeding prior to World War II. A Public Prosecutors office was established similar to our DPP and it is the responsibility of this office to determine if there is sufficient evidence to support prosecution. The Public Prosecutor if so satisfied, issues an indictment which is then served on the accused. The matter then progresses direct to trial without a preliminary hearing.

The main thrust of this submission is that it is possible for the accused to retain the benefits and protection currently afforded by the committal procedure without incurring the substantial delays inherently attached to the present cumbersome system. There are simpler and more efficient methods of filtering out cases that should or should not proceed to trial than by the present laborious scheme.

Mr Justice Wilson in part of his retirement speech (1984) stated:

> A number of jurisdictions have followed the English precedent in placing the responsibility for prosecutions in the hands of Directors of Public Prosecutions, being independent, highly qualified professionals having status equivalent to a judge. Other jurisdictions will follow suit. This development should render the committal proceeding unnecessary and pave the way for its abolition.

The Director of Public Prosecutions currently reviews every criminal case whether it is tried before judge and jury or summarily. The DPP also has the present power to file an ex-officio indictment even after the accused has been discharged by the magistrate at the committal.

Further, the DPP may, even at a time after the magistrate has committed an accused for trial, offer a 'no bill' if it is determined that a particular matter should not continue to trial.

With these supervisory powers in existence, the need for the person controlling the assessment of a case for committal to be a magistrate, is further diminished. The position and responsibilities are more 'administrative' rather than 'judicial'.

The DPP should be the sole 'filter' of matters which should or should not proceed to trial. Under such a scheme, a magistrate need not be involved in the decision making process in determining whether a person should be committed for trial. The committal proceeding exists solely to deal with indictable offences and these offences form only a small part of the total number of matters handled by the criminal courts in Australia.

The committing magistrate is in an ambiguous position. Either he must be recognised as an important dispenser of legal functions or be seen as a lesser official completing tasks of minor significance. All the decisions he makes are open to being overridden or changed either by the Director of Public Prosecutions or the trial judge.

The Australian Law Reform Commission's discussion paper on the role of the Attorney-General in criminal prosecutions, raised the possibility that the determination of indictments proceeding and their prosecution should be transferred to an 'independent non-political officer'. This comment leads me to believe that this function can adequately and properly be fulfilled by the Directorof Public Prosecutions

The preferred option supported by the New South Wales Attorney-General (1989) is that the decision as to whether a person is to be committed for trial should no longer be made by a magistrate, but by the Director of Public Prosecutions.

Recent publicity has attracted considerable attention to the New South Wales Attorney-General's recently announced proposals for reforms to their judicial system along similar lines. The main thrust of those proposals is the elimination of the traditional committal hearing to be replaced by the DPP having the responsibility to determine if a matter should go to trial.

By substituting the DPP in the role currently fulfilled by the magistrate in committal proceedings, the facility to overrule or right any breach of procedure would lie with the superior court during a pre-trial review. One immediate benefit is obvious—magistrates would be freed to address the backlog of summary matters. Shortages of magistrates generally and particularly in the Australian Capital Territory, are causing extensive backlogs and delays in summary matters. This adds to the problems of obtaining court time and space for committal hearings.

There are other areas where benefits would be felt. Witnesses would not be required to give evidence on oath on two separate occasions. The situation could be avoided where some witnesses withdraw from proceedings rather than be subjected to a second stressful cross-examination. Witnesses would also appear at court with better recollection of the facts if delays were avoided.

In addition, there would be a reduced risk of a jury being exposed to adverse publicity surrounding a case prior to the actual trial. This sometimes occurs at present by the media reporting publicly the evidence given at the committal hearing.

Inadequate disclosure of the prosecution case, reluctant disclosure of known alibi by the defence, shoddy and inept cross-examination are all practices which have eroded the effectiveness of the committal proceeding and hence fuelled further argument for its abolition and replacement by more efficient administrative techniques.

The Law Reform Commission of Canada (1974) recommended abolition of the preliminary enquiry. This recommendation coupled with proposals relating to disclosure, in essence, suggested a compulsory meeting between the prosecution and defence. Their submission being that once discovery functions were fulfilled adequately there is no reason to retain the preliminary hearing.

Proponents in favour of the present system argue that a properly conducted committal hearing:

- acts as a screen against poorly based prosecutions;
- avoids needless trials;
- allows early discovery;
- provides an opportunity to cross-examine witnesses; and
- provides a forum for exploration and clarification of issues otherwise to be determined during the trial.

Although emphasis is placed on the need to protect the defendant, it should not be overlooked that both sides have an interest in avoiding unnecessary proceedings. Each side must learn how to improve its case. The prosecution is given a chance to judge the reliability

of its witnesses and to discover weaknesses in its case. The defendant is given the opportunity to hear and test the Crown case.

The British Home Office and Lord Chancellor's Department Consultation Paper on the Future of Committals (1989) predicts the demise of committal proceedings on the basis that they are expensive and ineffective. Cases triable on indictment would go directly to the Crown Court. Should the defence challenge this, the resultant hearing in the Magistrates Court would be on the basis of written submissions and witness statements only, except under exceptional circumstances determined by the magistrate. The aim is to provide greater speed and economy, whilst protecting the defendant and filtering out weak or minor cases. The same proposals involve the transfer of power from the Magistrate's Courts to the Crown Prosecutors.

While the committal proceeding or preliminary hearing is an established part of our present criminal justice system, nowhere is there a statutory provision that requires this as an obligatory stage in the indictable proceeding.

Fox J. in the matter of *R v. Kent, ex parte McIntosh* (1970) 17 FLR 65 at 88 stated:

> Nothing is expressed in any of the legislation about the need to have preliminary proceedings. The fact appears to be, as pointed out in several cases, that whether or not there are preliminary proceedings is a matter of practice. This certainly seems extraordinary in view of the elaborate provisions made everywhere for and concerning preliminary proceedings.

Alternative Proposals

This paper has spent some time drawing attention to some of the ongoing shortcomings of the present system. I will now to move on to some of the alternatives available, being potential replacements for the committal proceeding in its present form as a preliminary hearing, and further, cover some other methods and practices which have the potential to contribute considerable savings in time, effort and costs over the present system.

The disposal of the committal proceeding necessarily involves consideration of other pre-trial procedures to replace or modify the committal function. There are ways other than the committal proceeding to achieve the objectives of enabling the accused to know and test the prosecution case, to review the decision to prosecute and to eliminate undisputed issues. The objective is to reduce the delay in bringing the proceeding to a final result and minimise the cost of the whole process. The legal profession, understandably, has a self-interest to protect and may resist what it sees as a potential threat to its role or livelihood.

Time Limits

The imposition of time limits before which an accused person is to be indicted has little to recommend it. The courts have available adequate 'abuse of process' powers that are sufficient to avoid any situation whereby the need for a specific mandatory time limit needs to be imposed by enactment. Time limits are not a tool to oblige the system to operate when there are more satisfactory alternatives available which if utilised appropriately would eliminate any need for any imposed time limit.

The process I propose consists of a prescribed path from charge to trial. Such a system must remain flexible to meet any of a multitude of variable conditions and circumstances which may occur within any particular matter under consideration. These should include:

- a system of pre-trial reviews presided over by a judge;

- electronic recording of interviews;
- the use of the 'hand-up brief' in all indictable matters;
- extensive pre-trial disclosure;
- plea negotiation; and
- election to trial by judge alone.

Pre-Trial Review

The idea of pre-trial review is not new or complex. It involves a prescribed mechanism for assessing the whole process leading up to the trial. It may be formal or informal and may be held at a variety of points in the pre-trial stage of the criminal process. This review is a procedure for determining the state of the preparation already put into a particular matter and is designed to be able to provide an indication of the readiness to proceed at any particular time. The judiciary has a necessary involvement in chairing these hearings as ours being an adversarial system, the parties to the dispute may not otherwise cooperate to the degree necessary to ensure efficient use of available resources.

This review is important as it has the potential to provide the mechanism for bringing the parties together to determine issues, make rulings and give directions with the overall view of creating a more streamlined trial process.

In New South Wales Local Courts, procedures have been introduced in the form of pre-trial conferences to identify issues and provide early discovery. The usefulness of the process has been acknowledged by the parties involved. This is similar to the case status inquiry in use in the Australian Capital Territory

Electronic Recording of Interviews

One of the areas attracting greatest challenge in the committal hearing is the authenticity of any alleged confession or admission. This aspect is generally challenged on principle by the defence and attacked at length in court. It also attracts the most allegations of impropriety by the police investigators. Considerable time at the committal and the subsequent trial is involved in contesting this issue.

A feasible method of reducing the contest of this particular aspect of the proceedings would have the potential to provide considerable savings in time, effort and subsequent cost. One such method which is available, has been in use in certain areas for some time and has been tested at court in several jurisdictions, is the electronic recording of police interviews.

For a confession or admission by a defendant to be admissible before a court it must be seen to have been made voluntarily. That does not mean that it must be volunteered. The issue of whether a confession was made voluntarily is a constant source of debate to contest or determine its admissibility. If these contested issues could be placed beyond dispute, many trials would not take place or be reduced in duration.

The predominant concern of law reform commissions and other committees has been the issues of the reliability of confessional material and fairness to the accused. A comprehensive system of electronic recording of police interviews with suspects, either audio or video, has the potential to have a marked impact on reducing current court time consumed by confrontations over the admissibility issue of confessional material.

In its series of discussion papers on Shortening of Criminal Trials in the Crown Court, the Criminal Bar Association of Victoria (1980) examined the issue of tape-recording and commented:

> It has long been the opinion of this association and indeed any objective commentator that interviews with suspects should be recorded on tape and as a result of the pace of technical developments, the tape should where possible, be videotaped. The arguments in favour of introducing such a system seem to us so overwhelming that it is difficult to understand why it has not been done.

Dr Jacqueline Tombs, head of the Scottish Criminological Research Office, indicated that the Scottish experience with tape-recording police interviews with suspects has shown considerable savings in time in the pre-trial process, most notably in relation to the number of guilty pleas tendered at an earlier stage, further reducing the number of trials within trials over the admissibility of police interviews with suspects (Victorian Bar Council 1985).

The results of her studies indicated benefits in many areas, some of those being:

- police interviews when recorded tended to be much reduced in duration;
- prosecutors found there were increased numbers of guilty pleas and that they were occurring earlier in the proceedings;
- defence lawyers felt there was less chance of abuse by police interviewers; and
- courts found the most significant benefits in that the disputes over authenticity of admissions or confessional material were dramatically reduced.

The Canadian Law Reform Commission (1984), in its working paper on Questioning Suspects, recommended a system of tape recording of all police interviews.

The Committee to Review Commonwealth Criminal Law, established by the Commonwealth Attorney-General, published an interim report in March 1989. Under the section 'Tape Recording of Police Interviews,' the committee said:

> The review committee is strongly of the opinion that the most important safeguard to ensure that questioning is properly conducted and that the results of the questioning are honestly reported would be a requirement that evidence of a confession or admission should be recorded by tape (preferably by videotape).

The same report goes on to describe the benefits of this process:

> A record of that kind protects the accused from a false claim that a confession was made and protects the Police from a false assertion that a confession was fabricated. The use of video or audio recorders will reduce the possibility of dispute regarding confessions and will be likely to considerably reduce the duration and cost of criminal trials.

There is now a very strong body of informed opinion in favour of the extensive use of tape recorders in the interviewing of suspects. Almost every law reform commission and committee which has examined the subject in recent times has endorsed the idea in principle. There is no doubt that the introduction of a system of tape recording interviews would eliminate the potential for protracted disputes over confessions and admissions and thus directly reduce the duration of the trial process.

In Tasmania, police interviews with suspects have been recorded on videotape for some time. Initial responses indicate that the process is a positive step in overcoming delays

in preliminary proceedings due to an increased tendency towards guilty pleas and a much reduced inclination to challenge the authenticity of the content. Similar trials are in practice in Queensland, however results of the effectiveness of the procedure in that state are not yet available.

The 'Hand-Up Brief'

A system presently used in the situation of a plea of guilty, is that of the 'hand-up brief' of evidence. This involves the supply of a complete copy of the prosecution case material to the presiding magistrate. This procedure is currently in practice in the Australian Capital Territory and New South Wales

The benefit of the 'hand-up brief' in this situation is twofold. The first and most obvious, is that the witnesses do not need to attend and give evidence before the trial. The second, reduces the task of assessing the evidence and determining appropriateness, to a straightforward viewing of the written material by the reviewing judge. This has the accumulative effect of creating a mechanism which can completely replace the committal hearing.

If there are any objections to any particular aspect of the evidence by the defence, it need not necessarily make it inadmissible. The relevant witness may be required to attend and be cross-examined to determine authenticity or demeanour only after a ruling by the judge according to strict necessity. The object is the reduction of court hearing time, the relief of court personnel, substantial economies to the public purse and reduced inconvenience and disruption to witnesses.

Unfortunately this process has been abused by some practitioners who routinely challenge every aspect of a case and require the attendance of all witnesses without relevance to their testimony or benefit to the proceedings. The lack of a firm hand by the judiciary has permitted this practice to continue.

Properly used in conjunction with adequate pre-trial disclosure and prior notice of issues to be contested, the 'hand-up brief' as a matter of course has the capability to contribute considerably to savings of court time.

Pre-Trial Disclosure

To conduct an enterprise as complex as the criminal trial efficiently, heavy dependence upon the amount and quality of preparation beforehand is required. The pre-trial disclosure and review procedures currently in place need to be reviewed to develop a more efficient process of dealing with the multitude of pre-trial issues which otherwise consume unnecessary amounts of the trial court's time. By looking carefully at developing better pre-trial procedures it should be possible and practical to eliminate some issues from the trial altogether.

At present, disclosure is often only achieved by entering into a lengthy committal hearing. This may take the form of an oral presentation of the evidence, a 'hand-up brief' or a combination of both. Few committals are successful in giving a clear indication to the accused of the precise extent of the case against them. There is a tendency at this time, in efforts to streamline the existing committal proceeding, for the net effect to be less disclosure being provided, thus leaving more issues to be contested at the actual trial. If the prosecution case was presented to the defence at an earlier stage and the defence was required to indicate it's defences, the committal as such would no longer be necessary.

It is consistent with the basic philosophy of the criminal trial system that the pre-trial disclosures between the parties should be the fullest possible and at the earliest opportunity. While there is a need to develop the pre-trial disclosure mechanism and introduce it at an

earlier point in the process, care must be exercised that this process does not become so cluttered and cumbersome that any efficiency achieved in the actual trial is lost by protracted pre-trial deliberations. Even though the current practice is that the crown provides a degree of disclosure, it generally occurs in a very inconsistent manner. There is a direct relationship between the extent and nature of disclosure before the trial and the efficient conduct and duration of the trial itself.

The traditional concern of the legal system in relation to disclosure has been fairness, particularly with the need to provide the accused with a fair trial. In recent times, examination of the disclosure question as a whole has increasingly focused on the potential to produce quicker, cheaper and more efficient trials by its increased usage.

The British Royal Commission on Criminal Procedure (1981) commented on pre-trial disclosure as follows:

> The prior disclosure of matters that could take up time at trial can be of great importance in securing the efficient use of resources of the police, prosecutors and the courts. Accordingly it is our view that provision should be made for the fullest disclosure possible . . . (Roberts 1984).

The present circumstances indicate that there is an unnecessarily heavy reliance on prosecutorial discretion. There is a lack of adequate guidelines or formal pressure to develop efficiency in this area. The process of isolating and dealing with the issues is largely left to the trial itself.

Prosecution disclosure needs to be formalised by the production of a clear set of systematic guidelines as to the nature of material to be disclosed by and to whom and on what basis. If advance disclosures were obligatory and automatic in all cases, the defendant would be in a position to make a better informed choice between summary hearing and jury trial. He would also be better informed to assess the likely success of the case against him and be able to determine any potential plea accordingly.

While it could be argued that any requirement by law on the process of pre-disclosure may tend to compromise the prosecution case, there is a need for the process to be clearly and explicitly set out. The desired effect would be to encourage uniformity and standardise procedures with the ultimate view of increasing the capacity to ascertain issues quickly, and determine pleas early. If the defence was required in advance of the trial to indicate the nature and extent of its defences, there is little doubt that criminal trials would be shorter and there would be fewer of them. The prosecution would be able to direct its attention to the particular issues which it knows are to be contested. In view of the onus on the prosecution to prove its case 'beyond a reasonable doubt' it is realistic to consider a slightly different criteria of disclosure for the defence to that of the prosecution.

The adversary system of trial is supposed to be a contest of approximately equal opponents, so in varying degrees, disclosure should be a two-way street.

There is a present tendency for the defence to attack on all fronts without regard to the real issues in question. A disclosure of defences early in proceedings would enable the judge to rule with the view to confining the argument to the real issues of the trial. This requirement should extend to the declaration of details of the case at the appropriate moment before the trial and should be sufficient to indicate to the prosecution if the matter is worth pursuing.

The provision of disclosure material should only be restricted where the safety of an individual is at risk or where such disclosure would interfere with the administration of justice.

It is currently a regular practice for the prosecution to approach the defence with a view to establishing which issues are to be contested. Unfortunately the frequent response is to reveal nothing of the defence approach. As a result the prosecution is obliged to present an expansive prosecution in an attempt to anticipate all possible avenues likely to be contested by the defence.

This results in the prosecution presentation being considerably longer, and in the most part unnecessary, than if the issues were restricted to those points actually requiring clarification. The net result is greater consumption of vital court time.

Should the defence raise an issue before the trial not previously indicated, the prosecution may be obliged to seek an adjournment to research the newly revealed aspect. The prosecution may also be required to call extra witnesses and or further evidence to counter the points raised. Further time wastage results. Both situations could be avoided with the defence being subject to similar disclosure rules as the prosecution with a subsequent saving of court time.

The argument may be put forward, that if the defence is obliged to disclose, then the principle that it is up to the prosecution to prove its case may be eroded. However, if the defence is not obliged to disclose and chooses not to do so, then the inference may be drawn that the defence is not inclined to have their case dealt with expeditiously.

In supporting a move to oblige disclosure by the defence, this principle may be preserved by specifying the particular nature of disclosure to be complied with. A minimum defence disclosure should include:

- designated specific areas where prosecution is to be disputed;
- the general nature of the defence tack;
- specific medical, forensic or other specialist evidence; and
- indications of alibi, excuse or other explanation.

There is a responsibility on the defence to disclose sufficient details to indicate to the prosecution whether there is a reasonable likelihood of an acquittal should their evidence be accepted by a jury. It must be apparent that if the trial can be avoided by adequate disclosure before the trial then this must be the preferred course, rather than proceeding with secret evidence with the sole view to winning a case before the jury.

A minimum prosecution disclosure should include:

- full details of the charge/indictment;
- copies of all documents/tapes which contain a record of any conversation by the accused with police or witnesses;
- copies of all witness statements taken by police;
- details of all forensic/medical and exhibit material; and
- a copy of the person's criminal record.

This proposal is designed to permit the trial to concentrate on areas of real disagreement and eliminate the majority of short notice adjournments brought about by previously undeclared situations. Without some form of obligation on the defence to disclose, the problems associated with 'surprise' evidence being presented at short notice and the resultant delays will continue.

The Scottish jurisdiction has also been addressing the issue of the high consumption of time and money involved in criminal trials. There are no committal proceedings in Scotland. As of 1980, procedures have been introduced to ensure an increase in the degree of pre-trial disclosure.

The prosecution is now required to provide the defence with a list of witnesses and exhibits. It must also provide copies of all formal statements to be tendered. The system

also provides for the prosecutor to question the accused in the presence of a judicial officer in regard to obtaining any denial, explanation, justification or comment regarding matters averred in the charge. There are restrictions on the manner of question presentation which is controlled by the judicial member.

The main benefits achieved have been to reduce the number of disputes over the admissibility of confessional evidence, the incidents of last minute guilty pleas and the number of witnesses required to attend and give evidence. This system is still under review and while it has attracted criticism as being inquisitorial, it has had the positive effect of reducing the duration of trials and pre-trial delays.

The English courts rely heavily on a system of filtering whereby a magistrate is supplied with a full 'hand-up brief' and makes his decision to commit to trial on the submitted written material alone, unless the defence makes a special submission to the contrary.

As a result, only a very small proportion of these pre-trial proceedings take the form of a full presentation of the evidence with associated cross-examination, the vast majority being content to rely on the magistrate's assessment—perhaps this says something about the quality of the English magistrates.

Under the Magistrates Court Rules (United Kingdom), an accused person is prevented from adducing evidence in support of an alibi at his trial unless he has given notice of the particulars therein at the pre-trial stage. He is required to provide that notice to the prosecution and the court.

This same English system provides the trial judge with powers to direct disclosure by the defence in certain specified serious fraud matters. While it may be considered unfair to place conditions on certain offence categories, it does indicate a trend towards measures being instituted to oblige greater disclosure in the interest of shortening the pre-trial process and the trial itself.

After publication of the paper, *Discovery in Criminal Cases*, by the Canadian Law Reform Commission (1974), Montreal adopted an experimental system in 1975. This comprised a disclosure conference between both counsel followed by a short hearing before a member of the judiciary. This system was considered to be sufficiently successful to be adopted by most other provinces. In Ottawa, this procedure is presided over by a separate disclosure court. While this style of procedure was not introduced successfully in all areas of Canada the main stumbling blocks described were due to a lack of cooperation by the legal profession.

The American Bar Association in its 1970 report, *Discovery and Procedure Before Trial*, indicated there was a necessity for a three-stage process to pre-trial procedure:

- an explanatory stage between parties;
- a procedural stage involving the rulings and directions applicable to be supervised by a member of the judiciary; and
- a trial plan supervised by the trial judge where specific rulings are made to bind both parties on issues to be contested.

The report set out a number of general principles to govern pre-trial procedure with particular emphasis on the need to oblige greater pre-trial discovery. The report also recommended considerable disclosure by the defence.

Plea Negotiation

In any particular criminal matter presented before the courts for determination, it may serve the public interest better if the certainty of a conviction for a slightly lesser or varied charge is

secured, rather than the uncertainty of a conviction of the original offence actually being obtained before a contested trial. This becomes particularly relevant when multiple charges are likely to attract concurrent penalties.

The New South Wales judicial system provides for a process of charge negotiation. The ultimate decision as to the nature of the charge lies with the Director of Public Prosecutions. The other Australian states have similar systems with charge decisions also being determined by DPPs. This process has several benefits:

- early indication of plea;
- greater likelihood of 'guilty plea';
- avoidance of some jury costs; and
- definite conviction vs likely or acquittal.

This practice needs to be controlled and operated in an open forum to prevent abuses.

The Scottish criminal justice system allows for a process of plea negotiation; in fact the practice is encouraged by a preliminary informal meeting which provides early opportunity for plea adjustment. This may take the form of negotiation with regard to:

- charge reduction;
- alternate charge;
- deletion of some charges; or
- amendment of charge wordings.

The success of this system rests heavily on the degree of cooperation between the prosecution and defence.

Election to Trial by Judge Alone

When a person is charged with a serious crime they are, under the present rules, entitled to a trial before a jury. There are distinct benefits in such a person being able to elect to have a trial by judge alone. The main benefits are:

- there is no need to instruct the jury on points of law or give directions;
- there is no risk of jury contamination by media or other influences;
- the process is much more streamlined and shorter in duration resulting in a cheaper trial; and
- the committal hearing would be unnecessary as there is no jury to mislead.

New Zealand has allowed the accused to elect trial by judge alone since 1979, other than in special cases where a judge has ruled that a particular matter is to proceed before a jury. Estimates in that country indicate that the duration of this type of trial is reduced by half compared to an equivalent jury trial.

Canada has had the right to elect trial by judge alone for more than 30 years. Estimates indicate that in that country this type of trial has been reduced in duration to about one-fifth that of a full trial by jury.

This facility has been available in New South Wales since 1979 for certain fraud offences. Indications on time savings there are not yet available.

South Australia has had this option since 1984, the only condition being that the accused must have had legal advice before making that choice.

Conclusion

There is no simple method of reducing the time involved in criminal trials and their lead-up. Change must and will come from many sources. These changes will not occur unless all parties involved are receptive to the concept in principle.

Any new system needs to be flexible enough to do the job without imposing undue restrictions. With care, we can avoid the establishment of a rigid, expensive apparatus that may have the potential to be more trouble than the existing procedures.

The legal fraternity and government agencies together need to be convinced that any new system will work or is worth trying. It is realised that because attitudes have become entrenched through the years it may be difficult to convince the profession that change is necessary and so will require the goodwill and cooperation of the whole legal profession.

A more cooperative attitude needs to be developed on the basis that greater efficiency is in the interests of all concerned. The changes recommended will involve changes in the way work is approached with those affected by any new system needing to be convinced of its value.

While not to be adopted automatically, a change which works well in one system may be adapted to another more readily, especially in the Australian community with its relatively uniform political approach that exists between the states and territories.

The intention is to set in motion a profound change in the manner of operation of Crown cases. These changes will require time, care and substantial effort.

References

American Bar Association 1970, *Standards relating to Discovery and Procedure before Trial*, American Bar Association Project on Standards for Criminal Justice, Institute of Judicial Administration, New York.

Coopers & Lybrand W.D. Scott 1989, *Report on a Review of the New South Wales Court System*, (the *Coopers Lybrand Report*), May, Sydney.

Criminal Bar Association of Victoria 1980, Discussion papers on Shortening Criminal Trials in Crown Courts.

Crowley, C. 1989, Retirement Speech to the Law Society of Australian Capital Territory, September.

Home Office and Lord Chancellor's Department 1989, 'Consultation Paper on the Future of Committals', *The Criminal Law Review*, p. 766.

Law Reform Commission of Canada 1984, Working paper No. 32, *Questioning of suspects*, Ottawa.

Law Reform Commission of Canada, 1974, *Discovery in Criminal Cases*, Law Reform Commission of Canada, Ottawa.

New South Wales Attorney-General's Department 1989, *Reforms to the Criminal Justice System*, Discussion Paper, May, Sydney.

Roberts, D. 1984, British Government Royal Commission on Criminal Procedure; in 'Tape recording the questioning of suspects, The field trials', *The Criminal Law Review*, September.

Tombs, J. 1985, Address to the Shorter Trials Committee in Victorian Bar Council.

Victorian Bar Council, Shorter Trials Committee 1985, *Report on Criminal Trials*, Melbourne.

Willis, J. 1984, 'Reflections on Nolles' in *Prosecutorial Discretion*, ed. I. Potas, Seminar Proceedings No 6, Australian Institute of Criminology, Canberra.

Wilson, Justice 1984, Address to the 24th Australian Legal Convention, Perth.

Committal for Trial and Pre-Trial Disclosure: Some Overseas Perspectives

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Proposals for Reform in New South Wales

Discussion Paper

In May 1989, the Attorney General for New South Wales, the Honourable Mr John Dowd, issued a Discussion Paper on Reforms to the Criminal Justice System. The Paper contained a number of reform proposals. The first was in relation to Committal Proceedings. It was as follows:

> The decision whether to commit a person for trial will no longer be made by a magistrate but by the Director of Public Prosecutions. The Director of Public Prosecutions will also decide whether a matter should be dealt with summarily or on indictment. A witness may still be cross-examined before a magistrate, at the request of the defence or the prosecution, where:
>
> (1) the witness gives evidence as to identification of the defendant;
>
> (2) the witness is an accomplice;
>
> (3) the witness gives evidence of an opinion based of scientific examination;
>
> (4) the party is able to demonstrate special or exceptional circumstances which require the cross examination of a particular witness; or
>
> (5) the other party consents.
>
> It is intended that a party seeking to cross-examine on grounds (1) to (4) would first be required to seek the consent of the other party.

According to the Discussion Paper the decisions of the Director of Public Prosecutions (DPP) whether to prefer a charge and whether the proceedings should be summary or on indictment would be made after perusal of statements of witnesses taken by the police and conferences with witnesses in appropriate cases. These decisions would be notified to the Local Court when the matter was next before it and the magistrate would (formally) commit

for trial if such was the decision of the DPP. Any cross-examination of witnesses would take place after committal, and after the disclosure by the prosecution as also proposed (see later). The results of any cross-examination would then be considered by the DPP, before trial but after committal (NSW Attorney-General's Department 1989, pp. 35-41.).

The second reform proposal was in relation to pre-trial disclosure. This proposal dealt with disclosure both by the prosecution and the accused. The proposal in relation to pre-trial disclosure by the prosecution was as follows:

> The prosecution should disclose the following information to the accused automatically in summary and indictable matters:
>
> 1. The precise terms of the indictment/information;
>
> 2. Copies of any documents (or tapes where made) containing a record of the accused's conversations or statements to the police (for example, records of interview, and handwritten statements.);
>
> 3. Statements of all witnesses interviewed by the police during the investigation (whether they are to be called by the prosecution at the trial or not);
>
> 4. Copies of any documentary exhibits;
>
> 5. Details of where and when a non-documentary exhibit may be inspected;
>
> 6. The criminal record of the accused;
>
> 7. The names and addresses of any person from whom a statement was not taken, and the ground(s) upon which the witness might be regarded as material; and
>
> 8. Copies of any reports from 'expert witnesses'.
>
> Upon request, the criminal record of any witness, or victim, should be made available where the request demonstrates the relevance of such information.
>
> The information need not be disclosed where there would be a danger to the life or safety of any person or where it would interfere with the administration of justice.

Although the Discussion Paper considers sanctions that could be imposed on the prosecution for non-disclosure (NSW Attorney-General's Department 1989, p. 48), those have not found their way into the proposal. Reliance appears instead to be placed 'on the cooperation and professional ethics of those persons who form the prosecution' (p. 48). It is of particular interest that the proposal for disclosure by the prosecution is to apply to summary as well as to indictable matters.

In relation to pre-trial disclosure by the accused the proposal was as follows:

> The accused should be required to disclose to the prosecution and the court:
>
> 1. the general nature of his or defence; and
>
> 2. the areas in which the prosecution case is disputed.

Where the accused departs from the nature of his or her disclosed defence or fails to comply with a requirement of disclosure, the trial judge or the prosecution (with leave of the judge) may refer to this and invite the jury to draw appropriate inferences.

It would seem from the first two proposals above that the Attorney-General has accepted that two important functions of committal proceedings as presently conducted are the disclosure in advance of the evidence the prosecution will seek to present at the trial and the opportunity for the defence to test that evidence by cross-examination. This is indicated both by the proposed retention of the defence right to cross-examine witnesses (although only of specified categories) before a magistrate and by the proposed obligations of disclosure by the prosecution, notwithstanding the proposed transfer of the committal decision from a magistrate to the DPP.

The proposal that the accused be required to make pre-trial disclosure of the general nature of his or her defence and of the areas in which the prosecution case is disputed with the sanction of adverse comment for non-compliance appears to derive from the Report of the Roskill Committee on Fraud Trials (HMSO, London 1986) and the *Criminal Justice Act 1987* (UK) which implemented the recommendations of that Report (NSW Attorney-General's Department 1989, pp. 52-5). That Report and the consequent legislation was confined to serious and complex fraud trials, but the present proposal extends to all criminal trials. The justification for this extension is said to lie in 'the accused's interest in having his or her case dealt with as speedily as possible' (NSW Attorney-General's Department 1989, p. 54). This 'interest' is preferred to the argument that 'compulsory pre-trial disclosure would represent a significant erosion of the rights of the accused and conflict with the basic principle of criminal justice that it is up to the prosecution to prove its case, the accused not being required to prove anything' (NSW Attorney-General's Department 1989, p. 53). The issue of pre-trial disclosure by the defence as a way of 'improving the fact-finding function of the trial process' is said to be beyond the scope of the Discussion Paper (p. 51).

The reduction of delay in the criminal justice system appears to be the primary concern of the Discussion Paper and the proposed reforms. The object of the exercise is stated to be 'to finalise a range of reform proposals directed to reducing court delays in criminal proceedings' (NSW Attorney-General's Department 1989, p. 84). A criminal justice system has, of course, other objectives and concerns besides the reduction of delay and these should be borne in mind when considering reforms.

Media Release

On 18 February 1990, the Attorney-General issued a media release on the reform of committals. He announced that proposed changes, which were said to be the result of extensive consultation after the issue of the Discussion Paper, had been approved by State Cabinet. The main change, in line with the proposal in the Discussion Paper, will be that the DPP will decide whether a person charged should be committed for trial. (It was noted by the Attorney that, with 'no-billing' and the filing of ex-officio indictments by the DPP, the 'decision by the magistrate to commit or not by no means determines the outcome at the moment'). The change would reduce court delays, it was said, in that about one-third of the delay between charge and trial was taken up by the current committal process. It was also stated that the DPP would 'become involved from the very beginning of a planned prosecution' and 'decide whether it should go ahead'.

The 'important safeguard' of allowing the defence to test the evidence of 'key witnesses' in front of a magistrate at a pre-trial hearing would remain, as in the Discussion Paper. It is of interest to note, however, that the category (4) witness of the Discussion Paper is more broadly, if not more loosely described, in the media release as: 'where there are reasonable grounds to suspect that cross-examination will affect either the assessment of the reliability of the witness or would elicit further material to support a defence'. The magistrate will decide if a witness falls into this category if the DPP does not consent. It may prove difficult in the

event to prevent the defence from cross-examining any witness with some appearance of materiality.

The only references to pre-trial disclosure by the prosecution in the media release are to 'stricter requirements for the prosecution to disclose its case and other material helpful to the defence so the accused is not prejudiced by the changes in procedure' and to 'enhanced disclosure rules'. It remains to be seen whether the legislation will include any sanctions for non-disclosure and whether there will be any means of review of the grounds for non-disclosure that are specified in the last paragraph of that proposal in the Discussion Paper.

More significantly, the originally proposed requirement of pre-trial disclosure by the accused was not referred to at all in the media release. Presumably it will not form part of the legislation. This way is assumed to be a result of the 'extensive consultation' after the issue of the Discussion Paper, particularly consultation with defence representatives. Whether pre-trial disclosure by the accused in the manner mooted would, coincidentally, have improved the fact-finding function of the trial process in New South Wales will presumably not now be known.

Legislation

It had been hoped that draft legislation would have been available for debate at this conference but unfortunately it was not. There is in that, perhaps, some advantage in so far as the die may not be irrevocably cast. Doubtless the closer scrutiny this important measure is given by all concerned the better the prospects for success of this large step in the reform of our criminal justice system.

This large step consists in essence in the transfer of the committal decision from a magistrate to the DPP, or more specifically in taking from the magistrate his or her present part in the committal process and leaving to the DPP alone the decision whether to commit for trial or not. This involves a change in the committal process from a decision by a member of the judiciary (albeit exercising administrative functions) after a public hearing (or where there is an opportunity for one) to a decision by the prosecution made in private.

It can be instructive to consider how the committal and pre-trial disclosure processes are handled in other jurisdictions and the nature of any significant reform proposals in those jurisdictions.

The Committal Process and Pre-Trial Disclosure in Selected Overseas Jurisdictions

England

The current committal process in England is similar to the current process in New South Wales, but in England official proposals for far-reaching change have also been made.

The Current Process There are currently two forms of proceedings for committal for trial on indictment before the Crown Court—full committals and paper committals. Full committals take place under section 6(1) of the Magistrates Courts Act 1980 (UK). These are usually requested by the defence and range from witnesses giving oral evidence and being cross-examined, followed by oral submissions as to the sufficiency of the evidence, to a 'read through' procedure based on written statements followed by submissions as to sufficiency. In 1986, about 13 per cent of committals were full committals (an increase from less than 8 per cent in 1981). Paper committals take place under section 6(2) of the Magistrates Courts Act (UK). Under this procedure if the defence and prosecution agree

that written statements (under s.102) will be the only evidence before the Magistrate's Court, the court may commit the accused for trial without considering the content of those statements or the sufficiency of the evidence contained in them. In other words, the defence consents to a committal on the basis of the statements. If the defence wishes to challenge the sufficiency of the evidence, it must opt for the full committal procedure. There can also be no paper committal if the accused is unrepresented. In 1986, about 87 per cent of committals were paper committals (a decrease from over 92 per cent in 1981).

As to the Magistrate's Court serving as a filter of cases that should not be going to trial, a study in 1981 showed that 12 per cent of full committal hearings resulted in discharge by the magistrate. The figure in New South Wales for all committal hearings seems to be no more than 5 per cent (NSW Attorney-General's Department 1989, p. 24).

Apart from committal by a Magistrate's Court, there are two other ways by which an accused can be sent for trial on indictment. The first is by means of a voluntary bill of indictment, a procedure infrequently used whereby a prosecutor may apply for the consent of a High Court judge to a case being brought directly before the Crown Court. This, untypically in the common law systems, involves a committal decision by a superior court.

The second way is the transfer procedure under the Criminal Justice Act 1987 (UK) in serious fraud cases whereby the Director of Public Prosecutions or the Director of the Serious Fraud Office, amongst others, may certify that there is sufficient evidence for committal and that it is appropriate that the management of the case should without delay be taken over by the Crown Court, with the result that the committal functions of the Magistrate's Court cease (s.4). There is provision for the accused to apply to the Crown Court for the dismissal of the transferred charge on the ground of the insufficiency of the disclosed evidence and for the hearing of that application on oral evidence, if such appears to the judge to be required in the interests of justice (s.6). There is also provision under this legislation for a preparatory hearing before the jury is sworn, in which the judge may order the accused to give a statement in writing setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution (s.9), with the sanction of adverse comment to the jury for non-compliance or for departure at the trial from the disclosure at the preliminary hearing (s.10). The serious fraud cases legislation in England is atypical, both in allowing superior court review of a committal decision by the prosecution and in obliging the accused to disclose his or her defence in advance of trial. The present reform proposals in New South Wales appear to have turned way from both these paths for our pre-trial processes either in particular types of case or generally. It is noteworthy that the New South Wales Law Reform Commission recommended in 1987 that the decision to prosecute should be the prosecution's but that there should be a right to challenge that decision in the prospective court of trial (NSWLRC 1987, p. 321).

Apart from the two ways just considered of sending for trial other than through the Magistrate's Court, the main difference in committal procedures between England and New South Wales is that the paper committal in England is a procedural formality in that it can only occur by consent of the parties and without consideration by the magistrate of the sufficiency of the evidence. It is uncommon for a committal in New South Wales not to involve some contest as to the sufficiency of the evidence, even where the evidence is entirely in written statements. If a defendant is unrepresented and does not contest sufficiency, the magistrate should, in the interests of justice, nevertheless consider the question. This form of 'paper committal' in New South Wales is really equivalent to the 'read through' committal in England, which is regarded as a full committal.

The role of the magistrate in committal proceedings in New South Wales and full committals in England is very similar. Also similar is the role of the DPP and his or her officers in the two jurisdictions, at least since the introduction of the Crown Prosecution Service in England in 1985, although there seem to be relatively fewer 'no bills' found by English prosecutors than their counterparts in New South Wales.

As to pre-trial disclosure by the prosecution in England, in cases to be tried on indictment and the subject of committal proceedings, the prosecution is obliged to make available to the defence all 'unused material' (as well as the material used for committal) (Archbold 1988, pp. 4-178). In cases triable either way (on indictment or summarily) but tried summarily before a magistrate, a defendant is entitled to be supplied with either copies of statements or a summary of the facts and matters of which the prosecutor proposes to adduce evidence (Archbold 1988). The New South Wales proposals, it will be recalled, would extend disclosure by the prosecution to summary as well as to indictable offences. At present in New South Wales disclosure by the prosecution, other than where there are committal proceedings, can be minimal. '[T]here are few rules effectively governing the practice of disclosure by the prosecution' (NSWLRC 1987 p. 97, and, generally, Ch. 4).

Pre-trial disclosure by the defence in England is generally not required. The only exceptions of importance are for the 'defence' of alibi and, since 1987, in serious fraud cases. The Royal Commission on Criminal Procedure (the Phillips Commission) recommended in 1981 that the principle on which the advance notification of alibi is required 'could be extended to other defences for example, depending on medical evidence or expert forensic scientific evidence which, by taking the prosecution by surprise, can cause the trial to be adjourned while investigation is carried out to confirm or disprove them', but that recommendation has not yet been implemented in England. It now seems that New South Wales will not even be going as far as the Phillips Commission recommendations.

Proposals for Change In July 1989, the Lord Chancellor's Department of the Home Office issued a consultation paper on the Future of Committal Proceedings. The reform proposal offering the most promise, according to that paper, was referred to by the New South Wales Attorney-General in his media release as going much further than his preferred proposals. The Lord Chancellor's preferred proposal covers both indictable only cases and cases that could be tried either on indictment or summarily ('either way' cases). As to indictable only cases, the prosecution would serve statements comprising the case papers on the defence and a notice certifying that there was sufficient evidence to justify trial on indictment. The defence would have the right to challenge the sufficiency of the evidence in the Magistrate's Court, but any such challenge would be on the basis of written statements (encompassing both witness statements and written submissions) considered 'in open court'. In exceptional circumstances and only with leave of the court, oral submissions could be made. A successful challenge would result in the discharge of the defendant. As to 'either way' cases, the proposal would also transfer the mode-of-trial decision from the magistrate to the prosecution, while preserving the right of the defendant to elect trial in the Crown Court. In this respect the proposal is similar to the Attorney-General's preferred proposal for New South Wales. The Lord Chancellor's proposal in relation to 'either way' cases involves service by the prosecution of the case papers (summary or statements) on the defence with a notice of mode of trial and of sufficiency of evidence. If the case is ultimately to proceed in the Crown Court the defendant has the same right to challenge the sufficiency of the evidence in the Magistrate's Court as he or she would have in an indictable only case. In no case will the defendant have the right to cross-examine prosecution witnesses.

The Lord Chancellor's proposal, unlike that of the New South Wales Attorney-General, preserves the right of a defendant to have a decision from a magistrate on the sufficiency of the prosecution's evidence to support a charge to be heard on indictment. It is true that that decision will be taken in the absence of oral evidence, including cross-examination, and that the proposal in New South Wales is to continue to permit, in limited circumstances, the cross-examination of prosecution witnesses before a magistrate. It is a nice question whether justice is better served by allowing a magistrate to determine pre-trial the sufficiency of the prosecution's evidence entirely on written statements, or by allowing some prosecution witnesses to be cross-examined before a magistrate deprived of a committal function.

Scotland

Committal procedures in Scotland are different from those in England and New South Wales. To appreciate the difference it is necessary to understand the role of the procurator fiscal in the Scottish system. A procurator fiscal is appointed by the Lord Advocate (the Chief Law Officer of Scotland and the Public Prosecutor) to a district in Scotland. He or she is responsible for investigating all crimes in his or her district, may examine witnesses (but not the suspect) and must examine them in cases where the trial is to be on indictment. He or she determines the charge, if any, and the court of trial—the High Court for the most serious crimes (murder, rape), the Sheriff Court (either before a jury for the next most serious crimes or summarily) or the Magistrate's Court (now called the District Court). He or she prepares the case and assists Crown Counsel (the Lord Advocate or an Advocate Depute) in the High Court, and conducts the prosecution in the Sheriff Court. Trial on indictment, whether in the High Court or the Sheriff Court, and the form of the indictment, must be approved by Crown Counsel.

The decision to commit for trial in all cases of trial on indictment is effectively taken by the procurator fiscal. The defendant is brought before the Sheriff consequent upon a petition lodged by the procurator fiscal to be given the opportunity to emit a declaration (make a statement) in answer to the charge, an opportunity rarely availed of by the defendant. The procurator fiscal then, or on a subsequent appearance by the defendant before the Sheriff, asks that the defendant be committed for trial. The Sheriff routinely does this without seeing or hearing any evidence.

As to pre-trial disclosure by the prosecution, the defence has no right of access to statements by prosecution witnesses, but a procurator may reveal the contents of those statements to the defence. Indictments are served on defendants in advance of the trial and they contain the names and addresses of prosecution witnesses and a list of the documents and articles to be produced as evidence. A defendant or his or her legal representative may interview those witnesses and examine the documents and articles listed. This could remove some, though not necessarily all, of the surprise from the prosecution's case at trial.

As to pre-trial disclosure by the defendant, a feature of Scottish criminal procedure has been the pleading hearing ('first diet') at which the defendant's plea is taken and any objections to the proceedings considered. If the defendant seeks to rely on any special defences such as alibi, insanity, diminished responsibility or impeachment (blaming another as the perpetrator), notice of such must then be given.

The prominent position of the procurator fiscal deriving from Continental models in the Scottish criminal justice system appears to have prevented the development of an English-type committal process. With the development of the organisation and powers of the prosecution service in England and New South Wales it is perhaps not surprising that proposals to transfer committal decisions from the magistracy to the prosecution have emerged. If disclosure of the prosecution case—an important practical effect of committal proceedings before magistrates but—not a feature of the Scottish system is retained in New South Wales, then one of the main benefits of the old process will have been preserved and the potentiality for better filtering, by prosecutors involved in the system from the investigation stage, will have been added.

France

There is a neat, hierarchical quality about the French criminal justice system and it might be convenient to start with the related hierarchies of the criminal courts and the offences tried therein.

> The *cour d'assises*, deals with offences (*crimes*) punishable with imprisonment from 5 years to life. The court consists of a president, two other judges and nine lay persons (*jurés*).
>
> The *tribunal correctionel*, deals with offences (*délits*) punishable with imprisonment from 2 months to 5 years, or by fine, and with *crimes* treated as *délits* by a process known as 'correctionalisation'. The court consists of three judges or a single judge.
>
> The *tribunal de police*, deals with offences (*contraventions*) punishable by imprisonment up to 2 months, or by fine. The court consists of a single judge.

Criminal investigation in France is under the control of prosecutors (*procureurs*) or examining magistrates (*juges d'instruction*). The judicial police, however, do most of the actual investigation, including the taking of statements. The results of the investigation finish up in a *dossier* which is centrally important in the processing and disposition of a case, the trial being essentially a public confirmation of the contents of the *dossier*. *Crimes* and the more serious or sensitive *délits* are investigated by an examining magistrate with the aid of the judicial police. Other *délits* and *contraventions* are investigated by the judicial police under supervision by prosecutors. Police and prosecutors have coercive powers of investigation in relation to all flagrant offences (*l'enquête flagrante*). An examining magistrate has power to order detention of a defendant during investigation and pending trial and this is generally done in cases of *crime*.

As to committal for trial in France, the decision whether a defendant is sent for trial before the *cour d'assises* for a crime is made by the *chambre d'accusation*, a section of the *cour d'appel*, after the case has been remitted there by the examining magistrate. The *chambre d'accusation* is comprised of three judges, the hearing is on the papers in the *dossier*, and only the prosecutor and the defence lawyer(s) may be present at the hearing. The decision whether a defendant is sent for trial before the *tribunal correctionel* is made by the examining magistrate, if one has been involved in the investigation, or by the prosecutor supervising the investigation. The decision whether a defendant is sent for trial before the *tribunal de police* is made by a prosecutor who cites the defendant to appear for trial on a particular date. All committal decisions are made in private.

Except for cases tried in the *cour d'assises*, all committal decisions are taken by persons closely associated with the investigation of the case, either the examining magistrate or the supervising prosecutor. Both these officials, as well as having knowledge of the investigation and its results, have judicial character—the examining magistrate is a judge of the *tribunal correctionel*, and prosecutors are regarded as part of the magistrature (same training and career service as judges, often called *le parquet*—the magistrate on 'the floor' rather than the magistrate 'seated' (*assis*)). They are thus well placed to act as filters of cases for trial. Even greater screening is provided for the *crimes* going to the *cour d'assises* through the interposition of the *chambre d'accusation*. It is perhaps small wonder that there is such a high rate of conviction in French criminal trials (generally over 90 per cent).

Pre-trial disclosure by the prosecution in France is a function of access by the defence to the *dossier*. In general, the legal representative (usually an *avocat*) of the defendant has a right of access to the *dossier* at all times and is able to obtain copies of documents, such as statements of witnesses, in the *dossier* (*Code de Procédure Pénale*, art. 118). The defendant, personally, has no such right. One of the main functions in fact of the defendant's *avocat* is to discover the contents of the *dossier* (Frase 1988). An accused must be represented before the *cour d'assises* and he or she will generally be represented during investigation by the examining magistrate. A defendant will generally be represented before the *tribunal correctionel* but less frequently during the investigation by, or supervised by, the prosecutor. So while the *dossier* is not secret, the accused needs a legal representative to access it and he or she may not always have one.

The extent of pre-trial disclosure by the defence in France has to be understood in the context of the relationship between the investigator (police, prosecutor, examining magistrate) and the suspect/defendant. Although there is a right to silence in a suspect/defendant, the right is rarely exercised. Only before an examining magistrate is a defendant to be told about it (*Code de Procédure Pénale*, art. 114). Also adverse inferences can and will be drawn at the trial if the defendant does not respond to questioning during the investigation or at trial—this is regarded as part of the 'means of defence' (*Code de Procédure Pénale*, art. 353). For whatever reason, defendants generally respond to questioning during investigation (Stephan 1973). Their responses go into the *dossier* and are thus before the trial court from the outset. The investigator is under an obligation to get at the truth and this involves investigating any exculpatory matters that come to notice (*Code de Procédure Pénale*, arts. 62, 58, 81, 82, 101, 165). Thus by the time a case comes to trial a defendant is unlikely to have anything to say or to advance that is not in the *dossier*, and if he or she did and it was exculpatory it would be regarded by the court as suspect for want of earlier notification and opportunity for investigation.

West Germany

The criminal courts in West Germany are organised on a state (*Land*) basis although they apply federal criminal law and procedure. The higher of the two trial courts is the *Landgericht* of district court (called *Schwurgericht* or *Grosse Strafkammer* when sitting as a criminal court). The court is composed of three professional and two lay judges. It hears cases of homicide and other serious crimes. The lower of the two trial courts is the *Amtsgericht* or local court, and is composed of one professional and two lay judges when hearing the more serious cases (being then called *Schöffengericht*), and one professional judge when hearing less serious cases.

Prosecutors have theoretical control over all aspects of criminal investigations in West Germany, the examining magistrate having been abolished in 1975. However, it is the police (*Kriminalpolizei*) who initiate and develop investigations. Witnesses are examined by the police, usually on a 'voluntary' basis although they can be forced to attend by a prosecutor. The defendant must be examined by the police or a prosecutor and any matter of exculpation investigated before a formal charge (*Anklage*) is filed. The results of the investigation are recorded in a dossier (*Akte*) to which the legal representative of the defendant has right of access when the investigation has been completed (StPO, s.147).

The decision whether to put the defendant on trial is made by the court competent to try the case (StPO, s.199). This decision is made on the motion of the prosecutor, which motion, together with the dossier and a summary of the evidence and of the results of the investigation, forms part of the formal charge. The defendant is given an opportunity to object before the court, on factual or legal grounds, to the convening of a trial (StPO,

s.201). The court orders the convening of a trial if the defendant appears sufficiently suspect of having committed the crime (StPO, s.203). An order convening a trial cannot be appealed against by the defendant but an order refusing to convene a trial can be appealed against by the prosecutor (StPO, s.210).

As indicated, the prosecution can be obliged to disclose its case and the evidence in support, on the completion of the investigation as the defendant's legal representative then has right of access to the dossier. There is not a right of access during the investigation as in France, but access can be well in advance of the date of trial.

As to pre-trial disclosure by the defence, the position in West Germany is similar to the position in France and for similar reasons. Defendants generally respond to questioning by the investigator (Stephan 1973). The right to silence has, however, better legal protection in West Germany. The defendant has to be advised, before questioning either by the police or the prosecutor, that the law permits him to decline to speak about the case (StPO, ss.136, 163a). But under the principle of the 'free evaluation of the evidence' (StPO, s.261) the silence of the defendant, where an innocent explanation if there were one might have been expected, will weigh against the defendant. Also, as in France, any exculpatory matter would be expected by the court to be in the dossier—if it were raised for the first time at the trial it would be viewed with suspicion.

In West Germany, as in France, access to the dossier resolves the problem of pre-trial disclosure by the prosecution. The dossier, also, with its record of the interrogation of the defendant and of the investigation of any exculpatory matter, serves effectively to disclose whatever the defendant has to disclose.

Some Other Overseas Jurisdictions in Brief

New Zealand

The Summary Proceedings Act NZ 1957 provides for three types of preliminary hearing in New Zealand:

(i) by oral evidence from the prosecution witnesses, and any defence witnesses (ss.161, 163-5),

(ii) by written statements of witnesses, subject to the right of the court to receive witnesses to attend and give evidence (s.173A); and

(iii) committal for trial without consideration of the evidence, where there are written statements, the defendant is represented and the representative so consents (s.160A).

Types (i) and (ii) require a consideration of the sufficiency of the evidence to put the defendant on trial (s.168), while (iii), like the English paper committal, does not.

The law and practice regarding disclosure by the prosecution in New Zealand is similar to that current in New South Wales. A Royal Commission has recommended that the prosecution should provide the defence with an outline of the facts upon which it intends to rely in summary prosecutions (NSWLRC 1987 4.54).

Canada

A system of preliminary inquiry in the manner of the traditional committal hearing still operates, but a magistrate may commit for trial with the consent of the defendant without taking any (or any further) evidence. As noted in the Discussion Paper (NSW Attorney-General's Department 1989, p. 22), in 1974 the Law Reform Commission of Canada recommended the abolition of the preliminary inquiry as the establishment of recommended procedures for uniform discovery to the defence in all criminal cases would leave no substantial reason for its continuance. However, in 1984 the Commission recommended that the preliminary inquiry be retained as full disclosure by the prosecution would reduce the length and number of preliminary inquiries so they could perform their true function as a screen against an insufficient case (NSW Attorney-General's Department 1989, p. 22).

The United States

There are two principal processes for screening charges before a trial may be held in the United States. The first and more widespread is the preliminary hearing which still functions in the United States in the manner of the traditional English full committal. The test for the sufficiency of the evidence is 'probable cause'. The other process is review by a grand jury. The grand jury hears only evidence presented by the prosecutor and the hearing is secret. The defendant is not present and has no opportunity to cross-examine the prosecutor's witnesses or to present evidence. The prosecutor proposes an indictment which can be approved by the grand jury (by majority) as a 'true bill' or dismissed. By virtue of the Fifth Amendment all federal felony charges require a grand jury indictment. A few states provide for a preliminary hearing and then grand jury review. In some states also, the prosecution can avoid any committal process and proceed directly from its decision to charge to a trial. This has been held by the Supreme Court not to violate the due process requirements of the Constitution (*Lem Woon v. Oregon* 229 US 586 (1913)).

In 1975 the American Law Institute (ALI) recommended that a defendant have a right to either a preliminary hearing or review by a grand jury, which right could be waived if the defendant were legally represented. The ALI clearly preferred the preliminary hearing to grand jury review which it described as 'not an adequate or fair substitute' for a preliminary hearing. The ALI also took the view that the preliminary hearing should provide an opportunity for testing the accusation and 'for such incidental discovery as may be inherent in such process; but that the preliminary hearing should not be regarded as an independent discovery device'.

It is unlikely that grand jury review would now be considered as an option in New South Wales.

As to pre-trial disclosure by the prosecution in the United States, the federal rules of criminal procedure require disclosure, on request by the accused, of the accused's prior statements and criminal record, documents and tangible objects material to the case for the accused and intended to be used by the prosecution, reports of scientific examinations and tests, and the names and addresses of all prosecution witnesses (but not their statements) and their records of convictions. The regulation of these requirements, including enforcement, is left to the trial courts. Disclosure by state law and practice is variable. The Sixth Amendment prescription that ' in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and case of the accusation' has been interpreted by the Supreme Court to require all prosecutors to disclose evidence which is favourable to the accused and might create a reasonable doubt as to guilt (*US v. Agurs* 427 US 97 (1976)).

The defence also is required on request by the prosecution to make pre-trial disclosures under the federal rules of criminal procedure. These comprise documents and tangible objects, reports of examinations and tests, and the names and addresses of witnesses, that the accused intends to introduce or call in evidence-in-chief at the trial. Regulation and enforcement is again left to the trial courts.

Conclusions

Committal for Trial

The Attorney-General's proposal for New South Wales to vest the totality of the committal power in the DPP to the exclusion of any role by the judiciary is a bold one. Procedures elsewhere in the common law would lend the proposal little support. Even on the Continent, where the prosecutor has traditionally had greater power in the criminal justice system, his or her role in the committal process is subject to significant limitations.

As to the common law world, currently in England magistrates rule, at the option of the defence, on the sufficiency of the prosecution's evidence, except in serious fraud cases. The English proposals for change in this system will allow the defence to challenge the DPP's decision to commit before a magistrate, if generally only on paper. In serious fraud cases and on voluntary bills of indictment, the prosecutor's decision to commit for trial is subject to review by a judge of the Crown Court or the High Court respectively, or, broadly, by a judge of the court of trial. Canada preserves the magistrate as a filter for committals and New Zealand preserves the option for the defence to have a magistrate rule on the sufficiency of the evidence. The United States retains the magistrate or the grand jury to screen the prosecution's charging decisions in indictable cases, although for a prosecutor to send a defendant directly to trial is not unconstitutional and occasionally happens.

West Germany requires the court of trial to decide, on the motion of the prosecutor, whether to convene a trial, although that decision is subject to appeal by the prosecutor. In France, the prosecutor may commit for trial all cases not investigated by an examining magistrate, and in cases so investigated those that are tried in the highest court (*cour d'assises*) must be sent there by an indicting court (*chambre d'accusation*).

It is only in Scotland, where the prosecutor has traditionally had the powers of a Continental prosecutor, that the entire committal power rests effectively with the prosecutor.

Should a prosecutor have the whole of the power to send a person for trial on a serious charge? Generally the response in the jurisdictions considered here has been in the negative. Either the judiciary at a lower level (a magistrate) should make or contribute to the decision, or the judiciary at the trial level should review the decision, at the option of the defendant, made by a prosecutor. The recommendation of this latter procedure by the New South Wales Law Reform Commission appears to have been unavailing. A prosecutor in our system is, in the final analysis and notwithstanding the desiderata of fairness and impartiality, on one side of an adversary process, and the decision to prosecute must be seen in that perspective. The consequences for the accused, even if successful at the trial, are quite different to those for a defendant in a civil case. The administration of justice is involved even at the stage of committal for trial in a criminal case and there is a strong argument for some judicial role at that stage.

Pre-Trial Disclosure

Pre-trial disclosure by the prosecution is not the primary function of committal proceedings, and so is not a substitute for them, as the Canadian Law Reform Commission confirmed. That committal proceedings have in fact served the purpose of pre-trial discovery by the prosecution has doubtlessly led to the claim for its continuance in the event of the abolition of traditional committal proceedings and has probably strengthened the claim for pre-trial discovery by the prosecution generally. The clear tendency in common law jurisdictions is to extend and make obligatory pre-trial disclosure by the prosecution in all indictable cases, whether actually tried on indictment or summarily. The New South Wales proposal extends discovery to all summary matters and it is a full disclosure, including statements of witnesses who are not to be called to give evidence at the trial. It seems, however, that there will be no sanction imposed upon the prosecution for failure to disclose. Indeed, there will often be

no way for the defence to know if there has been full disclosure by the prosecution. In this regard the Continental system of access by the legal representative of the defendant to the investigation dossier is preferable from the defence point of view. While admitting that there are significant differences between the common law and the Continental criminal justice systems, it is at least arguable that if the prosecutor in New South Wales is to make the decision to commit for trial then the investigation file on which that decision is based should be accessible to the party most affected by that decision, or at least to that party's legal representative. The strengths and weaknesses in the basis for the decision should be open for assessment by the defence for the purposes of the trial. This should be more acceptable if the DPP has control over the investigation from the outset, as has been proposed, and is seen as an impartial agent of the state rather than as an adversary in litigation.

The requirement of any further pre-trial disclosure by the defence appears to have been abandoned by the Attorney-General. Yet there are precedents for such disclosure in the Federal Rules in the United States, and recently in serious fraud cases in England. The Continental systems are effective in inducing early disclosure by a defendant through a regime of adverse inferences from belated or non-disclosure. And Scotland actually requires greater disclosure by the defence than by the prosecution. If an important function of our criminal trial is the ascertainment of the truth, then pre-trial disclosure of at least the general nature of any defence should be required.

Select Bibliography

Archbold, J.F. 1988, *Criminal Pleading Evidence & Practice*, 43rd edn, Sweet & Maxwell, London.

Bishop, J. 1989, *Prosecution Without Trial*, Butterworths, Sydney.

Code de Procédure Pénale (French Code of Criminal Procedure), France.

Frase, R. 1988, *Introduction, French Code of Criminal Procedure*, F.B. Rothman, Littleton, Colo.

Israel, J.H., Kamisar, Y. & LaFave, W.R. 1989, *Criminal Procedure & the Constitution*, West Publishing Co., St. Paul, Minn.

Langbein, J. 1977, *Comparative Criminal Procedure*, Germany.

Lord Chancellor's Department of the Home Office 1989, *Committal Proceedings: A Consultation Paper*, Home Office, London.

New South Wales Attorney-General's Department 1987, *Procedure from Charge to Trial: Specific Problems & Proposals*, DP 14, 2 vols 1987 (NSWLRC), Sydney.

New South Wales Attorney-General's Department 1989, *Reforms to the Criminal Justice System*, Discussion Paper, May, Sydney.

Renton, R.W. & Brown, H.H. 1983, *Criminal Procedure according to the Law of Scotland*, W. Greene, Edinburgh.

Great Britain, Royal Commission on Criminal Procedure 1981, *Report of the Royal Commission on Criminal Procedure*, (Phillips Commission), Her Majesty's Stationery Office, London.

Seymour, J. 1978, *Committal for Trial*, Australian Institute of Criminology, Canberra.

Sheehan, A. 1975, *Criminal Procedure in Scotland & France*, Her Majesty's Stationery Office, London.

Stephan, J. 1973, 'Possible Lessons from Continental Criminal Procedure' in *The Economics of Crime & Punishment*, ed. American Enterprise Institute for Public Policy Research, Washington.

Strafprozessordnung (StPO), (West German Code of Criminal Procedure), Germany.

Weigend, T. 1983, 'Criminal Procedure: Comparative Aspects', in *Encyclopaedia of Crime & Justice*, ed. S.H. Kadish, Free Press, New York, p. 537.

The Future of Committals—a Defence Lawyer's Perspective

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The push to abolish or severely restrict committal proceedings has been justified on a number of grounds. Greater list management efficiency in the superior courts is one. Saving money is another. There have been a host of other 'justifications' including saving witnesses the trouble and trauma of giving evidence twice, namely at committal and at trial.

But, with the greatest respect, the most unjustified 'justification' has come from two of the country's most eminent jurists, former High Court Chief Justice Sir Harry Gibbs and former High Court Justice Sir Ronald Wilson.

At the Australian Legal Convention in Perth in September 1987 Sir Ronald Wilson said:

> A number of jurisdictions have followed English precedent in placing the responsibility for prosecutions in the hands of Directors of Public Prosecutions, being independent, highly qualified professionals having a status equivalent to a judge. Other jurisdictions will be following suit. This development should render the committal proceeding unnecessary and pave the way for its abolition as has recently been recommended by the New South Wales Law Reform Commission. Only very recently New South Wales joined the group of states who have a Director of Public Prosecutions with independent authority to decide upon prosecutions. New South Wales has also recently joined the group of states which has significantly modified previous committal procedures and introduced a system of paper committals (Lee 1988).

Sir Harry Gibbs took up this position when, at the Second International Criminal Law Congress at Surfers Paradise in June 1988 he said that committal proceedings before magistrates served two main functions. The first was to ensure that the accused was not put on trial unless there was either a probability of conviction or a prima facie case against him. Sir Harry said this was an essential function, but one that could now be performed by DPPs.

Sir Harry went on to say that if it were accepted that DPPs were people of integrity, impartial, experienced in the criminal law and free from political influence, a ruling by the DPP was just as convincing as that of a magistrate. Sir Harry said that the second function of committal hearings was to apprise the accused fully and in detail of the case that had been brought against him or her. This could be done through the provision of full statements by all the witnesses before the trial took place (*The Australian*, 22nd June 1988, p. 4).

At that same conference, John Coldrey QC, Victorian State Director of Public Prosecutions, supported the retention of committals saying that they were no more expensive than possible alternatives (*The Australian*, 22nd June 1988).

I do not propose to argue with the contention that DPPs (the particular incumbents) are people of integrity, experienced in the criminal law and free from political interference—but, to argue that they are impartial is absurd.

Impartial, one may ask, as between whom? And, even assuming a particular incumbent of that office may be impartial, one cannot say the same of his staff prosecutors. Prosecutors are prosecutors and to say that a Chief Prosecutor (a DPP) is equivalent to a judge is to demean the independence and status of the judiciary.

Some comments I will make about prosecutors will, perhaps, offend some. That is regrettable. In my experience over the last 15 years practising almost exclusively in the criminal defence field I have come across some fine prosecutors whose ethical standards, fairness and competence were beyond reproach. I have also experienced prosecutors whose standards on these criteria have been poor.

A particular legal community in any state knows which prosecutors are trustworthy and which are not. Those who are not, though, cause significant damage by their unfair conduct in, say, not revealing a statement in their possession which may point to the innocence of the accused. But the older and more experienced such a prosecutor becomes, the less amenable he or she becomes to what few restraints are available to deal with dishonest or less than proper behaviour.

Therefore, for it to be argued that the impartiality of the DPP office is a suitable alternative for the magisterial committal proceeding, is breathtaking. Had such a suggestion come from persons other than those of the status of Sir Harry Gibbs and Sir Ronald Wilson, not a moment's notice would have been paid to it. With the greatest respect to both ex-justices, I suggest no further notice should be paid to it.

While a particular incumbent of the Office of Director of Public Prosecutions may be impartial, there is no system capable of being devised to ensure that all prosecutors under his command display such a quality in the handling of their cases.

The longer a person prosecutes the more likely he or she is to succumb to partisanship, to form alliances with particular police officers or groups of police and to fall into the 'them and us' mould that characterises the attitude of too many police towards the criminal justice system.

This paper will argue for the retention of the full committal. In doing so it will endeavour to show that the full committal serves a vital pre-trial discovery purpose that no other procedure can achieve.

Many who argue for the abolition of committals do so for reasons they are not completely honest about. I am still waiting for the conference or platform where a police spokesman admits that the primary reason police want committals abolished is that they make life more difficult for police by allowing the defence to come by evidence showing that the police case is not as strong as would be otherwise contended by the prosecution.

Some who argue for the restriction or abolition of committals have never had to defend. The taking of instructions is made more realistic and fruitful if those instructions have been tested before trial against the evidence that emerges from a proper, detailed committal cross-examination.

Advantages of Committal Hearings

The substantial advantages to the accused of a preliminary investigation of the Crown case against him were outlined by Mr Justice Fox in *R v. Kent, ex Parte Macintosh* (1970) 17 FLR 77:

> The main advantage to the accused is probably the knowledge he gained before the trial of what the Crown witnesses say on their oath when constrained by the rules of evidence and when cross-examined. This is of course something distinctly different from, and usually of greater benefit than, a knowledge of what was said in private by the prospective witnesses to the police. It is common experience that one admission made to the accused's counsel at the preliminary examination, even on a collateral matter, can make all the difference at the trial. There are other advantages, such as seeing the witnesses and observing their demeanour, which are well recognised, but it is not necessary to discuss them in detail. Whether accused persons should have these advantages (or this protection) is not to the point. The fact is that the law provides a procedure which has the consequences mentioned. There can be no doubt that the preliminary examination forms an important part in the whole trial process and that where there is no preliminary examination the accused person concerned can be at a serious disadvantage as compared with others who have the charges against them dealt with in the ordinary way (Lee 1988).

The Law Society of New South Wales 1989, listed the desirable consequences of committals:

> Committal hearings produce a number of very practical and desirable consequences. These include:
>
> 1. The accused may realise that he/she cannot successfully defend a weak case and may plead guilty (without committal he/she would defend a trial).
>
> 2. The magistrate in some circumstances may offer to hear the case without the public inconvenience and expense of summonsing a jury.
>
> 3. The Crown, upon a further examination of it's case, may abandon certain charges.
>
> 4. In the light of the evidence emerging from committal proceedings, the Crown and the defence can engage in a meaningful discussion of 'charge bargaining' whereby the accused offers to admit guilt to a lesser charge in return for the Crown abandoning the greater.
>
> 5. Committal proceedings inevitably narrow the issues for trial and save considerable time and expense.
>
> Abolishing committals may leave the weaknesses of the prosecution case (or in some instances the defence case) concealed. This may result in defence and prosecution lawyers being unwilling to make confessions. Confessions usually reduce the length of trials.

These issues are substantial and warrant closer consideration. All of them were shown in operation in a particular case heard in Brisbane last year.

That case was a Commonwealth committal which ran for 16 weeks. It involved nine defendants charged with conspiring to import cannabis and an allegation that a substantial quantity of cannabis had been imported in 1986 and that a further substantial importation was planned in 1987-88. As a result of the disclosure and discovery revealed by such a committal, a projected 12-18 month trial was avoided. If such cross-examination had not been permitted and the accused had been sent for trial on either no committal or a severely restricted one, there inevitably would have been a trial. The accused in that case could be said by the end of the committal to be aware of the strength of the case against them. Having an accused person sit through a committal is an excellent way of impressing upon

him that he, too, will, on trial, be as rigorously cross-examined on his instructions as the police witnesses were at committal.

This is a salutary manner in bringing home forcefully to an accused the facts of life.

Further, as a result of this 'full' committal, significant charge bargaining occurred as a result of which the prosecution finally accepted the validity of the defence contention on a significant part of the prosecution case which had been hotly contested throughout the committal.

Delay

The delay between committal and trial in New South Wales stands at about two years (Law Society of New South Wales 1989).

It is suspected that this quite unacceptable delay is one of the driving reasons behind the emasculation of committals in New South Wales. Such delays do not exist in Queensland. Due to the proficiency in listing achieved by Mr Justice Carter in the Supreme Court and His Honour Judge Helman, Chairman of the District Court, the average time from end of committal to trial is less than six months.

As one who has been wont to criticise much that has been wrong with the criminal justice system in Queensland over the years, such listing efficiency is quite outstanding. An examination of how this came about is instructive as it shows that listing practices, not lengthy committals, has been the principle cause of delay.

Queensland Supreme and District Court listing procedures were, up until a few years ago, in a fairly dilapidated state. There were lengthy delays from committal to trial. Listing was done by legally unqualified clerks in the Crown Law office. Listing practices were erratic and the system allowed for judge shopping.

The system which now operates is that, three weeks after committal, the entire committal transcript is available. An indictment is presented at a special listing call-over held before the listing judge within about seven weeks of the end of the committal. Usually, on this occasion, a trial date is set. Trials are invariably heard within six months of committal and, often, in a much shorter period.

The listing system operates very effectively due to the fact that Mr Justice Carter and Judge Helman respectively have held the listing judges' position for a number of years, and consequently, have instituted and maintained a system that is both flexible and definite.

Where a committal is abolished or significantly restricted, it would inevitably lengthen the list in the Superior Court with a resultant economic penalty to be paid as it is now well accepted that Superior Courts are considerably more costly to run than Magistrate's Courts.

Improvements for Committal

If, by enforceable procedures backed up by real sanctions, police were obliged to reveal all evidence in their possession at committal hearings, committals themselves would be shorter as the lengthy cross-examination needed to extract answers from unwilling witnesses would be unnecessary.

In addition, the compulsory delivery of full prosecution briefs to the defendant at least, say, 14 days before committal would cut down on the length of committals. Such compulsory delivery must carry real penalties to be levied against investigating officers if not complied with.

Queensland at the moment provides a good illustration of the problems and the solution relating to pre-committal discovery. The problem is easily identified and the solution simple.

In August 1988 a directive was issued that police officers, pursuant to the *Director of Prosecutions Act 1984* (Qld), must deliver to the defence all statements to be used at a

committal at least seven days in advance. The guideline is instructive. It is outlined as follows:

> 1. Subject to the exceptions set out in paragraph 2 all admissible evidence collected by the investigating police officers should be produced at committal hearings.
>
> 2. Evidence need not be produced when:
>
> (a) It is unlikely to influence the result of the committal proceedings and it is contrary to the public interest to disclose it, e.g.
>
> (i) it deals with a matter affecting national security;
>
> (ii) it contains details that if they become known it might facilitate the commission of another offence or alert someone not charged with an offence that is a suspect;
>
> (iii) it discloses or is likely to disclose the method of surveillance or detection of offences or means of gathering evidence;
>
> (iv) it contained information likely to lead to the identification of an informant; and
>
> (v) it contains matters of considerable private delicacy to the person who can give the evidence or matters that, if published, would be likely to cause violence or serious domestic disharmony.
>
> (b) It is unlikely to influence the result of the committal proceedings and the person who can give the evidence is not reasonably available or his evidence would result in unusual expense or inconvenience or produce the risk of injury to his physical or mental health provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence.
>
> (c) It would be unnecessary and repetitive in view of other evidence to be produced, provided a copy of any written statement containing any evidence in the possession of the prosecution is given to the defence.
>
> (d) It is reasonably believed the production of the evidence would lead to a dishonest attempt to persuade the person who can give the evidence to change his story or not to attend before the court of trial, or to an attempt to intimidate or injure any person.
>
> (e) It is reasonably believed the evidence is untrue or there is such doubt attaching to the evidence it ought to be tested upon cross-examination, provided the defence is given notice of the person who can given the evidence and such particulars of it as would allow the defence to make its own enquiries regarding the evidence and reach a decision as to whether it will produce that evidence.
>
> (f) It is reasonably believed the evidence is a result of a contrivance of the defendant or some person acting in the interest of the defendant, e.g. it takes the form of a false, self-serving statement of the defendant.
>
> 3. Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.

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

This directive issued because formal liaison meetings between the Bar, Law Society and senior police over a number of years failed to solve the endemic problem of late delivery of briefs. For a short while after its issue, the directive had the desired effect—briefs were being delivered within the time stipulated. But the old ways eventually returned because the guidelines have no punitive teeth.

Frustrated police prosecutors confide that while notices of committal dates are sent out immediately after committal dates are set, investigating officers frequently ignore the requirement to have the brief in within the seven-day period.

Individual prosecutors cannot do anything about it. Apart from the fact that prosecutors are often allocated a brief just before a matter comes on for hearing, those prosecutors who are allotted a matter well in advance are in no position to exert any force over a recalcitrant investigating officer. Often the investigating officer is more senior in rank and more experienced than the police prosecutor. Consequently the police prosecutor is ignored.

There are no effective steps taken by those heading the Police Prosecution Corps to remedy this state of affairs. I was told recently that the Inspector in Charge of the Police Prosecution Corps 'talks to' the Inspector in Charge of the squad containing the recalcitrant investigating officer. This is worse than useless.

A system must be put in place (and for the economic rationalist this will not cost money) where an investigating officer commits a disciplinary offence for failure to deliver a brief on time. Not only are defence lawyers and their clients inconvenienced by late delivery of briefs but disruption is caused to civilian witnesses who are kept waiting in court corridors whilst statements are digested and discussions had as to which witnesses are needed for cross-examination.

The solution to the problem has already been demonstrated by two other prosecution agencies operating in Queensland—the Commonwealth Director of Public Prosecutions and the Special Prosecutor's Office set up in early 1989 to prosecute cases arising out of the Fitzgerald Inquiry. For many years now the Federal DPP office in Queensland has provided statements to the defence well in advance of committal—often at least two weeks beforehand.

The Special Prosecutor has handled some complex and lengthy prosecutions in the last 12 months. In almost all cases in which my firm has been involved, these briefs have been professionally and timely delivered many weeks in advance of committal.

The rejoinder put up by Queensland Police when the performance of the Special Prosecutor's Office in delivering early briefs is discussed, is one of 'oh, they have lots of resources'. But an examination of the practices of the Special Prosecutor's Office reveals that to be irrelevant. The Special Prosecutor's Office tells police, within a reasonable time framework, when briefs are to be ready and if they are not, they pay the penalty.

The Federal DPP has a practice whereby liaison is had with a nominated individual at the AFP head office in Brisbane whose task it is to ensure that briefs are delivered well in advance. That system works well.

The new command structure under the just passed Queensland *Police Service Administration Act 1990* combined with the new discipline code to be produced soon will, hopefully, provide the framework for forcing Queensland Police to the position which the Australian Federal Police and police attached to the Special Prosecutor's Office have reached. But without real sanctions, a system of time limits for brief deliveries simply does not work. Sanctions, combined with proper supervision of arresting officers by their superiors, will address the attitude of many police of providing briefs as late as possible, to make it as difficult as they can for the defence to prepare for and conduct proper cross-examination.

A further device to reduce the delay caused by late delivery of committal briefs is to have a system of case management introduced in the Magistrate's Court for committals.

At the moment when a matter is set for committal, the defence is expected to state how long a particular listed committal is expected to last when no prosecution statements are ever available to the defence at that time. This makes such an estimate often impossible.

A procedure is needed where, at least once between mention and committal date, prosecution and defence are required to attend a case conference where the prosecutor reveals the state of readiness of the police brief and, if difficulties are being experienced, appropriate enforcement action can be taken by a case management magistrate. Such court-managed oversight of the readiness of a committal brief ought to encourage prosecution compliance with deadlines.

A system of minimum deadlines for committal brief delivery is workable. While my practice is primarily Queensland-based, I am also admitted in Western Australia. The Western Australian system of not providing a committal date until the statements have been provided to the defence seems to work well.

Conclusion

There has been very little research done on whether committals add to the delay experienced in some jurisdictions in concluding a criminal charge. I contend that committals do not add to the delay problem, where it exists—rather, it assists in the shortening of superior court trials.

Delay is being used as a convenient excuse by those who are opposed to committal hearings for other reasons. As much was admitted by New South Wales Attorney-General John Dowd when, at an Institute of Criminology Seminar in Sydney in 1989 entitled 'Delay in the Criminal Justice System', Mr Dowd stated (in the context of affirming his government's commitment to the abolition of committal proceedings) that his aim was to use the current climate of concern over court delays to introduce long overdue reforms not necessarily connected with delays (*Legal Service Bulletin*, Volume 14, No. 6, December 1989, p. 278).

Where research has been done, the percentage of full committals compared to shorter or paper committals is quite surprising. A Home Office Statistical Department survey carried out during a one month period at all Magistrate's Courts in England and Wales in January 1981 found that 92.4 per cent were paper committals and just 7.6 per cent were full committal proceedings ('The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System' [1985] *Criminal Law Review*, p. 355 at 357).

To abolish or severely emasculate committals is a serious step. It interferes with a constitutional right established over three centuries and should not be tolerated save on the most overwhelming evidence.

The Chief Justice of the High Court of Australia (Sir Anthony Mason) put the position into perspective when addressing the Society for the Reform of the Criminal Law in May 1989. Addressing the issue of delays, the Chief Justice said:

> Unfortunately the need to eliminate delays sometimes creates pressures to alter or qualify traditional rules and procedures designed to protect the defendant, for no good reason other than the desire to facilitate the prosecution case. Quite apart from the increased volume of cases coming before the courts, the number of long criminal trials is greater than it used to be. Legal aid is by no means the only cause. Criminal trials are becoming more complex. The present tendency to bring conspiracy charges (despite judicial discouragement) notably in relation to drug and taxation offences, is one factor. Conspiracy trials are notorious for their complexity.
>
> [These] criticisms come at a time when national economic stringency is sapping the willingness of the Executive to expand the resources and facilities of our system of justice, including the criminal justice system. We should not allow these pressures to obscure our pursuit of justice. It would be false economy indeed to permit cost savings to prejudice the attainment of justice. Nothing could be more destructive of the fundamental values of our society. Yet there is a risk that the fashionable emphasis on economic rationalism may devalue and set at risk standards which are fundamental to a just society (*Australian Law News*, May 1989, p. 12).

As indicated above, there are no delay problems in Queensland. Because New South Wales has a delay problem there is no reason why the rest of Australia should go along with a move to abolish/restrict committals especially when it has been tacitly admitted by the New South Wales Attorney-General that committals do not necessarily contribute to the delay problem. To have the prosecutors become the persecutors if the role of the committal is diminished, cannot be tolerated.

It is interesting to conclude this discussion by focussing on the difference in position on this topic between police spokesmen and the Federal Director of Public Prosecutions. At a national conference on crime and police powers held in Sydney in March 1989 the Deputy Commissioner of the Australian Federal Police, Mr John Johnson said:

> Long committal hearings tied up police time and money and had become a waste of time. Directors of Public Prosecutions could now decide whether or not to go ahead with trials, bypassing the committal process (*The Age*, 22nd March 1989, p 15).

However, the Federal DPP, Mr Mark Weinberg QC, defended the committal as:

> It was an essential part of the criminal justice system especially in complex crimes, to assess witnesses' behaviour in committals to make a proper decision to prosecute. I would see abolishing committals in this country as an unmitigated disaster (*The Age*, 22nd March 1989, p. 15).

Mr Weinberg has defended as well as prosecuted. Mr Johnson, I suspect, has not.

References

The Law Society of New South Wales 1989, Committals and the Right to a Jury, unpublished paper.

Lee, Justice 1988, 'In defence of the Committal for Trial', paper presented at the Second International Criminal Law Congress, Surfers Paradise, June.

A Tasmanian Defence Lawyer's Perspective

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The object of this paper is to give some insight into the functioning of committal proceedings from the perspective of a Tasmanian defence barrister, and to present a case for their retention, primarily for the sake of ensuring, so far as the legal system reasonably can, justice for accused persons. It is not a paper based on academic research or empirical evidence, but on the author's experience in the practice of criminal law.

The Function of Committal Proceedings

It is trite to say that committal proceedings exist for the purpose of determining whether to bring accused persons to trial. The test to be adopted by magistrates or justices in deciding whether or not to commit an accused person for trial varies from jurisdiction to jurisdiction. However, it can be said that an accused person who contests committal proceedings will not be brought to trial unless the evidence offered at those proceedings either:

- shows a prima facie case against the accused;
- is sufficient to warrant the accused's being put on trial; or
- raises a strong or probable presumption of the guilt of the accused.

Committal proceedings serve a number of purposes that are ancillary to their original raison d'être. They enable an accused person to find out with precision the nature and strength of the Crown case, to see what the prosecution witnesses are prepared to say on oath, to cross-examine the prosecution witnesses, and to some extent to gain access to documents which might otherwise not be made available for inspection.

If committal proceedings were abolished and replaced by some system whereby proofs or statements of the evidence of prosecution witnesses were made available to the accused before the trial, the accused would not have the same opportunity to investigate before trial matters of detail which are often extremely significant in relation to factual allegations. In cases of crimes of violence, for example, it is often very important to establish with precision the version of each of the dramatis personae as to the sequence of events, particularly as to

who went where, who did what, and who said what. Often these matters of detail are not apparent from written statements or proofs. Often they go to matters that are critical to the defence. It is in the interests of justice that an accused person receive a fair trial and fairness requires being given an opportunity to hear precisely what the Crown witnesses say.

Committal proceedings afford an opportunity for defence counsel to probe the Crown case, and to scrutinise the Crown witnesses. It is helpful in planning cross-examination for a trial to have seen something of the witnesses at the committal.

Often a Crown witness will not come up to proof. That is, the Crown witness will not repeat from the witness box on oath all the facts or alleged facts set out in his or her written statement or proof. It is in the interests of the fair trial of accused persons that they have an opportunity to establish at an early stage precisely how far each Crown witness is prepared to go in incriminating him or her on oath. False accusations sometimes melt away when the accusers face the prospect of repeating their allegations in open court.

Cross-examination at the committal stage serves a very important role in protecting accused persons against subsequent fabrication, exaggeration or slanting of evidence. Thus, for example, defence counsel often takes the opportunity to elicit evidence from detectives that their clients did not make any admissions, or that they did not make any admissions at particular stages, for example, in the police car on the way to the police station. Part of the art of cross-examination is to close off the 'escape routes' which an untruthful witness could use to explain away a fact which might be inconsistent with his evidence. It is in the interests of justice for the accused that an opportunity to lock possibly dishonest witnesses into their stories at an early stage be available.

Often accused persons instruct their legal representatives that police records of interview, especially unsigned ones, are wholly or partly fabricated. If a record of interview is fabricated, it will contain only information available to the police officers concerned from other sources. (The reverse is not true. The fact that there is no new information in a record of interview does not necessarily mean that it was fabricated.) When such instructions are given, it is desirable that the officers conducting and present at the interview be cross-examined at the committal stage as to what knowledge they had in relation to the information appearing in the record of interview, and how and when they came to know each of the relevant facts.

Increasingly, complex scientific evidence is being used in cases of crimes of violence. The Crown frequently relies on expert evidence as to blood, hair, semen, saliva, handwriting, fingerprints, voice prints, soil, botany, and the chemical analysis of drugs, to name some of the more common areas of expertise. Experts' reports and proofs generally do not descend into the detail necessary to enable their assumptions, methodology and conclusions to be tested. It is therefore essential to the fair trial of accused persons that there be an opportunity at a preliminary stage to cross-examine such experts. If the first opportunity to cross-examine such experts is at the trial, then there will often not be adequate time for the defence to seek advice from its own experts as to the Crown's scientific evidence. Such advice is needed not only for the purpose of calling a defence expert to give evidence, but also for the purpose of the cross-examination of the Crown's experts. It is often necessary for complicated calculations and/or experiments to be done in order to evaluate the reliability and legitimacy of a Crown expert's conclusions. Thus, there can be no substitute for the opportunity to question an expert witness at a preliminary stage.

In some cases, the opportunity to investigate scientific evidence at the committal, and to seek advice thereon prior to the trial, results in such evidence going unchallenged at the trial. Of course, this phenomenon is not unique to scientific evidence. It often happens that non-expert evidence challenged at committal proves to be unassailable and therefore goes unchallenged at the trial.

Committal proceedings also provide an opportunity for defence counsel to elicit exculpatory evidence from prosecution witnesses. This aspect is particularly important in cases where the defence counsel is seeking to lay a basis for a defence of provocation, insanity, automatism or intoxication. For example, when it is proposed to raise an insanity

defence, it is desirable to cross-examine witnesses as to aspects of the accused's behaviour with a view to seeking advice from a psychiatrist as to the evidence prior to the trial.

An accused person has the right to give and call evidence at committal proceedings. However, this is a course which should be embarked upon with great caution. The accused would certainly be cross-examined and anything that he or she said could be used as evidence for the Crown at the trial. Any evidence given by a defence witness would enable the Crown to be better prepared at the trial. For these reasons, an accused person should not give or call evidence unless there is reason to be very confident that the evidence will be accepted as true by the magistrate and lead the magistrate to discharge the accused.

Committal proceedings provide an opportunity for the defence to compel the giving or production of evidence favourable to the defence. In exceptional cases, there will be unwilling witnesses who, if summonsed or subpoenaed to appear, will give evidence favourable to the accused.

More significantly, committal proceedings can be used in order to compel the production of documents. This is of particular significance since discovery is not available in criminal proceedings. For example, in a recent Tasmanian murder case, as a result of defence counsel calling during the committal for the production of statements of civilian witnesses made to the police, the defence learned of four witnesses who had made statements saying they had seen the deceased alive on days subsequent to the day when the accused was alleged to have killed him. The prosecution had not proposed to tell the defence of at least three of those witnesses.

In *Barton v. R* (1980) 147 CLR 75 at 99, Gibbs ACJ, and Mason J, (as they then were), with whom Aickin J, agreed, pointed out the effect of depriving an accused person of the benefit of committal proceedings in the following terms:

> In such a case the accused is denied knowledge of what the Crown witnesses say on oath; the opportunity of cross-examining them; the opportunity of calling evidence in rebuttal; and the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is no strong or probable presumption of guilt.

Discharge of Accused Persons

If an accused person is discharged at the conclusion of committal proceedings, that means that the case against that person was not strong enough to warrant bringing him or them to trial. Thus, committal proceedings operate to protect accused persons from capricious, misconceived, hasty, and ill-considered decisions to prosecute.

Accused persons are discharged at the conclusion of committal proceedings in only a very small percentage of cases. However, that does not mean that committal proceedings are ineffective in stopping prosecutions that should not have been instituted, or that should not be allowed to continue. The existence of committal proceedings can be expected to cause police and other prosecuting authorities to take care in their decisions to prosecute. Committals, after all, provide the only independent means of scrutiny of decisions to prosecute.

Consequences of Abolishing Committals

Whatever becomes of committal proceedings in the various Australian jurisdictions, the Directors of Public Prosecutions and their equivalents will always retain the power to discontinue prosecutions. However, Crown Prosecutors who have not had the advantage

of observing witnesses in court cannot successfully replace magistrates in the weeding out or filtering role that magistrates currently perform in committal proceedings.

For example, accused persons are sometimes discharged following committal hearings as a result of the evidence of critical witnesses being unconvincing or unreliable in the extreme. A prosecutor reviewing a decision to prosecute with only written material to go by could not be expected to 'weed out' such a case.

Further, a prosecutor reviewing a decision to prosecute will generally have before him or her the views of a colleague who took the original decision to prosecute. The review of the decision to prosecute in such a situation will not be independent. The risk of a one-eyed view of the law and/or the facts being perpetuated is strong.

Without committal proceedings, a greater percentage of criminal cases would go to trial. There would not only be cases where the accused would have been discharged by a magistrate at the committal stage. There will also be cases in which committal hearings would have revealed overwhelming and irrefutable evidence of guilt. In such cases now, once the defence sees how strong the prosecution case is at the committal stage, a plea of guilty is frequently entered in lieu of a trial taking place. Given the opportunity to cross-examine prosecution witnesses in the inexpensive forum of the Magistrate's Court, defence lawyers will frequently advise their clients that the prosecution witnesses are demonstrably credible and consistent and that a plea of guilty should be offered to the charge, or to an alternative charge acceptable to the prosecuting authority.

Committal proceedings serve to define the issues in a case. Exploratory cross-examination which in the end leads nowhere (but which might have lead somewhere) is better conducted in a Magistrate's Court, rather than before a judge and jury. Without committal proceedings, such exploratory cross-examination will have to be conducted at the trial or not at all. Defence counsel would be aware of the risks of boring the jury, asking a lot of questions, that get nowhere, or getting an unexpected adverse answer. There will even be cases in which defence counsel will take the opportunity to cross-examine witnesses on the voire dire (where there is some basis for one) in the same manner, and for the same purposes, as one would presently cross-examine at a committal.

For these reasons, the abolition of committal proceedings would increase both the number of trials and the length of trials. Trials normally take several times as long as committal proceedings for many reasons. Usually, more witnesses are called. All evidence is given orally. Cross-examination usually takes longer. Procedures in jury cases are slower than in Magistrate's Courts, especially in cases involving large numbers of documents, each of which has to be shown to all twelve jurors on being tendered.

For these reasons, the abolition of committal proceedings could be expected to make the delays in criminal courts worse rather than better.

More numerous and longer trials will result in greater legal costs (to governments, accused persons and legal aid authorities). The expenses involved in summoning jury panels and remunerating jurors and court staff are also substantial.

There is a danger that if the abolition of committals leads to more and longer trials, governments would respond to such a trend by turning indictable offences into summary ones. As Murphy J, said in *Barton v. R* (1980) 147 CLR 75 at 109,

> The trend to replace indictable offences by summary ones seriously erodes the institution of trial by jury, which is the most important safeguard for the liberties of the people.

The abolition of committal proceedings would deprive the legal profession of an opportunity to interview prosecution witnesses in a setting where there can be no allegation of impropriety. Whilst there is no property in witnesses, defence solicitors are usually very reluctant to approach prosecution witnesses for fear of being falsely accused of some impropriety. The removal of the opportunity to cross-examine prosecution witnesses at the committal stage is likely to lead to significantly more common extra-curial questioning of

prosecution witnesses by defence solicitors and their agents, and to more frequent allegations of attempts to corrupt witnesses.

Thus, there are many disadvantages associated with the abolition or curtailment of the availability of committal proceedings. However, the paramount objection to the abolition or restriction of committal proceedings is that injustice to accused persons must inevitably result. There will be less opportunity to expose mistakes, lies and exaggerations on the part of prosecution witnesses or to counter circumstantial evidence in a 'trial by ambush' setting. Innocent persons will be convicted of serious crimes as a result.

Streamlining

Originally, all criminal cases involved committal hearings and all evidence at committal hearings had to be given orally and recorded in the form of written depositions signed by the witnesses. Over the years, in the various Australian jurisdictions, a number of measures have been introduced in order to save time and energy. Such streamlining procedures have included the following:

- giving the accused person the right to waive committal proceedings, for example *Justices Act 1959* (Tas.) s.56A(6)(a);

- empowering magistrates to receive evidence at committal proceedings in documentary form, so that it does not need to be given orally, for example *Justices Act 1959* (Tas.) s.57(4);

- giving the accused person the right to specify which prosecution witnesses are required to attend the committal proceedings for cross-examination, so that others need not attend at all, for example *Justices Act 1959* (Tas.) s.56A(6)(b). (The position in Tasmania is that an accused person may either:
  (i) waive committal proceedings;
  (ii) not dispute that he or she should be committed for trial, but require the taking of depositions from such of the prosecution witnesses as he or she chooses (an 'uncontested committal'); or
  (iii) dispute the making of an order for committal for trial, in which case the prosecution decides which prosecution witnesses it will call.)

- permitting the tape recording of committal proceedings in lieu of the taking of depositions in writing during the proceedings, for example *Justices Act 1959* (Tas.) s.57; and

- allowing the accused to admit facts which the Crown would otherwise have to prove.

The Future of Committal Hearings: the Victim/Witness Point of View

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On the morning of 5 March 1990 the long-awaited committal hearing of Bevan Spencer Von Einem began in Adelaide. The media had reached frenzy point discussing the possible charges and the circumstances of the alleged offences. 'Mystery witnesses' who were to give 'sensational new evidence' were promised, and the scene was set for the committal hearing to end all committal hearings. Von Einem had been convicted of the murder of Richard Kelvin in 1983 and both the police and the general public had long suspected that he was part of a 'Family' of homosexuals who had been responsible for the deaths of a number of young men in Adelaide around that time. The committal hearing, some seven years later, was to decide whether he had a case to answer for the murder of two young men whose frightful injuries were similar to those of Richard Kelvin. The committal was publicised widely. Evidence was given suggesting that Von Einem was responsible for the disappearance of three young children in 1966 and also for the abduction of two other young girls from the Adelaide Oval several years later.

For the families of the two murdered young men, the committal hearing undoubtedly raised their grief and horror to levels not experienced for years. Mixed with revival of their grief has been the beginning of the hope that, at last, their loved ones' brutal deaths might be explained. But overall for these families, including those whose children disappeared over twenty years ago, the committal hearing experience has been one of grief and anguish, or as Dr Gerry McGrath (1989) of the National Police Research Unit recently described it, 'horror revisited'.

The Victims of Crime Service

The Victims of Crime Service in South Australia was established in 1979 to provide support, friendship, counselling and information to crime victims and their families. As far as VOCS was concerned, victims of crime a mere decade ago were the 'forgotten people' of the criminal justice system. The foundation members of the organisation were in fact families of the victims of the 'Truro' and serial 'Family' killings. Throughout the process of uncertainty and grief these indirect victims of crime had felt isolated from the main stream of society. No-one, they thought, understood their pain, no-one could offer them the support, advocacy and direction that can only come from having lived through a similar experience. VOCS gathered such people together, and within the organisation they grew in strength.

The past decade has seen great advances in the recognition of the needs of crime victims, both in Australia and around the Western world. In South Australia, for example, we now offer a combination of professional and voluntary support services to crime victims through VOCS, the Police Department has its own Victims Unit; a Criminal Injuries Compensation fund has been established; victim impact statements are a part of the sentencing process in most court jurisdictions; and all State Public Service organisations have given their assent of a statement of victims' rights. Reform within the courts system has begun, both at the level of amendments to relevant Acts of Parliament as well as the provision of upgraded physical facilities for victim/witnesses.

Victims are certainly no longer the 'forgotten people' of the criminal justice system. They have become, at least in South Australia, a significant political force and it is their opinions about committal hearings that will be represented in this paper.

The Victim\Witness Point of View

Victims of serious crime generally recover from the trauma. With the support of family, friends or organisations like VOCS and with the assistance of individuals within the criminal justice system, they generally regain their previous level of function, or hopefully learn from their experience about human qualities they only suspected they possessed before the crime was committed. The recovery process commences very soon after the crime is committed and continues for varying periods of time depending upon the individual. From a counselling and support point of view, delays within the court system often mean that the victim's process of recovery is interrupted by such events as committal hearings. Inevitably, the trauma is rekindled or revisited by this process in order that a criminal might be brought to justice. It is therefore, from the victim/witness's point of view, essential that the court process be as brief as is possible and that the waiting time between the offence and any subsequent court hearings be as brief as possible.

A comprehensive survey of victims of crime, which has been undertaken by the Office of Crime Statistics (1990) indicates that, by and large, crime victims accept the trauma of the court process as an essential part of the desired outcome. Their major concerns are quite often focused on waiting facilities and the amount of time spent waiting in the precincts of the court. Victim/witnesses are also frequently disturbed by having to face the offender in crowded, uncomfortable and often spartan waiting rooms. Most comments in this vein related to committal hearings at Courts of Summary Jurisdiction but the problems were also experienced in other jurisdictions. Eighty per cent of victim/witnesses reported that they encountered the offender and/or the offender's family and friends outside the courtroom. Their reactions were variously described as 'no reaction', to 'anger and hatred', 'fear', 'harassment' and 'felt uncomfortable'. This certainly underlines the potential trauma of court appearances be they in the context of committal hearings or hearings proper.

A very high percentage of the population of South Australia probably believes that the present Von Einem committal hearing is, in fact, a trial in progress and often a victim/witness is inclined to a similar belief about their own case. They are for example, orientated to the belief that 'guilt or innocence' are pertinent issues, and for them the committal process is particularly confusing. The rules are quite different from those they observe while watching TV courtroom dramas. For example, the defendant remains entirely silent and it is the victim/witness who is enthusiastically put through the wringer by the defence counsel who pulls out all the stops, engaging in what barristers often describe as 'going fishing'. There is no jury to offend or put offside, and the object of the exercise from the defence point of view, is to break down the prosecutor's witnesses including, of course, the victim.

A belief sometimes held by people other than victim/witnesses, is that participation of the victim in the committal hearing prepares them for the trial, should a trial eventuate.

Having experienced cross-examination and the unfamiliarity of the court setting, as well as the strangeness of language and appearance of court officials, the victim/witness is supposedly better prepared for his or her appearance on behalf of the Crown, at trial. I would suggest that a committal hearing, whilst generally similar to the trial process, is often less inhibited and more stressful for the victim. Suggesting that it provides the opportunity to practice being a witness, is somewhat akin, from the victim's point of view, to suggesting that one should attend one's dentist to have a tooth extracted some months prior to the extraction proper.

In conclusion, the 11th of the 17 Victims' Rights in South Australia states:

> The victim of crime shall have the right to not be required to appear at the preliminary hearings or committal proceedings unless deemed material to the defence or prosecution.

(*See* Appendix 1 for complete list of Victims' Rights in South Australia). In cases involving sexual assault or child abuse allegations, victims are rarely called upon to appear. It would seem that in these circumstances so called 'paper committals' are more than adequate in terms of reaching a decision as to whether there is a case to answer. A survey of Courts of Summary Jurisdiction in South Australia in 1987 indicated that of 681 committal hearings conducted only 57 or 8.4 per cent were dismissed. Such a low percentage should be taken into account when consideration is being given to alternative forms of committal.

On New Year's Eve in 1989 a middle-aged woman and her husband were set upon by six assailants, five adults and a juvenile, outside the Adelaide Casino. The woman and her husband sustained severe injuries. The six alleged offenders were arrested and charged and the committal process commenced on 14 November, 1989. After 27 adjournments a conclusion was reached on 19 December of the same year, committing all five adults for trial. Regarding the offenders; one failed to appear initially, one failed to appear after lunch on the first day of the committal, one arrived intoxicated to the adjourned hearing and one, being a juvenile was referred to the Childrens Court where the matter was dismissed. The trial is listed for 16 July 1990 in the Adelaide Supreme Court. The Victims of Crime Service has been counselling and supporting the victims of this offence through this extraordinary process and their opinion about committal hearings is quite clear. I also wonder, how such experience will affect their performance as witnesses during the trial.

References

Bard, M. & Sangrey, D. 1986, *The Crime Victim's Book*, 2nd edn, Citadel Press, Secaucus.

McGrath, Dr G. 1989, *Victims of Violent Crime, Horror Revisited: towards effective victim assistance by Police in major crimes*; *a case study*, 1989 Annual Oration of the South Australian Justice Administration Foundation, National Police Research Unit, Adelaide.

Office of Crime Statistics, Attorney-General's Department South Australia, 1990, *Victims & Criminal Justice*, Adelaide.

Office of Crime Statistics, Attorney-General's Department, South Australia 1987, Unpublished database, Adelaide.

Shapland, J., Willmore, J. & Duff, P. 1985, *Victims in the Criminal Justice System*, Cambridge Studies in Criminology, Gower.

Appendix 1

Declaration of Victims' Rights

1. be dealt with at all times in a sympathetic, constructive and reassuring manner and with due regard to the victims' personal situation, rights and dignity;

2. be informed about the progress of investigations being conducted by police (except where such disclosure might jeopardise the investigation);

3. be advised of the charges laid against the accused and of any modifications to the charges in question;

4. have a comprehensive statement taken at the time of the initial investigation which shall include information regarding the harm done and losses incurred in consequence of the commission of the offence. The information in this statement shall be updated before the accused is sentenced;

5. be advised of justifications for accepting a plea of guilty to a lesser charge or for accepting a guilty plea in return for recommended leniency in sentencing;

6. be advised of justification for entering a nolle prosequi (i.e. to withdraw charges) when the decision is taken not to proceed with charges. (Decisions which might prove discomforting to victims should be explained with sensitivity and tact);

7. have property held by the Crown for purposes of investigation or evidence returned as promptly as possible. Inconveniences to victims should be minimised wherever possible;

8. be informed about the trial process and of the rights and responsibilities of witnesses;

9. be protected from unnecessary contact with the accused and defence witnesses during the course of the trial;

10. not have his or her residential address disclosed unless deemed material to the defence or prosecution;

11. not be required to appear at preliminary hearings or committal proceedings unless deemed material to the defence or prosecution;

12. have his or her need or perceived need for physical protection put before a bail authority which is determining an application for bail by the accused person, by the prosecutor;

13. be advised of the outcome of all bail applications and be informed of any conditions of bail which are designed to protect the victim from the accused;

14. have the full effects of the crime upon him or her made known to the sentencing court either by the prosecutor or by information contained in a pre-sentence report; including any financial, social, psychological and physical harm done to or suffered by the victim. Any other information that may aid the court in sentencing including the restitution and compensation needs of the victim should also be put before the court by the prosecutor;

15. be advised of the outcome of criminal proceedings and be fully appraised of the sentence, when imposed, and its implications;

16. be advised of the outcome of parole proceedings;

17. be notified of an offender's impending release from custody.

A Prosecution Perspective

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Committal proceedings have been a feature of criminal procedure in Australia almost from the time that settlement began.[1] Many, but not all, judicial systems which are modelled upon the English system of criminal justice have developed committal procedures for determining whether persons accused of serious crime should be sent for trial (Lord Chancellor's Department 1989). In recent years, there has been widespread and justified concern about delays in the criminal justice system (Roden 1989). Fingers have been pointed at committal hearings as a major cause of delay (NSW Attorney-General's Department 1989). Increasingly, there is pressure to do away with committals, and to replace them with what is often described as greater prosecutorial discovery.[2] This paper attempts to present the case for retaining committals from a somewhat unusual point of view, that of the prosecution.

The Case Against Committal Hearings— With Some Balancing Observations

Before proceeding to analyse the value of a committal hearing to a prosecutor, it is proper to consider (and to concede where appropriate) the validity of arguments which can be raised against retaining committal proceedings.

The main argument against committal hearings is that they are responsible for excessive delay in bringing to trial persons accused of serious criminal offences. Committals are said to be directly responsible for one-third of all delay which occurs in New South Wales between the time that a suspect is charged and the time of his trial (Hidden 1990). There is no doubt that lengthy committal proceedings can contribute significantly to delays which accused persons face while awaiting trial. Delay is tantamount to injustice, to both the Crown, and to the accused. The problem is exacerbated by the fact that Magistrate's Courts are busy courts right throughout Australia. This means that in some states committal hearings of any significant duration cannot be conducted in other than a piecemeal fashion. On occasion, committal proceedings have stretched out for months, if not years, because of the inability of a particular Magistrate's Court to deal with a committal hearing in one continuous sitting. This phenomenon has been particularly apparent in New South Wales, and in the Australian Capital Territory.

A second major criticism of committal hearings is that in so far as they have as their primary role the filtering out of those matters which should not proceed to trial (because of

the unlikelihood that there will be a conviction), this role is not being performed adequately, or at all. In several cases, accused persons are being sent for trial upon evidence which is too weak to justify that occurrence. In New South Wales, a survey carried out by Coopers and Lybrand in 1989 concluded that magistrates were discharging defendants after all prosecution evidence had been led in only 2 per cent of committal hearings (NSW Attorney-General's Department 1989, p. 24). It is true that the Bureau of Crime Statistics put the figure at significantly higher than 2 per cent (NSW Attorney-General's Department 1989). Whatever the correct figure, a low filtration rate raised doubts as to whether the retention of committal hearings is justified.

One can readily understand why New South Wales is at the forefront of proposals to do away with committal hearings. Delays in that state are truly appalling (NSW Attorney-General's Department 1989) though the position has improved in recent months. The paper committal system introduced in 1983 has, by all accounts, not operated as well as would have been expected. It seems that there has been a tendency on the part of some defence counsel to require virtually all witnesses to attend for cross-examination. This tendency means that paper committals save very little time. It is apparent that the New South Wales Director of Public Prosecutions elects not to prosecute considerable numbers of persons who have been committed to stand trial. Statistics set out in the Discussion Paper prepared by the New South Wales Attorney-General's Department (dated May 1989) indicate that in the period between 13 July 1987 and 30 June 1988, the New South Wales Director of Public Prosecutions decided not to prosecute in 425 cases in which the accused had been committed for trial. This represented 17 per cent of the total number of 2,449 trials completed. A total of 138 out of these 425 cases involved matters in which the evidence in support of a prosecution was either insufficient, or where it could be said there were no reasonable prospects of conviction. Thus, the New South Wales Director of Public Prosecutions is declining to prosecute about 6 per cent of those who have passed the filtration process of the committal hearing (NSW Attorney-General's Department 1989).

It has been argued that these 138 cases represent clear errors on the part of the New South Wales magistracy. On the other hand, it may be said with some justification that these figures do not reveal how many of these 138 cases are those affected by changes in the evidence, (for example, the death, or subsequent unwillingness of a witness to testify). Others may represent merely those cases where two minds may approach the same question fairly and objectively, and simply come to different views.

One would need to know a good deal more about the sorts of cases which are filtered out by magistrates in order to be able to make a proper statistical appraisal of the value of committal hearings in New South Wales. Are they very long matters (in which case the filtration exercise, if properly carried out, may be of great value)? In how many of these cases would the Director of Public Prosecutions have detected non-viable prosecutions had there not been something akin to a full committal hearing? It is by no means simple to assess the weight of a prosecution case based upon statements made to police officers during the course of an investigation. There is a significant advantage in seeing how witnesses actually perform under cross-examination, (or, at least, in reading the depositions setting out such cross-examination).

It has also been argued against the retention of committal hearings that the right to cross-examine witnesses at a committal is virtually useless in those large numbers of committal hearings where the defendant is unrepresented.[3] It is true that unrepresented defendants seldom achieve very much of value to their defence through their cross-examination of prosecution witnesses. This is not, however, always so. In any event, one might legitimately respond to this argument by pointing out that the defects in a system of legal aid (which is not generous enough to enable persons devoid of adequate resources to be provided with appropriate legal representation) are scarcely an appropriate impetus for the eradication of existing rights. I have always been somewhat bemused by the refusal of

legal aid authorities to make available modest amounts to at least enable the retention of relatively junior members of the legal profession to appear for accused persons at committal hearings. Paradoxically, huge sums may be set aside thereafter for trial. This may be too late, after the damage has been done. A committal hearing usually does not require a Rolls Royce defence. Alternatively, it certainly does not require one to be paid for out of public funds. It does not follow that justice is done where, whether at committal or trial, no resources are made available by the state to those whom it prosecutes. Anyone who has had the misfortune of prosecuting a case against an unrepresented accused (whether at committal or trial) will readily agree that the interests of justice are best served when the accused is accorded adequate legal representation. The earlier such representation is made available, the better.

It has been noted that committal hearings can lead to a meandering cross-examination at trial, based upon minute discrepancies between the testimony given at trial, and what was said at the earlier hearing. This is, of course, perfectly true. Perhaps no less true is the observation that such meandering (and tedious) cross-examination may also occur as a result of any departure from what is contained in an original witness statement, irrespective of whether there has been a committal hearing. Poor advocacy (and this form of cross-examination can be regarded as nothing less than poor advocacy) needs to be rectified by proper training, and the development of appropriate professional standards within the profession. Trial judges could also do a good deal more to prevent this style of cross-examination from being pursued.

Those who oppose committal hearings argue that they provide an opportunity for unduly harsh cross-examination to be conducted with impunity, in circumstances where such cross-examination would never be attempted in front of a jury. This may have the effect, whether intended or not, that the witness will not be willing to give evidence at trial. This problem may be overstated. Defence witnesses who have been given a particularly difficult time at committal sometimes emerge as better prosecution witnesses at trial. The element of surprise is lost when prosecution witnesses are cross-examined too extensively at committal, and one should never underestimate the value of the element of surprise.

It has also been argued against the retention of committal hearings that the various tests required to be applied by magistrates in determining whether there should be committal for trial are, for the most part, too complex and difficult. This leads to much uncertainty.[4] It also leads to further delay through collateral review. The willingness of the New South Wales Supreme Court to permit such review has generated a proliferation of challenges to decisions made during the course of committal hearings. In the Commonwealth sphere, the provisions of the *Administrative Decisions (Judicial Review) Act 1977* have had a similar, regrettable effect. An appropriate response to these criticisms might be to suggest that it is surely not difficult to devise a relatively straightforward, and simple, test to be applied by magistrates in determining whether to commit for trial. This has been done in Victoria. The Victorian test requires no more than a consideration of whether the evidence adduced before the magistrate is of sufficient weight to support a conviction. This compares favourably with dual tests using archaic language copied from mid-nineteenth century English statutes, and an even more difficult New South Wales formulation which required magistrates to predict what a jury is 'not likely' to do. It would also seem not to be difficult to enact legislation prohibiting collateral review of decisions by magistrates during the committal process. To abolish committal hearings because of difficulties associated with

peripheral and remediable aspects of those hearings seems very much like throwing the baby out with the bath water.

Two other arguments can be identified against committal hearings. It is said that witnesses should only ever once be put through the ordeal of giving evidence in a criminal trial, and that it is unduly burdensome to require them to give evidence on more than a single occasion. There is, however, a great deal at stake so far as an accused person is concerned: his freedom is at risk. One must have every sympathy for the ordeal of prosecution witnesses of all types, including complainants in cases involving alleged sexual offences, and children. This concern must be balanced, however, against the rights of accused persons, who have more at stake, and who are entitled to due process.

Finally, it has been said that committals should be done away with because there is a risk associated with the conduct of such hearings that material which is highly prejudicial will be publicised, and endanger a fair trial. It should be borne in mind that a well publicised committal hearing may, in some cases, lead to witnesses whose evidence may be of great importance coming forward. Such witnesses may assist either the prosecution, or the defence. Magistrates have the right, however, to suppress material which should not be published in the interests of a fair trial. It is also within the province of Parliament to prohibit reporting of committal hearings. In any event, it is surely paternalistic to say to accused persons that they should be deprived of their rights to a committal hearing because there is a risk that some damage may be done to their prospects at trial. The short answer is that this is a risk that most defendants will happily bear.

The Case in Favour of Retaining Committal Hearings—a Prosecution Perspective

This brings me to the true subject matter of this paper which, as pointed out earlier, is not the traditional debate between those who favour the abolition of committal hearings, and those on the defence side who regard them as a sacred right. There is, in fact, a very real case to be made for retaining committal hearings, not merely from a defence perspective, but also from a prosecution perspective. When I refer to a prosecution perspective, I mean, of course, the public interest in ensuring that those who are guilty of serious criminal offences are prosecuted to conviction, and those who cannot be proved to have committed such offences are acquitted. It goes without saying that the prosecution has no interest in securing convictions at any cost.

The best way to overcome delays in the criminal justice system is to develop processes designed to encourage those who are guilty of criminal conduct to plead guilty, and thereby to avoid the need for, and expense of, a costly criminal trial. The earlier the plea of guilty, the better.[5]

Do committal hearings produce more pleas of guilty than would be the case without them? There is no empirical evidence of which I am aware specifically directed to this point. However, it is my belief, based upon my own experience, that there are many cases where it would be totally irresponsible to advise a defendant charged with serious offences to plead guilty without having tested the material against him. A statement made by a prospective witness to a police officer is just that—no-one knows the circumstances under which that statement came to be made, or whether the witness will adhere to it if pressed. In recent years there have been documented cases of police officers who have sought to improve on what a witness is actually prepared to say about the events in question. This has led to the casting of statements into forms which do not accurately reflect what the witness truly knows

about the matter. Sometimes a statement which is produced is the end product of a number of earlier statements, some of them never having been signed, or adopted by the witness. These earlier versions have not been turned over to the defence as part of the pre-trial discovery process. Some of these statements have been made by witnesses who have a good deal to gain by implicating the particular accused, and exculpating themselves. It is only through the committal process, and through the use of compulsory discovery, that their existence has come to light, and thrown a different complexion upon the case.[6]

A case alters significantly after a thorough and proper cross-examination of key witnesses. It may be that what is revealed is that these witnesses have made their statements in a perfectly proper fashion, and that they adhere to them whole-heartedly, and cannot be shaken in cross-examination. If their evidence seems likely to be accepted, particularly if it is corroborated, a client may well be advised that he has no real option other than to plead guilty, and to seek to obtain the benefits available to him of a reduced sentence in return for such a plea. The problem is that one simply does not know enough about the prosecution case from a perusal of witness statements to enable a sensible judgment to be made (Napley 1966, p. 495).

However expensive committal hearings may be, they cost (on a time basis) but a fraction of what a trial in a superior court costs (Victorian Shorter Trials Committee 1985; and Advisory Committee on Committal Proceedings (Vic) 1986). It is ironic that we have come to recognise the value of pleas of guilty by enacting legislation requiring that such pleas attract a sentencing discount (s.4 *Penalties and Sentences Act 1985* (Vic.)) and yet it is proposed in some places to do away with committal hearings. The result will be fewer pleas of guilty.

Even if the committal hearing does not itself produce a plea of guilty, (and an early one at that) it may have the effect of reducing the time which must be spent on a number of issues during the course of a trial. Once one accepts that trial time is inherently more costly than committal time, it is surely better that rabbits be chased down holes during committals than that this be done during trials. If there is to be a fishing expedition of some kind (and I do not condone fishing expeditions unless there are fish to be caught) let that fishing expedition take place before a magistrate, and not before a judge and jury. A properly conducted committal hearing can lead to the avoidance of lengthy voir dire hearings which might otherwise be necessary at trial. Issues can be resolved more quickly before a magistrate than before a judge and jury. Lines of inquiry which have proved to be unprofitable at the committal hearing can be jettisoned by the time of the trial. The case can proceed to the real issues. All the problems associated with the issuing of wide subpoenae, and associated claims of privilege, can be dealt with and disposed of once and for all at the committal hearing instead of occupying more valuable higher court time.

The knowledge of what a witness is likely to say in response to a particular question enables the examination and cross-examination of that witness to be kept under tight rein. A strong trial judge who is both able and willing to exercise appropriate control over counsel will ensure that the trial proceeds without undue delay.

From the prosecution point of view, there are significant advantages to be gained from having important witnesses exposed to cross-examination at committal. The prosecutor learns how the witness will perform while under attack. He can more accurately assess whether there are reasonable prospects of a conviction based upon the testimony of that witness.[7] It is impossible to assess the credibility of a witness from a perusal of prior statements, even if the witness is also conferenced. Witnesses who are likely to fall apart under pressure should have that fact exposed at the earliest possible opportunity, and not after the trial has commenced.

A prosecutor is also confronted from time to time with a witness who is unwilling to provide assistance to the police by making a statement of his own free will, but whom he

suspects would be prepared to tell the truth if called to testify. The reluctant witness may be pivotal to the case against the accused. The committal allows for this type of witness to be brought forward under compulsion, and to have his testimony available for consideration by the prosecution.

It has been argued that with the establishment of independent Crown prosecution services, and the creation of the Office of Director of Public Prosecutions, a new and more effective filtration process is available. It is said that committal hearings are no longer required in consequence of this development. I doubt that this is so. It must be borne in mind that within any such prosecution service there will be persons of conspicuous ability, and experience. There will also be persons with little or no trial experience, and perhaps a modicum of ability.[8] Some prosecution officers have never seen a criminal trial take place. Their appearance work is confined to summary matters in Magistrate's Courts, with perhaps the odd appearance in the higher courts on pleas of guilty. Are such officers to be assigned the task of determining whether there are reasonable prospects of conviction before a jury? The reply may be made that some magistrates are no better equipped to determine how a jury is likely to respond to a prosecution case. However, bearing in mind the heavy responsibilities that are today imposed upon magistrates, one would hope that persons occupying those positions, would be people of substantial experience and quality. They should be well able to decide whether a prosecution case is strong enough to warrant putting the accused upon his trial. A magistrate conducting a committal hearing has the advantage of having seen and heard the witnesses give their evidence, and be cross-examined. A prosecution officer reading witness statements lacks at least that advantage.

Committal hearings can also provide tactical advantages for the prosecution. One can learn a great deal about how a defence case will be conducted at trial from the line of cross-examination adopted at committal. It is perhaps for this reason that the practice of conducting full committals in England is comparatively rare.[9] The vast majority of cases in that country proceed as paper committals, uncontested, in order to achieve the maximum degree of surprise at trial (Napley 1966). This style of advocacy has not found favour in Australia. It is likely that if legal representation were readily available to all accused persons, many would be counselled to require a full committal hearing. From the prosecution point of view, this would not necessarily be a bad thing. A full committal may lead to the accused committing himself to a particular line of defence at too early a stage, before an informed judgment can be made about the wisdom of that course. Once a line of questioning has been adopted by the defence at committal, a departure from that approach at trial can, of course, be drawn to the jury's attention with significant forensic advantages to the Crown.

Defendants seldom go into evidence at committal hearings. From a prosecution point of view, one can think of nothing better than the opportunity to probe the defence case, and particularly, the chance to cross-examine the defendant at committal. Regrettably from a Crown perspective, this sort of opportunity comes along all too rarely. As a prosecutor, I would be reluctant to see it disappear altogether.

A committal hearing may expose weaknesses in the prosecution case, which, while not fatal to that case, may nevertheless point to the need to strengthen the evidence, prior to trial. The prosecution may discover, for example, that the charges which have been laid are inappropriate, and cannot be sustained. Lesser charges may be substituted and in some cases may lead to a plea of guilty, and perhaps summary disposal. If a prosecution witness does not perform well at committal, and there is thought to be a need for more evidence to be obtained to support his testimony, such evidence can be sought, and obtained before the

trial. This is particularly true with experts. If an expert is unchallenged at committal, it can probably be inferred that he will be unchallenged at the trial. If he is subject to a strong attack at committal, the need for corroborative evidence may become apparent. Other experts may be procured.

Defence submissions as to defects in the prosecution case, whether addressed to fact, or to law, can be met and rectified in time for trial. All of this is of immense value to a prosecutor who benefits from a second chance to get the case right. It surprises me that there are prosecutors who are prepared to forego these advantages in exchange for what seems to be a misguided quest for greater speed, and less delay. Bringing a case to trial more quickly but having that trial take longer, and with more risk that it will be unsuccessful, apears to be a poor bargain.[10]

I am opposed to all forms of collateral review of committal hearings. It is appropriate for superior courts, particularly those outside the court hierarchy which has the responsibility for trying the particular criminal offence, to become involved in the criminal process. Administrative Decisions Judicial Review (ADJR) applications to the Federal Court have produced scandalous delays in Federal prosecutions. The suggestion implicit in some calls for the abolition of committal hearings that an improper or erroneous prosecution decision taken by the Director of Public Prosecutions can be guarded against by permitting judicial review of the decision to indict strikes me as almost bizarre.

This will be an open invitation to any defendant with substantial means to review the exercise of prosecutorial discretion. The delays which will result from forays into the Federal Court, or the Supreme Court, and through the hierarchy of the appellate court system, will make delays resulting from committal hearings seem insignificant by comparison. It is particularly desirable that there be independent judicial scrutiny in cases which have about them the suggestion that special treatment is being meted out to a defendant who is a well-known personage in the community.

One particular advantage of a committal hearing is that a decision to commit is taken by a judicial officer (who is obliged to accord natural justice). One can more confidently accept the need to allow that decision to stand, pending ultimate resolution by a jury, than one can the decision of a Director of Public Prosecutions. The case for judicial review is greater when a prosecuting lawyer makes the decision to put someone on trial than when the decision is taken by an impartial and independent judicial officer. The Director of Public Prosecutions is, of course, required to be fair and objective. He will not be perceived as being impartial, and perhaps this is not unreasonable. His role is to prosecute. His day-to-day contacts with investigating agencies (including the police) make it difficult for the reasonable bystander to be satisfied that the scrutiny which has been brought to bear upon the police brief is wholly independent, and without predisposition, even if that be the case. The integrity of the criminal justice system calls for the continued involvement of magistrates in determining whether prosecuting authorities are correct in saying that the case is of sufficient weight to justify putting the accused on trial. The responsibility placed upon the Director of Public Prosecutions to decide whether to proceed with a prosecution is, of course, lessened to the extent that an independent judicial officer is prepared to agree that there is a case fit to go for trial. This is no bad thing.[11]

This is not to say that there is no room for improvement to the committal system as it presently operates throughout Australia. There is a real need for reform in some areas. A clear and simple test should be adopted to enable magistrates to know precisely how they should approach the question whether to commit for trial. In this respect, I favour the current Victorian test over that in operation in New South Wales because of its greater simplicity, and its avoidance of the need to attempt to predict what a jury properly instructed

is likely to do, or rather is not likely to do. It goes without saying that I favour the current Victorian test over that still used in some other states, which is the traditional formulation so frequently misunderstood over the years. I favour greater availability of legal aid, albeit on a modest scale, in committal hearings. I support the introduction, in those states which do not have it, of legislation permitting a magistrate in his discretion to decline to permit witnesses to be cross-examined at committal unless it can be shown that the interests of justice so require. I am not concerned about the possibility that there may develop varying practices among magistrates in exercising a broad discretion of this type. It seems to me that over time guidelines will develop. It would be preferable for this to occur on a case-by-case basis rather than setting out in a structured way specific rules. Just as costs are unavailable to the Crown in criminal matters involving indictable offences, so also it should not be open to a magistrate to award costs against the prosecution where a committal hearing has been brought in good faith, but has failed to produce a committal for trial. The Crown should not be deterred from bringing charges, or pursuing them, by the consideration (albeit sub-silentio) that if the case goes wrong, substantial costs may be awarded. Charges can fail for many reasons unconnected with either negligence, or bad faith on the part of those who prosecute. Witnesses may fail to swear up to their statements, for all sorts of reasons (NSW Attorney-General's Department 1989).

Most important, it is essential that magistrates be given power to cut short protracted cross-examination which is unhelpful in regard to the specific statutory task magistrates are required to perform. Magistrates should be encouraged to insist that cases proceed with despatch. It is incomprehensible how a magistrate can permit defence counsel to cross-examine a single witness as to credibility for weeks or even months on end (as has happened in some recent committals). If counsel cannot effectively damage the credibility of a prosecution witness within a day or two, then he is scarcely likely to achieve very much more in a week or a month.

Ultimately the solution to the problem posed by extremely lengthy committals (which have in some instances become a disgrace to the system) lies in a change of attitude on the part of some members of the legal profession. There must be an appreciation of the fact that if a few lawyers persist in stretching out committals to inordinate lengths, governments will step in and do away with committal hearings. Magistrates must be made conscious of the need to keep these preliminary inquiries moving, and not to permit them to become bogged down. Prosecutors must learn to see the wood for the trees. Too often committals are prosecuted with excessive attention to minutiae, rather than sound judgment about what is necessary, and what is not.

If committals can be confined to relevant issues, they will continue to serve the legitimate ends of accused persons, and of the prosecution. Nothing could do more to overcome the problems of delay without upsetting the delicate balance which lies at the heart of any rational and humane system of criminal justice.

The New South Wales Hybrid— **Pre-Committal Hearings: a Postcript**

Committal proceedings were described by two members of the High Court as 'an important element in our system of criminal justice'. Gibbs ACJ and Mason J (as they then were) went on to say 'they constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair'—*Barton v. R* (1980) 147 CLR 75.

It is true that not all members of the High Court endorsed these views. Nonetheless, it is somewhat surprising to find that within a decade or so of their utterance, moves are afoot in some states to curtail or even abolish the committal hearing. Most prominent among those

who favour the case for legislation to do away with the right to a traditional committal hearing is the Attorney-General for New South Wales. His department released a discussion paper in May 1989 which canvassed a number of possible reforms to the criminal justice system. The most controversial of these reforms was that which involves what he describes as 'modification of committal proceedings rather than abolition' (Dowd 1990).

It is plain from the Attorney's public utterances that the Bill does away with the magistrate's function of committing for trial. It gives to the Director of Public Prosecutions in New South Wales (and by virtue of the operation of the provisions of the *Judiciary Act 1903* (Cwlth), also to the Commonwealth Director of Public Prosecutions) the power to determine whether a person suspected of serious criminality shall be placed on trial before a judge and jury. The Attorney argues that the new scheme will assist in reducing the delays accused persons now face in waiting for trial, and in reducing the number of witnesses who unnecessarily go through the often harrowing experience of cross-examination. He describes the new scheme as a 'pre-committal hearing scheme' (NSW Attorney-General's Department 1989).

The essence of the New South Wales scheme will be as follows (NSW Attorney-General's Department 1989). After an accused is arrested or summonsed and bail determined in the usual way, all statements of witnesses taken by police will be forwarded to the Director of Public Prosecutions. The Director will decide whether the proceedings should continue, and if they will, what the appropriate charges should be. In relation to state offences, the New South Wales Director will also decide whether the matter should be dealt with summarily or on indictment, where this is possible.

The prosecution evidence will then be disclosed to the defence within a period set when the matter first comes before the court. Also provided to the defence will be the names, if any, of witnesses the prosecution intends to call to be examined at the 'pre-committal hearing'. The defence will then inform the prosecution of those additional witnesses it wishes to cross-examine. The prosecution will determine whether to consent to the cross-examination of those witnesses. Prosecution witnesses may only be cross-examined without the consent of the prosecution if they fall into an appropriate category. If there is a dispute as to whether a witness falls into a particular category, then that will be resolved by a magistrate.

The discussion paper prepared last year proposed that a witness could be cross-examined at a pre-committal hearing where:

(i) the witness gives evidence as to identification of the defendant;

(ii) the witness is an accomplice;

(iii) the witness gives evidence of an opinion based on scientific examination;

(iv) the defendant is able to demonstrate special or exceptional circumstances which require the cross-examination of a particular witness; or

(v) the prosecution consents.

The current proposals involve the retention of these five categories with the modification that category (ii) is expanded so that cross-examination will now be allowed where the witness is an accomplice, or an indemnified witness or an informer. In addition, the defendant is to be given a right of cross-examination 'where there are reasonable grounds to suspect that cross-examination will either affect the assessment of the reliability of the witness or would adduce further material to support a defence' (NSW Attorney-General's Department 1989). It is clear that this new formulation provides a much wider right of cross-examination than had been proposed in the discussion paper. It is to be welcomed in that respect. There is a problem, however, in working out precisely what the new

formulation will encompass. How will a magistrate determine whether there are 'reasonable grounds to suspect' the matters set out without at least embarking upon some preliminary investigation of the matter? Will this new provision permit cross-examination of police witnesses? What is implicit in the word 'defence'? Does it extend to exclusionary discretion, and otherwise admissible evidence? These matters will provide rich pickings for defence lawyers.

The procedure then contemplates that the pre-committal hearing can take place before a magistrate who will ensure that the rules of evidence are applied and that the proceedings are conducted fairly. The defendant will have the right to give or call evidence. At the conclusion of the pre-committal hearing, the evidence will be considered and the Director of Public Prosecutions will make a further decision as to whether the matter should proceed to trial. If the Director decides not to put on trial a person who has been charged with an offence, the legislation will specifically require that reasons for this decision must be given upon request.

It has been correctly noted that the most important aspect of the new scheme is that a magistrate will no longer decide whether or not to commit a person to trial. That decision will now be made by the Director of Public Prosecutions. Those who are critical of the new scheme focus their attention upon this specific aspect of its operation. They claim that it is inappropriate for a party to criminal proceedings, in this case, the Crown, to decide whether a person should be put on trial without the independent scrutiny of a judicial officer to safeguard the rights of the accused person. The Attorney responds by noting that these criticisms fail to address the fact that the Director of Public Prosecutions, through the Crown Prosecutors, has been making just that decision ever since the *Director of Public Prosecutions Act 1987* came into operation in New South Wales on 13 July 1987. Whether or not a magistrate commits a person for trial does not mean that the person will stand his/her trial. Before a case can proceed to trial after committal, a Crown Prosecutor must consider the matter and, if appropriate, find a bill of indictment. A Crown Prosecutor is not required to find a bill simply because the person was committed for trial. A recommendation can be made to the Director that no bill be found. Even after a bill has been found, a Crown Prosecutor can recommend there be no further proceedings. Similarly, just because a person is discharged by a magistrate at committal proceedings, does not mean the person will not stand his/her trial. The Director of Public Prosecutions has the power to file an ex-officio indictment, as does the Attorney-General. It follows, according to this reasoning, that whether a person is committed for trial or not by a magistrate, the Director of Public Prosecutions has the power to 'overrule' the magistrate's decision'.

It is difficult to evaluate the merits of the proposed new scheme without having seen the detailed draft of its provisions. It is fair to make one point, however, and that is this. A decision to ex-officio indict a person who has been discharged at committal is never taken lightly. Full weight is given to the magistrate's opinion that the evidence presented by the prosecution is not of sufficient weight to justify committing the accused for trial. It is one thing to have available the residuary power to ex-officio indict in extreme cases—it is quite another to take over the task of independently scrutinising the evidence from judicial officers and to vest that task in those who are charged with the function of prosecuting offenders.

I do not believe that the case for abolishing committal hearings in their present form, and replacing them with this new hybrid has been adequately made out. I would prefer that the problems associated with the existing committal structure be addressed, and modification made where appropriate. I would strongly support the amendments to the *Justices Act 1902* made by the former New South Wales government (which would have restricted the right of defendants to require the attendance of some witnesses for cross-examination and given magistrates' powers to halt unhelpful cross-examination). It is a pity that those amendments have not been proclaimed. The present Attorney claims that he has not proclaimed those provisions because he realises the importance of allowing evidence to be

tested prior to trial, and believes that it is a matter of fundamental importance that this aspect of committal proceedings be retained (Dowd 1990, p. 15). It is somewhat paradoxical therefore, that his new proposals go far beyond what would have been achieved had the amendments been proclaimed, and effectively abolish some of the very rights he claims to be concerned about in so far as meaningful effect can be given to them.

The Attorney proposes that the replacement of committals by the proposed pre-committal hearings be supplemented by a requirement that there be greater disclosure of the prosecution case. He notes that under the current committal system, there is no requirement of complete discovery, and that a more comprehensive scheme of disclosure of the prosecution case to the accused would be fairer, and enable the issues at the trial to be narrowed. The new procedures will require automatic disclosure to the accused (that is, without a request for such information having to be made). There is no difficulty with the requirement of wide disclosure—it seems, however, to be a poor substitute for a properly conducted committal hearing. I do not believe in trade-offs in this area. The case for the retention of committal hearings does not depend upon any argument to the effect that they constitute the only effective method of disclosure of the prosecution case. Rather, the primary function of committal hearings is to ensure that an independent judicial officer is given the opportunity to scrutinise the prosecution case and to determine whether it is appropriate that the accused person be put to the trauma, expense, and inconvenience of a trial. This, the new New South Wales hybrid system—however well-intentioned—will not achieve.

Endnotes

1. The *Indictable Offences Act 1848* 11, 12 Vic., C 42 (1848) was adopted in New South Wales in 1850. Prior to that, Justices of the Peace exercised an inquisitorial role, closely examining the prisoner without permitting him the right to decline to answer questions. It was the creation of a professional police force in 1829 in England which meant that the Justice could begin to act in a quasi-judicial capacity, since he was no longer required to supplement the deficiencies of the police force. The institution of the grand jury never really took root in Australia (Bishop 1990).

2. New South Wales has already determined to follow this path. It is likely that the Northern Territory will do the same, as its Justices Act Review Committee is reviewing committal proceedings. There are also tentative proposals to review the committal system in Queensland. In England the Home Office and Lord Chancellor's Department have issued a Consultation Paper on the Future of Committal Proceedings (1989). It foreshadows the abolition of committal proceedings, and the substitution of mandatory prosecution discovery. The defendant will still be able to challenge the sufficiency of evidence if the matter is to go for trial in the Crown Court, but only upon the basis of the witness statements. No cross-examination of witnesses will be permitted. All submissions to a magistrate challenging the sufficiency of the prosecution evidence must be in writing, except with leave.

3. The position varies from state to state, but, as a general proposition, it is fair to say that in recent years in at least New South Wales and Victoria, legal aid has not generally been made available to those facing committal hearings.

4. The controversy flared with the decision of the New South Wales Court of Appeal in *Wentworth v. Rogers* [1984] 2 NSWLR 422. This led to the adoption of a new legislative formulation of the test for committal which was not happily drafted. It was the subject of detailed analysis by O'Brien J in *Carlin v. Thwat Chidkhunthod* (1985) 4 NSWLR 182. More recently the new formulation was further considered by the Court of Appeal in *DPP (NSW) v. Saffron* (1989) 39 A Crim R 64.

5. This factor has come to assume great importance with significant sentencing discounts now being given for early pleas of guilty, even without any indication of remorse on the part of the accused.

6. Witness statements taken by police often contain material which is inadmissible, and far too wide ranging. Depositions are generally in tighter form. Apart from the dangers of witness statements being the product of suggestions made by the police, they will not, as a rule, contain any material which can be regarded as exculpatory. Police questioning is not geared towards producing such material. The police do not know what is important to a potential defence—only a legal representative of the accused properly instructed can elicit such material. This can only be done at a committal hearing—the trial is not the venue for discovering such exculpatory material (Napley 1966).

7. Most prosecutors in Australia now apply a variant of the reasonable prospects of conviction test in determining whether to file an indictment for trial. This is a higher standard than merely being satisfied that there is a prima facie case. It requires an assessment to be made of the strength of the prosecution case, and this includes making judgments about the credibility of prosecution witnesses.

8. It will not always be possible to have the decision whether to indict for trial, and if so, upon what counts, taken at the highest levels within a prosecution service. It will be inevitable, given the sheer volume of cases that must be evaluated that there will be some 'rubber stamping' of decisions taken by comparatively junior officers.

9. The golden rule of the English criminal bar was said to be 'ask no questions at committal'. While often departed from, there is still a sense in which this represents conventional English wisdom.

10. It is noted that the new New South Wales proposals do not contain this vice, at least so far as the New South Wales Director of Public Prosecutions is concerned. Regrettably, the Commonwealth Director may find himself the target of more ADJR applications for review than ever before as a result of the new modified system which is to be introduced in that state.

11. The amendments to the New South Wales *Justices Act* (which were not proclaimed) would have achieved this end. *See also Magistrates (Summary Proceedings) Act 1975* (Vic.) s 45B(7).

References

Advisory Committee on Committal Proceedings (Vic.) 1986, *Report*, February, Melbourne.

Bishop, J. 1990, 'The Abolition of Committal Hearings', *Proceedings of the Institute of Criminology*, Sydney University Law School, 11 April, Sydney.

Dowd, J.A.R. 1990, 'Committal Reform: Radical or Evolutionary Change', *Proceedings of the Institute of Criminology*, Sydney University Law School, 11 April.

Hidden, P.J. 1990, 'The Benefits of Committal Proceedings', *Proceedings of the Institute of Criminology*, Sydney University Law School, 11 April.

Home Office, Lord Chancellor's Department 1989, *Committal Proceedings: A Consultation Paper*, Her Majesty's Stationery Office, London.

Napley, D. 1966, 'The Case for Preliminary Inquiries', *Criminal Law Review*, 490.

New South Wales Attorney-General's Department 1989, Discussion Paper on Reforms to the Criminal Justice System.

Roden, A., 'Delays in Criminal Trials', Australian Academy of Forensic Science, 11 May 1989.

Victorian Bar Council, Shorter Trials Committee 1985, *Report on Criminal Trials*, Melbourne.

Committals¾ Time for Change

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An interesting observation about human nature is that when the need for change becomes apparent, most of us tend to feel more comfortable modifying or adjusting rather than radically changing or starting afresh. The conservative view that the time-tested methods are generally the best is supported by the fact that the status quo affords consistency, stability and predictability. However, there is no wisdom in a rigidly conservative stance which defiantly resists significant change which is sensible, well reasoned, and more importantly, based on what is seen as a dire need. As a generalisation, the legal profession fits as well as any group into the conservative mould.

It is pleasing to note that the Institute has invited other perspectives in the debate as to the efficacy of the committal proceedings. It is likely that we will find that all is not as well as most lawyers would portray. The committal process has flaws. This paper suggests that the existing committal process in many instances is an elaborate waste of time, and in some cases even counter-productive. There is a need for a different approach but only so long as sufficient administrative and judicial safeguards are put into place to protect the principles the existing committal procedure is said to provide.

The Issues

In the most prominent authority of *Barton v. R* (1980) 32 ALR 449 the majority held the committal proceedings to be a critical prerequisite in the attainment of a fair trial. It is important to note that Murphy and Wilson JJ disagreed.

Supporters of committal proceedings identify it as an integral part of the criminal justice system since it:

- provides an effective **screening** process to prevent weak cases reaching trial;
- allows an early identification of **guilty pleas**;
- provides a comprehensive **disclosure** of the Crown's case and allows concentration on the facts in dispute;
- allows the defence to **test the witnesses** for the Crown; and
- allows the **witnesses to prepare** for the trial.

Screening—How far do you go?

Outside the actual committal proceedings there already exists extensive screening measures to ensure only deserving cases are taken to trial. A filter is applied on at least three and sometimes four separate occasions either side of the committal proceedings. In the first instance, the police investigator's decision to charge is reviewed by the police prosecutor before it is formally placed before the court. The prosecutorial policy of the South Australia Police Department, for example, which is based on the Prosecution Policy of the Commonwealth requires three criteria be met before the charge continues. Not only must a prima facie case exist, but there must also be a reasonable prospect of conviction, and in addition, the prosecution must be shown to be consistent with public interest.

In deciding whether there is a reasonable chance of success, account is taken of the version supplied by the accused to police during the interview, or any other evidence proffered by the defence in pre-trial discussion which might throw light on the likely success of the prosecution case. If a prima facie case exists, but a good defence is known and unlikely to be shaken, the prosecution will not continue. Of all the cases I manage in South Australia, approximately three per cent each year are diverted from prosecution because the prosecutorial policy criteria are not met.

A second and quite common part of the screening process is the dialogue between counsel and the police prosecutor which can result in charges being withdrawn, or reduced so as to allow them to be heard in the lower court. Many indictable offences are withdrawn from the trial at an early stage by police prosecutors without consultation with the Crown Prosecutor. Quite properly, where counsel is in possession of information which is likely to convince the prosecution not to continue, it should be raised in negotiation. This obviously calls for an enlightened and sensitive prosecutorial attitude. Counsel might also have convincing legal argument which will cause the prosecution to fail. Again, in the interests of fairness to the accused, the prosecutor should be willing to consider the legal issue prior to committal and where appropriate withdraw. In my experience, both issues of fact and law are widely discussed between police prosecutors and counsel prior to committal, resulting in some charges being withdrawn and in other cases reduced.

Because police prosecutors have nothing to do with the trial in the higher courts, their negotiation powers are extremely limited at this early stage in the proceedings. This will be commented upon below.

Perhaps the greatest indication of the ineffectiveness of the committal process as a screening device, is that a magistrate's decision to commit is, in effect, ignored by the Crown Prosecutor. As a third filter the facts are looked at afresh, and despite the committal of prima facie case, the Crown Prosecutor can still decide not to prosecute or prosecute on different charges. The same irony applies where the Crown Prosecutor decides to indict ex officio where there has been no case to answer.

In 1987 in South Australia there was a nolle prosequi in 10.8 per cent of all cases committed to the higher courts and 4.5 per cent of cases where the Crown proceeded with a different charge. In 1988 the figures were slightly higher in both areas with 11.3 per cent and 4.7 per cent respectively.

Disclosure—an Effective Practice even without a Committal

Recent years have seen a higher standard of disclosure prior to committal. This is an observation made by Brereton and Willis (1989), who go on to say that 'more generally, it would appear that there is a growing acceptance by prosecution agencies of the need for greater disclosure'.

Certainly in those jurisdictions with paper committals, all of the relevant witness statements are made available to the defence. In South Australia at least, greater attention is given to openness and disclosure in the committal process, especially because of King CJ's remarks in the Full Court decision of *R v. Harry, ex parte Eastway*, (1986) 39 SASR 203 where he said:

> It is not sufficient for (the prosecutor) to call only the minimum evidence required to make out a prima facie case. He is also required, in the absence of sound reasons to the contrary, to call all witnesses, whom, in the exercise of his discretionary judgment, he considers to be material irrespective of whether their evidence strengthens or weakens the case for the prosecution.
>
> Prior to a preliminary hearing, it is customary in those jurisdictions with paper committals to deliver all witness statements to the defence. Originally designed to speed up the process (consistent with openness and fairness to the accused), this procedure is now suffering abuse at the hands of insensitive and ill-prepared lawyers. A constant source of frustration to police prosecutors, magistrates and (most of all) witnesses, which will be addressed later, is derived from the fact that it is not uncommon for **all** witnesses to be summoned by defence notwithstanding the delivery of their written statements and regardless of their need. With the unprepared lawyer who reads the statements for the first time just prior to the committal, there can be the sudden realisation that the witnesses are not really required. Consequently, he or she asks some irrelevant questions, or the witnesses are simply sent away. To the insensitive lawyer, the committal is sometimes used as training ground for the young barrister, or as a 'fishing expedition'.

Cross-Examination at Committal—Two Bites at the Cherry

The majority in *Barton v. R* (1980) 32 ALR 449 also referred to the opportunity to cross-examine witnesses at committal as being one of the critical needs in the attainment of a fair trial. It certainly places the accused in a better position, learning in advance how a witness will respond to specific questions and identifying a style of cross-examination which will bring about the best results. Another advantage to the accused is that it provides the opportunity to check the testimony in the trial against the depositions of the committal. Put another way, the question might properly be asked, 'Why should the accused be allowed to have a warm-up prior to a trial, or have the opportunity to wear down the witnesses?'

Some relatively serious offences such as assault occasioning actual bodily harm and break and enter (dependent on the value of goods stolen) can be heard and determined in summary jurisdictions. Penalties in these jurisdictions include sentences of up to two years imprisonment. Yet the committal process, said to be critical for indictable offences, is considered to be completely unnecessary in the lower jurisdiction. A house break and larceny for $2,000 in South Australia requires the committal process and attracts all its benefits for the accused, but the same offence at $1,999 does not. It is difficult to pick the difference in principle—clearly it is only an issue of degree.

If the need to cross-examine is based on the notion that it constitutes a critical safeguard for the accused to ensure that he cannot be tried unless a prima facie case is established, why do the same principles not apply with criminal cases in a summary jurisdiction? The issue of degree does not satisfactorily answer the question. If the principle is so fundamental then it should apply at all levels where a person's liberty is at stake. Given the screening and disclosure processes which exist outside the actual committal it could be just as effectively argued that if it is sufficient in the summary jurisdiction then it can work in the higher courts. Supporters of the committal proceedings would probably be staunch

supporters of the institution of the jury system. If the jury is as discerning and effective as its proponents contend, why is there a need for such an elaborate preliminary hearing to establish if there is a prima facie case to put before it? The jury could do that as part of its overall function as a finder of fact, just as the magistrate does.

An observation by police prosecutors is that in the majority of oral committals, cross-examination is overused, deriving little value to the defence. Even in non-contentious cases, lawyers are seen to embark on monotonously long cross-examinations with no clear direction and for no discernible purpose. Cynical observers note that extra time is extra money for lawyers.

Witnesses—The Key Actors but the Least Considered

Do the committal proceedings really allow the witnesses to prepare for the trial? Few enjoy the experience of giving evidence in court. If the court process is unduly harsh or unsympathetic, the requirement to attend twice can have an adverse effect on the witnesses which will make the prosecutor's task much more difficult, if not impossible. Eighty-nine per cent of victims who participated in Newburn and de Peyrecave's (1988) survey described their court experience in negative terms. Likewise, Shapland, Willmore and Duff (1985) found that victims who were called to court to give evidence were 'usually confused and worried', suffering anxiety even re-victimisation, as their case passed through the court system. Bard and Sanger reported that giving evidence was a 'frustrating and frightening experience'. As one victim told the President's Task Force on Victims of Crime:

> It is almost impossible to walk into a courtroom and describe in detail the thing you most want to forget. It is also devastating to have to face your assailant. Although you are surrounded by people and (officers) of the court, the fear is still overwhelming (1982, p. 9).

The same Task Force heard that victims sometimes feel as if they are on trial themselves. In the quote that follows, note the perception of the witness of the distinction between treatment at the committal, and treatment at the trial before a jury:

> The preliminary hearing was an event for which you were completely unprepared. You learn later that the defence is often harder on a victim at the preliminary hearing than during the trial. In trial, the defence (lawyer) cannot risk alienating the jury. At this hearing, there is only the (magistrate)—and he certainly doesn't seem concerned about you.
>
> Hours later you are released from the stand after reliving your attack in public, in intimate detail. You have been made to feel completely powerless. As you sat facing a smirking defendant and as you described the threats, you were accused of lying and inviting the 'encounter'. You have cried in front of these uncaring strangers. As you leave no one thanks you.

Data from a current survey by the Attorney-General for South Australia confirms the worst suspicions about the negative feelings of witnesses. I am grateful to Julie Gardner from the Office of Crime Statistics (SA) for making available to me some of the relevant sections from questionnaires:

> The solicitor tried to put me down and confuse me; the language the solicitor asked and the way my words could be turned against what I meant.
> I came out looking worse than the offender and I felt I was degraded by reports made in the press.

Especially pertinent to the critical part witnesses play in the whole process, was a comment which seemed to sum up the frustration and despair some victim/witnesses suffer and the difficulty in getting them back into the system for a second time:

> I feel that the victim's rights and personal tragedies are totally ignored by the solicitors and the whole affair was just a laugh. **I'd never appear again as a witness.**

The reluctance of witnesses to go to court even in the first place is an increasing problem. Once called, the system does little to remove any apprehension or frustration. With crowded lists it is not uncommon for witnesses to be sent away to come back another day because the case is not reached. Delays which can extend over months or even years add to the anxiety and result in a lessened interest in the outcome. Once in the witness box, many feel as the comments above attest, that the system is unfair to them. The committal process, especially where counsel is unconcerned about discretion or finesse, which are essential before a jury, can make the witness 'battle worn' and thereafter reluctant or unwilling to appear at the trial.

I am assured by those who deal closely with victims that the strong negative feelings about the court process is not overstated or atypical in the comments I have referred to above. That being the case, and particularly in the view of at least one witness that the preliminary hearing is especially daunting, the committal insofar as witnesses are concerned can be counterproductive. A significant number of the cases not proceeded with by the Crown are based on the unwillingness of witnesses to give evidence.

Conclusion—The Need for Reform

It is possible to have a process which brings to trials only those against whom there is an adequate and properly prepared case and which allows full disclosure to the defence, without resorting to committal proceedings as we currently know them. In fact, a simpler, more meaningful and cheaper process consistent with fairness to the accused, can be achieved by the type of reform which has been introduced in New South Wales.

To be most effective, the Crown or DPP must take over the conduct of all indictable briefs from the police prosecutors. Police prosecutors are, in effect, only caretakers of these briefs and have no real control over them since they are ultimately decided in a different jurisdiction. By handling these cases earlier the Crown Prosecutor can engage in more meaningful negotiations and effectively sort out the guilty pleas, the nolle prosequis and the reduced charges and be allowed to concentrate on the cases which are really going to trial and which require some extra attention. This is certainly not a criticism of South Australia's police prosecutors: their competency overall is reflected in an extremely high success rate.

The 60 per cent of cases which will end up as pleas of guilty really deserve no more than a pre-court discussion between counsel and Crown Prosecutor. Openness and fairness will provide as much information to counsel (in most cases) as a committal would.

In addressing the issues seen to be the features of the committal, I take the view, with one exception, that each can be met without the formalised judicial process as we now know it. Screening can be purely administrative in all but those exceptional cases, just as the New South Wales' system now allows with magisterial oversight being introduced only where certain criteria are met. The current system does not provide an early indication of

guilty pleas. In fact it disguises them. Comprehensive disclosure can be achieved by introducing the Crown earlier in the proceedings, and, without the need to call evidence, the provision of written declarations together with negotiations between counsel and Crown Prosecutor will provide sufficient information. The argument that witnesses benefit is a myth. They are worse off in the committal process and can be frightened off forever.

The facility of testing witnesses would be removed if the committal were abolished. However, if it is really so necessary, why are our prisons full of persons who have been tried with serious offences in the summary courts, without this facility? But, even with the provision of allowing cross-examination of witnesses in special cases, as it is in New South Wales, this provision would cure any difficulties presented to the defence.

It will be interesting to note the developments in New South Wales after their new scheme has been in effect for a while. It is encouraging to see legislators take bold leaps and change a system where the need is obvious, rather than, 'peck' away at procedures which have simply not stood the test of time. I predict that the severe deprivation to defence cases, as heralded by the legal profession in New South Wales, will not arise.

References

Bard, M. & Sangrey, D. 1979, *The Crime Victim's Book*, New York, Basic Books, p. 125.

Bishop, K. 1990, The Abolition of Committal Proceedings, a paper presented to a seminar on committal reform convened by the Sydney Law School, April.

Brereton, D. & Willis, J. 1989, The Committal: Abandon, Retain or Reform?, a paper presented to the 1989 AIJA Annual Seminar, 18-20 August.

Newburn, T. & de Peyrecave, H. 1988, 'Victims' Attitudes to Courts and Compensation', *Research Bulletin*, No. 25, Home Office Research and Planning Unit, UK, p. 20.

Office of Crime Statistics 1987, *Crime and Justice in South Australia*, (1988 figures not published at time of writing).

Shapland, J., Willmore, J. & Duff, P. 1985, *Victims in the Criminal Justice System*, Gower, Aldershot, UK, pp. 62-3.

United States 1982, *President's Task Force on Victims of Crime*, The Task Force, Washington, DC, p. 9.

Committals in Victoria—a Police Perspective

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

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

Terms of Reference of Committee

The terms of reference of the Committee were:

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

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

Perceived Purposes of Committal Hearings

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

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

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

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

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

Benefits of Cross-Examination

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

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

Disadvantages of Cross-Examination

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

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

Dress-Rehearsal Approach

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

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

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

Adjournments

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

Calling of all Witnesses

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

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

Pressure

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

Availability of Witnesses

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

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

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

Delay

In *Barton's* case Murphy J stated:

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

Right to Cross-Examine

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

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

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

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

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

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

Abuse of Right to Cross-Examine

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

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

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

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

Marks J went on to say:

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

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

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

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

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

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

Restriction on Right to Cross-Examine Accused Persons

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

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

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

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

Failure of Defendant to Enter Defence

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

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

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

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

Issues to be Determined at Trial

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

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

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

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

Strain on Police Resources

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

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

Legislative Intervention

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

New South Wales Proposals

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

In a recent article, Byrne concluded that:

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

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

Recommended Approaches

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

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

Removal of Automatic Right to Cross-Examine

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

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

Full Discovery

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

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

Combination of Approaches

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

Endnotes

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

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

References

Advisory Committee on Committal Proceedings 1986, *Report on Committal Proceedings*, (the *Coldrey Committee Report)*, Victorian Government Printer, Melbourne, February at (i).

Byrne, P. 1988, 'Criminal Law & Justice: The Future of Committal Proceedings', *Australian Law Journal*, vol. 62, p. 292 at 297.

Campbell, I.G. 1985, 'Discovery in Committal Proceedings', *Criminal Law Journal*, vol. 9, p. 270 at 285-8.

Dowd, J. 1990, Committal Reform: Radical or Evolutionary Change, paper presented at Sydney Law School Seminar, 11 April.

Law Reform Commission of Victoria, Report No. 11 1989, *Unsworn Statements in Criminal Trials* Victorian Printing, Blackburn, Melbourne, Vic. at para 504.

Phillips, J.H. 1984, 'The Responsibilities of the Prosecutor' in *Preparation of Criminal Trials in Victoria*, ed. R.M. Read, Director of Public Prosecutions, at 5.

Pinder, S. 1988, 'Crown drops cop charges', *The Sun* Wednesday August 3, p. 7.

Victoria Parliamentary Debates, Legislative Assembly 1986, 7 October at 996.

Publicity and Committals

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It will be useful firstly to discuss why and how newspapers report courts, including some general principles of open courts. Secondly, a number of propositions about particular coverage of committal proceedings will be made, on the assumption that things stay more or less as they are. Finally, a few observations, some practical, will be stated about publicity and court reportage were the committal system to be changed along any of the lines being canvassed at this conference.

Why Court Proceedings are Reported

The law courts are a great theatre of life, where one sees people at their best and at their worst. The cases before the court involve conflict, whether between citizen and citizen or the citizen and the state, and conflict is a staple of news. Decisions made in the courts can have a great impact on the community. For all of these reasons newspapers publish court reports and devote considerable resources to the task.

In the past, newspapers such as *The Canberra Times* have had three overlapping reasons for detailed court coverage. One was for simple news, with reports judged and placed simply on their news value. Another was for politics—because the law, the way in which it is interpreted and applied is at the very heart of social organisation and our readers need to know what is going on. There was 'newspaper of record' material as well, in which cases, dull or otherwise, have been presented as a way of providing the public, or a section of it, with basic information about what is going on.

But times have changed, and the style of media coverage has changed considerably. Although all newspapers, and some broadcast media, report big or sensational cases, and the reports command as much lineage as ever, few newspapers attempt any longer to give a systematic coverage of all of the courts in their primary circulation areas. Few contain any newspaper of record material—apart from the law lists—and few put into the field reporters with legal qualifications or experience which enable them to comment with any expertise on matters being decided in the courts. More newspapers than before have law reporters or legal correspondents, but a high proportion of these sit high in ivory towers pontificating and do not actually soil their hands by entering courtrooms.

The Canberra Times has resisted these trends and sometimes looks a little old-fashioned. Although it is an increasing strain on our resources we continue to attempt to systematically cover everything of note happening in the ACT. This is done partly because we think it is part of our duty of community service: we believe our readers want and need to know about what is happening in the ACT, not simply about the odd juicy or sensational case which goes through it—but also for commercial reasons—simply because we believe that a systematic coverage produces the goods—the news stories which people expect in our paper.

How Court Proceedings are Reported

Be that as it may, the style of coverage is changing at *The Canberra Times* as well as elsewhere. For starters, reports tend to be brighter, and somewhat less deferential. This is all to the good, provided reporters know what they are doing and obey the limits of the law, commonsense and good taste. Reports are now more likely to include comment and interpretation, and, within limits—particularly if our readers can readily discern the difference—this is perfectly all right.

Reports not only provide a service to ordinary readers—whose knowledge of legal concepts, though not to be underestimated, may not be profound—but to lawyers and legal specialists who need to know something of the obiter of particular cases and the judicial reasoning involved. And given the political importance of some decisions, the press is quicker to comment on the wider implications of a case and even, sometimes, about the politics of the decision making.

The range of courts and tribunals covered is increasing. In Canberra, for instance, unlike 15 years ago, there is now the High Court, the Federal Court and the Family Court as well as the familiar ACT Supreme Court and ACT Magistrates Court. There is also the Administrative Appeals Tribunal and a number of other specialist tribunals getting regular attention. Space, whether in pages devoted exclusively to court reports or in ordinary news or comment pages, is at a considerable premium, and reports have to compete for inclusion. Whether a report is used depends on matters such as brightness, topicality and tightness. Good reports are lifted ahead to news pages, but even on the courts pages, news value, in ordinary terms, is the primary consideration.

One other change, very much contrary to old court reporting practice, is that the best reporters understand that much of what happens around and about the courts—as much as in them—is the stuff of news as well.

Although most newspapers doing regular reportage have good relationships and arrangements with the backroom court staff, which enables easy access to essential court papers and materials, it is important to understand that reporters have no especial privilege before the courts. Our reporters are simply ordinary citizens, and, when they attend a court case, they stand, technically at least, in no better position than any ordinary old busybody or senior citizen who comes in and sits in the back of a courtroom. What is written carries no legal protection any greater than a person gossiping among his or her friends about what he or she had seen and heard. There are some obvious legal rules—for example, about reporting a voire dire examination or coping with a suppression order of some sort or

another—which have more impact upon the press than on the ordinary member of the public, but even there the difference is one of degree only. It is not fundamental.

The other point to mention is that legal restrictions upon reportage are only one element of restrictions on coverage. Good taste is another. Newspaper policy is another. Using *The Canberra Times* as an example, it has a number of written down policies about different types of case and coverage. These policies, for example, cover how drink-driving cases, shoplifting, suicide and sexual offence matters (to nominate but four) are reported. In each of these areas significantly more could be reported if we chose, but, for what is thought to be good reasons, supportable in our view of the public interest, some restrictions have been placed on them. The policy that we do not report the names of persons accused of sexual offences and assaults unless and until they are convicted will be discussed further below.

Open Courts

It is always easiest for reporters to do their jobs when the formal restrictions on what they can report are clear. It is also much easier, in applying policy as much as in practice, when the rules are the same. A newspaper has an obvious vested interest in open courts—after all, its survival turns on its being able to sell information. But even putting that obvious interest aside one can argue that the public interest is best served by the open dispensation of justice. In a big community a newspaper does have some grounds for saying that in sitting in and reporting a case, it stands in for the legitimate interest and curiosity of the world at large. People need to know and want to know what is happening in the courts, but because it is practically impossible for them to attend, because of work and other commitments, they expect that newspapers will do the monitoring for them.

We live, however, in an age in which the trend is to put more restrictions upon coverage. It is probably true, for most jurisdictions (apart from South Australia), that the powers of courts to close proceedings or put reporting restrictions upon them, has not altered much over the years. Be that as it may, it is undoubtedly true that these powers are being more availed of. Quite apart from that, it seems that the courts now require of newspapers stronger attention than in the past to the avoidance of accidental or incidental prejudice. This is in spite of the fact that the trend in actual contempt decisions is becoming increasingly liberal. For newspapers, avoidance of contempt is a serious worry and much of what occurs is self-denying ordinance. When a person is before the courts on two charges, one to be heard soon after the other, there is a serious risk that coverage of the first, however innocuous, will be accused of prejudicing the latter.

There are two separate objections to powers of the court to restrict reportage. The first one is that a very high proportion of the orders made appear to ordinary citizens to offend the principle of equality before the law. That is, the same rules do not seem to apply to all. A solicitor, or a doctor, or a prominent businessman charged with an offence has a very good chance, before some magistrates, at least, of getting his name suppressed until after the case is disposed of. A labourer, or any other ordinary wage slave, has next to no such chance. The ordinary citizen seems to have no difficulty with the idea of a suppression power over the names of rape victims or others, but when the power is seen to be exercised capriciously, when there appears to be different rules for different people, the image of the law takes a mighty battering. This battering appears to be greater at the lower, rather than the higher court, if only because so much of what occurs in the workhorse lower courts depends on consent.

The second problem is that increasingly courts appear to be using materials access to which is restricted, whether in practice or as a matter of ruling. Yet these materials have been created as a part of an attempt to influence the court in its decisions and do in fact do so. What then happens is that it is impossible for the outsider, including the reporter attempting to explain to the world what occurred, to know why. In some cases it is a matter of the court's suppressing documents handed up to it—say psychiatrist's reports. In other cases, there is no formal prohibition at all. It is simply that the court, as a matter of convenience and to save time, uses, and allows counsel to use documents, around which everyone speaks in shorthand but no-one who does not have the document can know. When the court rises it can often be very difficult in practice to obtain a copy of the document—even where there is no formal reason why it ought not to be available. The file, for example, stays with the judge because the case is not concluded and cannot be inspected in the registry. The magistrate has not marked the document as an exhibit and does not place it on the file. Cases such as these are ones where justice may be done, but it is not seen to be done.

In espousing open justice, and a minimum of reporting restriction, I do not want to be taken as denying the need for some suppression or the real risk to the justice process that publication can bring. I will not discuss the damage to reputation from a report of a conviction—but even that is real enough—simply because in most cases that is a consequence of the deed in question rather than the fact of publication. There are two areas of risk about which the criminal justice system has to be very alert—and both are particular risks in the committal process.

The first area of risk is of prejudice—a particularly serious risk in indictable matters since material ruled relevant at committal may be ruled out at trial, the more likely perhaps if the indictment is in a form and on charges different to committal. Though it is not denied that this risk is a substantial one, it can be overstated for two reasons. Firstly, the time between committal and trial is usually substantial and most members of the public, and potential jurors, will have forgotten it, if ever they saw it, by the time of trial. Secondly, the other actors in the system often pay insufficient heed to the conscientiousness with which members of most juries obey judges' remarks about forgetting anything they may have seen or heard about a case and to concentrate on the evidence before the court.

These comments about overstatement apply more strongly to the routine, ordinary or minor case, rather than the celebrated one. However conscientious the juror, it is difficult to avoid retaining some background information about, say, a Murphy case or a Chamberlain case. Accept this, however, and where does one go? Suppose we keep committals but hold them in secret: would justice be better served? I doubt it; indeed such a system could work to the disadvantage of the defendant in cases where publicity brings forward volunteer witnesses.

The second area of risk is a much more tricky one. Much as I would, in another context such as a defamation case, deny it, the fact is that a substantial proportion of the public equate being charged and being brought before the courts with being guilty of an offence. Even those ultimately acquitted, and who get publicity surrounding their acquittal commensurate with the publicity surrounding their being charged must invariably suffer the comments of those who will assume that they have escaped only because of a technicality, or because the police evidence fell short of proof. In this regard my comments about there sometimes seeming to be one law for the rich and another for the poor are perhaps a little unfair. A lawyer who is charged will almost certainly lose nearly all of his or her business

immediately after; so may a doctor, a prominent businessman or accountant or whatever, when an ordinary wage slave may, for want of prominence, escape relatively unscathed except in his or her neighbourhood and amongst friends. The nature of the opprobrium may differ according to the type of offence, but there does appear to be cause for saying that the ordinary member of the public does not much believe in the presumption of innocence. Publicity, in short, can ruin a person, even though they have committed no offence. In many circumstances that very ruination may prevent a person being able to conduct a proper defence.

Personally, I have thought that there were grounds for arguing that no person should have his or her name published unless or until conviction occurred or unless that person consented. Were there to be such a rule, it would have to be applied uniformly, otherwise the moment it appeared that it was used selectively the courts would fall into discredit. Indeed, if one wanted to ask why the South Australian suppression laws are so routinely ignored out of the jurisdiction, one should look at its selectivity.

Above, it was mentioned that the *The Canberra Times* has a policy of not naming persons charged with sexual offences before conviction. It accompanies a policy of not naming victims or alleged victims of sexual assaults, whether or not the court has made orders. Relevant areas of the policy are as follows.

First, we do not identify, in any circumstances, victims of sexual assault. Although the position is reserved in a case where an alleged victim has completely concocted a story, perhaps with a view to blackmail or similar, reporters should assume this rule to be inviolate. If it is a consequence of this rule (as in an incest case) that we cannot identify the alleged assailant, even after conviction, that is what follows. Naming victims is completely out. Other identifying details, such as sometimes: occupation (public servant, teacher, waitress is fine, headmistress is not), street address, or some physical characteristic should be avoided if the tendency would be to identify the victim to someone who knew the victim but did not have previous knowledge of the case.

Secondly, we do not identify an accused person facing charges of sexual assault unless or until he or she is convicted. This rule is not inviolate—we would probably publish the Prime Minister's name if he is charged with indecent exposure—but such would require a decision by the editor. This is a general matter of *Canberra Times* policy, not a matter of law: the thinking is that there is some especial disgrace—including a public assumption of guilt—flowing from an accusation with sexual overtones which does not occur in, say, a theft case.

No other newspaper of which I am aware has a similar policy. But even those who might agree with us might wonder whether or not the discretion ought to be in the hands of an editor rather than the court. All that can be said about this is that one should not assume any want of accountability on the part of editors to members of the general public—one quite willing to make formal and informal complaints. The policy has been attacked from both sides—there are a substantial number of people who think names should be published, if not always for worthy reasons, and others believe the policy ought to be extended.

I would have no objection to extending the policy, or to its being extended by law. But it would create enormous problems. In by far the greatest proportion of cases, the actual identity of an accused person is not particularly relevant to the news value of the court case, though names, of course, are a very convenient form of shorthand. In any case where a number of names are suppressed, whether by the court or by editorial policy, our reporters tie themselves in great knots finding formulae for distinguishing between them.

The trouble lies with cases in which identity or some identifying characteristic is highly relevant to the story. I might not think that including the name of John Brown, plumber, is critical to the reporting of a theft case, but if a minister of the Crown, a departmental

secretary, the commander of the police drug squad or a senior official of a bank is the person charged, is it right, in the public interest, that the name be suppressed? Few newspapers would agree. Should one not have reported that Lionel Murphy had been charged?

The case for non-suppression is extremely strong in a situation where a prominent person is charged in respect of something going to the heart of his or her formal duties, but can be strong even in cases where the connection is not so marked. No one could deny some disadvantage, or risk from the presumption of guilt reaction, but that is not the only public interest at stake. The interests of justice would appear to let some technically innocent people rot in gaol for up to a year awaiting trial, with consequences even more definite and grievous than being named as an accused person, however, this does not turn a hair. Sometimes, the public has a legitimate interest in knowing that a particular person is before the courts, and, frankly, on past performance, the capacity of many judges cannot be trusted to be better arbiters than newspapers. Put bluntly, many are often too sensitive to the needs of people of their own class and too careless of the rights of those who are not. If any move is made to suppress the names of persons at the committal stage, the first quid quo pro ought to be the removal of other restrictions. The recent liberalisation of Family Court and, in some jurisdictions, Childrens Court, reporting restrictions ought perhaps to be a base model—everything can be reported except identifying details. But even there, any law ought to contain provision for the use of names in appropriate cases, and some ready method of testing decisions which are made.

A Practical Problem

One problem about the existing committal system is that it is often very difficult to decide what are committal proceedings. In the ACT, for instance, a substantial number of matters are ones capable of being dealt with summarily or by indictment, the decision being sometimes one of election by the prosecution, sometimes by the accused and sometimes by the magistrate. Often, the election is only made at the prima facie stage, which may be several days into the case. If there are reporting or publicity restrictions based on the idea that the matter is a committal proceeding, then at some stage, if the nature of the case changes, it is again an open matter. The problem is not an insurmountable one, but this can cause considerable difficulty. It will produce a bad effect if the consequence of the earlier prohibition is that some sections of the media simply fail to cover such cases. The public interest, after all, includes publicity to the courts.

Conclusion

If committal proceedings are to be abolished altogether, with the matter simply handed to Crown prosecutors, one can predict a number of results which have little to do with issues of publicity as such. Trials would be expected to take longer, and I do not expect that pre-trial proceedings, however conducted, and with or without publicity, will avoid this problem. The acquittal rate would be expected to increase substantially, not because the committal system is a particularly well-adapted filter, but because inadequate or not, it does perform some filtration, both in weeding out insupportable cases and in reducing overdrawn cases to

reasonable ones. If the ACT is used as an example, a few general comments can be made. Indictable matters are in the hands of the Director of Public Prosecutions from the beginning and good minds go into the initial consideration of charges at the committal stage as at the indictment stage. The reason why indictment charges are often more conservative than the initial ones is because evidence does not come up to expectations, not usually because of incompetence on the part of prosecutors. In short, it will be rather more frequent, in middle of the jury trial, for cases to collapse or be significantly reduced. Of course there will be savings in abolishing committals, but these will have to be balanced against considerably higher costs at the far more expensive and longer lasting jury trial. Some witnesses may have an easier time because counsel do not get two bites of the cherry—one of which, however conducted cannot prejudice the accused in the minds of the jury. But then, again, there is the risk to accused if what witnesses really say or know cannot be tested except before the jury. All of these observations, all of which have no doubt been made already by other Tories at this conference, have, however, little to do with issues of publicity. Indeed, the press might not mind at all. The far more stately pace of a jury trial makes it easier to report—indeed, when I was a court reporter I cannot remember ever being stretched to covering two at once. So, perhaps there will be more reportage. If that is so, I think it would be a good thing, but I cannot help wondering whether everyone would agree.

Judicial Review of Committal Proceedings for Federal Offences

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People charged with serious criminal offences in Australia have the case against them evaluated in a 'preliminary examination' or committal hearing. In Victoria this is governed by the *Magistrates (Summary Proceedings) Act 1971*; also *Magistrates Courts Act 1989* s.56 and Schedule 5 (not yet proclaimed). Preliminary examinations are intended to protect the citizen from being prosecuted on inadequate evidence, by filtering out weak or unmeritorious cases. This is seen as benefiting the state, by promoting efficiency in criminal prosecutions; it also benefits the accused, ensuring he or she is not prosecuted without some material evidence of guilt. The hearing is conducted by a magistrate, who is required to consider whether the evidence is of sufficient weight to support a conviction for an indictable offence, and if so to direct that the accused stand for trial, *Magistrates (Summary Proceedings) Act 1975* s.59(7).

In fact the majority of cases are committed for trial at the preliminary examination. The accused rarely puts in a defence and the decision is based on the evidence of the prosecution, together with any cross-examination of prosecution witnesses by the defence. The Victorian Advisory Committee on Committal Proceedings reported that in 1984 81.2 per cent of defendants were committed for trial; 3.7 per cent were discharged, 3.2 per cent of cases were withdrawn, and 11.9 per cent of cases were determined summarily (Report of Advisory Committee on Committal Proceedings 1986, p. 9). Brereton and Willis (1989, p. 8) found only 2 per cent were discharged. Only a very few, therefore, were in fact 'filtered out' by the formal committal procedure. The Committee was concerned to observe, further, that a significant number of cases committed for trial did not then proceed to trial; in 12.6 per cent of cases the Crown led no evidence, and in 8.1 per cent the accused was acquitted by direction. The Committee considered these figures gave cause for concern that committal hearings were not operating effectively as a safeguard against unnecessary prosecutions.

There have been a number of proposals to replace the preliminary examination with a simpler and less expensive form of trial disclosure. These proposals have been debated most seriously in New South Wales. Arguments for abolition usually emphasise reducing delays in getting matters to trial, reducing costs, and avoiding the repeated cross-examination of witnesses.

However, practitioners point to other functions served by the preliminary examination as justifying its retention:

- it is an important source of notice to the accused, both of the charges and of the evidence. The accused can obtain a picture of the prosecution's case, and cross-examine prosecution witnesses, to test their evidence;

- the prosecution case may be weakened by cross-examination, so that it is dismissed by the magistrate, or with the effect that the prosecution proceeds on a lesser charge. If the matter proceeds to trial, the accused is at least better placed tactically. He or she can also test the character of prosecution witnesses, including their prior convictions, to an extent which would be dangerous at the trial;

- the preliminary examination provides information for use at the trial. Evidence is recorded, and can be adduced at the trial; a witness who changes his or her evidence can have any discrepancy put at the trial. These depositions are also available for admission at the trial if, for instance, the witness has died, or if the evidence is not in dispute; and

- there are also advantages for the prosecution. The preliminary examination can clarify the issues in dispute, and it provides the prosecution with an opportunity to test its case. It may be that, faced with a manifestly strong case, an accused will decide to plead guilty.

The importance of the committal for discovery, and for testing by cross-examination, was also endorsed by the Victorian Advisory Committee.

According to the High Court in *Barton v. R* (1989) 147 CLR 75 at 99, the committal hearing should provide the following benefits to the accused:

- knowledge of what the Crown witnesses say on oath;

- the opportunity of cross-examining them;

- the opportunity of calling evidence in rebuttal; and

- the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is not strong or probably [sic] presumption of guilt.

However, the 'informational' function of the preliminary examination has been difficult to enforce in the courts. Despite legislative provisions requiring information to be given to the accused about the case against him or her at the preliminary enquiry (*see* for instance *Magistrates (Summary Proceedings) Act 1975* (Vic.) ss.45, 48 and 75.), and judicial endorsement of the role of the hearing as an information source for the accused, failure to fulfil this additional function has not proved fatal to the hearing. For instance, an accused has no right enforceable by mandatory order (other than any statutory right) to further and better particulars of the charge (*see* for instance *Ex parte Coffey, re Evans* (1971) 1 NSWLR 434; *Summers v. Cosgriff* (1979) VR 564. Einfeld J criticised this state of affairs in *Briot v. Riedel* 10.3.89 (1989) ACLD 289), and it has been stated in several cases that it is not part of the magistrate's duty to provide the accused with a rehearsal for the trial, or to ensure that the tactical objectives of each party are met (*R v. Epping and Harlow Justices, ex parte Massaro* [1973] QB 433).

The prosecution is recognised to have a discretion as to the witnesses and evidence it produces at the preliminary enquiry; it does not have to provide full disclosure. In Victoria, a magistrate was held not to be in error in finding that a police prosecutor had an overriding discretion as to the witnesses to be called, despite having commenced by 'hand-up brief',

after the defence gave notice that it would require the attendance of all of the large number of witnesses whose statements had been provided (*R v. Arthur, ex parte Kipadistrias* 8.11.82, unreported, Supreme Court of Victoria). The effect of this decision was, however, reversed by legislative amendment in 1986 (*Magistrates (Summary Proceedings) Act 1975* s.46 requires attendance of witnesses requested by defendant under a 'hand-up brief'; s.45B empowers the magistrate to disallow frivolous or vexatious requests).

It has been said that any defects in the informative functions of the committal can be cured by providing the accused with the information later, or at the trial. This is consistent with the view that the preliminary enquiry is 'tentative and non-conclusive' (*Summers v. Cosgriff* (1979) VR 564, 568). However it does not take account of the reality that the accused may have been held in custody pending the trial—a serious infringement of liberty, particularly if observance of proper procedure and access to information might have resulted in dismissal of the charge.

The Place of Committals in the Criminal Process

Committal proceedings for state and federal offences are heard in state Magistrate's Courts; the procedures followed are those prescribed in the relevant state legislation. The state courts are for this purpose invested with federal jurisdiction by s.68(1) and (2) *Judiciary Act 1903* (Cwlth) and s.85(1) and (5) *Crimes Act 1914* (Cwlth). The enquiry takes place after the police investigation and the decision of the police prosecutor to start proceedings. It is in effect the second level of review of the prosecution's evidence in an indictable case.

There are two decisive stages in a committal hearing. At the close of the prosecution case a Victorian magistrate is required to decide whether the evidence 'is of sufficient weight to support a conviction for an indictable offence'. If not, the magistrate is required to discharge the accused (s.56(1)(a)). Otherwise the accused is cautioned and invited to plead or make answer to the charge (s.56(1)(b)).

The same test is then applied on completion of the defence case (which may involve no more than the accused pleading not guilty and reserving his or her defence), the magistrate this time considering all of the evidence in the case. If the evidence is regarded as sufficient, the magistrate must then commit the accused to prison or admit him or her to bail.

This is the traditional committal procedure. Paper committals, or 'hand-up briefs', have also been available since 1972; the written statements of witnesses can be admitted in place of oral evidence, subject to the right of the accused person to require the attendance of any witnesses (ss.45 and 46). The majority of cases now follow this format.

It is important to note that the magistrate's finding at the committal is not conclusive; it does not fetter the prosecutorial discretion either to proceed with the case or to withdraw. A prosecution can proceed despite a decision by the magistrate not to commit the accused for trial. The prosecution can also commence proceedings for an offence which was not examined at the committal hearing, or for an offence other than that which the magistrate directed that the accused be tried; it can, on the other hand, decide not to proceed, despite a committal for trial.

Indeed, it is not strictly necessary for a preliminary examination to be held at all. A defendant can choose to stand trial without a committal hearing, and the Prosecution can also simply present the accused for trial. The latter course was strongly criticised by the High Court in *Barton v. R*, and it seems to be used rarely.

The High Court was not prepared to say that failure to hold a committal hearing necessarily meant the trial was unfair; but a stay could be granted for unfairness if the defendant had been deprived of adequate information. Failure to hold a committal might be justified if, for example, the defendant in fact had all the relevant information (*Barton v. R*

(1980) 147 CLR 75, 96, 101-2. *See also Barron* (1987) 10 NSWLR 215. Fox J in *R v. Kent, ex parte McIntosh* commented that the optional nature of the preliminary enquiry was extraordinary, in view of the elaborate statutory provisions for holding preliminary enquiries in every jurisdiction (1970) 17 FLR 65).

Committal Hearings and Judicial Review

Judicial review of the legality of the decisions made in committal proceedings is effectively the only avenue of review of such decisions; there is no provision for appeal.

Judicial review can be obtained under the state Supreme Court Rules, by prerogative writ or Order to Review, or under specific statutory provisions for review of magistrates' decisions (For example, *Magistrates Courts Act 1971* (Vic.) s.88; *Justices Act 1902* (WA) s.197). Federally, review is available under the *Administrative Decisions (Judicial Review) Act 1977* (*AD(JR) Act 1977*).

The availability of judicial review has traditionally depended upon the characterisation of the decision or decision maker: this has significantly limited the development of avenues for judicial review of committals. For example, judicial review by the prerogative writs of certiorari and prohibition is only available to bodies which 'act judicially' (Hotop 1985, p. 275). The fact that the result of the preliminary examination is technically inconclusive, together with the magistrate's limited discretion in the making of the final decision whether or not to commit for trial, have led to its characterisation as 'ministerial' or 'executive' and arguably outside the supervisory jurisdiction of the higher courts. From this perspective it is pointed out that there are several later stages at which any unfairness may be rectified: there is the possibility that the prosecution will decide not to proceed after committal; there is the trial itself; the judge may direct an acquittal; and, if the accused is convicted, there may be an appeal.

It cannot be denied, however, that the outcome of the committal hearing can be very significant. It involves the application of a broad statutory test to evidence, in a court-like adversary procedure, and it results in the determination of whether an accused is to be held in custody or admitted to bail, or discharged entirely. The decision to commit, with its attendant publicity, is likely to be personally damaging to the accused and the hearing itself may involve detrimental publicity.

Review in the state courts

Judicial review of committal proceedings for state offences continues to be restricted by the limitations on availability of the prerogative writs and equivalent orders, and conservative interpretations of the grounds of review.

The underlying theme in the courts has been reluctance to intervene in the criminal process, a perspective which has manifested itself in a number of ways:

- The judicial/ministerial distinction has been used to restrict review by way of certiorari and prohibition (*Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145; *R v. Murphy, ex parte Hamilton* 21.7.80, unreported, Supreme Court of Victoria; *Wentworth v. Rogers* (1984) 2 NSWLR 422), and by the order to review procedure under the *Magistrates Courts Act 1971* (Vic.), (*Phelan v. Allen* [1970] VR 219) although this approach to limiting intervention is generally becoming less popular (*see Sankey v. Whitlam* (1978) 142 CLR 1 at 83-4 per Mason J. For an example, *see Moularas v. Nankervis* (1985) VR 369. *See also* Sykes, Lanham and Tracey 1984, at 211).

- The traditional distinction between jurisdictional and non-jurisdictional error of law is generally strictly maintained, with a preference for finding that a matter is within the magistrate's jurisdiction to decide. Once the magistrate has properly assumed jurisdiction, the courts prefer to allow the enquiry to continue without interruption to a conclusion, before they will consider review, (*see* for example, *R v. Wells Street Stipendiary Magistrate, ex parte Seillon* (1978) 1 WLR 1002: it is a matter of convenience, and also easier to decide whether any real injustice has been done at the end. Compare *Bacon v. Rose* (1972) 2 NSWLR 793; *Nankervis* (1985)VR 369; *Campagnolo v. Attrill* (1982) VR 893).

- The content of the requirement to observe the rules of natural justice is interpreted narrowly in view of the 'inconclusive' character of the proceedings. There is no absolute requirement that the defendant have full information about the charges, (for instance *Ex parte Coffey, re Evans* (1971) 1 NSWLR 434; *Summers v. Cosgriff* (1979) VR 893) or that all relevant witnesses be available for cross-examination (*R v. Epping and Harlow Justices, ex parte Massaro* [1973] QB 433; *R v. Arthur, ex parte Kapidistrias*, 8.11.82, unreported, Supreme Court of Victoria).

- Relief is also discretionary. In fact, it was the view of Gibbs ACJ in *Sankey v. Whitlam* that the inconclusiveness of the preliminary enquiry is irrelevant to the power of the court to review, but very material to the exercise of the discretion to review. His Honour recommended that criminal proceedings 'be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to [intervene]' (1978) 142 CLR 1, 26. The Federal Court has followed this guideline, and has developed a presumption of denial of relief in the absence of extraordinary circumstances. Although the requirement of 'special reasons' for intervention is reiterated in the cases, it has not in fact often been used to exclude review in the state courts. A case which has passed through the filtering process described in the previous paragraphs will probably obtain the requested relief.

The prerogative writs were the first choice of the early applicants for review of committals. Certiorari and prohibition were held to be unavailable in *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145 and that case has continued to influence developments in the area. It was followed in Victoria in 1980 in *R v. Murphy, ex parte Hamilton* 21.7.80 (unreported) Supreme Court of Victoria. The early committal cases were affected by the 'characterisation' approach to review, but the movement away from rigid categorisation of decision-making has led to the recognition that many 'non-judicial bodies' affect rights and should be expected to 'act judicially', and will therefore be amenable to review.

The declaration is probably now the most widely sought remedy. It is, of course, discretionary.

In relation to federal offences, however, the scope for review is, at least at first glance, considerably wider.

Review of committals for federal offences

The Federal Court accepted that it had jurisdiction to review committal proceedings under the *Administrative Decisions (Judicial Review) Act 1977* in the 1983 case of *Lamb v. Moss* (1983) 49 ALR 533. It held that the decisions in dispute were 'decisions of an administrative character', made 'under an enactment' and therefore reviewable under the new legislation. The Federal Court held that the class of reviewable decisions is not limited

to decisions which 'finally determine rights or obligations' or which have 'an ultimate and operative effect' (1983) 49 ALR 533, 556.

It was held in *Lamb v. Moss* that the refusal of the magistrate to discharge the defendant, the finding of a prima facie case against the defendant, and the decision to proceed with the hearing having found a prima facie case, were reviewable 'decisions' (1983) 49 ALR 533, 557—per s.5 *AD(JR) Act*. The refusal to allow certain witnesses to be recalled for further cross-examination (the magistrate having found a different offence to that charged) was held to be, if not a decision, conduct for the purpose of making a decision (under s.6 *AD(JR) Act*).

The court observed that not every preliminary step will come within the jurisdiction of the Act, but it thought that sub-s.3(5) could authorise review of the taking of evidence in committal proceedings, or continuing with the enquiry (1983) 49 ALR 533, 558; compare the common law position as in *Sankey v. Whitlam* (1978) 142 CLR 1, 25.

Jurisdiction has therefore not been in issue since that decision, unlike the situation in the state courts, although recently there have been judicial suggestions that this jurisdiction should be reconsidered (*see* Northrop J in *O'Donovan v. Vereker* 76 ALR 197 at 105-6; Mason CJ in *Vereker v. O'Donovan* 18.3.88 (unreported). Einfeld J in *Briot v. Riedel* 10.3.89, dealing with a challenge to jurisdiction, was of the view that the jurisdiction of the Federal Court to review committals did not rest solely on *Lamb v. Moss* anyway).

The courts often express concern, when considering applications for review of committal proceedings, about the alleged inappropriateness of intervening in the criminal process, given the integrated nature of the criminal process and the checks and balances outlined earlier. Although jurisdiction to review has been accepted by the Federal Court, the court has generally adopted a policy of restraint. It is a matter of stated principle that a decision by a magistrate will only be reviewed in exceptional circumstances.

The grounds of review are set out in ss.5 and 6 of the *AD(JR)Act* and broadly cover the common law principles of judicial review. They include breach of the rules of natural justice, lack of jurisdiction and improper exercise of power. Important extensions of the common law are the inclusion as grounds of review of any error of law, whether or not jurisdictional and whether or not appearing on the record; *see* sub-s.5(1)(f). (Hotop 1985, p. 344), and the making of a decision without evidence or otherwise contrary to law (sub-ss.5(1)(h) and (j). The operation of sub-s.5(1)(h) is modified by sub-s.5(3), but could have very wide implications, and is not far removed from review on the merits. Applied in (inter alia) *Foord v. Whiddett* (1985) 60 ALR 269). The grounds of review appear to be wider than are available in the state courts. For instance, the High Court in *Sankey v. Whitlam* (1978) CLR 1 doubted the availability of review regarding the admissibility of evidence; *AD(JR) Act* s.3(2) and s.3(5) and *Lamb v. Moss* (1983) 49 ALR 533, 558 indicate this is reviewable in the federal sphere.

The Federal Court has power to make an order of review upon finding any of the grounds made out. It can quash the decision, refer it back to the decision-maker with or without directions, declare the rights of the parties, or direct any party to do or refrain from doing anything necessary (s.16). This power is discretionary. Even if an error is established the court may refuse relief, for instance where it would be futile (*see Lamb v. Moss* (1983 49 ALR 533 and *Doyle v. Chief of General Staff* (1982) 42 ALR 283; *see also* the comments of the Full Court of the Federal Court in *Seymour v. Attorney-General* (1984) 57 ALR 68, 71).The power of state courts to review committals for federal offences is excluded by s.9 of the *AD(JR)* Act.

Lamb v. Moss established that committal proceedings are reviewable under the *AD(JR) Act* but it is most widely cited for its discussion of the court's discretion to grant relief. The Full Court held, firstly, that it had a discretion to refuse relief even where the technical grounds have been made out, and secondly, that the power to make an order to review in respect of committal proceedings should be exercised only in exceptional circumstances. The court said it should be especially reluctant to intervene in respect of a

decision *in the course of* proceedings; 'additional considerations might intrude at the final stage; for example, in respect of committal for trial and commitment to prison pending trial' (1983) 49 ALR 533, 564. The Court drew attention to the comment of Gibbs ACJ in *Sankey v. Whitlam* to the effect that criminal proceedings should be allowed to proceed unless it is necessary in the interests of justice to intervene (1978) 142 CLR 1, 25-6. It concluded that the view of the High Court and the state courts, which it regarded as providing a sound guide in defining the powers of the Federal Court in this area, was that 'failure to permit criminal proceedings to follow their ordinary course will, in the absence of special circumstances, constitute an error of principle' (1983) 49 ALR 533, 547. The effect has been, not surprisingly, that even when the court has been prepared to review the decision, the magistrate's decision has rarely been altered.

Magistrates make innumerable decisions in the course of a committal hearing which a party might seek to review. In addition to the fundamental decision whether or not to commit to trial, there may be questions of admissibility of evidence, requests for adjournment or for further particulars, findings on claims for privilege and on matters of statutory interpretation, findings as to the existence of the necessary statutory consents to prosecution, and requests for termination of the proceedings on grounds of abuse of process, or of the magistrate's own alleged bias.

What are the Principles of Review?

Interlocutory matters

It will be harder to show exceptional circumstances requiring intervention in respect of interlocutory rulings (*Cheng Kui v. Quinn* (1984) 67 ALR 231; *Fermia v. Hand* (1984) 53 ALR 731; *Seymour v. AG (Cwlth)* (1984) 57 ALR 68). There are a number of reasons for this. Interlocutory matters are generally regarded as best left to be decided by the magistrate, unless a clearly defined question of law of public interest is involved. They are also frequently raised before the hearing has ended; permitting review in the course of a hearing inevitably leads to delays. Also it is not always possible to see, at an early stage in the proceedings, whether an applicant for review will actually be adversely affected by a preliminary decision. As a South Australian judge remarked, 'the proof of the pudding will be in the eating'. (Olsson J in *Potter and Potter v. Liddy* (1984) 14 A Crim R 204, 209, regarding a premature application for relief).

Admissibility of Evidence State courts have generally regarded the admissibility of evidence as a matter within the magistrate's jurisdiction, and therefore not reviewable (*see* for instance *Spautz v. Williams* (1983) 2 NSWSLR 506; *R v. Judge Mullaly* (1984) VR 745; *Clayton v. Ralphs* (1987) 26 A Crim R 43; but *see Sankey v. Whitlam* (1978) 142 CLR 1). This is not a restriction per se under the *AD(JR) Act:* review under the Act is not limited to jurisdictional error.

Exceptional circumstances warranting intervention to admit or exclude evidence may be found if the case raises an important question of public interest, or a straightforward question of statutory construction which does not involve the court in disputed or doubtful facts. (*see Shepherd v. Griffith* (1985) 60 ALR 176; declaration made. The existence of such characteristics do not however ensure success; *see McDermott v. Nicholl* 17.2.89).

A magistrate's refusal to excuse from cross-examination a witness claiming public interest immunity was reviewed and varied in *Young v. Quin* (1984) 56 ALR 168; on appeal (1985) 59 ALR 225. It was regarded as involving exceptional circumstances, 'a genuine and important question of legal principle not dependent upon the detail of the evidence in the particular case' (1984) 56 ALR 168, 172. The magistrate's rejection of the claim to immunity was held to be an error of law (1985) 59 ALR 225, 232.

Generally, however, relief will be refused as a matter of discretion (*Clyne v. Scott* (1983) 52 ALR 405; *Seymour* (1984) 12 A Crim R 157; *Besey v. Mackenzie* (1987) 31 A Crim R 347). The magistrate will usually be seen as best placed to decide such interlocutory questions.

Procedure Breach of a mandatory (fundamental) procedural requirement would be reviewable under the *AD(JR) Act* s.5(1)(b). (*see* for instance *Clyne v. Scott* (1983) 52 ALR 405; *Wong v. Evans* (1985) 59 ALR 392—reviewable, but not remedy because breach not extablished on the facts). Where the Federal Court has reviewed a magistrate's decision on a point of procedure not governed by statute, it has emphasised that the error went to the magistrate's jurisdiction (*Parsons v. Martin* (1984) 58 ALR 395; order to review granted as to decision that the magistrate had no power to issue letters of request, and that parties could not rely on evidence obtained by the letters of request). Otherwise, intervention has not generally been permitted in respect of procedural matters, which will be regarded as within the magistrate's discretion (*Fermia v. Hand* (1984) 53 ALR 731).

Error Going to Jurisdiction State courts have usually been prepared to review errors going to jurisdiction; they have, however, tended to apply a narrow traditional definition of jurisdiction in deciding whether to review. Jurisdictional errors attracting review have included allegations of a breach of an express statutory requirement of consent, a claim that the offence was not known to law, and, a more recent development, the claim that there was no evidence to support the magistrate's finding of a prima facie case (*Bacon v. Rose* (1972) 2 NSWLR 793; *Sankey v. Whitlam* (1978) 142 CLR 1; *Bourke v. Hamilton* (1977) 1 NSWLR 470).

It is not, of course, necessary to show that an application for review under the *AD(JR) Act* raises a question going to jurisdiction, and similar matters have been accepted as reviewable under that Act (*Clyne v. Scott* (1983) 52 ALR 405; *Wong v. Evans* (1985) 59 ALR 392). However, the fact of going to jurisdiction may mean they are more readily reviewed (*see* French J in *Kunakool v. Boys* (1988) 26 A Crim R 1, 11)

A magistrate's decision as to the limits of his own power will clearly come within this category (*see AD(JR) Act* s.5(1)(d) and (e) and *see Parsons v. Martin* (1984) 58 ALR 395).

The magistrate's interpretation of a statute, for instance the statute creating the offence, will also be a good candidate for review e.g. under s.5(1)(d), (e) or (f) (*see* for example, *Shepherd v. Griffith* (1985) 60 ALR 176; *Kunakool v. Boys* (1988) 77 ALR 435; *Vereker v. Rodda* 72 ALR 49, on appeal *O'Donovan v. Vereker* (1987) 76 ALR 97). French J in *Kunakool v. Boys* said that where 'the decision to commit is challenged on grounds which go essentially to the construction of a statute, raise an important question of law, and do not involve any intricate consideration of the evidence, then there will be . . . "additional considerations" which favour review.' (1987) 26 A Crim R 1 at 11.

Breach of Natural Justice An error leading to denial of natural justice will clearly be reviewable.

One of the few successful applications for review in the Federal Court arose after committal but turned on a claim that natural justice had been denied in the course of the hearing (*Tahmindjis v. Brown* (1985) 60 ALR 120). Whilst making an application under the *Freedom of Information Act 1982* (Cwlth) after the committal, the applicants' solicitors had discovered that the magistrate had, during the proceedings, spoken privately to the solicitor for the informants to express his concern about the direction of the prosecution case. The prosecution had subsequently changed its approach.

The court agreed that the magistrate had not acted impartially, and should therefore be disqualified for bias. Fox J was not prepared to exercise the discretion not to provide a remedy, saying that it was a case where it was clearly in the public interests to intervene to ensure that court proceedings were conducted according to law. This case was the last in a series arising out of the so-called 'Greek conspiracy' Social Security fraud case, of which *Lamb v. Moss* was another. The decision to quash the committal was in this instance likely to be conclusive; to proceed by ex officio indictment would have had the appearance of victimisation.

Relief has also been granted to require a magistrate properly to carry out his obligations under the legislation to take further submissions from the defendant, after finding a prima facie case (*Besey v. Mackenzie* (1987) 31 A Crim R 347).

The decision to commit

As has been noted earlier, the court may be more ready to intervene when the proceedings have been completed. Applications in this context may be made either from the decision to commit, or from the finding of a prima facie case after the close of the prosecution evidence.

In the state courts it has been noted that the decision whether to commit is treated as 'ministerial' (administrative). In some jurisdictions this has been taken to mean it is not amenable to review, at least by the prerogative writs. Review of the 'ultimate issue' also threatens to move beyond the question of 'legality' into the issue of 'merits'. However it has on occasions been permitted—for instance, where the statutory test was not applied, or where there was no evidence to support the decision.

Review under the *AD(JR) Act* is of course predicated on the existence of an 'administrative decision'; such characterisation is not a problem here. The final decision is often the subject of attack, either based on a challenge to a decision made in the course of the hearing or for more direct defect.

Cases being reviewed under the *AD(JR) Act* have tended to involve very serious charges, such as major fraud cases, and/or defendants with a great deal to lose by being committed. A defendant who is determined to challenge committal proceedings will often begin with the finding of a prima facie case. Success at one of these points, particularly on the grounds of no evidence, it is likely to be extremely influential in the decision of the Director of Public Prosecutions whether to proceed.

The cases claiming an error in a decision in the course of hearing have already been considered.

Challenges to the ultimate decision, per se, will usually be based either on the argument that there was no evidence to support the findings, or that the magistrate did not apply the correct statutory test for committal.

Applying the Wrong Test An argument that the magistrate applied the wrong statutory test in deciding that there was a prima facie case, or in reaching a decision to commit, would undoubtedly be a sufficiently fundamental error of law to warrant review—for example, under s.5(1)(d) (unauthorised decision); 5(1)(f) (error of law); 5(1)(e) with (2)(a), (b) (relevant/irrelevant considerations). (*Murphy v. Director of Public Prosecutions* (1985) 60 ALR 299 held that such error would be reviewable, but no error here. *See also Einem and McDonald v. Edwards, Grant and Collie* (1984) 12 A Crim R 463, *upheld on appeal: Edwards v. Von Einem and McDonald* 12.10.84 (unreported) Full Federal Court; *Hopcroft v. Price and Torrance* 26.9.85 (unreported) Federal Court).

No evidence Review on the grounds that there was no evidence to support the decision is expressly provided for in the *AD(JR) Act* (s.5(1)(h) and s.5(3)). A conclusion based on no evidence traditionally constituted an error of law within jurisdiction, and was therefore unreviewable, unless it appeared on the face of the record (when it was only reviewable by certiorari) *(R v. Nat Bell Liquors* (1922) 2 AC 128; approved by the High Court in *R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1952) 1 KB 338). But in recent years it has been recognised as a ground of jurisdictional error within the broad meaning of that concept; it has has also come to be seen as a breach of natural justice (*Pochi* (1980) 31 ALR 666; regarding committals, *see Bourke v. Hamilton* (1977) NSWLR 470; *Gorman v. Fitzpatrick* (1985) 4 NSWLR 286). It may therefore also be reviewable under the *AD(JR) Act* s.5(1)(f) or s.5(1)(a) as well.

Nevertheless, review will generally be refused, as a matter of discretion. Review under this head inevitably involves a close examination of the facts, and can look very like a rehearing. In conformity with its 'supervisory' role, the court will be reluctant to appear to be taking over the magistrate's role at this important point in the preliminary examination. As Wilcox J observed in *Souter v. Webb and Ward*, such an application should only be considered if it is clear 'without intricate consideration of the evidence, that there is a failure to establish a necessary ingredient in the charge' (1984) 54 ALR 683, 690.

The mere claim that the committal was without basis will not automatically be regarded as showing exceptional circumstances warranting review (*Murphy v. Director of Public Prosecutions* (1985) 60 ALR 299). However, a decision to commit was recently quashed in the Federal Court for lack of evidence (*Briot v. Reidel* 10.3.1989—(1989) ACLD 289). Delays by the prosecution in pursuing the matter, and the complexity of the issues for consideration by a jury, together with the professional context of the conduct constituted 'exceptional circumstances' justifying relief.

To summarise, most decisions in committal proceedings are reviewable under the *AD(JR) Act*, but as a matter of discretion relief is rarely granted. The Federal Court emphasises that it is in its view most important that criminal proceedings be free of unnecessary interventions. They should be resolved quickly, in the interests of the community and the accused person; the delay involved in judicial review will only be warranted in exceptional cases, for example where the interests just mentioned are outweighed by the need for a prompt and authoritative decision on a question of law (*Wong v. Evans* (1985) 59 ALR 392, 399). The fact that a defendant is disadvantaged by being committed for trial is not by itself an 'exceptional circumstance'. In practice the discretion to grant relief is most likely to be exercised when the alleged error clearly goes to the magistrate's jurisdiction to act.

Discussion

Even as it made the decision in *Lamb v. Moss*, the Federal Court was well aware that accepting jurisdiction to review committal proceedings could open a Pandora's Box—a proliferation of applications for review—fragmentation and delay in the criminal process—the depletion of legal aid funds—and the strategic, rather than genuine, use of the jurisdiction (1983) 49 ALR 533, 556. It took the view that on principle such fears should not prevent it from protecting the public interest and ensuring the due administration of the criminal process. The safeguard it offered was the discretion to refuse relief ((1983) 49 ALR 557).

Nonetheless the potential recognised by the court has to an extent been realised. Since *Lamb v. Moss* was decided, a 'significant number' of applications for review have been made; few have been successful (*see* ALR *Ninth Annual Report 1984-85*, p. 26. The Commonwealth DPP indicates that by 1988 at least ten such applications had been made).

Some defendants have sought review at every stage of the committal process; whether or not ultimately successful, the resort to the jurisdiction has undoubtedly produced delays.

Not long after the decision in *Lamb v. Moss* the Special Prosecutor, Mr Robert Redlich, criticised review of committals under the Act. He asserted that it provided people charged with criminal offences under Federal laws 'the opportunity of disrupting the ordinary criminal process' (*Annual Report* of the Special Prosecutor 1983-84, p. 164). He recommended that the Attorney-General consider whether such review should be available (Special Prosecutor, *Annual Report 1983-84*, p. 165). The former Chief Justice of the High Court has also been highly critical, calling the Federal Court's jurisdiction to review committals an 'absurd interference with the ordinary course of criminal justice' which he thought could not have been intended by the legislature (Gibbs 1985, p. 525).

The High Court, when it recently considered (and refused) an application for special leave to appeal in *Vereker v. O'Donovan*, commented that 'the undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us.' Further, the High Court threw doubt on the jurisdiction of the Federal Court to review committals under the *AD(JR) Act*: 'we are by no means convinced that the Federal Court has the jurisdiction which it claimed to exercise in the present case and we would emphasise . . . that if the court has the jurisdiction, it is a jurisdiction to be exercised very sparingly and in most exceptional cases only.' (18.3.88 (unreported); extracted at (1988) 6 Leg Rep SL 3. *See also* comments of Einfeld J in *Yates v. Wilson* (1989) 86 ALR 311, 320).

There are two issues here: whether committals for federal offences should be subject to judicial supervision at all, and if so, whether that supervision should be provided by the Federal Court under the *AD(JR) Act* or by the state courts.

Should committal proceedings be reviewable? It is accepted that there should not be de novo appeals from committal decisions; they are a preliminary and non-final process and should not be re-decided needlessly. However, there must be a mechanism for ensuring the legality of the decision-making.

Supervisory review is a manifestation of the Rule of Law: that executive action is not absolute, but is itself subject to legal constraints. As the Administrative Review Council (ARC) recently put it,

> The availability of judicial scrutiny of the legality of administrative action serves the twofold purpose of protecting individual rights and interests from unauthorised action and ensuring that public powers are exercised within their legal limits (ARC 1989, p. 5).

Judicial review is also interactive, with the judiciary developing standards of fairness and lawfulness for application by primary decision makers. (For instance, the courts currently enforce the requirement that the committal decision be based on evidence; they generally have not enforced the committal's informational function).

Committal proceedings should be subject to the supervision of the superior courts. They are a public part of the criminal justice system and magistrates should be seen to be operating within their statutory authority. It is not satisfactory to leave questions of legality, such as the existence of jurisdiction, or whether the legislation creating an offence is valid, or whether the magistrate was biased, to be decided at the trial if the defendant is committed for trial. These are questions which should be determined as soon as practicable, and can readily be resolved in the context of judicial review.

Committal proceedings have a significant impact on accused persons, and the protections and benefits provided to both defendant and prosecution should be clearly enforceable. Their legal non-finality does not remove the impact of the public accusation, and although the Director of Public Prosecutions can proceed with a trial despite dismissal at the committal stage this is not usual.

Mason CJ has recently been critical of review of committals, but 12 years ago he stated in *Sankey v. Whitlam* that the decision whether to commit is

> One which materially affects the defendant because it exposes him to trial upon indictment and to a deprivation of his liberty pending trial. . . It would be quite unacceptable to say that a committing magistrate is not under a duty to act judicially or that he is entirely free from supervision by a superior court, even when acting without jurisdiction or in excess of his jurisdiction ((1978) 142 CLR 1, 83-4).

This is not to deny the importance of speedy resolution of criminal matters, and the risks of delay and discontinuity. The *Sankey*, *Moss* and *Forsyth* series of cases illustrate how review procedures can draw out the criminal process. It is suggested, however, that it is of primary importance, as a matter of policy, to supervise the legality of committal proceedings and to protect the interest of accused persons. Having ensured the avenue of review, properly defined, the court could be given a broad discretion to refuse relief if it was unwarranted.

Despite the judicial, and extra-judicial, criticism of review, there has been no indication that Parliament intends to intervene. In any event, committals for state offences are currently reviewable to a greater or lesser extent; persons charged with federal offences should not be any **less** protected.

What should be reviewable? The ARC in its Discussion Paper said, 'The *AD(JR) Act* purports to strike a balance between the need, on the one hand, to protect public authorities from unwarranted litigation with, on the other hand, the desirability of providing individuals with a means by which they might vigorously and effectively obtain judicial review of the legality of public administrative action' (ARC 1985, p. 11). The central question is how such a balance is to be achieved.

There are a number of ways of delimiting the scope of judicial review (Craig 1983, Ch. 9). It can be based on the traditional concept of jurisdictional error. This presupposes that there are some matters which are within the tribunal's exclusive jurisdiction and cannot be reviewed, and some upon which its power is predicated, and which are therefore open to review. The difficulty which has been demonstrated in the case law is in drawing that crucial line. As Craig observes, deciding the question which matters go to jurisdiction involves steering a course between the Scylla of allowing the tribunal to decide its own parameters, and the Charybdis of drawing review so broadly as to approximate to an appeal (Craig 1983, p. 299).

The concept of jurisdictional error can be drawn very narrowly, so that once a tribunal has properly begun proceedings, anything it does is non-reviewable. It can be drawn widely, as was done for example in *Anisminic v. Foreign Compensation Commission* (1969) 2 AC 147, so that almost any error of law goes to jurisdiction: in effect the tribunal only has jurisdiction to decide correctly.

The jurisdictional/non-jurisdictional distinction might be eliminated entirely, and review then be limited to errors of law and breach of natural justice, or a range of defined errors, being those commonly regarded as going to jurisdiction or to breach of natural justice. The latter is essentially the road taken by the federal *AD(JR) Act*.

Another approach, employed in the United States and Canada, is to say that a tribunal's decision on a matter of law will not be interfered with if there are a range of possible views, and the tribunal's conclusion has a rational basis, in the light of the overall statutory objective. Findings of fact will not be reviewed if they are supported by substantial evidence (*see* Craig, 339-47; de Smith *Review of Administrative Action* (4th edn 1980) 114. *See also* the proposal of Dixon J, that a body acts within power when it makes a decision that 'relates to the subject matter of the legislation, and is reasonably capable of reference to the power given to the body': *R v. Hickman: ex parte Fox* (1945) 70 CLR

598, 615). This does not, however, offer a prospective applicant any clearer idea beforehand of the likelihood of success than does the jurisdictional fact doctrine.

The function of the preliminary examination should be kept in mind when discussing the balancing of interests in relation to review. Its object is to ensure that a defendant should not go to trial on inadequate evidence. It is also to inform the defendant of the prosecution case. A clear statement of the goals of the committal process should appear in the legislation, encompassing both the filtering and the discovery functions. These should as far as possible be embodied in legislative form as expressions of the procedural entitlements of the parties. (*See* for instance *Magistrates (Summary Proceedings) Act 1971* (Vic.)) s.45B and s.46). Errors leading to failure to fulfil these functions should then be amenable to review.

Without attempting an exhaustive statement, it is considered that review should at least be available in respect of -

- serious errors affecting the magistrate's authority to take the examination and to decide whether to commit, such as misconstruing a statute, taking account of irrelevant considerations and having improper purposes;
- the non-existence of a valid information;
- denial of natural justice;
- misapplication of the statutory tests; and
- breach by the magistrate of mandatory statutory provisions.

Review should also be available on the grounds that there was no evidence to support the decision. Although this might be close to review of the merits, and it is on the whole desirable to limit any examination by a reviewing court of the evidence in the case, it is submitted that a decision taken without evidence will be clearly unjust.

As a general rule applications for judicial review should not be considered until the proceedings have been completed, although there should be discretion to hear cases at an earlier point where it would be unjust to let the matter continue.

Where should review take place?

The Administrative Review Council (ARC) which monitors developments in administrative law in the federal context, has recommended on many occasions that committals be reviewable by the state courts, rather than by the Federal Court under the *AD(JR) Act*. The legislature has not to date taken up this recommendation.

In 1985 the ARC supported the Attorney-General's proposal to exclude committal decisions from review under the *AD(JR) Act* but recommended the revival of the jurisdiction of the state courts to review such decisions. (The ARC advice appears in summary form in its *Annual Report 1984-85*, pp. 25-7).

In 1989 the ARC again recommended removal of review of committals back into the state courts. It based its advice primarily on the view that the Commonwealth used the state courts for prosecution of Commonwealth offences, and there were no compelling reasons to separate review of committals from other aspects of the court process. It considered that 'the law of the state or territory concerned, including the law relating to rights of appeal and review in respect of the criminal trial, should apply.' (ARC Report no. 32, 76. Interestingly, it did not recommend removal from *AD(JR) Act* review of the decision to prosecute, held to be available in *Newby v. Moodie* (1989) 83 ALR 523; *see* Report no. 32, p. 79).

It is argued here that so long as the ambit of review at the state level is uncertain, and restricted by anachronistic technicalities, returning review of committals to the states must be regarded as unrealistic. This was the view of the Attorney-General, and of a number of

respondents to the ARC review; (ARC Report no. 26, p. 12 and Report no. 32, p. 77). If, however, procedures at state level were reformed, it would overall be appropriate that supervision be provided by the state Supreme Courts, which have greater expertise in criminal matters than the Federal Court and which oversee the other aspects of the prosecution. It might also avoid the situation of having a state Supreme Court find there is no case to go to the jury, after several Federal Court judges have held to the contrary during the review process, as occurred recently in Victoria.

Formulating the avenues for review

The next question is how the chosen type of review is to be expressed. Review at state level is largely still governed by common law-based remedies and common law grounds of review.

There are arguments for and against codification of grounds of review. Expressing grounds of review in statutory form provides greater certainty and may simplify complex areas where there are conflicting cases. (*See* the Report of the Kerr Committee, pp. 62, 75. The approach in the *AD(JR) Act* was recommended for South Australia by the South Australian Law Reform Committee, in its Report No 82, Relating to Administrative Appeals in 1984). On the other hand it can be excessively rigid. It has been argued that, particularly in the area of administrative law, codification would prevent development, such as the developments in the area of fairness (Griffiths 1978, p. 69). The New Zealand Public and Administrative Law Reform Committee recommended against codification of the grounds of review in its 12th Report (1978) 25. Common law developments have already overtaken the *AD(JR) Act*. (Hotop 1985, pp. 353-4). ARC Report no. 32 recognises this risk, but sees it as merely reinforcing the importance of ongoing review, such as that for which the ARC itself was created.

It is suggested, however, that the values of certainty and simplicity are of greater weight here, and that legislative expression of the grounds of review is desirable.

How is state review to be improved?

A detailed proposal for the reform of judicial review in state courts is beyond the scope of this paper. Broadly, the alternatives would be the enactment of a state *AD(JR) Act*, or amendment to existing Supreme Court Rules or Magistrates Courts legislation.[1]

A central feature would be a mechanism for control of proceedings. Applicants could be required to obtain leave. This method of regulation is used in England; a similar effect is achieved by the order nisi procedure which applies to federal review other than under the *AD(JR) Act* (ARC 1986, p. 17ff; Campbell 1984, p. 87). The object would be to prevent unmeritorious cases being heard in full, before the court can decide whether to exercise its discretion to grant review, as currently occurs. Applications for review under the Victorian *Administrative Law Act 1978* follow such a two-stage process. Applications are initially made ex parte, and the court has power to refuse the application, 'notwithstanding that a prima facie case for relief is disclosed . . . if satisfied that no matter of substantial importance is involved, or that in all the circumstances such refusal will impose no substantial injustice upon the applicant' (s.4(2)). On the other hand, there has been a movement away from the order nisi procedure in several jurisdictions, and a leave requirement received little support in the ARC's consultations. A two-stage leave process was seen as increasing expense, complexity and delay. It was also not clear that it would be effective (ARC 1986, pp. 19-21).

Alternatively the Supreme Court could be given a wide discretion to refuse relief. Such a discretion has been articulated by the Federal Court in relation to review of committal decisions, by the requirement of 'exceptional circumstances'. The Federal Court Rules already provide for refusal of an application which is an abuse of process, or frivolous or vexatious, and there have been moves towards extending that power. It is suggested that it

would be desirable if such a discretion were set out in the legislation. It should also be made clear that the discretion is capable of being exercised, in appropriate circumstances, at the outset of proceedings.

The ARC considered the option of expressly excluding from review certain matters such as interlocutory decisions. This could, however, lead to injustice in some circumstances, for example in the case of admission of evidence against the public interest, as in *Young* v. *Quin* (1984) 56 ALR 168, and *Sankey* v. *Whitlam* (1978) 142 CLR 1. However, the desirability of avoiding interference with ongoing criminal proceedings, where review is likely to be available at the conclusion of those proceedings, could be included as a matter to be taken into account when deciding whether to allow an application (ARC 1986, p. 29; ARC 1989, pp. 81-3).

To conclude, it has been argued, first, that the preliminary examination should be amenable to judicial review. This now seems to be generally accepted. Secondly, however, the technical requirements of the remedies and the legacy of earlier decisions on review mean that the availability of review in the state courts is uncertain. Although review is more successfully provided by the Federal Court under the *AD(JR) Act* in relation to federal offences, it is considered that it would be preferable to have all committals reviewed in the state courts. This is an additional reason for improving state review powers.

Finally, it has been argued that, in view of the seriousness of the interests which can be affected, the scope of judicial review should be wide enough to ensure fairness to the defendant, although stopping short of re-determining the merits. Most importantly, a broad discretion should be reposed in the court to refuse relief.

Endnotes

1. The Australian Capital Territory has recently enacted an *AD(JR) Act*. In Victoria, the *Administrative Law Act 1978*, which provides simplified procedures for applications for review, but does not codify grounds of review, currently excludes review of committal decisions by its definitions of 'tribunal' and 'decision'. The *Magistrates Court Act 1971* (Vic.) provides wide review powers, which have however been read down by the courts in relation to committals, notably in *Phelan v. Allen* (1970) VR 219; equivalent legislation in Western Australia expressly provides for review of committal proceedings: *Justices Act* 1902 (WA) s.197 and s.4.

References

Administrative Research Council 1985, *Annual Report 1984-5*.

Administrative Review Council 1985, *Discussion Paper: Some aspects of the operation of the Administrative Decisions (Judicial Review) Act 1977*, Australian Government Publishing Service, Canberra.

Administrative Review Council 1986, *Report No. 26, Review of the AD(JR) Act 1977—Stage One*, Australian Government Publishing Service, Canberra.

Administrative Review Council 1989, *Report No. 32, Review of the AD(JR) Act: the Ambit of the Act*, Australian Government Publishing Service, Canberra.

Advisory Committee on Committal Proceedings 1986, *Report on Committal Procedures*, February, Victorian Government Printer, Melbourne.

Brereton, D. & Willis, J, 1989, 'The Committal: Abandon, Retain or Reform?' presented at AIJA Seminar 18-20 August.

Campbell, E. 1984, 'State and Federal Judicial Review of Administrative Action' in *Advanced Civil Litigation Series¾Book One*, Faculty of Law, Monash University, Clayton, Victoria.

Commonwealth Administrative Review Committee, *Kerr Report* 1971, Government Printer, Canberra.

Commonwealth Special Prosecutor, *Annual Report 1983-84*.
Craig, P.P. 1983, *Administrative Law*, Sweet & Maxwell, London.
de Smith, S.A. 1980, *Judicial Review of Administrative Action*, 4th edn, Stevens & Sons, London.
Gibbs, H. 1985, 'The State of the Australian Judicature' (1985) 59 ALJ 522.
Griffiths, J. 1978, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action' (1978) 9 Fed L Rev 42.
Hotop, S. 1985, *Principles of Australian Administrative Law*, 6th edn, Law Book Company, Sydney.
New Zealand Public and Administrative Law Committee 1978, *Report No. 12*, Wellington, New Zealand.
South Australia Law Reform Committee 1984, *Report No. 82 Relating to Administrative Appeals*, Adelaide.

Legal Aid and Committals

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This paper will for the most part refer to Victoria but does not necessarily represent the settled policy of the Legal Aid Commission of Victoria. Nevertheless, it is the Commission's view that committals do have a future and that, properly utilised, they can aid the effective administration of the criminal justice system and thereby benefit all of the players in that system. Any jurisdiction that abolishes committals will not proceed for very long without introducing some form of pre-trial or preliminary hearing. Rather than throw out the baby with the bath water, it would be better to modify existing procedures so as to have them operate effectively.

The history of legal aid and committals in Victoria is a chequered one. In 1969 a *Legal Aid Act* was passed in Victoria which gave the responsibility for providing legal assistance in serious criminal matters, that is indictable offences, to the Public Solicitor's Office. This Office was funded by the state government and its staff were state public servants. The responsibility for the provision of legal assistance in matters other than indictable crime lay with the Legal Aid Committee. This Committee was funded to some extent by the state government and had a permanent secretary with a support staff none of whom were state public servants. The committee was made up of private practitioners representing the Law Institute and the Bar Council. These persons considered applications for assistance in all civil matters and summary crime including committals.

The reality of the situation after the advent of the *Legal Aid Act* of 1969 was by and large what had been the case prior to that—legal assistance was not available for committal proceedings. The result was that the majority of persons appearing in committal proceedings were unrepresented and the vast majority—in the order of 97 per cent—were committed to stand trial.

More or less contemporaneously with the developments of the 1969 legislation and its enactment, there was growing concern within the community that the real needs for legal assistance were not appreciated let alone met by the existing legal aid bodies. This concern did not for the most part reflect on either the 'bona fides' or commitment and dedication of those involved in the delivery of legal aid through the established bodies, that is the Public Solicitor's Office and the Legal Aid Committee. On the contrary it was directed to highlight the inadequacies of the funding of those bodies and the failure to come to grips with the real level of need for legal assistance in the community. With hindsight, it can be seen that the perception by the Secretary of the Legal Aid Committee that the expression of concern by community groups was in some way a criticism of the Committee was not as unfortunate as it seemed at the time. The perception that the Committee was 'under attack' made good press and hence there was media coverage of the need for more adequately funded schemes and more comprehensive schemes than presently existed.

Those agitating for more legal aid were not content with decrying the current situation. They were prepared to do something positive to meet the unmet needs and the first of the community legal centres, the Fitzroy Legal Service, was established. One area in particular in which it was perceived that there ought to be representation was committals. This was an area to which the Fitzroy Legal Service paid more than lip service, but with its extremely limited resources was unable to do very much to plug what was seen as a gaping hole in the criminal process.

One of the Fitzroy Legal Service's early full time co-ordinators was Julian Gardner who became the first Director of the Legal Aid Commission of Victoria. Given the background that has been set out, it is not surprising that when the Legal Aid Commission began operating in 1981, it did so with the avowed intention of providing assistance extensively in committal proceedings. The Commission's good intentions in this regard soon foundered on the rock of budgetary constraint. Owing to a dearth of dollars the Commission had to retreat to a position where assistance was available only in cases where the accused was charged with murder or rape. The rationale for the first was the seriousness of the charge and for the latter the fact that the issue was frequently not the act itself but the circumstances surrounding it such as intent and the issue of consent. Apart from those cases, assistance was available for committal proceedings only where exceptional circumstances existed. Over a period of time, it came to be accepted that the issue of identity constituted an exceptional circumstance that warranted assistance being granted.

Hence the situation was somewhat improved on pre-Commission days in that persons charged with murder or rape were assured of representation at committal proceedings provided they were otherwise eligible for assistance and generally, in cases where identity was an issue, persons were assisted at the preliminary hearings. However, it was still far from satisfactory. In fact it was most unsatisfactory in that accused persons were more often than not unrepresented at this stage of proceedings and in some cases one of a number of co-accused might be represented leaving the others to sit out the hearing feeling no doubt that their interests were prejudiced by their lack of representation. How much more terrifying would this procedure be for persons not fluent in English or labouring under some other disadvantage.

In 1984 the Commonwealth Legal Aid Council conducted a conference—the focus of which was the question 'Is the existing legal system wasting legal aid money?' Julian Gardner the then Director of the Legal Aid Commission of Victoria presented a paper at that conference in which he spoke of areas of the legal system which cause excessive demands on legal aid.

One such area that he identified was that of committal proceedings. There were no half measures in Julian's approach to this issue. He did not advocate additional funding. Nor did he recommend modifications to or a streamlining of procedures. He did suggest the abolition of committal proceedings and indicated not only that this would remove an area of the legal system causing excessive demand on legal aid but also that, in his view, their abolition would not interfere with the balance between, on the one hand, the interests of the community in having persons accused of crime tried or otherwise dealt with at the earliest possible time and, on the other hand, the need to protect those charged with crime from unacceptable risks of wrongful conviction.

In his paper Julian Gardner quoted Lord Lane who said that 'old style committal proceedings on consideration of evidence are absurdly wasteful of Magistrate's Courts time and are too often used simply as a dress rehearsal for a trial'. The former Director of Legal Aid then went on to say 'others have described committal proceedings as some sort of fishing expedition. If this description is apposite then it should be understood that it is not of the nature of fishing by the complete angler, resplendent in deer stalker, hat and waders casting with a fly for an intelligent trout. Rather it is a trawling or dredging operation designed to survey large expanses of the seabed in order to evaluate the future commercial exploitations of the fishing grounds'.

The paper went on to develop the case for the abolition of committals not only on budgetary grounds, but more importantly on the basis that the objectives that traditionally committals are designed to achieve are either not met or alternatively can be met by other procedures. The consequence being that apart altogether from financial considerations there was no justification for committal proceedings as part of the criminal justice system. This added a new dimension to the debate with respect to committals and legal aid. Previously it had been accepted that committals were not only an integral part of the criminal justice process but also a necessary and valid part. Committals were not assisted because funds were unavailable. Now it was being said that even if funds were available their expenditure on committal proceedings was unnecessary and failed to achieve their objectives or at least, that their objectives could be better achieved at much less cost.

The then Director of Legal Aid was not the only one questioning the validity and value of the committal process. The end result in Victoria of the calls from various sources for the abolition of committal proceedings was a request in 1985 from the then Attorney-General, Mr Jim Kennan (who incidentally has recently taken up that portfolio again) to the Director of Public Prosecutions Mr John Coldrey, QC to convene a committee to evaluate the role of committal proceedings in the administration of criminals.

That Committee on which the Legal Aid Commission of Victoria was represented reported to the Attorney-General and its report was published in February 1986. The Preface to the Report sums up the Committee's findings as follows:

> The Committee was of the unanimous view that the committal hearing constituted a vital cog in the machinery of the criminal law. Properly conducted, it had the capacity to filter out inadequate prosecutions, to refine the issues to be contested at any subsequent trial (thereby reducing its length) and to facilitate pleas of guilty by demonstrating the strength of the Crown case.
>
> Whilst the revelation of the Crown case can be accomplished administratively by the production of documents, there is a vast difference between subjecting an accused person to trial on the basis of typewritten statements of unknown reliability and presenting an accused person for trial upon the basis of evidence, the potency of which has been tested by cross-examination.
>
> Arguably the Crown would be creating a 'paper tiger' devoid of forensic teeth and it is not difficult to predict the lengthening of criminal trials as the scene of battle is transferred from the committal to the voir dire.
>
> Moreover, the Crown itself may well be disadvantaged if it is forced to conduct adversarial proceedings in the superior courts without having had the opportunity to realistically assess the viability of its own case.
>
> Whilst supporting the retention of the committal the Committee was not sanguine enough to believe that it was currently fulfilling its purpose with optimum efficiency. Modifications of the process are necessary to facilitate maximum effectiveness.

Those modifications recommended by the Committee were enacted and implemented. Hence committals proceedings in a revised form lived on in Victoria to fight another day. Following the publication of this Report and the implementation of its recommendations the guidelines for assistance in committal proceedings were reviewed and expanded by the Legal Aid Commission Victoria. The present guidelines are as follows:

- assistance will be provided in matters of homicide and in matters where consent or identification is an issue;

- assistance may be provided in any other matters where the Commission is satisfied on the material provided that a benefit will result from representation.

These guidelines clearly provide scope for representation at a greatly increased number of committals provided those representing the accused can demonstrate to the Commission that a benefit may flow from representation at that stage. To effectively demonstrate the benefit required the practitioner acting for the accused whether 'in-house' or in private practice needs to have a detailed knowledge of the case and the issues involved. Frequently assistance is granted for a committal on the basis that the benefit to be derived is the resolution of an issue at a rate less expensive than it would be in a trial court. At times, on the basis of the second leg of the guideline, assistance is provided for a committal even where there is to be a plea of guilty on the basis that material favourable to the accused can be more readily elicited at that stage of the proceedings.

The Criminal Delay Reduction Program

The next and current chapter in the history of Legal Aid and committals began with the establishment of the Criminal Delay Reduction Program. The Committee oversighting that program was to be composed of the chief executive officers of the various bodies involved in the criminal justice system. On that basis the Director of Legal Aid became a regular attendee at the committee meetings.

To assist it in its work and to obtain feedback from the coal face, the Committee accepted a suggestion that a working party of those involved in the court process should be established to consider practical day-to-day problems, and to present suggestions for the improvement of the system that would in particular reduce delays in the processing of cases. The Legal Aid Commission along with the listing Directorate, the Director of Public Prosecutions, the Bar and the police is represented on this working party.

Both the head Committee and the working party have developed various initiatives to reduce delay. The aspect, however, relevant to these proceedings has to do with changes to the committal proceedings.

These proposals emanated from the working party and received the full endorsement of the head committee. They have been in operation since early January this year and to date have been working extremely well. This is due in no small part to the efforts of staff of the Legal Aid Commission and in particular members of its Criminal Law Division.

These procedures oblige an informant to complete and serve the 'hand-up brief' on an accused within four weeks of the charge being laid if the accused is in custody and within 12 weeks of charging otherwise. Each committal is booked for a mention day: custody cases eight weeks after charging, other cases 16 weeks after charging. The parties including the police must appear on the mention day and if any extensions of time are sought, they have to be sought from the magistrate on the mention. Thus, extensions are tightly controlled.

The original idea was to have both the Director of Public Prosecutions and the Legal Aid Commission involved in the process so that on the mention day negotiations and having the matter dealt with summarily or with respect to a plea could be carried out and concluded. Owing to lack of resources the DPP has been unable to participate to the extent envisaged. Despite no additional resources, the Legal Aid Commission has nevertheless become heavily involved so that on mention days cases can be dealt with summarily or pleas to appropriate charges can be entered and the matter listed for hearing in the Country Court as a plea of guilty no more than three months beyond the date of the mention.

Under this scheme more cases are appropriately being diverted to the summary jurisdiction of the Magistrate's Courts, more pleas of guilty are being identified at an early

stage and more realism is being injected into the type and number of offences with which persons are being charged and in respect of which they are ultimately being presented to be dealt with in superior courts.

Conclusion

Committal proceedings will be of value only to the extent that they are utilised effectively. By and large a necessary pre-condition to their effective utilisation is legal representation. This means in reality that unless legal assistance is readily available persons appearing at committal proceedings will be unrepresented. Approximately 75 per cent of persons charged with indictable offences have in the past been legally assisted. Hence it is apparent that, if the efficacy of committal proceedings is dependent on accused persons being legally represented that legal aid has a large role to play.

The role of the Legal Aid Commission of Victoria in committal proceedings has varied. However, the benefits of early involvement are now recognised and at present a further expansion of the guidelines for assistance in committal proceedings is under consideration. There is no doubt that the Commission now sees real benefits flow from early involvement in cases involving serious criminal offences. Early investment of resources pay dividends in the early identification of pleas of guilty and significant reductions in the length of subsequent trials.

The effective involvement of the Legal Aid Commission in the current committal process is testified to in a letter dated 27 February 1990 from the Chief Magistrate to the Director of Legal Aid. The Chief Magistrate says:

> It has been very apparent to the magistrates sitting in this list that a large number of defendants have had advice from the Legal Aid Commission prior to attending court. Further, it is clear that the advice has been on the basis of a thorough consideration of the individual case, rather than some sort of across the board information given to those defendants who will not be legally aided at their committal but will be at their eventual trial.
>
> I know that this involvement with the committal mention system is difficult for you, given the unavailability of additional resources. In these circumstances I am very grateful to your office for its commitment to the implementation of the new system, and its assumption of the additional workload.

As was earlier indicated, it is the view of the Legal Aid Commission of Victoria that committals properly utilised do have a future in that they benefit all participants in the criminal jurisdiction.

Reference

Advisory Committee on Committal Proceedings 1986, *Report on Committal Proceedings,* (the *Coldrey Committee Report*), Victorian Government Printer, Melbourne.

Committals, Offence Classification and the Jurisdiction of the Magistrate's Court

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The debate about the future of the committal or preliminary hearing is part of a much wider debate. In the 1980s a range of issues came together and crystallised into a debate about court management, case management, the costs of justice, access to justice, and the effectiveness and efficiency of the criminal justice system. There can be no doubt that the debate was and is resource driven. The unwillingness and/or inability of government to provide more funds for more court resources led to court congestion and delays in justice. On the other hand, the unwillingness and/or inability of government to provide more resources to legal aid led to accusations that the legal process had become the preserve of the very poor and the very rich. Mr Justice McGarvie, who has a longstanding commitment to these issues stated recently:

> A system which is so slow and inefficient that persons acquitted of criminal charges have already spent long periods in prison awaiting trial, or which keeps people waiting for years before recovering money due to them, is not providing applied justice. This is so, even though the judge who eventually hears the case, finds the facts and applies the law so that the determination is fair and correct. A system which is so expensive that ordinary people cannot use it simply fails in its practical objective (McGarvie 1989).

Pressure on government led it to consider ways of responding. Throwing money at the problem would alleviate the pressure in the short term, but the problem would not go away in the long term. One of the first ways it found of responding was to tribunalise 'things like small civil claims, landlord and tenant disputes and so on. These tribunals had the twin advantages of being cheaper and quicker—and much more could be achieved if one banned the use of lawyers in them. But there were limits to this approach, and the legal profession started to resent it loudly and publicly. It also did not do much for the problem in the criminal area.

Close investigation revealed that there was no one answer to the problem. As the Victorian Bar Council/Judicial Administration Australian Institute of (AIJA) Shorter Trials Committee stated in debunking the notion that all this was the fault of legal aid:

> The Committee does not subscribe to the 'group villain' approach to the criminal trial problem. There is no one phenomenon predominantly responsible for the lengthening of trials. A large number of factors, some of them difficult to identify, are involved, and, as such, a wide range of solutions needs to be explored. The legal aid phenomenon is but one aspect of the problem. There is no doubt at all in the Committee's mind that there are relationships between legal aid and the changing face of the modern criminal trial but it is not easy to identify what they are, let alone pin them down in terms of cause and effect (1985).

Much, if not all of this, is now well known. A whole range of matters must be looked at—including charging practices, police practices, plea-bargaining, the use of conspiracy charges, the conduct of a jury trial and the attitudes and practices of lawyers. The multi-faceted nature of the problem has made dramatic change impossible, and incremental change the order of the day. That is to the good. For while there are costs in incremental change, the danger is that resource driven reform will fail to get the crucial balance between efficiency and justice right—and hence jeopardise the cooperation of the players and the punters. That cooperation will be necessary if change is to be effective. In the realm of the criminal trial, a major focus for change is the jurisdiction of the Magistrate's Courts (however named), for the very good reason that summary disposition is, or is supposed to be, expeditious, efficient, and relatively cheap. That is where we get to committals and this paper. This paper will focus on offence classification as a major criterion for court jurisdiction—and, of course, as the major criterion for the committal proceeding, or some equivalent should the committal be abolished. South Australia will be used as the example as it is as good an illustration as any.

The Nature of Offence Classification

Lawyers classify everything. The law is about classification. In some areas, such as constitutional law and the conflict of laws, a body of literature has built up about the nature and process of classification, but that has not been the case with respect to the classification of offences. Texts on criminal law and procedure devote precious little space to the classification of offences, and none to the development or discussion of any coherent theory concerning the issue.

It is well known that the common law divided offences into three categories: treason, felony and misdemeanour. (All treasons were felonies, but not all felonies were treasons). Treason was basically whatever the most recent victor said it was, ranging from revolution to looking sideways at the King's cousin once removed. The difference between felonies and misdemeanours is sometimes said to be that felonies were punishable by death and misdemeanours were not—but the true difference was originally that felonies were punishable by forfeiture of land and goods and misdemeanours were not. While the distinction between felonies and misdemeanours has been abolished in some jurisdictions, it remains current in others—such as South Australia. The distinction retains significance in those jurisdictions, albeit little procedural significance in the jurisdictional sense. In South Australia, s.295 of the *Criminal Law Consolidation Act 1935* abolishes 'attainder,

forfeiture and escheat', and s.329 abolishes any other common law legal disabilities consequent upon conviction for treason or felony. Fisse rightly remarks:

> Originally, this also was a procedural difference of significance, but nowadays it serves no useful purpose, indeed the contrary, for at the present day it contributes not only to the continuance in use of archaic and misleading terminology but also the preservation of anomalous technical rules which in the modern world have nothing but nuisance value (1990).

The criminal law abounds with classifications of other kinds. In South Australia, for example, the *Crimes (Confiscation of Profits) Act 1986* uses the concept of a 'prescribed offence', the *Summary Offences Act 1953* (among others) employs the category 'serious offence', and, of course, there is the distinction between offences for which an expiation fee may be paid and those in which it may not. The *Local and District Criminal Courts Act 1926* divides all criminal offences into 'group 1', 'group 2' and 'group 3' offences—more of this below. The offence of blackmail turns on the category of 'an infamous crime', which is defined as 'buggery, any assault with intent, or attempt, to commit buggery, and any solicitation, persuasion, promise or threat offered or made to any person to move or induce that person to permit or commit buggery'. But the key distinction for present purposes is that between indictable and summary offences.

At common law, all crimes were indictable. (Some argument may be made about contempt, but that is not to the point here). Just as the designation 'felony' described the *consequences* of conviction, so the designation 'indictable' described the *manner* in which the accused would be prosecuted and tried. So from about the end of the thirteenth century, the normal procedure in cases of crime was presentment by a grand jury, indictment, and trial by a petty jury (Holdsworth 1923). This replaced summary trial where the criminal was taken with mainour (the evidence of his guilt) and procedure by way of appeal. This procedure survived until 1819 (Holdsworth 1923 vol. 3, p. 608). Trial by jury replaced trial by battle. As a matter of interest, the information as a method of proceeding is almost as old, but was not widely used until the seventeenth century.

The development of summary jurisdiction is less than clear (Bateson 1926). A statute of 1391 gave justices a power to act summarily in certain cases of forcible entry, and a statute of 1411 a power to act summarily in certain cases of riot, and it seems that these powers were given so that justices could act speedily against the mischief. However, it is not until 1495 that Henry VII gave justices power to hear all offences short of felonies on information. Apparently the idea was to use this procedure to replenish the treasury by arbitrary and vexatious prosecutions—in any event, Henry VIII repealed it in the first year of his reign (1509). The seventeenth century saw the creation by statute of a wide range of petty offences, jurisdiction over which was given to justices acting summarily, and the trend was intensified by excise legislation and the *Game Act* of 1670. The process was not systematised until 1848. Hence the development of summary jurisdiction was achieved piecemeal and against strong opposition to the erosion of the right to trial by jury. How little has changed!

Again, the development of a category of indictable offences triable summarily is relatively recent. It seems to be conceded that this type of offence was made possible by the Administration of Criminal Justice Act 1855 (UK) and was conditional on the consent of the accused. The number, and type of offences and the procedures governing their prosecution and trial developed differently in each jurisdiction.

The Position in South Australia

Like many other jurisdictions, South Australia has three categories of offences: indictable, summary, and what are known as minor indictable offences. (The *Justices Act 1921* refers to these as 'simple offence', 'major offence', and 'minor indictable offence' respectively). It also retains the felony/misdemeanour distinction. A court of summary jurisdiction may not pass a sentence of imprisonment exceeding seven days unless the court is composed of a magistrate. Where the court is constituted by a magistrate, it is limited in the case of an indictable offence determined summarily to a 'Division 5 penalty' (another form of classification): that is, imprisonment for two years and/or a fine of $2,000 (s.19 *Criminal Law (Sentencing) Act 1988*). The problematic category is, of course, the minor indictable category.

The first question is: what offences are triable summarily? The answer is to be found in the *Justices Act 1921*. Section 4 provides that a minor indictable offence means:

(a) any offence designated as such by legislation;

(b) a group 3 offence *except*

(i) an offence against the person *except* common assault, assault occasioning, and malicious wounding;

(ii) concealment of childbirth;

(iii) offences against property resulting in loss or damage of more than $2,000; and

(iv) any other offence against property involving more than $2,000;

(c) a list of theft/fraud/receiving offences involving less than $2,000.

The first thing to be said about all of this is that the way in which this is done is extraordinarily obtuse. The reader has to go to the *Local and District Criminal Courts Act 1926* to find out that a 'group 3 offence' means any indictable offence the maximum punishment for which does not exceed five years, regardless of monetary penalty. The second thing to be said about this is that the list of offences seems highly arbitrary. Why on earth exclude concealment of childbirth (misdemeanour, 3 years)? Why include malicious wounding (misdemeanour, 5 years), but not administering poison with intent to injure (misdemeanour, 3 years), failing to provide food to a dependent (3 years), assaulting clergy (misdemeanour, 2 years) and so on? The list of larcenous offences is similarly bizarre; theft of cattle (felony, 8 years) is in; but ancillary blackmail offences (ss.163, 164, misdemeanours, 2 years and 3 years respectively) are not; house breaking is in (felony, 7 years) but possession of breaking instruments is not (misdemeanour, 7 years). The examples could be multiplied with ease. The lesson is what we all really know—the list of indictable offences triable summarily may have been rational at one stage, but is rational no longer. This is reinforced when government adds or replaces offences or increases penalties and does not give thought to the procedural consequences in this highly complex procedural

environment. (In South Australia, offences against the person created since 1986 which are 'group 3 offences' but which are not listed include unlawful threats (s.19(2) CLCA); endangerment (s.29(3)CLCA), and child pornography (s.58a CLCA).

The second question about the system is: how does it operate? The answer consists of two parts. First, the accused person has the right to elect to have the charge tried upon indictment at any time up to and including the close of the case for the prosecution—s.122(2) *Justices Act*. Thus, unless and until the accused indicates consent to summary disposition, the hearing must be run as if it is a committal. Second, the court itself has the power to determine that the matter should be tried on indictment in cases in which the court believes that such a course is warranted by reason of the seriousness of the offence, the intricacy of the facts, the difficulty of questions of law or for any other reason—s.122(3) *Justices Act*. Both of these provisions are open to objection. The first creates a situation in which there are obvious incentives for the accused to delay election until he or she can see which way the wind is blowing while, in the meantime, the more expensive committal procedures are forced to operate. The second, it is said, has led to a situation in which magistrates who find a simple issue of credibility 'too hard' push relatively trivial cases up.

The Meaning of Classification

The historical evidence is that the current system of offence classification derived from a belief that all true crimes should be designated as indictable offences, and that summary jurisdiction should be limited to the holding of committals and 'civil offences', not really crimes at all. There were two types of reason for this—the first, an intuition about what behaviour is 'really criminal' and what is not, the second, a consequentialist argument—once designated 'indictable', the offence attracted a regime of criminal procedure including such matters as trial by judge and jury, power of arrest without warrant, and so on. The first matter is one of perception and moves with time. For example, pollution and industrial safety offences might have been considered 'civil offences' in 1890, but not so in 1990. There is of course a degree of interplay between the two factors.

Where society was dealing with 'real crime' with real penalties, the commitment was to a mixture of legal expertise of high order—a judge—and community values informing an independent arbiter of fact—a jury. But the creation of a summary jurisdiction in an interdependent, highly regulated, industrial society was the creation of a cheaper, more efficient, more expeditious, less rigorous mechanism for trying criminal allegations, and the temptation to enlarge the jurisdiction has proved impossible to resist. As late as 1930, Dixon J could say:

> Proceedings upon indictment, presentment or ex officio information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the state may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the legislature as expedient for the efficient enforcement of

> certain statutory regulations with respect to the maintenance of the quiet and good order of society (*Munday v. Gill and Ors* (1930) 44 CLR 38 at 86).

Those days are long gone, not least due to the expansion of the category of indictable offences triable summarily. In its recommendations in relation to the right to trial by jury, the Constitutional Commission decided that the current distinction should be that between offences carrying a maximum of two years' imprisonment and offences which do not. That tells us much about what we as a society think 'real crimes' are made of. The increases in summary jurisdiction have not been the subject of controversy, no doubt because reform of the law in relation to offence classification is not headline material, nor, indeed, widely understood. Taking advantage of the advantages of summary jurisdiction—more rapid disposition, lower maxima, a less intimidating atmosphere for accused, and less expense to all parties and the state—is a pragmatic response to the problems of the costs of justice, court congestion, and delay in serious matters. But there are indications that this kind of solution has reached its limit.

Limits to Offence Reclassification

Latent ambiguity—dilemmas

There are at least two kinds of ambiguity about offence reclassification. The first is political. There is perceptible public pressure about crime. The focus of much of it is about *increasing* penalties. Increasing penalties has inevitable effects on offence classification and court jurisdiction. In a social environment in which no political party is capable of running on a program of lesser penalties, it is difficult to say the least, to justify at once increasing the level of penalties and degrading the seriousness of the offence by placing it in the summary jurisdiction. This inexorably leads to the second latent ambiguity. If larceny is a minor indictable, what justification can there be for a jury trial on a charge of stealing a pair of pantihose from a shop? If assault occasioning is a minor indictable, what is the justification for trying an assault in relation to a husband punching his wife with a resultant black eye before a jury in solemn procedure? Surely, it is said, these and other trivialities of the criminal calendar should be heard and determined summarily and are wasting scarce resources when tried by a jury. But triviality is in the eye of the beholder. The Retail Traders Associations do not think of shoplifting as trivial—and the defendant may be a person to whom conviction for shoplifting will mean an end to his or her livelihood. Also, a large range of people do not regard domestic violence as trivial—including the victim. The problem is that these are *real crimes*: not just civil offences.

Perceptions of the value of the right to trial by jury—signals

The last observation leads one to observe that, for whatever reason, and with whatever justification, it seems that the public value highly the right to trial by jury for real crimes (*see* for example, Neal 1986). However toothless, it is one of the few civil rights in the

Commonwealth Constitution. The point is being reached where taking away the right to trial by jury will attract resistance. Here is a cautionary tale.

In 1975 a body known as the James Committee (UK Home Office 1975) recommended to the UK Government, inter alia, that theft and offences of dishonesty which involved less than £20 pounds should be tried exclusively in the Magistrate's Courts. The Committee stated:

> In the last analysis, society has to choose between two conflicting aims. On the one hand is the existing right of the citizen to be tried by a judge and jury on any charge of theft or criminal damage, however small the amount involved. On the other hand is the right, especially important in defending a serious charge, to be heard as soon as possible. These two requirements have to be met with resources which are finite and cannot be expanded without limit. At present, defendants on serious charges are suffering the injustice of long-delayed trial, while the time of the Crown Court is partly occupied with minor cases of low monetary value (para 87).

The recommendation was accepted by the government and placed in the *Criminal Law Amendment Bill 1976*. The opposition was so vehement that the idea was dropped (Shetreet 1979). It was based on predictable lines—the right to trial by jury enjoyed by citizens for centuries was being taken away for mean expediency. The interesting thing is that, while the proposal for theft was dropped, a similar proposal in relation to criminal damage won through. This should tell us that the process of offence classification is about more than penalty or the amount of money involved—it also has to do with social stigma, the non-formal consequences of conviction, and the perceived seriousness of a given label.

The New South Wales Law Reform Commission

The New South Wales Law Reform Commission (1987) released a community discussion paper in 1987, which, inter alia, discussed and made recommendations about offences triable either way. The Commission criticised classification on the basis of value of goods or property involved at the election of the prosecution on the basis that it conduced to manipulation of estimated values; the criterion is nothing more than an arbitrary and inaccurate reflection of the gravity of the crime; it gave no guidance to those making prosecution decisions; the decision to prosecute summarily or on indictment is not public; and the accused gets no say in it. The Commission concluded:

> By vesting the discretion to decide whether to proceed summarily or by way of indictment in the prosecution, an accused person is denied the right to trial by jury if the prosecution's decision as to mode of trial is effectively treated as conclusive of the issue. Among offences which are triable either way, many of which may be of considerable importance to the general community are included. If it is accepted that one of the important contributions of the jury system to the administration of criminal justice is to ensure that community standards play a part in the determination of guilt, the question arises whether a jury should be prevented from hearing cases where community attitudes are of special concern. Summary prosecution denies the community, through its representation on a jury, an important opportunity to comment on the general validity of the criminal law or its application in a particular case (para 6.25).

The Commission went on to recommend a mode of trial hearing procedure in whatever court elected by the prosecution. Where an accused person pleads not guilty, the prosecution is required to disclose the substance of its case and there is then a mode of trial hearing in which the prosecution and the accused are heard as to the preferred mode of trial. Legislation should specify the matters relevant to the decision, and the criminal record of the accused cannot be disclosed. That is just the bare bones of the procedure outlined (para 6.56—6.72). It is an interesting option—but I wonder (a) whether it would not waste more time than it saved; (b) what the criteria for offence classification by this process would be; and (c) why the Commission did not consider the option of abolishing the entire category of offences.

Conclusions

It is quite clear that the classification of offences as either summary, indictable, or minor indictable has been unsystematic, arbitrary, and disorganised. It is equally clear that there has been pressure to expand the limits of summary jurisdiction as a response to court congestion higher up in the system. The success of this pressure, and the failure to understand that the effect was to some extent shifting congestion rather than dealing with it, has led to pressure on the committal or preliminary hearing to relieve congestion in courts of summary jurisdiction. Many of the issues discussed in this paper were touched upon by John Willis, when he wrote:

> Indictable offences which can be heard summarily typically include property offences such as theft or larceny, burglary and false pretences where the value of the property is below a certain amount—in Victoria $10,000. The advantages of summary jurisdiction for a person charged with one of these offences are considerable—the maximum penalties are much lower, the case will be heard more quickly, will be cheaper and in general will be far less traumatic. But there are disadvantages both actual and potential. In some cases, legal aid will not be granted unless the accused consents to summary jurisdiction . . . It is, moreover, not very difficult to imagine a scenario for the future where governments increase significantly the maximum penalties for indictable offences heard summarily and at the same time extend the range of 'indictable' offences which cannot be tried before a jury. The present situation is on one view an unsatisfactory half-way house . . . Arguments that maximum penalties should be lower for matters heard summarily because the quality of justice is inferior do little credit to those who espouse them. And arguments that the higher maximum reflects the greater gravity of those offences which must be tried on indictment are not really convincing.
>
> Moreover, it may be questioned whether the present approach to offences such as burglary is as the community would want . . . Certainly, it would seem that often a burglary case is just another summary matter like driving carelessly or assault, of no great import, being processed routinely through a court of summary jurisdiction. (Editorial (1986) 19 *ANZ Journal of Criminology*, vol. 1, pp. 2-3; Willis 1986).

I suggest that the limits of this downward pressure are being reached and that:

- it is possible and desirable to abolish indictable offences triable summarily. (An example is the recommendations of the Law Reform Commission of Canada, 'Classification of Offences' Working Paper 54, 1986). The straightforward way

of doing this and achieving economies would be to legislate substantively (rather than procedurally) to the effect that, to take a simple example, common assault is a summary offence and adjusting the penalty downwards accordingly. That is hardly revolutionary given that there exists the indictable offence of assault occasioning.

- the appropriate classification of an offence, or part of an offence, or a form of an offence, is a far more subtle thing than merely the amount of money involved, or the maximum penalty attributable to the offence. While, strictly speaking, each case is susceptible to individual analysis, concerning matters such as the complexity and difficulty of the facts and/or the application of the law in each individual case, that is a luxury our system of justice can no longer afford—or so it appears. That is why the offence triable either way should be abolished. When the defence have the election, the prosecution and the courts complain that too many trivial cases are taken up. When the prosecution has the election, the complaint is that the decision is made just as arbitrarily, or for reasons that have little to do with the efficient and just administration of the criminal justice system (MacDougall 1979). Incidentally, the rate of accuseds' preference for jury trial seems to indicate a consumer dissatisfaction with summary justice—reasons such as the perception that judges are more expert than magistrates, that magistrates more readily believe the police and that summary courts have a looser working definition of 'beyond reasonable doubt' have been cited (Willis 1986, p. 31). If that is the case, some hard work needs to be done there.

- the New South Wales Law Reform Commission recommendations bear some thoughtful consideration. They could be integrated into a scheme of pre-trial conferences. They have the overall virtue of placing the control of the court process, its efficiency and cost-effectiveness where it truly belongs—the court, and this coincides neatly with moves to give the court greater control over the committal process for similar reasons.

- some thought really should be given to the reclassification of summary offences originally properly summary but the nature of which has changed over the years. The most obvious examples of this are road traffic offences. DUI now attracts a great deal of social obloquy, and is commonly attended with minimum fines and minimum disqualification periods which may have a drastic effect upon a person's life and employment. In South Australia, illegal use of a motor vehicle attracts a minimum sentence of imprisonment for a second and subsequent offences (s.44(1) *Road Traffic Act*). There is an excellent case for upgrading these—the relevant real criminal offences of the 1990s.

Endnotes

1. 'The true criterion of felony is forfeiture'—4 Blackstones Commentaries 97. Interestingly, the enactment of draconian asset forteiture legislation in Australia may revive this distinction in another form. *See* Fisse, 'The Rise of Money-Laundering Offences and the Fall of Principle' (1989) *Criminal Law Journal*, p. 5.
2. It should be noted that s.5(2) of the *Criminal Law Consolidation Act 1935* provides that the designation of felony extends to any indictable offence punishable by a maximum of three years' imprisonment or more.
3. For example, the distinction between felony and misdemeanour is significant for the purposes of the felony murder rule and the common law crime of misprision. *See also*, for example, *Criminal Law Consolidation Act* (SA), ss.15, 24, 47(2), 167, 168, 1 69, 170, 171, 172, 196, 267, 268, 272, 291, all of which turn on the distinction between felony and misdemeanour.

4. Section 161(c), *Criminal Law Consolidation Act*. The category of 'infamous crimes' is also present in the Fifth Amendment to the Constitution of the United States. *See*, for example *US v. Moreland* (1922) 258 US 433.
5. Section 166(2), *Criminal Law Consolidation Act*. It is interesting that this behaviour remains 'an infamous crime' after it has ceased to be a crime at all.
6. This is based on an English procedure—*see* id. para 6.38. Interestingly, the Justices Clerks Society of England and Wales is of the view that the right of election should be in the hands of the accused—on efficiency and cost grounds.

References

Bateson V.B. 1926, *Paley on Summary Convictions*, Ninth Edn, Sweet & Maxwell, London.

Editorial 1986, *ANZ Journal of Criminology*, vol. 19, no. 1, pp. 2-3.

Fisse, B. 1990, *Howard's Criminal Law*, Fifth Edn, Law Book Company, Sydney, at 9.

Holdsworth, W. 1923, *A History of English Law*, Third Edn, Vols 3 and 4, Sweet & Maxwell, London.

MacDougall, D.V. 1986, 'The Crown Election' 5 CR (3d) 315, cited in Law Reform Commission of Canada, Classification of Offences, Working Paper 54.

McGarvie, Justice 1989, 'Judicial Responsibility For the Operation of the Court System' 63 ALJ79 at 79.

Neal, D. 1986, 'The Political Significance of the Jury' in *The Jury*, Seminar Proceedings No. 11, Australian Institute of Criminology, Canberra.

NSW Law Reform Commission 1987, Criminal Procedure, 'Procedure From Charge To Trial: Specific Problems and Proposals', Volume 1, DP 14/1.

Shetreet, S. 1979, 'The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts', 13 UBCLR 52.

UK Home Office 1975, *The Distribution of Criminal Business Between the Crown Court and the Magistrate's Court: Report of the Interdepartmental Committee*, Cmnd 6323, Her Majesty's Stationery Office, London.

Victorian Bar/AIJA Shorter Trials Committee 1985, *Report on Criminal Trials*, Melbourne, at para 1.40.

Willis, J. 1986, 'Paying Lipservice to Juries' in *The Jury*, ed. D. Challinger, Australian Institute of Criminology, Canberra.