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.