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.