Moves in the Australian Capital Territory

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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.
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> (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;
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> (b) where the maximum punishment for a first offence does not exceed six months or is a fine—within one year;
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> (c) where the punishment provided in respect of the offences is a fine only—within one year; or
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> (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.
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> The deprivation of these advantages is, . . . a serious departure from the ordinary course of criminal justice.