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.

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