

# Committals, Offence Classification and the Jurisdiction of the Magistrate's Court

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**T**he 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 forfeiture 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, 169, 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.

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