The Case for the Retention of Committals in their Present Form is Overwhelming

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As the debate sparked by the Attorney-General's determination to strike down our long-established system of committal hearings has progressed, the value of retaining those hearings in their present form has become clearer by degrees. It is as if one had a gemstone of known quality at the outset, but uncut and unpolished. As the debate has proceeded, we have been able more and more to see the full lustre and beauty of the stone revealed. In the eyes of those of us who know the system, the process of analysis and re-evaluation which the debate has necessitated has had much the same effect as the gem cutter when he cuts and polishes the original stone to elicit its full potential.

When the discussion paper on reforms to the criminal justice system was published in May 1989, the 'reforms' then announced were much more horrendous than the still-unacceptable ones we are debating today. Rightly or wrongly, the debate at that initial stage was seen as one going to the abolition of the system. By degrees, the Attorney-General has had to yield to the outcry those original proposals generated. By January of this year, the Attorney-General was adopting a seemingly more mellow but, still unacceptable approach.

Problems with the Abolition Approach

'Consideration is now being given to not abolishing committal proceedings as such, but replacing these proceedings with a pre-trial hearing', he said in a media release issued that month. In the main, the concessions which he then made, in response to the public consternation created by his proposals, related to the broadening of the scope for cross-examination.

The nub of the problem, however, still remained. That nub is that, under our enlightened system of criminal justice, no person shall be required to stand his trial for a serious criminal offence unless a prima facie case has been established by the prosecution before an independent judicial officer.

It is the insistence of the Attorney-General that the decision-making role as to whether the accused should or should not be committed for trial is to be transferred from the magistrate to the Director of Public Prosecutions that is the cause of much of the anguish this controversy has precipitated.

A significant slur has been cast upon the magistracy by removing from it the decision-making function as to whether the accused should or should not be committed for trial. It is made all the worse by the deliberate argument consistently advanced by the Attorney-General that there is no significant difference from the accused's point of view between a decision made by an independent magistrate and one made, as is proposed by the Attorney-General, by the Director of Public Prosecutions.

It is a monstrous defamation of the magistracy for the Attorney-General consistently to argue that there is no such difference.

However technically correct it may be for the Attorney-General to say that the Director of Public Prosecutions no less than a magistrate is an independent judicial officer, it does scant justice either to the magistracy or to the position of the accused. To imply that an accused is entitled to expect nothing more from a magistrate than he is from an office which is indisputably part of the prosecution very much degrades the record of true independence and impartiality demonstrated by the bench in Local Courts over the years.

This is the aspect of the matter from which solicitors who regularly practice within the criminal justice system will never willingly budge. Of course it is true that in completely exceptional circumstances, it may be appropriate for any of a variety of usually very new reasons that someone who was not sent for trial by a magistrate should be so sent upon the initiative of the Director of Public Prosecutions. Again it is of course true that, perhaps in as many as 17 per cent of cases, persons who were sent to trial by magistrates should not finally be proceeded against upon the initiative of the Director of Public Prosecutions, usually, as before, for reasons newly emerged after the completion of the committal hearings.

The blunt and inescapable fact remains that, for the great generality of criminal cases, it is the full, fair and complete preliminary hearing of the facts before a magistrate at the committal stage which determines whether or not a citizen is required to stand trial. That is the matter which the proposals of the Attorney-General now seek to strike down, by transferring the decision-making function to a functionary of the Crown—the Director of Public Prosecutions.

An independent judicial officer—one of our tried and tested and universally honoured magistrates—is a more fitting person to have entrusted to him the decision-making role as to committal or discharge than any functionary of the prosecution.

We all value the fact that once a magistrate has a committal hearing entrusted to him, he and he alone takes responsibility for it, from commencement to conclusion, from go to whoa! What an ironic contrast these new proposals afford. They openly contemplate that there may be more than one—a multiplicity, in fact—of magistrates who may preside over, in their projected merely supervisory role, any particular committal hearing. What an incredible hotchpotch it is that is proposed.

Court Delays

What is involved here is an issue of the freedom of the individual. It is an issue of the state against the individual. Overwhelmingly it is an issue of fair play. The saddest irony of all is that these changes—quite inappropriately described by the Attorney-General as 'reforms'—are brought forward under the guise of court delay reduction measures. The harsh reality is that they will increase delays rather than reduce them. Such is the all-too-frequent price the beleaguered public is asked to pay through heavy-handed governmental

interference with processes of law which appropriately have evolved over the decades out of the human needs of the times.

The truth of the matter is that the court delays are far greater in the District Court than they are in the Local Court. For whatever reason, the Attorney-General appears to hedge whenever he is confronted with this simple fact, yet practitioners who work in the respective jurisdictions know that there is no room for dispute regarding the matter at all.

It is in the period after committal and before trial that the great bulk of the delay is located. It is not located in or around the committals stage itself. The Attorney-General himself attributes only one-third of the delay between charge and trial as being attributable to the committal process, two-thirds of it lying elsewhere—obviously in the period between committal and trial. Figures obtained from the 1989 Annual Report of the Attorney-General's Department make it clear that, in 1988, less than one-quarter of the delay in bail matters in the Sydney District Court and in all matters in the Western Sydney courts were attributable to the committal stage, three-quarters of the delay being based elsewhere. Accordingly, the real need is to tackle the delay where it is most evident rather than lashing out counter-productively at committal hearings.

These proposals by the Attorney-General, if implemented, mean the end of committal hearings as we know them. The matter cannot be put more succinctly than how the Law Society itself put it in a letter to the Attorney-General in December 1989:

> Without a right for a defendant to cross-examine witnesses without restriction, impeach prosecution witnesses as to credit and without the power by a magistrate to commit or discharge, the pre-trial hearings will have a fundamentally different character to the familiar committal hearings.

The dominant feature of any such implementation will be that court delays will be longer, not shorter, than they are today. The proposed new pre-trial hearing system will mean that many persons who have previously been prepared to change their plea after being committed by a magistrate, will now no longer be prepared to do so. Instead they will exercise their full rights in the District Court. Thus, there will be more jury trials in the District Court. Added to that, those jury trials will take longer to conclude, in part because all of the irrelevancies which are pruned out as a result of committal hearings will be left to be adjudicated in the already over-congested District Court.

Most experienced solicitors practising within the criminal justice system know that so far as most issues are concerned, the best course to take is to run them—that is, to test them out at the committal stage. Such solicitors normally then take the view that if, on those issues, the defence has simply not been credible, it should be strongly recommended to clients that they enter a plea at the District Court level. Implement the new pre-trial hearing system advocated by the Attorney-General, and those solicitors will certainly, quite properly, pursue a very different course. They will then feel obliged to run all of these issues in extenso at the already over-cluttered District Court level.

The existence of a 'I want my day in court' syndrome is undeniable. Part of this is that the accused craves an opportunity to confront his accuser followed by the chance to think carefully about the strength or otherwise of the prosecution case presented against him. If, at that stage, the prosecution case is demonstrably a formidable one, inevitably his lawyers' advice will be predictable. On sober reflection, the accused will tend to plead guilty. However, take away from that accused the opportunity of committal proceedings and it is inevitable he will demand his 'day in court' at the much more costly and over-burdened

District Court level. This will involve a full jury trial with all its expense and delay, instead of the accused pleading guilty before a judge sitting alone.

The reasons why the changes proposed by the Attorney-General will exacerbate rather than cure delays are manifold. For instance, it must be conceded that it is at the stage of committal proceedings that the real issues in the case become clearly defined for the first time. Perhaps more importantly, the matters about which there is no dispute become obvious to both sides. These are just some of the ways in which committals open the door to short cuts at the trial stage. Without committal proceedings as we know them, such short cuts would tend to be impossible. At the trial, in the District Court, the Crown would be obligated to prove strictly every single ingredient of its case. This is because there is no requirement—nor could there ever reasonably be imposed any requirement in criminal litigation—for the defence to disclose its case. Indeed, this is one of the matters which the Attorney-General has felt himself impelled to concede—that there will be no requirement of pre-trial disclosure by the accused.

The cognoscenti who are really familiar with criminal trials know full well that typewritten police statements are no substitute for the depositions obtained from committal proceedings. It is these depositions which provide the foundation from which judge and both counsel later work. Equally, they provide the foundation on which the Director of Public Prosecutions, in deciding whether or not to use the options open to him, such as to issue an ex-officio indictment—a very infrequently exercised option indeed—or go by way of no bill. A study of these depositions will result in warning lights glowing for expert eyes to see—alarm signals pointing to where a trial may have to be aborted; guides that all the relevant parties need to be able to see if that expensive and time-wasting abuse of court facilities is to be avoided at the costly trial stage.

Again—the real delay in the criminal process is not in the Local Courts. It is at the point of trial. Cases currently being tried have normally been committed for trial and awaiting a hearing for 18 months. It was once asserted that this time lag would be reduced following the creation of the office of the Director of Public Prosecutions. This has not eventuated. Neither will the claimed reductions in court delay promised as a result of the Attorney-General's current proposals. (Informed observers will also recall that a criminal registry and a listing directorate were likewise established with a view to reducing delays. Once again, however, the promised reductions did not eventuate.)

In the search for these elusive and, it is conceded, most important reductions in court delays, there is also a risk that the goal of an at-all-times fair system of criminal justice may be overlooked in the quest for delay reduction.

The Attorney-General himself has shown a confusion of mind as between priorities in this area. When he wrote to the Law Society on the 23 November 1989, he managed to get it right. He then wrote:

> The speedier progression to trial is certainly one of the aims of these proposals; however, reduction of delay in the system is certainly not their principal aim.

He went on to state a goal with which none of us could cavil, providing a better system is available. He expressed his ultimate aim, above and beyond the reduction of delay, in the following words:

> I am aiming to achieve a better and fairer system of criminal justice . . .

However, by the time of his recent letter to state parliamentarians on the subject the Attorney-General appeared to have done another somersault. Speaking of the same pre-trial hearing system he is now advocating, he wrote:

> Perhaps the greatest benefit will be through a reduction in delay between charge and trial . . .

We need to keep our basic priorities right. An at-all-times fair system of criminal justice is more important than any marginal whittling down of court delays.

It is not good enough just to make things tidier, easier and cheaper for the prosecution—which means in the long run, of course, for the government of the day.

Neither charge bargaining nor plea bargaining can in any meaningful way go forward without there having previously been committal proceedings. The simple fact is that without such prior committal proceedings, there is no basis from which negotiation can commence and proceed.

Quality and Independence

The issue at the heart of the matter is quality! Without any doubt, NSW's criminal justice system will continue to work if the changes foreshadowed by the Attorney-General are put in place. What will be lost, however, is some degree—an important degree—of that elusive entity which we know as quality. The view of the Law Society of NSW is that the quality of our criminal justice system will be significantly reduced under the proposals. Measured in practical terms, the outcome will be that many people who might, under our existing system, enjoy a discharge will end up deprived of that relief.

For this reason the proposal that the decision to commit for trial be made by, in effect, the prosecution, is worrying. It is true enough that the Director of Public Prosecutions is an independent judicial officer. It is recognised that there are constraints which properly rest upon the prosecution. Under our system, it is never proper that it should see itself as being committed to securing a conviction regardless. Nonetheless, those of us with extensive practical experience within the relevant jurisdiction know full well the force of the proposition that we have to work within an adversarial system. The esteem our system of criminal justice enjoys flows from the fact that the bench and the jury remain gloriously detached from the partisanship of that contest. That can never be said for the participants themselves, however. For them it is an out-and-out confrontation. This applies nearly as much to the prosecution as it does to the defence. The Director of Public Prosecutions is a fragment—the most important fragment—of the prosecution half of that adversarial contest.

That there is a proper measure of restraint which he is called upon to exercise we do not dispute, but, when the chips are down, he is part of the prosecution, independent judicial officer or not. This can never be said of our bench of magistrates, who have always exhibited proper impartiality and true independence.

However much the extent to which it enjoys statutory independence, the prosecution will always tend to remain sensitive to public concerns, attitudes and preoccupations. We can all conceive of situations in which they may be a public expectation regarding any particular prosecution, or type of prosecution. Is it seriously suggested that there will not be some pressure to respond felt within the prosecution? In commercial fraud cases, for example, where there is a great public outcry over many hapless victims having lost their

money, isn't it true that there might be a widespread loss of confidence in a prosecution which declined to prosecute? How much better in such situations if the relevant decision, to discharge or otherwise, is made by a truly independent judicial officer with no associations either with the prosecution or the defence.

Within sections of the community there has been a tendency to see recent reports about the Coledale prosecution as illustrating, if nothing else, the type of criticism attracted where there is a perception that a prosecution is being continued merely to satisfy public expectations.

It is important to ask the question whether or not it is true that individual prosecutors tend to reflect general prosecution policy where choices as to the type of defendants to be brought before the courts are involved. It has been said of the much debated Temby doctrine, which emerged whilst Mr Ian Temby, QC, was the Commonwealth Director of Public Prosecutions, that it was illustrative of this. How much better that the relevant decision should always be made by that much esteemed 'independent judicial officer'—one of our magistrates.

We live in an age when the focus is upon so-called 'open government' or 'Glasnost', to use the Russian alternative. How strange, accordingly, that the current proposal should run so counter to this fashionable and broadly accepted thoughtstream of our time. For at the heart of these proposals is the notion that, in future, the decision to commit or to discharge should not be made in public at all, as it always has been when made by magistrates independent of the prosecution. On the contrary, it will be made in private behind the closed door of a functionary of the prosecution. If this does not raise alarm bells in the minds of lovers of liberty within our community, then something has gone seriously amiss.

It is easy to deride opposition to these proposed changes as the mere knee-jerk reaction of legal professionals with a vest-pocket interest in the preservation of the status quo. Cynicism of this order cannot diminish the rock-solid fact that the liberties of our people depend on the ever-ready existence of courageous advocates, whether solicitors or barristers, prepared and able to defend them without fear or favour when the awesome might of the prosecution is arrayed against them. Cynicism of that kind tends to dissipate very quickly when someone—it might be any one of us—finds himself facing a serious charge and desperately cries out for competent and forceful representation. Across the centuries the truth has remained that the foremost warriors in the cause of civil liberties have been lawyers.

The Future Outlook

So, what does the future hold if these proposals do come to be implemented? So far as the most vital right of all—that of unlimited cross-examination—the prospects for the future are very partial, very fragmentary. Rights of cross-examination of witnesses falling outside of the specific categories is entirely unknown. The signals are no good.

The most demeaning feature of the treatment of magistrates under these proposals, of course, is that they are, in the main, reduced to being mere supervisors of the pre-trial hearings which are offered to us as pale shadows of the full-scale committal hearings we know so well. The idea is that they should simply sit there and supervise. They are deprived entirely of any real decision-making power. Certainly as to the vital issue of whether there will be a discharge or a committal, they are to be impotent.

It seems the only concession in this area that has been wrung from the Attorney-General is that they may have conferred on them a discretion to permit cross-examination of

a witness who does not fall naturally within one of the specified categories 'where there are reasonable grounds to suspect that cross-examination will affect either the assessment or the reliability of the witness, or would elicit further material to support a defence'.

Yet, even where such a slender discretion may be made available, the question of how it can reasonably be expected to be exercised is itself a worry. Where there has already been no cross-examination allowed, on what basis will the magistrate be able to make his assessment that some should be permitted?

It cannot be disputed that magistrates make mistakes. Likewise, it cannot be denied that many magistrates have been too timid and hesitant in the exercise of their powers. A propensity for human error is inbuilt in all human beings, collectively no less than individually. Whether we look at an individual acting as a magistrate, as a District, Supreme or High Court judge, or as a Director of Public Prosecutions, the scope for human error is there. It is likewise there when one looks for justice from a collective body, such as a jury. But one does not discard a tried and tested system which has delivered substantially correct decisions across the course of the centuries merely because of this innate tendency for human error occasionally to show itself. This society, I believe, would never contemplate getting rid of the criminal jury. Equally, I believe that it should be insistent upon retaining the virtues of committal hearings as we know them.

In what has been described as the 'distant past', the courts sometimes heard trials on ex-officio indictments without the benefit of a preliminary examination. The truth is however, that even then, that kind of procedure always generated intense public disquiet. It has generated criticism in our own time, for example in the judgment of Gibbs ACJ and Mason J in *Barton v. R (1981)* 147 CLR 75.

Conclusion

Again and again, however, we are brought back to the issue of delay and the quite unsubstantiated allegation that this is magnified by committal hearings. The argument has some surface plausibility, but it is a plausibility which does not survive the shallowest scratching of its surface.

The committal process has received substantial judicial scrutiny in recent times. It has withstood this scrutiny wonderfully indeed. Just as with the polished as against the original natural gemstone, it has emerged from the process enormously enhanced. It has found many champions in recent times, including Mr Justice Lee whose paper 'In defence of the committal for trial' delivered to the Australian Criminal Lawyers' Conference at Broadbeach in July 1988 stated:

> Those who have been brought into contact with it in a professional capacity can recognise the tremendous part it can play in the proper defence of an accused person's interest, and it is a regrettable fact that those who have not had that experience may see its function and purpose in an entirely different light. Used responsibly by both prosecutor and accused it can be of significant benefit both for the public interest and in ensuring that prosecutions are not brought except on proper material and secondly in safeguarding the rights of an accused person and ensuring his fair trial. Where witnesses are required to give oral evidence and are cross-examined, it can be a valuable aid to a prosecutor in deciding on the proper charge to be laid at the trial and, in many cases, the oral evidence given at committal can induce an accused to plead guilty.

Greg James, QC, of the NSW Bar, has furnished a list of the significant public benefits provided by committals. This list is:

- disclosure of prosecution case;
- testing reliability, credibility and demeanour of witnesses;
- perpetuation of testimony;
- identification of issues between parties;
- enabling the prosecution to properly formulate charges; and
- early disposition of charges.

The statements in defence of committals have flowed from the very highest quarters—from the bench of the High Court in Australia, from Lord Devlin, who has described committal proceedings as 'an essential safeguard against wanton or misconceived prosecutions' in England, from our own Commonwealth, as distinct from our State Director of Public Prosecutions. The case for their retention in their present form is overwhelming.