Committals¾ Time for Change

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An interesting observation about human nature is that when the need for change becomes apparent, most of us tend to feel more comfortable modifying or adjusting rather than radically changing or starting afresh. The conservative view that the time-tested methods are generally the best is supported by the fact that the status quo affords consistency, stability and predictability. However, there is no wisdom in a rigidly conservative stance which defiantly resists significant change which is sensible, well reasoned, and more importantly, based on what is seen as a dire need. As a generalisation, the legal profession fits as well as any group into the conservative mould.

It is pleasing to note that the Institute has invited other perspectives in the debate as to the efficacy of the committal proceedings. It is likely that we will find that all is not as well as most lawyers would portray. The committal process has flaws. This paper suggests that the existing committal process in many instances is an elaborate waste of time, and in some cases even counter-productive. There is a need for a different approach but only so long as sufficient administrative and judicial safeguards are put into place to protect the principles the existing committal procedure is said to provide.

The Issues

In the most prominent authority of *Barton v. R* (1980) 32 ALR 449 the majority held the committal proceedings to be a critical prerequisite in the attainment of a fair trial. It is important to note that Murphy and Wilson JJ disagreed.

Supporters of committal proceedings identify it as an integral part of the criminal justice system since it:

- provides an effective **screening** process to prevent weak cases reaching trial;
- allows an early identification of **guilty pleas**;
- provides a comprehensive **disclosure** of the Crown's case and allows concentration on the facts in dispute;
- allows the defence to **test the witnesses** for the Crown; and
- allows the **witnesses to prepare** for the trial.

Screening—How far do you go?

Outside the actual committal proceedings there already exists extensive screening measures to ensure only deserving cases are taken to trial. A filter is applied on at least three and sometimes four separate occasions either side of the committal proceedings. In the first instance, the police investigator's decision to charge is reviewed by the police prosecutor before it is formally placed before the court. The prosecutorial policy of the South Australia Police Department, for example, which is based on the Prosecution Policy of the Commonwealth requires three criteria be met before the charge continues. Not only must a prima facie case exist, but there must also be a reasonable prospect of conviction, and in addition, the prosecution must be shown to be consistent with public interest.

In deciding whether there is a reasonable chance of success, account is taken of the version supplied by the accused to police during the interview, or any other evidence proffered by the defence in pre-trial discussion which might throw light on the likely success of the prosecution case. If a prima facie case exists, but a good defence is known and unlikely to be shaken, the prosecution will not continue. Of all the cases I manage in South Australia, approximately three per cent each year are diverted from prosecution because the prosecutorial policy criteria are not met.

A second and quite common part of the screening process is the dialogue between counsel and the police prosecutor which can result in charges being withdrawn, or reduced so as to allow them to be heard in the lower court. Many indictable offences are withdrawn from the trial at an early stage by police prosecutors without consultation with the Crown Prosecutor. Quite properly, where counsel is in possession of information which is likely to convince the prosecution not to continue, it should be raised in negotiation. This obviously calls for an enlightened and sensitive prosecutorial attitude. Counsel might also have convincing legal argument which will cause the prosecution to fail. Again, in the interests of fairness to the accused, the prosecutor should be willing to consider the legal issue prior to committal and where appropriate withdraw. In my experience, both issues of fact and law are widely discussed between police prosecutors and counsel prior to committal, resulting in some charges being withdrawn and in other cases reduced.

Because police prosecutors have nothing to do with the trial in the higher courts, their negotiation powers are extremely limited at this early stage in the proceedings. This will be commented upon below.

Perhaps the greatest indication of the ineffectiveness of the committal process as a screening device, is that a magistrate's decision to commit is, in effect, ignored by the Crown Prosecutor. As a third filter the facts are looked at afresh, and despite the committal of prima facie case, the Crown Prosecutor can still decide not to prosecute or prosecute on different charges. The same irony applies where the Crown Prosecutor decides to indict ex officio where there has been no case to answer.

In 1987 in South Australia there was a nolle prosequi in 10.8 per cent of all cases committed to the higher courts and 4.5 per cent of cases where the Crown proceeded with a different charge. In 1988 the figures were slightly higher in both areas with 11.3 per cent and 4.7 per cent respectively.

Disclosure—an Effective Practice even without a Committal

Recent years have seen a higher standard of disclosure prior to committal. This is an observation made by Brereton and Willis (1989), who go on to say that 'more generally, it would appear that there is a growing acceptance by prosecution agencies of the need for greater disclosure'.

Certainly in those jurisdictions with paper committals, all of the relevant witness statements are made available to the defence. In South Australia at least, greater attention is given to openness and disclosure in the committal process, especially because of King CJ's remarks in the Full Court decision of *R v. Harry, ex parte Eastway*, (1986) 39 SASR 203 where he said:

> It is not sufficient for (the prosecutor) to call only the minimum evidence required to make out a prima facie case. He is also required, in the absence of sound reasons to the contrary, to call all witnesses, whom, in the exercise of his discretionary judgment, he considers to be material irrespective of whether their evidence strengthens or weakens the case for the prosecution.
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> Prior to a preliminary hearing, it is customary in those jurisdictions with paper committals to deliver all witness statements to the defence. Originally designed to speed up the process (consistent with openness and fairness to the accused), this procedure is now suffering abuse at the hands of insensitive and ill-prepared lawyers. A constant source of frustration to police prosecutors, magistrates and (most of all) witnesses, which will be addressed later, is derived from the fact that it is not uncommon for **all** witnesses to be summoned by defence notwithstanding the delivery of their written statements and regardless of their need. With the unprepared lawyer who reads the statements for the first time just prior to the committal, there can be the sudden realisation that the witnesses are not really required. Consequently, he or she asks some irrelevant questions, or the witnesses are simply sent away. To the insensitive lawyer, the committal is sometimes used as training ground for the young barrister, or as a 'fishing expedition'.

Cross-Examination at Committal—Two Bites at the Cherry

The majority in *Barton v. R* (1980) 32 ALR 449 also referred to the opportunity to cross-examine witnesses at committal as being one of the critical needs in the attainment of a fair trial. It certainly places the accused in a better position, learning in advance how a witness will respond to specific questions and identifying a style of cross-examination which will bring about the best results. Another advantage to the accused is that it provides the opportunity to check the testimony in the trial against the depositions of the committal. Put another way, the question might properly be asked, 'Why should the accused be allowed to have a warm-up prior to a trial, or have the opportunity to wear down the witnesses?'

Some relatively serious offences such as assault occasioning actual bodily harm and break and enter (dependent on the value of goods stolen) can be heard and determined in summary jurisdictions. Penalties in these jurisdictions include sentences of up to two years imprisonment. Yet the committal process, said to be critical for indictable offences, is considered to be completely unnecessary in the lower jurisdiction. A house break and larceny for $2,000 in South Australia requires the committal process and attracts all its benefits for the accused, but the same offence at $1,999 does not. It is difficult to pick the difference in principle—clearly it is only an issue of degree.

If the need to cross-examine is based on the notion that it constitutes a critical safeguard for the accused to ensure that he cannot be tried unless a prima facie case is established, why do the same principles not apply with criminal cases in a summary jurisdiction? The issue of degree does not satisfactorily answer the question. If the principle is so fundamental then it should apply at all levels where a person's liberty is at stake. Given the screening and disclosure processes which exist outside the actual committal it could be just as effectively argued that if it is sufficient in the summary jurisdiction then it can work in the higher courts. Supporters of the committal proceedings would probably be staunch

supporters of the institution of the jury system. If the jury is as discerning and effective as its proponents contend, why is there a need for such an elaborate preliminary hearing to establish if there is a prima facie case to put before it? The jury could do that as part of its overall function as a finder of fact, just as the magistrate does.

An observation by police prosecutors is that in the majority of oral committals, cross-examination is overused, deriving little value to the defence. Even in non-contentious cases, lawyers are seen to embark on monotonously long cross-examinations with no clear direction and for no discernible purpose. Cynical observers note that extra time is extra money for lawyers.

Witnesses—The Key Actors but the Least Considered

Do the committal proceedings really allow the witnesses to prepare for the trial? Few enjoy the experience of giving evidence in court. If the court process is unduly harsh or unsympathetic, the requirement to attend twice can have an adverse effect on the witnesses which will make the prosecutor's task much more difficult, if not impossible. Eighty-nine per cent of victims who participated in Newburn and de Peyrecave's (1988) survey described their court experience in negative terms. Likewise, Shapland, Willmore and Duff (1985) found that victims who were called to court to give evidence were 'usually confused and worried', suffering anxiety even re-victimisation, as their case passed through the court system. Bard and Sanger reported that giving evidence was a 'frustrating and frightening experience'. As one victim told the President's Task Force on Victims of Crime:

> It is almost impossible to walk into a courtroom and describe in detail the thing you most want to forget. It is also devastating to have to face your assailant. Although you are surrounded by people and (officers) of the court, the fear is still overwhelming (1982, p. 9).

The same Task Force heard that victims sometimes feel as if they are on trial themselves. In the quote that follows, note the perception of the witness of the distinction between treatment at the committal, and treatment at the trial before a jury:

> The preliminary hearing was an event for which you were completely unprepared. You learn later that the defence is often harder on a victim at the preliminary hearing than during the trial. In trial, the defence (lawyer) cannot risk alienating the jury. At this hearing, there is only the (magistrate)—and he certainly doesn't seem concerned about you.
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> Hours later you are released from the stand after reliving your attack in public, in intimate detail. You have been made to feel completely powerless. As you sat facing a smirking defendant and as you described the threats, you were accused of lying and inviting the 'encounter'. You have cried in front of these uncaring strangers. As you leave no one thanks you.

Data from a current survey by the Attorney-General for South Australia confirms the worst suspicions about the negative feelings of witnesses. I am grateful to Julie Gardner from the Office of Crime Statistics (SA) for making available to me some of the relevant sections from questionnaires:

> The solicitor tried to put me down and confuse me; the language the solicitor asked and the way my words could be turned against what I meant.
> I came out looking worse than the offender and I felt I was degraded by reports made in the press.

Especially pertinent to the critical part witnesses play in the whole process, was a comment which seemed to sum up the frustration and despair some victim/witnesses suffer and the difficulty in getting them back into the system for a second time:

> I feel that the victim's rights and personal tragedies are totally ignored by the solicitors and the whole affair was just a laugh. **I'd never appear again as a witness.**

The reluctance of witnesses to go to court even in the first place is an increasing problem. Once called, the system does little to remove any apprehension or frustration. With crowded lists it is not uncommon for witnesses to be sent away to come back another day because the case is not reached. Delays which can extend over months or even years add to the anxiety and result in a lessened interest in the outcome. Once in the witness box, many feel as the comments above attest, that the system is unfair to them. The committal process, especially where counsel is unconcerned about discretion or finesse, which are essential before a jury, can make the witness 'battle worn' and thereafter reluctant or unwilling to appear at the trial.

I am assured by those who deal closely with victims that the strong negative feelings about the court process is not overstated or atypical in the comments I have referred to above. That being the case, and particularly in the view of at least one witness that the preliminary hearing is especially daunting, the committal insofar as witnesses are concerned can be counterproductive. A significant number of the cases not proceeded with by the Crown are based on the unwillingness of witnesses to give evidence.

Conclusion—The Need for Reform

It is possible to have a process which brings to trials only those against whom there is an adequate and properly prepared case and which allows full disclosure to the defence, without resorting to committal proceedings as we currently know them. In fact, a simpler, more meaningful and cheaper process consistent with fairness to the accused, can be achieved by the type of reform which has been introduced in New South Wales.

To be most effective, the Crown or DPP must take over the conduct of all indictable briefs from the police prosecutors. Police prosecutors are, in effect, only caretakers of these briefs and have no real control over them since they are ultimately decided in a different jurisdiction. By handling these cases earlier the Crown Prosecutor can engage in more meaningful negotiations and effectively sort out the guilty pleas, the nolle prosequis and the reduced charges and be allowed to concentrate on the cases which are really going to trial and which require some extra attention. This is certainly not a criticism of South Australia's police prosecutors: their competency overall is reflected in an extremely high success rate.

The 60 per cent of cases which will end up as pleas of guilty really deserve no more than a pre-court discussion between counsel and Crown Prosecutor. Openness and fairness will provide as much information to counsel (in most cases) as a committal would.

In addressing the issues seen to be the features of the committal, I take the view, with one exception, that each can be met without the formalised judicial process as we now know it. Screening can be purely administrative in all but those exceptional cases, just as the New South Wales' system now allows with magisterial oversight being introduced only where certain criteria are met. The current system does not provide an early indication of

guilty pleas. In fact it disguises them. Comprehensive disclosure can be achieved by introducing the Crown earlier in the proceedings, and, without the need to call evidence, the provision of written declarations together with negotiations between counsel and Crown Prosecutor will provide sufficient information. The argument that witnesses benefit is a myth. They are worse off in the committal process and can be frightened off forever.

The facility of testing witnesses would be removed if the committal were abolished. However, if it is really so necessary, why are our prisons full of persons who have been tried with serious offences in the summary courts, without this facility? But, even with the provision of allowing cross-examination of witnesses in special cases, as it is in New South Wales, this provision would cure any difficulties presented to the defence.

It will be interesting to note the developments in New South Wales after their new scheme has been in effect for a while. It is encouraging to see legislators take bold leaps and change a system where the need is obvious, rather than, 'peck' away at procedures which have simply not stood the test of time. I predict that the severe deprivation to defence cases, as heralded by the legal profession in New South Wales, will not arise.

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