Judicial Review of Committal Proceedings for Federal Offences

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People charged with serious criminal offences in Australia have the case against them evaluated in a 'preliminary examination' or committal hearing. In Victoria this is governed by the *Magistrates (Summary Proceedings) Act 1971*; also *Magistrates Courts Act 1989* s.56 and Schedule 5 (not yet proclaimed). Preliminary examinations are intended to protect the citizen from being prosecuted on inadequate evidence, by filtering out weak or unmeritorious cases. This is seen as benefiting the state, by promoting efficiency in criminal prosecutions; it also benefits the accused, ensuring he or she is not prosecuted without some material evidence of guilt. The hearing is conducted by a magistrate, who is required to consider whether the evidence is of sufficient weight to support a conviction for an indictable offence, and if so to direct that the accused stand for trial, *Magistrates (Summary Proceedings) Act 1975* s.59(7).

In fact the majority of cases are committed for trial at the preliminary examination. The accused rarely puts in a defence and the decision is based on the evidence of the prosecution, together with any cross-examination of prosecution witnesses by the defence. The Victorian Advisory Committee on Committal Proceedings reported that in 1984 81.2 per cent of defendants were committed for trial; 3.7 per cent were discharged, 3.2 per cent of cases were withdrawn, and 11.9 per cent of cases were determined summarily (Report of Advisory Committee on Committal Proceedings 1986, p. 9). Brereton and Willis (1989, p. 8) found only 2 per cent were discharged. Only a very few, therefore, were in fact 'filtered out' by the formal committal procedure. The Committee was concerned to observe, further, that a significant number of cases committed for trial did not then proceed to trial; in 12.6 per cent of cases the Crown led no evidence, and in 8.1 per cent the accused was acquitted by direction. The Committee considered these figures gave cause for concern that committal hearings were not operating effectively as a safeguard against unnecessary prosecutions.

There have been a number of proposals to replace the preliminary examination with a simpler and less expensive form of trial disclosure. These proposals have been debated most seriously in New South Wales. Arguments for abolition usually emphasise reducing delays in getting matters to trial, reducing costs, and avoiding the repeated cross-examination of witnesses.

However, practitioners point to other functions served by the preliminary examination as justifying its retention:

- it is an important source of notice to the accused, both of the charges and of the evidence. The accused can obtain a picture of the prosecution's case, and cross-examine prosecution witnesses, to test their evidence;

- the prosecution case may be weakened by cross-examination, so that it is dismissed by the magistrate, or with the effect that the prosecution proceeds on a lesser charge. If the matter proceeds to trial, the accused is at least better placed tactically. He or she can also test the character of prosecution witnesses, including their prior convictions, to an extent which would be dangerous at the trial;

- the preliminary examination provides information for use at the trial. Evidence is recorded, and can be adduced at the trial; a witness who changes his or her evidence can have any discrepancy put at the trial. These depositions are also available for admission at the trial if, for instance, the witness has died, or if the evidence is not in dispute; and

- there are also advantages for the prosecution. The preliminary examination can clarify the issues in dispute, and it provides the prosecution with an opportunity to test its case. It may be that, faced with a manifestly strong case, an accused will decide to plead guilty.

The importance of the committal for discovery, and for testing by cross-examination, was also endorsed by the Victorian Advisory Committee.

According to the High Court in *Barton v. R* (1989) 147 CLR 75 at 99, the committal hearing should provide the following benefits to the accused:

- knowledge of what the Crown witnesses say on oath;

- the opportunity of cross-examining them;

- the opportunity of calling evidence in rebuttal; and

- the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is not strong or probably [sic] presumption of guilt.

However, the 'informational' function of the preliminary examination has been difficult to enforce in the courts. Despite legislative provisions requiring information to be given to the accused about the case against him or her at the preliminary enquiry (*see* for instance *Magistrates (Summary Proceedings) Act 1975* (Vic.) ss.45, 48 and 75.), and judicial endorsement of the role of the hearing as an information source for the accused, failure to fulfil this additional function has not proved fatal to the hearing. For instance, an accused has no right enforceable by mandatory order (other than any statutory right) to further and better particulars of the charge (*see* for instance *Ex parte Coffey, re Evans* (1971) 1 NSWLR 434; *Summers v. Cosgriff* (1979) VR 564. Einfeld J criticised this state of affairs in *Briot v. Riedel* 10.3.89 (1989) ACLD 289), and it has been stated in several cases that it is not part of the magistrate's duty to provide the accused with a rehearsal for the trial, or to ensure that the tactical objectives of each party are met (*R v. Epping and Harlow Justices, ex parte Massaro* [1973] QB 433).

The prosecution is recognised to have a discretion as to the witnesses and evidence it produces at the preliminary enquiry; it does not have to provide full disclosure. In Victoria, a magistrate was held not to be in error in finding that a police prosecutor had an overriding discretion as to the witnesses to be called, despite having commenced by 'hand-up brief',

after the defence gave notice that it would require the attendance of all of the large number of witnesses whose statements had been provided (*R v. Arthur, ex parte Kipadistrias* 8.11.82, unreported, Supreme Court of Victoria). The effect of this decision was, however, reversed by legislative amendment in 1986 (*Magistrates (Summary Proceedings) Act 1975* s.46 requires attendance of witnesses requested by defendant under a 'hand-up brief'; s.45B empowers the magistrate to disallow frivolous or vexatious requests).

It has been said that any defects in the informative functions of the committal can be cured by providing the accused with the information later, or at the trial. This is consistent with the view that the preliminary enquiry is 'tentative and non-conclusive' (*Summers v. Cosgriff* (1979) VR 564, 568). However it does not take account of the reality that the accused may have been held in custody pending the trial—a serious infringement of liberty, particularly if observance of proper procedure and access to information might have resulted in dismissal of the charge.

The Place of Committals in the Criminal Process

Committal proceedings for state and federal offences are heard in state Magistrate's Courts; the procedures followed are those prescribed in the relevant state legislation. The state courts are for this purpose invested with federal jurisdiction by s.68(1) and (2) *Judiciary Act 1903* (Cwlth) and s.85(1) and (5) *Crimes Act 1914* (Cwlth). The enquiry takes place after the police investigation and the decision of the police prosecutor to start proceedings. It is in effect the second level of review of the prosecution's evidence in an indictable case.

There are two decisive stages in a committal hearing. At the close of the prosecution case a Victorian magistrate is required to decide whether the evidence 'is of sufficient weight to support a conviction for an indictable offence'. If not, the magistrate is required to discharge the accused (s.56(1)(a)). Otherwise the accused is cautioned and invited to plead or make answer to the charge (s.56(1)(b)).

The same test is then applied on completion of the defence case (which may involve no more than the accused pleading not guilty and reserving his or her defence), the magistrate this time considering all of the evidence in the case. If the evidence is regarded as sufficient, the magistrate must then commit the accused to prison or admit him or her to bail.

This is the traditional committal procedure. Paper committals, or 'hand-up briefs', have also been available since 1972; the written statements of witnesses can be admitted in place of oral evidence, subject to the right of the accused person to require the attendance of any witnesses (ss.45 and 46). The majority of cases now follow this format.

It is important to note that the magistrate's finding at the committal is not conclusive; it does not fetter the prosecutorial discretion either to proceed with the case or to withdraw. A prosecution can proceed despite a decision by the magistrate not to commit the accused for trial. The prosecution can also commence proceedings for an offence which was not examined at the committal hearing, or for an offence other than that which the magistrate directed that the accused be tried; it can, on the other hand, decide not to proceed, despite a committal for trial.

Indeed, it is not strictly necessary for a preliminary examination to be held at all. A defendant can choose to stand trial without a committal hearing, and the Prosecution can also simply present the accused for trial. The latter course was strongly criticised by the High Court in *Barton v. R*, and it seems to be used rarely.

The High Court was not prepared to say that failure to hold a committal hearing necessarily meant the trial was unfair; but a stay could be granted for unfairness if the defendant had been deprived of adequate information. Failure to hold a committal might be justified if, for example, the defendant in fact had all the relevant information (*Barton v. R*

(1980) 147 CLR 75, 96, 101-2. *See also Barron* (1987) 10 NSWLR 215. Fox J in *R v. Kent, ex parte McIntosh* commented that the optional nature of the preliminary enquiry was extraordinary, in view of the elaborate statutory provisions for holding preliminary enquiries in every jurisdiction (1970) 17 FLR 65).

Committal Hearings and Judicial Review

Judicial review of the legality of the decisions made in committal proceedings is effectively the only avenue of review of such decisions; there is no provision for appeal.

Judicial review can be obtained under the state Supreme Court Rules, by prerogative writ or Order to Review, or under specific statutory provisions for review of magistrates' decisions (For example, *Magistrates Courts Act 1971* (Vic.) s.88; *Justices Act 1902* (WA) s.197). Federally, review is available under the *Administrative Decisions (Judicial Review) Act 1977* (*AD(JR) Act 1977*).

The availability of judicial review has traditionally depended upon the characterisation of the decision or decision maker: this has significantly limited the development of avenues for judicial review of committals. For example, judicial review by the prerogative writs of certiorari and prohibition is only available to bodies which 'act judicially' (Hotop 1985, p. 275). The fact that the result of the preliminary examination is technically inconclusive, together with the magistrate's limited discretion in the making of the final decision whether or not to commit for trial, have led to its characterisation as 'ministerial' or 'executive' and arguably outside the supervisory jurisdiction of the higher courts. From this perspective it is pointed out that there are several later stages at which any unfairness may be rectified: there is the possibility that the prosecution will decide not to proceed after committal; there is the trial itself; the judge may direct an acquittal; and, if the accused is convicted, there may be an appeal.

It cannot be denied, however, that the outcome of the committal hearing can be very significant. It involves the application of a broad statutory test to evidence, in a court-like adversary procedure, and it results in the determination of whether an accused is to be held in custody or admitted to bail, or discharged entirely. The decision to commit, with its attendant publicity, is likely to be personally damaging to the accused and the hearing itself may involve detrimental publicity.

Review in the state courts

Judicial review of committal proceedings for state offences continues to be restricted by the limitations on availability of the prerogative writs and equivalent orders, and conservative interpretations of the grounds of review.

The underlying theme in the courts has been reluctance to intervene in the criminal process, a perspective which has manifested itself in a number of ways:

- The judicial/ministerial distinction has been used to restrict review by way of certiorari and prohibition (*Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145; *R v. Murphy, ex parte Hamilton* 21.7.80, unreported, Supreme Court of Victoria; *Wentworth v. Rogers* (1984) 2 NSWLR 422), and by the order to review procedure under the *Magistrates Courts Act 1971* (Vic.), (*Phelan v. Allen* [1970] VR 219) although this approach to limiting intervention is generally becoming less popular (*see Sankey v. Whitlam* (1978) 142 CLR 1 at 83-4 per Mason J. For an example, *see Moularas v. Nankervis* (1985) VR 369. *See also* Sykes, Lanham and Tracey 1984, at 211).

- The traditional distinction between jurisdictional and non-jurisdictional error of law is generally strictly maintained, with a preference for finding that a matter is within the magistrate's jurisdiction to decide. Once the magistrate has properly assumed jurisdiction, the courts prefer to allow the enquiry to continue without interruption to a conclusion, before they will consider review, (*see* for example, *R v. Wells Street Stipendiary Magistrate, ex parte Seillon* (1978) 1 WLR 1002: it is a matter of convenience, and also easier to decide whether any real injustice has been done at the end. Compare *Bacon v. Rose* (1972) 2 NSWLR 793; *Nankervis* (1985)VR 369; *Campagnolo v. Attrill* (1982) VR 893).

- The content of the requirement to observe the rules of natural justice is interpreted narrowly in view of the 'inconclusive' character of the proceedings. There is no absolute requirement that the defendant have full information about the charges, (for instance *Ex parte Coffey, re Evans* (1971) 1 NSWLR 434; *Summers v. Cosgriff* (1979) VR 893) or that all relevant witnesses be available for cross-examination (*R v. Epping and Harlow Justices, ex parte Massaro* [1973] QB 433; *R v. Arthur, ex parte Kapidistrias*, 8.11.82, unreported, Supreme Court of Victoria).

- Relief is also discretionary. In fact, it was the view of Gibbs ACJ in *Sankey v. Whitlam* that the inconclusiveness of the preliminary enquiry is irrelevant to the power of the court to review, but very material to the exercise of the discretion to review. His Honour recommended that criminal proceedings 'be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to [intervene]' (1978) 142 CLR 1, 26. The Federal Court has followed this guideline, and has developed a presumption of denial of relief in the absence of extraordinary circumstances. Although the requirement of 'special reasons' for intervention is reiterated in the cases, it has not in fact often been used to exclude review in the state courts. A case which has passed through the filtering process described in the previous paragraphs will probably obtain the requested relief.

The prerogative writs were the first choice of the early applicants for review of committals. Certiorari and prohibition were held to be unavailable in *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145 and that case has continued to influence developments in the area. It was followed in Victoria in 1980 in *R v. Murphy, ex parte Hamilton* 21.7.80 (unreported) Supreme Court of Victoria. The early committal cases were affected by the 'characterisation' approach to review, but the movement away from rigid categorisation of decision-making has led to the recognition that many 'non-judicial bodies' affect rights and should be expected to 'act judicially', and will therefore be amenable to review.

The declaration is probably now the most widely sought remedy. It is, of course, discretionary.

In relation to federal offences, however, the scope for review is, at least at first glance, considerably wider.

Review of committals for federal offences

The Federal Court accepted that it had jurisdiction to review committal proceedings under the *Administrative Decisions (Judicial Review) Act 1977* in the 1983 case of *Lamb v. Moss* (1983) 49 ALR 533. It held that the decisions in dispute were 'decisions of an administrative character', made 'under an enactment' and therefore reviewable under the new legislation. The Federal Court held that the class of reviewable decisions is not limited

to decisions which 'finally determine rights or obligations' or which have 'an ultimate and operative effect' (1983) 49 ALR 533, 556.

It was held in *Lamb v. Moss* that the refusal of the magistrate to discharge the defendant, the finding of a prima facie case against the defendant, and the decision to proceed with the hearing having found a prima facie case, were reviewable 'decisions' (1983) 49 ALR 533, 557—per s.5 *AD(JR) Act*. The refusal to allow certain witnesses to be recalled for further cross-examination (the magistrate having found a different offence to that charged) was held to be, if not a decision, conduct for the purpose of making a decision (under s.6 *AD(JR) Act*).

The court observed that not every preliminary step will come within the jurisdiction of the Act, but it thought that sub-s.3(5) could authorise review of the taking of evidence in committal proceedings, or continuing with the enquiry (1983) 49 ALR 533, 558; compare the common law position as in *Sankey v. Whitlam* (1978) 142 CLR 1, 25.

Jurisdiction has therefore not been in issue since that decision, unlike the situation in the state courts, although recently there have been judicial suggestions that this jurisdiction should be reconsidered (*see* Northrop J in *O'Donovan v. Vereker* 76 ALR 197 at 105-6; Mason CJ in *Vereker v. O'Donovan* 18.3.88 (unreported). Einfeld J in *Briot v. Riedel* 10.3.89, dealing with a challenge to jurisdiction, was of the view that the jurisdiction of the Federal Court to review committals did not rest solely on *Lamb v. Moss* anyway).

The courts often express concern, when considering applications for review of committal proceedings, about the alleged inappropriateness of intervening in the criminal process, given the integrated nature of the criminal process and the checks and balances outlined earlier. Although jurisdiction to review has been accepted by the Federal Court, the court has generally adopted a policy of restraint. It is a matter of stated principle that a decision by a magistrate will only be reviewed in exceptional circumstances.

The grounds of review are set out in ss.5 and 6 of the *AD(JR)Act* and broadly cover the common law principles of judicial review. They include breach of the rules of natural justice, lack of jurisdiction and improper exercise of power. Important extensions of the common law are the inclusion as grounds of review of any error of law, whether or not jurisdictional and whether or not appearing on the record; *see* sub-s.5(1)(f). (Hotop 1985, p. 344), and the making of a decision without evidence or otherwise contrary to law (sub-ss.5(1)(h) and (j). The operation of sub-s.5(1)(h) is modified by sub-s.5(3), but could have very wide implications, and is not far removed from review on the merits. Applied in (inter alia) *Foord v. Whiddett* (1985) 60 ALR 269). The grounds of review appear to be wider than are available in the state courts. For instance, the High Court in *Sankey v. Whitlam* (1978) CLR 1 doubted the availability of review regarding the admissibility of evidence; *AD(JR) Act* s.3(2) and s.3(5) and *Lamb v. Moss* (1983) 49 ALR 533, 558 indicate this is reviewable in the federal sphere.

The Federal Court has power to make an order of review upon finding any of the grounds made out. It can quash the decision, refer it back to the decision-maker with or without directions, declare the rights of the parties, or direct any party to do or refrain from doing anything necessary (s.16). This power is discretionary. Even if an error is established the court may refuse relief, for instance where it would be futile (*see Lamb v. Moss* (1983 49 ALR 533 and *Doyle v. Chief of General Staff* (1982) 42 ALR 283; *see also* the comments of the Full Court of the Federal Court in *Seymour v. Attorney-General* (1984) 57 ALR 68, 71).The power of state courts to review committals for federal offences is excluded by s.9 of the *AD(JR)* Act.

Lamb v. Moss established that committal proceedings are reviewable under the *AD(JR) Act* but it is most widely cited for its discussion of the court's discretion to grant relief. The Full Court held, firstly, that it had a discretion to refuse relief even where the technical grounds have been made out, and secondly, that the power to make an order to review in respect of committal proceedings should be exercised only in exceptional circumstances. The court said it should be especially reluctant to intervene in respect of a

decision *in the course of* proceedings; 'additional considerations might intrude at the final stage; for example, in respect of committal for trial and commitment to prison pending trial' (1983) 49 ALR 533, 564. The Court drew attention to the comment of Gibbs ACJ in *Sankey v. Whitlam* to the effect that criminal proceedings should be allowed to proceed unless it is necessary in the interests of justice to intervene (1978) 142 CLR 1, 25-6. It concluded that the view of the High Court and the state courts, which it regarded as providing a sound guide in defining the powers of the Federal Court in this area, was that 'failure to permit criminal proceedings to follow their ordinary course will, in the absence of special circumstances, constitute an error of principle' (1983) 49 ALR 533, 547. The effect has been, not surprisingly, that even when the court has been prepared to review the decision, the magistrate's decision has rarely been altered.

Magistrates make innumerable decisions in the course of a committal hearing which a party might seek to review. In addition to the fundamental decision whether or not to commit to trial, there may be questions of admissibility of evidence, requests for adjournment or for further particulars, findings on claims for privilege and on matters of statutory interpretation, findings as to the existence of the necessary statutory consents to prosecution, and requests for termination of the proceedings on grounds of abuse of process, or of the magistrate's own alleged bias.

What are the Principles of Review?

Interlocutory matters

It will be harder to show exceptional circumstances requiring intervention in respect of interlocutory rulings (*Cheng Kui v. Quinn* (1984) 67 ALR 231; *Fermia v. Hand* (1984) 53 ALR 731; *Seymour v. AG (Cwlth)* (1984) 57 ALR 68). There are a number of reasons for this. Interlocutory matters are generally regarded as best left to be decided by the magistrate, unless a clearly defined question of law of public interest is involved. They are also frequently raised before the hearing has ended; permitting review in the course of a hearing inevitably leads to delays. Also it is not always possible to see, at an early stage in the proceedings, whether an applicant for review will actually be adversely affected by a preliminary decision. As a South Australian judge remarked, 'the proof of the pudding will be in the eating'. (Olsson J in *Potter and Potter v. Liddy* (1984) 14 A Crim R 204, 209, regarding a premature application for relief).

Admissibility of Evidence State courts have generally regarded the admissibility of evidence as a matter within the magistrate's jurisdiction, and therefore not reviewable (*see* for instance *Spautz v. Williams* (1983) 2 NSWSLR 506; *R v. Judge Mullaly* (1984) VR 745; *Clayton v. Ralphs* (1987) 26 A Crim R 43; but *see Sankey v. Whitlam* (1978) 142 CLR 1). This is not a restriction per se under the *AD(JR) Act:* review under the Act is not limited to jurisdictional error.

Exceptional circumstances warranting intervention to admit or exclude evidence may be found if the case raises an important question of public interest, or a straightforward question of statutory construction which does not involve the court in disputed or doubtful facts. (*see Shepherd v. Griffith* (1985) 60 ALR 176; declaration made. The existence of such characteristics do not however ensure success; *see McDermott v. Nicholl* 17.2.89).

A magistrate's refusal to excuse from cross-examination a witness claiming public interest immunity was reviewed and varied in *Young v. Quin* (1984) 56 ALR 168; on appeal (1985) 59 ALR 225. It was regarded as involving exceptional circumstances, 'a genuine and important question of legal principle not dependent upon the detail of the evidence in the particular case' (1984) 56 ALR 168, 172. The magistrate's rejection of the claim to immunity was held to be an error of law (1985) 59 ALR 225, 232.

Generally, however, relief will be refused as a matter of discretion (*Clyne v. Scott* (1983) 52 ALR 405; *Seymour* (1984) 12 A Crim R 157; *Besey v. Mackenzie* (1987) 31 A Crim R 347). The magistrate will usually be seen as best placed to decide such interlocutory questions.

Procedure Breach of a mandatory (fundamental) procedural requirement would be reviewable under the *AD(JR) Act* s.5(1)(b). (*see* for instance *Clyne v. Scott* (1983) 52 ALR 405; *Wong v. Evans* (1985) 59 ALR 392—reviewable, but not remedy because breach not extablished on the facts). Where the Federal Court has reviewed a magistrate's decision on a point of procedure not governed by statute, it has emphasised that the error went to the magistrate's jurisdiction (*Parsons v. Martin* (1984) 58 ALR 395; order to review granted as to decision that the magistrate had no power to issue letters of request, and that parties could not rely on evidence obtained by the letters of request). Otherwise, intervention has not generally been permitted in respect of procedural matters, which will be regarded as within the magistrate's discretion (*Fermia v. Hand* (1984) 53 ALR 731).

Error Going to Jurisdiction State courts have usually been prepared to review errors going to jurisdiction; they have, however, tended to apply a narrow traditional definition of jurisdiction in deciding whether to review. Jurisdictional errors attracting review have included allegations of a breach of an express statutory requirement of consent, a claim that the offence was not known to law, and, a more recent development, the claim that there was no evidence to support the magistrate's finding of a prima facie case (*Bacon v. Rose* (1972) 2 NSWLR 793; *Sankey v. Whitlam* (1978) 142 CLR 1; *Bourke v. Hamilton* (1977) 1 NSWLR 470).

It is not, of course, necessary to show that an application for review under the *AD(JR) Act* raises a question going to jurisdiction, and similar matters have been accepted as reviewable under that Act (*Clyne v. Scott* (1983) 52 ALR 405; *Wong v. Evans* (1985) 59 ALR 392). However, the fact of going to jurisdiction may mean they are more readily reviewed (*see* French J in *Kunakool v. Boys* (1988) 26 A Crim R 1, 11)

A magistrate's decision as to the limits of his own power will clearly come within this category (*see AD(JR) Act* s.5(1)(d) and (e) and *see Parsons v. Martin* (1984) 58 ALR 395).

The magistrate's interpretation of a statute, for instance the statute creating the offence, will also be a good candidate for review e.g. under s.5(1)(d), (e) or (f) (*see* for example, *Shepherd v. Griffith* (1985) 60 ALR 176; *Kunakool v. Boys* (1988) 77 ALR 435; *Vereker v. Rodda* 72 ALR 49, on appeal *O'Donovan v. Vereker* (1987) 76 ALR 97). French J in *Kunakool v. Boys* said that where 'the decision to commit is challenged on grounds which go essentially to the construction of a statute, raise an important question of law, and do not involve any intricate consideration of the evidence, then there will be . . . "additional considerations" which favour review.' (1987) 26 A Crim R 1 at 11.

Breach of Natural Justice An error leading to denial of natural justice will clearly be reviewable.

One of the few successful applications for review in the Federal Court arose after committal but turned on a claim that natural justice had been denied in the course of the hearing (*Tahmindjis v. Brown* (1985) 60 ALR 120). Whilst making an application under the *Freedom of Information Act 1982* (Cwlth) after the committal, the applicants' solicitors had discovered that the magistrate had, during the proceedings, spoken privately to the solicitor for the informants to express his concern about the direction of the prosecution case. The prosecution had subsequently changed its approach.

The court agreed that the magistrate had not acted impartially, and should therefore be disqualified for bias. Fox J was not prepared to exercise the discretion not to provide a remedy, saying that it was a case where it was clearly in the public interests to intervene to ensure that court proceedings were conducted according to law. This case was the last in a series arising out of the so-called 'Greek conspiracy' Social Security fraud case, of which *Lamb v. Moss* was another. The decision to quash the committal was in this instance likely to be conclusive; to proceed by ex officio indictment would have had the appearance of victimisation.

Relief has also been granted to require a magistrate properly to carry out his obligations under the legislation to take further submissions from the defendant, after finding a prima facie case (*Besey v. Mackenzie* (1987) 31 A Crim R 347).

The decision to commit

As has been noted earlier, the court may be more ready to intervene when the proceedings have been completed. Applications in this context may be made either from the decision to commit, or from the finding of a prima facie case after the close of the prosecution evidence.

In the state courts it has been noted that the decision whether to commit is treated as 'ministerial' (administrative). In some jurisdictions this has been taken to mean it is not amenable to review, at least by the prerogative writs. Review of the 'ultimate issue' also threatens to move beyond the question of 'legality' into the issue of 'merits'. However it has on occasions been permitted—for instance, where the statutory test was not applied, or where there was no evidence to support the decision.

Review under the *AD(JR) Act* is of course predicated on the existence of an 'administrative decision'; such characterisation is not a problem here. The final decision is often the subject of attack, either based on a challenge to a decision made in the course of the hearing or for more direct defect.

Cases being reviewed under the *AD(JR) Act* have tended to involve very serious charges, such as major fraud cases, and/or defendants with a great deal to lose by being committed. A defendant who is determined to challenge committal proceedings will often begin with the finding of a prima facie case. Success at one of these points, particularly on the grounds of no evidence, it is likely to be extremely influential in the decision of the Director of Public Prosecutions whether to proceed.

The cases claiming an error in a decision in the course of hearing have already been considered.

Challenges to the ultimate decision, per se, will usually be based either on the argument that there was no evidence to support the findings, or that the magistrate did not apply the correct statutory test for committal.

Applying the Wrong Test An argument that the magistrate applied the wrong statutory test in deciding that there was a prima facie case, or in reaching a decision to commit, would undoubtedly be a sufficiently fundamental error of law to warrant review—for example, under s.5(1)(d) (unauthorised decision); 5(1)(f) (error of law); 5(1)(e) with (2)(a), (b) (relevant/irrelevant considerations). (*Murphy v. Director of Public Prosecutions* (1985) 60 ALR 299 held that such error would be reviewable, but no error here. *See also Einem and McDonald v. Edwards, Grant and Collie* (1984) 12 A Crim R 463, *upheld on appeal: Edwards v. Von Einem and McDonald* 12.10.84 (unreported) Full Federal Court; *Hopcroft v. Price and Torrance* 26.9.85 (unreported) Federal Court).

No evidence Review on the grounds that there was no evidence to support the decision is expressly provided for in the *AD(JR) Act* (s.5(1)(h) and s.5(3)). A conclusion based on no evidence traditionally constituted an error of law within jurisdiction, and was therefore unreviewable, unless it appeared on the face of the record (when it was only reviewable by certiorari) *(R v. Nat Bell Liquors* (1922) 2 AC 128; approved by the High Court in *R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1952) 1 KB 338). But in recent years it has been recognised as a ground of jurisdictional error within the broad meaning of that concept; it has has also come to be seen as a breach of natural justice (*Pochi* (1980) 31 ALR 666; regarding committals, *see Bourke v. Hamilton* (1977) NSWLR 470; *Gorman v. Fitzpatrick* (1985) 4 NSWLR 286). It may therefore also be reviewable under the *AD(JR) Act* s.5(1)(f) or s.5(1)(a) as well.

Nevertheless, review will generally be refused, as a matter of discretion. Review under this head inevitably involves a close examination of the facts, and can look very like a rehearing. In conformity with its 'supervisory' role, the court will be reluctant to appear to be taking over the magistrate's role at this important point in the preliminary examination. As Wilcox J observed in *Souter v. Webb and Ward*, such an application should only be considered if it is clear 'without intricate consideration of the evidence, that there is a failure to establish a necessary ingredient in the charge' (1984) 54 ALR 683, 690.

The mere claim that the committal was without basis will not automatically be regarded as showing exceptional circumstances warranting review (*Murphy v. Director of Public Prosecutions* (1985) 60 ALR 299). However, a decision to commit was recently quashed in the Federal Court for lack of evidence (*Briot v. Reidel* 10.3.1989—(1989) ACLD 289). Delays by the prosecution in pursuing the matter, and the complexity of the issues for consideration by a jury, together with the professional context of the conduct constituted 'exceptional circumstances' justifying relief.

To summarise, most decisions in committal proceedings are reviewable under the *AD(JR) Act*, but as a matter of discretion relief is rarely granted. The Federal Court emphasises that it is in its view most important that criminal proceedings be free of unnecessary interventions. They should be resolved quickly, in the interests of the community and the accused person; the delay involved in judicial review will only be warranted in exceptional cases, for example where the interests just mentioned are outweighed by the need for a prompt and authoritative decision on a question of law (*Wong v. Evans* (1985) 59 ALR 392, 399). The fact that a defendant is disadvantaged by being committed for trial is not by itself an 'exceptional circumstance'. In practice the discretion to grant relief is most likely to be exercised when the alleged error clearly goes to the magistrate's jurisdiction to act.

Discussion

Even as it made the decision in *Lamb v. Moss*, the Federal Court was well aware that accepting jurisdiction to review committal proceedings could open a Pandora's Box—a proliferation of applications for review—fragmentation and delay in the criminal process—the depletion of legal aid funds—and the strategic, rather than genuine, use of the jurisdiction (1983) 49 ALR 533, 556. It took the view that on principle such fears should not prevent it from protecting the public interest and ensuring the due administration of the criminal process. The safeguard it offered was the discretion to refuse relief ((1983) 49 ALR 557).

Nonetheless the potential recognised by the court has to an extent been realised. Since *Lamb v. Moss* was decided, a 'significant number' of applications for review have been made; few have been successful (*see* ALR *Ninth Annual Report 1984-85*, p. 26. The Commonwealth DPP indicates that by 1988 at least ten such applications had been made).

Some defendants have sought review at every stage of the committal process; whether or not ultimately successful, the resort to the jurisdiction has undoubtedly produced delays.

Not long after the decision in *Lamb v. Moss* the Special Prosecutor, Mr Robert Redlich, criticised review of committals under the Act. He asserted that it provided people charged with criminal offences under Federal laws 'the opportunity of disrupting the ordinary criminal process' (*Annual Report* of the Special Prosecutor 1983-84, p. 164). He recommended that the Attorney-General consider whether such review should be available (Special Prosecutor, *Annual Report 1983-84*, p. 165). The former Chief Justice of the High Court has also been highly critical, calling the Federal Court's jurisdiction to review committals an 'absurd interference with the ordinary course of criminal justice' which he thought could not have been intended by the legislature (Gibbs 1985, p. 525).

The High Court, when it recently considered (and refused) an application for special leave to appeal in *Vereker v. O'Donovan*, commented that 'the undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us.' Further, the High Court threw doubt on the jurisdiction of the Federal Court to review committals under the *AD(JR) Act*: 'we are by no means convinced that the Federal Court has the jurisdiction which it claimed to exercise in the present case and we would emphasise . . . that if the court has the jurisdiction, it is a jurisdiction to be exercised very sparingly and in most exceptional cases only.' (18.3.88 (unreported); extracted at (1988) 6 Leg Rep SL 3. *See also* comments of Einfeld J in *Yates v. Wilson* (1989) 86 ALR 311, 320).

There are two issues here: whether committals for federal offences should be subject to judicial supervision at all, and if so, whether that supervision should be provided by the Federal Court under the *AD(JR) Act* or by the state courts.

Should committal proceedings be reviewable? It is accepted that there should not be de novo appeals from committal decisions; they are a preliminary and non-final process and should not be re-decided needlessly. However, there must be a mechanism for ensuring the legality of the decision-making.

Supervisory review is a manifestation of the Rule of Law: that executive action is not absolute, but is itself subject to legal constraints. As the Administrative Review Council (ARC) recently put it,

> The availability of judicial scrutiny of the legality of administrative action serves the twofold purpose of protecting individual rights and interests from unauthorised action and ensuring that public powers are exercised within their legal limits (ARC 1989, p. 5).

Judicial review is also interactive, with the judiciary developing standards of fairness and lawfulness for application by primary decision makers. (For instance, the courts currently enforce the requirement that the committal decision be based on evidence; they generally have not enforced the committal's informational function).

Committal proceedings should be subject to the supervision of the superior courts. They are a public part of the criminal justice system and magistrates should be seen to be operating within their statutory authority. It is not satisfactory to leave questions of legality, such as the existence of jurisdiction, or whether the legislation creating an offence is valid, or whether the magistrate was biased, to be decided at the trial if the defendant is committed for trial. These are questions which should be determined as soon as practicable, and can readily be resolved in the context of judicial review.

Committal proceedings have a significant impact on accused persons, and the protections and benefits provided to both defendant and prosecution should be clearly enforceable. Their legal non-finality does not remove the impact of the public accusation, and although the Director of Public Prosecutions can proceed with a trial despite dismissal at the committal stage this is not usual.

Mason CJ has recently been critical of review of committals, but 12 years ago he stated in *Sankey v. Whitlam* that the decision whether to commit is

> One which materially affects the defendant because it exposes him to trial upon indictment and to a deprivation of his liberty pending trial. . . It would be quite unacceptable to say that a committing magistrate is not under a duty to act judicially or that he is entirely free from supervision by a superior court, even when acting without jurisdiction or in excess of his jurisdiction ((1978) 142 CLR 1, 83-4).

This is not to deny the importance of speedy resolution of criminal matters, and the risks of delay and discontinuity. The *Sankey*, *Moss* and *Forsyth* series of cases illustrate how review procedures can draw out the criminal process. It is suggested, however, that it is of primary importance, as a matter of policy, to supervise the legality of committal proceedings and to protect the interest of accused persons. Having ensured the avenue of review, properly defined, the court could be given a broad discretion to refuse relief if it was unwarranted.

Despite the judicial, and extra-judicial, criticism of review, there has been no indication that Parliament intends to intervene. In any event, committals for state offences are currently reviewable to a greater or lesser extent; persons charged with federal offences should not be any **less** protected.

What should be reviewable? The ARC in its Discussion Paper said, 'The *AD(JR) Act* purports to strike a balance between the need, on the one hand, to protect public authorities from unwarranted litigation with, on the other hand, the desirability of providing individuals with a means by which they might vigorously and effectively obtain judicial review of the legality of public administrative action' (ARC 1985, p. 11). The central question is how such a balance is to be achieved.

There are a number of ways of delimiting the scope of judicial review (Craig 1983, Ch. 9). It can be based on the traditional concept of jurisdictional error. This presupposes that there are some matters which are within the tribunal's exclusive jurisdiction and cannot be reviewed, and some upon which its power is predicated, and which are therefore open to review. The difficulty which has been demonstrated in the case law is in drawing that crucial line. As Craig observes, deciding the question which matters go to jurisdiction involves steering a course between the Scylla of allowing the tribunal to decide its own parameters, and the Charybdis of drawing review so broadly as to approximate to an appeal (Craig 1983, p. 299).

The concept of jurisdictional error can be drawn very narrowly, so that once a tribunal has properly begun proceedings, anything it does is non-reviewable. It can be drawn widely, as was done for example in *Anisminic v. Foreign Compensation Commission* (1969) 2 AC 147, so that almost any error of law goes to jurisdiction: in effect the tribunal only has jurisdiction to decide correctly.

The jurisdictional/non-jurisdictional distinction might be eliminated entirely, and review then be limited to errors of law and breach of natural justice, or a range of defined errors, being those commonly regarded as going to jurisdiction or to breach of natural justice. The latter is essentially the road taken by the federal *AD(JR) Act*.

Another approach, employed in the United States and Canada, is to say that a tribunal's decision on a matter of law will not be interfered with if there are a range of possible views, and the tribunal's conclusion has a rational basis, in the light of the overall statutory objective. Findings of fact will not be reviewed if they are supported by substantial evidence (*see* Craig, 339-47; de Smith *Review of Administrative Action* (4th edn 1980) 114. *See also* the proposal of Dixon J, that a body acts within power when it makes a decision that 'relates to the subject matter of the legislation, and is reasonably capable of reference to the power given to the body': *R v. Hickman: ex parte Fox* (1945) 70 CLR

598, 615). This does not, however, offer a prospective applicant any clearer idea beforehand of the likelihood of success than does the jurisdictional fact doctrine.

The function of the preliminary examination should be kept in mind when discussing the balancing of interests in relation to review. Its object is to ensure that a defendant should not go to trial on inadequate evidence. It is also to inform the defendant of the prosecution case. A clear statement of the goals of the committal process should appear in the legislation, encompassing both the filtering and the discovery functions. These should as far as possible be embodied in legislative form as expressions of the procedural entitlements of the parties. (*See* for instance *Magistrates (Summary Proceedings) Act 1971* (Vic.)) s.45B and s.46). Errors leading to failure to fulfil these functions should then be amenable to review.

Without attempting an exhaustive statement, it is considered that review should at least be available in respect of -

- serious errors affecting the magistrate's authority to take the examination and to decide whether to commit, such as misconstruing a statute, taking account of irrelevant considerations and having improper purposes;
- the non-existence of a valid information;
- denial of natural justice;
- misapplication of the statutory tests; and
- breach by the magistrate of mandatory statutory provisions.

Review should also be available on the grounds that there was no evidence to support the decision. Although this might be close to review of the merits, and it is on the whole desirable to limit any examination by a reviewing court of the evidence in the case, it is submitted that a decision taken without evidence will be clearly unjust.

As a general rule applications for judicial review should not be considered until the proceedings have been completed, although there should be discretion to hear cases at an earlier point where it would be unjust to let the matter continue.

Where should review take place?

The Administrative Review Council (ARC) which monitors developments in administrative law in the federal context, has recommended on many occasions that committals be reviewable by the state courts, rather than by the Federal Court under the *AD(JR) Act*. The legislature has not to date taken up this recommendation.

In 1985 the ARC supported the Attorney-General's proposal to exclude committal decisions from review under the *AD(JR) Act* but recommended the revival of the jurisdiction of the state courts to review such decisions. (The ARC advice appears in summary form in its *Annual Report 1984-85*, pp. 25-7).

In 1989 the ARC again recommended removal of review of committals back into the state courts. It based its advice primarily on the view that the Commonwealth used the state courts for prosecution of Commonwealth offences, and there were no compelling reasons to separate review of committals from other aspects of the court process. It considered that 'the law of the state or territory concerned, including the law relating to rights of appeal and review in respect of the criminal trial, should apply.' (ARC Report no. 32, 76. Interestingly, it did not recommend removal from *AD(JR) Act* review of the decision to prosecute, held to be available in *Newby v. Moodie* (1989) 83 ALR 523; *see* Report no. 32, p. 79).

It is argued here that so long as the ambit of review at the state level is uncertain, and restricted by anachronistic technicalities, returning review of committals to the states must be regarded as unrealistic. This was the view of the Attorney-General, and of a number of

respondents to the ARC review; (ARC Report no. 26, p. 12 and Report no. 32, p. 77). If, however, procedures at state level were reformed, it would overall be appropriate that supervision be provided by the state Supreme Courts, which have greater expertise in criminal matters than the Federal Court and which oversee the other aspects of the prosecution. It might also avoid the situation of having a state Supreme Court find there is no case to go to the jury, after several Federal Court judges have held to the contrary during the review process, as occurred recently in Victoria.

Formulating the avenues for review

The next question is how the chosen type of review is to be expressed. Review at state level is largely still governed by common law-based remedies and common law grounds of review.

There are arguments for and against codification of grounds of review. Expressing grounds of review in statutory form provides greater certainty and may simplify complex areas where there are conflicting cases. (*See* the Report of the Kerr Committee, pp. 62, 75. The approach in the *AD(JR) Act* was recommended for South Australia by the South Australian Law Reform Committee, in its Report No 82, Relating to Administrative Appeals in 1984). On the other hand it can be excessively rigid. It has been argued that, particularly in the area of administrative law, codification would prevent development, such as the developments in the area of fairness (Griffiths 1978, p. 69). The New Zealand Public and Administrative Law Reform Committee recommended against codification of the grounds of review in its 12th Report (1978) 25. Common law developments have already overtaken the *AD(JR) Act*. (Hotop 1985, pp. 353-4). ARC Report no. 32 recognises this risk, but sees it as merely reinforcing the importance of ongoing review, such as that for which the ARC itself was created.

It is suggested, however, that the values of certainty and simplicity are of greater weight here, and that legislative expression of the grounds of review is desirable.

How is state review to be improved?

A detailed proposal for the reform of judicial review in state courts is beyond the scope of this paper. Broadly, the alternatives would be the enactment of a state *AD(JR) Act*, or amendment to existing Supreme Court Rules or Magistrates Courts legislation.[1]

A central feature would be a mechanism for control of proceedings. Applicants could be required to obtain leave. This method of regulation is used in England; a similar effect is achieved by the order nisi procedure which applies to federal review other than under the *AD(JR) Act* (ARC 1986, p. 17ff; Campbell 1984, p. 87). The object would be to prevent unmeritorious cases being heard in full, before the court can decide whether to exercise its discretion to grant review, as currently occurs. Applications for review under the Victorian *Administrative Law Act 1978* follow such a two-stage process. Applications are initially made ex parte, and the court has power to refuse the application, 'notwithstanding that a prima facie case for relief is disclosed . . . if satisfied that no matter of substantial importance is involved, or that in all the circumstances such refusal will impose no substantial injustice upon the applicant' (s.4(2)). On the other hand, there has been a movement away from the order nisi procedure in several jurisdictions, and a leave requirement received little support in the ARC's consultations. A two-stage leave process was seen as increasing expense, complexity and delay. It was also not clear that it would be effective (ARC 1986, pp. 19-21).

Alternatively the Supreme Court could be given a wide discretion to refuse relief. Such a discretion has been articulated by the Federal Court in relation to review of committal decisions, by the requirement of 'exceptional circumstances'. The Federal Court Rules already provide for refusal of an application which is an abuse of process, or frivolous or vexatious, and there have been moves towards extending that power. It is suggested that it

would be desirable if such a discretion were set out in the legislation. It should also be made clear that the discretion is capable of being exercised, in appropriate circumstances, at the outset of proceedings.

The ARC considered the option of expressly excluding from review certain matters such as interlocutory decisions. This could, however, lead to injustice in some circumstances, for example in the case of admission of evidence against the public interest, as in *Young* v. *Quin* (1984) 56 ALR 168, and *Sankey* v. *Whitlam* (1978) 142 CLR 1. However, the desirability of avoiding interference with ongoing criminal proceedings, where review is likely to be available at the conclusion of those proceedings, could be included as a matter to be taken into account when deciding whether to allow an application (ARC 1986, p. 29; ARC 1989, pp. 81-3).

To conclude, it has been argued, first, that the preliminary examination should be amenable to judicial review. This now seems to be generally accepted. Secondly, however, the technical requirements of the remedies and the legacy of earlier decisions on review mean that the availability of review in the state courts is uncertain. Although review is more successfully provided by the Federal Court under the *AD(JR) Act* in relation to federal offences, it is considered that it would be preferable to have all committals reviewed in the state courts. This is an additional reason for improving state review powers.

Finally, it has been argued that, in view of the seriousness of the interests which can be affected, the scope of judicial review should be wide enough to ensure fairness to the defendant, although stopping short of re-determining the merits. Most importantly, a broad discretion should be reposed in the court to refuse relief.

Endnotes

1. The Australian Capital Territory has recently enacted an *AD(JR) Act*. In Victoria, the *Administrative Law Act 1978*, which provides simplified procedures for applications for review, but does not codify grounds of review, currently excludes review of committal decisions by its definitions of 'tribunal' and 'decision'. The *Magistrates Court Act 1971* (Vic.) provides wide review powers, which have however been read down by the courts in relation to committals, notably in *Phelan v. Allen* (1970) VR 219; equivalent legislation in Western Australia expressly provides for review of committal proceedings: *Justices Act* 1902 (WA) s.197 and s.4.

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