

Legal Aid and Committals

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This paper will for the most part refer to Victoria but does not necessarily represent the settled policy of the Legal Aid Commission of Victoria. Nevertheless, it is the Commission's view that committals do have a future and that, properly utilised, they can aid the effective administration of the criminal justice system and thereby benefit all of the players in that system. Any jurisdiction that abolishes committals will not proceed for very long without introducing some form of pre-trial or preliminary hearing. Rather than throw out the baby with the bath water, it would be better to modify existing procedures so as to have them operate effectively.

The history of legal aid and committals in Victoria is a chequered one. In 1969 a *Legal Aid Act* was passed in Victoria which gave the responsibility for providing legal assistance in serious criminal matters, that is indictable offences, to the Public Solicitor's Office. This Office was funded by the state government and its staff were state public servants. The responsibility for the provision of legal assistance in matters other than indictable crime lay with the Legal Aid Committee. This Committee was funded to some extent by the state government and had a permanent secretary with a support staff none of whom were state public servants. The committee was made up of private practitioners representing the Law Institute and the Bar Council. These persons considered applications for assistance in all civil matters and summary crime including committals.

The reality of the situation after the advent of the *Legal Aid Act* of 1969 was by and large what had been the case prior to that—legal assistance was not available for committal proceedings. The result was that the majority of persons appearing in committal proceedings were unrepresented and the vast majority—in the order of 97 per cent—were committed to stand trial.

More or less contemporaneously with the developments of the 1969 legislation and its enactment, there was growing concern within the community that the real needs for legal assistance were not appreciated let alone met by the existing legal aid bodies. This concern did not for the most part reflect on either the 'bona fides' or commitment and dedication of those involved in the delivery of legal aid through the established bodies, that is the Public Solicitor's Office and the Legal Aid Committee. On the contrary it was directed to highlight the inadequacies of the funding of those bodies and the failure to come to grips with the real level of need for legal assistance in the community. With hindsight, it can be seen that the perception by the Secretary of the Legal Aid Committee that the expression of concern by community groups was in some way a criticism of the Committee was not as unfortunate as it seemed at the time. The perception that the Committee was 'under attack' made good press and hence there was media coverage of the need for more adequately funded schemes and more comprehensive schemes than presently existed.

Those agitating for more legal aid were not content with decrying the current situation. They were prepared to do something positive to meet the unmet needs and the first of the community legal centres, the Fitzroy Legal Service, was established. One area in particular in which it was perceived that there ought to be representation was committals. This was an area to which the Fitzroy Legal Service paid more than lip service, but with its extremely limited resources was unable to do very much to plug what was seen as a gaping hole in the criminal process.

One of the Fitzroy Legal Service's early full time co-ordinators was Julian Gardner who became the first Director of the Legal Aid Commission of Victoria. Given the background that has been set out, it is not surprising that when the Legal Aid Commission began operating in 1981, it did so with the avowed intention of providing assistance extensively in committal proceedings. The Commission's good intentions in this regard soon foundered on the rock of budgetary constraint. Owing to a dearth of dollars the Commission had to retreat to a position where assistance was available only in cases where the accused was charged with murder or rape. The rationale for the first was the seriousness of the charge and for the latter the fact that the issue was frequently not the act itself but the circumstances surrounding it such as intent and the issue of consent. Apart from those cases, assistance was available for committal proceedings only where exceptional circumstances existed. Over a period of time, it came to be accepted that the issue of identity constituted an exceptional circumstance that warranted assistance being granted.

Hence the situation was somewhat improved on pre-Commission days in that persons charged with murder or rape were assured of representation at committal proceedings provided they were otherwise eligible for assistance and generally, in cases where identity was an issue, persons were assisted at the preliminary hearings. However, it was still far from satisfactory. In fact it was most unsatisfactory in that accused persons were more often than not unrepresented at this stage of proceedings and in some cases one of a number of co-accused might be represented leaving the others to sit out the hearing feeling no doubt that their interests were prejudiced by their lack of representation. How much more terrifying would this procedure be for persons not fluent in English or labouring under some other disadvantage.

In 1984 the Commonwealth Legal Aid Council conducted a conference—the focus of which was the question 'Is the existing legal system wasting legal aid money?' Julian Gardner the then Director of the Legal Aid Commission of Victoria presented a paper at that conference in which he spoke of areas of the legal system which cause excessive demands on legal aid.

One such area that he identified was that of committal proceedings. There were no half measures in Julian's approach to this issue. He did not advocate additional funding. Nor did he recommend modifications to or a streamlining of procedures. He did suggest the abolition of committal proceedings and indicated not only that this would remove an area of the legal system causing excessive demand on legal aid but also that, in his view, their abolition would not interfere with the balance between, on the one hand, the interests of the community in having persons accused of crime tried or otherwise dealt with at the earliest possible time and, on the other hand, the need to protect those charged with crime from unacceptable risks of wrongful conviction.

In his paper Julian Gardner quoted Lord Lane who said that 'old style committal proceedings on consideration of evidence are absurdly wasteful of Magistrate's Courts time and are too often used simply as a dress rehearsal for a trial'. The former Director of Legal Aid then went on to say 'others have described committal proceedings as some sort of fishing expedition. If this description is apposite then it should be understood that it is not of the nature of fishing by the complete angler, resplendent in deer stalker, hat and waders casting with a fly for an intelligent trout. Rather it is a trawling or dredging operation designed to survey large expanses of the seabed in order to evaluate the future commercial exploitations of the fishing grounds'.

The paper went on to develop the case for the abolition of committals not only on budgetary grounds, but more importantly on the basis that the objectives that traditionally committals are designed to achieve are either not met or alternatively can be met by other procedures. The consequence being that apart altogether from financial considerations there was no justification for committal proceedings as part of the criminal justice system. This added a new dimension to the debate with respect to committals and legal aid. Previously it had been accepted that committals were not only an integral part of the criminal justice process but also a necessary and valid part. Committals were not assisted because funds were unavailable. Now it was being said that even if funds were available their expenditure on committal proceedings was unnecessary and failed to achieve their objectives or at least, that their objectives could be better achieved at much less cost.

The then Director of Legal Aid was not the only one questioning the validity and value of the committal process. The end result in Victoria of the calls from various sources for the abolition of committal proceedings was a request in 1985 from the then Attorney-General, Mr Jim Kennan (who incidentally has recently taken up that portfolio again) to the Director of Public Prosecutions Mr John Coldrey, QC to convene a committee to evaluate the role of committal proceedings in the administration of criminals.

That Committee on which the Legal Aid Commission of Victoria was represented reported to the Attorney-General and its report was published in February 1986. The Preface to the Report sums up the Committee's findings as follows:

The Committee was of the unanimous view that the committal hearing constituted a vital cog in the machinery of the criminal law. Properly conducted, it had the capacity to filter out inadequate prosecutions, to refine the issues to be contested at any subsequent trial (thereby reducing its length) and to facilitate pleas of guilty by demonstrating the strength of the Crown case.

Whilst the revelation of the Crown case can be accomplished administratively by the production of documents, there is a vast difference between subjecting an accused person to trial on the basis of typewritten statements of unknown reliability and presenting an accused person for trial upon the basis of evidence, the potency of which has been tested by cross-examination.

Arguably the Crown would be creating a 'paper tiger' devoid of forensic teeth and it is not difficult to predict the lengthening of criminal trials as the scene of battle is transferred from the committal to the voir dire.

Moreover, the Crown itself may well be disadvantaged if it is forced to conduct adversarial proceedings in the superior courts without having had the opportunity to realistically assess the viability of its own case.

Whilst supporting the retention of the committal the Committee was not sanguine enough to believe that it was currently fulfilling its purpose with optimum efficiency. Modifications of the process are necessary to facilitate maximum effectiveness.

Those modifications recommended by the Committee were enacted and implemented. Hence committals proceedings in a revised form lived on in Victoria to fight another day. Following the publication of this Report and the implementation of its recommendations the guidelines for assistance in committal proceedings were reviewed and expanded by the Legal Aid Commission Victoria. The present guidelines are as follows:

- assistance will be provided in matters of homicide and in matters where consent or identification is an issue;
- assistance may be provided in any other matters where the Commission is satisfied on the material provided that a benefit will result from representation.

These guidelines clearly provide scope for representation at a greatly increased number of committals provided those representing the accused can demonstrate to the Commission that a benefit may flow from representation at that stage. To effectively demonstrate the benefit required the practitioner acting for the accused whether 'in-house' or in private practice needs to have a detailed knowledge of the case and the issues involved. Frequently assistance is granted for a committal on the basis that the benefit to be derived is the resolution of an issue at a rate less expensive than it would be in a trial court. At times, on the basis of the second leg of the guideline, assistance is provided for a committal even where there is to be a plea of guilty on the basis that material favourable to the accused can be more readily elicited at that stage of the proceedings.

The Criminal Delay Reduction Program

The next and current chapter in the history of Legal Aid and committals began with the establishment of the Criminal Delay Reduction Program. The Committee overseeing that program was to be composed of the chief executive officers of the various bodies involved in the criminal justice system. On that basis the Director of Legal Aid became a regular attendee at the committee meetings.

To assist it in its work and to obtain feedback from the coal face, the Committee accepted a suggestion that a working party of those involved in the court process should be established to consider practical day-to-day problems, and to present suggestions for the improvement of the system that would in particular reduce delays in the processing of cases. The Legal Aid Commission along with the listing Directorate, the Director of Public Prosecutions, the Bar and the police is represented on this working party.

Both the head Committee and the working party have developed various initiatives to reduce delay. The aspect, however, relevant to these proceedings has to do with changes to the committal proceedings.

These proposals emanated from the working party and received the full endorsement of the head committee. They have been in operation since early January this year and to date have been working extremely well. This is due in no small part to the efforts of staff of the Legal Aid Commission and in particular members of its Criminal Law Division.

These procedures oblige an informant to complete and serve the 'hand-up brief' on an accused within four weeks of the charge being laid if the accused is in custody and within 12 weeks of charging otherwise. Each committal is booked for a mention day: custody cases eight weeks after charging, other cases 16 weeks after charging. The parties including the police must appear on the mention day and if any extensions of time are sought, they have to be sought from the magistrate on the mention. Thus, extensions are tightly controlled.

The original idea was to have both the Director of Public Prosecutions and the Legal Aid Commission involved in the process so that on the mention day negotiations and having the matter dealt with summarily or with respect to a plea could be carried out and concluded. Owing to lack of resources the DPP has been unable to participate to the extent envisaged. Despite no additional resources, the Legal Aid Commission has nevertheless become heavily involved so that on mention days cases can be dealt with summarily or pleas to appropriate charges can be entered and the matter listed for hearing in the Country Court as a plea of guilty no more than three months beyond the date of the mention.

Under this scheme more cases are appropriately being diverted to the summary jurisdiction of the Magistrate's Courts, more pleas of guilty are being identified at an early

stage and more realism is being injected into the type and number of offences with which persons are being charged and in respect of which they are ultimately being presented to be dealt with in superior courts.

Conclusion

Committal proceedings will be of value only to the extent that they are utilised effectively. By and large a necessary pre-condition to their effective utilisation is legal representation. This means in reality that unless legal assistance is readily available persons appearing at committal proceedings will be unrepresented. Approximately 75 per cent of persons charged with indictable offences have in the past been legally assisted. Hence it is apparent that, if the efficacy of committal proceedings is dependent on accused persons being legally represented that legal aid has a large role to play.

The role of the Legal Aid Commission of Victoria in committal proceedings has varied. However, the benefits of early involvement are now recognised and at present a further expansion of the guidelines for assistance in committal proceedings is under consideration. There is no doubt that the Commission now sees real benefits flow from early involvement in cases involving serious criminal offences. Early investment of resources pay dividends in the early identification of pleas of guilty and significant reductions in the length of subsequent trials.

The effective involvement of the Legal Aid Commission in the current committal process is testified to in a letter dated 27 February 1990 from the Chief Magistrate to the Director of Legal Aid. The Chief Magistrate says:

It has been very apparent to the magistrates sitting in this list that a large number of defendants have had advice from the Legal Aid Commission prior to attending court. Further, it is clear that the advice has been on the basis of a thorough consideration of the individual case, rather than some sort of across the board information given to those defendants who will not be legally aided at their committal but will be at their eventual trial.

I know that this involvement with the committal mention system is difficult for you, given the unavailability of additional resources. In these circumstances I am very grateful to your office for its commitment to the implementation of the new system, and its assumption of the additional workload.

As was earlier indicated, it is the view of the Legal Aid Commission of Victoria that committals properly utilised do have a future in that they benefit all participants in the criminal jurisdiction.

Reference

Advisory Committee on Committal Proceedings 1986, *Report on Committal Proceedings*, (the *Coldrey Committee Report*), Victorian Government Printer, Melbourne.