The Future of Committals—a Defence Lawyer's Perspective

Terry O'Gorman
O'Gorman & Robertson
Solicitors
Queensland

The push to abolish or severely restrict committal proceedings has been justified on a number of grounds. Greater list management efficiency in the superior courts is one. Saving money is another. There have been a host of other 'justifications' including saving witnesses the trouble and trauma of giving evidence twice, namely at committal and at trial.

But, with the greatest respect, the most unjustified 'justification' has come from two of the country's most eminent jurists, former High Court Chief Justice Sir Harry Gibbs and former High Court Justice Sir Ronald Wilson.

At the Australian Legal Convention in Perth in September 1987 Sir Ronald Wilson said:

> A number of jurisdictions have followed English precedent in placing the responsibility for prosecutions in the hands of Directors of Public Prosecutions, being independent, highly qualified professionals having a status equivalent to a judge. Other jurisdictions will be following suit. This development should render the committal proceeding unnecessary and pave the way for its abolition as has recently been recommended by the New South Wales Law Reform Commission. Only very recently New South Wales joined the group of states who have a Director of Public Prosecutions with independent authority to decide upon prosecutions. New South Wales has also recently joined the group of states which has significantly modified previous committal procedures and introduced a system of paper committals (Lee 1988).

Sir Harry Gibbs took up this position when, at the Second International Criminal Law Congress at Surfers Paradise in June 1988 he said that committal proceedings before magistrates served two main functions. The first was to ensure that the accused was not put on trial unless there was either a probability of conviction or a prima facie case against him. Sir Harry said this was an essential function, but one that could now be performed by DPPs.

Sir Harry went on to say that if it were accepted that DPPs were people of integrity, impartial, experienced in the criminal law and free from political influence, a ruling by the DPP was just as convincing as that of a magistrate. Sir Harry said that the second function of committal hearings was to apprise the accused fully and in detail of the case that had been brought against him or her. This could be done through the provision of full statements by all the witnesses before the trial took place (*The Australian*, 22nd June 1988, p. 4).

At that same conference, John Coldrey QC, Victorian State Director of Public Prosecutions, supported the retention of committals saying that they were no more expensive than possible alternatives (*The Australian*, 22nd June 1988).

I do not propose to argue with the contention that DPPs (the particular incumbents) are people of integrity, experienced in the criminal law and free from political interference—but, to argue that they are impartial is absurd.

Impartial, one may ask, as between whom? And, even assuming a particular incumbent of that office may be impartial, one cannot say the same of his staff prosecutors. Prosecutors are prosecutors and to say that a Chief Prosecutor (a DPP) is equivalent to a judge is to demean the independence and status of the judiciary.

Some comments I will make about prosecutors will, perhaps, offend some. That is regrettable. In my experience over the last 15 years practising almost exclusively in the criminal defence field I have come across some fine prosecutors whose ethical standards, fairness and competence were beyond reproach. I have also experienced prosecutors whose standards on these criteria have been poor.

A particular legal community in any state knows which prosecutors are trustworthy and which are not. Those who are not, though, cause significant damage by their unfair conduct in, say, not revealing a statement in their possession which may point to the innocence of the accused. But the older and more experienced such a prosecutor becomes, the less amenable he or she becomes to what few restraints are available to deal with dishonest or less than proper behaviour.

Therefore, for it to be argued that the impartiality of the DPP office is a suitable alternative for the magisterial committal proceeding, is breathtaking. Had such a suggestion come from persons other than those of the status of Sir Harry Gibbs and Sir Ronald Wilson, not a moment's notice would have been paid to it. With the greatest respect to both ex-justices, I suggest no further notice should be paid to it.

While a particular incumbent of the Office of Director of Public Prosecutions may be impartial, there is no system capable of being devised to ensure that all prosecutors under his command display such a quality in the handling of their cases.

The longer a person prosecutes the more likely he or she is to succumb to partisanship, to form alliances with particular police officers or groups of police and to fall into the 'them and us' mould that characterises the attitude of too many police towards the criminal justice system.

This paper will argue for the retention of the full committal. In doing so it will endeavour to show that the full committal serves a vital pre-trial discovery purpose that no other procedure can achieve.

Many who argue for the abolition of committals do so for reasons they are not completely honest about. I am still waiting for the conference or platform where a police spokesman admits that the primary reason police want committals abolished is that they make life more difficult for police by allowing the defence to come by evidence showing that the police case is not as strong as would be otherwise contended by the prosecution.

Some who argue for the restriction or abolition of committals have never had to defend. The taking of instructions is made more realistic and fruitful if those instructions have been tested before trial against the evidence that emerges from a proper, detailed committal cross-examination.

Advantages of Committal Hearings

The substantial advantages to the accused of a preliminary investigation of the Crown case against him were outlined by Mr Justice Fox in *R v. Kent, ex Parte Macintosh* (1970) 17 FLR 77:

> The main advantage to the accused is probably the knowledge he gained before the trial of what the Crown witnesses say on their oath when constrained by the rules of evidence and when cross-examined. This is of course something distinctly different from, and usually of greater benefit than, a knowledge of what was said in private by the prospective witnesses to the police. It is common experience that one admission made to the accused's counsel at the preliminary examination, even on a collateral matter, can make all the difference at the trial. There are other advantages, such as seeing the witnesses and observing their demeanour, which are well recognised, but it is not necessary to discuss them in detail. Whether accused persons should have these advantages (or this protection) is not to the point. The fact is that the law provides a procedure which has the consequences mentioned. There can be no doubt that the preliminary examination forms an important part in the whole trial process and that where there is no preliminary examination the accused person concerned can be at a serious disadvantage as compared with others who have the charges against them dealt with in the ordinary way (Lee 1988).

The Law Society of New South Wales 1989, listed the desirable consequences of committals:

> Committal hearings produce a number of very practical and desirable consequences. These include:
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> 1. The accused may realise that he/she cannot successfully defend a weak case and may plead guilty (without committal he/she would defend a trial).
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> 2. The magistrate in some circumstances may offer to hear the case without the public inconvenience and expense of summonsing a jury.
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> 3. The Crown, upon a further examination of it's case, may abandon certain charges.
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> 4. In the light of the evidence emerging from committal proceedings, the Crown and the defence can engage in a meaningful discussion of 'charge bargaining' whereby the accused offers to admit guilt to a lesser charge in return for the Crown abandoning the greater.
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> 5. Committal proceedings inevitably narrow the issues for trial and save considerable time and expense.
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> Abolishing committals may leave the weaknesses of the prosecution case (or in some instances the defence case) concealed. This may result in defence and prosecution lawyers being unwilling to make confessions. Confessions usually reduce the length of trials.

These issues are substantial and warrant closer consideration. All of them were shown in operation in a particular case heard in Brisbane last year.

That case was a Commonwealth committal which ran for 16 weeks. It involved nine defendants charged with conspiring to import cannabis and an allegation that a substantial quantity of cannabis had been imported in 1986 and that a further substantial importation was planned in 1987-88. As a result of the disclosure and discovery revealed by such a committal, a projected 12-18 month trial was avoided. If such cross-examination had not been permitted and the accused had been sent for trial on either no committal or a severely restricted one, there inevitably would have been a trial. The accused in that case could be said by the end of the committal to be aware of the strength of the case against them. Having an accused person sit through a committal is an excellent way of impressing upon

him that he, too, will, on trial, be as rigorously cross-examined on his instructions as the police witnesses were at committal.

This is a salutary manner in bringing home forcefully to an accused the facts of life.

Further, as a result of this 'full' committal, significant charge bargaining occurred as a result of which the prosecution finally accepted the validity of the defence contention on a significant part of the prosecution case which had been hotly contested throughout the committal.

Delay

The delay between committal and trial in New South Wales stands at about two years (Law Society of New South Wales 1989).

It is suspected that this quite unacceptable delay is one of the driving reasons behind the emasculation of committals in New South Wales. Such delays do not exist in Queensland. Due to the proficiency in listing achieved by Mr Justice Carter in the Supreme Court and His Honour Judge Helman, Chairman of the District Court, the average time from end of committal to trial is less than six months.

As one who has been wont to criticise much that has been wrong with the criminal justice system in Queensland over the years, such listing efficiency is quite outstanding. An examination of how this came about is instructive as it shows that listing practices, not lengthy committals, has been the principle cause of delay.

Queensland Supreme and District Court listing procedures were, up until a few years ago, in a fairly dilapidated state. There were lengthy delays from committal to trial. Listing was done by legally unqualified clerks in the Crown Law office. Listing practices were erratic and the system allowed for judge shopping.

The system which now operates is that, three weeks after committal, the entire committal transcript is available. An indictment is presented at a special listing call-over held before the listing judge within about seven weeks of the end of the committal. Usually, on this occasion, a trial date is set. Trials are invariably heard within six months of committal and, often, in a much shorter period.

The listing system operates very effectively due to the fact that Mr Justice Carter and Judge Helman respectively have held the listing judges' position for a number of years, and consequently, have instituted and maintained a system that is both flexible and definite.

Where a committal is abolished or significantly restricted, it would inevitably lengthen the list in the Superior Court with a resultant economic penalty to be paid as it is now well accepted that Superior Courts are considerably more costly to run than Magistrate's Courts.

Improvements for Committal

If, by enforceable procedures backed up by real sanctions, police were obliged to reveal all evidence in their possession at committal hearings, committals themselves would be shorter as the lengthy cross-examination needed to extract answers from unwilling witnesses would be unnecessary.

In addition, the compulsory delivery of full prosecution briefs to the defendant at least, say, 14 days before committal would cut down on the length of committals. Such compulsory delivery must carry real penalties to be levied against investigating officers if not complied with.

Queensland at the moment provides a good illustration of the problems and the solution relating to pre-committal discovery. The problem is easily identified and the solution simple.

In August 1988 a directive was issued that police officers, pursuant to the *Director of Prosecutions Act 1984* (Qld), must deliver to the defence all statements to be used at a

committal at least seven days in advance. The guideline is instructive. It is outlined as follows:

> 1. Subject to the exceptions set out in paragraph 2 all admissible evidence collected by the investigating police officers should be produced at committal hearings.
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> 2. Evidence need not be produced when:
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> (a) It is unlikely to influence the result of the committal proceedings and it is contrary to the public interest to disclose it, e.g.
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> (i) it deals with a matter affecting national security;
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> (ii) it contains details that if they become known it might facilitate the commission of another offence or alert someone not charged with an offence that is a suspect;
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> (iii) it discloses or is likely to disclose the method of surveillance or detection of offences or means of gathering evidence;
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> (iv) it contained information likely to lead to the identification of an informant; and
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> (v) it contains matters of considerable private delicacy to the person who can give the evidence or matters that, if published, would be likely to cause violence or serious domestic disharmony.
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> (b) It is unlikely to influence the result of the committal proceedings and the person who can give the evidence is not reasonably available or his evidence would result in unusual expense or inconvenience or produce the risk of injury to his physical or mental health provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence.
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> (c) It would be unnecessary and repetitive in view of other evidence to be produced, provided a copy of any written statement containing any evidence in the possession of the prosecution is given to the defence.
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> (d) It is reasonably believed the production of the evidence would lead to a dishonest attempt to persuade the person who can give the evidence to change his story or not to attend before the court of trial, or to an attempt to intimidate or injure any person.
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> (e) It is reasonably believed the evidence is untrue or there is such doubt attaching to the evidence it ought to be tested upon cross-examination, provided the defence is given notice of the person who can given the evidence and such particulars of it as would allow the defence to make its own enquiries regarding the evidence and reach a decision as to whether it will produce that evidence.
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> (f) It is reasonably believed the evidence is a result of a contrivance of the defendant or some person acting in the interest of the defendant, e.g. it takes the form of a false, self-serving statement of the defendant.
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> 3. Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.

> 4. Copies of written statements to be given to the defence including copies to be used for the purposes of an application under s.110A of the Justices Act are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them: whenever possible they should be given at least seven clear days before the commencement of the committal proceedings.
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> 5. In all cases where admissible evidence collected by the investigating police officers has not been produced at the committal proceedings a note of what has occurred and why it occurred should be made and included in the police brief delivered to the office of the Director of Prosecutions, if a copy of a statement containing evidence not produced at the committal proceeding has been given to defence, the note should record that fact.
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> 6. These guidelines should apply as from 15th August 1988.

This directive issued because formal liaison meetings between the Bar, Law Society and senior police over a number of years failed to solve the endemic problem of late delivery of briefs. For a short while after its issue, the directive had the desired effect—briefs were being delivered within the time stipulated. But the old ways eventually returned because the guidelines have no punitive teeth.

Frustrated police prosecutors confide that while notices of committal dates are sent out immediately after committal dates are set, investigating officers frequently ignore the requirement to have the brief in within the seven-day period.

Individual prosecutors cannot do anything about it. Apart from the fact that prosecutors are often allocated a brief just before a matter comes on for hearing, those prosecutors who are allotted a matter well in advance are in no position to exert any force over a recalcitrant investigating officer. Often the investigating officer is more senior in rank and more experienced than the police prosecutor. Consequently the police prosecutor is ignored.

There are no effective steps taken by those heading the Police Prosecution Corps to remedy this state of affairs. I was told recently that the Inspector in Charge of the Police Prosecution Corps 'talks to' the Inspector in Charge of the squad containing the recalcitrant investigating officer. This is worse than useless.

A system must be put in place (and for the economic rationalist this will not cost money) where an investigating officer commits a disciplinary offence for failure to deliver a brief on time. Not only are defence lawyers and their clients inconvenienced by late delivery of briefs but disruption is caused to civilian witnesses who are kept waiting in court corridors whilst statements are digested and discussions had as to which witnesses are needed for cross-examination.

The solution to the problem has already been demonstrated by two other prosecution agencies operating in Queensland—the Commonwealth Director of Public Prosecutions and the Special Prosecutor's Office set up in early 1989 to prosecute cases arising out of the Fitzgerald Inquiry. For many years now the Federal DPP office in Queensland has provided statements to the defence well in advance of committal—often at least two weeks beforehand.

The Special Prosecutor has handled some complex and lengthy prosecutions in the last 12 months. In almost all cases in which my firm has been involved, these briefs have been professionally and timely delivered many weeks in advance of committal.

The rejoinder put up by Queensland Police when the performance of the Special Prosecutor's Office in delivering early briefs is discussed, is one of 'oh, they have lots of resources'. But an examination of the practices of the Special Prosecutor's Office reveals that to be irrelevant. The Special Prosecutor's Office tells police, within a reasonable time framework, when briefs are to be ready and if they are not, they pay the penalty.

The Federal DPP has a practice whereby liaison is had with a nominated individual at the AFP head office in Brisbane whose task it is to ensure that briefs are delivered well in advance. That system works well.

The new command structure under the just passed Queensland *Police Service Administration Act 1990* combined with the new discipline code to be produced soon will, hopefully, provide the framework for forcing Queensland Police to the position which the Australian Federal Police and police attached to the Special Prosecutor's Office have reached. But without real sanctions, a system of time limits for brief deliveries simply does not work. Sanctions, combined with proper supervision of arresting officers by their superiors, will address the attitude of many police of providing briefs as late as possible, to make it as difficult as they can for the defence to prepare for and conduct proper cross-examination.

A further device to reduce the delay caused by late delivery of committal briefs is to have a system of case management introduced in the Magistrate's Court for committals.

At the moment when a matter is set for committal, the defence is expected to state how long a particular listed committal is expected to last when no prosecution statements are ever available to the defence at that time. This makes such an estimate often impossible.

A procedure is needed where, at least once between mention and committal date, prosecution and defence are required to attend a case conference where the prosecutor reveals the state of readiness of the police brief and, if difficulties are being experienced, appropriate enforcement action can be taken by a case management magistrate. Such court-managed oversight of the readiness of a committal brief ought to encourage prosecution compliance with deadlines.

A system of minimum deadlines for committal brief delivery is workable. While my practice is primarily Queensland-based, I am also admitted in Western Australia. The Western Australian system of not providing a committal date until the statements have been provided to the defence seems to work well.

Conclusion

There has been very little research done on whether committals add to the delay experienced in some jurisdictions in concluding a criminal charge. I contend that committals do not add to the delay problem, where it exists—rather, it assists in the shortening of superior court trials.

Delay is being used as a convenient excuse by those who are opposed to committal hearings for other reasons. As much was admitted by New South Wales Attorney-General John Dowd when, at an Institute of Criminology Seminar in Sydney in 1989 entitled 'Delay in the Criminal Justice System', Mr Dowd stated (in the context of affirming his government's commitment to the abolition of committal proceedings) that his aim was to use the current climate of concern over court delays to introduce long overdue reforms not necessarily connected with delays (*Legal Service Bulletin*, Volume 14, No. 6, December 1989, p. 278).

Where research has been done, the percentage of full committals compared to shorter or paper committals is quite surprising. A Home Office Statistical Department survey carried out during a one month period at all Magistrate's Courts in England and Wales in January 1981 found that 92.4 per cent were paper committals and just 7.6 per cent were full committal proceedings ('The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System' [1985] *Criminal Law Review*, p. 355 at 357).

To abolish or severely emasculate committals is a serious step. It interferes with a constitutional right established over three centuries and should not be tolerated save on the most overwhelming evidence.

The Chief Justice of the High Court of Australia (Sir Anthony Mason) put the position into perspective when addressing the Society for the Reform of the Criminal Law in May 1989. Addressing the issue of delays, the Chief Justice said:

> Unfortunately the need to eliminate delays sometimes creates pressures to alter or qualify traditional rules and procedures designed to protect the defendant, for no good reason other than the desire to facilitate the prosecution case. Quite apart from the increased volume of cases coming before the courts, the number of long criminal trials is greater than it used to be. Legal aid is by no means the only cause. Criminal trials are becoming more complex. The present tendency to bring conspiracy charges (despite judicial discouragement) notably in relation to drug and taxation offences, is one factor. Conspiracy trials are notorious for their complexity.
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> [These] criticisms come at a time when national economic stringency is sapping the willingness of the Executive to expand the resources and facilities of our system of justice, including the criminal justice system. We should not allow these pressures to obscure our pursuit of justice. It would be false economy indeed to permit cost savings to prejudice the attainment of justice. Nothing could be more destructive of the fundamental values of our society. Yet there is a risk that the fashionable emphasis on economic rationalism may devalue and set at risk standards which are fundamental to a just society (*Australian Law News*, May 1989, p. 12).

As indicated above, there are no delay problems in Queensland. Because New South Wales has a delay problem there is no reason why the rest of Australia should go along with a move to abolish/restrict committals especially when it has been tacitly admitted by the New South Wales Attorney-General that committals do not necessarily contribute to the delay problem. To have the prosecutors become the persecutors if the role of the committal is diminished, cannot be tolerated.

It is interesting to conclude this discussion by focussing on the difference in position on this topic between police spokesmen and the Federal Director of Public Prosecutions. At a national conference on crime and police powers held in Sydney in March 1989 the Deputy Commissioner of the Australian Federal Police, Mr John Johnson said:

> Long committal hearings tied up police time and money and had become a waste of time. Directors of Public Prosecutions could now decide whether or not to go ahead with trials, bypassing the committal process (*The Age*, 22nd March 1989, p 15).

However, the Federal DPP, Mr Mark Weinberg QC, defended the committal as:

> It was an essential part of the criminal justice system especially in complex crimes, to assess witnesses' behaviour in committals to make a proper decision to prosecute. I would see abolishing committals in this country as an unmitigated disaster (*The Age*, 22nd March 1989, p. 15).

Mr Weinberg has defended as well as prosecuted. Mr Johnson, I suspect, has not.

References

The Law Society of New South Wales 1989, Committals and the Right to a Jury, unpublished paper.

Lee, Justice 1988, 'In defence of the Committal for Trial', paper presented at the Second International Criminal Law Congress, Surfers Paradise, June.