

Committals again under the Microscope

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It is not surprising that the use of committal hearings in the processing of indictable criminal cases is again under close scrutiny. The traditional committal hearing was one at which the witnesses for the police case, or at least most of them, appeared at the Magistrate's Court, gave oral evidence, and were cross-examined by the defence. After the evidence, and any submissions made by the parties, the judicial officer decided whether the accused had a case to answer, and if so, committed the person for trial by judge and jury.

During the 1970s and '80s all Australian jurisdictions carried out a variety of investigations into their committal hearing systems. As a result of the adoption of recommendations made by many of those inquiries, the systems have changed dramatically. The modern committal system has become largely a paper shuffling exercise; the statements of witnesses are collected, collated, sent back and forth between the parties and then bundled up for assessment by the Magistrate's Court. But in various ways the right to call witnesses to give oral evidence and to be cross-examined on that evidence has been retained.

The vast majority of Australian committals are now of this paper, or 'hand-up brief', type. In comparison with the system of yesteryear, it might well be argued that what we have now is the 'Claytons' committal system; that is, the committal system you have when you don't really have a committal system. Generally, today's committal is not so much a judicial and forensic exercise as a bureaucratic, procedural and administrative one.

The main impact of the new 'paper' approach has been to save a good deal of time and expense; yet there are still a number of very long, complicated and expensive committal hearings, especially in states such as New South Wales and Victoria. The fact that the great bulk of committals are now paper shuffling exercises—yet there are still some which cause headaches because of their length and expense—has led governments to question very seriously, especially on the grounds of cost-benefit efficiency, whether committal hearings have any future as part of the criminal justice system.

The New South Wales Initiative

This is a bullet which the government of New South Wales has well and truly bitten. In that state there is a legislative proposal effectively to abolish committal proceedings. The Director of Public Prosecutions will make the decision whether to commit for trial, and if so, upon what charges. It will still be possible, however, for certain witnesses to be called to give oral evidence and to be cross-examined in the presence of a magistrate. The function of the magistrate, it seems, will be limited to refereeing the process of examining and cross-examining the witnesses.

There is a great deal of controversy and unhappiness in New South Wales about this proposal. Whatever the outcome might be, it can be suspected that its impact will not be limited to New South Wales because there is likely to be catalytic effect in other states, which will now be looking at their own systems on a first principles basis. My suspicion is that governments in other states have toyed quite seriously with the abolition of committal proceedings but, anticipating significant opposition, have decided against it.

A Personal View

While much of the conference content assumes that committal hearings will be retained in one form or another, the threshold question—stimulated so forcefully by the New South Wales initiative—is whether committal proceedings should be abolished or retained in their present, or some other, form. I am in the retentionist camp. It strikes me that charging a person with an indictable criminal offence is one of the most serious things that can happen to anyone in our society and when the power to do that is in the hands of agencies of the state, I believe that we should tread, as we have in the past, very warily.

It seems to me that a person charged by the police or some other law enforcement agency with an indictable criminal offence (leaving aside for the moment the important question of which offences are, and which should be, indictable) should have the right to go before an independent judicial officer, in an open court, represented by a lawyer and argue that there is an insufficient basis to justify subjecting him to the trauma, and often, expense, of a criminal trial before judge and jury. What precise form that hearing takes is another question which will no doubt be the subject of discussion at this conference.

Clearly, many people who intend to plead not guilty will wish to avoid having a trial at all; and would be very keen to preserve their present entitlement to make a no case submission to a magistrate at a committal hearing. But committal proceedings should be retained for cases of people who wish to plead guilty, and also for those who only make up their minds about plea at a late stage in the criminal process. I do, however, agree with suggestions now being made that additional steps should be taken to identify guilty pleas much earlier than at present. In these cases, a highly streamlined procedure can be used, but I would still be unhappy with the elimination of judicial involvement and leaving the matter entirely to the police and prosecution officials.

The great majority of people charged with criminal offences do eventually plead guilty but many have difficulty making up their minds about plea and do not decide until a fairly late stage in the process. I do not believe that just because, statistically, most people are likely to plead guilty one should deny a committal hearing to a person who has not made up his or her mind about a plea. To my mind, there should be a mechanism in the criminal process between charging and the trial court by means of which a person can get further and better particulars of a case and challenge the case, or at least aspects of it; and this process should be under the control of a judicial officer who should have the power to make the key decisions.

I do not base my case in favour of retaining some form of committal proceedings purely on justice and fairness grounds. It seems that there are also efficiency reasons for doing so. Even if police officers and prosecution officials are skilled and conscientious, the absence of a careful sifting of the material, detailed cross-examination of key witnesses, and independent judicial supervision paves the way for much less efficient, more protracted and perhaps even unnecessary trials; and it is suggested that this is not a one-sided process. I have been told by experienced defence counsel that unnecessary trials have been avoided by the operation of the committal hearing process, at which severe weaknesses in the Crown case have been exposed by cross-examination and other means. Equally, I have been told by experienced Crown Prosecutors that committal hearings often serve the purpose of strengthening the Crown case for the subsequent trial. They say that the committal process is a very important factor in trial preparation and in the efficient conduct of the trial itself.

The AIJA Project on Committals

Apart from the privilege of making a few introductory remarks at this conference, my main reason for being here is to listen to the paper to be delivered by Dr Brereton and Mr Willis and to observe the reactions to it. Dr Brereton and Mr Willis have just completed a major, national study of committal hearings in Australia on behalf of the Australian Institute of Judicial Administration (AIJA). The conclusion of their work on this study is another reason why this conference is so timely.

The study commenced at the beginning of last year with the support of all Australian Attorneys-General and Chief Magistrates. It is the first study of committals on a national scale and is primarily concerned with issues of policy rather than strictly legal and procedural matters. It has involved the collection of an impressive amount of novel, hard, empirical data. I have had the benefit of seeing in draft form the paper which they are to present today and I must say that, while undoubtedly I have a vested interest in the matter, the paper is one of the best pieces of legal policy research I have read. It combines new data on a national basis with a very hard-headed analysis of the key policy questions. I hope that it might be possible for those responsible for formulating policy in this area in New South Wales to have a look at the paper before finally making up their minds about what they propose to do.

The project has certainly confirmed the great value of conducting research into aspects of the judicial system on a national, comparative basis. All too often, important initiatives are taken in one jurisdiction in ignorance of what is going on in other comparable places or after some mere, passing reference to those related developments. The significance of the sort of work done by Brereton and Willis on behalf of the AIJA is that neither they, nor the Institute, has an axe to grind on the issue and that, when the report on the study is published in the next couple of months, those interested will have available a comprehensive national analysis of this important aspect of our criminal justice system.