A Prosecution Perspective

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Committal proceedings have been a feature of criminal procedure in Australia almost from the time that settlement began.[1] Many, but not all, judicial systems which are modelled upon the English system of criminal justice have developed committal procedures for determining whether persons accused of serious crime should be sent for trial (Lord Chancellor's Department 1989). In recent years, there has been widespread and justified concern about delays in the criminal justice system (Roden 1989). Fingers have been pointed at committal hearings as a major cause of delay (NSW Attorney-General's Department 1989). Increasingly, there is pressure to do away with committals, and to replace them with what is often described as greater prosecutorial discovery.[2] This paper attempts to present the case for retaining committals from a somewhat unusual point of view, that of the prosecution.

The Case Against Committal Hearings— With Some Balancing Observations

Before proceeding to analyse the value of a committal hearing to a prosecutor, it is proper to consider (and to concede where appropriate) the validity of arguments which can be raised against retaining committal proceedings.

The main argument against committal hearings is that they are responsible for excessive delay in bringing to trial persons accused of serious criminal offences. Committals are said to be directly responsible for one-third of all delay which occurs in New South Wales between the time that a suspect is charged and the time of his trial (Hidden 1990). There is no doubt that lengthy committal proceedings can contribute significantly to delays which accused persons face while awaiting trial. Delay is tantamount to injustice, to both the Crown, and to the accused. The problem is exacerbated by the fact that Magistrate's Courts are busy courts right throughout Australia. This means that in some states committal hearings of any significant duration cannot be conducted in other than a piecemeal fashion. On occasion, committal proceedings have stretched out for months, if not years, because of the inability of a particular Magistrate's Court to deal with a committal hearing in one continuous sitting. This phenomenon has been particularly apparent in New South Wales, and in the Australian Capital Territory.

A second major criticism of committal hearings is that in so far as they have as their primary role the filtering out of those matters which should not proceed to trial (because of

the unlikelihood that there will be a conviction), this role is not being performed adequately, or at all. In several cases, accused persons are being sent for trial upon evidence which is too weak to justify that occurrence. In New South Wales, a survey carried out by Coopers and Lybrand in 1989 concluded that magistrates were discharging defendants after all prosecution evidence had been led in only 2 per cent of committal hearings (NSW Attorney-General's Department 1989, p. 24). It is true that the Bureau of Crime Statistics put the figure at significantly higher than 2 per cent (NSW Attorney-General's Department 1989). Whatever the correct figure, a low filtration rate raised doubts as to whether the retention of committal hearings is justified.

One can readily understand why New South Wales is at the forefront of proposals to do away with committal hearings. Delays in that state are truly appalling (NSW Attorney-General's Department 1989) though the position has improved in recent months. The paper committal system introduced in 1983 has, by all accounts, not operated as well as would have been expected. It seems that there has been a tendency on the part of some defence counsel to require virtually all witnesses to attend for cross-examination. This tendency means that paper committals save very little time. It is apparent that the New South Wales Director of Public Prosecutions elects not to prosecute considerable numbers of persons who have been committed to stand trial. Statistics set out in the Discussion Paper prepared by the New South Wales Attorney-General's Department (dated May 1989) indicate that in the period between 13 July 1987 and 30 June 1988, the New South Wales Director of Public Prosecutions decided not to prosecute in 425 cases in which the accused had been committed for trial. This represented 17 per cent of the total number of 2,449 trials completed. A total of 138 out of these 425 cases involved matters in which the evidence in support of a prosecution was either insufficient, or where it could be said there were no reasonable prospects of conviction. Thus, the New South Wales Director of Public Prosecutions is declining to prosecute about 6 per cent of those who have passed the filtration process of the committal hearing (NSW Attorney-General's Department 1989).

It has been argued that these 138 cases represent clear errors on the part of the New South Wales magistracy. On the other hand, it may be said with some justification that these figures do not reveal how many of these 138 cases are those affected by changes in the evidence, (for example, the death, or subsequent unwillingness of a witness to testify). Others may represent merely those cases where two minds may approach the same question fairly and objectively, and simply come to different views.

One would need to know a good deal more about the sorts of cases which are filtered out by magistrates in order to be able to make a proper statistical appraisal of the value of committal hearings in New South Wales. Are they very long matters (in which case the filtration exercise, if properly carried out, may be of great value)? In how many of these cases would the Director of Public Prosecutions have detected non-viable prosecutions had there not been something akin to a full committal hearing? It is by no means simple to assess the weight of a prosecution case based upon statements made to police officers during the course of an investigation. There is a significant advantage in seeing how witnesses actually perform under cross-examination, (or, at least, in reading the depositions setting out such cross-examination).

It has also been argued against the retention of committal hearings that the right to cross-examine witnesses at a committal is virtually useless in those large numbers of committal hearings where the defendant is unrepresented.[3] It is true that unrepresented defendants seldom achieve very much of value to their defence through their cross-examination of prosecution witnesses. This is not, however, always so. In any event, one might legitimately respond to this argument by pointing out that the defects in a system of legal aid (which is not generous enough to enable persons devoid of adequate resources to be provided with appropriate legal representation) are scarcely an appropriate impetus for the eradication of existing rights. I have always been somewhat bemused by the refusal of

legal aid authorities to make available modest amounts to at least enable the retention of relatively junior members of the legal profession to appear for accused persons at committal hearings. Paradoxically, huge sums may be set aside thereafter for trial. This may be too late, after the damage has been done. A committal hearing usually does not require a Rolls Royce defence. Alternatively, it certainly does not require one to be paid for out of public funds. It does not follow that justice is done where, whether at committal or trial, no resources are made available by the state to those whom it prosecutes. Anyone who has had the misfortune of prosecuting a case against an unrepresented accused (whether at committal or trial) will readily agree that the interests of justice are best served when the accused is accorded adequate legal representation. The earlier such representation is made available, the better.

It has been noted that committal hearings can lead to a meandering cross-examination at trial, based upon minute discrepancies between the testimony given at trial, and what was said at the earlier hearing. This is, of course, perfectly true. Perhaps no less true is the observation that such meandering (and tedious) cross-examination may also occur as a result of any departure from what is contained in an original witness statement, irrespective of whether there has been a committal hearing. Poor advocacy (and this form of cross-examination can be regarded as nothing less than poor advocacy) needs to be rectified by proper training, and the development of appropriate professional standards within the profession. Trial judges could also do a good deal more to prevent this style of cross-examination from being pursued.

Those who oppose committal hearings argue that they provide an opportunity for unduly harsh cross-examination to be conducted with impunity, in circumstances where such cross-examination would never be attempted in front of a jury. This may have the effect, whether intended or not, that the witness will not be willing to give evidence at trial. This problem may be overstated. Defence witnesses who have been given a particularly difficult time at committal sometimes emerge as better prosecution witnesses at trial. The element of surprise is lost when prosecution witnesses are cross-examined too extensively at committal, and one should never underestimate the value of the element of surprise.

It has also been argued against the retention of committal hearings that the various tests required to be applied by magistrates in determining whether there should be committal for trial are, for the most part, too complex and difficult. This leads to much uncertainty.[4] It also leads to further delay through collateral review. The willingness of the New South Wales Supreme Court to permit such review has generated a proliferation of challenges to decisions made during the course of committal hearings. In the Commonwealth sphere, the provisions of the *Administrative Decisions (Judicial Review) Act 1977* have had a similar, regrettable effect. An appropriate response to these criticisms might be to suggest that it is surely not difficult to devise a relatively straightforward, and simple, test to be applied by magistrates in determining whether to commit for trial. This has been done in Victoria. The Victorian test requires no more than a consideration of whether the evidence adduced before the magistrate is of sufficient weight to support a conviction. This compares favourably with dual tests using archaic language copied from mid-nineteenth century English statutes, and an even more difficult New South Wales formulation which required magistrates to predict what a jury is 'not likely' to do. It would also seem not to be difficult to enact legislation prohibiting collateral review of decisions by magistrates during the committal process. To abolish committal hearings because of difficulties associated with

peripheral and remediable aspects of those hearings seems very much like throwing the baby out with the bath water.

Two other arguments can be identified against committal hearings. It is said that witnesses should only ever once be put through the ordeal of giving evidence in a criminal trial, and that it is unduly burdensome to require them to give evidence on more than a single occasion. There is, however, a great deal at stake so far as an accused person is concerned: his freedom is at risk. One must have every sympathy for the ordeal of prosecution witnesses of all types, including complainants in cases involving alleged sexual offences, and children. This concern must be balanced, however, against the rights of accused persons, who have more at stake, and who are entitled to due process.

Finally, it has been said that committals should be done away with because there is a risk associated with the conduct of such hearings that material which is highly prejudicial will be publicised, and endanger a fair trial. It should be borne in mind that a well publicised committal hearing may, in some cases, lead to witnesses whose evidence may be of great importance coming forward. Such witnesses may assist either the prosecution, or the defence. Magistrates have the right, however, to suppress material which should not be published in the interests of a fair trial. It is also within the province of Parliament to prohibit reporting of committal hearings. In any event, it is surely paternalistic to say to accused persons that they should be deprived of their rights to a committal hearing because there is a risk that some damage may be done to their prospects at trial. The short answer is that this is a risk that most defendants will happily bear.

The Case in Favour of Retaining Committal Hearings—a Prosecution Perspective

This brings me to the true subject matter of this paper which, as pointed out earlier, is not the traditional debate between those who favour the abolition of committal hearings, and those on the defence side who regard them as a sacred right. There is, in fact, a very real case to be made for retaining committal hearings, not merely from a defence perspective, but also from a prosecution perspective. When I refer to a prosecution perspective, I mean, of course, the public interest in ensuring that those who are guilty of serious criminal offences are prosecuted to conviction, and those who cannot be proved to have committed such offences are acquitted. It goes without saying that the prosecution has no interest in securing convictions at any cost.

The best way to overcome delays in the criminal justice system is to develop processes designed to encourage those who are guilty of criminal conduct to plead guilty, and thereby to avoid the need for, and expense of, a costly criminal trial. The earlier the plea of guilty, the better.[5]

Do committal hearings produce more pleas of guilty than would be the case without them? There is no empirical evidence of which I am aware specifically directed to this point. However, it is my belief, based upon my own experience, that there are many cases where it would be totally irresponsible to advise a defendant charged with serious offences to plead guilty without having tested the material against him. A statement made by a prospective witness to a police officer is just that—no-one knows the circumstances under which that statement came to be made, or whether the witness will adhere to it if pressed. In recent years there have been documented cases of police officers who have sought to improve on what a witness is actually prepared to say about the events in question. This has led to the casting of statements into forms which do not accurately reflect what the witness truly knows

about the matter. Sometimes a statement which is produced is the end product of a number of earlier statements, some of them never having been signed, or adopted by the witness. These earlier versions have not been turned over to the defence as part of the pre-trial discovery process. Some of these statements have been made by witnesses who have a good deal to gain by implicating the particular accused, and exculpating themselves. It is only through the committal process, and through the use of compulsory discovery, that their existence has come to light, and thrown a different complexion upon the case.[6]

A case alters significantly after a thorough and proper cross-examination of key witnesses. It may be that what is revealed is that these witnesses have made their statements in a perfectly proper fashion, and that they adhere to them whole-heartedly, and cannot be shaken in cross-examination. If their evidence seems likely to be accepted, particularly if it is corroborated, a client may well be advised that he has no real option other than to plead guilty, and to seek to obtain the benefits available to him of a reduced sentence in return for such a plea. The problem is that one simply does not know enough about the prosecution case from a perusal of witness statements to enable a sensible judgment to be made (Napley 1966, p. 495).

However expensive committal hearings may be, they cost (on a time basis) but a fraction of what a trial in a superior court costs (Victorian Shorter Trials Committee 1985; and Advisory Committee on Committal Proceedings (Vic) 1986). It is ironic that we have come to recognise the value of pleas of guilty by enacting legislation requiring that such pleas attract a sentencing discount (s.4 *Penalties and Sentences Act 1985* (Vic.)) and yet it is proposed in some places to do away with committal hearings. The result will be fewer pleas of guilty.

Even if the committal hearing does not itself produce a plea of guilty, (and an early one at that) it may have the effect of reducing the time which must be spent on a number of issues during the course of a trial. Once one accepts that trial time is inherently more costly than committal time, it is surely better that rabbits be chased down holes during committals than that this be done during trials. If there is to be a fishing expedition of some kind (and I do not condone fishing expeditions unless there are fish to be caught) let that fishing expedition take place before a magistrate, and not before a judge and jury. A properly conducted committal hearing can lead to the avoidance of lengthy voir dire hearings which might otherwise be necessary at trial. Issues can be resolved more quickly before a magistrate than before a judge and jury. Lines of inquiry which have proved to be unprofitable at the committal hearing can be jettisoned by the time of the trial. The case can proceed to the real issues. All the problems associated with the issuing of wide subpoenae, and associated claims of privilege, can be dealt with and disposed of once and for all at the committal hearing instead of occupying more valuable higher court time.

The knowledge of what a witness is likely to say in response to a particular question enables the examination and cross-examination of that witness to be kept under tight rein. A strong trial judge who is both able and willing to exercise appropriate control over counsel will ensure that the trial proceeds without undue delay.

From the prosecution point of view, there are significant advantages to be gained from having important witnesses exposed to cross-examination at committal. The prosecutor learns how the witness will perform while under attack. He can more accurately assess whether there are reasonable prospects of a conviction based upon the testimony of that witness.[7] It is impossible to assess the credibility of a witness from a perusal of prior statements, even if the witness is also conferenced. Witnesses who are likely to fall apart under pressure should have that fact exposed at the earliest possible opportunity, and not after the trial has commenced.

A prosecutor is also confronted from time to time with a witness who is unwilling to provide assistance to the police by making a statement of his own free will, but whom he

suspects would be prepared to tell the truth if called to testify. The reluctant witness may be pivotal to the case against the accused. The committal allows for this type of witness to be brought forward under compulsion, and to have his testimony available for consideration by the prosecution.

It has been argued that with the establishment of independent Crown prosecution services, and the creation of the Office of Director of Public Prosecutions, a new and more effective filtration process is available. It is said that committal hearings are no longer required in consequence of this development. I doubt that this is so. It must be borne in mind that within any such prosecution service there will be persons of conspicuous ability, and experience. There will also be persons with little or no trial experience, and perhaps a modicum of ability.[8] Some prosecution officers have never seen a criminal trial take place. Their appearance work is confined to summary matters in Magistrate's Courts, with perhaps the odd appearance in the higher courts on pleas of guilty. Are such officers to be assigned the task of determining whether there are reasonable prospects of conviction before a jury? The reply may be made that some magistrates are no better equipped to determine how a jury is likely to respond to a prosecution case. However, bearing in mind the heavy responsibilities that are today imposed upon magistrates, one would hope that persons occupying those positions, would be people of substantial experience and quality. They should be well able to decide whether a prosecution case is strong enough to warrant putting the accused upon his trial. A magistrate conducting a committal hearing has the advantage of having seen and heard the witnesses give their evidence, and be cross-examined. A prosecution officer reading witness statements lacks at least that advantage.

Committal hearings can also provide tactical advantages for the prosecution. One can learn a great deal about how a defence case will be conducted at trial from the line of cross-examination adopted at committal. It is perhaps for this reason that the practice of conducting full committals in England is comparatively rare.[9] The vast majority of cases in that country proceed as paper committals, uncontested, in order to achieve the maximum degree of surprise at trial (Napley 1966). This style of advocacy has not found favour in Australia. It is likely that if legal representation were readily available to all accused persons, many would be counselled to require a full committal hearing. From the prosecution point of view, this would not necessarily be a bad thing. A full committal may lead to the accused committing himself to a particular line of defence at too early a stage, before an informed judgment can be made about the wisdom of that course. Once a line of questioning has been adopted by the defence at committal, a departure from that approach at trial can, of course, be drawn to the jury's attention with significant forensic advantages to the Crown.

Defendants seldom go into evidence at committal hearings. From a prosecution point of view, one can think of nothing better than the opportunity to probe the defence case, and particularly, the chance to cross-examine the defendant at committal. Regrettably from a Crown perspective, this sort of opportunity comes along all too rarely. As a prosecutor, I would be reluctant to see it disappear altogether.

A committal hearing may expose weaknesses in the prosecution case, which, while not fatal to that case, may nevertheless point to the need to strengthen the evidence, prior to trial. The prosecution may discover, for example, that the charges which have been laid are inappropriate, and cannot be sustained. Lesser charges may be substituted and in some cases may lead to a plea of guilty, and perhaps summary disposal. If a prosecution witness does not perform well at committal, and there is thought to be a need for more evidence to be obtained to support his testimony, such evidence can be sought, and obtained before the

trial. This is particularly true with experts. If an expert is unchallenged at committal, it can probably be inferred that he will be unchallenged at the trial. If he is subject to a strong attack at committal, the need for corroborative evidence may become apparent. Other experts may be procured.

Defence submissions as to defects in the prosecution case, whether addressed to fact, or to law, can be met and rectified in time for trial. All of this is of immense value to a prosecutor who benefits from a second chance to get the case right. It surprises me that there are prosecutors who are prepared to forego these advantages in exchange for what seems to be a misguided quest for greater speed, and less delay. Bringing a case to trial more quickly but having that trial take longer, and with more risk that it will be unsuccessful, apears to be a poor bargain.[10]

I am opposed to all forms of collateral review of committal hearings. It is appropriate for superior courts, particularly those outside the court hierarchy which has the responsibility for trying the particular criminal offence, to become involved in the criminal process. Administrative Decisions Judicial Review (ADJR) applications to the Federal Court have produced scandalous delays in Federal prosecutions. The suggestion implicit in some calls for the abolition of committal hearings that an improper or erroneous prosecution decision taken by the Director of Public Prosecutions can be guarded against by permitting judicial review of the decision to indict strikes me as almost bizarre.

This will be an open invitation to any defendant with substantial means to review the exercise of prosecutorial discretion. The delays which will result from forays into the Federal Court, or the Supreme Court, and through the hierarchy of the appellate court system, will make delays resulting from committal hearings seem insignificant by comparison. It is particularly desirable that there be independent judicial scrutiny in cases which have about them the suggestion that special treatment is being meted out to a defendant who is a well-known personage in the community.

One particular advantage of a committal hearing is that a decision to commit is taken by a judicial officer (who is obliged to accord natural justice). One can more confidently accept the need to allow that decision to stand, pending ultimate resolution by a jury, than one can the decision of a Director of Public Prosecutions. The case for judicial review is greater when a prosecuting lawyer makes the decision to put someone on trial than when the decision is taken by an impartial and independent judicial officer. The Director of Public Prosecutions is, of course, required to be fair and objective. He will not be perceived as being impartial, and perhaps this is not unreasonable. His role is to prosecute. His day-to-day contacts with investigating agencies (including the police) make it difficult for the reasonable bystander to be satisfied that the scrutiny which has been brought to bear upon the police brief is wholly independent, and without predisposition, even if that be the case. The integrity of the criminal justice system calls for the continued involvement of magistrates in determining whether prosecuting authorities are correct in saying that the case is of sufficient weight to justify putting the accused on trial. The responsibility placed upon the Director of Public Prosecutions to decide whether to proceed with a prosecution is, of course, lessened to the extent that an independent judicial officer is prepared to agree that there is a case fit to go for trial. This is no bad thing.[11]

This is not to say that there is no room for improvement to the committal system as it presently operates throughout Australia. There is a real need for reform in some areas. A clear and simple test should be adopted to enable magistrates to know precisely how they should approach the question whether to commit for trial. In this respect, I favour the current Victorian test over that in operation in New South Wales because of its greater simplicity, and its avoidance of the need to attempt to predict what a jury properly instructed

is likely to do, or rather is not likely to do. It goes without saying that I favour the current Victorian test over that still used in some other states, which is the traditional formulation so frequently misunderstood over the years. I favour greater availability of legal aid, albeit on a modest scale, in committal hearings. I support the introduction, in those states which do not have it, of legislation permitting a magistrate in his discretion to decline to permit witnesses to be cross-examined at committal unless it can be shown that the interests of justice so require. I am not concerned about the possibility that there may develop varying practices among magistrates in exercising a broad discretion of this type. It seems to me that over time guidelines will develop. It would be preferable for this to occur on a case-by-case basis rather than setting out in a structured way specific rules. Just as costs are unavailable to the Crown in criminal matters involving indictable offences, so also it should not be open to a magistrate to award costs against the prosecution where a committal hearing has been brought in good faith, but has failed to produce a committal for trial. The Crown should not be deterred from bringing charges, or pursuing them, by the consideration (albeit sub-silentio) that if the case goes wrong, substantial costs may be awarded. Charges can fail for many reasons unconnected with either negligence, or bad faith on the part of those who prosecute. Witnesses may fail to swear up to their statements, for all sorts of reasons (NSW Attorney-General's Department 1989).

Most important, it is essential that magistrates be given power to cut short protracted cross-examination which is unhelpful in regard to the specific statutory task magistrates are required to perform. Magistrates should be encouraged to insist that cases proceed with despatch. It is incomprehensible how a magistrate can permit defence counsel to cross-examine a single witness as to credibility for weeks or even months on end (as has happened in some recent committals). If counsel cannot effectively damage the credibility of a prosecution witness within a day or two, then he is scarcely likely to achieve very much more in a week or a month.

Ultimately the solution to the problem posed by extremely lengthy committals (which have in some instances become a disgrace to the system) lies in a change of attitude on the part of some members of the legal profession. There must be an appreciation of the fact that if a few lawyers persist in stretching out committals to inordinate lengths, governments will step in and do away with committal hearings. Magistrates must be made conscious of the need to keep these preliminary inquiries moving, and not to permit them to become bogged down. Prosecutors must learn to see the wood for the trees. Too often committals are prosecuted with excessive attention to minutiae, rather than sound judgment about what is necessary, and what is not.

If committals can be confined to relevant issues, they will continue to serve the legitimate ends of accused persons, and of the prosecution. Nothing could do more to overcome the problems of delay without upsetting the delicate balance which lies at the heart of any rational and humane system of criminal justice.

The New South Wales Hybrid— **Pre-Committal Hearings: a Postcript**

Committal proceedings were described by two members of the High Court as 'an important element in our system of criminal justice'. Gibbs ACJ and Mason J (as they then were) went on to say 'they constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair'—*Barton v. R* (1980) 147 CLR 75.

It is true that not all members of the High Court endorsed these views. Nonetheless, it is somewhat surprising to find that within a decade or so of their utterance, moves are afoot in some states to curtail or even abolish the committal hearing. Most prominent among those

who favour the case for legislation to do away with the right to a traditional committal hearing is the Attorney-General for New South Wales. His department released a discussion paper in May 1989 which canvassed a number of possible reforms to the criminal justice system. The most controversial of these reforms was that which involves what he describes as 'modification of committal proceedings rather than abolition' (Dowd 1990).

It is plain from the Attorney's public utterances that the Bill does away with the magistrate's function of committing for trial. It gives to the Director of Public Prosecutions in New South Wales (and by virtue of the operation of the provisions of the *Judiciary Act 1903* (Cwlth), also to the Commonwealth Director of Public Prosecutions) the power to determine whether a person suspected of serious criminality shall be placed on trial before a judge and jury. The Attorney argues that the new scheme will assist in reducing the delays accused persons now face in waiting for trial, and in reducing the number of witnesses who unnecessarily go through the often harrowing experience of cross-examination. He describes the new scheme as a 'pre-committal hearing scheme' (NSW Attorney-General's Department 1989).

The essence of the New South Wales scheme will be as follows (NSW Attorney-General's Department 1989). After an accused is arrested or summonsed and bail determined in the usual way, all statements of witnesses taken by police will be forwarded to the Director of Public Prosecutions. The Director will decide whether the proceedings should continue, and if they will, what the appropriate charges should be. In relation to state offences, the New South Wales Director will also decide whether the matter should be dealt with summarily or on indictment, where this is possible.

The prosecution evidence will then be disclosed to the defence within a period set when the matter first comes before the court. Also provided to the defence will be the names, if any, of witnesses the prosecution intends to call to be examined at the 'pre-committal hearing'. The defence will then inform the prosecution of those additional witnesses it wishes to cross-examine. The prosecution will determine whether to consent to the cross-examination of those witnesses. Prosecution witnesses may only be cross-examined without the consent of the prosecution if they fall into an appropriate category. If there is a dispute as to whether a witness falls into a particular category, then that will be resolved by a magistrate.

The discussion paper prepared last year proposed that a witness could be cross-examined at a pre-committal hearing where:

(i) the witness gives evidence as to identification of the defendant;

(ii) the witness is an accomplice;

(iii) the witness gives evidence of an opinion based on scientific examination;

(iv) the defendant is able to demonstrate special or exceptional circumstances which require the cross-examination of a particular witness; or

(v) the prosecution consents.

The current proposals involve the retention of these five categories with the modification that category (ii) is expanded so that cross-examination will now be allowed where the witness is an accomplice, or an indemnified witness or an informer. In addition, the defendant is to be given a right of cross-examination 'where there are reasonable grounds to suspect that cross-examination will either affect the assessment of the reliability of the witness or would adduce further material to support a defence' (NSW Attorney-General's Department 1989). It is clear that this new formulation provides a much wider right of cross-examination than had been proposed in the discussion paper. It is to be welcomed in that respect. There is a problem, however, in working out precisely what the new

formulation will encompass. How will a magistrate determine whether there are 'reasonable grounds to suspect' the matters set out without at least embarking upon some preliminary investigation of the matter? Will this new provision permit cross-examination of police witnesses? What is implicit in the word 'defence'? Does it extend to exclusionary discretion, and otherwise admissible evidence? These matters will provide rich pickings for defence lawyers.

The procedure then contemplates that the pre-committal hearing can take place before a magistrate who will ensure that the rules of evidence are applied and that the proceedings are conducted fairly. The defendant will have the right to give or call evidence. At the conclusion of the pre-committal hearing, the evidence will be considered and the Director of Public Prosecutions will make a further decision as to whether the matter should proceed to trial. If the Director decides not to put on trial a person who has been charged with an offence, the legislation will specifically require that reasons for this decision must be given upon request.

It has been correctly noted that the most important aspect of the new scheme is that a magistrate will no longer decide whether or not to commit a person to trial. That decision will now be made by the Director of Public Prosecutions. Those who are critical of the new scheme focus their attention upon this specific aspect of its operation. They claim that it is inappropriate for a party to criminal proceedings, in this case, the Crown, to decide whether a person should be put on trial without the independent scrutiny of a judicial officer to safeguard the rights of the accused person. The Attorney responds by noting that these criticisms fail to address the fact that the Director of Public Prosecutions, through the Crown Prosecutors, has been making just that decision ever since the *Director of Public Prosecutions Act 1987* came into operation in New South Wales on 13 July 1987. Whether or not a magistrate commits a person for trial does not mean that the person will stand his/her trial. Before a case can proceed to trial after committal, a Crown Prosecutor must consider the matter and, if appropriate, find a bill of indictment. A Crown Prosecutor is not required to find a bill simply because the person was committed for trial. A recommendation can be made to the Director that no bill be found. Even after a bill has been found, a Crown Prosecutor can recommend there be no further proceedings. Similarly, just because a person is discharged by a magistrate at committal proceedings, does not mean the person will not stand his/her trial. The Director of Public Prosecutions has the power to file an ex-officio indictment, as does the Attorney-General. It follows, according to this reasoning, that whether a person is committed for trial or not by a magistrate, the Director of Public Prosecutions has the power to 'overrule' the magistrate's decision'.

It is difficult to evaluate the merits of the proposed new scheme without having seen the detailed draft of its provisions. It is fair to make one point, however, and that is this. A decision to ex-officio indict a person who has been discharged at committal is never taken lightly. Full weight is given to the magistrate's opinion that the evidence presented by the prosecution is not of sufficient weight to justify committing the accused for trial. It is one thing to have available the residuary power to ex-officio indict in extreme cases—it is quite another to take over the task of independently scrutinising the evidence from judicial officers and to vest that task in those who are charged with the function of prosecuting offenders.

I do not believe that the case for abolishing committal hearings in their present form, and replacing them with this new hybrid has been adequately made out. I would prefer that the problems associated with the existing committal structure be addressed, and modification made where appropriate. I would strongly support the amendments to the *Justices Act 1902* made by the former New South Wales government (which would have restricted the right of defendants to require the attendance of some witnesses for cross-examination and given magistrates' powers to halt unhelpful cross-examination). It is a pity that those amendments have not been proclaimed. The present Attorney claims that he has not proclaimed those provisions because he realises the importance of allowing evidence to be

tested prior to trial, and believes that it is a matter of fundamental importance that this aspect of committal proceedings be retained (Dowd 1990, p. 15). It is somewhat paradoxical therefore, that his new proposals go far beyond what would have been achieved had the amendments been proclaimed, and effectively abolish some of the very rights he claims to be concerned about in so far as meaningful effect can be given to them.

The Attorney proposes that the replacement of committals by the proposed pre-committal hearings be supplemented by a requirement that there be greater disclosure of the prosecution case. He notes that under the current committal system, there is no requirement of complete discovery, and that a more comprehensive scheme of disclosure of the prosecution case to the accused would be fairer, and enable the issues at the trial to be narrowed. The new procedures will require automatic disclosure to the accused (that is, without a request for such information having to be made). There is no difficulty with the requirement of wide disclosure—it seems, however, to be a poor substitute for a properly conducted committal hearing. I do not believe in trade-offs in this area. The case for the retention of committal hearings does not depend upon any argument to the effect that they constitute the only effective method of disclosure of the prosecution case. Rather, the primary function of committal hearings is to ensure that an independent judicial officer is given the opportunity to scrutinise the prosecution case and to determine whether it is appropriate that the accused person be put to the trauma, expense, and inconvenience of a trial. This, the new New South Wales hybrid system—however well-intentioned—will not achieve.

Endnotes

1. The *Indictable Offences Act 1848* 11, 12 Vic., C 42 (1848) was adopted in New South Wales in 1850. Prior to that, Justices of the Peace exercised an inquisitorial role, closely examining the prisoner without permitting him the right to decline to answer questions. It was the creation of a professional police force in 1829 in England which meant that the Justice could begin to act in a quasi-judicial capacity, since he was no longer required to supplement the deficiencies of the police force. The institution of the grand jury never really took root in Australia (Bishop 1990).

2. New South Wales has already determined to follow this path. It is likely that the Northern Territory will do the same, as its Justices Act Review Committee is reviewing committal proceedings. There are also tentative proposals to review the committal system in Queensland. In England the Home Office and Lord Chancellor's Department have issued a Consultation Paper on the Future of Committal Proceedings (1989). It foreshadows the abolition of committal proceedings, and the substitution of mandatory prosecution discovery. The defendant will still be able to challenge the sufficiency of evidence if the matter is to go for trial in the Crown Court, but only upon the basis of the witness statements. No cross-examination of witnesses will be permitted. All submissions to a magistrate challenging the sufficiency of the prosecution evidence must be in writing, except with leave.

3. The position varies from state to state, but, as a general proposition, it is fair to say that in recent years in at least New South Wales and Victoria, legal aid has not generally been made available to those facing committal hearings.

4. The controversy flared with the decision of the New South Wales Court of Appeal in *Wentworth v. Rogers* [1984] 2 NSWLR 422. This led to the adoption of a new legislative formulation of the test for committal which was not happily drafted. It was the subject of detailed analysis by O'Brien J in *Carlin v. Thwat Chidkhunthod* (1985) 4 NSWLR 182. More recently the new formulation was further considered by the Court of Appeal in *DPP (NSW) v. Saffron* (1989) 39 A Crim R 64.

5. This factor has come to assume great importance with significant sentencing discounts now being given for early pleas of guilty, even without any indication of remorse on the part of the accused.

6. Witness statements taken by police often contain material which is inadmissible, and far too wide ranging. Depositions are generally in tighter form. Apart from the dangers of witness statements being the product of suggestions made by the police, they will not, as a rule, contain any material which can be regarded as exculpatory. Police questioning is not geared towards producing such material. The police do not know what is important to a potential defence—only a legal representative of the accused properly instructed can elicit such material. This can only be done at a committal hearing—the trial is not the venue for discovering such exculpatory material (Napley 1966).

7. Most prosecutors in Australia now apply a variant of the reasonable prospects of conviction test in determining whether to file an indictment for trial. This is a higher standard than merely being satisfied that there is a prima facie case. It requires an assessment to be made of the strength of the prosecution case, and this includes making judgments about the credibility of prosecution witnesses.

8. It will not always be possible to have the decision whether to indict for trial, and if so, upon what counts, taken at the highest levels within a prosecution service. It will be inevitable, given the sheer volume of cases that must be evaluated that there will be some 'rubber stamping' of decisions taken by comparatively junior officers.

9. The golden rule of the English criminal bar was said to be 'ask no questions at committal'. While often departed from, there is still a sense in which this represents conventional English wisdom.

10. It is noted that the new New South Wales proposals do not contain this vice, at least so far as the New South Wales Director of Public Prosecutions is concerned. Regrettably, the Commonwealth Director may find himself the target of more ADJR applications for review than ever before as a result of the new modified system which is to be introduced in that state.

11. The amendments to the New South Wales *Justices Act* (which were not proclaimed) would have achieved this end. *See also Magistrates (Summary Proceedings) Act 1975* (Vic.) s 45B(7).

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