COMMITTAL REFORM
RADICAL OR EVOLUTIONARY CHANGE?

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As you are no doubt all aware, I am soon to put before Parliament proposals to replace committal proceedings as we now know them with a new scheme of pre-committal hearings. The finer details of that scheme are still being settled but the broad thrust of the proposals is well-known. Before I outline how I expect the new scheme to operate it may be helpful if I tell you something of the background to the proposed amendments.

BACKGROUND TO REFORMS

Early in 1989 my Department and I began to work on a Discussion Paper concerning various reforms to the criminal justice system. there were a number of reasons for the commencement of this work. The Chief Judge of the District Court, His Honour Judge Staunton, Q.C., and the Deputy Secretary of my Department, Mr Peter Webb, travelled together overseas and prepared a comprehensive report concerning criminal procedures in other common law jurisdictions. Mr Reg Blanch, Q.C., the Director of Public Prosecutions travelled overseas in late 1988 and early 1989 examining the prosecution process in both Hong Kong and the United Kingdom. He also prepared a comprehensive report on his findings.

A further impetus for the re-examination of various aspects of the criminal justice system came from an assessment made by me and my Department of the problems faced by the criminal justice system.

It was therefore decided that a Discussion Paper would be prepared which would outline a number of possible reforms to the criminal justice system. In preparing the Discussion Paper there was no single objective in mind. The proposed reforms were to have various objectives. Some, such as providing for mandatory disclosure of the prosecution case to the accused, were designed to promote the rights of the accused to receive a fair trial. Other proposals were intended to reduce delays whilst others were aimed at assisting victims where this was possible without impinging on the rights of the accused.

The Discussion Paper was not prepared by a single individual and there were no pre-determined conclusions as to what the Discussion Paper would recommend. It was intended simply to be the basis for community discussion of the various issues.

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1 Paper delivered at a public seminar entitled "Committal for Trial and Pre-Trial Disclosure", convened by the Institute of Criminology, The University of Sydney, 11 April 1990

The Paper was released in May 1989 and widely distributed. In the month that followed a total of 32 responses were received from various individuals and groups. Some of the proposals were strongly supported, whilst others were strongly criticised. An example of the former is the proposal to allow a judge not to sum up the facts in a short trial, whilst an example of the latter is the Discussion Paper's proposal regarding plea bargaining where many respondents pointed out that the proposals would significantly hamper the acceptable charge bargaining that currently goes on, where the prosecution agrees to proceed on a lesser charge if the accused pleads guilty.

However, it has to be recognised that by far the most controversial recommendation in the Discussion Paper was the proposal regarding the replacement of committals. The preferred option was reconsidered in the light of those responses.

This reconsideration firstly involved, of course, the question of whether any change should be made at all to the current committal system. The Government does not simply look upon the responses to the Discussion Paper as helpful only in deciding how best to replace committals. Many of the responses contained well-reasoned and thoughtful arguments concerning the advantages of the present committal system over the preferred option.

It has to be said that most of the arguments put forward were well-known to us, as, in deciding whether to propose the replacement of committal proceedings, we had already considered such arguments. However, the various responses enabled us to further consider the question of what changes, if any, should be made to the committal system.

In the end it was decided to proceed with a modified version of the preferred option and it was that scheme that I took to Cabinet. as you will be aware, Cabinet approved my proposals on 13 February this year and the various amending Bills are currently being drafted by Parliamentary Counsel.

You will also recall that the Coopers and Lybrand Report was released at about the same time as the Discussion Paper. It recommended the complete abolition of committal proceedings, a proposal I immediately rejected with the support of my Department. The scheme I took to Cabinet involves modification of committal proceedings rather than abolition. I have no doubt that the scheme approved by Cabinet is a significant improvement on the present system of sending a person to trial. It does away with the Magistrate's function of committing for trial. This is not a step we have undertaken lightly, but is one which had to be taken after the inefficiencies in the present system were so clearly demonstrated. The scheme will assist in reducing the delays an accused person now faces in waiting for trial, reduce the number of witnesses who unnecessarily go through the often harrowing experience of cross-examination, and allow a more efficient distribution of work between the Local court and the Higher Courts.

As a part of the proposal, it is intended to give the Director of Public Prosecutions the power to determine whether a matter will be dealt with summarily or on indictment with the consent of the defendant where necessary. The Director of the Criminal Law Review Division of my Department, who is a Crown Prosecutor, tells me that he was once

briefed to conduct a trial where the allegation was that the accused had stolen two pairs of jeans from a retail store, a charge which obviously should have been dealt with summarily.

This Government has already instituted changes to make the work of the Local Courts more efficient. Committals are generally now run continuously so that the old situation of committals being conducted over a number of days separated by some months will no longer occur. Also from 1 January 1990, the Director of Public Prosecution took over the conduct of all committals in courts which commit to the Sydney District Court.

OUTLINE OF SCHEME

I will briefly outline how it is expected that the pre-committal hearing scheme will operate. After doing that I will discuss some of the more important aspects of the scheme in some detail.

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 who will firstly decide whether the proceedings should continue and, if they will, the appropriate charge. The Director of Public Prosecutions 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 consider whether to consent to 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. I will deal with these categories later. Should there be a dispute as to whether a witness falls into a particular category then the magistrate will resolve the matter.

The pre-committal hearing will then take place at which the Magistrate will ensure that the rules of evidence are applied and that the proceedings are conducted fairly. As he or she does now. 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. A bill will be found, if appropriate, at this stage. A certificate of committal will be prepared by the Director of Public Prosecutions, served on the accused, and filed with the court. From that moment on the higher court will have jurisdiction in the matter and the trial will take place in the usual way.

If the Director of Public Prosecutions 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 on request.

The changes will maximise the opportunity the defence has of persuading the Director of Public Prosecutions that there should be no further proceedings. The defence will have the opportunity of making such submissions both prior to the pre-committal hearing and after the hearing in the light of the evidence given.

MAGISTRATES NO LONGER DECIDE WHETHER TO SEND DEFENDANTS TO TRIAL

Perhaps 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. It is this aspect that has received the most substantial criticism following public announcement of the proposal.

These criticisms proceed along the lines 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. What these criticisms fail to address, however, is that the Director of Public Prosecutions, through the Crown Prosecutors, has been making just that decision since the *Director of Public Prosecutions Act* came into operation on 13 July 1987, and before that (where there was a 'no bill' application). A similar decision was made by the Attorney General of the day. Where there was no application for a 'no bill' the decision was made by a Crown Prosecutor. This has been the case since soon after the colony of New South Wales was established.

As I am sure you all know, simply because a Magistrate has committed a person for trial, does not mean that the person will stand his or 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. The Crown Prosecutor does not have to find a bill simply because the person was committed for trial. He or she can recommend to the Director of Public Prosecutions that no bill be found. Similarly, even after a bill has been found a Crown Prosecutor can recommend that there be no further proceedings. At any stage the accused may also request that there be no further proceedings.

In these cases the Director of Public Prosecution has a policy of giving reasons for his decisions. As the Discussion Paper noted, about 17 per cent of cases where the Magistrate commits for trial are 'no billed' by the Director of Public Prosecutions.

It must be remembered also that the charge for which a bill is found by a Crown Prosecutor is often different to the charge on which a person was committed for trial. Similarly, just because a person is discharged by a Magistrate at committal proceedings, does not mean the person will not stand his or her trial. The Director of Public Prosecutions has the power to file an ex officio indictment, as do I as Attorney General.

Section 4(2) of the *Criminal Procedure Act* which was introduced at the time of the *Director of Public Prosecutions Act* states that the Director of Public Prosecutions may present an indictment "whether or not the person to whom the indictment relates has been committed for trial in respect of an offence specified in the indictment". So whether a

person is committed for trial or not by a Magistrate, the Director of Public Prosecutions has the power to, if you like, 'overrule' the Magistrate's decision. Thus criticisms of the proposal which suggest that the Director of Public Prosecutions, as a party to proceedings, should not have the power to put someone on his or her trial, fail to recognise that the Director of Public Prosecutions has always had this power.

The Director of Public Prosecutions is responsible to parliament for the exercise of those powers (he must file an Annual Report which is subject to debate in the Parliament) and the Attorney General of the day retains the power to fine ex officio indictments or 'no bill' a matter despite the Director of Public Prosecutions' decision. This will not change under the new scheme.

I note that the Law Society issued a press release containing this statement: "The matter of greatest concern is the proposal to have the prosecutor, a Government employee, decide whether or not an accused person goes to trial". I am not sure how the Director of Public Prosecutions would feel to be described as a "Government employee" but, as the *Director of Public Prosecutions Act* makes clear, the Director is an independent statutory appointee and is no more a "Government employee" than Magistrates are under the *Local Courts Act.*

One result of the removal of the need for a magistrate to make a decision will be that it will no longer be necessary for the same Magistrate to hear the cross-examination of all the witnesses. This will allow significant improvements to the listing arrangements in the Local Court.

LIMITS ON CROSS-EXAMINATION OF WITNESSES

Apart from the change I have just referred to, perhaps the next most significant proposal is that there will now be a restriction on those prosecution witnesses who the defendant may cross-examine at the pre-committal hearing. Currently a defendant enjoys an unlimited right to require a witness to attend the committal hearing for the purposes of cross-examination. It matters not whether the witness is of crucial importance, or merely proves a formal matter, at present there are no restrictions on those witnesses who can be required for cross-examination.

Amendments to the *Justices Act* by the previous Government would have restricted the right of defendants to require the attendance of some witnesses for cross-examination and given magistrates powers to halt cross-examination. Had I wished to severely restrict the operation of committal proceedings, I could simply have proclaimed those sections. In fact I could still do so, but I realise the importance of allowing evidence to be tested prior to trial and I felt that it was a matter of fundamental importance that this aspect of committal proceedings be retained.

A limitation on cross-examination will be provided but this will be basically similar to the existing limitations under the *Evidence Act.*

The Discussion Paper proposed that a witness could be examined at the pre-committal hearing where:

1. The witness gives evidence as to identification of the defendant;
2. The witness is an accomplice;
3. The witness gives evidence of an opinion based on scientific examination;
4. The defendant is able to demonstrate special or exceptional circumstances which require the cross-examination of a particular witness; or
5. The prosecution consents.

Under the proposals that I took to Cabinet minor changes were made to the second category I have referred to so that cross-examination will now be allowed where the witness is an accomplice or an indemnified witness or an informer. The third category of scientific examination is intended to make it clear that medical examinations are covered. The defence is also given the right of cross-examination where the prosecution examines the witness in chief, but perhaps the most important change from the Discussion Paper concerns what I will describe as the general right of cross-examination. Under the proposals approved by Cabinet, the defendant will have 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". A comparison of this test with the test proposed in the discussion paper will show that the right of cross-examination has been significantly widened.

The setting of the appropriate threshold in this category is widely and, in my view, correctly seen to be crucial to the whole scheme. Mr Barry O'Keefe, Q.C., President of the New South Wales Bar Association noted in a radio interview "I think our real concern is to see how this residual category of witnesses that really ought to be cross-examined at the discretion, in the end, of the Magistrate, is going to work".

The test now proposed has not been arrived at overnight. Many of those who responded to the Discussion Paper commented on the test proposed in that Paper and some of those people were involved in discussions regarding an appropriate formulation of the test. I won't take your time by reciting the various formulations that were considered at one time or another, but I can assure you that the test approved by Cabinet is the widest of those formulations.

Of course, criticisms have now been made which suggest that the test is too wide and will not protect the interests of victims and other witnesses in any way whatever. I do not agree with those criticisms. Not only does the test itself provide some limitation but the requirement that the defence consider exactly why a person is needed for cross-examination will have a significant impact on the number of witnesses who are cross-examined unnecessarily simply because the defendant or his or her legal representative did not give proper consideration to whether a witness was truly needed for cross-examination.

DISCLOSURE OF THE PROSECUTION CASE

The replacement of committals by the proposed pre-committal hearings requires disclosure of the prosecution case. This is because committals, in their present form, are currently being utilised as a means of disclosure through the paper committals system. However, such disclosure is by no means comprehensive with, on occasions, witnesses not disclosed until the completion of the committal.

A more comprehensive scheme of disclosure of the prosecution case to the accused will not only be fairer to the accused, but will enable the issues at the trial to be narrowed as the accused focuses the defence against the prosecution case with greater precision.

The following information will be disclosed to the accused automatically, that is, without a request for such information having to be made.

1. The precise terms of the indictment;
2. Copies of any documents, or tapes where made containing a record of the accused's conversations or statements to the police (e.g., records of interview, handwritten statements, etc.);
3. Statements of all witnesses interviewed by or for the police during the investigation whether they are to be called by the prosecution at the trial or not;
4. Copies of any documentary exhibits;
5. Details of where and when a non-documentary exhibit may be inspected;
6. The criminal record of the accused;
7. The names and addresses, to the extent known to the prosecution, of any person from whom a statement was not taken by or for the police, where there is reason to suspect that the person might be regarded as material to the case, or has information which may be material to the preparation of the defence; and
8. Copies of any reports from "expert witnesses".

It is proposed also that, upon request, the criminal record of any witness, or victim, will be made available where the request demonstrates the relevance of such information.

The provision of the above information will be subject to limitations only where the supply of the information would create a danger to the life or safety of any individual, or would interfere with the administration of justice. Such considerations could apply to information which would identify witnesses in some cases.

Of course, the obligation to disclose the information is a continuing obligation. Thus, information which comes to the knowledge of the prosecution after the pre-committal hearing will also be disclosed. It is not expected that there would be many occasions when there was disagreement regarding the disclosure made by the prosecution. The occasions when the prosecution would have a serious concern about the

administration of justice or the safety of individuals will be very few indeed. The usual course will be that complete disclosure is made. There is no possibility, therefore, of the gains in efficiency through narrowing of the issues at the trial, being lost through the need to resolve matters concerning the extent of the disclosure at the pre-committal hearing.

Although we are today dealing mainly with indictable matters, the scheme of disclosure will also apply to summary matters.

CONCLUSION

That is a brief outline of the proposals which are soon to go before parliament. As to the question of whether they amount to radical or evolutionary change, I would have to say that it is the latter. The removal of the Magistrate's decision as to whether to commit for trial is a natural consequence of the creation of an independent statutory prosecution agency. As Mr Justice Wilson (as he then was) noted, speaking extra-judicially, the development of a Director of Public Prosecutions "should render the committal proceeding unnecessary and pave the way for its abolition".

With the creation of the Director of Public Prosecutions in the New South Wales under a previous Government with bipartisan support, it was obvious that the role of committal proceedings would have to be re-examined. This Government was brave enough to carry out this re-examination, fully recognising its importance. The decision to replace committals was not arrived at overnight and without public consultation, but only after the release of a discussion paper and consideration of the many responses we received. As a Government it is easy to sit back and do nothing — it's a lot harder for criticisms to be made when simply maintaining the status quo, but we were not prepared to do that. Had this Government wanted to take the easy way out we could have simply proclaimed the amendments to the *Justices Act* introduced by the previous Government which I referred to earlier. We could have avoided a great deal of criticism from some quarters. I believe that what we have come up with is an immense improvement on the present system.

There is no doubt that there is increasing pressure on our system of justice to operate efficiently and fairly. After all, there is not a bottomless pit of money which allows us to throw unlimited funds to the criminal justice system at the expense of hospitals, schools and other community needs. There is, therefore, a need to examine all aspects of the system to ensure that it is running in a fair and efficient manner. This examination cannot be limited to listing procedures and the like but must, as in the case of the reforms we are discussing today, involve looking afresh at the substantive procedures including those by which a person is committed for trial.

I see from the programme that Peter Hidden, QC, will present a paper on "The Benefits of Committal Proceedings". I was fortunate enough to be provided with a draft copy of his paper. I think it important that I deal with some of the points I expect him to raise. My basic argument is that the benefits of committal proceedings are to be retained. I would like to outline some, but not all, of the benefits of committal proceedings and explain how these benefits are retained.

1. Committals allow the prosecution evidence to be tested by cross-examination, and to see if a witness will "come up to proof" when sworn to tell the truth in a court. You will recall that the proposed scheme also allows this wherever 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. The new scheme will therefore have in this respect the same benefits as committals;
2. Committals narrow the issues for trial through cross-examination of witnesses and may well persuade an accused to plead guilty. Again the proposed scheme has exactly these benefits. In fact the new scheme will probably provide greater benefits because of the more formal requirement of disclosure of the prosecution case, allowing more precise cross-examination on the substantive issues;
3. Committals filter out hopeless cases. Hopeless cases will continue to be filtered out by the Director of Public Prosecutions as presently occurs;
4. Committals filter out these cases *in public* not behind closed doors. I have a few answers. Firstly, very few cases are filtered out by Magistrates at committal. In comparison to the Director of Public Prosecutions' 'no bill' powers. Secondly, the Director of Public Prosecutions has not once since his *Act* commenced refused to give any reasons for any of his decisions — furthermore, the new legislation will specifically require the Director of Public Prosecutions to give reasons as to why a person charged with an offence by police will not be sent to trial. Finally, we cannot ignore the very real problem that can be caused to ensuring a fair trial for the accused. There is a tendency for the publicity given to a magistrate's decision to commit, to prejudice the later trial.
5. Committal proceedings allow an accused to give sworn evidence. This is a rarely used right, but an important one which is retained under the proposed scheme.

Mr Hidden will no doubt mention other benefits of committal proceedings. The fundamental point that I wish to make is that as a barrister who has conducted many committals whilst at the Bar, I know full well that the early examination of witnesses has many benefits and the simple abolition of this process would be disastrous. That is why we talk of "replacement" with a scheme that recognises the benefits of committals and ensures that those benefits are also to be found in the new scheme.