# THE BENEFITS OF COMMITTAL PROCEEDINGS

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In a paper entitled "In Defence of the Committal for Trial" delivered at the Second International Criminal Law Congress at Surfers Paradise in 1988, Mr Justice J.A. Lee, the Chief Judge of the Common Law Division of our Supreme Court, wrote:

> Speaking for myself, I cannot feel other than that the preliminary investigation provided by committal is a protection to an accused against wrongful prosecution of the same order as is the requirement at the trial that the charge against him be proved beyond reasonable doubt. Putting altogether to one side the advantages which the accused himself may gain from the committal for use by him in the subsequent trial, there remains the fundamental feature that the committal ensures that a person is not put on trial unless it has been shown publicly that there is a prima facie case against him.

The modern Australian apologist of the committal system draws comfort from a variety of authoritative statements, chief among them being the resounding words of Gibbs ACJ and Mason J (as they were then) in *Barton v. The Queen*: [2]

> It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. 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. For us to say, as has been suggested, that the courts are concerned only with the conduct of the trial itself, considered quite independently of the committal proceedings, would be to turn our backs on the development of the criminal process and to ignore the function of the preliminary examination and its relationship to the trial. To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused person, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial.

With their Honours' reasons Aickin J agreed. The other three Justices (Stephen, Murphy and Wilson JJ) did not see committal proceedings as an essential pre-requisite of a fair trial, although none of them denied their benefit to, at least, the accused. For example, Stephen J referred to the effects of the absence of committal proceedings before trial as follows:[3]

> . . . loss by the accused of the chance of discharge by the committing magistrate is by no means the most serious detriment which absence of committal proceedings imposes upon an accused.

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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

2 (1980) 147 CLR 75, at 100

3 *ibid* at 105

> An accused also loses the opportunity of gaining relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of testing that evidence by cross-examination. A court, in exercise of its power to ensure a fair trial, can do much to reduce the deleterious effect of the first two of these losses by ensuring that the accused is furnished with particulars of the charge and proofs of evidence. But the loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable. How serious this will be to the accused will depend upon the nature of the offence charged and of the Crown's evidence. It is likely to be the most serious detriment which absence of prior committal proceedings imposes upon the accused.

Before *Barton*, the importance of committal proceedings had been emphasised by our Court of Criminal Appeal in *Reg. v. Fazzari*[4] and it was more recently re-asserted by that same Court in *Reg. v. Nicholds*.[5]

Quite apart from their advantage to the accused, committal proceedings are an integral part of the administration of our criminal justice system because:

(a) they enable both the prosecution and the defence to assess the strength of the evidence upon which the Crown relies;

(b) they are conducted (generally speaking) in public;

(c) they result in a decision whether or not the case is fit for trial by a person independent of the prosecution.

The examination and cross-examination of significant witnesses in the committal proceedings helps both prosecution and defence to delineate the real issues in the trial and, in cases where the cogency of the evidence is confirmed, may well persuade an accused to plead guilty. It might be added that committal proceedings also enable an accused to present evidence in his or her own case, which can itself be tested by cross-examination. Even if that evidence does not lead to the accused's discharge, it may be material in the decision of the Director of Public Prosecutions whether the matter should proceed to trial. The fact that the right of an accused to present evidence in committal proceedings is rarely invoked is not to the point.

The "paper committal" system, introduced in the 1980s into the *Justices Act* 1902, can do much to relieve delays in the procedure and, clearly, its use is to be encouraged. The fact remains, however, that the credibility of a witness whose evidence is significantly in dispute cannot be assessed from a statement given to investigating police. Quite apart from the light which the demeanour of the witness in court may cast upon the reliability of his or her evidence, cross-examination may lead, at the least, to a modification of what appears in the statement and, in addition, may elicit fresh material helpful to the defence case. Such material may afford new lines of enquiry to the accused's legal representatives which would need to be pursued in preparation for the trial.

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4 Unreported, 8 December 1977

5 Unreported, 13 August 1987

Nowhere is this more apparent than in the ever-increasing number of cases in which the prosecution relies upon the evidence of prisoners or other persons with a criminal background (whether or not they be accomplices in the offence charged). I would be the first to acknowledge that there are serious cases in which the only evidence upon which the Crown can rely is that of established criminals, and I do not suggest that persons with lengthy criminal records are necessarily incapable of telling the truth. The fact remains that many such persons who give evidence have their own interests to serve and their dubious credibility is often balanced by a deal of rat cunning. Because of their chequered background, some of them have an "earthiness" about them which is appealing to a jury and conveys an apparent frankness. Yet, that appearance may be no more than a veneer concealing a pathological liar or a fantasist. Frequently, the only way to discredit such a witness is a painstaking investigation of the details of his or her evidence, and the material upon which such an investigation might be based may appear for the first time in cross-examination at the committal proceedings.

The presumption of innocence, which endures until a person has been found guilty of an offence by a jury, does not alter the fact that to require a citizen of this community to face trial on indictment is a major step. No-one would deny the inconvenience and anxiety caused by a trial to the accused and, in cases of violence or sexual assault, the alleged victim; nor would anyone deny the attendant expense to the community and, should legal aid not be available, the accused. In addition, in the period between committal and trial, the accused may be held in custody or his or her liberty may be fettered by conditions of bail. It is for these reasons that the decision to commit for trial must be made in public and by a person unconnected with the prosecuting authority.

It is not to the point that the Director of Public Prosecutions has the power, rarely exercised, to present an ex officio indictment. That power is a necessary safeguard against the exceptional case where the discharge of the accused by a magistrate is clearly ill-advised (as is, conversely, the power of the Director to elect not to proceed to trial where an accused has been committed for trial upon clearly inadequate evidence). Nor is it to the point that, in the absence of committal proceedings, the decision to prosecute on indictment would be made by a senior law officer of undoubted integrity and high repute. In this regard, it is interesting to note the comments of the New south Wales Law Reform Commission upon the Scottish system of criminal prosecution in the 1987 discussion paper, *Procedure from Charge to Trial: Specific Problems and Proposals.* The effect of that system is that the decision to put a person on trial is made, without committal proceedings as we know them, by the Procurator Fiscal. The Law Reform Commission had this to say:

> The Scottish system of criminal procedure appears to depend heavily on the proposition that the Procurators, as people of integrity and as responsible officials, will act fairly and properly and only where the justification for taking action against a citizen is well founded. Without in any way seeking to reflect adversely upon the administration of the Scottish system, we do not consider that a presumption of this kind should be such a fundamental feature of the process of criminal justice. Fairness and integrity are not by themselves enough to guarantee that a correct decision is made. More importantly, however, the principles, firstly, that justice should be seen to be done and, secondly, that

> those responsible for the administration of justice are publicly accountable for the decisions they make, are ignored by this process.[6]

## THE ATTORNEY GENERAL'S PROPOSALS

Although described in the Attorney General's media release as "sweeping changes to committal procedures", the changes proposed would amount to the abolition of committal proceedings as we know them. The decision to "commit for trial" would be made in private by the Director of Public Prosecutions. Provision is made for a pre-trial hearing, presided over by a magistrate, at which the evidence of certain witnesses may be tested by examination and cross-examination, but it would be no part of the magistrate's function to assess that evidence and to determine whether the accused should be placed on trial. The accused would have the right to cross-examine certain classes of witnesses, and may be able to cross-examine witnesses falling outside those classes if the prosecution consents or the magistrate so orders.

Conspicuous by their absence from the category of witnesses whom the accused is entitled to cross-examine are the alleged victims of crime. Yet, their credibility, particularly in sexual assault cases, is usually central to the Crown case. No doubt, it is unfortunate that persons who have suffered violence or sexual assauit (especially, in the latter case, children) must be called upon to give evidence on two occasions. However, criminal proceedings are distressing and time consuming for all concerned, and the personal interests of victims cannot be allowed to override the dictates of justice. The accused would have the right to cross-examine a witness who is an accomplice or who has been indemnified against prosecution in respect of the matter charged, but there may be many cases in which a criminal informer (whether or not a prisoner) who does not fall into that category may be relied upon by the prosecution. For the reasons stated above, it is essential that any such witness be available for cross-examination before trial. Again, why should police, whose evidence is often highly contentious, be excluded? (Cross-examination of police is not always a thankless task!)

It would remain to be seen to what extent, if at all, the prosecution would consent to the cross-examination of witnesses falling outside these specified categories. In the absence of that consent, the defence would have to invoke the discretion of the presiding magistrate to direct cross-examination of such a witness "where there are reasonable ground to suspect that cross-examination will affect either the assessment of the reliability of the witness, or would elicit further material to support a defence". I fail to see how, in most cases, that assessment could be made before any cross-examination was embarked upon.

Presumably, the proposal that certain witnesses by available for cross-examination before trial is intended to preserve one of the benefits of committal proceedings — that is, the opportunity for both the prosecution and the defence to assess the strength of the case.

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6 New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals* (1987) Volume 1, p 296

(Such an assessment, of course, enables the prosecution not only to decide whether the case should proceed to trial but, if so, upon what charge. Sometimes the evidence of important prosecution witness at committal may lead the prosecution to abandon the charge originally preferred, and to proceed with some lesser charge.) However, the identification of the witnesses upon whose credibility the prosecution case depends will vary according to the facts of the case itself and cannot be predicted by reference to pre-existing categories. I appreciate that it is proposed that the defence would be entitled to cross-examine any witness whom the prosecution chose to examine in chief, but I fail to see why the *right* of the defence to cross-examine witnesses falling outside the other three specified categories should be contingent upon the prosecution making that choice.

The proposed changes are heralded as, above all else, a step towards the reduction of delays in the criminal justice system. The fact is, however, that the lion's share of the delay in finalising criminal trials is in the period between committal and trial. The Attorney General's media release itself attributes about one-third of the delay between charge and trial to the committal process. In fact, figures contained in the 1989 Annual Report of the Attorney General's Department disclose that, in 1988, committals accounted for a little over one-third of the delay between arrest and trial in relation to custody matters in the Sydney District Court, but a little under one-quarter of that delay in bail matters in the Sydney district Court and in all matters in the Western Sydney Courts. I might add that, as far as I am aware, no analysis has yet been made of the effect of the paper committal system upon the efficiency of the committal process.

In any event, one wonders whether the proposed procedure would save time. The cross-examination of some witnesses before trial would occur: and it is impossible to predict how often the prosecution would elect to examine in chief witnesses falling outside the three specified categories or would consent to their cross-examination, just as it cannot be known how liberal would be the exercise of the residual discretion of magistrates to permit the cross-examination of such witnesses. No doubt, time would be spent on disputation as to whether a witness falls into one of the three defined categories, or as to whether that discretion ought be exercised.

The Attorney General's media release also announces that the proposed changes "... will give the Director of Public Prosecutions a bigger role in the prosecution process". Indeed, they would, and one cannot but wonder whether this is not the real agenda. The media release goes on:

> The DPP will now become involved from the very beginning of a planned prosecution, decide whether it should go ahead and eventually whether the person should be committed for trial.

In other words, the decision to proceed to trial would be made by the same authority which had launched the prosecution in the first place. I have already commented upon the undesirability of that decision being made by the Director of Public Prosecutions, rather than by a person independent of the prosecution after a public hearing. This so particularly where the case is one which has attracted widespread publicity and where the allegations against the accused have engendered public outrage.

It would be undesirable, at this time, to discuss the notorious "Mr Bubbles" child sexual assault case, as it is the subject of continuing controversy. Suffice it to say that I cannot see anything in the system proposed by the Attorney General which could have prevented that matter going to trial in the Supreme Court where, no doubt, the prosecution would have collapsed as inevitably as it did in the Magistrate's Court.

In addition, the effect of the proposals would be that the developments between charge and trial would be in the hands of the DPP and his staff and would not be amenable to the supervision or control of any court. There are many who would advocate the imposition of time limits between charge and trial which are legally enforceable, and not merely precatory, under the present system. Under the proposed system, these would be essential.

## THE FUTURE FOR COMMITTALS

The Attorney General's media release asserts that, at present, more than 90 per cent of persons facing committal proceedings are, in fact, committed for trial. While I have not examined such statistics as there may be, I would not disagree. Making due allowance for the passionate myopia which is the just entitlement of all defence lawyers, there is justification in their claim that some magistrates simply refuse to perform the function entrusted to them by the *Justices Act*, and commit for trial when, in the light of the evidence, they ought not to do so. On the other hand, there have in recent times been instances of magistrates discharging person of some public notoriety where the evidence did not pass muster, even though a decision to commit would have been the easier option and would have attracted little criticism. The fact remains that the power to discharge is spelled out in the *Act* and the breadth of that power has recently been asserted in *Saffron v. Director of Public Prosecutions.*[7] No judicial body, however august, is immune from error and the fact that the committal process may not be as effective as filter as it should is no reason for abandoning it.

As already observed, the paper committal system is a timely reform, the effectiveness of which has not yet been assessed. It is incumbent upon the legal representatives on both sides of the record to ensure that the system is used efficiently, and that only those witnesses whose evidence is significant and requires to be tested are called. Again, the fact that the paper committal system is not used as effectively as it might be (if that be the fact) is no reason for abandoning the committal process. Much would be gained, also, by a reform of the listing process: it may be that there should be a call-over of committal proceedings before they are listed, and it is essential that all committals be able to be heard on consecutive days until their completion.

Finally, at the risk of a (baseless) charge of empire building, a plug for legal aid. The media release quotes the Attorney General as saying that, ". . . under the current system, the defence often treated committal proceedings as a "dry run" in which they could call every prosecution witness no matter how unimportant and try to discredit them".

7 (1989) 16 NSWLR 397

While I have no doubt that this has happened, I would respectfully challenge the assertion that it is commonplace. Indeed, it is the experience of the Public Defenders that, in a large proportion of the cases in which they are briefed (and they are briefed in many), there has been a paper committal in which no witness was called for the simple reason that the accused was unrepresented at that stage. It is regrettable that, generally speaking, legal aid is not available for committal proceedings with the result that, in a significant number of cases, persons proceed to trial without the evidence for the prosecution having been tested at all. The committal process can be effective only where both sides are competently represented, and the provision of legal aid at that stage for persons unable to afford private representation would be beneficial not only to them but to the administration of justice as a whole. In the paper previously referred to, Mr Justice Lee said of the committal:

> Used responsibly by both prosecutor and accused it can be of significant benefit both to the public interest in ensuring that prosecutions are not brought except on proper material and secondly in safeguarding the rights of an accused person and ensuring his fair trial.

In addition, the provision of legal representation at the outset to all persons charged with indictable offences may well lead to may more cases being disposed of summarily. I have no doubt that the cost of providing legal aid in committals would, in the fullness of time, be offset by the speedier and more efficient dispatch of the business of the criminal courts.

It is in the nature of things that the day-to-day working of the committal process, like any other legal procedure, has its imperfections. There may well be some bathwater which ought to be jettisoned, but the baby must be preserved.