

The Future of Victoria's Committal System

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“Should Victoria maintain, abolish, replace or reform the present committal system?”

-This question was asked by the Victorian Law Reform Commission ‘VLRC’ which is due to deliver its report on ‘committal hearings’ to the Victorian parliament 31 March 2020. The VLRC is currently seeking submissions on this question.

I INTRODUCTION

In Victoria the accused has a right to receive a ‘fair trial’ and this is a fundamental element of our criminal justice system. Procedure gives rise to fairness because it is an objective standard by which all are equally measured. Nevertheless, adherence to strict procedure can be problematic and can ‘make the administration of justice a solemn farce’. This paper argues that Victoria’s committal system whilst imperfect does not make a farce of ‘fair’ justice.

II VICTORIA’S COMMITTAL SYSTEM

Generally before an indictable offence is tried in the superior courts, magistrates first establish whether there is a *prima facie* case against the accused to stand trial. The jurisdiction is *sui generis* as magistrates in hearing committals do not act judicially and cannot hear indictable and summary matters together. Committal proceedings are administrative checks on cases brought against those accused of indictable crimes, they are not acts of adjudication.

The committal system is also the procedural equivalent of the 'discovery', 'pleadings' and 'case management' processes in civil law. A 'hand-up' brief must be served on the defendant at least 42 days before the committal mention hearing. Hand-up briefs contain the charge-sheet, a summary of material facts and evidence the prosecution will rely on in making its case. The committal mention hearing is the central case management hearing in committal proceedings.

III PURPOSES OF THE COMMITTAL SYSTEM

The *Criminal Procedure Act (2009)* (Vic) ("the Act") does not explicitly state the purpose of achieving the 'just, efficient and cost-effective resolution of the real issues in dispute' as is the case in civil procedural law. Whilst not needing an exactly similar purpose the Act has no clear overarching purpose. Prosecutors, but not every party, must have regard to justice, fairness, economic efficiency and the victims of crime.

The underlying purposes of the committal system are varied, controversial and unclear. These purposes are said to include providing the defendant with a summary of the charges against him; providing the defendant with a thorough understanding of the prosecution's evidence; to give the defence an opportunity to cross-examine witnesses; encouraging early guilty pleas; and giving the prosecution and defence a dress rehearsal. The committal process also protects the accused from wonton and misconceived prosecutions.

It may be noted that committal hearings massively benefit the accused. Any procedural step that benefits the accused is 'fairer' for the accused. This kind of a fairness is important in protecting the accused from unjust prosecutions. Nevertheless, whilst it is important for procedural rules to be 'fair' for the accused, 'fair' must also mean 'fair' for all parties. It should also be mentioned that 'fairness' for the accused is not the only value with which our legal system is imbued.

IV PROBLEMS WITH THE COMMITTAL SYSTEM

In truth the prosecution has complete control over the prosecution of criminal cases. If a magistrate commits a person to trial a 'no bill' may be found. If a magistrate decides not to commit a person to trial the prosecution may file an *ex officio* indictment. The committal system can be completely circumvented by *ex officio* indictments. Whatever benefits the accused may have received from the committal process can be effectively nullified. This can occur even if a magistrate finds that there is insufficient evidence to commit an accused person to stand trial.

The deprivation of committal proceedings is a deprivation of valuable protection that is (at least presently) uniformly available to other accused persons. A procedural process is only truly 'fair' if it applies universally. The courts have no control over how the relevant prosecutor decides to commence proceedings but once he/she commences proceedings the courts do their utmost to ensure that the accused receives a fair trial.

Historically the prerogative use of *ex officio* indictments has been used by prosecutors for malicious and political ends. The abuse of process was rectified by the Magna Carta of 1215. Modern *ex officio* indictments are a statutory power with prerogative characteristics. It is argued that prosecutors are highly independent, highly qualified professionals who are well equipped to decide who should be tried and on what basis. This is undoubtedly true. Prosecutors are best equipped to identify on what basis which individuals should be indicted. For all intents and purposes it is the prosecution that prosecutes the accused. However, this is irrelevant in light of the real question in issue:

A SHOULD THE DEFENDANT DERIVE THE BENEFIT OF COMMITTAL PROCEEDINGS?

The majority in *Barton v R* concluded that *ex officio* exceptions to committal proceedings are only justified on 'strong and powerful grounds'. The committal system was seen by the majority as providing such important protections to the accused that without them trials would generally be unfair.

Wilson J in the minority argued that 'the functions of prosecutors and of Judges must not be blurred' and that '[judges] should not appear to have any responsibility [for prosecution]'. This proposition is well

founded. However, it misses the fact that prosecutors already always have power with respect to prosecution. Furthermore, it fails to identify the true benefit of committal proceedings. The benefit to the accused does not exist in the possibility of a magistrate refusing to commit them to trial. The benefit to the accused exists in knowing their case against them.

Failure at committal is a powerful statement to prosecution authorities that proceedings should not be brought to trial. However, failure at committal is nothing more than an administrative indication that the prosecution's case is unmeritorious in the eyes of the magistrate. Judges are never afforded with an opportunity to prevent prosecution. The judge's role is, rather, to prevent an abuse of process and control proceedings once an accused person has been committed to trial.

V COMPETING TRADE-OFFS –ECONOMIC EFFICIENCY

The committal system itself is imperfect. Whilst the accused should derive the benefit of committal proceedings there are other competing interests at play. Consideration must be had to economic efficiency and victims.

The committal system should not be abused by defence council thereby making a farce of 'fair' justice. Delay is a major problem in our current judicial system. Committal proceedings provide defence council with an opportunity to unnecessarily delay court proceedings. A greater number of procedural steps allow for a greater number of arguments to be made with respect to procedural irregularity. Defendants have made mockeries of committal proceedings before.

Some argue that without the committal system delays may simply be shifted to superior courts. It has also been argued that a lack of committal procedures can contribute to delay. It is unclear whether the committal system contributes to delays. For this reason the case management role of committal hearings should be emphasised in future laws to ensure that delays are minimised as much as possible. The committal system already provides opportunity for dialogue with the case direction notice. Pleas can be made before the full hand-up brief is served. Nonetheless, laws should emphasise that if the committal process is abused an ex officio indictment is an alternative measure available to the prosecution. This may encourage defence lawyers to think twice before abusing the committal system.

VI VICTIMS

Victims and witnesses sometimes need to testify twice. Having to re-experience trauma at trial or during committal hearings can interfere with their recovery. Defence council sometimes 'go fishing' and put witnesses through the wringer.

The Act already provides witnesses with some mild protections. People who were children or had cognitive impairments at the time the criminal proceedings commenced cannot be cross-examined in sexual offences cases. There is a 'hurdle' requirement before witness can be cross-examined. However, once leave to cross-examine is obtained, the witness can be cross-examined on any issue except where the court disallows a question.

The problem of victim trauma can be mitigated by laws that encourage defence council to take into account the needs of the victim.

Magistrates should be given a power to end committal proceedings and recommend the prosecution bring an *ex officio* indictment if the court is satisfied that the cross-examination is unwarranted, capricious, malicious or otherwise does not properly take into account the needs of the victim.

VII CONCLUSION

Unlike in the United States where committals occur by grand jury, our system is not *ex parte*. Our prosecutors do not use grand juries as a shield in those cases where prosecutions are controversially discontinued and where they fail to live up to public expectations. In England grand juries existed until 1933. They were always held *ex parte*. In Victoria the accused attends his committal hearing so that he may have a fighting chance at defending himself at trial. *Ex officio* indictments should loom over the accused to ensure that the accused (or defence council) does not abuse a process which exists primarily for their benefit. Our committal system should not be seen as a screening process by which indictments are filtered. Rather, our committal system should be seen as a procedure ensuring fairness for the accused. The accused must play his part properly without taking advantage of the benefits afforded to him.

For bibliographic information and pinpoint references please refer to the .pdf version of this article.

WHO AM I

My name is Ari and I am a law student at Monash University in Melbourne Australia. I learn Chinese (Mandarin) in my spare time.

WHAT IS THIS

I built this website in June 2019 using Jekyll 'Papyrus' which can be found on github. Here you can find essays on law and philosophy. I also publish stories about my experiences learning Chinese (Mandarin) as well as the odd translation.

WHERE AM I

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