JUSTICIABILITY OF DECISIONS IN THE CRIMINAL PROCESS: REVIEW OF COMMITTAL PROCEEDINGS IN THE FEDERAL COURT

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1 INTRODUCTION

Justiciability is a central concept in administrative law. It is used to define the limits of judicial review, limits drawn in terms of "judicial conceptions of the proper relationship between the courts and the executive".[1] This paper examines the limits on judicial review of one part of the criminal process.

Decisions made at a criminal trial can be challenged by statutory avenues of appeal or, less usually, by judicial review. Decisions earlier in the criminal process, however, are generally unreviewable at common law. For a variety of reasons, they have "enjoyed a special immunity from judicial review."[2] The discretions to prosecute, or to discontinue a prosecution, have been regarded as non-reviewable exercises of prerogative powers.[3] Where equivalent powers have been conferred by statute, the unlimited terms in which they are granted has similarly meant they are unreviewable.[4] Even with moves to greater review of prerogative powers in Australia and overseas[5] prosecution decisions continue to be regarded as unreviewable. As they involve a wide and unstructured discretion, with a large policy component, they are said to be more appropriately accountable to Parliament than to the courts.[6]

Committal proceedings have different features. They are statutory in origin, and the discretion being exercised is statutorily defined. There have however also been doubts about their amenability to review, at least by the prerogative writs. One reason, as will be seen, has been the traditional classification of the magistrate's function as executive rather than judicial.

The "New Administrative Law", and in particular the establishment of review under the Commonwealth Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act), has seen a widening of review of the criminal process. Many decisions have been held to fall within the Federal Court's jurisdiction as

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1 M Allars, *Introduction to Australian Administrative Law* (1990) 43.

2 *Ibid* 45.

3 See *R v Prosser* (1848) 11 Beav 306; *Gouriet v Union of Post Office Workers* [1978] AC 435; *Barton v R* (1980) 147 CLR 75, 90-95.

4 *Barton v R* (1980) 147 CLR 75, 94; and see *Clyne v Attorney-General (Cth)* (1984) 55 ALR 624.

5 See *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

6 See *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, 219 *per* Mason J; *Barton v R* (1980) 147 CLR 75, 91, 94-5.

decisions "of an administrative character made ... under an enactment".[7] Jurisdiction has been found - or conceded - to exist under the AD(JR) Act in relation to decisions to prosecute, to consent to prosecution, and to proceed by indictment rather than summarily.[8] Jurisdiction to review has also been accepted in relation to committal proceedings for criminal offences.[9] The extension of judicial review in the federal sphere, provided an "administrative" decision "under an enactment" can be located, appears to have overridden the common law immunity. However the Federal Court in fact exercises its powers in these matters only in "exceptional" circumstances, as will be discussed below. The discussion here will focus on the review of committal proceedings for offences against federal law. The paper will examine the current state of the law regarding review of committals under the AD(JR) Act. It will then analyse the matters of principle at issue, and the implications of these broader principles for the direction of reform. First, it is necessary to outline the nature of committal proceedings.

2 THE OPERATION OF COMMITTAL PROCEEDINGS

People charged with serious criminal offences in Australia have the case against them evaluated in a "preliminary examination" or committal hearing, the object of which is to test the sufficiency of the prosecution evidence. Preliminary examinations are intended to protect the citizen from being prosecuted on inadequate evidence, by filtering out weak or unmeritorious cases. This is seen as benefitting the state, by promoting efficiency in criminal prosecutions; it also benefits the accused, ensuring he or she is not prosecuted without some material evidence of guilt. Committals for offences against both State and federal laws are heard in state Magistrates' Courts; the procedures followed are those prescribed in the relevant state legislation.[10] In their traditional form they entail a formal adversarial hearing in a magistrates' court.

There are two stages at which decisions must be made in committal hearings: the completion of the prosecution case, and the close of the defence case (if any). In Victoria, for instance, having heard the prosecution case a magistrate is required to decide whether the evidence "is of sufficient weight to support a conviction". If not, the magistrate is required to discharge the accused. Otherwise the accused is cautioned and invited to plead or make answer to the charge. The magistrate also has power at this point to decide whether the evidence is sufficient to support a conviction for some *other* indictable offence, and if so

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7 Administrative Decisions (Judicial Review) Act 1977 s 3(1). Note that prosecution decisions are not included in Schedule 1, which exempts specified decisions from review; they are however protected from the s 13 duty to provide reasons under Schedule 2. The non-inclusion of such decisions in Schedule 1 was considered significant by the Federal Court in *Newby v Moodie* (1988) 83 ALR 523, 527. On the issue of the abrogation of prerogative powers by statute see M Allars, *supra* n 1, 47, 96.

8 See *Newby v Moodie* (1988) 83 ALR 523; *Murchison v Keating (No 2)* (1984) 54 ALR 386; *Buffier v Bowen* (1987) 72 ALR 256; *Murchison v Keating (No 1)* (1984) 54 ALR 380.

9 *Lamb v Moss* (1983) 49 ALR 533.

10 The state courts are invested with federal jurisdiction to hear committals for federal offences by s 68(1) and (2) Judiciary Act 1903 (Cth) and s 85E(1) and (5) Crimes Act 1914 (Cth)). On procedures followed at committals see generally D Brereton and J Willis, *The Committal in Australia* (1990).

have the defendant charged. The same test is then applied on completion of the defence case (which may involve no more than the accused pleading not guilty and reserving his or her defence), the magistrate this time considering all of the evidence in the case. If the evidence is regarded as sufficient, the magistrate must then commit the accused to prison or admit him or her to bail.[11] This is the traditional committal procedure. Paper committals, or "hand-up briefs", are also available in all jurisdictions, and in fact have become the norm[12]; the written statements of witnesses are admitted in place of oral evidence, subject to the right of the accused person to require the attendance of any witnesses.

Committal proceedings have been under challenge recently both from governments (proposing abolition) and from participants (looking for greater accountability, or more efficiency). There have been proposals to replace the preliminary examination with a simpler and less expensive form of pre-trial disclosure, debated most seriously in New South Wales.[13] Arguments for abolition usually emphasise reducing delays in getting matters to trial, reducing costs, and avoiding the repeated cross-examination of witnesses; it is also argued that the committal is not an effective filter of weak cases. This latter part warrants further attention.

The majority of cases are committed for trial at the preliminary examination. The accused rarely puts in a defence and the decision is based on the evidence of the prosecution, together with any cross-examination of prosecution witnesses by the defence. Statistics on the operation of committal proceedings are, however, controversial. A 1989 New South Wales study by Coopers & Lybrand found a two per cent committal discharge rate in that state; this figure is now widely acknowledged as being unreliable.[14] Brereton and Willis, in a study commissioned by the Australian Institute of Judicial Administration, found a discharge rate in Victoria of 9.5% between September 1989 and March 1990. They also found a significantly lower rate of entry by the Crown of *nolle prosequi*, or "no bills" (around 6.5%) when the decision was being made after committal whether to proceed with the prosecution, suggesting that the committal is now functioning quite effectively in Victoria to remove the weakest cases. In South Australia the discharge rate at committal was 8%, with a slightly higher "no bill" rate of 11%.[15]

This study casts doubt on the arguments based on alleged ineffectiveness. However the committal is also widely valued for its role as a source of information. This role was emphasised by most of the participants at the recent national conference on the future of committals, almost all of whom

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11 Magistrates' Court Act 1989 (Vic) s 56 and Schedule 5 cl 11. The tests vary from jurisdiction to jurisdiction; see *eg* Justices Act 1902 (NSW) ss 41(2) and 41(6) (whether a jury would "not be likely to convict the defendant"). See summary in D Brereton and J Willis, *supra* n 10, 27-28.

12 D Brereton and J Willis, *supra* n 10, 65.

13 See P Byrne, "Committal proceedings: New South Wales proposals" (1990) 64 ALJ 430.

14 See, D Brereton and J Willis, "Evaluating the Committal" paper presented at the Conference on the Future of Committals, Australian Institute of Criminology, Canberra, May 1990. See also J Bishop, *Prosecution Without Trial* (1990) 90-99.

15 See discussion in D Brereton and J Willis, *supra* n 10, 49-54. The increased discharge rate in Victoria may also be connected with the change, in 1987, to the test to be applied by the magistrate in deciding whether to commit.

categorically rejected the moves towards abolition of committal proceedings. According to the High Court in *Barton v R*, the committal hearing should provide the following benefits to the accused:

> (1) knowledge of what the Crown witnesses say on oath; (2) the opportunity of cross-examining them; (3) the opportunity of calling evidence in rebuttal; and (4) the possibility that the magistrate will hold that there is no prima facie case or that the evidence is insufficient to put him on trial or that there is no strong or probably [sic] presumption of guilt.[16]

Stephen J also emphasised the importance of the committal for informing the accused of the case against him or her:

> The most obvious detriment [where no committal is held] is the loss of the opportunity of being discharged ... [But] [a]n 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... [T]he loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable.[17]

But despite this endorsement, and despite legislative provisions requiring information to be given to the accused about the case against him or her at the preliminary enquiry,[18] the "informational" function of the preliminary examination has been difficult to enforce in the state courts, at least by judicial review. Specifically, failure to fulfil this additional function has not been held to vitiate the hearing. For instance, an accused has no right enforceable by mandatory order (other than any statutory right) to further and better particulars of the charge,[19] and it has been stated that it is not part of the magistrate's duty to provide the accused with a rehearsal for the trial, or to ensure that the tactical objectives of each party are met.[20] Einfeld J recently criticised the restrictive approach of the courts to such matters as the ordering of particulars. He observed,

> [i]n my experience, the absence of particulars puts magistrates far too much in the hands of the prosecution in complicated cases ... History was able to show that if *Moss v Brown*[21] had directed particulars to be supplied, four years of litigation may ... have been avoided.[22]

The courts do not demand that the prosecution provide full disclosure of its witnesses; it has an absolute discretion as to the witnesses and evidence it produces at the preliminary enquiry.[23] The magistrate does not make an error of

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16 (1980) 147 CLR 75, 99 *per* Gibbs ACJ and Mason J.

17 *Ibid*, 105. See also the strong obiter comments of King CJ in *R v Harry; ex parte Eastway* (1986) 39 SASR 203, 209-214.

18 *Eg* Magistrates' Court Act 1989 (Vic) s 56 and Schedule 5 cl 1, cl 6. See generally D Brereton and J Willis, *supra* n 10, 23-27.

19 *Eg Ex parte Coffey; Re Evans* [1971] 1 NSWLR 434; *Moss v Brown* [1979] 1 NSWLR 114; *Summers v Cosgriff* [1979] VR 564.

20 *R v Epping and Harlow Justices; ex parte Massaro* [1973] QB 433; *Moss v Brown* [1979] 1 NSWLR 114.

21 One of a series of New South Wales cases arising out of prosecutions for alleged Social Security fraud; later cases included *Lamb v Moss* (1983) 49 ALR 533 and *Tahmindjis v Brown* (1985) 60 ALR 120. (Author's footnote)

22 *Briot v Riedel* (Federal Court of Australia, 10 March 1989, unreported decision of Einfeld J).

23 *R v Epping and Harlow Justices; ex parte Massaro* [1973] QB 433; *R v Arthur: ex parte Kapidistrias* (Supreme Court of Victoria, 8 November 1982, unreported); *Re*

law, or breach natural justice, if he or she fails to require the attendance of all witnesses.[24] Courts in some jurisdictions have endorsed the power of a magistrate to stay committal proceedings for abuse of process, for instance where the failure to call a particular witness made the proceedings unfair to the defendant.[25] The High Court has however held that, at least under the New South Wales legislation, a magistrate has no inherent or statutory power to stay a committal for abuse of process.[26] The better view now seems to be that the *trial court* may stay the trial proceedings due to unfair conduct during the committal, to ensure, for instance, the provision of necessary information to permit a fair trial.[27]

A central feature of the committal is that the magistrate's finding is not conclusive; it does not affect the prosecutorial discretion either to proceed with the case or to withdraw. This has been critical to the common law attitude that the proceedings should not be subject to judicial review. A prosecution can proceed despite a decision by the magistrate not to commit the accused for trial, as the Director of Public Prosecutions (DPP) has power to proceed by *ex officio* indictment.[28] The DPP can also commence proceedings for an offence which was not examined at the committal hearing, or for an offence other than that for which the magistrate directed that the accused be tried; the DPP can, on the other hand, decide not to proceed, despite a committal for trial.[29] Indeed, it is not strictly necessary for a preliminary examination to be held at all. A defendant can choose to stand trial without a committal hearing, and the DPP can also simply present the accused for trial. The latter course was, however, strongly criticised by the High Court in *Barton v R*,[30] and it seems to be used rarely.

The High Court was not prepared in *Barton's* case to say that failure to hold a committal hearing automatically meant the trial was unfair; but a stay could be granted for unfairness if the defendant had been deprived of adequate information. It was said that failure to hold a committal might not render a trial an abuse of process if, for example, the defendant in fact had all the relevant information.[31] In view of the elaborate statutory provisions for holding preliminary enquiries in every jurisdiction, Fox J in *R v Kent; ex parte McIntosh* considered it

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Harlock; ex parte Robinson [1980] WAR 260; *R v Harry; ex parte Eastway* (1986) 39 SASR 203, 205.

24 See *R v Harry; ex parte Eastway* (1986) 39 SASR 203. The majority in that case was however highly critical of the prosecution tactics in calling the minimum witnesses; King CJ stated that the prosecutor's attitude showed "an inadequate grasp of his responsibilities": 214.

25 *Eg Miller v Ryan* [1980] 1 NSWLR 93; *Sloan* (1988) 32 A Crim R 366; *Houston v Crannage* [1990] WAR 11.

26 *Grassby v R* (1989) 87 ALR 618; see also *Jago v District Court of New South Wales* (1989) 87 ALR 577.

27 *R v Harry; ex parte Eastway* (1986) 39 SASR 203, 212.

28 *Eg* Crimes Act 1958 (Vic) s 353; Criminal Procedure Act 1986 (NSW) s 4(2); Judiciary Act 1903 (Cth) s 71A; Director of Public Prosecutions Act 1983 (Cth) s 6(2A).

29 See R Fox, *Victorian Criminal Procedure* (6th ed 1988) 81, 87; J Bishop, *supra* n 14, 149-150.

30 (1980) 147 CLR 75

31 *Barton v R* (1980) 147 CLR 75, 98, 101-102, 105-106. See also *Barron v Attorney-General for New South Wales* (1987) 10 NSWLR 215, 234.

extraordinary that the preliminary enquiry should be optional.[32] But the non-conclusive nature of the hearing has led the state courts to doubt the appropriateness of judicial review, by analogy with the approach to the review of bodies with merely recommendatory powers.

It is argued in support of this narrow view of the courts' supervisory jurisdiction that any defects in the informative functions of the committal can be cured by providing the accused with the information later, or at the trial.[33] However it does not take account of the reality that the accused may have been held in custody pending the trial - a serious infringement of liberty, particularly if observance of proper procedure and access to information might have resulted in dismissal of the charge.

3 COMMITTAL PROCEEDINGS AND JUDICIAL REVIEW

Judicial review of the legality of the decisions made in committal proceedings is effectively the only avenue of review of such decisions; there is no provision for appeal on the merits of the decision. Magistrates make innumerable decisions in the course of a committal hearing which a party might seek to review. In addition to the decision whether or not to commit to trial, there may be questions of admissibility of evidence, requests for adjournment or for further particulars, findings on claims for privilege and on matters of statutory interpretation, findings as to the existence of the necessary statutory consents to prosecution, and requests for termination of the proceedings on grounds of the magistrate's own alleged bias.

Judicial review may be obtained under the state Supreme Court Rules by prerogative writ or Order to Review, or under specific statutory provisions for review of magistrates' decisions.[34] In the Commonwealth sphere, review is available under the Administrative Decisions (Judicial Review) Act 1977 (to be discussed further below). The availability of judicial review has traditionally depended upon the characterisation of the decision or decision maker, and this has significantly limited the common law development of avenues for judicial review of committals. For example, judicial review by the prerogative writs of certiorari and prohibition is only available to bodies which "act judicially" and whose decisions "affect rights".[35] The courts have had difficulty defining the function performed by the committing magistrate. However the fact that the preliminary examination is "merely" an inquiry, together with the magistrate's broad discretion in the making of the final decision whether or not to commit for trial and for what other offence, have tended to lead to characterisation as "ministerial" or "executive",[36] as not affecting rights, and arguably outside the supervisory jurisdiction of the higher courts. Here the courts seem to have harked back to the early investigative role of the committing magistrate which, like that of police today, would not generally be reviewable.[37] It has also been pointed out that

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32 (1970) 17 FLR 65.

33 See *Summers v Cosgriff* [1979] VR 564, 568.

34 See Justices Act 1902 (WA) s 197.

35 *R v Electricity Commissioners; ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 205.

36 See *Ammann v Wegener* (1971) 129 CLR 415, 435-436.

37 See *R v Commissioner of Police of the Metropolis; ex parte Blackburn* [1968] 2 QB 118; and see *Wright v McQualter* (1970) 17 FLR 305. Originally committal

there are several later stages at which any error may be rectified: there is the possibility that the prosecution will decide not to proceed after committal; there is the trial itself; the judge may direct an acquittal; and, if the accused is convicted, there may be an appeal.

In other circumstances however the "distinctive judicial character" of preliminary examinations has been recognised. The High Court in *R v Murphy* observed that they were "*sui generis*", but followed similar procedures to judicial proceedings, and "the ordinary consequence of an adverse determination of them is ... the commitment to prison of the accused...".[38] It cannot be denied that the outcome of the committal hearing can be very significant. It results in the determination of whether an accused is to be held in custody or admitted to bail, or discharged entirely. The decision to commit, with its attendant publicity, is likely to be personally damaging to the accused and the hearing itself may involve detrimental publicity.

A Common law review in the state courts

Judicial review of committal proceedings for offences under state legislation depends on common law rights to review. It continues to be restricted by the limitations on availability of the prerogative writs and equivalent orders, and narrow interpretations of the grounds of review, although some state courts have been more ready to provide judicial review than others.

The prerogative writs were the first choice of the early applicants for review of committals. Certiorari and prohibition were held to be unavailable in the 1946 New South Wales case of *Ex parte Cousens; Re Blacket*.[39] The Supreme Court rejected an application for prohibition against a magistrate hearing a committal for treason allegedly committed beyond the seas, where it was claimed the magistrate had no jurisdiction to hear the case. Street CJ stated

> This is essentially an executive and not a judicial function; and although magistrates have been exercising this authority for nearly four hundred years, no instance can be found of a superior Court having interfered with a magistrate by certiorari or prohibition....[40]

This case has continued to influence developments in the states which have accepted its authority. It was not followed in Queensland in *R v Schwarten; ex parte Wildschut*,[41] but has been affirmed in New South Wales[42] and Victoria,[43]

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proceedings were part of the investigation process; the justices actively sought evidence and conducted examinations in private, and ultimately presented a bill of indictment to the grand jury. However the establishment of a regular police force in the 1830s led to the development of a more judicial role for the justices, with the Indictable Offences Act 1848 ("Jervis's Act"): see J F Stephen, *A History of the Criminal Law of England* (1883) Vol 1, Ch VII. This act also formed the basis of magistrates' functions in conducting committals in Australia: see Alex Castles, *An Australian Legal History* (1982) 214-215.

38 (1985) 158 CLR 596, 616.

39 (1947) 47 SR (NSW) 145.

40 *Ibid* 146. See text *supra* n 37. de Smith comments that courts dealing with applications for judicial review during the war years were often concerned not to jeopardise "the public interest" by too much emphasis on individual rights; see J M Evans, *de Smith's Judicial Review of Administrative Action* (4th ed 1980) 32.

41 [1965] Qd R 276; and see *R v Bjelke-Peterson; ex parte Plunkett* [1978] Qd R 305. Review was held to be available in *Re Harlock; ex parte Robinson* [1980] WAR 260; authority of *Ex parte Cousens* not decided, in *R v Kelly; ex parte Hoang van Duong* (1981) 28 SASR 271.

where applications to review (at least by certiorari and prohibition) have usually been refused. The early committal cases were affected by the "classification of functions" approach to review, but the movement in administrative law away from rigid categorisation of decision-making has led to the recognition that many other "non-judicial bodies" affect rights and should be expected to "act judicially", and will therefore be amenable to review. In 1978 in *Sankey v Whitlam* the High Court was prepared to grant the declaration applied for, but Mason J also commented that, however the magistrate's functions were classified, the magistrate was required to "act judicially" in the sense of observing "certain standards of fairness appropriate to be applied by a judicial officer" and should be amenable to the prerogative writs.[44] Declarations and mandamus have been granted in relation to committal decisions.[45] The declaration is probably now the most widely sought remedy. It is, of course, discretionary.

The underlying theme in the courts providing common law review has been reluctance to intervene in the criminal process, a perspective which has manifested itself in a number of ways.

a) The judicial/ministerial distinction has been used to restrict review by way of certiorari and prohibition.

b) Where review is permitted, it will usually be for traditional jurisdictional error only.[46] Further, once the magistrate has properly assumed jurisdiction, the courts prefer to allow the enquiry to continue without interruption to a conclusion.[47]

c) The content of the requirement to observe the rules of natural justice is interpreted narrowly in view of the "inconclusive" character of the proceedings. As noted earlier, there is no absolute requirement that the defendant have full information about the charges, or that all relevant witnesses be available for cross-examination.

d) It is emphasised that relief is also discretionary. In fact, it was the view of Gibbs ACJ in *Sankey v Whitlam* that the inconclusiveness of the preliminary enquiry is irrelevant to the power of the court to review, but very material to the exercise of the discretion to review. His Honour

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42 At least in relation to review for jurisdictional error; *eg Ex parte Coffey; re Evans* [1971] 1 NSWLR 434; *Connor v Sankey* [1976] 2 NSWLR 570; *Spautz v Williams* [1983] 2 NSWLR 506. See also discussion in M Aronson and N Franklin, *Review of Administrative Action* (1987) 491, 586.

43 *Phelan v Allen* [1970] VR 219; *R v Murphy; ex parte Hamilton* (Supreme Court of Victoria, 21 July 1980, unreported). But see *Moularas v Nankervis* [1985] VR 369.

44 *Sankey v Whitlam* (1978) 142 CLR 1, 83-84. See also *R v Murphy* (1985) 158 CLR 596, 616; *R v Botting* (1966) 56 DLR 25.

45 Jurisdiction to grant declarations was given its imprimatur in *Sankey v Whitlam* (1978) 142 CLR 1, and the remedy has been held to be available (although rarely granted) in numerous cases since, such as *Bacon v Rose* [1972] 2 NSWLR 793; see M Aronson and N Franklin, *supra* n 42, 479. Mandamus has been granted *eg*, in *Ex parte Donald; re McMurray* (1969) 89 WN (Pt 1)(NSW) 462; *Sankey v Whitlam* (1977) 21 ALR 457; *Wentworth v Rogers* [1984] 2 NSWLR 422.

46 See *R v Carden* (1879) 5 QB 1; *Ex parte Dowsett; re Macauly* (1943) 60 WN(NSW) 40; *R v Bjelke-Peterson; ex parte Plunkett* [1978] Qd R 305; *Bacon v Rose* [1972] 2 NSWLR 793; *R v Judge Mullaly; ex parte Attorney-General for the Cth* [1984] VR 745.

47 *Eg, R v Wells Street Stipendiary Magistrate; ex parte Seillon* [1978] 1 WLR 1002: it is a matter of convenience, and also easier to decide whether any real injustice has been done at the end. See also *Moularas v Nankervis* [1985] VR 369.

recommended that criminal proceedings "be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to [intervene]".[48] Although the requirement of "special reasons" for intervention is reiterated in the cases, it has not in fact often been used to exclude review in the state courts. A case which has passed through the filtering process described in the previous paragraphs will probably obtain the requested relief.

In relation to federal offences the scope for review is, at least at first glance, considerably wider.

B Review of Committals for Federal Offences

Before the passing of the AD(JR) Act, decisions made by magistrates in committal hearings for federal offences were reviewed (where this was permitted) in state courts. The AD(JR) Act swept aside common law limitations, providing for review in the Federal Court of decisions "of an administrative character" for any error of law. It set out grounds of review which broadly cover the common law principles of judicial review.[49] They include breach of the rules of natural justice, lack of jurisdiction and improper exercise of power. An important extension of the common law is the inclusion as a ground of review of any error of law, whether or not jurisdictional and whether or not appearing on the record.[50]

The Federal Court has power under the AD(JR) Act to review "decisions of an administrative character made ... under an enactment"[51] and "conduct for the purpose of making a decision", which includes "the doing of any act or thing preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation".[52] The Federal Court accepted jurisdiction to review committal proceedings under the Act in 1983 in *Lamb v Moss*,[53] concluding that the decisions in dispute were "decisions of an administrative character", or conduct engaged in for the purpose of making a decision, and were made "under an enactment". In a statement of far wider significance than simply committal decisions, the Federal Court held that the class of reviewable decisions is not limited to decisions which "finally determine rights or obligations" or which have "an ultimate and operative effect".[54] Thus, the finding of a *prima facie* case against the defendant, and the decision to proceed with the hearing having found a *prima facie* case, were reviewable "decisions".[55] The refusal to allow certain witnesses to be recalled for further cross-examination (the magistrate having found a different offence to that charged) was held to be, if not

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48 (1978) 142 CLR 1, 26. The Federal Court has followed this guideline, and has developed a presumption of denial of relief in the absence of extraordinary circumstances.

49 Sections 5 and 6.

50 Sub-section 5(1)(f).

51 Section 5 and s 3(1). An expansive, and non-exhaustive definition of "decision" is given in s 3(2) and s 3(3).

52 Section 6 and s 3(5).

53 (1983) 49 ALR 533.

54 *Ibid* 556; overruling earlier cases requiring a "decision" to have the character of finality, *eg Riordan v Parole Board of the Australian Capital Territory* (1981) 3 ALD 144.

55 *Lamb v Moss* (1983) 49 ALR 533, 557.

a decision, conduct for the purpose of making a decision. The Court conceded that some preliminary steps would not come within the jurisdiction of the Act, but it thought that sub-s 3(5) could authorise review of the taking of evidence in committal proceedings, or continuing with the enquiry.[56]

The effect of this decision was that state courts were precluded from reviewing committals for federal offences.[57] There may be some scope for common law review by the Federal Court under s 39B Judiciary Act 1903 and related provisions, although it is not clear that a state magistrate would be considered an "officer of the Commonwealth".[58] The AD(JR) Act is now however clearly the preferable avenue for review.

Lamb v Moss has stood as the authority for challenge to a range of conclusions reached on the way to the ultimate determination of an issue.[59] In the context of committals for instance, a decision by a magistrate whether or not to receive particular evidence will be a "decision"; a statement that the magistrate would exclude certain evidence if it was tendered is at least "conduct".[60]

In fact the Federal Court re-aligned the question from one of *jurisdiction* to one of *discretion to refuse relief*.[61] The courts often express concern, when considering applications for review of committal proceedings, about the alleged inappropriateness of intervening in the criminal process, given the integrated nature of the criminal process and the checks and balances outlined earlier. Although jurisdiction to review committals has been accepted since *Lamb v Moss*, the court has generally adopted a policy of restraint; a decision by a magistrate will only be reviewed in exceptional circumstances.

The Federal Court has power to make an order of review upon finding any of the grounds made out. It can quash the decision, refer it back to the decision-maker with or without directions, declare the rights of the parties, or direct any party to do or refrain from doing anything necessary.[62] This power is discretionary. Even if an error is established the Court may refuse relief, for instance where it would be futile.[63] The discretion to refuse relief has been the cornerstone of the Federal Court's approach to review of committals. The Full Court held in *Lamb v Moss*, first, that it can refuse relief even where the technical grounds have been made out; and secondly, that the power to make an order to review in respect of committal proceedings should be exercised only in exceptional circumstances. The Court has said it should be especially reluctant to intervene in respect of a decision *in the course of* proceedings; "[a]dditional considerations might intrude at the final stage; for example, in respect of

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56 *Ibid* 558; *cf* the common law position in *Sankey v Whitlam* (1978) 142 CLR 1, 25.

57 By s 9 AD(JR) Act.

58 See *Trimbole v Dugan* (1984) 57 ALR 75, 79; *R v Murray and Cormie; ex parte the Commonwealth* (1916) 22 CLR 437. On the powers of the Federal Court to grant relevant remedies, see generally D C Pearce, *Australian Administrative Law Service* paras 408-409, 417-420.

59 See M Aronson and N Franklin, *supra* n 42, 244-246.

60 *Shepherd v Griffiths* (1985) 60 ALR 176, 182.

61 See M Aronson and N Franklin, *supra* n 42, 243.

62 Section 16.

63 See *Lamb v Moss* (1983) 49 ALR 533 and *Doyle v Chief of General Staff* (1982) 42 ALR 283; see also the comments of the Full Court of the Federal Court in *Seymour v Attorney-General* (1984) 57 ALR 68, 71.

committal for trial and commitment to prison pending trial".[64] It adopted the view of the High Court and the state courts that "[f]ailure to permit criminal proceedings to follow their ordinary course will, in the absence of special circumstances, constitute an error of principle".[65] This approach was specifically endorsed in the recent case of *Australian Broadcasting Tribunal v Bond* by Mason CJ, asserting "[t]he delays consequent upon fragmentation of the criminal process are so disadvantageous that they should be avoided unless the grant of relief by way of judicial review can clearly be seen to produce a discernible benefit...."[66] The effect has been, not surprisingly, that even when the court has been prepared to review, the magistrate's decision has rarely been altered.

The jurisdiction of the Federal Court to review committals has thus scarcely been in issue since that decision. The point is rarely made the subject of a ruling, but most findings in a committal hearing have been assumed to be either a "decision" or "conduct". Recently, however, there have been judicial hints that this jurisdiction should be reconsidered. In 1987 Northrop J in *O'Donovan v Vereker* commented that it might be necessary to reconsider whether committal decisions were indeed made "under an enactment" under the AD(JR) Act.[67] Chief Justice Mason in the High Court observed, during the (unsuccessful) application for special leave in the same case, that "we are by no means convinced that the Federal Court has the jurisdiction which it claimed to exercise in the present case."[68] On the other hand, Einfeld J in *Briot v Riedel*[69] and again in *Yates v Wilson*,[70] dealing with a challenge to jurisdiction, was of the view that the jurisdiction of the Federal Court to review committals did not rest solely on *Lamb v Moss*.

These signs of judicial discontent came to a head in the recent decision of *Australian Broadcasting Tribunal v Bond*.[71] Whilst not involving a committal hearing, the implications of the decision will be widereaching. The Australian Broadcasting Tribunal had held an inquiry under s 17C(1) of the Broadcasting Act 1942 (Cth) regarding the possible exercise of its powers under s 88(2) to suspend or revoke a commercial broadcasting licence, held by companies controlled by Alan Bond, if it appeared advisable in the public interest. This power could be exercised on any of three grounds, one being that the licensee "is no longer a fit and proper person to hold the licence".[72] The ABT made several findings of fact,[73] on the basis of which it concluded that Bond would not be a fit

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64 *Lamb v Moss* (1983) 49 ALR 533, 564.

65 *Ibid* 546.

66 (1990) 94 ALR 11, 25.

67 (1987) 76 ALR 97, 105-106. In *Lamb v Moss* it was accepted that the provisions of the Judiciary Act 1903 (Cth) empowering state magistrates to hear Commonwealth committals were sufficient to constitute their decisions "under an enactment" for the purposes of the AD(JR) Act. An alternative view, which has not to date been argued strongly, is that the source of power is essentially the relevant state act. See *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 55 ALR 179; D Sweeney and N Williams, *Commonwealth Criminal Law* (1990) 156-157.

68 *Vereker v O'Donovan* (High Court of Australia, 18 March 1988, unreported).

69 Federal Court of Australia, 10 March 1989, unreported.

70 (1989) 86 ALR 311, 320.

71 (1990) 94 ALR 11.

72 Broadcasting Act 1942 (Cth) s 88(2)(b)(i).

73 These included findings that Bond paid $400 000 in settlement of a defamation action brought by the then Premier of Queensland, believing this was necessary to

and proper person to hold a broadcasting licence, and that the licensees, being companies controlled by Bond, were no longer fit and proper persons to hold a licence. These findings were the primary subjects of the application for review.

The Federal Court set aside the ABT decision, and the Tribunal appealed to the High Court. Mason CJ took the opportunity to re-examine the jurisdictional limits under the AD(JR) Act, and with Brennan and Deane JJ construed the term "decision" more narrowly than had been the case since *Lamb v Moss*. The Chief Justice looked at the juxtaposition of "decision" and "under an enactment"; the definition of "decision" in s 3(2) and s 3(3); and the separate provision for review of preparatory acts as "conduct", and concluded that a reviewable decision must generally be one which is "final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration or one for which provision is made under the statute."[74] A conclusion reached as a step towards an ultimate decision will therefore not usually be reviewable, unless a ruling on the point is provided for by the statute. A "decision" must also be a substantive determination;[75] review of procedural matters, such as refusal of an adjournment, are provided for by the "conduct" category. "Conduct" was held to be "action taken ... for the purpose of making a reviewable decision", being "essentially procedural and not substantive in character".[76] A challenge to "conduct" was a claim that the process of the decision-making was flawed, for instance that it involved a denial of natural justice.[77]

In the present case, the findings in relation to Alan Bond were held not to be reviewable decisions. The findings in relation to the licensee were reviewable, as they were expressly authorised by the Broadcasting Act 1942 (Cth). Whilst the finding that Bond would not be a fit and proper person to hold a licence was a *necessary step* to the conclusion regarding the licensees, it was neither final, nor called for by the Act. The Chief Justice was however careful to re-affirm the conclusion in *Lamb v Moss* that the finding of a *prima facie* case by a committing magistrate was still a "decision"; it was expressly provided for by the state statute, and it "resolved an important substantive issue to be determined before the ultimate decision could be made ... whether to commit the defendant for trial".[78]

It is arguable that such a narrow interpretation of the AD(JR) Act is not necessarily consistent with the terms of the Act, for instance the very wide definition of "decision" in s 3(2), nor with the remedial character of the legislation.[79] There has, however, been growing concern in the High Court about use of the Act,[80] and this is obviously reflected in the judgments. What is the effect on committal proceedings? The state legislation governing committals

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protect his interests in Queensland; that he threatened to use his television staff to gather information on a business competitor and to expose that competitor on television; and that he gave misleading evidence to the ABT at a previous inquiry.

74 (1990) 94 ALR 11, 23.

75 *Ibid* 24. *Cf* (1990) 94 ALR 11, 53 *per* Toohey and Gaudron JJ.

76 *Ibid* 27.

77 *Id.* Note that the effect of defining a matter as "conduct" rather than as a "decision" is that it then falls outside the right to a statement of reasons under s 13.

78 *Ibid* 24.

79 *Cf* the approach of the dissenting judges, Toohey and Gaudron JJ.

80 D Sweeney and N Williams commented presciently in 1989, "it is only a matter of time before *Lamb v Moss* is overturned": *supra* n 67, 156.

expressly provides for decisions as to the existence of a *prima facie* case, and whether or not to commit. Such decisions thus continue to be reviewable. It may also provide for rulings on admissibility of particular evidence, closure of the court in certain circumstances, and the granting of adjournments. These should be regarded as either "decisions" or, if essentially "procedural", at least reviewable "conduct". Any other matters will apparently have to be found to fall within the definition of "conduct" if they are to be reviewable. Findings of fact will also not be reviewable as "decisions" independently of the ultimate decision, according to the majority in *Bond*, unless the finding is required by the statute.[81] It is not clear whether traditional jurisdictional fact questions, such as whether the necessary circumstances exist for the magistrate to exercise jurisdiction, would be "decisions", although it would obviously be anomalous if they did not. Decisions on such questions are not expressly called dor by the statute, and they are not usually "final", although presumably a decision that jurisdiction did *not* exist would be a reviewable "decision", as it would have the character of finality referred to. The scope for review of other decisions may depend on the context in which they are being made.

To what extent *have* the rulings (to use a neutral expression) made in committal hearings been considered reviewable?

(1) Review of Interlocutory Matters under the AD(JR) Act

Even before the High Court decision in *Bond*, it was harder to show "exceptional circumstances" requiring intervention in respect of interlocutory rulings.[82] There are a number of reasons for this. Interlocutory matters are generally regarded as best left to be decided by the magistrate, unless a clearly defined question of law of public interest is involved. They are also frequently raised before the hearing has ended; permitting review in the course of a hearing inevitably leads to delays. And it is not always possible to see, at an early stage in the proceedings, whether an applicant for review will actually be adversely affected by a preliminary decision. As a South Australian judge remarked, "the proof of the pudding will be in the eating".[83] A few examples will be considered.

(a) Admissibility of Evidence

State courts have generally regarded the admissibility of evidence as a matter within the magistrate's jurisdiction, and therefore not reviewable.[84] This approach is not possible under the AD(JR) Act: review under the Act is not limited to jurisdictional error, and reviewable "conduct" is defined under s 3(5) of the Act to include the taking of evidence. However the Federal Court has likewise intervened only rarely.[85]

Exceptional circumstances warranting intervention to admit or exclude evidence may be found if the case raises an important question of public interest,

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81 (1990) 94 ALR 11, 26.

82 *Cheng Kui v Quinn* (1984) 67 ALR 231; *Fermia v Hand* (1984) 53 ALR 731; *Seymour v Attorney-General (Cth)* (1984) 57 ALR 68.

83 Olsson J in *Potter and Potter v Liddy* (1984) 14 A Crim R 204, 209, in response to a premature application for relief.

84 See *eg Spautz v Williams* [1983] 2 NSWLR 506; *R v Judge Mullaly; ex parte Attorney-General for the Cth* [1984] VR 745; *Clayton v Ralphs and Manos* (1987) 26 A Crim R 43; but see *Sankey v Whitlam* (1978) 142 CLR 1.

85 *Eg Clyne v Scott* (1983) 52 ALR 405.

or a straightforward question of statutory construction which does not involve the court in disputed or doubtful facts.[86] A magistrate's refusal to excuse from cross-examination a witness claiming public interest immunity was reviewed and varied in *Young v Quin*.[87] It was regarded as meeting the requirement of exceptional circumstances, being "a genuine and important question of legal principle not dependent upon the detail of the evidence in the particular case".[88] The magistrate's rejection of the claim to immunity was held to be an error of law.[89] Generally, however, relief will be refused as a matter of discretion.[90] The magistrate will usually be seen as best placed to decide such interlocutory questions.

(b) Procedure

Procedural error (such as compliance with time limits, or provision of notice) has generally been treated as a non-jurisdictional error of law; it only vitiates a decision if the procedural provision is construed to be mandatory.[91] Breach of a mandatory procedural requirement is a ground for an order of review under the AD(JR) Act s 5(1)(b), or as an error of law under s 5(1)(f).[92] It will either involve a "decision", if it was authorised by the statute (for instance, powers to close the court in a sexual assault or other cases), or at least "conduct".[93] Where the Federal Court has reviewed a magistrate's decision on a point of procedure not governed by statute, it has emphasised that the error went to the magistrate's jurisdiction.[94] Otherwise, intervention has not generally been permitted in respect of procedural matters, which will be regarded as within the magistrate's discretion.[95]

(c) Error Going to Jurisdiction

State courts have usually been prepared to review errors going to jurisdiction; they have, however, tended to apply a narrow traditional definition of jurisdiction in deciding whether to review. Jurisdictional errors attracting review have included allegations of a breach of an express statutory requirement of consent, a claim that the offence was not known to law, and, a more tentative development,

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86 *Shepherd v Griffiths* (1985) 60 ALR 176; declaration made that as a matter of interpretation evidence of a taped telephone conversation was admissible under the relevant Act in this type of hearing. *Cf McDermott v Nicholl* (Federal Court of Australia, 17 February 1989, unreported decision of Neaves J).

87 (1985) 59 ALR 225, on appeal from rejection of the application in (1984) 56 ALR 168.

88 (1984) 56 ALR 168, 172.

89 (1985) 59 ALR 225, 232. A declaration was made that the magistrate was bound to disallow the cross-examination of the police witness regarding an affidavit dealing with police investigations, including matters of danger to informants and officers.

90 *Clyne v Scott* (1983) 52 ALR 405; *Seymour* (1984) 12 A Crim R 157; *Besey v Mackenzie* (1987) 31 A Crim R 347.

91 See generally M Aronson and N Franklin, *supra* n 42, 61-65.

92 See *eg Clyne v Scott* (1983) 52 ALR 405; *Wong v Evans* (1985) 59 ALR 392.

93 *Eg* Magistrates' Court Act 1989 (Vic) s 126; sched 5 cl 15. *Cf* the decision in *Moularas v Nankervis* [1985] VR 369.

94 *Parsons v Martin* (1984) 58 ALR 395. Order to review granted as to decision that the magistrate had no power to issue letters of request, and that parties could not rely on evidence obtained by the letters of request.

95 *Eg Fermia v Hand* (1984) 53 ALR 731.

the claim that there was no evidence to support the magistrate's finding of a *prima facie* case.[96]

It is not, of course, necessary to show that an application for review under the AD(JR) Act raises a question going to jurisdiction, and similar matters have been accepted as reviewable under that Act.[97] However, the fact of going to jurisdiction may mean the error is more readily reviewed.[98] A magistrate's decision as to the limits of his or her own power will clearly come within this category.[99] The magistrate's interpretation of a statute - for instance the statute creating the offence - will also be a good candidate for review.[100] French J in *Kunakool v Boys* concluded that where "the decision to commit is challenged on grounds which go essentially to the construction of a statute, raise an important question of law, and do not involve any intricate consideration of the evidence, then there will be ... 'additional considerations' which favour review."[101]

(d) Breach of Natural Justice

An error leading to denial of natural justice will clearly be reviewable.[102] One of the few successful applications for review in the Federal Court, *Tahmindjis v Brown*, arose after committal but turned on a claim that natural justice had been denied in the course of the hearing.[103] As a result of making an application under the Freedom of Information Act 1982 (Cth) after the committal the applicants' solicitors discovered that the magistrate had, during the proceedings, spoken privately to the solicitor for the informants to express his concern about the direction of the prosecution case. The prosecution had subsequently changed its approach. The court agreed that the magistrate had not acted impartially, and should therefore be disqualified.[104] Fox J was not prepared to exercise the discretion not to provide a remedy, saying that it was a case where it was clearly in the public interest to intervene to ensure that court proceedings were conducted according to law.[105] This case was the last in a series arising out of the notorious Social Security fraud prosecutions, of which *Lamb v Moss* was another. The decision to quash the committal was in this instance likely to be conclusive; to proceed by *ex officio* indictment would have had the appearance of victimisation. Relief has also been granted to require a magistrate properly to carry out his

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96 Respectively, *Bacon v Rose* [1972] 2 NSWLR 793; *Sankey v Whitlam* (1978) 142 CLR 1; *Bourke v Hamilton* [1977] 1 NSWLR 470.

97 *Clyne v Scott* (1983) 52 ALR 405; *Wong v Evans* (1985) 59 ALR 392.

98 See French J in *Kunakool v Boys* (1988) 26 A Crim R 1, 11.

99 See AD(JR) Act s 5(1)(d) and (e); and see *Parsons v Martin* (1984) 58 ALR 395.

100 Under s 5(1)(d), (e) or (f). *Eg Shepherd v Griffiths* (1985) 60 ALR 176; *Kunakool v Boys* (1988) 77 ALR 435; *Vereker v Rodda* (1987) 72 ALR 49, on appeal *O'Donovan v Vereker* (1987) 76 ALR 97. In the light of the decision in *Bond*'s case, reviewability may depend on whether the question of construction arose in the context of a decision which is required by the statute, or is final and determinative of a fact in issue.

101 (1987) 26 A Crim R 1, 11.

102 Under s 5(1)(a) or s 6(1)(a). Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, 27 suggested that reviewable "conduct" would include "the continuation of proceedings in such a way as to constitute a denial of natural justice".

103 (1985) 60 ALR 120.

104 *Ibid* 133.

105 *Ibid* 134.

obligations under the legislation to take further submissions from the defendant, after finding a *prima facie* case.[106]

(2) Review of the Decision to Commit

As has been noted earlier, the Federal Court may be more ready to intervene when the proceedings have been completed. Applications in this context may be made either from the decision to commit, or from the finding of a *prima facie* case after the close of the prosecution evidence. In the state courts the decision whether to commit is treated as "ministerial" (administrative). As noted earlier, in some jurisdictions this has been taken to mean it is not amenable to review, at least by the prerogative writs. Review of the "ultimate issue" whether or not to commit for trial also threatens to move beyond the question of "legality" into "merits", the very question the magistrate is to decide. However it has on occasions been permitted - for instance, where it was argued that the statutory test was not applied, or that there was no evidence to support the decision.[107]

Review under the AD(JR) Act is of course predicated on the existence of an "administrative decision". Such characterisation has not been seen as a problem here - something of an irony, given the emphasis some state courts have placed on the "judicial" features of committal decisions when they have been prepared to review them. The final decision is often the subject of attack under the AD(JR) Act, either based on a challenge to a decision made in the course of the hearing or for more direct defect.[108] Cases being reviewed have tended to involve very serious charges, such as major fraud cases, and/or defendants with a great deal to lose by being committed (as well as the resources to pursue relief). A defendant who is determined to challenge committal proceedings will often begin with the finding of a *prima facie* case. Success at one of these points, particularly on the grounds of no evidence, is likely to be extremely influential in the decision of the Director of Public Prosecutions whether to proceed.

The cases alleging an error in the course of hearing have already been considered. Challenges to the ultimate decision, *per se*, will usually be based either on the argument that the magistrate did not apply the correct statutory test for committal, or that there was "no evidence" to support the findings.

(a) Applying the Wrong Test

An argument that the magistrate applied the wrong statutory test in deciding that there was a *prima facie* case, or in reaching a decision to commit, would undoubtedly be a sufficiently fundamental error of law to warrant review.[109]

(b) No evidence

A conclusion based on "no evidence" traditionally constituted an error of law within jurisdiction, and was therefore unreviewable unless it appeared on the face

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106 *Besey v Mackenzie* (1987) 31 A Crim R 347.

107 See *eg Wentworth v Rogers* [1984] 2 NSWLR 472.

108 As already noted, jurisdiction to review such final committal decisions has been confirmed by the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11.

109 *Eg* under s 5(1)(d) (unauthorised decision); 5(1)(f) (error of law); or 5(1)(e) with (2)(a), (b) (relevant or irrelevant considerations). See *Murphy v Director of Public Prosecutions* (1985) 60 ALR 299.

of the record (when it was only reviewable by certiorari).[110] But in recent years it has been recognised as a ground of jurisdictional error within the broad meaning of that concept; it has also come to be seen as a breach of natural justice.[111]

Review on the basis that there was no evidence to support the decision is expressly provided for in the AD(JR) Act s 5(1)(h), limited to the grounds in s 5(3). The approach taken in *Minister for Immigration and Ethnic Affairs v Pochi*[112] suggests that decisions made without evidence might also be reviewable under the AD(JR) Act s 5(1)(a). Chief Justice Mason in *Bond*'s case considered, and rejected, an argument that s 5(1)(h) and s 5(3) were exhaustive of review for no evidence. He concluded that the s 5(1)(f) "error of law" ground included the "no evidence" ground as it existed at common law prior to the enactment of the AD(JR) Act. This seems to include, not only total absence of evidence, but absence of any *probative* evidence, although it is not clear whether the Chief Justice equated this with the English "no sufficient evidence" test.[113] The terminology is ambiguous, but it appears to at least affirm the moves to widen the scope for reviewing the evidence considered by the decision maker.[114]

Nevertheless, review will generally be refused, as a matter of discretion. Review under this head inevitably involves a close examination of the facts, and can look very like a rehearing. The magistrate will have had the task of deciding whether there was, for instance, evidence "of sufficient weight to support a conviction". Challenge on the grounds of no evidence, and *a fortiori* no probative or sufficient evidence, risks moving into an examination of that very question. In conformity with its supervisory role, the Court will be reluctant to appear to be taking over the magistrate's role at this important point in the preliminary examination. As Wilcox J observed in *Souter v Webb and Ward*, such an application should only be considered if it is clear "without intricate consideration of the evidence, that there is a failure to establish a necessary ingredient in the charge".[115]

The mere claim that the committal was without basis will not automatically be regarded as showing exceptional circumstances warranting review.[116] A decision to commit was recently quashed in the Federal Court for lack of evidence.[117] The charges related to an allegedly fraudulent scheme to minimise sales tax. Justice Einfeld regarded as "exceptional circumstances" justifying relief

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110 *R v Nat Bell Liquors* [1922] 2 AC 128; approved by the High Court in *R v Cook; ex parte Twigg* (1980) 147 CLR 15, 27; *R v Northumberland Compensation Appeal Tribunal; ex parte Shaw* [1952] 1 KB 338.

111 See *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666; Deane J said that procedural fairness required that a decision be based on logically probative evidence. He reiterated this view in *Bond*'s case (1990) 94 ALR 11, 46-47. Regarding committals, see *Bourke v Hamilton* [1977] 1 NSWLR 470; *Gorman v Fitzpatrick* (1985) 4 NSWLR 286. In Canada a lack of *legally admissible* or *probative* evidence has been accepted as a ground of review of committal decisions for jurisdictional error: Peter Connelly, "Certiorari and Committals for Trial" (1980-81) 23 Crim L Q 369.

112 (1980) 31 ALR 666.

113 (1990) 94 ALR 11, 38.

114 See M Allars, *supra* n 1, 194.

115 (1984) 54 ALR 683, 690. See also *Foord v Whiddett* (1985) 60 ALR 269.

116 *Murphy v Director of Public Prosecutions* (1985) 60 ALR 299.

117 *Briot v Reidel* (Federal Court of Australia, 10 March 1989, unreported decision of Einfeld J.).

delays by the prosecution in pursuing the matter, and the complexity of the issues for consideration by a jury, together with the fact that the defendants were "professional men" and had taken legal advice regarding their scheme. Reversing the decision on appeal, the Full Court stated firmly that "his Honour was seriously in error in using the *Administrative Decisions (Judicial Review) Act* procedure to review the whole of the voluminous evidence".[118]

To summarise, many decisions in committal proceedings are reviewable under the AD(JR) Act, but as a matter of discretion relief is rarely granted. The Federal Court emphasises that it is most important that criminal proceedings be free of unnecessary intervention. They should be resolved quickly, in the interests of the community and the accused person; the delay involved in judicial review will only be warranted in exceptional cases, for example where the interests just mentioned are outweighed by the need for a prompt and authoritative decision on a question of law.[119] The fact that a defendant is disadvantaged by being committed for trial is not by itself an "exceptional circumstance". In practice the discretion to grant relief is most likely to be exercised when the alleged error clearly goes to the magistrate's jurisdiction to act.

4 DISCUSSION

When it made the decision in *Lamb v Moss* the Federal Court was well aware that accepting jurisdiction to review committal proceedings could open a Pandora's Box; a proliferation of applications for review, fragmentation and delay in the criminal process, the depletion of legal aid funds, and the strategic rather than genuine use of the jurisdiction.[120] It took the optimistic view that on principle such fears should not prevent it from protecting the public interest and ensuring the due administration of the criminal process. The safeguard it offered was the discretion to refuse relief.[121] Nonetheless the potential for delay and tactical use of the jurisdiction appears to some extent to have been realised. The Administrative Review Council reports that since *Lamb v Moss* was decided, a "significant number" of applications for review have been made, few of which have been successful.[122] Some defendants have sought review at every stage of the committal process; whether or not ultimately successful, the resort to the jurisdiction has undoubtedly produced delays. *Lamb v Moss* is itself an example. Charges were originally laid in 1978; a challenge to committal procedures was unsuccessful,[123] followed by applications under the AD(JR) Act in *Moss v Brown*,[124] and on appeal in *Lamb v Moss*. The prosecution was brought to an

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118 *Castles v Briot & Ors* (Federal Court of Australia, 23 October 1989, unreported decision of Morling, Pincus, O'Loughlin JJ) 10.

119 See *Wong v Evans* (1985) 59 ALR 392, 399.

120 (1983) 49 ALR 533, 556.

121 *Ibid* 557.

122 See Administrative Review Council, Ninth Annual Report 1984-85, 26. At least two dozen applications for review (including their subsequent appeals) have been reported; doubtless other applications have been made, including additional applications by the parties in the reported cases. D Sweeney and N Williams found that between 1983 and August 1989 there had been at least 45 applications for review of decisions in the criminal process under the AD(JR) Act, about half of which related to decisions of magistrates in committal proceedings: *supra* n 67, 151.

123 *Moss v Brown* (1979) 1 NSWLR 114 (leave to appeal to the High Court refused).

124 (1983) 47 ALR 217.

end when the Federal Court set aside the last orders for committal in 1985 in *Tahmindjis v Brown*.[125] The prosecutions of participants in the Norfolk Island Public Art Gallery taxation scheme also gave rise to numerous applications for review in the course of the committal proceedings, all ultimately unsuccessful.[126] The committal proceedings began in August 1985; the defendants came to trial in the Victorian Supreme Court in 1990. The case against one defendant was subsequently dismissed by the trial judge; the remaining defendants were acquitted by the jury.

Not long after the decision in *Lamb v Moss* the Special Prosecutor, Mr Robert Redlich, criticised review of committals under the AD(JR) Act. He asserted that it provided people charged with criminal offences under Federal laws "the opportunity of disrupting the ordinary criminal process".[127] A former Chief Justice of the High Court has also been highly critical, calling the Federal Court's jurisdiction to review committals an "absurd interference with the ordinary course of criminal justice" which he thought could not have been intended by the legislature.[128]

The High Court, when it considered (and refused) an application for special leave to appeal in *Vereker v O'Donovan*, commented that "[t]he undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us."[129] It also threw doubt on the jurisdiction of the Federal Court to review committals under the AD(JR) Act: "we are by no means convinced that the Federal Court has the jurisdiction which it claimed to exercise in the present case and we would emphasise ... that if the court has the jurisdiction, it is a jurisdiction to be exercised very sparingly and in most exceptional cases only."[130]

There are two issues of policy here: whether committals for federal offences should be subject to judicial supervision at all, and if so, where that supervision should be provided.

A Should committal proceedings be reviewable?

Supervisory review is a manifestation of the rule of law: the principle that executive action is not absolute, but is itself subject to legal constraints. As the ARC recently put it,

> The availability of judicial scrutiny of the legality of administrative action serves the twofold purpose of protecting individual rights and interests from unauthorised action and ensuring that public powers are exercised within their legal limits.[131]

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125 (1985) 60 ALR 120.

126 *Eg Vereker v Rodda* (1987) 72 ALR 49; *O'Donovan v Vereker* (1987) 76 ALR 97; *Vereker v O'Donovan* (High Court of Australia, 18 March 1988, unreported); *Forsyth v Rodda* (1988) 37 A Crim R 50; *Forsyth v Rodda* (1989) 87 ALR 699.

127 Annual Report of the Special Prosecutor 1983-84, 164.

128 The Right Hon Sir Harry Gibbs, "The State of the Australian Judicature" (1985) 59 ALJ 522, 525.

129 High Court of Australia, 18 March 1988, unreported.

130 *Id.* See also comments of Einfeld J in *Yates v Wilson* (1989) 86 ALR 311, 320, and Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, referred to earlier.

131 Administrative Review Council, Report No 32: *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act* (1989) 5.

As noted earlier, the justiciability of a particular power is now seen to depend on its subject matter, rather than simply on the source of the power or the nature of the decision maker.[132]

Allars observes that the broad and unfettered powers of police and prosecutors are "[i]n a category of their own" and have enjoyed "a special immunity from judicial review".[133] Committals are not of this type. Magistrates hearing committal proceedings exercise powers very similar to those they exercise in summary proceedings, applying statutory tests in a court-like context governed by the rules of evidence. Their decisions are based on "manageable standards" and directly affect individual rights.[134] There is no reason why they should not be regarded as *prima facie* subject to judicial review. The width of the discretion may make it more difficult to show, for instance, "agenda error", but is not a reason to remove them entirely from review.[135]

It is accepted that there should not be *de novo appeals* from committal decisions. However it is submitted that there must be a mechanism for ensuring the legality of the decision-making. Committal proceedings are a public part of the criminal justice system and magistrates should be seen to be operating within their statutory authority. Bayne observes that the justiciability of a decision may turn in part on whether there is some other institution which is more appropriate to review its legality.[136] Committal decisions are indirectly reviewed when the prosecution case is reconsidered by the prosecution, and again at trial. This is not, however, any remedy for an illegality at or during the committal, which may have resulted in detention, in negative publicity, and at least increased the risk to the defendant of being put on trial. It is quite unsatisfactory to leave questions of legality, such as the existence of jurisdiction, or whether the legislation creating an offence is valid, or whether the magistrate was biased, to be decided at the trial if the defendant is committed for trial. These are questions which should be determined as soon as practicable, and can readily be resolved in the context of judicial review. Committal proceedings have a significant impact on accused persons, and the procedural protections and benefits provided to both defendant and prosecution should be clearly enforceable. Their legal non-finality does not remove the impact of the public accusation, and although the Director of Public Prosecutions can proceed with a trial despite dismissal at the committal stage this is not usual.

Chief Justice Mason has recently been critical of review of committals, but twelve years ago he stated in *Sankey* v *Whitlam* that the decision whether to commit is

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132 See *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Panel on Take-overs and Mergers; ex parte Datafin* [1987] 2 WLR 699. Mason J commented in *Toohey*, "The purpose of preventing unnecessary judicial intervention is better achieved ... by denying review in those cases in which *the particular exercise of power* is not susceptible of the review sought". (1981) 151 CLR 170, 222 (my emphasis).

133 M Allars, *supra* n 1, 45.

134 See P Bayne, "Justiciability: the Report of the Administrative Review Council (ARC)" (1989) 63 ALJ 767, 770.

135 See M Aronson and N Franklin, *supra* n 42, 26-31.

136 P Bayne, *supra* n 134, 769.

> one which materially affects the defendant because it exposes him to trial upon indictment and to a deprivation of his liberty pending trial ... It would be quite unacceptable to say that a committing magistrate is not under a duty to act judicially or that he is entirely free from supervision by a superior court, even when acting without jurisdiction or in excess of his jurisdiction.[137]

This is not to deny the importance of speedy resolution of criminal matters, and the risks of delay and discontinuity. The *Moss* and *Forsyth* series of cases illustrate how review procedures can draw out the criminal process. It is suggested, however, that it is of primary importance, as a matter of policy, to supervise the legality of committal proceedings and to protect the interest of accused persons. Having ensured the avenue of review, properly defined, the court could be given a broad discretion to refuse relief if it was unwarranted.

Despite the judicial, and extra-judicial, criticism of review, there has been no indication that federal Parliament intends to intervene and exclude committals from review under the AD(JR) Act. At present, committal decisions regarding state offences are reviewable in some states, on some grounds, as discussed above. Persons charged with federal offences should not be any *less* protected.

(1) Approaches to review

The ARC in its Discussion Paper on the operation of the AD(JR) Act said, "The [AD(JR) Act] purports to strike a balance between the need, on the one hand, to protect public authorities from unwarranted litigation with, on the other hand, the desirability of providing individuals with a means by which they might vigorously and effectively obtain judicial review of the legality of public administrative action."[138] The central question is how such a balance is to be achieved.

The preferred scope of judicial review depends ultimately on a value judgment about "whose relative opinion on which matters should be held to be authoritative".[139] Review has traditionally been based on the concept of jurisdictional error or *ultra vires*.[140] This presupposes that there are some matters which are within the tribunal's exclusive jurisdiction and cannot be reviewed, and some upon which its power is predicated, and which are therefore open to review. The difficulty demonstrated in the case law is in drawing that crucial line. As Craig observes, deciding the question of which matters go to jurisdiction involves steering a course between the Scylla of allowing the tribunal to decide its own parameters, and the Charybdis of drawing review so broadly as to approximate to an appeal.[141] Developments in England[142] and, to a lesser extent, in Australia,[143] have been in the latter direction, towards a widening of the scope

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137 (1978) 142 CLR 1, 83-84.

138 Administrative Review Council, "Some Aspects of the Operation of the Administrative Decisions (Judicial Review) Act 1977" Discussion Paper (1985) 11.

139 P P Craig, *Administrative Law* (1983) 315. See generally Craig's discussion in Ch 9.

140 Although see D Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] Public Law 543 on the current relevance of these concepts.

141 P P Craig, *supra* n 139, 299.

142 *Eg*, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; *Re Racal Communications Ltd* [1981] AC 374.

143 The attitude of the High Court to the English developments has not been entirely clear, but a broadening of the scope for review can be seen *eg* in *Re Gray; ex parte Marsh* (1985) 157 CLR 357; *BHP Petroleum Pty Ltd v Balfour* (1987) 71 ALR 711.

for review. If the concept of jurisdictional error is to be used it can be drawn very narrowly, so that once a tribunal has properly begun proceedings, anything it does is non-reviewable. Or it can be drawn widely, as in *Anisminic v Foreign Compensation Commission*,[144] so that almost any error of law goes to jurisdiction. The jurisdictional/non-jurisdictional distinction might however be avoided entirely, and review then be defined by reference to some or all errors of law and breach of natural justice. This is essentially the road taken by the AD(JR) Act.[145]

Alternatively, one might say, for instance, that a tribunal's decision on a matter of statutory construction will not be interfered with if it falls within a range of reasonably tenable interpretations; if the court considers that the tribunal's conclusion has a rational basis, in the light of the overall statutory objective.[146] A comparable proposal in the context of the operation of privative clauses, by Dixon J (as he then was) of the Australian High Court, was that a body be taken as acting within power when it makes a decision that "relates to the subject matter of the legislation, and is reasonably capable of reference to the power given to the body".[147] Such approaches have the advantage of recognising the expertise of the tribunal, as well as avoiding the difficulties with the concept of "jurisdiction".[148]

Central to any resolution of these competing interests should be an understanding of the *function* of the preliminary examination. One object is undoubtedly to ensure that a defendant should not go to trial on inadequate evidence. The other important purpose is to inform the defendant of the prosecution case. This has been recognised both in practitioners' responses to proposals to remove or alter committal proceedings, and by the New South Wales government's proposal to replace committals by a form of discovery. A clear statement of the goals of the committal process should appear in the legislation, encompassing both the filtering and the discovery functions; they should be embodied in legislative form as expressions of the procedural entitlements of the parties. This will assist magistrates in exercising their powers, as well as providing a basis for any application to review. Errors leading to failure to fulfil these functions should then be amenable to review. Without attempting an exhaustive statement, it is argued that review should therefore be available in respect of

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For clearer acceptance of *Anisminic* see *eg Thelander v Woodward* [1981] 1 NSWLR 644.

144 [1969] 2 AC 147. And see Australian cases referred to *supra* n 143.

145 See Report of the Commonwealth Administrative Review Committee (the Kerr Committee), Parliamentary Paper 144 (1971) 77.

146 This is an approach used in the United States and Canada: see P P Craig, *supra* n 139, 338-343.

147 *R v Hickman; ex parte Fox* (1945) 70 CLR 598, 615. Another "deferential" analysis is that of Kirby J in *Australian Broadcasting Commission Staff Association v Bonner* (1984) 54 ALR 653, 668-9. See generally M Aronson and N Franklin, *supra* n 42, 35-41.

148 They also, however, seem to require a rejection of the idea that an exercise of power is either lawful or it is not - the basis of review of "legality". Further, it is not clear that they offer a prospective applicant any clearer idea beforehand of the likelihood of success than does the jurisdictional error doctrine. See discussion of these points in P P Craig, *supra* n 139, 344-347.

(a) serious errors affecting the magistrate's authority to take the examination and to decide whether to commit, such as misconstruing a statute, misapplication of statutory tests, failing to take account of considerations relevant, for instance, to the informational, or filtering, functions of the proceedings[149] and pursuing purposes outside those specified in the legislation;

(b) denial of natural justice;[150]

(c) breach by the magistrate of mandatory statutory provisions.[151]

It is considered that, on balance, review should also be available on the grounds that there was no probative evidence to support the decision. Although this might be close to review of the merits, and it is on the whole desirable to limit any examination by a reviewing court of the evidence in the case, it is submitted that a decision taken without such evidence will clearly be unjust.[152]

Timing of the application to review is also important; as a general rule applications for judicial review of committals should not be considered until the proceedings had been completed. There should however be discretion to hear cases at an earlier point where it would be unjust to let the matter continue. Application for review under the AD(JR) Act does not operate as an automatic stay on procedures,[153] and applicants should be encouraged to allow matters to proceed (unless it is clearly unjust to do so).

B Where should review take place?

The power of state courts to review committals for federal offences is currently excluded by s 9 of the AD(JR)Act. The Administrative Review Council (ARC) has recommended on many occasions that committals be reviewable by the state courts, rather than by the Federal Court under the AD(JR) Act. The legislature has not to date taken up this recommendation, and there is no suggestion that it will now do so.[154]

In 1985 the ARC supported the Attorney-General's proposal to exclude committal decisions from review under the AD(JR) Act but recommended the revival of the jurisdiction of the state courts to review such decisions.[155] In 1989 the ARC again recommended review of committals by the state courts. It based its advice primarily on the view that the Commonwealth used the state courts for prosecution of Commonwealth offences, and there were no compelling reasons to separate review of committals from other aspects of the court process. It considered that "the law of the State or Territory concerned, including the law relating to rights of appeal and review in respect of the criminal trial, should

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149 When deciding questions such as an application for particulars, or for an adjournment.

150 This might include failure to require attendance of all relevant witnesses, or placing unreasonable limits on cross-examination.

151 These may be construed as mandatory in the light of the expressed purpose of the legislation; see M Aronson and N Franklin, *supra* n 42, 61-65.

152 In the light of *Bond*'s case this is an area which requires clarification; should there be a "no sufficient evidence" test? See also P Connolly, *supra* n 111.

153 See AD(JR) Act s 15.

154 But see the history of proposals to, *inter alia*, tighten up the power of the Federal Court to refuse to hear an application, under s 10; ARC Report No 32, *supra* n 131, 1-2.

155 The ARC advice appears in summary form in its Ninth Annual Report, *supra* n 122, 25-27.

apply."[156] It did not however recommend removal from AD(JR) Act review of Commonwealth *prosecution* decisions.[157]

It is argued here that so long as the ambit of review at the state level is uncertain, and restricted by anachronistic technicalities, it would be unrealistic or at least unfair to return review of committals for federal offences to the states.[158] If, however, procedures at state level were reformed, it would then be appropriate that supervision be provided by the state Supreme Courts, which have greater expertise in criminal matters than the Federal Court and which oversee the other aspects of the prosecution.

C Reforming common law review in the states

Reforms to common law judicial review need to address matters such as application procedures, rights to reasons, and standing to apply for review, as well as the substantive questions of grounds for review and their possible codification, and remedies. The Administrative Review Council is in the process of evaluating the ambit of the AD(JR) Act and the area is also being examined in Queensland.[159] A detailed discussion of reform of judicial review in state courts is thus unnecessary here; it is also beyond the scope of this paper. A central feature however would be a mechanism for control of proceedings. It is of great concern that avenues for judicial review can be, and are, exploited for strategic purposes. As Jenkinson J observed in *Seymour v Attorney-General (Cth)*:

> Against the interest of the appellant in the result of the committal proceeding and in the conduct of that proceeding according to law must be weighed the public interest in the expeditious resolution of accusations of crime. The longer such an accusation remains unresolved the greater the risk of serious harm to the community. Those risks are multifarious: the fading of witness's recollections, the diminution of public confidence in the administration of the criminal law, the prolonging of fears and hatreds which the resolution of criminal charges tends to allay ... are perhaps the more obvious.[160]

Applicants could be required to obtain leave to apply for review, a method of regulation used in England and, until recently, in the Federal Court.[161] The object would be to prevent unmeritorious cases being heard in full, before the court can decide whether to exercise its discretion to grant review, as currently occurs. Applications for review under the Victorian Administrative Law Act follow such a two-stage process. Applications are initially made *ex parte*, and the court has power to refuse the application, "notwithstanding that a prima facie

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156 ARC Report No 32, *supra* n 131, 76.

157 *Ibid* 79. This has a rational basis, since such decisions are made under Commonwealth legislation, by Commonwealth officers. Presumably however it would encourage defendants to make use of AD(JR) procedures to challenge pre-committal decisions. The ARC did not consider this a significant problem, as the same policy of restraint would apply.

158 This was also the view of the Attorney General, and of a number of respondents to the ARC review; see ARC Report No 26: *Review of the Administrative Decisions (Judicial Review) Act 1977 - stage one* (1986) 12 and Report No 32, *supra* n 131, 77. See also D Brereton and J Willis, *supra* n 10, 102.

159 See Electoral and Administrative Review Commission, Issues Paper No 4: *Review of Judicial Review of Administrative Decisions and Actions*, Brisbane (May 1990); and Public Submissions (July 1990).

160 (1984) 57 ALR 68, 71.

161 See ARC Report No 26, *supra* n 158, 17ff; EARC Issues Paper No 4, *supra* n 159, 13, 41.

case for relief is disclosed ... if satisfied that no matter of substantial importance is involved, or that in all the circumstances such refusal will impose no substantial injustice upon the applicant." (s 4(2)) On the other hand, there has been a movement away from the order nisi procedure in several jurisdictions. A two-stage leave process is widely seen as increasing expense, complexity and delay. It is also not clear that it would be effective.[162]

Alternatively the Supreme Courts could be given a wide discretion to refuse relief, such as that developed by the Federal Court in relation to review of committal decisions, by the requirement of "exceptional circumstances". The Federal Court Rules already provide for refusal of an application which is an abuse of process, or frivolous or vexatious, or where no reasonable cause of action is disclosed, and there have been moves towards extending that power.[163] It should also be made clear that the discretion is capable of being exercised, in appropriate circumstances, at the outset of proceedings.

The ARC considered the option of expressly excluding from review certain matters such as interlocutory decisions. This could lead to injustice in some circumstances, for example in the case of admission of evidence against the public interest, as in *Young v Quin*[164] and *Sankey v Whitlam*.[165] However, the desirability of avoiding interference with ongoing criminal proceedings, where review is likely to be available at the conclusion of those proceedings, should be a matter to be taken into account when deciding whether to allow an application.[166]

5 CONCLUSION

The criminal process as a whole can be seen as a highly structured set of determinations, by magistrate, by DPP, and ultimately by judge or jury, the "correctness" of which in terms of proof of guilt is "reviewed" at each stage. It has been pointed out in this paper that there has been considerable reluctance at common law to permit supervisory review of these processes. Review of the committal stage (and earlier stages) has been facilitated by the AD(JR) Act, but the practical operation of this jurisdiction has itself been subjected to considerable criticism.

Nonetheless, it has been argued here, first, that the preliminary examination should be amenable to judicial review, as a process which clearly affects rights. There seems in fact to be broad agreement with this in principle, subject to degrees of concern about the risk of abuse. Although review is more successfully provided by the Federal Court under the AD(JR)Act in relation to federal offences, it would be preferable to have all committals reviewed in the state

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162 See ARC Report No 26, *supra* n 158, 19-21. The view has been expressed to the author by a prosecutor that the Federal Court does not usually refuse to hear an application under the AD(JR) Act, despite the requirement of "exceptional circumstances", and that a leave requirement would therefore be similarly ineffective. Statistics provided in the EARC Issues Paper No 4, *supra* n 159, 82, show that very few applicants for the prerogative writs in the Queensland Supreme Court fail to obtain leave to proceed.

163 See Order 20 rule 2 Federal Court Rules.

164 (1984) 56 ALR 168.

165 (1978) 142 CLR 1.

166 See ARC Report No 26, *supra* n 158, 29; ARC Report No 32, *supra* n 131, 81-83.

courts.[167] However the technical requirements of the remedies and the legacy of earlier decisions on review mean that the availability of review in the state courts is uncertain. This is an important reason for reforming state review powers. In view of the seriousness of the interests which can be affected, the scope of judicial review should be wide enough to ensure fairness to the defendant, with the committal performing both its "filtering" and its "discovery" functions, although it should stop short of re-determining the merits (recognising that this may be a rather fine distinction at times). Most importantly, a broad discretion should be reposed in the court to refuse relief. The right of parties to the criminal process to properly conducted proceedings must be protected. The special character of the criminal process calls for a re-evaluation of both state and federal avenues of review.

167 And AD(JR) Act review has its own limitations.