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The Effect of Written Depositions at Preliminary Hearings, 1981

Summary

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PREFACE

This is the third study which monitors the use of written depositions at preliminary hearings since the procedure was introduced in 1977. This study goes further than the previous ones in that it also describes some operational features of written depositions and evaluates them in terms of their objectives.

Written depositions are an attractive proposition for the administration of the courts because of their implications for resource savings. However, any provisions to encourage their use must be assessed in the wider context of the purpose of preliminary hearings. It has not been the task of this study to make this assessment but issues and alteratives are introduced as a basis for discussing possible changes.

The contribution of court staff and other interested people to this study is greatly appreciated. The research was undertaken by John Hilhorst, assistant advisory officer and Prue Oxley, senior research officer.

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PURPOSE OF STUDY

The purpose in the study was to monitor the incidence of written depositions in preliminary hearings and to assess their impact in terms of the three objectives:

(i) to minimise inconvenience to the public (witnesses), to the prosecution and to the defence;

(ii) to reduce the length of preliminary hearings, thereby saving valuable judicial and administrative time;

(iii) to reduce the time from the first court appearance to committal.

The study covered the period from 1 February to 31 July 1981. The sample includes 238 cases committed for trial and 101 committed for sentence.

FINDINGS

Incidence - Type of Depositions

	n	%
Oral	84	24.8
Written	40	11.8
Both	130	38.3
s153A - no hearing	85	25.1
Total	339	100.0

In 1981 36.9% of indictable cases were completely without oral depositions either because s153A was used and consequently there were no depositions (25.1%) or because all depositions were written (11.8%). Another 38% made use of written depositions but had oral ones as well. Rather than hearings depending completely on written depositions, the trend since the introduction of the procedure has been towards hearings using both procedures.

Although the exact incidence is not known, there seems to be a significant practice of cross-examination of witnesses on their written statements.

Minimising inconvenience to witnesses (objective 1)

At least 37% of indictable cases were committed without oral depositions and without witnesses appearing in court. On top of this some of the witnesses involved in the 38.3% of hearings with both oral and written depositions would not have been summonsed. Oral hearings had on average 6 witnesses and written hearings had 8. Expert witnesses used written depositions more than police witnesses, who used them more than lay witnesses.

The length of preliminary hearings (objective 2)

Hearings where all depositions are written are on average shorter than ones with all oral evidence, but those with a combination of written and oral are longer still. This is because this last category tends to have more witnesses. On average each oral deposition took approximately four times as long to make in court per witness as each written one.

Time between first court appearance and committal (objective 3)

Hearings with written depositions took a longer time to get to committal stage than oral ones did. This took 9 weeks 2 days on average compared with 7 weeks 1 day.

COMMENTS FROM INTERESTED PARTIES

Most replies contained comment to the effect that:

(i) Written statements are especially used for non-contentious evidence

(ii) Both prosecution and defence counsel usually want to see and hear main witnesses in order to assess their credibility and their performance and/or to prepare them for a trial situation.

It was generally agreed that greater liaison between prosecution and defence is necessary for there to be more use made of written statements. A frequent concern was that the prosecution does not supply the defence with statements in time for the advantages of the written procedures to take effect. Often they are not presented to the defence until the hearing by which time witnesses have been summonsed and appeared. It also wastes hearing time while the defence decides whether or not to accept them. If accepted at this late date, it means that witnesses are present in court unnecessarily and a full day's programmed sitting-time is not used efficiently. The prosecution perspective of this liaison problem is that defence counsel do not file or not until the day of the hearing the required memorandum consenting to written statements as admissible evidence.

POINTS FOR DISCUSSION

The purpose of preliminary hearings

The methods used to encourage or require greater use of written depositions must depend on what the purpose of the preliminary hearing is. Suggested functions include:

(i) ensuring that no-one stands trial unless a prima facie case has been made against him.

(ii) informing the defendant of the nature and strength of the case against him.

(iii) assessing the credibility of the witness and the witnesses performance.

(iv) giving witnesses some experience for the trial situation.

The current and different positions in New Zealand and the United Kingdom are introduced in the full report.

Alternative approaches

The appropriate procedures for expediting preliminary hearings depend on their purpose. Obviously, if establishing a prima facie case is the only consideration, procedures could be very much more directive than they now are. For example :

(i) Written depositions will be submitted to the defence within a stipulated period prior to the hearing.

(ii) Written statements will be admissible unless the defence files a memorandum of non-consent with the prosecution at least seven days before the hearing.

(iii) In the first instance, depositions will be written, but the defence or prosecution will have the right to insist on oral depositions.

(iv) Depositions will be written but the defence or prosecution can request leave of court to have oral depositions.

(v) A more radical alternative is that recommended by the recent British Royal Commission on Criminal Procedures to abolish preliminary hearings altogether (Report, p.181). They recommended this in a context of the Crown Prosecutor acting as filter and of proper disclosure to the defence in all cases which would allow the defence to assess whether there was sufficient evidence on paper to justify a trial. If the defence wish to challenge this, they would make an "application for discharge", in writing, to the magistrate.

Preliminary hearings of rape charge

Because of its topicality the report discusses the following points in relation to rape charges: nearly all rape complainants are cross-examined at the preliminary hearing which they find a difficult experience; there is strong support for the proposition that judges rather than justices of the peace should preside over rape hearings; measures taken overseas to alleviate this ordeal for rape complainants e.g. no oral depositions, taped interviews as evidence.

Publication of evidence

The Criminal Law Reform Committee's suggestion that prohibiting publication of evidence should be reconsidered is noted.