Dear Editor

Yesterday I was alarmed by a report that the NSW Government is considering or intending to abolish committal proceedings in criminal prosecutions. Indictments found without committal proceedings are not new: they are called *ex officio* indictments. Although not new they are exceptional, and are used only in very special circumstances.

I make these comments as a barrister and retired judge who has conducted numerous criminal matters both at committal and trial stages. I was a Crown prosecutor for some years. That role included almost weekly appearances for the Crown in the Court of Criminal Appeal in the years immediately before my appointment to the bench.

Because of the seriousness of the matter, I am moved to warn the government to think carefully before changing the system of the prosecution of criminal cases.

The abolition of committal proceedings without substituting an appropriate equivalent would almost certainly result in many cases going to trial with little or no chance of resulting in convictions. There would be resultant high costs of mounting trials including the expense of empanelling many more juries.

The abolition of committal proceedings is very likely to result in a high prosecution failure rate because of the inability of whoever has the task of finding bills of indictment to assess the evidential strength of many cases when that assessment depends upon paperwork alone without hearing and seeing witnesses whose credit may be doubtful.

One of the primary functions of preliminary hearings is the evaluation of the strength of the prosecution case. The mere fact that there is evidence on paper to establish the essential elements of a crime does not show its probative value. The weight of evidence is an important factor to be considered

In the inevitable event of a much larger number of failed prosecutions at trial, the community at large would become more adversely critical of the criminal prosecution system than they are now, to the detriment of public respect for the law.

I strongly suspect that the financial support provided to the court system, which has manifestly declined over recent decades, is the result of our governments' opinions that money spent on the court system is not electorally efficacious.

Only after a preliminary consideration of the available evidence in a committal proceeding, with access to the evidence if required, should an experienced office (a legal practitioner) in the prosecution service be required to decide, not just that there is some evidence to support a conviction for a crime, but that the weight of the evidence is likely to support a guilty finding by a jury.

The Hon J A Nader RFC QC
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Dear Editor

I enjoyed reading Justice Allsop's 2017 Sir Maurice Byers Lecture, set out in the last issue of *Bar News*. The address builds on an 1987 observation by that advocate, 'The law is an expression of the whole personality and should reflect the values that sustain human societies.' My concern is not so much for the law or for the judges who administer it but for the practitioner who represents the client in negotiating its many paths and pitfalls.

It will be soon be the case if it is not already that a material number of commercial solicitors and barristers will never have a natural person as a client, let alone the increasing number of practitioners who will never practise other than as in-house counsel.

In the context of Sir Maurice's observation, how is the law utilised as and applied as an expression of the whole personality which reflects the values that sustain human societies, in a dispute where one or more of the parties has only a legal personality and, to pick up the jargon of trust law, perhaps no more than a bare personality?

The situation is the more complicated when one considers the increase in matters across jurisdictions. A lawyer may represent a group of companies registered in a group of jurisdictions. That lawyer owes a duty to the court, but one asks 'which court?'

My concern is hardly a novel one. As a letter from a highly experienced general counsel to the editor of the ALJ published in December last year indicates, practitioners in the corporate world are well aware of the practical and ethical issues. But it is something that requires close attention sooner rather than later. Or we may wake up to find the civil divisions of our superior courts divided into the Natural Persons List and the Legal Personalities List.

Regards,
David Ash