# THE ABOLITION OF COMMITTAL PROCEEDINGS

*John B. Bishop* [1]
Barrister-at-Law

In a media release dated 18 February 1990 the New South Wales Attorney General, John Dowd MP, announced "sweeping changes to committal procedures". According to the release, the changes will confer on the Director of Public Prosecutions a more significant role in the prosecution process and reduce delays in the courts. More particularly, the Director will enter the prosecution process from the outset, and in due course determine whether a person should be committed for trial. The changes will mean that a magistrate will no longer be able to discharge an accused or commit an accused for trial; the magistrate's role will be confined to presiding over a "pre-trial hearing". If "committal proceedings" are properly described as "a hearing before a Justice or Justices for the purpose of deciding whether a person charged with an offence should be committed for trial or for sentence",[2] the effect of the government's decision will be not merely to change committal proceedings, but to abolish them. Accordingly, for the purpose of this paper, this is the primary issue to be addressed.

A secondary, yet very important, issue concerns the format of the pre-trial hearing. The hearing is to be confined to the cross-examination of "key witnesses". These witnesses fall into two groups: those that may be cross-examined by the accused as a matter of right; and those that may be so cross-examined with the approval of the magistrate, where "there are reasonable grounds to suspect that cross-examination will affect either the assessment of the reliability of the witness or would elicit further material to support a defence.[3] The former group of witnesses is confined to those identifying the accused, accomplices of the accused, indemnified witnesses, scientific experts, and witnesses examined by the prosecution or approved by the prosecution for cross-examination. The media release contemplates a decision to prosecute, or not to prosecute, by the Director of Public Prosecutions at the outset, and, where there is a pre-trial hearing, after its termination.[4] Where he decided not to proceed to trial, he will make public his reasons.

There are two other proposed reforms of note. First, legislation will be introduced to prevent "unduly offensive, badgering or harassing questioning" of witnesses. Second, the prosecution will be required to disclose to the accused not merely its case, but also "other material helpful to the defence". These are subsidiary to the principal reforms, but are still very important.

---

1 Paper delivered at a public seminar entitled "Committal for Trial and Pre-Trial Disclosure", convened by the Institute of Criminology, The University of Sydney, 11 April 1990

2 *Justices Act* 1902 s 3(1) (definition of "committal proceedings")

3 Media Release, 18 February 1990, p 2

4 *Ibid* at 1, 3

To evaluate the proposed reforms it is necessary to first review the function and importance of committal proceedings. Against this background, an assessment may be made of the proposed reforms, and consideration given to any weaknesses. In undertaking these tasks, it is advisable to keep two things in mind. On the one hand, encouragement should be given to bold and innovative reforms to the criminal process, particularly those that shorten the procedures that lead to trial. The delays that plague the criminal process at the present time constitute an eloquent argument for this approach. On the other hand, objections raised by the legal profession to any reforms are very important, and the protection of the accused is all important. Efficiency experts could well suggest many new procedures for the effective disposition of criminal cases, but effectively is by no means the only criterion.

## COMMITTAL PROCEEDINGS: FUNCTION

To understand and appreciate the function of committal proceedings it is important to place the proceedings in their historical context.[5] The preliminary examination of criminal offences has a long history.. The earlier instances in England of any kind of inquiry as a preliminary to trial reach back into the twelfth century. The assizes of Clarendon (1166) and Northhampton (1176) established the jury of presentment, or grand jury. Constituted by a large body of landowners, its duty was to bring to the notice of the king's itinerant justices the suspected criminals within its territory so that they could be put on trial. The grand jury proved too cumbersome for the task of criminal investigation and during the fourteenth century this duty passed largely to justices of the peace, though prosecutions by private citizens were still permitted.

The justices of the peace carried out preliminary inquiries into indictable offences, and the role of the grand jury became advisory: it sat at the commencement of assizes and quarter sessions to determine whether the bills of indictment presented to it established a prima facie case. During the same period coroners conducted investigations in certain cases by means of juries and the examination of witnesses on oath, and a person could be put on trial as a result of a coroner's inquest.[6] In 1554 coroners were required by statute to commit to writing material evidence given at an inquest, and empowered to bind over witnesses to appear at trial.[7] The same statute required justices of the peace to take the examination of the prisoner and commit to writing the material evidence against him before his release on bail,[8] and empowered them to bind over witnesses for trial.[9] A further enactment in 1555 required that an examination should be made where the prisoner was not bailed, and in these circumstances the justices were also empowered to bind over for trial witnesses whose evidence they deemed to be material.[10] The depositions of the

5 See, generally, Holdsworth, W., *A History of English Law* (7th ed, rev, 1956) Vol 1, pp 295-7; Vol 4, pp 528-30; and W.R. Cornish, *The Jury* (1971) pp 67-8

6 *ibid* Vol 1, pp 82-7

7 1,2 Philip and Mary, c 13(v) (1554)

8 *Ibid* at c 13(iv)

9 *Ibid* at c 13(v)

10 2, 3 Philip and Mary, c 10(II)(1555)

justices were used by the grand jury to decide whether or not the case was fit for trial, in conjunction with any additional evidentiary material obtained by the grand jury.

Until the nineteenth century the role of the justices of the peace was inquisitorial. The prisoner was closely examined without being informed of his rights. Witnesses for the prosecution were examined in private, their evidence being taken for the information of the court, not for the prisoner, who had no right to be present to hear their evidence nor to be legally represented at the hearing. Indeed, until 1836 he had no right of access to the depositions of the witnesses.[11] The creation of a professional police force in 1829 and the years following relieved the justices of their duty to "pursue" and "arrest",[12] and led to a radical transformation of the preliminary hearing. The justice could "act as a judge" now that he was "no longer required to supplement the deficiencies of the police force".[13] The new role for justices of the peace at preliminary hearings was expressed in the *Indictable Offences Act* 1848.[14] This legislation provided for the examination of the prosecution witnesses in the presence of the accused who could not only cross-examine them but make a statement in reply, and the justices were bound to satisfy themselves that the accused should be committed for trial. As Plucknett says, the preliminary hearing thus became "in form at least, although not in substance, a judicial proceeding".[15]

The *Indictable Offences Act* 1848 was adopted in New South Wales in 1850.[16] The legislation in New South Wales was amended in some respects during the second half of the nineteenth century and then repealled by the *Justices Act* 1902.[17] Section 41 of that Act separated the hearing of a charge into two stages. First, at the close of the prosecution case the magistrate was required to consider whether or not there was a prima facie case. If not, the accused was discharged. Second, at the close of all the evidence, including the accused's statement and evidence (if any) and the evidence of his witnesses (if any), the magistrate was required to consider whether the evidence was sufficient to put the accused

11 See 6, 7 William IV, c114 (1836), which gave to persons awaiting trial the right to purchase the depositions for a fee (III), or to inspect them without fee (IV)
12 34 Edward III, cI(2) (1360)
13 Holdsworth, *op cit supra* n 5 at 297
14 11, 12 Vic, c 42(1848)
15 Plucknett, T.F.T., *A Concise History of the Common Law* (5th ed, 1956) p 433
16 14 Vic, No 43 and c44(1848)
17 *Justices Act* 1902 s 2, Sch 1

on trial for an indictable offence or whether it raised a strong or probable presumption of his guilt. If either, he was committed for trial; if neither, he was discharged.

Since that time there have been some important alterations to committal proceedings in New South Wales. Most importantly, in 1955 a shortened procedure was introduced for pleas of guilty, whereby a person charged with an indictable offence not punishment with penal servitude for life could plead guilty and be committed for sentence on the basis of written statements from prosecution witnesses;[18] in 1971 a new subsection empowered a magistrate to excuse an accused from attendance during part or the whole of the prosecution case where he is a co-accused and is legally represented;[19] in 1983 provision was made for a written copy of the charges to be given to an accused prior to the commencement of the prosecution evidence,[20] and for the admission of written statements,[21] in 1985 alterations were made to the evidentiary standards applied by a magistrate at the conclusion of the prosecution evidence and at the conclusion of all the evidence,[22] and in 1988 the 1983 "paper committal" reform was extended to *require* service of the prosecution statements in respect of all witnesses.[23] These alterations to the procedures at committal proceedings are important but they have not altered the fundamental character of the legislation: its purpose is to protect the accused against ill-founded prosecutions by requiring a magistrate to determine that the case against him is a proper case for trial.

Committal proceedings serve purposes other than the elimination of weak cases by the magistrate. The proceedings give to the accused notice of the evidence supporting the charge against him, a benefit supplemented by the statutory requirement that a free copy of the depositions be made available on request to a person committed for trial.[24] Both the letter and spirit of the law are observed in New South Wales, where the Crown provides for the accused prior to trial proofs of evidence of the witnesses not called in committal proceedings and to be called at the trial.

Committal proceedings assist the accused in other ways. He has a right to be present and through solicitor or counsel to conduct an exhaustive cross-examination of the prosecution witnesses, opening up lines of defence for trial, and taking risks in the full

18 The procedure is set out in the *Justices Act* 1902 s 51A, which was inserted into the *Act* by the *Crimes (Amendment) Act* 1955 s 7(1)(a). The words "not punishable with penal servitude for life" were omitted by the *Justices (Amendment) Act* 1985 s 3 Sch 1(3)(a), so that the accused may now plead guilty to any offence

19 Subsection (1B) of s 41 of the *Justice Act* 1902, inserted by the *Justices (Further Amendment) Act* 1971 s 3(d)(ii)

20 *Justices (Procedures) Amendment Act* 1983 s 5 Sch 1(1), amending s 41(1) of the *Justices Act* 1902

21 *Justices (Procedure) Further Amendment Act* 1983 s4 Sch 1(3), inserting sub-div 7A into Pt IV, Div 1 of the *Justices Act* 1902

22 *Justices (Amendment) Act* 1985 s 3 Sch 1, amending s 41(2) and s 41(6) of the *Justices Act* 1902. The new standards were effective from 16 March 1985. The former standards are analysed in J.B. Bishop, *Prosecution Without Trial* (1989) pp 80-85. In respect of the new standards see *Carlin v. Thawat Chidkhunthod* (1985) 4 NSWLR 182 and *Saffron v. DPP*; *Allen v. DPP* (1989) 16 NSWLR 397

23 *Justice (Paper Committals) Amendment Act* 1987 s 3 Sch 1. The amendment took effect on 4 April 1988

24 *Justices Act* 1902 s 40(1)

assurance that answers adverse to his case are generally not admissible before a jury.[25] The proceedings operate as a 'trial run' in which the accused may test not merely the accuracy and reliability of the prosecution evidence but may also make observations on the character and demeanour of the prosecution witnesses. The information so obtained may be invaluable in determining whether to make any particular witness the focal point of attack at trial, or perhaps to accept his evidence as true and build a defence around it, particularly if further enquiries after committal confirm that he is a credible witness. To attempt to do these things for the first time a trial would not only be difficult, but could be quite disastrous. Another important benefit of the proceedings is that precise cross-examination of the prosecution witnesses may be used to 'freeze' the evidence of the witnesses on the critical issues, for the purpose of confining the witnesses that evidence at the trial or destroying their credibility by cross-examination at trial on the differences between their evidence at committal and trial. The proceedings also assist the Crown by exposing a weak prosecution case, thus leading to a lesser charge at trial, or perhaps even a decision not to proceed, notwithstanding committal for trial. The proceedings can also save the resources of the Crown and the accused where they reveal an invincible prosecution case, and a plea of guilty is therefore advised. Thus, committals proceedings serve many purposes, even where an outworking of their primary purpose does not lead to a dismissal of the charges and the discharge of the accused.

These purposes are ancillary to the conduct of committal proceedings, or perhaps more properly, they are benefits conferred on the Crown and the accused as a consequence of committal proceedings, and are to be distinguished from the central function of committal proceedings: to ensure that a person is not required to stand trial unless a proper case for trial is first established in the proceedings.

This distinction has been drawn in English and Australian authorities. In *R. v. Epping and Harlow Justices; Ex parte Massaro*[26] Lord Widgery CJ said that committal proceedings constitute a safeguard for the accused to ensure that he cannot be tried unless a *prima facie* case is established against him, and rejected the contention that they constitute "a rehearsal proceeding" so that the defence can "try out" its cross-examination on prosecution witnesses for the purpose of the trial.[27] His Lordship rejected a submission that the prosecution was required to call the prosecutrix at committal proceedings so that she could be cross-examined on her allegation that she had been sexually assaulted.

A similar approach was taken by the South Australian Court of Criminal Appeal in *Re Van Beelen*.[28] It was held that the prosecution was not required as a matter of law to call evidence at the committal proceedings to the effect that another person had confessed to the murder of which the petitioner had convicted, nor other evidence that may support the alleged confession, though the petitioner lost the opportunity of investigating whether this person was responsible for the murder.[29] The Court said that materials introduced into

25 Note *Sadaraka v. R* (1980) 4 A Crim R 221
26 [1973] 1 QB 433
27 *Ibid* at 435
28 (1974) 9 SASR 163
29 *Ibid* at 241-8

a committal proceeding should satisfy "the tests of relevancy" and should not be "calculated to mislead"; and added, "[t]he pursuit of distracting irrelevancies, the probing of miscellaneous suspicions about merely theoretical possibilities" and "the resort to mere fishing expeditions . . . should not be alllowed by the magistrate to confuse the real issue, namely, whether, on the admissible evidence presented at the preliminary examination, the accused should be committed for trial".[30] The evidence in question was considered irrelevant.[31]

Similarly in *Moss v. Brown*[32] the New South Wales Court of Appeal said that the "nature and purpose" of a preliminary hearing is:

> to receive, examine and permit the testing of, evidence introduced by the prosecutor . . . to determine whether there is sufficient evidence to warrant the person charged being put on trial . . .[33]

The Court acknowledged that the inquiry is often used by the accused as "a kind of a dress-rehearsal for the trial" and for "other tactical purposes" unconnected with the outcome of the committal proceedings, and the Attorney General may use the depositions to decide whether or not to file an indictment, but "it is no part of the function of the inquiry . . . to ensure these uses are served . . ."[34] It followed in the instant case that there could be no valid objection to the division of a large number of accused persons charged with conspiracy into groups for the purpose of separate committal hearings, even though an accused person in one group may not have the opportunity of cross-examining witnesses called to give evidence against accused persons in another group, and this evidence may influence the Attorney General to proceed to trial against that accused person or may be used against that accused person at his trial.

The central function of committal proceedings — to ensure that a person is not required to stand trial unless a case suitable for trial is first established against him in the proceedings — has been clarified and reinforced by these decisions. In this respect the proceedings serve to protect a citizen against hasty, wanton, misconceived and speculative prosecutions. As such they represent a continuation of the work of the grand juries in deciding whether or not a person should be put on trial. The modern form of preliminary hearing, introduced in the nineteenth century, conferred on the accused the right to cross-examine witnesses, as well as to make a statement in reply. Reforms in the second half of the twentieth century have streamlined and improved the procedures, from the perspectives of the Crown and the accused. However, these reforms have not altered the essential character of the preliminary hearing, which exists now, as it did in the mid nineteenth century when it assumed its modern form, to ensure that before trial there is established a case that warrants trial. That has been the rationale of the preliminary hearing, and that is its rationale today. The extent to which committal proceedings in New South Wales ensure that before a person is committed for trial there exists a proper case

30 *Ibid* at 244
31 *Ibid* at 246-8
32 [1979] 1 NSWLR 114
33 *Ibid* at 125
34 *Id*

for trial is the yardstick by which the proceedings are to be measured. To the extent that this purpose is served the proceedings may be counted a success or failure.

## COMMITTAL PROCEEDINGS: IMPORTANCE

The importance of committal proceedings within the criminal process was emphasised by the High Court of Australia in *Barton v. R.*[35] The issue arose in an examination of the powers of the Attorney General of New South Wales to file an ex officio indictment. The Attorney General had filed ex officio indictments in respect of certain offences where almost all of the informant's evidence had been adduced in committal proceedings's evidence had been adduced in committal proceedings (the Harbourside indictment), and in respect of other offences where committal proceedings had not commenced (the Bounty indictment). The High Court held unanimously that the decision of the Attorney General to file these indictments was not subject to judicial review. The Court further held, by a majority (four to two), that a trial court could stay a trial commenced by an ex officio indictment to prevent an abuse of process, and that unfairness arising from the use of an ex officio indictment was not necessarily eliminated by the supply of particulars or proofs of evidence of the prosecution witnesses. In the result the High Court held that no abuse of process was established in respect of the Harbourside indictment, but that in respect of the Bounty indictment there were good reasons for committal proceedings, although it was for the Supreme Court to weigh the relevant interests and decide whether a stay was warranted so that these proceedings could ensure.

In the course of the judgements the importance of committal proceedings in the criminal process was underlined. Stephen J described committal proceedings as "an important part of the protection ordinarily afforded to an accused in the criminal process", and said that the launching of a prosecution in the absence of committal proceedings "will . . . always call for a careful evaluation by the trial court of all the circumstances, lest the consequent prejudice to the accused should be such as to have deprived him of a fair trial".[36] Gibbs and Mason JJ (with whom Aickin J agreed) said that in the absence of committal proceedings the accused is denied knowledge of the prosecution evidence, the opportunity of cross-examining prosecution witnesses, the right to call evidence in rebuttal, and the possibility of a finding of no prima facie case or that the evidence is not sufficient to commit the accused for trial.[37] It followed that the by-passing of committal proceedings constituted "a serious departure from the ordinary course of criminal justice", and a trial held without these proceedings ". . . unless justified on strong and powerful grounds, must necessarily be considered unfair".[38] Their Honours refused to accept the suggestion that the concern of the courts is with the conduct of the trial, not committal proceedings, for to do so, their Honours said, "would be to turn our backs on the

35 (1981) 55 ALJR 31
36 *Ibid* at 40
37 *Ibid* at 38
38 *Id*

development of the criminal process and to ignore the function of the preliminary examination and its relationship to the trial".[39] Their Honours continued:

> To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial.[40]

The High Court judgments constitute a ringing endorsement of committal proceedings as an important protection for the accused in the criminal process. The critical question, however, is whether the stated importance of committal proceedings is matched by the operation of the proceedings in practice.

The available statistical material casts doubt on the efficacy of committal proceedings. The most recent statistics published by the NSW Bureau of Crime Statistics and Research on the higher criminal courts in New South Wales encompass all criminal cases finalised in the District Court and Supreme Court in 1988. In that year 1,445 persons proceeded to trial (26.7 per cent of all persons whose cases were finalised) and 453 persons had all their charges 'no-billed'.[41] This number seems far in excess of what it ought to be, but in terms of this paper it must be understood subject to two important qualifications. First, it is based on offences that include federal offences, so the discontinuance of charges also involves the federal Director of Public Prosecutions. Second, it includes charges not taken to trial for whatever reason, whereas the magistrates' decisions to commit for trial are confined to the evidence led in committal prodeedings.

A more instructive analysis of the statistical material for the purposes of this paper is contained in the 1988-9 Report from the Office of the Director of Public Prosecutions for New South Wales. It is there stated[42] that over the relevant period 605 persons were given the benefit of a 'no-bill'. All told there were 3,393 trials (293 Supreme Court, 3,100 District Court) over the relevant period.[43] The charges 'no-billed' were categorised as follows: all charges 'no-billed' (445); outstanding charges after trial 'no-billed' (108); and some charges 'no-billed' (52). The Report then sets out a table of reasons for the 'no-bill' according to the number of times the reason for the 'no-bill' was found to exist, and in a separate table the reasons for the 'no-bill' according to "predominant reason". The latter reasons were distributed as follows: no case (118); no reasonable prospect of conviction (220); criminality more appropriate for Local Court (16); criminality covered in other sentences (79); considerations personal to victim/witness (67); change in evidence/loss of witness (58); offence trivial/technical/obscure (8); staleness of offence/prosecution delay (3); considerations personal to accused (9); and other reasons (27). In summary, there were 118 persons who received the benefit of a 'no-bill' primarily because there was 'no case'

39 *Id*
40 *Id*
41 NSW Bureau of Crime Statistics and Research, *New South Wales Higher Criminal Courts Statistics 1988*, p 15 (Table 6)
42 Office of the Director of Public Prosecutions, *Annual Report 1988-1989* p30 (Appendix 3)
43 *Ibid* at 33-4 (Appendices 6, 7)

— that is to say, "on an assessment of the facts and law it was decided there was no case to be tried by a jury"; and 220 persons were 'no-billed' primarily because there was "no reasonable prospect of conviction" — that is to say, "although a jury might convict, the chances of that happening are so slight as not to justify the time and expense of a jury trial".[44] However viewed, these numbers seem excessively large.[45]

The opinions of those who participate in committal proceedings are also instructive. Some years ago the writer supervised a study on committal proceedings, in which comment was made by a wide range of experienced magistrates, barristers, solicitors and police prosecutors on the practice in these proceedings. The study was undertaken prior to changes to the evidentiary standards applied by magistrates at the conclusion of the prosecution evidence and all the evidence at committal proceedings, and prior to the appointment of a Director of Public prosecutions for the State. These matters notwithstanding, the study provides important in-sights into the working of committal proceedings in practice.[46] It is not possible to set out in full the result of the study but some key findings are here presented.

The study revealed an interesting contrast between the responses of the police prosecutors, on the one hand, and those of the barristers and solicitors, on the other hand, to a question on the strength of the evidence necessary for a magistrate fo find a prima facie case. The tendency of the policy prosecutors (9 responses) was to give a formal, even legal answer to the question. In retrospect, it must be conceded that the question was ambiguous: it could have been interpreted to refer to evidence technically required as a matter of law, or, as intended, actually required as a matter of practice. However, the answers of prosecutors as a whole are significant in not even hinting that the magistrates find a prima facie case on weak evidence. The barristers and solicitors (15 responses) left no doubt in their answers that they interpreted the question to refer to the quantum of evidence required in practice, and not merely as a matter of law. Indeed, their responses were strikingly consistent in referring to the weakness of the evidence accepted as satisfying a prima facie case. They spoke of "not very strong" evidence (6 responses); a "scintilla" of evidence (2); a "smattering" of evidence (1); "any" evidence (1); and "virtually no evidence" (1). of the remaining four respondents, one barrister said that the test of prima facie case was ignored; one solicitor was critical of most magistrates for setting the standard as low as "some evidence"; while two barristers gave somewhat obscure answers. Particularly illuminating were some of the additional comments: the magistrates are too close to the police ("the sceptics would say that magistrates are too close to the police, and it's not untrue"); magistrates are "very weak" and prefer to leave the decision to the Attorney General; no consideration is given to the level of evidence; overwhelming suspicion is sufficient; the willingness of the magistrates to commit is a matter of concern; and some magistrates will never find no case to answer, and most will find a prima facie case unless there is no evidence at all, the cause being the "training and

44 *Ibid* at 32 (Appendix 5)

45 See also the statistics for the period 1980-1985, when the Attorney General, advised by his Crown Law Officers, made the relevant decision: Bishop, J.B., *Prosecution Without Trial* (1989) pp 97-8

46 See Bishop, *Prosecution Without Trial* (1989) pp 90-9. The study was undertaken from October 1982 to February 1983

upbringing" of the magistrates and their "association" with the police. In summary, the impression given by the barristers and solicitors was that inadequate evidence is often sufficient to establish a prima facie case, the magistrate acting merely as a "rubber stamp".

The responses of the Crown prosecutors were also significant. They were asked to indicate the reasons for the inconsistencies between the magistrates' decisions to commit for trial and their recommendations to the Attorney General. One of the Crown prosecutors simply noted that he was "pretty satisfied" because the cases that came to him were "well prepared with respect to both fact and law". The other eight respondents offered reasons for the inconsistencies. The reasons may be categorised as follows: there is a lack of evidence of one or more elements of the offence (two references); the evidence is not strong enough for trial by jury (2); attitudes differ to the prosecution of certain offences — for example, culpable driving (1); witnesses are unavailable or unwilling to appear (1); and magistrates do not exercise a proper scrutiny of the prosecution case (5). One respondent mentioned "humanitarian grounds" without further explanation. Comments by the Crown prosecutors on the inexperience and/or attitude of the magistrates dominated the responses. Two of the respondents referred to the magistrates' ignorance of what happens in the higher courts, one saying that their knowledge is confined to the lower courts where they are likely to be "subtly bullied by the police prosecutor" or "suffer from a too-close relationship with the police generally". This respondent added that magistrates have difficulty in applying themselves to what is "reasonable doubt". The other respondent said that magistrates do not have enough time or experience "to assess the likely outcome of a jury trial". The five respondents who referred to the failure of the magistrates to exercise a proper scrutiny of the prosecution case said that: the magistrate is "too hurried"; he commits "when in doubt"; he ignores his duty to exercise his discretion, "some evidence" being considered sufficient; he abrogates his responsibility, adhering to the maxim "when in doubt commit"; and he "shirks his responsibility", in that submissions are made to him on the point in issue, yet he still refers the case to the Crown law authorities for them "to do what he should do at first instance".

The magistrates, for their part, maintained throughout the study that they exercised a proper scrutiny of the prosecution evidence, but some of their comments in answering questions on the variation by them of charges at committal may indicate otherwise. Certain answers suggested considerable confidence in the charging process, at least in the laying of a charge generally appropriate to the facts adduced in evidence. Other answers established that some magistrates have it very much in mind that the Attorney General and Crown prospectors are not bound by a decision to commit for trial, and therefore to fix on a particular charge at committal, as distinct from a charge generally consistent with the facts, seems to be unnecessary. One magistrate even had in mind alternative verdicts by a jury, so that it was unnecessary to give particular attention to the appropriate charge for committal as long as there was a prima facie case on the charge as laid. A picture emerged that magistrates are fully aware of committal for trial as an administrative act, having no bearing whatsoever on the decision of the Crown to proceed to trial, and that they should be concerned to find committal justified only in a general sense ("I only look at a charge in specie . . . I consider that to be appropriate enough"), with responsibility for detailed consideration of the evidence and the appropriate charges to devolve upon the Crown. The awareness by the magistrates that the real decision to

prosecute is that of the Attorney General and Crown prosecutors may indicate that in evaluating the prosecution evidence they are not merely casual about the precise charge for committal, but also about the strength of the evidence required for committal. There would be a very strong temptation to fix the standard of evidence required for committal at a very low level, and commit for trial in all but the weakest cases, an approach consistent with views expressed by the Crown prosecutors, defence counsel and solicitors.

The statistical and empirical evidence suggest that committal proceedings are a most ineffective screening mechanism. In *Barton v R*[47] the justices of the High Court were clearly of the view that the historical justification for committal proceedings — prior to trial a case appropriate for trial must be established against the accused in committal proceedings — is still valid in the modern day. The problem is that the High Court's conception of committal proceedings does not accord with the manner in which the proceedings operate in practice in New South Wales. The fundamental reason for the abolition of committal proceedings is that the proceedings do not in practice serve the primary purpose claimed for them. In summary, committal proceedings are "ritualist committal proceedings"[48] calling for reform.

## COMMITTAL PROCEEDINGS: REFORM

It would be impossible to argue from the experience of the common law world that committal proceedings are essential to the operation of the criminal process. In the United States use of the preliminary hearing varies widely. According to one writer, the preliminary hearing "runs the gamut from mandatory application to almost total atrophy".[49] In Scotland committal proceedings do not involve a decision by a judicial officer that the prosecution evidence justifies committal for trial; the Procurator Fiscal or one of his Deputes examines all the witnesses ("the recognition" of witnesses) and then requests the Sheriff, a judicial officer, to commit the accused for trial, a request that is granted automatically.[50] In England the application of the "section 1 committal", introduced by the *Criminal Justice Act* 1967, has all but destroyed committal proceedings. In essence, the legislation permits the justices, at the election of the accused, to commit the accused for trial, an election that is made in most cases. A report in 1981 indicated that "adequate review of the prosecution evidence at committal proceedings is, save in a small

47 (1981) 55 ALJR 31

48 Seymour, J., *Committal for Trial* (1978) p 112

49 Griffin, J.G., "The Preliminary Hearing Versus the Grand Jury Indictment: 'Wasteful Nonesense of Criminal Jurisprudence' Revisited" (1974) 26 *Uni of Flor LR* 825

50 Sheehan, A.V., *Criminal Procedure in Scotland and France* (1975) p 144; and see generally pp 125-57 (Chapter 6)

minority of cases, little more than legal fiction":[51] Indeed, the abolition of committal proceedings, as such, was recommended in England by the Royal Commission on Criminal Procedure in 1981[52] and, in respect of fraud cases, by the Roskill Committee in 1986[53] The abolition of committal proceedings was also proposed by the Canadian Law Reform Commission in 1974[54] and by the NSW Law Reform Commission in 1987.[55]

Nor could committal proceedings be regarded as indispensable to the operation of the criminal justice system in New South Wales. The statistical and empirical evidence present a sorry picture of the functional significance of the proceedings within the criminal process. Committal proceedings represent the traditional method for disposing of weak indictable charges. Their screening function is the *raison d'etre* of their existence, not an optional extra. This function has not been assigned primarily to prosecutors in the withdrawal of an indictable charge prior to the commencement of proceedings, nor to judges in directing an acquittal during trial, but rather to magistrates in discharging the accused in committal proceedings. In principle, the emphasis is well-placed. The case comes before a magistrate at a relatively early point in the criminal process. The magistrate not only reads the evidence but also hears and observes the witnesses, a far superior position to that of the Crown, which is unfined to a 'paper' decision. However diligent some magistrates may be, there can be little doubt that as a group the magistrates are far too casual in their scrutiny of the law and facts, largely it would seem on the grounds that the real prosecutorial decision is yet to come.

The decision of the government to abolish committal proceedings is thus consistent with the mood of reform in the common law world, and is a common sense response to the demonstrated weakness of committal proceedings in this State. However, the government does not intend merely to abolish committal proceedings, but to introduce a pre-trial hearing between charge and trial. It is interesting to compare the government's preferred option, expressed in a Discussion Paper of May 1989, with the proposed reform of February 1990. Both confer on the accused the right to cross-examine a designated set of witnesses (the latter also includes "indemnified witnesses"), but, in respect of other witnesses, the preferred option requires that the accused "demonstrate special or exceptional circumstances which require the cross-examination of a particular witness".[56] This stringent condition has been replaced by one that requires an accused to show that there are "reasonable grounds to suspect that cross-examination will affect either the assessment of the reliability of the witness or would elicit further material to support a

51 McConville M. and Baldwin, J., *Courts, Prosecution, and Conviction* (1981) p 81

52 Royal Commission on Criminal Procedure (UK) (Chairman: Sir Cyril Philips), *Report* (1981) paras 8.24-8.31 (pp 180-3)

53 See Zander, M., "The Report of the Roskill Committee on Fraud Trials" [1986] *Crim L R* 423 at 426 (commenting on Chapter 4 of the Report)

54 Law Reform Commission of Canada, study Report, *Discovery in Criminal Cases* (1974) pp 72-3; 166-7. For later developments see Report No. 22, *Disclosure by the Prosecution* (1984) pp 10-11

55 NSW Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals*, DP14/1 (1987), pp 319-20; and Chapter 7 generally

56 Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (May 1989) p 1

defence". It seems to the writer that implementation of this rule would authorise the cross-examination of virtually all witnesses that are now required by accused persons for cross-examination. If this is the way that the pre-trial hearing operated in practice, it would neutralise a critical purpose of the reform: the reduction of delays in the courts.

It is also difficult to understand the need for a special statutory provision which prevents "unduly offensive, badgering or harassing questioning" of a witness. Though this is to be a pre-trial hearing, it remains a criminal proceeding, and the rights of the accused in cross-examination should not be qualified. In any event, the power to protect witnesses from such questioning is provided for a common law,[57] and pursuant to the *Evidence Act* 1898, which empowers a court to "forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears . . . to be needlessly offensive in form:[58] Accordingly, a new statutory provision to the same effect would appear to be superfluous.

On the other hand, the statutory provision that will compel the prosecution to disclose to the defence not merely the statements of the prosecution witnesses, but "other material helpful to the defence", to the extent that it picks up the preferred option set out in the discussion paper of May 1989,[59] is most welcome. This proposal requires the prosecution to disclose:

> (1) the precise terms of the indictment/information; (2) copies of any documents (or tapes where made) containing a record of the accused's conversations or statements to the police (e.g., records of interview, hand-written statements, etc.); (3) statements of all witnesses interviewed by the police during the investigation Whether they are to be called by the prosecution at the trial or not; (4) copies of any documentary exhibits; (5) details of where and when a non-documentary exhibit may be inspected; (6) the criminal record of the accused; (7) the names and addresses of any person from whom a statement was not taken, and the ground(s) upon which the witness might be regarded as material; (8) copies of any reports from 'expert witnesses'.

The proposal also envisages that the criminal record of a prosecution witness will be made available to the defence where it appears to be relevant. Understandably, there is a proviso that prohibits disclosure of any information where a person's safety might be threatened or it would interfere with the course of justice.

There are two excellent features of this proposal. First, it involves disclosure of statements from persons interviewed, whether or not they form part of the prosecution case; and the identification of persons from whom statements were not taken, and the grounds on which their statements might have relevance to the case. At present the accused at trial has the depositions from the committal, and the statements of any additional witnesses that the Crown will call at the trial (at times only an outline of their

57 See *Mechanical and General Inventions Co. v. Austin* [1935] AC 346 at 359-60

58 Section 58. See also New South Wales Bar Association, *Rules*, 47, 48, 51

59 Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (May 1989) p 2

evidence). As the accused lacks the financial resources to match the police investigation of the case, the accused's defence will frequently be based on inadequate information. This reform is important because it will help to redress the obvious imbalance between the investigative powers of the law enforcement agencies and the accused.[60]

Second, the proposal applies to summary proceedings as well as to proceedings on indictment. Mandatory disclosure of the prosecution case in summary proceedings is essential to the proper conduct of the defence case. The conduct of a proper defence by an advocate depends substantially for its efficacy on careful preparation. Prior to a jury trial, defence counsel is able to prepare in advance of the trial submissions on the admissibility of evidence and points of law, and a general outline of his address to the jury. When a barrister or solicitor conducts a case before magistrates, he may have no detailed knowledge of the prosecution case and is thus unable to prepare legal argument in reference to it. He must devise an approach to cross-examination and formulate a plan for the defence at the same time as he is first made aware of the prosecution evidence and is recording it. Arguments on the admissibility of evidence and other legal points must be presented ex tempore, as must his address to the court. In these circumstances the quality of the defence case must of necessity be diminished.[61]

## CONCLUSION

There has been stiff opposition to the proposed reforms. The New South Wales Bar Association[62] rejects the argument that committal proceedings should be abolished. The Association contends that the proposal is objectionable because a decision by the Director of Public Prosecutions is not open to public scrutiny nor subject to review by the superior courts. The Association also says that committal proceedings are effectual, and that the abolition of the proceedings will enlarge the work of the higher criminal courts and worsen the present delays. The Law Society of New South Wales has expressed similar views to those of the Bar Association.[63] It further believes that magistrates should be given wider powers to remove weak cases at committal proceedings, apparently to bring the magistrates' powers into line with the discretion exercisable by the Director of Public Prosecutions.[64] No official position has been taken by the magistracy but the media has quoted strong criticisms by unidentified magistrates. According to these reports, the

60 See generally, Lane, W.B., "Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors", in Basten, J., *et al*, *The Criminal Injustice System* (1982) p 174

61 See Baldwin, J. and Mulvaney, A., "Advance Disclosure in the Magistrates' Courts: How Useful are the Prosecution Summaries?" [1987] *Crim L R* 805

62 News Media Release, 20 February 1990

63 Pamphlet, 9 November 1989. Their expressed views antedate the formal decision of Cabinet to abolish committal proceedings, because the proposal to abolish committal proceedings was circulated at an earlier stage for public discussion. See generally, Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (May 1989)

64 The magistrate, unlike the Director of Public Prosecutions, may not take into account matters outside the evidence. See *Carlin v. Thawat Chidkhunthod* (1985) 4 NSWLR 182 at 197 (O'Brien CJ of CrD); approved by the Court of Appeal in *Saffron v DPP*; *Allen v DPP* (1989) 16 NSWLR 397

magistrates recognise the need for major changes to committal proceedings, but they are critical of such extensive and controversial changes, particularly as they would have the effect of downgrading the status of the magistracy.[65]

With respect, this opposition is misconceived. It is time to acknowledge the substantial changes to the balance of the criminal process over the last century and a half. Committal proceedings were an important development in 1850 when they assumed their modern form. They enabled the accused to question witnesses and make a statement in reply, rights that did not exist until that time. In New South Wales it was until 1882 in summary cases and 1891 in indictable cases that the accused was able to give evidence on oath.[66] Full rights of appeal were not achieved until 1912.[67] Legal aid is largely a phenomena of the second half of the twentieth century, particularly the third quarter of the twentieth century. These developments have strengthened immeasurably the position of the accused within the criminal process, and in recent decades have prompted substantial changes to committal proceedings, even calls for the abolition of the proceedings. The government's decision to abolish committal proceedings is entirely consistent with these developments, and is further justified because in this State the proceedings do not serve their primary purpose of removing weak cases from the criminal lists.

Associated with this reform is the introduction of a pretrial hearing. In the form in which it is presently described it may produce a situation which leaves the prosecution and defence with the worst of both worlds: weak cases will not be dismissed by the magistrates because they would have no power to dismiss them, and the Director of Public Prosecutions and his officers may have to digest a large volume of material before reaching the same conclusion that the magistrates would have reached. At the same time the length of pre-trial hearings could be exactly the same as the committal proceedings that they replace. In his 1988-9 Report the Director of Public Prosecutions spoke of the need to rein in the long delays in the criminal courts, and saw as his dream a situation in which cases come to trial within six months of charge. He cited the relatively short delay before trial in England as an exemplary for this State to follow.[68] However, in England the "section 1 committal", which is used in most cases, is completed in a few minutes; only a small proportion of cases involve the hearing of oral evidence; and a minuscule proportion involve a full hearing.[69] There is thus in most cases no impediment between charge and trial. As long as committal proceedings remain, the Director's dream that cases will come to trial within six months of charge, will remain just that: a dream. That committal proceedings are to be abolished is welcome, but the projected format of the pre-trial hearing should be revised, to ensure that it consumes only a short period of court time. Otherwise this most significant and beneficial reform of the criminal process will be rendered otiose.

65 *Sydney Morning Herald*, 20 February 1990
66 *Evidence in Summary Convictions Act* 1882, s 1; *Criminal Law and Evidence Amendment Act* 1891, s 6
67 *Criminal Appeal Act* 1912
68 Office of the Director of Public prosecutions, *Annual Report 1988-1989*, pp 11-12
69 McConville and Baldwin, *op cit supra* n 51 at 81