

COMMITTAL FOR TRIAL

AN ANALYSIS OF THE AUSTRALIAN LAW
TOGETHER WITH AN OUTLINE OF
BRITISH AND AMERICAN PROCEDURES

John Seymour

Australian Institute of Criminology 

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ADDENDUM

Mention can be made of one or two changes which have occurred between the completion of the manuscript and printing. On the subject of the power to file an indictment in the Northern Territory reference should also be made to ss.13 and 14(1) of the *Criminal Law and Procedure Ordinance* 1978 (N.T.). The question of the publication of committal proceedings has been the subject of a report in Victoria: *Report from the Statute Law Revision Committee upon Section 44 of the Magistrates (Summary Proceedings) Act* 1975, 1978. Also two previously unreported cases have now been reported. They are: *R. v. Bjelke-Petersen; Ex parte Plunkett* [1978] Qd. R. 305, and *R. v. Byczko* (No.1) (1977) 16 S.A.S.R. 506.

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INTRODUCTION

This is a study of the law governing committal for trial. The primary focus is on Australian legislation and case law, although a substantial number of English authorities have been included. Coronial proceedings have not been covered.

One cannot, of course, talk about an "Australian" system: the first task which a researcher in this field must undertake is an analysis of the Acts and Ordinances in force in the six States and two Territories which make up the Commonwealth. Such an analysis is presented in Chapter I.

This is followed by an examination of the objectives of committal procedures and a consideration of the criteria employed by an examining magistrate. The possibility of a higher court exercising supervisory powers over the conduct and outcome of a committal hearing has attracted a good deal of interest in a number of States and the case law on this subject is dealt with in Chapter IV. To complete this account of procedures in Australia the study includes a brief description of the role of the Attorney-General.

Chapter VI examines systems overseas. The countries whose procedures are outlined are: England, New Zealand, the United States of America, Canada, and Scotland. The concluding chapter draws attention to certain significant aspects of committal proceedings and outlines a model which seems to offer efficiency without sacrificing the basic objectives which these proceedings fulfil.

It must be emphasised that this study is a theoretical one. It does not incorporate the results of empirical research. The need for such research is great. To many the committal process is a cumbersome, mechanical routine, but their criticisms can be answered or confirmed only by rigorous study of the system in operation. Some suggestions for research are contained in Chapter VII.

I have endeavoured to state the law as at 31 May 1978.

CHAPTER I

THE STATUTORY PROVISIONS GOVERNING COMMITTAL PROCEEDINGS IN AUSTRALIA

The purpose of this chapter is to outline the most important features of the legislation in each of the States and Territories.¹ The relevant Acts and Ordinances are as follows:

New South Wales	<i>Justices Act</i> , 1902 (consolidated 1976)
Victoria	<i>Magistrates (Summary Proceedings) Act</i> 1975
Queensland	<i>Justices Act</i> 1886-1978
South Australia	<i>Justices Act</i> , 1921-1977
Western Australia	<i>Justices Act</i> , 1902-1977
Tasmania	<i>Justices Act</i> 1959 (consolidated 1974)
Australian Capital Territory	<i>Court of Petty Sessions Ordinance</i> 1930-1977
Northern Territory	<i>Justices Ordinance</i> 1928-1977

Unless otherwise indicated all section references in this chapter are to these enactments.

Before considering the legislative details, however, it is interesting to note that nowhere is it stated that the holding of a preliminary hearing is an obligatory step in proceedings in respect of an indictable offence. Fox, J., pointed this out in *R. v. Kent and Others; Ex parte McIntosh and Others*:² "The fact appears to be ... that whether or not there are preliminary proceedings is a matter of practice". As his Honour remarked, this seems extraordinary in view of the elaborate provisions made everywhere for and concerning committal hearings.³

The Court

In the majority of the States and Territories the legislation empowers a justice or justices to preside over committal proceedings.⁴ In two jurisdictions specific mention is made of magistrates: some of the relevant Victorian sections include a reference to a Magistrates' Court,⁵ while in the Australian Capital Territory a magistrate is

authorised to sit.⁶ Where no mention is made of magistrates they may preside by virtue of provisions which empower them to perform the functions of justices.⁷ Throughout the description which follows I refer to magistrates only.

In all jurisdictions it is provided that the place where the preliminary hearing is held shall not be deemed an open court, and the magistrates are given the power to exclude persons from the court.⁸ A magistrate may use this power if he feels that the ends of justice require him to do so. The Victorian statute adds a reference to the use of the power of exclusion in order to protect the reputation of the victim of an alleged sexual assault or of an offence of extortion.⁹ Further, that State has enacted specific rules governing a preliminary hearing when the offence alleged is rape, attempted rape, or assault with intent to rape. A stipendiary magistrate sitting alone must preside and, when the complainant is being examined or her statement read, no person may be present other than the informant, the accused, legal representatives and their clerks, police and court officers involved in the case, and persons specially authorised by the magistrate.¹⁰ In Queensland there exists a rule as to the exclusion of persons from the court while a child is giving evidence in a case involving a sexual offence against a child.¹¹

The same two States have also passed legislation restricting the publication of reports of committal proceedings. The Victorian Act prohibits the publication of a report of any confession or admission unless the accused is discharged or until after his trial. There is also an absolute prohibition on the publication of the prosecution's opening statement, and the magistrate may forbid the publication of any statement to which objection has been taken. Finally, there is an over-riding power to prevent the publishing of material likely to be prejudicial to a fair trial.¹² The restrictions in Queensland apply to hearings in respect of indictable offences of a sexual nature; magistrates are empowered to prohibit the publication of the whole or part of the proceedings.¹³

The Western Australian statute confers a more general power on the magistrate, who may at any time state that in his opinion in the interests of justice it is undesirable that any report of the evidence given at the hearing should be published.¹⁴

The Oral Hearing

The first part of the hearing consists of the taking of the evidence for the prosecution; the evidence is taken on oath or in such other manner as is prescribed.¹⁵ Where written depositions are taken these must usually be signed by the witness and by the magistrate.¹⁶ In most jurisdictions there is provision for some other form of recording.¹⁷

The defendant must normally be present throughout the hearing.¹⁸ Four jurisdictions, however, make special provision for the accused to

be excused from attendance. These are New South Wales,¹⁹ Victoria,²⁰ Queensland and the Australian Capital Territory. The Queensland law is unique in that it provides that a person charged upon a private complaint need not appear in person at a preliminary hearing until the magistrate is satisfied that the evidence is sufficient to put him on trial.²¹ In the Australian Capital Territory a defendant who is at liberty may apply for an order excusing him from attendance during the preliminary hearing. Where a summons has been issued an order may be made at any time after its issue and before the completion of the taking of the prosecution evidence. Further, it may be made whether or not the applicant is before the court or has attended before the court in connection with the proceedings. The application must not be granted unless the accused will be legally represented during his absence. When an order has been made the court may at any time require the accused's attendance, and must do so once it has concluded that the prosecution evidence has established a *prima facie* case.²²

A typical preliminary hearing begins with a reading of the charge, but the defendant does not normally plead at this stage. After the prosecutor opens his case the evidence of the prosecution witnesses is taken in the manner described above. Cross-examination by the accused or his solicitor or counsel is permitted; in two jurisdictions the legislation makes specific reference to this right of cross-examination.²³

A distinctive feature of the Tasmanian system is that the defendant is asked to plead at the beginning of the preliminary hearing.²⁴ The Act provides that, at the commencement of the hearing, the court must explain to an unrepresented defendant his rights and duties in respect of the charge. The magistrate is directed to use "the prescribed form of words" or "words of like import".²⁵ The prescribed formula is set out in rule 49 of the *Justices Rules*, 1976, and requires the magistrate to explain the purpose of a committal hearing, and to ask the defendant to plead. If the defendant wishes, he will be granted an adjournment. If a guilty plea is entered the defendant is committed to the Supreme Court for sentence.²⁶ If the defendant pleads not guilty or that he has cause to show why he should not be convicted of the charge, there will not necessarily be an oral hearing, as he is then asked whether he wishes depositions to be taken.²⁷ If he does not he is committed for trial.²⁸ If he does require depositions the normal hearing procedure is followed.²⁹

Special mention must also be made of Western Australia. Before the hearing of the evidence there is a court sitting which seems to be unique in Australia. The defendant is brought before a magistrate, who must read and explain to him the offence with which he is charged, tell him that he is not required to plead, indicate the courses of action open to him, and provide him with a written statement describing the procedure to be adopted. The proceedings are then adjourned.³⁰

Later in this chapter I shall discuss the provisions - existing in all jurisdictions - which permit committal on the basis of written statements. The Western Australian adjournment of the preliminary sitting allows the prosecution time to prepare written statements of the evidence to be tendered and to make them available to the defendant.

The defendant, for his part, also has time to consider his position, and can decide whether or not to allow the prosecution to proceed in this way. When the proceedings resume the defendant is asked to elect whether to have a preliminary hearing.³¹ If he elects to have a hearing this takes the normal form, except that the written statements may be tendered as evidence if the defendant does not object; the admissible parts of these statements are read aloud.³²

In the majority of Australian jurisdictions the legislation sets out a two-stage process to be followed during a preliminary hearing. Having heard the prosecution case the magistrate must make an initial assessment of the evidence in order to determine whether the hearing should proceed further or whether the defendant, if in custody, should be discharged. If the hearing does continue then, once the defence has had its chance, a further assessment is made, and the decision to commit or discharge is reached.

The criteria to be employed by the court in making its decision at each stage of the process must be considered in detail, for there are some variations.

With regard to the making of the discharge decision at the conclusion of the prosecution case the law is clear. In all eight jurisdictions the court must, if it is of the opinion that the evidence is not sufficient to warrant the defendant being put upon trial for *any* indictable offence, order the defendant, if in custody, to be discharged as to the information or complaint then under inquiry.³³ As might be expected, the same test predominates when it comes to the making of the alternative decision as to whether the hearing should proceed further.³⁴ However, in New South Wales³⁵ and the Australian Capital Territory³⁶ a different criterion governs the decision to proceed with the hearing. In each of these jurisdictions the magistrate must proceed only if he is of the opinion that a *prima facie* case has been made out by the prosecution. There are also differences between these jurisdictions in the wording of the relevant sections. In the Australian Capital Territory the Ordinance refers to the need for a *prima facie* case "in respect of an indictable offence" whereas the New South Wales Act is less precise.³⁷

In Victoria the decision to proceed relates to the indictable offence with which the defendant is charged.³⁸ Should the magistrate conclude that the evidence is sufficient to put the accused on trial for some indictable offence other than that with which he has been charged, he must direct that a new information be prepared.³⁹

A distinctive feature of the Act governing Victorian procedure at this stage is that *two* tests are available to the magistrate when he performs his task of deciding whether the hearing should proceed. As an alternative to the sufficiency test the magistrate is directed to ask himself "if the evidence given for the prosecution raises a strong or probable presumption of the guilt of the accused" in respect of the indictable offence with which he is charged.⁴⁰

Once it has been decided that the proceedings are to continue,

the defendant is given an opportunity to make a statement. Before he does so, the court is required to administer a statutory caution, and in most jurisdictions the relevant statute sets this out.⁴¹ The form of words prescribed in Queensland is a good example:

You will have an opportunity to give evidence on oath before us and to call witnesses. But first I am going to ask you whether you wish to say anything in answer to the charge. You need not say anything unless you wish to do so and you are not obliged to enter any plea; and you have nothing to hope from any promise, and nothing to fear from any threat that may have been held out to induce you to make any admission or confession of guilt. Anything you say will be taken down and may be given in evidence at your trial. Do you wish to say anything in answer to the charge or enter any plea?⁴²

If the defendant does make a statement the general rule is that this must be taken down in writing or otherwise recorded.⁴³ In all jurisdictions provision is made for the accused to give evidence on his own behalf and to call witnesses.⁴⁴

After the defendant has had an opportunity to present his case the court must again assess the evidence in order to reach its decision as to committal or discharge. In the main the criterion employed at this stage is exactly the same as that which was relied on at the close of the prosecution case: is the evidence sufficient to put the defendant on trial for an indictable offence?⁴⁵ As well as this test, Victoria repeats the alternative formulation, viz., whether the evidence "raises a strong or probable presumption of the guilt" of the defendant.⁴⁶ New South Wales also adopts this course and makes provision for the same two tests,⁴⁷ although the strong and probable presumption test was not included in the section dealing with the court's earlier decision. The idiosyncracies of the Victorian and New South Wales statutes do not end there, however. The former states that when all the evidence has been taken the magistrate must order the discharge of the defendant if he is of the opinion "that there is not sufficient reason to put the accused person upon his trial for any indictable offence",⁴⁸ while the latter directs that the defendant must be discharged if the magistrate is of the opinion "that on such evidence the defendant ought not to be put upon his trial for an indictable offence".⁴⁹

When no guilty plea has been entered and the magistrate considers that the evidence is sufficient he directs that the defendant be tried in the appropriate court, and steps are taken to ensure the defendant's attendance, either by remanding him in custody or admitting him to bail.⁵⁰

Plea of Guilty

In all jurisdictions provision is made for the entering of a plea of guilty at some stage of the hearing. Several of the statutes and

Ordinances refer to the possibility of such a plea at the end of the prosecution case.⁵¹ In Tasmania, as has been noted, a defendant is asked to plead at the commencement of the committal proceedings,⁵² while in Western Australia provision is made for the reception of a guilty plea at two points in the hearing. The defendant may plead guilty when, at the resumed sitting, he has elected not to have a preliminary hearing,⁵³ or he may do so when the court has finished examining the prosecution witnesses.⁵⁴ In New South Wales⁵⁵ and the Australian Capital Territory⁵⁶ the defendant may plead guilty at any time during the hearing.

Two States and the two Territories place limitations on a lower court's right to accept a guilty plea. In South Australia a defendant may not plead guilty during a preliminary hearing when the charge is murder, treason or manslaughter.⁵⁷ In the Northern Territory a guilty plea may not be received when the offence is punishable by imprisonment for life.⁵⁸ The New South Wales statute states that such a plea may not be entered in respect of an indictable offence punishable with penal servitude for life,⁵⁹ while in the Australian Capital Territory the relevant section excludes offences punishable by death or penal servitude for life.⁶⁰

Specific provision is made in South Australia⁶¹ and the Northern Territory⁶² for the defendant, upon pleading guilty, to call witnesses as to his character, and the depositions of any such witnesses must be recorded.

Once a guilty plea has been accepted the defendant is, in most jurisdictions, committed for sentence.⁶³ In Victoria, however, the magistrate directs the accused person to be tried.⁶⁴

Another point which must be considered is the possibility of the defendant changing his mind after entering a guilty plea during a committal hearing.

In New South Wales⁶⁵ and the Australian Capital Territory⁶⁶ a defendant who has been committed on a plea of guilty may request the higher court to order that the proceedings in the lower court be continued. A similar application may be made by counsel for the Crown. The relevant Victorian provision states that where a defendant has pleaded guilty and been presented for trial and then does not plead guilty to the presentment, he must on application by the Crown, and may on his own application, be tried in the Supreme Court or County Court.⁶⁷ In sharp contrast are Queensland⁶⁸ and Western Australia,⁶⁹ where it is provided that a court confronted by such a defendant who later pleads not guilty must, if satisfied that he did admit the offence before the magistrate, direct a plea of guilty to be entered. In both States, however, provision is made for the higher court to enter a plea of not guilty if it appears from the depositions that the defendant has not committed the offence charged or any other indictable offence.

The situation in Tasmania is that where a defendant has been committed for sentence and withdraws his plea the court may, if the

Attorney-General makes an application, direct him to be tried in the Supreme Court.⁷⁰

In South Australia and the Northern Territory the procedure is quite different. A defendant who has been committed for sentence may withdraw his plea by giving written notice to the Attorney-General (or to the Crown Law Officer in the Northern Territory) not less than seven days before the higher court's sitting commences. He is then tried in that court.⁷¹

Another way in which the procedure set in motion by a guilty plea can be reversed is when the Judge in the higher court concludes that the evidence does not support the charge. As has been noted, both Queensland and Western Australian law permit a Judge to enter a plea of not guilty in such circumstances.⁷² In New South Wales and the Australian Capital Territory the Judge must order the resumption of the committal hearing if it appears to him that the facts do not support the charge.⁷³

In South Australia and the Northern Territory if it appears to the court that a guilty plea should be withdrawn, the court may advise the defendant to withdraw his plea. If he does so he is deemed to have been committed for trial.⁷⁴

Written Statements in Lieu of Oral Evidence

Two purposes can be fulfilled by the use of written statements instead of oral testimony. These statements may be employed as a means of making the committal procedure more efficient, for the witnesses' need to attend and recite their evidence is obviated and the court's time is saved. This leaves the court's function substantially unaltered, as the magistrate must still consider the evidence and determine whether it warrants committal. Alternatively, the use of written statements can remove from the court the task of examining the sufficiency of the evidence and thus create a mechanism which completely replaces the committal hearing. Each of these approaches will be examined in turn.

In seven jurisdictions explicit provision is made for the courts to admit witnesses' written statements without the need for those witnesses to appear.⁷⁵ The New South Wales Act does not make specific reference to the use of written evidence but it is frequently employed when a defendant has pleaded guilty under s.51A. This State is distinctive in that it confines its use of written testimony to cases dealt with under that section.⁷⁶

Except in Tasmania and New South Wales the legislation includes certain formal requirements which must be satisfied before these statements may be tendered.⁷⁷ Although there are variations from jurisdiction to jurisdiction, the matters dealt with include the need to supply to the other party a list of witnesses and exhibits, copies of statements, copies of documents, a statement of the other party's rights,

and the need to observe certain formalities as to attestation. The Tasmanian Act merely refers to the fact that the evidence must be in the form of a statutory declaration.⁷⁸

Varying restrictions are placed on the use of written statements. The most important of these relate to whether both parties may make use of them or only one, whether they may be employed for all offences, and whether legal representation is a pre-requisite.

In Victoria only a stipendiary magistrate or two justices may preside over proceedings employing written statements;⁷⁹ also this procedure is not available when the charge is murder, attempted murder, or conspiracy to murder. Only the informant may invoke it.⁸⁰ In Queensland,⁸¹ Western Australia,⁸² and Tasmania⁸³ both sides may tender written statements and these may be used in relation to any indictable offence. However, written statements may not be admitted in Queensland if the defendant is not represented.⁸⁴ In South Australia,⁸⁵ the Australian Capital Territory,⁸⁶ and the Northern Territory⁸⁷ only the prosecution may claim the benefit of this procedure, which applies to any indictable offence.

The provisions regarding objection to the use of written statements are variously expressed. In Queensland if the parties do not agree to the use of written statements they are not admissible⁸⁸ and in Western Australia a party may object to a statement being tendered.⁸⁹ In the two Territories the defendant may, not less than five days before the hearing, require the attendance of the witness.⁹⁰ The effect of this is to render the written statement inadmissible. The Victorian Act is very similar, but allows the accused to require the attendance of the witness either to give oral evidence or for cross-examination only.⁹¹ The next section provides that a written statement may be tendered if the accused has not required the witness to attend "to give evidence".⁹² Presumably this means that if the witness has attended for the purposes of cross-examination the statement may still be received by the Court. In Tasmania the law is that a party may request the court to summon a witness who has made a statutory declaration "to attend as a witness for further examination or cross-examination".⁹³ Whether such a request renders the written statement inadmissible is not made clear. In South Australia it seems that the defendant cannot block the reception of a written statement, but he does have the right, before the completion of the prosecution case, to require the witness to attend "for the purpose of oral examination".⁹⁴ Cross-examination is permitted.⁹⁵ The legislation in Queensland⁹⁶ and the Australian Capital Territory⁹⁷ also allows for the cross-examination of a witness whose statement has been admitted. The Western Australian statute enables any party at a preliminary hearing to apply to the court requiring the attendance of a witness whose written statement has been tendered in evidence.⁹⁸ In Victoria⁹⁹ and the two Territories¹⁰⁰ further opportunity for objection to the admissibility of a written statement arises during the hearing. In such a case it is for the court to decide whether to uphold the objection and to require the attendance of the witness. Provisions enabling the court to require the attendance of a witness who has made a written statement exist in six jurisdictions.¹⁰¹

Also worthy of mention in this analysis of the use of written testimony is the fact that, in Victoria, when a charge of rape, attempted rape or assault with intent to rape is being dealt with, the informant must present the complainant's evidence in written form unless the magistrate rules otherwise.¹⁰² Similarly, South Australian law places some limitations on the right of a defendant charged with a sexual offence (as defined) to require the victim's appearance at the preliminary hearing.¹⁰³

As has been indicated the above-described procedures regarding the reception of written testimony leave the court's task unaltered, as the sufficiency of the evidence must still be weighed. However, four States - Victoria, Queensland, Western Australia and Tasmania - have gone further and have enacted laws which obviate the need for consideration of the evidence.

Victoria allows a defendant to elect to stand trial without a preliminary hearing where he has been served with copies of the written evidence.¹⁰⁴ In Queensland, where the evidence consists solely of written statements, and counsel for the defendant consents to his client's committal, then the court must commit without determining whether the evidence is sufficient to put the defendant on trial for an indictable offence.¹⁰⁵ In Western Australia, as we have seen, the defendant is asked to elect whether he wants a preliminary hearing.¹⁰⁶ He will be taken to have elected to have a preliminary hearing if he stands mute or does not answer the question putting him to his election, if he objects to the tender of any statement,¹⁰⁷ if he cross-examines any witnesses, if he gives or tenders any evidence other than by way of written statement, or if he submits that there is no case to answer.¹⁰⁸ If he does not elect to have a preliminary hearing the magistrate must, without any consideration of the contents of the written statements, commit the defendant.¹⁰⁹ It will be remembered that in Tasmania a defendant may elect not to have depositions taken. The statute allows a defendant who has made such an election - and who pleads not guilty or cause to show and has not disputed the making of a committal order - to be committed for trial without consideration of the evidence.¹¹⁰ He is supplied with a copy of the police statements prior to the trial.

FOOTNOTES

- ¹ Committal procedures regarding offences against the laws of the Commonwealth are governed by State or Territory law: s.68(1) and (2) *Judiciary Act* 1903 (Cth.). Note, however, that only a Stipendiary, Police, or Special Magistrate, or a specially authorised Magistrate may exercise jurisdiction: s.68(3).
- ² (1970) 17 F.L.R. 65.
- ³ At p.88.
- ⁴ N.S.W. s.41(1); Vic. s.48(1). See also *Magistrates' Courts Act* 1971 (Vic.) s.22A(f). Qld. s.104(1); S.A. s.106(1); W.A. s.101A(1); Tas. s.56A(1), and N.T. s.106(1).
- ⁵ Vic. s.43(1).
- ⁶ A.C.T. s.18(2).
- ⁷ N.S.W. s.10(1); *Magistrates' Courts Act* 1971 (Vic.) s.52; Qld. s.30(1); S.A. s.13; W.A. s.33(1); Tas. s.22(1), and s.18(1) *Magistrates Ordinance* 1976 (N.T.).
- ⁸ N.S.W. s.32; Vic. s.43(1); Qld. s.71; S.A. s.107; W.A. ss.66 and 67; Tas. s.56; A.C.T. s.52, and N.T. s.107.
- ⁹ Vic. s.43(1).
- ¹⁰ Vic. s.47A. The section also makes provision for the use of written statements in lieu of oral evidence. This topic will be discussed later in this chapter.
- ¹¹ Qld. s.71A(1). See also s.5 *Criminal Law (Sexual Offences) Act* 1978 (Qld.).
- ¹² Vic. s.44. (At the time of writing s.44(1)(2) and (3) have not yet come into operation).
- ¹³ Qld. s.71A(2).
- ¹⁴ W.A. s.101D. See also s.103A *Evidence Act* 1910 (Tas.).

- ¹⁵ N.S.W. s.36(1); Vic. s.48(1) and s.53; Qld. s.73; S.A. s.108(1); W.A. s.69(1); Tas. s.39; A.C.T. s.90AB, and N.T. s.108(1).
In some jurisdictions the fact that evidence may be taken other than on oath is made clear elsewhere. See s.12 *Oaths Act*, 1900 (N.S.W.); s.102 *Evidence Act* 1958 (Vic.); ss.8 and 9 *Evidence Act*, 1929-1976 (S.A.); the N.S.W. *Oaths Act*, 1900 is in force in the A.C.T.
- ¹⁶ N.S.W. s.36(5); Vic. ss.48(2) and 59(6); Qld. s.77; S.A. s.108(2); W.A. s.73(1); Tas. s.56A(6A) (only the witness needs to sign), and A.C.T. s.60(2). The equivalent section of the Northern Territory Ordinance (s.108(2)) was repealed in 1970.
- ¹⁷ N.S.W. s.36(4); Vic. s.48(1) and (3); s.131 *Evidence Act* 1958 (Vic.); s.5 *The Recording of Evidence Acts*, 1962-1968 (Qld.); s.5 *Recording of Evidence Act*, 1975 (W.A.); (at the time of writing this Act has not yet come into force). A.C.T. s.60(1).
- ¹⁸ N.S.W. s.41(1B)(a); Vic. s.48(1); Qld. s.104(1); S.A. s.108(2); s.102 of the Western Australian Act does not spell out the need for the defendant's presence during the prosecution evidence, but s.105(2) requires his presence when the defence case is presented. Section 57 of the Tasmanian statute does not state that the defendant must be present during the taking of the depositions. A.C.T. s.90AB, and N.T. s.106(1).
- ¹⁹ N.S.W. s.41(1B)(b). This subsection applies when there is more than one defendant and allows a defendant to be excused from attendance if the court is satisfied that he will be legally represented during the taking of the prosecution evidence. Subsection 1B was added to the Act in 1971 and solves the problem raised by *Ex parte Coffey; Re Evans and Another* [1971] 1 N.S.W.L.R. 434. In that case there was a conspiracy charge involving 15 persons; the rule requiring the presence of the accused meant that each had to be present during the whole of the committal proceedings. The Court of Appeal expressed concern about this provision.
- ²⁰ Vic. ss.49 and 50. The former section allows for absence due to the accused's physical condition or for compassionate reasons, and the latter covers a defendant who absconds, is unruly, or is absent for any reason. Under s.50(1) the hearing may continue if the magistrate feels that it cannot be postponed "without undue prejudice inconvenience or embarrassment to the prosecution or any other person accused or any witness."
- ²¹ Qld. s.103A. It seems that even when sufficient evidence has been adduced attendance is not obligatory. S.103A(2) states that when the magistrate is satisfied as to the sufficiency of the evidence he *may* order the defendant to appear at the hearing.
- ²² A.C.T. ss.89A and 90ABA. Note that this section was introduced by the *Court of Petty Sessions (Amendment) Ordinance (No.4) 1977*. An earlier Ordinance (*Court of Petty Sessions (Amendment) Ordinance (No.3) 1977*) was not tabled and was therefore void.

- ²³ Vic. s.48(1), and A.C.T. s.90AB.
- ²⁴ Tas. s.56A(2).
- ²⁵ Tas. s.56A(1).
- ²⁶ Tas. s.63(1). Also open to him is a plea that further proceedings may not be had on the complaint (s.56A(3)(c)). On reception of such a plea the magistrate must either amend or dismiss the complaint or overrule the plea (s.56A(4)).
- ²⁷ Tas. s.56A(6). Provision is made for a defendant to accept committal while requiring the depositions of one or more witnesses to be taken.
- ²⁸ Tas. s.62. In such a case he is supplied with a copy of the police statements prior to trial.
- ²⁹ Tas. s.56A(6A).
- ³⁰ W.A. s.101A(1).
- ³¹ W.A. s.101B(1).
- ³² W.A. ss.102, 69(3)(d) and 73(2)(a).
- ³³ N.S.W. s.41(2)(a); Vic. s.56(1); Qld. s.104(2); S.A. s.109(1) and (2); W.A. s.106; Tas. s.61; A.C.T. s.91(a), and N.T. s.109(1) and (2).
- ³⁴ Qld. s.104(2); S.A. s.109(1) and (3); N.T. s.109(1) and (3). Neither the Western Australian nor the Tasmanian statute spells out the need to proceed with the hearing if the prosecution evidence is sufficient, but this is implicit in ss.106 and 61 respectively.
- ³⁵ N.S.W. s.41(2)(b).
- ³⁶ A.C.T. s.91(b).
- ³⁷ *Ex parte Dowsett; Re Macaulay* (1943) 60 W.N. (N.S.W.) 40 suggests that there are limits to the enquiry which a committing magistrate may undertake. Evidence as to the commission of an offence other than that charged may be admitted, but in the view of Roper, J., the evidence must be "relevant to the charge the substance of which was contained in the information before the magistrate". His Honour added: "If ... in the course of an enquiry on an information as to one offence evidence is deliberately admitted not to substantiate or assist the case as to that offence but for the sole purpose of showing the commission of some other offence as to which no charge has been made, then I think the receipt of that evidence for that purpose is outside the jurisdiction of the magistrate. Otherwise the hearing of an information as to the commission of an indictable offence might become a roving enquiry as to whether the accused had ever committed any indictable offence" (at p.42). His

Honour also cited *Ex parte McQuillan* (1932) 49 W.N. (N.S.W.) 87.

³⁸ Vic. s.56(1)(b).

³⁹ Vic. s.56(2).

⁴⁰ Vic. s.56(1)(b).

⁴¹ N.S.W. s.41(4)(i); Vic. s.56(1)(b); Qld. s.104(2)(b); S.A. s.110(1); W.A. s.102; A.C.T. s.92(1)(ii), and N.T. s.110(1).

⁴² Qld. s.104(2)(b).

⁴³ N.S.W. s.41(4)(ii); Vic. s.59(1); Qld. s.104(3); S.A. s.110(2); W.A. s.102, and A.C.T. s.92(2).

⁴⁴ N.S.W. s.41(5); Vic. s.59(4) and (5); Qld. s.104(4); S.A. s.111; W.A. s.105(1); A.C.T. s.92(3), and N.T. s.111. Although the Tasmanian Act makes no reference to the defendant's right to give or adduce evidence he is permitted to do so.

⁴⁵ Qld. s.108(1); S.A. s.112(1); W.A. s.107; Tas. s.62; A.C.T. s.94, and N.T. s.112(1).

⁴⁶ Vic. s.59(7).

⁴⁷ N.S.W. s.41(6)(b).

⁴⁸ Vic. s.59(7).

⁴⁹ N.S.W. s.41(6)(a).

⁵⁰ N.S.W. s.42; Vic. s.59(7); Qld. s.108(1); S.A. s.112(3)(a); W.A. s.107; Tas. s.62; A.C.T. s.94(b), and N.T. s.112(3).

⁵¹ Vic. s.56(1)(b); Qld. s.113(1); S.A. ss.109(3)(b) and 134(1), and N.T. ss.109(3)(b) and 134(1).

⁵² Tas. s.56A(2).

⁵³ W.A. s.101C(b)(i).

⁵⁴ W.A. ss.102 and 114.

⁵⁵ N.S.W. s.51A(1).

⁵⁶ A.C.T. s.90A(1).

⁵⁷ S.A. ss.109(3) and 134(1).

⁵⁸ N.T. s.134(1). Cp. s.109(3) (dealing with the procedure to be adopted at the end of the prosecution case) which still contains a reference to capital offences and manslaughter as offences in respect of which a guilty plea may not be received.

- 59 N.S.W. s.51A(1).
- 60 A.C.T. s.90A(1).
- 61 S.A. s.137(1) and (2).
- 62 N.T. s.137(1) and (2).
- 63 N.S.W. s.51A(1)(c) and (d)(ii); Qld. s.113(1); S.A. s.136(1)(a); W.A. s.114; Tas. s.63(1); A.C.T. s.90A(8), and N.T. s.136.
- 64 Vic. s.57(1)(b).
- 65 N.S.W. s.51A(1)(d)(i).
- 66 A.C.T. s.90A(7).
- 67 Vic. s.58(2).
- 68 *The Criminal Code* (Qld.) s.600.
- 69 *The Criminal Code* (W.A.) s.618.
- 70 Tas. s.63(6).
- 71 S.A. s.141(1) and (2), and N.T. s.141(1) and (2).
- 72 *The Criminal Code* (Qld.) s.600, and *The Criminal Code* (W.A.) s.618.
- 73 N.S.W. s.51A(1)(d)(i), and A.C.T. s.90A(7).
- 74 S.A. s.142, and N.T. s.142.
- 75 Vic. s.46(1) and (2); Qld. s.110A(2); S.A. s.106(2); W.A. s.69(2); Tas. s.57(2); A.C.T. s.90AA(1), and N.T. s.105B(1).
- 76 The terms of s.51A have already been outlined. What is not made clear in the Act is that, before accepting a plea of guilty, a magistrate asks the accused if he has read the police brief (this contains statements of witnesses and documentary evidence). If the accused has not had the opportunity to read the brief the magistrate ensures that he is given a copy. He is also told that he has the right to have witnesses called to testify to the statements in the brief. The magistrate will have been given the brief and thus has the information allowing him to decide whether to accept or reject the plea.
- 77 Vic. s.45(2), (3), (5) and (6); Qld. s.110A(5) and (14); S.A. s.106(2) and (3); W.A. s.69(3); A.C.T. s.90(1) and (2), s.90AA(2), and N.T. s.105A(1) and (2), s.105B(2).
- 78 Tas. s.57(2).
- 79 Vic. s.45(1).

- 80 Vic. s.45(2).
- 81 Qld. s.110A(2).
- 82 W.A. s.69(2).
- 83 Tas. s.57(2).
- 84 Qld. s.110A(4).
- 85 S.A. s.106(2).
- 86 A.C.T. s.90(1).
- 87 N.T. s.105A(1).
- 88 Qld. s.110A(5).
- 89 W.A. s.69(3).
- 90 A.C.T. s.90AA(3), and N.T. s.105B(3).
- 91 Vic. s.45(9).
- 92 Vic. s.46(1).
- 93 Tas. s.57(2).
- 94 S.A. s.106(6).
- 95 S.A. s.106(7).
- 96 Qld. s.110A(8).
- 97 A.C.T. s.90AA(9).
- 98 W.A. s.73(2).
- 99 Vic. s.46(6).
- 100 A.C.T. s.90AA(6), and N.T. s.105B(6).
- 101 Vic. s.46(5); Qld. s.110A(9); W.A. s.73(2)(c); Tas. s.57(2);
A.C.T. s.90AA(7), and N.T. s.105B(7).
- 102 Vic. s.47A(5).
- 103 S.A. s.106(6a) and (6b). See also *Criminal Law Consolidation Act, 1935-1976* (S.A.) s.57a which deals with persons charged with sexual intercourse with, or indecent assault upon, a person under 17. When conducting the preliminary examination a magistrate may accept a guilty plea without taking any evidence.
- 104 Vic. s.51(1) and (2).

¹⁰⁵ Qld. s.110A(6).

¹⁰⁶ W.A. s.101B(1).

¹⁰⁷ W.A. s.101B(2).

¹⁰⁸ W.A. s.101C(a).

¹⁰⁹ W.A. s.101C(b)(iii). If the defendant elects not to have a preliminary hearing he is asked to plead (s.101C(b)(i) and is then committed for trial or sentence.

¹¹⁰ Tas. s.62.

CHAPTER II

THE FUNCTIONS OF COMMITTAL PROCEEDINGS

In asking what purposes committal proceedings serve one can distinguish between their statutorily proclaimed objective and other benefits which flow from the pursuit of this objective.

In each of the jurisdictions discussed it is clear that the primary function of the committal hearing is to test the sufficiency of the evidence against an accused person. The basic purpose is to screen out cases in which a trial is not justified.¹ Lord Widgery, C.J., has expressed this aim in general terms:

For my part I think it is clear that the function of the committal proceedings is to ensure that no-one shall stand his trial unless a *prima facie* case has been made out.²

A Queensland commentator puts the matter simply:

The duty of a magistrate on hearing a complaint for an indictable offence is one which is exercised in favour of defendants. It is an investigation on their behalf relating to the charge against them in order to satisfy a bench of magistrates that there is something for a higher court to decide.³

This objective is of particular importance to a defendant who is in custody: his detention may continue only if the magistrate rules that there is a case to answer.

Although emphasis is placed on the need to protect the defendant, it should not be overlooked that both sides have an interest in avoiding unnecessary proceedings.

The other major function of committal proceedings is to inform the defendant of the nature and strength of the case which he must meet. Whether this is a formal objective or a collateral benefit is debateable. Nevertheless, the defendant is given the opportunity to hear and test the Crown evidence. Also, the prosecution is given a chance to judge the reliability of its witnesses and to discover weaknesses in its case. Each side can learn how to improve its case and is alerted to the possibility of objecting to inadmissible evidence. The hearing clarifies the issues to be determined at the trial. Further, Dean suggests that the fact that the process gives each an idea of the other's case can mean that a basis for plea-bargaining can be established.⁴ Even if such bargaining does not occur the hearing might lead

to a reduction of the charge.⁵

Napley points out that the assistance which a preliminary hearing can give to the defence is not limited to the avoidance of an unjustified trial.

[A] vital part of the presentation of the defence often involves the protection of a client against himself [I]t is essential in the interests of the client, once he has given his explanation, that a competent solicitor should endeavour to evaluate, in the client's interest, both the reliability of his version of the facts and the likelihood of the Crown failing to satisfy a jury. If the solicitor is dissatisfied as to the probability of either he may endeavour to persuade the client to plead guilty. This, in itself, often involves analysing the prosecution evidence in order to demonstrate to the client himself that it is apparent that he is guilty; that the jury will undoubtedly find him guilty and that his interests may be served in some way other than a contest. Thus the cross-examination at the preliminary inquiry enables the informed solicitor to test any part of the story given to him by the client, of which he has doubt, against the account of the prosecution witnesses given under cross-examination. Prior to this, any attempt to convince the client of the impossibility of his position and the strength of the evidence of the prosecution witnesses is inevitably met with the argument, "They are lying - you wait until they are cross-examined."⁶

For a clear statement of the advantages which are probably best regarded as side benefits rather than formal objectives one cannot do better than refer to *R. v. Carden*. There, Cockburn, C.J., stated:

The perpetuation of testimony is no doubt one of various very great incidental advantages arising from the provisions of the statutes relating to the duties of justices in these matters. In the first place those who have to frame the indictment have the advantage of seeing the whole of the evidence on the depositions, and of being able to adapt the indictment to it. The judge also is enabled to make himself acquainted with the facts before the trial. Again, if there is any discrepancy between the deposition of a witness and his statement at the trial, this may afford substantial grounds for shaking his evidence. Lastly, if a witness dies, or is too ill to attend, his testimony is perpetuated.⁷

Taking the evidence at the preliminary hearing also has the effect of freezing witnesses' testimony while it is fresh in their minds.

Other benefits of the procedure are the saving of the time of the

trial court - the hearing may produce a guilty plea or a withdrawal of the prosecution - and the help given by the proceedings in estimating the length of the trial. Where there are no restrictions on the publication of proceedings the publicity attending the hearing may cause new witnesses to come forward. Dean makes the point that the preliminary hearing can also provide an opportunity for altering the conditions of the defendant's bail.⁸ Also his continued detention in custody might be reviewed.

Further advantages are listed by the Council of the English Law Society: witnesses whose evidence is of a formal nature are relieved from attendance at the trial, the receipt of depositions allows court officials to facilitate arrangements, and proceedings are materially shortened by clarification and arrangement of the evidence presented in the court below.⁹

A United States commentator has pointed out that committal proceedings perform objectives of two types: those relevant to society's interest in the prosecution of offenders, and those reflecting a concern for the rights of the defendant.¹⁰ Originally, as this writer indicates, the preliminary hearing focused solely on the former objective. The hearing was at first inquisitorial, and was held in secret; the defendant was not permitted to be present during the examination of witnesses, had no right to counsel, and was not able to call his own witnesses.¹¹ The hearing's purpose was to enable the prosecution to secure the evidence it needed. Although the emphasis is now on the protection of the accused, and the hearing is held primarily for his benefit, some features of the early hearing remain. Thus a function of the hearing is to bind over the suspect for further proceedings;¹² the magistrate must take the necessary steps to ensure that the defendant will appear for trial. Similarly the hearing can exercise control over witnesses to ensure their attendance;¹³ a witness can be required to enter into a recognizance to give evidence at the trial.

Although counsel on both sides of a case naturally value the opportunity provided by the preliminary hearing, it should be noted that, both in England and Australia, there is authority in support of the view that it is not the function of a committal hearing to provide the defence with an opportunity to rehearse its case or to explore the case which it must meet.

Lord Widgery firmly rejected the notion that the hearing is "a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court".¹⁴ The matter with which the Lord Chief Justice had to deal was a defence application for an order of *certiorari* to bring up and quash a justices' committal order. The accused was charged with indecent assault on a young girl, and the defence objected to the prosecution's refusal to call the girl as a witness at the preliminary hearing. The defence argument was that it should not have been deprived of the chance of cross-examining the girl. Lord Widgery rejected this submission, and ruled that there was no need for the prosecution to call a particular witness if it could make out a *prima facie* case without doing so. In the Lord

Chief Justice's opinion the action by the prosecution was not a breach of the rules of natural justice.

This ruling underlines the primary function of the committal hearing which is "to ensure that no-one shall stand his trial unless a *prima facie* case is made out".¹⁵ But it is possible to imagine situations in which a refusal to permit defence counsel to probe the Crown's case would prevent the court from satisfactorily determining whether a *prima facie* case has been made out. Suppose the complainant in the *Epping and Harlow Justices* case proved to be a totally unreliable witness. Might not the defence feel that a refusal to call her had resulted in the accused being unjustifiably put to the trouble and expense of a jury trial?¹⁶ With regard to the possibility of the defendant being prejudiced, however, it must not be overlooked that the prosecution is taking a risk when it decides not to call a witness, and this fact will have a bearing on its willingness to present an incomplete case at the preliminary hearing.¹⁷

R. v. Epping and Harlow Justices; Ex parte Massaro has been followed in New South Wales and South Australia. A relevant decision in the latter jurisdiction is *In Re Van Beelen*¹⁸ where defence counsel complained, *inter alia*, of the prosecution's failure to inform it of a "confession" made by a man named Sandercock. The police had come to the conclusion that Sandercock was unreliable and not to be believed. Counsel for the defence argued that the Crown's failure at the preliminary examination to disclose Sandercock's statement had prejudiced the accused, in that it had denied him the opportunity of investigating the possibility that this man, and not the defendant, had committed the crime. In rejecting counsel's submission that there was a duty on the Crown to disclose all information relevant to the charge the Full Court stated:

A magistrate ... conducts an examination of witnesses for the purpose of determining whether a *prima facie* case has been made out against the accused. This examination provides a safeguard to the accused in order to ensure that he cannot be put on trial unless the prosecution has fairly made out a case for him to answer. But it seems to us that the magistrate is concerned only with the hearing of evidence directly relevant to the alleged criminal act and the accused's connection with it. Materials which do not satisfy the tests of relevancy in the sense which we have indicated, or which are calculated to mislead, and which do not, therefore, assist in the presentation of a case proper for the consideration of the magistrate, ought reasonably to be treated as profitless, and rejected. The pursuit of distracting irrelevancies, the probing of miscellaneous suspicions about merely theoretical possibilities, the resort to mere fishing expeditions in the hope of discovering something that may bear on the facts in dispute, should not be allowed 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.¹⁹

The court then went on to adopt Lord Widgery's statement, and accepted the principle that the Crown may exercise its discretion in deciding what witnesses should be called. The argument that the prosecutor's conduct was open to criticism was therefore rejected.

[I]t seems to us that unless it clearly be shown that the failure of the prosecution to disclose to defence advisers at the preliminary examination the names of witnesses who could give material evidence was activated by some "oblique motive", or was a positive technique calculated to secure an unfair tactical advantage or to preclude the defence advisers from searching for the truth by proper and permitted methods of examination, then there can be no reason to apprehend a miscarriage of justice by reason of the omission to disclose the names of witnesses. *A fortiori*, there is no reason to conclude that such an omission could have given rise to a miscarriage of justice where the evidence of any witness, sought to be adduced in examination or cross-examination, could have no relevance to the essential facts in issue.²⁰

In Re Van Beelen was approved in the New South Wales case of *Maddison v. Goldrick*.²¹ Both the South Australian Court's characterisation of the purpose of committal proceedings and the statement by Lord Widgery were adopted by the New South Wales Supreme Court, and ruled to be applicable to proceedings in that State. On appeal the New South Wales Court of Appeal²² gave no explicit indication that it disapproved of the approach adopted in the English and South Australian cases. Delivering the court's judgment, Samuels, J.A., made it clear that what the accused had sought during the committal hearing were the statements of those whom the police had interviewed, and whom the prosecutor proposed to call.²³ Access to these statements was granted, as the court was satisfied that counsel needed them to establish the main ingredient of his client's defence. His Honour pointed out that the accused's counsel had not sought to embark upon "a fishing expedition".²⁴ The inference to be drawn is that the New South Wales Court of Appeal accepted the *Van Beelen* view of such expeditions.

Thus the courts seem likely to place some limits on the advantages which a defendant may gain from a committal hearing. He may not, it is submitted, look to it as a source of all the material which the Crown has in its possession. Nor may he look to it as an opportunity to rehearse his own case. However, the decision of the New South Wales Court of Appeal does seem to recognise the notion that the committal hearing should give the accused some assistance in the preparation of his defence. Samuels, J.A., stated:

Any procedure which deprived a defendant of the opportunity to pursue a proper and often fruitful course in cross-examination would be, in my view, seriously defective.²⁵

A later comment by his Honour is also significant, although it was more relevant to civil proceedings than to a criminal trial.

[O]ver recent years, the endeavours of law reformers, in most cases supported by the judges, have been directed to disposing of the last vestiges of trial by ambush, and to enabling each side to start the contest with the greatest possible knowledge of what is going to be alleged against him.²⁶

This suggests a judicial recognition of the need for a committal hearing not to be limited to the function identified by Lord Widgery.

In support of his view that it is accepted that the accused is entitled to some information as to the nature of the case against him, Samuels, J.A., referred to the existence of procedures by which the prosecution may supply to the defendant copies of witnesses' statements.²⁷ Mention of these procedures (which are outlined in Chapter I) draws attention to a point not yet considered in this chapter. Where a "hand-up" committal has occurred without consideration of the evidence no attempt is made to fulfil the screening function which I have emphasised: the procedure avowedly becomes a device to inform the defendant of the nature of the case which he must meet. Indeed, both in England and New Zealand there has been some criticism of the hand-up procedure's failure to screen out cases which should not have reached trial. The James Report made the following comments on the English use of hand-up committals:

Witnesses have expressed the opinion to us that, as a result of the section 1²⁸ procedure, a significant number of cases are committed for trial on evidence which does not justify a committal We have ... been given examples of specific cases committed for trial under section 1 which, in all probability, would not have been committed had proper consideration been given to the evidence by the parties.²⁹

In New Zealand in *R. v. Jackson*³⁰ Speight, J., had to deal with a case where a committal had been based solely on written statements. He ruled that there was no evidence to support the charge, and added:

It requires but five minutes reading of the papers to recognise that there is not a scintilla of evidence which could be put before a jury and the papers should never have even troubled the officers of this Court.

His Honour therefore ordered that no indictment be presented.

Criticisms such as these are a reminder of the importance of not overlooking the basic purpose which committal procedures must fulfil. Nevertheless, it is submitted that Lord Widgery's statement is too restrictive. In fact committal proceedings perform a number of functions, and it must be accepted that they have a role to play in helping the defendant to prepare for his trial. Just what that role is

has yet to be precisely defined. It does seem clear that the courts in Australia will seek to place limits on the demands which a defendant can make during a committal hearing.

FOOTNOTES

- ¹ The criteria employed during this screening process are discussed in Chapter III.
- ² *R. v. Epping and Harlow Justices; Ex parte Massaro* [1973] Q.B. 433, 435; [1973] 1 All E.R. 1011, 1012. It is interesting to compare Lord Widgery's statement with the much fuller explanation given in a Wisconsin case: "The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." *Thies v. State* 178 Wis. 98, 103; 189 N.W. 539, 541 (1922).
- ³ W. Kennedy Allen, *The Justices Acts of Queensland*, Law Book Company, 3rd ed., 1956, 259.
- ⁴ D.B. Dean, "Preliminary Examination Potential", 58 *Marquette L.R.* (1974), 159, 172.
- ⁵ D. Napley, "The Case for Preliminary Inquiries", [1966] *Crim.L.R.* 490, 495.
- ⁶ D. Napley, *op.cit.*, 494 - 495.
- ⁷ (1879) 5 Q.B.D. 1, 7.
- ⁸ D.B. Dean, *op cit.*, 172.
- ⁹ Memorandum of the Council of the Law Society (1964) quoted by D. Napley, *op cit.*, 491.
- ¹⁰ Note, "The Preliminary Hearing - An Interest Analysis", 51 *Iowa L.R.* (1965), 164, 165.
- ¹¹ *Ibid.*, 166-171.
- ¹² *Ibid.*, 167.
- ¹³ *Ibid.*, 171.
- ¹⁴ *R. v. Epping and Harlow Justices; Ex parte Massaro* [1973] Q.B. 433, 435; [1973] 1 All E.R. 1011, 1012. See also *R. v. Gordon* (1879) 5 Q.B.D. 1.
- ¹⁵ *R. v. Epping and Harlow Justices; Ex parte Massaro* [1973] Q.B. 433, 435; [1973] 1 All E.R. 1011, 1012.
- ¹⁶ For another example of a refusal to call the complainant see *Washington v. Clemmer* 339 F. 2d 715 (D.C. Cir.1964). There the accused and the police had offered conflicting statements as to whether the complainant could positively identify the accused. In

view of this conflict it was improper to refuse to allow the victim to be called. If she had been called and had been unable to identify the accused the preliminary hearing might have found that probable cause had not been made out.

¹⁷ Even so, the risk taken by the prosecution in such a situation is reduced by the fact that it is always open to it to institute fresh committal proceedings or to proceed by way of *ex officio* indictment.

¹⁸ (1974) 9 S.A.S.R. 163.

¹⁹ At p.244.

²⁰ At p.247.

²¹ [1975] 1 N.S.W.L.R. 557.

²² *Maddison v. Goldrick* [1976] 1 N.S.W.L.R. 651.

²³ At p.658.

²⁴ At p.657.

²⁵ At p.667.

²⁶ At p.668.

²⁷ At p.668.

²⁸ The reference is to s.1 *Criminal Justice Act*, 1967. This introduced "hand-up" committals into the English system. The section is discussed in Chapter VI.

²⁹ Home Office, *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts*, London, H.M.S.O., 1975, (Cmd. 6323) para. 232.

³⁰ Supreme Court of New Zealand, Unreported. Judgment delivered 18 August 1977.

CHAPTER III

THE CRITERIA GOVERNING THE DECISION TO COMMIT OR DISCHARGE

At the end of a committal hearing a magistrate must decide whether or not to commit the defendant for trial. As was noted in Chapter I, the Acts and Ordinances in force in Australia set out the criteria to be employed in reaching this decision. It is the purpose of this chapter to examine these criteria. Unless otherwise indicated the section references are to the legislation cited *ante*, p.1.

The situation is complicated by the fact that in each jurisdiction the legislation creates a two-stage process, and calls for a decision to be made at the end of the prosecution evidence and again at the conclusion of the defence case. In most jurisdictions the criterion which, at the end of the prosecution case, governs the decision to discharge the defendant or proceed with the hearing is whether the evidence is sufficient to put him upon his trial for an indictable offence.¹ The same criterion is employed at the end of the hearing.²

Analysis is further complicated by the way in which the word "sufficient" is used in the various Acts and Ordinances. The sufficiency of the evidence is the criterion which a magistrate must employ in most jurisdictions in reaching his final decision as to committal or discharge. Yet at the end of the prosecution case he must discharge the defendant if the evidence is not sufficient to put him on trial. Clearly the term "sufficient" must have two meanings in the legislation. When a discharge decision is made at the end of the prosecution evidence this reflects the view that the basic outlines of the case have not been established, and that there is therefore no point in proceeding with the committal hearing. It will be argued later that the ultimate decision is quite different.

Three jurisdictions combine the sufficiency formula with other tests. In New South Wales a magistrate is directed to discharge the defendant at the end of the prosecution case if the evidence is "not sufficient to warrant the defendant being put upon his trial for an indictable offence", but the test for proceeding with the hearing is whether "a *prima facie* case has been made out".³ When we consider the second stage (i.e., when all the evidence has been heard) we find two types of criteria governing the committal decision. To the familiar sufficiency test is added a reference to "a strong or probable presumption of ... guilt". Thus, at the conclusion of the prosecution and defence evidence a magistrate in New South Wales must commit the defendant for trial:

... if he ... is ... of opinion that the evidence is sufficient to warrant the defendant being put on his trial for an indictable offence, or if the evidence

raises a strong or probable presumption of the guilt of the accused."⁴

However, he must discharge the defendant if, on the evidence, he "ought not to be put on his trial for an indictable offence".⁵

Victoria also makes use of the strong or probable presumption test, but employs it as an alternative at both stages of the proceedings. At the end of the prosecution evidence the magistrate must proceed with the hearing if the evidence is sufficient to put the accused upon his trial or if the evidence raises a strong or probable presumption of guilt.⁶ At the end of all the evidence the same criteria must again be employed before the magistrate directs the defendant to be tried.⁷ Like its counterpart in New South Wales the Victorian statute further complicates the decision-making process at this later stage, for the same sub-section directs the magistrate to discharge the defendant from custody if he is "of opinion that there is not sufficient reason to put the accused person upon his trial for any indictable offence".

In the Australian Capital Territory the sufficiency test governs each of the decisions which a magistrate can make except that which faces him when, having heard the prosecution evidence, he must determine whether to proceed with the committal hearing. This decision depends on the existence of evidence which "has established a *prima facie* case against the accused person in respect of an indictable offence".⁸

Several issues are raised by this analysis of the statutory provisions. The most obvious is the striking juxtaposition, in the New South Wales and Victorian legislation, of the sufficiency test and the strong or probable presumption test. It is submitted that these two formulations clearly embody different standards. Authority on the point is provided by *Armah v. Government of Ghana and Another*,⁹ a decision of the House of Lords. Lord Reid makes it clear that the sufficiency criterion is not the same as the strong or probable presumption test, and that the latter demands a higher standard than the former.¹⁰ A commentator on the New South Wales Act describes the strong or probable presumption formula as "largely surplusage", and states:

It is difficult to imagine a case where the second alternative applied that did not embrace the first.¹¹

This comment underlines an unsatisfactory feature of the New South Wales and Victorian statutes. The yoking of two different types of criteria merely confuses the issue: if evidence meeting the lower standard is sufficient to justify committal the legislation should say so. If this standard is achieved it should be unnecessary for the magistrate to concern himself with the second criterion.¹²

Nevertheless, the strong or probable presumption test does form part of the law of Victoria and New South Wales, and we must ask what it means. In the *Armah* case Lord Reid explained it as follows:

The magistrate must weigh the whole of the evidence

put before him and decide whether he - not a hypothetical jury - thinks it probable that the accused committed the offence. And "probable" does not mean certain or nearly certain, and on the other hand it does not mean a mere possibility.¹³

Lord Morris distinguishes between a prediction of the jury's verdict and a determination that the evidence is such as could support a guilty verdict:

It is to be observed that the magistrate is not called upon to assess or to decide whether [the offender] will probably be found guilty. That would not be a rational exercise in forecasting to impose on any magistrate.¹⁴

Later His Lordship adds:

If he can feel that upon the evidence before him as it stands a tribunal or a jury could properly say that they were satisfied that guilt was established, then it would seem to follow that the evidence raised a strong or probable presumption of guilt.¹⁵

Lord Pearce also disapproved of magisterial attempts to forecast a verdict:

[T]he magistrate must decide whether the evidence raises a strong or probable presumption. That question is not identical with the question whether a reasonable jury could convict, which introduces another element of discretion. There may well, I think, be cases where a judge or magistrate may come to the conclusion: "I personally do not think that the evidence raises a strong or probable presumption but I appreciate that some other reasonable man (or jury) could come to a different conclusion." In such a case, in my opinion, the duty of the magistrate is to dismiss [The magistrate] personally must make his decision on the problem set to him by the statute. He must not substitute for his own view the possible views of a hypothetical jury.¹⁶

These comments on the strong or probable presumption test raise a fundamental question about the nature of the decision which a magistrate must make at a preliminary hearing. Is a decision to commit a determination that "there is something for a higher court to decide"¹⁷ or is it some sort of prediction as to the result of the trial?¹⁸ When a magistrate commits for trial is he deciding that the facts require further enquiry, or is he indicating that the defendant is probably guilty?

Any attempt to answer these questions must, of course, take into

account the wording of the relevant sections.¹⁹ As has been shown the most common legislative formula in Australia is the sufficiency test. Before committing for trial a magistrate must, in the majority of jurisdictions, be of the opinion that the evidence is sufficient to put the defendant on trial for an indictable offence. It should be noted that it is the magistrate's opinion which matters: it is submitted that the above-quoted comment by Lord Pearce correctly states the law in Australia, and that the magistrate must personally make his decision and not substitute for his own view the possible views of a hypothetical jury.

In performing this task clearly a magistrate must weigh the testimony which he has heard. As Taylor has pointed out, a rejection of the view that a magistrate must make a limited assessment of the evidence would appear to fail to give any weight to the legislative requirement that the evidence be "sufficient".²⁰ Yet in so doing he must not usurp the function of the jury. A distinction must be drawn between a decision that the evidence is insufficient to merit consideration by a jury and a thorough-going review of the entire case which culminates in a prediction of the jury's verdict. The point can be underlined by recalling the basic purpose of the committal hearing. It is to protect a defendant against unjustified exposure to a jury trial. The preliminary hearing exists, as Wood has reminded us, to prevent excesses and to ensure that there are no indiscriminate prosecutions.²¹ Its purpose is not to provide a magistrate with an opportunity to intervene if he believes that the jury will not convict.

In attempting to define the magistrate's function it might be helpful to distinguish between various levels of evidence. First there is evidence which justifies arrest. Second there are two levels of evidence which must be considered at a committal hearing. And third is the quantum of evidence which permits a jury to convict; what a jury requires is, of course, proof beyond reasonable doubt. The criminal process can be seen in terms of gradually increasing standards, and there should be a clearly identifiable difference between the standards required at each stage.

Let us focus on the committal process. It will be recalled that in each jurisdiction a two-stage procedure has been created. In New South Wales and the Australian Capital Territory the distinction between these two stages is underlined in the legislation by the use of different criteria. At the conclusion of the prosecution case a magistrate must proceed with the hearing if a *prima facie* case has been established. He must commit if the evidence is sufficient to put the defendant on trial. How do the two decisions differ?²²

It is submitted that the legislative direction that a *prima facie* case must be made out at the earlier stage of the hearing requires that there be some evidence implicating the accused. This must be evidence in the legal sense (i.e., relevant, credible and admissible) and it must create the outline of a case (i.e., it must lay a foundation for establishing each of the ingredients of the offence). Something more is needed before committal is justified. Perhaps the distinction between the two decisions can be expressed in terms of the need to assess the evidential value of the material before the court and the

need to assess its probative value. When a magistrate makes the committal/discharge decision his task "involves weighing and judgment rather than a wooden comparison of the testimony with the elements of the crime".²³

Such a conclusion is supported by the analysis contained in *Irvine's Justices of the Peace*. This rejected the notion that whenever a *prima facie* case is made out the justice should commit.

If this meaning be accepted as the rule, it would be useless to allow the prisoner to call witnesses; for, supposing that even on very slender evidence a *prima facie* case was substantiated against the accused, the evidence of fifty or a hundred witnesses of the most unimpeachable character proving the strongest defence should not, in that case, influence the justice. But this is evidently not the intention of the Legislature, which makes express provision for the calling of witnesses for the defence. Hence the discretion of the justice must rest in something else than a *prima facie* case.²⁴

Defining this "something else" is extremely difficult. A committing magistrate dwells in a shadowy middle territory, and he must try to avoid converting to his own use the standards which are more appropriate to an arresting police officer or a jury. He must articulate his own standards. He must walk a fine line between committing for trial whenever there is any evidence, however weak, and trying the case.

In *R. v. Governor of Brixton Prison, Ex parte Bidwell* Swift, J., offered the following as a test which a magistrate should apply before committing a defendant:

[T]here must be such evidence that, if it be uncontradicted at the trial, a reasonably minded jury may convict upon it.²⁵

It should be noted that this formula refers to evidence on the basis of which a jury *may* convict. This suggests that a distinction might be made between a magistrate's decision as to whether, on the evidence before him, a jury *could* convict and a decision as to whether it *would* convict. In my submission it is proper for a magistrate to rule that a reasonable jury *could not* convict the defendant on the basis of evidence presented and that this evidence is therefore "insufficient". It is further submitted that it would be improper for a magistrate to rule that as a jury *would not* convict, the evidence is insufficient. The difference may seem to be merely a semantic one, but it is submitted that the latter is a usurpation of the jury's function and a naked attempt to predict the trial outcome, while the former is merely a way of asking whether there is evidence which warrants consideration by a jury.

The answer to the question as to what is meant by "sufficient"

evidence is that it is evidence worthy of examination by a jury. What is required is "a case which calls for an answer".²⁶ If a magistrate concludes that there is no reasonable possibility that a jury could find the defendant guilty he must, in my submission, intervene to prevent the matter going further. It is submitted that a remote possibility of a guilty verdict is not enough to justify committal and that a magistrate should refuse to commit when there is no more than some evidence on which the jury *might* convict. A mere possibility or suspicion of guilt is not enough.²⁷ As an example, let us suppose that a case occurs in which much depends on identification evidence and this (because of poor light and the suspect's distance from the witness) is flimsy. It is submitted that a magistrate who commits for trial on the view that, though the evidence is extremely flimsy, a jury might just believe it, is not performing his screening function. An offence where it is recognised that it is dangerous to convict without corroboration provides an example which might fall on the other side of the line. If such an offence is charged and corroboration is entirely lacking it can be argued that committal for trial is justified on the grounds that it is up to a properly directed jury to decide the question of guilt.

The approach discussed has a good deal in common with that which must be adopted by a trial Judge faced with a defence submission that there is no case to answer. On the Judge's task in such a situation the Australian High Court has stated:

When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted.²⁸

This statement makes the sort of distinction which I have sought to draw between a proper assessment of the strength of the evidence and a usurpation of the role of the jury.

Writing of the South Australian system Hannan has thrown further light on the difference between a committing magistrate's task and a jury's. He states that a justice should commit for trial:

... if he is doubtful whether he ought to believe the evidence for the prosecution or the evidence for the defence, for it is no part of the duty of the justice to decide questions of conflicting testimony, which should be left to be decided by a jury after a committal.²⁹

And Taylor, writing of the law in Canada, has observed that a justice is not permitted:

... to refuse to commit on the basis of a reasonable doubt as to the sufficiency of the evidence as the law is clear that if there is a reasonable doubt at

this stage then that doubt should be resolved in favour of committal.³⁰

One situation which must be considered is that which arises when a committing magistrate rules on the existence of a defence. An example of this is seen in the English case *In re Roberts*.³¹ There the charge was one of having sexual intercourse with an under-age girl. The statutory defence of reasonable belief that the girl was over 16 was raised, and the onus of proving the necessary facts was on the accused. The examining justices ruled that the defence had been established and refused to commit. On a police application to the judge of assize for a bill of indictment against the accused, Havers, J., held that it was open to the justices to take the course they did, and the application was refused.

A magistrate who acts this way is performing trial-like functions, and the question to be asked is whether he usurps the jury's function when he does so. It should be noted that the situation in *Roberts* was a special one: the justices did not rule that there was a reasonable doubt about the defendant's commission of the offence (a ruling which they would not have been authorized to make), but, rather, that no reasonable jury could fail to be satisfied on the balance of probabilities that the statutory defence had been established.³² A ruling of the latter kind accords with the view that a committing magistrate must discharge a defendant if he is of the opinion that no reasonable jury could convict. Further, there would be no point in making provision for the reception of defence evidence if we were to conclude that a magistrate may never rule that a defence has been established. Nevertheless, a magistrate in a case such as *Roberts* must weigh the evidence and assess the credibility of the witnesses, and when he does so the distinction between his function and that of a jury is far from clear.

The Possibility of Jurisdictional Error

One further matter requires discussion. It is submitted that in the majority of the States and Territories a magistrate must, when reaching his decision, confine himself to a consideration of the strength of the evidence. It follows that, in my submission a magistrate who takes into account other matters acts in excess of his jurisdiction.

The question of jurisdictional excess is examined in Chapter IV, but this aspect of the matter can be conveniently discussed here as it involves an analysis of the legislative provisions set out on pp. 27-28 (*supra*). The issue is a simple one. What do these provisions direct the magistrate to do?

In four States and the two Territories the legislation makes it clear that the magistrate must, at the conclusion of the prosecution and defence evidence, commit the defendant for trial if the evidence is sufficient.³³ It is submitted that he is entitled to consider no factor other than the strength of the evidence, and that he has no discretion in the matter if he considers the evidence to be sufficient. The Acts and Ordinances state that once evidence of the required standard is available the magistrate *shall* commit for trial.³⁴

If in any of these six jurisdictions a magistrate were to refuse to commit because, for example, he believed that the defendant had already suffered enough, or because he felt that further proceedings would be pointless, such a magistrate would, I submit, be acting in excess of his jurisdiction. He has not confined himself to an examination of evidential matters. Non-evidential considerations are the province of the Attorney-General.

In two States the law relating to the criteria governing the final decision is unclear. In New South Wales a magistrate is directed, at the end of all the evidence, to discharge the defendant if "on such evidence the defendant ought not to be put on his trial".³⁵ It might be argued that such a formula entitles the magistrate to take into account factors other than the strength of the evidence. Such an argument is not a convincing one, as the sub-section does seem to invite the magistrate to focus on the evidence. All that can be said is that the wording used in New South Wales is slightly less precise than that employed in the four States and the two Territories discussed above.

Questions about the justice's room to manoeuvre are also raised by the Victorian statute. In that State a justice must discharge the defendant if, "after hearing all the oral evidence and reading such statements and considering such documents and exhibits as are admitted in evidence ... the justice is of opinion that there is not sufficient reason to put the accused person upon his trial".³⁶ Does the section implicitly confine the justice to a consideration of the evidence, or do the words "not sufficient reason" allow him to take other matters into account? The answer to this question is by no means certain, but when one compares this wording with that used in the other seven jurisdictions it does seem that a Victorian magistrate might have a little more freedom than his colleagues elsewhere.

FOOTNOTES

- ¹ Vic. s.56(1)(a) and (b); Qld. s.104(2); S.A. s.109(1), (2) and (3); N.T. s.109(1), (2) and (3); W.A. s.106; Tas. s.61.
- ² N.S.W. s.41(6)(b); Vic. s.59(7); Qld. s.108(1); S.A. s.112(1), (2) and (3); W.A. s.107; Tas. s.62; A.C.T. s.94; N.T. s.112(1), (2) and (3).
- ³ N.S.W. s.41(2)(a) and (b).
- ⁴ N.S.W. s.41(6)(b).
- ⁵ N.S.W. s.41(6)(a).
- ⁶ Vic. s.56(1)(b).
- ⁷ Vic. s.59(7).
- ⁸ A.C.T. s.91.
- ⁹ [1968] A.C. 192.
- ¹⁰ At pp.225-6. See also the remarks by Lord Upjohn at pp.260-1. Lord Pearson, however, adopted a contrary view and stated that the strong or probable presumption test "provides the definition, which would otherwise be lacking, of the amount of evidence which is sufficient to put the accused party upon his trial for an indictable offence" (at p.267).
- ¹¹ J.M. Smail, *Justices Act 1902-1966*, New South Wales, Annotated, Sydney, Butterworths, 1966, 188.
- ¹² It seems that the retention of the two tests can be explained by considering the history of the legislation. The Acts in New South Wales and Victoria have their origin in the English *Indictable Offences Act*, 1848. Section 25 of that statute embodied both criteria, and thus it seems that their juxtaposition in the New South Wales and Victorian Acts can be regarded as an historical accident. In passing it is interesting to note that the phrase "strong or probable presumption of guilt" also occurs in s.109 of the Queensland Act. This section deals with cases in which only one justice sits, and allows him to remand the defendant for a hearing before two or more justices. See also *Criminal Code* (Tas.) s.310(4).
- ¹³ At p.229.
- ¹⁴ At pp.242-243.
- ¹⁵ At p.243.
- ¹⁶ At pp.252-253.

- 17 *In re the Mercantile Bank: Cox v. Millidge* (1893) 19 V.L.R. 527, 529, per Hood, J.
- 18 An authority which is sometimes cited to support the argument that it is the magistrate's duty to decide whether there is a presumption of guilt is *R. v. Carden* (1879) 44 J.P. 119, 137. Both Halsbury and Harris rely on this decision. (Halsbury, *Laws of England*, Butterworths, 4th ed., 1976, Vol. 11, 105; B. Harris, *The Criminal Jurisdiction of Magistrates*, London, Barry Rose Publishers, 5th ed., 1976, 42). It should be noted, however, that though the phrase "presumption of guilt" occurs in the Justice of the Peace Report, it does not appear in the Queen's Bench Report. In the latter Cockburn, C.J., stated: "The duty and province of the magistrate before whom a person is brought, with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if there be any, whether the case is one in which the accused ought to be put upon his trial". (1879) 5 Q.B. 1, 6.
- 19 The phrase "a *prima facie* case" is sometimes used to refer in a general way to the quantum of evidence which justifies committal. See, for example, the following statement: "A magistrate is clearly bound, in the exercise of a sound discretion, not to commit anyone unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit." W. Kennedy Allen, *The Justices Acts of Queensland*, Law Book Company, 3rd ed., 1956, 277. (Citing *Cox v. Coleridge* (1822) 107 E.R. 15). See also *Attorney-General of the State of New South Wales v. Jackson* (1906) 3 C.L.R. 730, 748, per O'Connor, J. However, except in the New South Wales and Australian Capital Territory legislation this phrase does not appear, and even in these two jurisdictions it refers only to the test which must be applied at the end of the prosecution case. Further, Lord Reid has criticised its use: "That phrase is not self-explanatory: what is it that the case shows *prima facie* or at first sight? Is it that on the evidence as it stands at the moment the accused would seem to be guilty, or is it that the evidence contains allegations set out in such a way that further investigation is justified? I would hope that a less ambiguous phrase will be used especially in any future legislation." (*Armah v. Government of Ghana and Another* [1968] A.C. 192, 229-230). It is submitted that the term "*prima facie* case" should be avoided.
- 20 J.P. Taylor, "The Test for Committal on the Preliminary Inquiry: U.S.A. v. Shephard - A View of Sufficiency," 11 *University of British Columbia Law Review*, 1977, 213, 228. This paper is a very useful discussion of the tests which a committing magistrate should employ.
- 21 J.C. Wood, "The Submission of No Case to Answer in Criminal Trials - The Quantum of Proof," 77 *Law Quarterly Review*, 1961, 491, 498.
- 22 An example of the making of a distinction between the two decisions is to be found in *R. v. Branson and Garland*. There at the end of a committal hearing Mr C. Kilduff, C.M., stated, "[I]t is my view

that the evidence against each of the defendants has established a *prima facie* case but it is my further opinion that a jury properly directed would not convict the defendants and I propose to discharge both defendants." (Unreported, Canberra Court of Petty Sessions, 1976).

- ²³ American Law Institute, *Model Code of Pre-arraignment Procedure*, Tentative Draft No. 5, 1972, 91.
- ²⁴ Quoted in *Nash on Magistrates' Courts*, Sydney, Law Book Company, 3rd ed., 1975, 233-234. The Distinction between a *prima facie* case and evidence justifying committal is clearly underlined if one considers proceedings in which the defendant reserves his defence. In New South Wales and the Australian Capital Territory a magistrate must ask himself whether a *prima facie* case has been established at the end of the prosecution evidence. If he is satisfied that this has been established he must ask the defence to present its evidence, and if the defence is reserved the magistrate must then apply a *different* criterion to the evidence which he has just considered. An advisory opinion prepared by an Assistant Law Officer in New South Wales expresses the view that when an accused has reserved his defence a magistrate who bases his decision to commit on no more than the existence of a *prima facie* case is open to criticism. (C.E. Weigall, "Committals for Trial," *Stipendiary Magistrates Bulletin*, No. 8, 1948, 5-7).
- ²⁵ [1937] 1 K.B. 305, 314. Note that this test, too, is open to the criticism that a magistrate employing it might allow his view of the evidence to be overborne by the view of a hypothetical jury. Indeed, in *Armah* Lord Reid criticised it for precisely this reason: "Stated as Swift J. states it, the magistrate would have to weigh the evidence to see whether 12 reasonable men and women could all properly think it sufficiently convincing to satisfy them beyond reasonable doubt of the guilt of the accused The experienced counsel who appeared in this case appeared to be agreed that in practice magistrates do not always consider what a hypothetical jury could or could properly do but rather consider broadly as a matter of discretion whether a case has been made out fit for consideration by a jury." [1968] A.C. 192, 229. It should also be noted that Swift, J., was discussing the strong and probable presumption test.
- ²⁶ This was the definition of a *prima facie* case advanced by the South Australian Full Court in *Wilson v. Buttery* [1926] S.A.S.R. 150, 153.
- ²⁷ See R.E. Salhany, *Canadian Criminal Procedure*, Ontario, Canada Law Book Co., 2nd ed., 1972, 89, citing *R. v. Cowden* (1947) 90 C.C.C. 101.
- ²⁸ *May v. O'Sullivan* (1955) 92 C.L.R. 654, 658. With regard to the possibility of using the same criteria as are employed when a trial court is faced with the submission that there is no case to answer, see also *Myers v. Commonwealth* 298 N.E. 2d 819 (1973) and the discussion of the case by D.B. Dean, "Preliminary Examination

Potential," 58 *Marquette L.R.* (1974), 159, 166-170. Note also that the American Law Institute's Model Code of Pre-Arraignment Procedure favours this criterion. (Discussed *post* 89). See, too, R.E. Salhany, *Canadian Criminal Procedure*, Ontario, Canada Law Book Co., 2nd ed., 1972, 89, and the cases there cited.

- ²⁹ A.J. Hamman, *Summary Procedure of Justices in South Australia*, Melbourne, Law Book Company, 4th ed., 1975, 146.
- ³⁰ J.P. Taylor, *op.cit.*, 216.
- ³¹ [1967] 1 W.L.R. 474.
- ³² See commentary on the decision, [1967] *Crim. L.R.* 304.
- ³³ Qld. s.108(1).
S.A. s.112(1) and (3).
W.A. s.107.
Tas. s.62.
A.C.T. s.94.
N.T. s.112(1) and (3).
- ³⁴ See also *Atkinson v. United States of America Government* [1969] 3 All E.R. 1317; [1971] A.C. 197, where four of the Law Lords stated that a magistrate has no discretion and must commit if the evidence is sufficient. "In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial." (Lord Reid, at p.1322, 232). "It has never been suggested that examining magistrates at committal proceedings have a discretion to refuse to commit on the ground that although a *prima facie* case has been made out, to do so would be contrary to natural justice". (Lord Guest, at p.1334, 246-7).
- ³⁵ N.S.W. s.41(6).
- ³⁶ Vic. s.59(7).

CHAPTER IV

THE NATURE OF COMMITTAL PROCEEDINGS AND THE POSSIBILITY OF REVIEW BY A HIGHER COURT

As has been shown, the magistrate's task at a preliminary hearing is to determine whether or not committal for trial is warranted. An examination of the nature of this task raises a number of questions, the most important of which concern the ability of a higher court to review the conduct and outcome of the hearing.

A number of cases have emphasised how limited the magistrate's role is.

A magistrate ... does not act as a Court of Justice; he is only an officer deputed by the law to enter into a preliminary inquiry.¹

The duty and province of the magistrate ... is to determine ... whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case.²

In substance, a committing magistrate determines nothing, except that in his opinion a *prima facie* case has been made out for committing the accused for trial.³

The justices may adjudicate nothing whatever. All they say is whether there is substantially anything alleged against the accused which should reasonably admit of inquiry, and if there is not to discharge him, but otherwise to let the usual course of trial by jury take its course....It is therefore plainly to be seen that at no portion of the inquiry before the justices is any order made which determines any matter as to which there is any contention.⁴

References to a committing magistrate's place in the criminal justice system can be used to reinforce this view. It can be argued that the defendant runs little risk at the committal stage, as there is a series of safeguards between the preliminary hearing and conviction.⁵ The Attorney-General may enter a *nolle prosequi*, the trial Judge may direct the jury that the evidence does not support the charge, the jury may acquit, and, of course, there is the possibility of an appeal.

That the magistrate's determination lacks finality is further indicated by the fact that if he decides not to commit, this decision is not a ground for a plea of *autrefois acquit*.⁶ If a magistrate

discharges a defendant the prosecutor may later re-commence committal proceedings in respect of the same offence.⁷ Nor does the magistrate decide the charge on which the defendant is indicted: the accused may be tried for a different offence from that for which he was committed.⁸

Acceptance of the proposition that a committing magistrate "determines nothing" paves the way for the argument that the higher courts should not exercise supervisory jurisdiction over committal proceedings. This argument takes as its starting point the distinction between a magistrate's judicial and executive functions, and characterises a decision at a committal hearing as executive. *Ex parte Cousens; Re Blacket and Another* contains an extremely clear statement on the point by Jordan, C.J.:

In relation to charges of offences which they [the magistrates] have no jurisdiction to try and dispose of, *their authority is not judicial*; they do not determine whether the accused is guilty or not guilty; they consider the evidence adduced against him, and if they think that there is enough to justify putting him upon his trial, they direct that he be held, or bailed, for trial by a Court which has jurisdiction to try him. *This is essentially an executive and not a judicial function*⁹

Such a view has important implications regarding the possibility of review and the availability of *certiorari* and prohibition. However, as Jordan, C.J., recognised, it does not provide a complete answer to those who seek to persuade a higher court to exercise control over the conduct or outcome of a committal hearing. The Chief Justice conceded that there are many cases in which persons performing executive functions are subject to the prerogative writs:¹⁰ merely labelling the magistrate's functions as executive and not judicial does not put them beyond the reach of these writs. As we shall see, this aspect was to be explored in later cases.

In *Cousens* the offence alleged was treason, and prohibition was sought on the ground that the courts of New South Wales had no jurisdiction to adjudicate upon treason committed beyond the seas. The Supreme Court ruled that prohibition was not available. The reason given was that although magistrates had been presiding over committals for nearly four hundred years no instance could be found of a superior court having interfered with a magistrate by *certiorari* or prohibition in his exercise of this function.¹¹

Thus, the decision in *Cousens* has two elements. A committing magistrate's function was characterised as executive and - by reason of absence of precedent - not within the category of executive acts over which a higher court could exercise supervisory jurisdiction by way of *certiorari* or prohibition.

It should be noted that, although the application with which the Chief Justice had to deal concerned an issue arising at the outset of the magisterial inquiry (i.e., that the charge was, on its face, bad

in law), the principle which he enunciated seems to have been based on a consideration of the nature of the decision as to committal or discharge. In *Ex parte Coffey; Re Evans and Another*¹² - one of a number of cases in which *Cousens* has been followed - counsel for the applicants argued that it should be regarded as authority for the proposition that a higher court will not exercise its supervisory power in respect of a magistrate's decision to commit or not to commit for trial, and not as authority in respect of the exercise by a magistrate of any collateral power.¹³ The judgments of the New South Wales Court of Appeal in *Coffey* do not suggest that any such limitation should be placed on the ruling contained in the earlier case. Moffitt, J.A., put the matter emphatically:

The basic and central matter decided by *Ex parte Cousens; Re Blacket* is that the court in exercise of its supervisory powers under the prerogative writs will not interfere with the decision of the magistrate conducting an inquiry either into his decision to commit or not to commit or into his decision upon or his declining to decide any equivalent or related question at an earlier stage of the proceedings whether it be based on factual or legal considerations relating to the charges before him. I see no valid reason why we should not follow *Ex parte Cousens; Re Blacket* in this regard.¹⁴

This is a very broad statement of principle. The other two members of the Court of Appeal (Herron, C.J., and Holmes, J.A.,) stated that they thought that the *Cousens* decision should be supported and that it correctly states the law.¹⁵ Whether an examining magistrate's immunity from review is as complete as Moffitt, J.A., suggested is not, however, made clear.

When reaching its conclusion in *Coffey*, the New South Wales Court of Appeal had explicitly rejected Roper, J.'s reasoning in *Ex parte Dowsett; Re Macaulay*.¹⁶ This decision must be examined, for it indicates another line of approach to the question of review.

While accepting that an examining magistrate does not exercise judicial functions,¹⁷ Roper, J., pointed to the ambiguity inherent in the use of the word "judicial". He cited the following passage from *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*:¹⁸

The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind - that is a mind to determine what is fair and just in respect of the matters under consideration.

Roper, J., therefore reached a different result from that obtained in the other cases discussed:

I have come to the conclusion that a magistrate holding

an inquiry into the question whether a person should be put upon trial for an indictable offence is a ministerial officer, but that it is incumbent on him to exercise judicial functions and act within the limits of the powers conferred upon him. In my opinion, in a proper case the writ of prohibition is available against such a magistrate.¹⁹

A similar approach was adopted by the Queensland Full Court in *R. v. Schwarten; Ex parte Wildschut*,²⁰ although the New South Wales decisions were not referred to in the judgment. The court disapproved of attempts to determine where the judicial functions of magistrates commence and where their ministerial functions end in committal proceedings. It was considered that it would be difficult to state that the ministerial power of the magistrate never merges, or is never likely to merge, into a judicial power. More significantly, however, the court questioned the necessity of deciding these matters:

It seems to us that even in making a determination whether to commit for trial or not justices have to weigh the evidence and in that sense make a determination based on a hearing in the conduct of which they may have to act judicially even if they are performing a ministerial function.²¹

In reaching its decision to make an order for prohibition the court applied the statement of Atkin, L.J., in *The King v. Electricity Commissioners; Ex parte London Electricity Joint Committee Company (1920) Limited and Others*.

...[T]he operation of the writs [of prohibition and *certiorari*] has extended to control the proceedings of bodies which do not claim to be and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.²²

In adopting this statement the Queensland Full Court seems to have accepted that a committing magistrate engages in the determination of questions affecting rights. It is interesting to refer to *Cousens* on this point, for the *Electricity Commissioners* case was cited, and the principle which it embodies was not entirely rejected. Consideration was given to the argument that, because an examining magistrate has the power to decide whether a defendant shall be discharged or committed to prison or required to provide bail, this empowers him to interfere with the defendant's legal right to his personal liberty. It was argued by counsel for the applicant that this made control by the higher courts appropriate. Jordan, C.J., commented that there would be "a good deal of force" in such arguments were it not for the absence of precedent for intervention.²³

Reference must also be made to a Canadian case, *R. v. Botting*.²⁴

The judgment of Laskin, J.A., contains an emphatic statement of the view that a committal hearing does make determinations affecting rights:

I construe the reference to "rights" broadly as involving a position which may be adversely affected by a decision. Thus, in the case of a committal for trial, an accused is adversely affected, even if there is no adjudication of guilt, because he is compelled to seek bail if he would regain his freedom pending indictment and trial.... [E]ven if there be no immediate prejudice to an accused committed for trial ... I am of opinion that certiorari should lie because ... a committal for trial is an integral part of a process which may terminate in action prejudicial to the accused.²⁵

It should be noted that this reasoning was explicitly rejected by Herron, C.J., and Holmes, J.A., in *Coffey*.²⁶

Thus there are two lines of authority on the appropriateness of review by way of prohibition and *certiorari*. The most important decisions are, on the one hand, *Cousens* and *Coffey*,²⁷ and, on the other, *Dowsett* and *Schwarten*.²⁸ As has been pointed out in *R. v. Dobson and Another*; *Ex parte Hatch*, the conflict is not over the label which should be applied to committal proceedings:

[The cases], whether they decide for or against the availability of the writ of prohibition, agree that the function of the magistrate in committal proceedings is ministerial. The only difference of opinion is on the question whether those functions are purely executive or, because they have to be exercised judicially, attract the principle enunciated in *R. v. Electricity Commissioners*.²⁹

The twin questions of the importance - or otherwise - of the label placed on committal proceedings and of the need to consider the real nature of the proceedings were thoroughly re-examined in *Connor v. Sankey and Others*; *Whitlam v. Sankey and Others*.³⁰ There the New South Wales Court of Appeal had to deal with applications for orders which would have had the effect of bringing the committal hearing to an end. Such a task required a decision on the correctness of *Cousens*. Street, C.J., ruled that it should not be followed, while Moffitt, P., and Reynolds, J.A., ruled that it should.

The Chief Justice began his examination of *Cousens* by pointing out that the fact that the case raised the issue of the jurisdiction of a New South Wales court to adjudicate upon a charge of treason committed beyond the seas made it an "inauspicious" setting in which to seek a writ of prohibition.³¹ In cases of high treason judges are, as was said in *Cousens*, reluctant to give a premature ruling on the question of jurisdiction.

His Honour was not impressed by the emphasis which *Cousens* placed

on the fact that magistrates had been presiding over committal hearings for nearly four hundred years without the invocation of the higher courts' supervisory powers. On this argument Street, C.J., quoted with approval from *R. v. Botting*:

Of the four arguments presented against resort to *certiorari* to quash a committal for trial, the weakest is the appeal to lack of precedent. The common law would have been stillborn, or would have soon died of starvation if it were nourished on such a principle.³²

Further, the Chief Justice discerned a recent trend towards extending the scope of the supervisory powers of the superior courts.³³ He pointed to the cases in which the question of the availability of prohibition against a committing magistrate had been left open or decided contrary to the law laid down in *Cousens*. Reference was made to *R. v. Nicholl* in which Blackburn, J., stated that he doubted whether the classification of the proceedings as ministerial or judicial should be decisive in determining the availability of prohibition.³⁴

After reviewing the cases which had supported the authority of *Cousens*, Street, C.J., concluded that, "It cannot be said that the decision in *Ex parte Cousens*; *Re Blacket* has been embraced with wholly ungrudging acceptance."³⁵ He decided that it should no longer be regarded as correct and that the decision in *Schwarten* was to be preferred.³⁶

Like Blackburn, J., he rejected arguments based on the "mere labeling" of the proceedings, and stated that there is "an element of unreality" in classifying the whole exercise as purely administrative so as to place it beyond the supervisory authority of a higher court.³⁷ He then indicated his view of committal hearings:

To say of a decision to commit or not to commit that it is not a determination affecting the rights of subjects involves an unacceptable degree of judicial remoteness from the plain, incontrovertible significance that attaches to such decision in ordinary circles (certainly to the person who is either committed for trial or released). And I regard it as equally unacceptable to contemplate a committing magistrate being free from the duty to act judicially in the exercise of his statutory powers within the procedural framework laid down in the *Justices Act*. He falls precisely within Atkin L.J.'s statement [in *R. v. Electricity Commissioners*], and it is not necessary either to particularize the wide-ranging scope of his powers, or to call in aid the prejudicial concomitants of exposure to committal proceedings, in order to substantiate the justification, in the due administration of our system of justice, for affording a person subjected to such proceedings the supervisory protection of this Court.³⁸

His Honour set out the limits of the superior court's powers:

I would wish to make clear that the intervention of this Court by prohibition would not carry with it power to intervene in an appellate role in connection with matters falling within the jurisdiction of the committing magistrate to determine [T]his Court has the right and duty, when called upon to do so, to investigate whether, in any particular committal proceeding, there is a want, or excess, of jurisdiction, included in which broadly stated category are excesses in a legal sense as well as circumstances amounting to denials of natural justice.³⁹

He clarified the matter by citing a passage from *R. v. Botting*:

The function of the superior Court is supervisory only and any inquiry upon which it embarks is restricted to a determination as to whether the inferior tribunal acted within the scope of its jurisdictional competence. Once jurisdiction has been confirmed, and there is no evidence of any failure to comply with some mandatory statutory requirement, then no review of the discretion exercised by the presiding officer of the inferior tribunal may be undertaken. To do so would constitute an improper invasion and usurpation of the discretionary power vested in the lower tribunal and would constitute the exercise of an appellate function.⁴⁰

The distinction between an inquiry into jurisdictional competence and a usurpation of the magistrate's function is not, however, quite as clear as this statement suggests. The problem is that it can be argued that a magistrate acts outside his jurisdiction when he begins an inquiry in circumstances where the information does not disclose an offence triable in the courts.

In challenging the magistrate's jurisdiction to initiate an inquiry, counsel for Messrs. Connor and Whitlam raised this issue, for they submitted, *inter alia*, that the charges contained in the informations did not allege offences known to the law. It is in the judgment of Moffitt, P., that one finds the fullest discussion of the implications of such a submission.

His Honour listed three possible bases of a magistrate's power to begin an inquiry:

- (a) an information charging what is alleged to be an indictable offence;
- (b) an information charging what in the magistrate's opinion is an indictable offence; and
- (c) an information charging what is in fact an indictable offence.⁴¹

A superior court's ability to exercise powers of review depended upon

an acceptance of the argument that the last of these three formulations was correct. This argument was rejected.

Moffitt, P., quoted with approval from the judgment of Dixon, J., (as he then was) in *Parisienne Basket Shoes Pty. Ltd. v. Whyte*:

It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed.⁴²

His Honour saw no logical reason why these comments should not apply to a magistrate conducting committal proceedings. He also cited the following passage from *Ex parte Mullen; Re Hood and Others*:

[I]f a fact on which the presence or absence of jurisdiction turns is itself one which can only be determined as part of the general inquiry into the matter which is being heard, and especially where it is one of the matters which would arise to be disposed of in any ordinary case, this is a material factor pointing to the conclusion that it is intended that it is the determination by the inferior tribunal that the fact exists which is to be the criterion of the existence of jurisdiction; and that that determination must therefore be treated as final and not provisional. The question is, however, in every case one to be determined on the language of the particular statute.⁴³

Accordingly, Moffitt, P., examined the sections of the New South Wales Justices Act 1902, which conferred on a magistrate the power to reach decisions in committal proceedings. The relevant provisions of the statute direct the magistrate to form his opinion of the evidence presented, and his Honour pointed out the significance of the word "opinion". This word, he said, usually describes a power or jurisdiction which is exclusive, in that it is a power or jurisdiction to come to a decision of fact and law which is right or wrong, and is not examinable by prohibition.⁴⁴

His conclusion was that the Justices Act confers upon the magistrate "the conclusive or exclusive authority"⁴⁵ to determine the

preliminary questions arising at the committal stage. He explained:

If the plaintiffs' submissions are correct, it would mean that one of the very questions, upon which the magistrate is charged to form his opinion at the end of the inquiry, could be the subject of what really would be a pre-emptive appeal by resort to the prerogative powers. It would be surprising to read, into the wide investigatory and committal powers already referred to, a potential veto to the exercise of those powers on the narrow basis submitted. To use the words of Dixon J. in *Parisienne Basket* case it would produce an "inconvenient result."⁴⁶

Having rejected the plaintiffs' submissions regarding the basis of a magistrate's power to begin an inquiry, Moffitt, P., found it unnecessary to decide between the other two possibilities (i.e., whether the magistrate's power depended on the existence of an information charging what is alleged to be an offence, or on an information charging what in the magistrate's opinion is an offence). He inclined to the view that it is sufficient if there is an information alleging an offence, but added that if the other view was preferable, it was clear that the magistrate in the present case had determined the matter against the plaintiffs and his decision was not examinable.⁴⁷

On the facts before him Reynolds, J.A., was prepared to assume that a magistrate's jurisdiction to inquire depends on the actual existence of an information⁴⁸ and did not find it necessary to examine the complexities of the law relating to the determination of the existence of facts conferring jurisdiction.

Let us return to the question of the authority of *Cousens*. We have seen that when faced with a choice between the removal of what he saw as an "invalid fetter"⁴⁹ upon a superior court's supervisory jurisdiction and an adherence to the doctrine of precedent, Street, C.J., opted for the former. The other two members of the court, however, felt bound to follow *Cousens*. Moffitt, P., was unable to distinguish the case before him, and did not accept the argument that *Cousens* should be overruled:

It is sufficient to say that it is virtually impossible to contemplate overruling an authority which has stood for many years, and which has been repeatedly followed, and recently affirmed upon review after full argument.⁵⁰

Also, it is clear that Moffitt, P., regarded *Cousens* as a correct statement of the law. He referred to a long course of non-interference by superior courts, the nature of committal proceedings, and the safeguards built into the system as supporting the view that it is neither permissible nor proper for superior courts to interfere with committal proceedings by the exercise of prerogative powers.⁵¹ On *Cousens* Reynolds, J.A., commented:

[I]t seems to me that there are overwhelming considerations

against an inclination to examine trends in other jurisdictions with a view to pronouncing, as we were invited, that *Ex parte Cousens* is not consonant with modern concepts, and should not be followed.⁵²

The Availability of Other Remedies

Before any attempt can be made to assess the present situation regarding the higher courts' ability to exercise control over committal proceedings, reference must also be made to cases in which remedies other than prohibition and *certiorari* have been discussed.

Mandamus

The question of the availability of *mandamus* as a procedure for exercising control over examining magistrates was discussed by the New South Wales Court of Appeal in *Ex parte Donald; Re McMurray and Another*.⁵³ The facts of the case were that at the beginning of the committal proceedings counsel for the accused had sought further particulars of the charge. The police refused to supply these. The magistrate declined to make an order. The matter was then adjourned and the applicants requested a writ of prohibition to prevent further proceedings, a writ of *certiorari*, and a writ of *mandamus* directing the magistrate to order the supply of further particulars. Walsh, J.A., ruled that *certiorari* was an inappropriate remedy as there was no order that could be quashed. Obviously, he said, the court could not quash the committal proceedings. His Honour also regarded a writ of prohibition as being inappropriate, for similar reasons. There was nothing to prohibit, and the court would not make an order which would have had the effect of preventing the committal proceedings from continuing.⁵⁴ Thus, Walsh, J.A., concluded that there was no need to make a general ruling on the availability of *certiorari* or prohibition: even if they had been available they were not considered to be appropriate in the circumstances. However, he did add that he was disposed to adhere to *Cousens*.⁵⁵

The central issue, then, was the availability of the writ of *mandamus*. On this subject Walsh, J.A., stated:

I am of opinion that this Court is not precluded from entertaining an application for *mandamus* merely by reason of the fact (if this be accepted as a fact) that the functions of the committing magistrate are executive or ministerial, as contrasted with being judicial. It is, in my opinion, established that this is not in itself a ground for denying this remedy I may add that I do not consider that anything in the case of *Ex parte Cousens* ... conflicts with what I have just stated

But I do not mean that nothing in the reasons for judgment in *Cousens*' case is relevant to the present applications. On the contrary, I think that the description therein of the nature and of the results of committal proceedings is of importance. In an application for *mandamus*, the

applicant must show not merely that some error has occurred, but that it is an error of such a kind that the court will treat it as having the result that the relevant jurisdiction, power or duty has in law not been exercised or performed at all Further, the grant of mandamus is, in any event, discretionary. The court must consider whether or not the alleged error has so adversely affected or prejudiced some right or interest of an applicant that it is proper to grant relief to him and, in this connexion, the non-conclusive character of committal proceedings may properly be taken into account.⁵⁶

Turning to the facts of the case his Honour stated that, although in his opinion a magistrate has an inherent power to order the giving of particulars, he is not under a duty to make such an order. There is, the Judge pointed out, no express provision compelling him to make such an order. It followed that a decision on a request for further particulars was a matter for the discretion of the magistrate.⁵⁷ His Honour therefore concluded that the court should not interfere:

Assuming the existence of a discretionary power, it cannot, of course, avail the applicants to seek to persuade this Court that the magistrate ought to have exercised his discretion in a different manner.⁵⁸

Holmes, J.A., agreed that it was up to the magistrate to decide whether the order should be made, but Wallace, P., concluded that the magistrate had erroneously acted on the belief that he did not have a discretion. The result was that, by a 2-1 majority, *mandamus* was refused.

A contrasting case is *Ex parte Himmelhoch*.⁵⁹ There the justices' refusal to admit certain evidence during a committal hearing was the subject of an application for a writ of *mandamus*. Although all three Judges expressed reluctance about interfering with the justices' exercise of their discretion, the application was granted.

Finally in this review of Australian authorities on the availability of the prerogative writs mention must be made of *R. v. Bjelke-Petersen and Latchford; Ex parte Plunkett*.⁶⁰ A private complaint had been laid, but had, at the committal hearing, been dismissed by the magistrate. The prosecutor then sought orders of *certiorari* and *mandamus*; the Queensland Supreme Court was asked to quash the magistrate's dismissal order and to require him to proceed with the hearing. The prosecutor challenged the magistrate's decision as to the admissibility of certain evidence, his rulings on a number of legal points, and his determination that the evidence adduced by the prosecutor was not sufficient to justify placing the defendants on trial.

In his judgment the Chief Justice re-asserted that, though a committing magistrate's function is ministerial, he is not free from an obligation to act judicially. On this latter point *Schwarten* was cited

with approval. Thus the court was not precluded from granting the relief sought. However, his Honour ruled that intervention on the grounds urged was not justified, as the prosecutor's challenges did not go to the jurisdiction and did not constitute such a non-jurisdictional error of law on the face of the record as would invalidate the proceedings. Any mistakes which the magistrate may have made were made in the exercise of his jurisdiction.

Declaratory Relief

Authority on this form of relief is provided by *Bacon v. Rose*.⁶¹ *Bacon* sought a declaration pursuant to s.10 of the *Equity Act* 1901 (N.S.W.) that the committal proceedings which had been instituted against her were invalid because they had been commenced without the necessary ministerial approval. Despite the fact that the applicant was unable to point to a proprietary interest or property element Street, C.J., in Eq., (as he then was), held that this should not disqualify her from seeking this form of relief:

If an administrative or ministerial process is wrongly invoked against a person, then there is in my view just as much basis for recognizing and declaring a right in that person to be rid of the invalid administrative or ministerial yoke as there is in the case where a person's property is invalidly affected It does not follow from what I have stated that declaratory relief is available as a means of appeal, either before, during, or after committal proceedings. I am concerned only with an assertion made by the plaintiff that the proceedings have been instituted in the face of an express statutory precondition. If this claim be made out by the plaintiff, then there is every reason, in the pursuit of the due and orderly administration of law, for this Court to assent to its processes being invoked to expose the disregard of the statutory precondition, and to declare the absence of justification for the plaintiff being exposed to committal proceedings.⁶²

In the course of his judgment Street, C.J., in Eq., said that he had "some reservations"⁶³ about accepting the *Cousens* view that the prerogative writs of prohibition and *certiorari* were unavailable, and it is interesting to note that in *Willesee v. Willesee*⁶⁴ Holland, J., expressed similar doubts. The latter Judge had to deal with an application for a declaration that the plaintiff was entitled to a committal hearing in a closed court, pursuant to s.3 of the *First Offenders (Women) Act* 1918 (N.S.W.). Thus, as in *Bacon v. Rose*, the application was based on a failure to fulfil a statutory requirement. Holland, J., ruled that the case was a proper one for the granting of declaratory relief; in so doing he followed *Bacon v. Rose*. On the subject of the availability of the prerogative writs his Honour commented that he would be reluctant to accept the view that in cases involving the disregard of a clear statutory provision the court would not have

intervened by way of prohibition (to prevent a continuance of an existing violation) and *mandamus* (to compel performance of the statutory duty).⁶⁵ On the relationship between these remedies and a declaration he added:

The fact that there are other remedies available, even in the same Court, affects the question whether declaratory relief should, as a matter of discretion, be granted, but is no bar to that relief. Thus, if it would be true to say that orders in the nature of prohibition or *mandamus* would lie in the present case, it would remain open to the Court to grant declaratory relief in lieu of or in addition to making such orders if that appeared to be a useful and appropriate course. If, on the other hand, a magistrate conducting committal proceedings was immune from any review by prerogative writs, that would, in a proper case, be a ground for intervening by means of a declaratory order.⁶⁶

His Honour also referred to the point made by Street, C.J., in *Eq.*, regarding the use of an application for declaratory relief as a means of appeal. Holland, J., commented that this limitation was intended to guard against the view being taken that the court would be prepared to review on an application for a declaration any exercise of discretion by a magistrate or any wrong decision of fact or error on a point of law arising in the course of committal proceedings. Although agreeing that it must not be taken that the declaratory jurisdiction represents a general method of appeal he stated:

Cases may occur in which it would be proper to exercise the declaratory jurisdiction, even though the effect would be to review, as if on appeal, a decision of the magistrate. Such cases will stand on their own special circumstances⁶⁷

Later the same year his Honour was again confronted by an application for a declaration relating to a decision made at a committal hearing. The application was refused. The case was *Acs. v. Anderson and Others*⁶⁸ in which the plaintiff sought to have a magistrate's decision on a point of law (involving legal professional privilege) reviewed. In explaining his refusal to grant declaratory relief Holland, J., said:

[I]f the plaintiff was held to be entitled to declaratory relief on the present point of law, because of its general importance and/or its importance to the prosecution in this particular case, it is difficult to see how the Court could refuse such relief on any other point of law of similar importance that might arise in committal proceedings It is not a fear of opening the "flood gates of litigation" that concerns me, but undue interference in the exercise by magistrates of their executive functions in conducting committal proceedings, and the utility of an intervention by this Court In my opinion, the pursuit of the due and orderly administration

of the law does not require this Court to permit interruption of committal proceedings by allowing its jurisdiction to be invoked to review the decision of a magistrate on a point of law as to the admissibility of evidence such as arose in the present case.⁶⁹

His Honour refused to accept the submission⁷⁰ that the case was one whose "special circumstances" justified intervention which would have amounted to appellate review.

A declaration was also among the orders sought in *Connor v. Sankey and Others*; *Whitlam v. Sankey and Others*.⁷¹ The judgments of the New South Wales Court of Appeal did not, however, take the matter much further. Street, C.J., (who had decided *Bacon v. Rose*) pointed out that:

The declaratory jurisdiction of this Court is not hedged about with the restrictions, nor clouded by the complications, that attach to the remedy by way of prohibition.⁷²

He then reviewed the three cases discussed above, and concluded that the court would have had jurisdiction to grant declaratory relief if the plaintiffs had been able to establish that the informations alleged offences not known to the law.⁷³ For Moffitt, P., it followed that, if the prerogative relief sought by the plaintiffs would not be given, the declaratory orders sought by them should not be made. It will be remembered that he ruled that it was not appropriate for the court to intervene by way of prohibition. His conclusion regarding a declaration was as follows:

Upon the initial analysis made by me, the reason [the Court] will decline to [intervene] is because exclusive jurisdiction upon the matter is conferred by statute upon the tribunal in question. In this setting, there is no basis for the exercise of a judicial discretion to grant declaratory relief to usurp the authority or jurisdiction of the tribunal in question by declaring what order it should make. It would be a negative and somewhat futile exercise of power by a superior court to decline to make an effective order to ensure what should be done, yet declare what should be done, in the hope it will be done.⁷⁴

Reynolds, J.A., did not deal separately with the question of the appropriateness of declaratory relief.

The subject was further examined in New South Wales in *Bourke and Another v. Hamilton and Another*.⁷⁵ There Needham, J., sitting in the Equity Division of the Supreme Court, had to deal with an application for a declaration under s.75 of the *Supreme Court Act 1970* (N.S.W.). The plaintiffs faced a number of charges of forging and uttering instruments. During the committal proceedings the magistrate had expressed the view that the prosecution evidence established a *prima facie* case. The plaintiffs sought a declaration that (*inter alia*)

there was no evidence upon which he could properly form that opinion.

In the view of Needham, J., the crucial feature of the case was that the plaintiffs were seeking a declaration under s.75. He was thus able to distinguish authorities such as *Cousens* and *Coffey* which dealt with the prerogative writs. Particular reliance was placed on *Forster v. Jododex (Australia) Pty. Ltd.*⁷⁶ in which emphasis was given to the breadth of the powers conferred on the court by s.10 of the *Equity Act 1901 (N.S.W.)*, the predecessor of s.75:

I draw from these judgments [in *Forster*] the conclusion that there is no principle that the discretion of the Court should be exercised against the plaintiffs in this case.⁷⁷

Reference was also made (*inter alia*) to *Bacon v. Rose*, *Willesee v. Willesee* and *Acs v. Anderson*.

It is submitted that the judgment in the first of these cases offers little support for the proposition that a higher court may undertake an inquiry of the kind contemplated in *Bourke v. Hamilton*. As Street, C.J., in Eq., pointed out, he was, in *Bacon v. Rose*, concerned only with the plaintiff's assertion that the proceedings had been initiated in the face of an express statutory pre-condition.⁷⁸ *Willesee*, however, offers stronger support, and in *Acs v. Anderson* in the Court of Appeal, Hutley, J.A., (with whose judgment Moffitt, P., agreed) conceded the possibility of intervention in situations where the court was of the opinion that rejection of an application for a declaration would "completely obstruct the process of justice".⁷⁹

Thus there is some authority in support of the view that a higher court's exercise of the declaratory jurisdiction need not be confined to peripheral aspects of the committal process. Nor, in the opinion of Needham, J., is there anything in the *Sankey* judgments which casts doubt on this conclusion.

It will be remembered that in *Sankey* Street, C.J., was of the view that the granting of declaratory relief was not beyond the Supreme Court's powers and Reynolds, J.A., did not deal with the matter. It was therefore only the judgment of Moffitt, P., which might be thought to stand in the way of the making of an order under s.75 of the *Supreme Court Act*. Needham, J., did not interpret the President's judgment as indicating that the power to make an order under s.75 could never be exercised in respect of committal proceedings.⁸⁰

From his review of the authorities his Honour concluded that there was nothing to prevent him from considering the plaintiffs' application:

I think I should approach the resolution of this case ... on the basis that, if it is clearly established that no examining magistrate, properly directing himself as to the law, could reach a conclusion, in respect of any charge against either plaintiff, that there was evidence upon which he could find that a *prima facie* case had

been made out, I should make a declaration to that effect with such ancillary orders as would be apt.⁸¹

Such a conclusion is an important and novel one. It is submitted that the court's willingness to undertake an inquiry of the kind indicated represents a significant departure from the principles established in the cases discussed in this chapter. None of these cases has explicitly suggested that a higher court would be prepared to entertain a submission that an accused person's committal was not justified on the evidence before the magistrate.⁸²

In practice, however, Needham, J.'s pronouncement may have little impact. On the facts before him he declined to make any of the declarations or orders sought. Further, he was very guarded when he outlined the situations in which intervention would be permitted:

It is my opinion that the Supreme Court should exercise its power under s.75 in respect of committal proceedings only where it is clear that, if such power be not exercised, justice will not be done to the plaintiff⁸³ Such a case would exist, no doubt, where it was clear that there was no evidence to support any charge against the plaintiff, and ... in circumstances where the informations and summonses allege offences not known to the law.⁸⁴

British Authorities

The British cases throw some light on the problems discussed in this chapter, but the procedural matters which have troubled the Australian courts do not seem to have attracted much attention.

In 1879 Cockburn, C.J., made the following comment (in *R. v. Carden*) on the powers of a higher court over a committing magistrate:

While we have authority to issue a mandamus to hear and determine, we have no authority, as it seems to me, to control the magistrate in the conduct of the case, or to prescribe to him the evidence which he shall receive or reject, as the case may be. We are not called upon to exercise anything in the nature of appellate jurisdiction.⁸⁵

In the Irish case of *R. v. Justices of Roscommon* O'Brien, C.J., stated:

In my opinion, it is clear upon the authorities, that we cannot by mandamus compel magistrates to return an accused person for trial, once in the exercise of their discretion they have determined he shall be discharged, and it is equally clear that we cannot in any proceedings by certiorari quash a decision of the magistrates which results from the exercise of a discretion vested in them by law.⁸⁶

O'Brien, J., was equally emphatic:

I am clearly satisfied that there is no power known to the law which can compel magistrates either to grant or refuse informations in indictable offences.⁸⁷

Holmes, J., agreed that the magistrate has an absolute discretion when it comes to ruling on the sufficiency of the evidence in the depositions.⁸⁸

Mention can be made of several cases involving applications for a writ of *mandamus*. In *Ex parte Bottomley and Others*⁸⁹ the court refused to interfere with the committing magistrates' exercise of discretion regarding which witnesses should be heard and how their evidence should be taken. *Mandamus* was also sought (together with a writ of prohibition) in *R. v. Aubrey-Fletcher; Ex parte Ross-Munro*.⁹⁰ The applications were dismissed without any discussion of the availability or appropriateness of these remedies.

Another example of the refusal of an application for an order of *mandamus* occurred in *R. v. A. Wells Street Stipendiary Magistrate; Ex parte Seillon*.⁹¹ There the magistrate had ruled that certain questions were not admissible. Lord Widgery, C.J., pointed out that it was not the practice of the higher courts to interfere with committal proceedings which had not run their course.

In *R. v. Norfolk Quarter Sessions; Ex parte Brunson*⁹² Lord Goddard also stressed the higher courts' unwillingness to intervene. In this case it had been argued before Quarter Sessions that the accused had been wrongly committed because the committal had been based on the evidence of an incompetent witness. This argument had been accepted and Quarter Sessions had quashed the indictment. The matter with which Lord Goddard dealt was a challenge to this decision: before him was a motion for an order of *certiorari* to bring up and quash the order made at Quarter Sessions and for an order of *mandamus* requiring Quarter Sessions to hear and determine the indictment. Both orders were granted.

Only Lord Goddard discussed the appropriateness of review by a higher court. His Lordship indicated that he was reluctant to accede to an argument based on the competence of the witness. He pointed out that, if a committal could be vitiated because evidence had been wrongly admitted, it would follow that committals could always be objected to if it could be shown that there was something in the depositions which was inadmissible as evidence.⁹³ Noting that no court had held a committal to have been vitiated because of the reception of objectionable evidence, his Lordship added:

[A]s long as it is shown that justices have acted in accordance with the Indictable Offences Act, 1848, a committal by them is a good committal. Whether the evidence that has been given before the justices will be admitted at the trial is quite another matter.⁹⁴

Another case involving an application for a writ of *certiorari* was *R. v. Horseferry Road Magistrates' Court; Ex parte Adams*.⁹⁵ There the applicant complained of a ruling made by an examining magistrate. At the end of the prosecution evidence he had decided that there was a *prima facie* case. Counsel for the defendant had then sought to call his client as a witness. The magistrate declined to allow him to be called. It was this ruling which was challenged. The application was granted and the committal quashed. The magistrate had acted in breach of the rules governing committal hearings.

In *R. v. Wharmby, Lindley and Lindley*⁹⁶ - which also involved a failure to comply with statutory requirements - the matter was brought to a higher court by way of a motion to quash the indictment. The motion was granted.

Finally, mention must be made of two other methods of challenging the conduct and outcome of a committal hearing. An incarcerated defendant can seek a writ of *habeas corpus*. The relevant English cases deal with challenges to magistrates' decisions to commit in custody pending the outcome of extradition proceedings, but the judgments frequently refer to committal hearings. In the House of Lords decision in *Schtraks v. Government of Israel and Others*, for example, Lord Evershed remarked:

[I]t cannot be suggested that ... there is in the Divisional Court or in your Lordships' House any competence or duty to review the exercise by the magistrate of his powers [of committal] if the proceedings before him were regular in form and practice and the subject-matter was one within the magistrate's jurisdiction.⁹⁷

However, both in this decision and a more recent one some of their Lordships seem to suggest that special rules might apply when *habeas corpus* proceedings are instituted. In particular, mention must be made of *Armah v. Government of Ghana and Another*.⁹⁸ As this case concerned a suspect dealt with under the *Fugitive Offenders Act*, 1881 (U.K.) a detailed examination of their Lordships' speeches would be out of place here, but it is interesting to note that the majority view was that a higher court must interfere if the evidence before the magistrate was not sufficient to justify committal.

This suggests the existence of a far-reaching power of review, and the question to be asked is whether the principles stated by the majority apply to committal proceedings. It is submitted that they do not. In view of the higher courts' extreme reluctance to intervene in committal proceedings it is submitted that both English and Australian courts would make a clear distinction between these proceedings and extradition matters. In *Armah* Lord Reid makes explicit reference to the difference between a court's power to interfere with committal of a prisoner to be sent out of the jurisdiction, and the power to interfere where there has been a committal for trial in his own country.⁹⁹

The other method of challenge is by way of appeal. In a number of English cases alleged irregularities in committal proceedings have formed the basis for appeals against convictions.¹⁰⁰ In none was any

indication given as to whether this was the most appropriate form of procedure.¹⁰¹

Discussion

The law relating to the higher courts' ability to exercise supervisory jurisdiction over the conduct and outcome of committal proceedings is rather difficult to disentangle. Part of the reason for this has been the courts' pre-occupation with procedural matters, a pre-occupation which can all too readily obscure more fundamental questions as to the desirability of intervention.

Before considering these questions, however, let me comment on the conflict over the nature of committal proceedings. It is submitted that, during the course of these proceedings, a magistrate *does* perform judicial functions. This submission reflects a preference for the views expressed in *Ex parte Dowsett*; *Re Macaulay*,¹⁰² *R. v. Swarten*; *Ex parte Wildschut*,¹⁰³ and for those set out in the judgment of Street, C.J., in *Connor v. Sankey and Others*; *Whitlam v. Sankey and Others*.¹⁰⁴

There is something artificial about labelling a committing magistrate's function non-judicial. An examination of the real nature of the decisions which he must make casts doubt on such a definition. At a committal hearing the magistrate must make determinations as to the ingredients of the offence or offences charged - sometimes (as in *Sankey*) this will mean ruling on complex legal questions - and he must also weigh the evidence before him.¹⁰⁵ There will be occasions when he must rule on the existence of a defence.¹⁰⁶ It is difficult to see how magistrates performing such functions could be said not to be acting judicially. At the very least, it is submitted, they are performing a task to which they must bring a judicial mind.

Further, I submit that in performing their duties they must determine questions affecting rights. The comments made by Laskin, J.A., in *R. v. Botting*¹⁰⁷ and by Street, C.J., in *Sankey* seem, with respect, to indicate the significance of the ultimate decision which a committing magistrate must make. It can also be argued that incidental rulings as to the way the proceedings should be conducted affect rights.

But such arguments do not help us much in deciding whether - and if so in what circumstances - the higher courts should exercise supervisory jurisdiction. Let us approach this question by considering the actual situations which have faced them.

It is submitted that it is clear that the superior courts will exercise supervisory jurisdiction over a committing magistrate when he has acted in breach of the statute governing committal procedures; similarly when he has disregarded any other statutory provision. Let us suppose, for example, that a magistrate presiding over a committal hearing were to refuse to permit a defendant to give evidence or to call witnesses. Such a course would, in my submission, be plainly contrary to the legislation in force in each of Australia's eight

jurisdictions and would justify intervention by a higher court. *R. v. Horseferry Road Magistrates' Court; Ex parte Adams* is an English example of intervention in such a situation.¹⁰⁸ Three other English cases provide clear illustrations of action following breaches of the statutory provisions outlining the powers and duties of examining magistrates. *R. v. Wharmby, Lindley and Lindley*,¹⁰⁹ *R. v. Gee*,¹¹⁰ and *R. v. Phillips*¹¹¹ illustrate irregularities in the taking of the depositions. These irregularities revealed a failure to comply with the relevant statutory requirements, and in each case a higher court intervened. Examples of proceedings to compel obedience to other types of statutory directive are *Willesee v. Willesee*¹¹² (disregard of a provision requiring the hearing to be conducted in a closed court) and *R. v. Coleshill Justices; Ex parte Davies and Another*¹¹³ (action to compel adherence to s.6 of the *Children and Young Persons Act*, 1969 (U.K.)). *Bacon v. Rose*¹¹⁴ provided a similar situation - there ministerial approval was required before proceedings were instituted - though on the facts it was held that this approval had been obtained.

Not very different are those cases where a magistrate has done something which he has no power to do. In *Schwarten* it was ruled that a higher court's supervisory powers could be invoked to prevent one magistrate taking over from another mid-way through a committal hearing.¹¹⁵

It does seem, however, that intervention is unlikely to occur if the magistrate's error is only a minor one. Some authority for this proposition is provided by *R. v. Edgar and Others*¹¹⁶ where, though there was an irregularity in the method of taking some of the depositions, it was held that those which had been properly taken contained sufficient evidence to justify committal.

But does the conclusion that a magistrate must not act in breach of relevant statutory provisions - and that the higher courts will intervene if he does so - satisfactorily dispose of the problems which have been the subject of this chapter? Clearly it does not.

Two further bases for review remain. These are jurisdictional error and denial of natural justice.¹¹⁷ Needless to say, neither category, nor that of statutory breach, can be treated as being self-contained. Street, C.J., for example, included in the category of excess of jurisdiction situations amounting to denials of natural justice,¹¹⁸ and breaches of statutory requirements can be regarded as jurisdictional errors.

Nothing in any of the cases discussed in this chapter is incompatible with the view that a higher court may intervene when an examining magistrate has acted without jurisdiction. In practice, however, the superior courts have displayed extreme reluctance to interfere and have defined the magistrate's jurisdiction very broadly. As a result, intervention because of jurisdictional error seems to have been seen as a theoretical possibility rather than as a method of exercising real control over committing magistrates.

Nevertheless, in the majority of the cases reviewed the courts'

reliance on established principles relating to jurisdictional competence has not produced difficulties. The superior courts have declined to intervene when magistrates have exercised a jurisdiction which is properly theirs. These courts will not usurp a magistrate's function by substituting their judgment, even though they might not approve of the way in which the magistrate has acted.

There are numerous examples of the courts displaying this attitude. With regard to the manner of conducting the hearing the following are illustrations of situations in which the higher courts have refused to intervene: a magistrate declining to order the giving of further particulars (*Ex parte Coffey*; *Re Evans and Another*¹¹⁹ and *Ex parte Donald*; *Re McMurray and Another*¹²⁰); a magistrate refusing to deal separately with charges against one of a number of co-defendants (*Ex parte Coffey*; *Re Evans and Another* and *R. v. Dobson and Another*; *Ex parte Hatch*¹²¹); magistrates' rulings as to which witnesses should be heard and as to the admissibility of evidence (*Ex parte Bottomley and Others*,¹²² *R. v. Carden*,¹²³ *Ex parte Dowsett*; *Re Macaulay*¹²⁴ and *R. v. Norfolk Quarter Sessions*; *Ex parte Brunson*¹²⁵); a magistrate's decision on a point of law arising during a committal hearing (*Acs v. Anderson and Others*¹²⁶).

These cases, then, can be seen as examples of magistrates exercising their discretion in respect of matters which - in the words of Moffitt, P., - they have "the conclusive or exclusive authority"¹²⁷ to determine.

The ultimate exercise of this discretion is, of course, the decision as to whether or not to commit for trial. It is submitted that this is not a decision which the higher courts would normally review. If they were to do so they would take on the appellate role which Cockburn, C.J., (in *R. v. Carden*) and Street, C.J., (in *Sankey*) explicitly rejected.¹²⁸ A statement by Bigham, J., - although made in an extradition case - put the point well. One thing a defendant cannot come to court and say is:

... that there is evidence one way and the other, and that this Court ought to enter into the consideration as to whether the magistrate has exercised his discretion as to it properly.¹²⁹

Although the majority view in *Armah v. Government of Ghana and Another*¹³⁰ may have raised doubts as to whether this statement correctly sets out the law with regard to extradition proceedings, it is submitted that it does apply to committal hearings. When reaching his conclusion on the evidence the magistrate is acting within his jurisdiction and thus, it seems, is immune from review. He is exercising a discretion which is his and his alone. That this must logically be so is made clear in the following passage from *R. v. Nat Bell Liquors Ltd.*, a passage which, though dealing with a justice's role during a trial, is of general relevance to the problem of confining jurisdictional review within proper limits:

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge

is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong.¹³¹

Although, as Tracey points out, this principle has been challenged,¹³² it is submitted that such challenges as have occurred will not affect the law regarding the review of committal proceedings. As Tracey shows, the Australian courts might prove reluctant to accept the argument that a decision unsupported by the evidence is open to attack for want of jurisdiction.¹³³ Further, even if the courts do recognise this new ground of jurisdictional error, it seems most unlikely that they will take advantage of it to review a committing magistrate's exercise of his discretion. It is submitted that the higher courts' well established policy of non-intervention will prevail.¹³⁴

If we exclude challenges based on the sufficiency of the evidence, what remains? Is the magistrate's jurisdiction so broad that the making of the committal decision must remain his exclusive preserve?

Street, C.J., has stated that, though an examining magistrate's powers are extensive, they are not boundless.¹³⁵ It is submitted that there are at least two situations in which a magistrate's ultimate decision might be reviewed by a higher court. These have been mentioned in Chapter III. They occur when a magistrate takes into account factors other than the strength of the evidence, or when he applies the wrong criteria when assessing the evidence. Both involve a misconception as to the nature of the decision which the magistrate must make. Support for the view that the making of such an error can be regarded as acting without jurisdiction is provided by Lord Pearce in *Anisminic Ltd. v. The Foreign Compensation Commission and Another*. His Lordship stated that lack of jurisdiction can arise, *inter alia*, when a tribunal which is engaged in a proper enquiry asks itself the wrong questions or takes into account matters which it was not directed to take into account.¹³⁶

Let us take an extreme example of reliance on criteria unrelated to the strength of the evidence. Suppose at the end of a committal hearing the magistrate makes it clear that he is satisfied that there is sufficient evidence to warrant committal for trial, but that he does not intend to commit because he personally disapproves of prosecutions in respect of the offence charged. Is this a mistaken use of powers which he has (and so immune from review) or an abuse of his powers?

It is submitted that it is the latter and that it is a course of action which can and should result in intervention by a superior court.¹³⁷ If - as is my submission - the magistrate is in error, this does not seem to be the type of error which should be remedied by an Attorney-General's decision to file an *ex officio* indictment. Review by a higher court would clarify the criteria on which committal decisions should be based.

The second situation - that which occurs when a magistrate does confine himself to evidential matters but applies the wrong criterion - is more controversial. It will be remembered that, in Chapter III, I suggested that a magistrate misconceives the nature of the decision which he must make if he refuses to commit because he believes that a jury would not convict. In my submission a magistrate who uses this test has asked himself the wrong question, and has not adopted a legitimate method of weighing the sufficiency of the evidence. If this submission is accepted then a good argument can be made out that a higher court should intervene on the ground of jurisdictional error. Perhaps *mandamus* would be an appropriate method of forcing the magistrate to re-consider his decision.

Another situation in which a committing magistrate might exceed his jurisdiction is if he were to receive evidence quite unrelated to the charge before him. This possibility was considered by Roper, J., in *Dowsett*:

If ... in the course of an enquiry on an information as to one offence evidence is deliberately admitted not to substantiate or assist the case as to that offence but for the sole purpose of showing the commission of some other offence as to which no charge has been made, then I think the receipt of that evidence for that purpose is outside the jurisdiction of the magistrate. Otherwise, the hearing of an information as to the commission of an indictable offence might become a roving enquiry as to whether the accused had ever committed any indictable offence.¹³⁸

The foregoing analysis suggests that a number of problems raised by an examination of the higher courts' supervisory powers can be satisfactorily resolved by applying established principles of jurisdictional competence. I have not, however, dealt with the most difficult problem posed by the cases discussed in this chapter. This arises when a magistrate must deal with the submission that the information or complaint which initiated the proceedings does not disclose an offence triable in the courts. It will be remembered that submissions of this kind were made in *Cousens* and *Sankey*. In the latter case, Moffitt, P., rejected the view that the magistrate's decision on the validity of the proceedings before him could be the subject of review. In his Honour's opinion if a magistrate rules that the information discloses an offence known to the law this ruling - being one involving a matter within the magistrate's jurisdiction - is not one which the higher courts can review.

Such an approach accords with the principles laid down in *Nat Bell Liquors*. If a committal hearing has begun, a decision on the preliminary question as to the validity of the information must be regarded as being within the magistrate's jurisdiction. If it is not so regarded the magistrate cannot perform the task of deciding whether or not to commit for trial. In determining whether the information does disclose a triable offence he might make a mistake of law - and so wrongly exercise his jurisdiction - but he is still acting within it.

A decision on the validity of the information might represent a mistaken use of a power which a magistrate has; it is not the exercise of a power which he has not.

Such a conclusion, however, raises difficulties if one accepts that the basic purpose of the committal hearing is to prevent a defendant being unjustifiably exposed to a jury trial. From such an argument it follows that there is good reason to create a system in which the preliminary issue of the validity of the charge and the competence of the courts to deal with it should be authoritatively decided at an early stage. Further, the committal hearing itself can be a lengthy and expensive business. If the information does not disclose an offence triable in the courts is the state justified in subjecting the defendant to a committal hearing and to the trouble and expense of preparing a defence? A more efficient system of justice would result if the issue could be removed to a higher court and decided before the full machinery of criminal justice had been put into operation. Surely the system would benefit from an authoritative ruling at the outset that the state has no business taking any proceedings because the information on which the whole edifice rests does not disclose a triable offence?

As has been indicated the authorities suggest that such a result cannot be achieved by way of review of the magistrate's ruling on the question. To argue that a magistrate has jurisdiction only if the information discloses what is in fact a triable offence is to argue for a lost cause. It is submitted that what is needed is a special procedure by which the question of the validity of the information could be removed to a higher court. It should be possible to invoke this procedure only at the commencement of the preliminary hearing.

A magistrate faced with complex submissions as to whether an offence is disclosed or whether the offence is triable in the courts of his State or Territory may rule either way. Having heard the evidence he may commit or discharge. No doubt some would argue that whichever course he takes there is no need for the new procedure which I have suggested. Their argument would be that, if a magistrate gives an erroneous ruling on the validity of the information and commits for trial, a trial or appellate court can put him right. I hope I have answered this argument: if the information is defective surely the case should be removed from the system at the earliest possible stage. However, it is the other situation - that which arises when the magistrate has discharged the defendant - to which I wish to draw attention. Here it can be argued that, if a magistrate mistakenly rules that no triable offence is disclosed and discharges the accused, no harm has been done as the Attorney-General may proceed *ex officio*. In my submission such an argument is not entirely convincing. No doubt an Attorney-General could, in such circumstances, often take action. But let us consider charges brought against a member of government or against a high public official. Suppose allegations are made against such a person and an attempt is made to charge him with a little-known common law offence. If the magistrate rules that he has never heard of the offence and for this reason discharges the defendant it does not seem satisfactory to rely on the Attorney-General to initiate proceedings. Such a matter might be politically sensitive, and it would seem

desirable to obtain a ruling by a court.

Conclusion

Let me summarize. Debate as to whether committal proceedings should be categorised as executive or judicial should not be allowed to obscure the importance of the decisions made by the magistrate. Neither technical arguments as to administrative law remedies nor reliance on the possibility of magistrates' errors later being put right should be permitted to stand in the way of appropriate supervision by the superior courts.

Intervention when the magistrate has acted in breach of a specific statutory provision is well established. Further, it is submitted that when an examining magistrate exceeds his jurisdiction review by a higher court is permissible and desirable. As Evans, J.A., has pointed out, the non-conclusive character of committal proceedings is not a relevant factor when jurisdictional error is alleged:

A tribunal either has or has not jurisdiction; it either did or did not exceed that jurisdiction which has been conferred on it and in my opinion the finality or otherwise of the adjudication is immaterial.¹³⁹

Two important matters have been held to be within the magistrate's exclusive jurisdiction and so not subject to review. These are rulings as to the sufficiency of the evidence and on the validity of the proceedings (i.e., whether the information or complaint discloses a triable offence). With regard to the latter ruling I have suggested that a new type of procedure should be introduced so that, at the outset, an authoritative decision may be obtained; this would allow for the speedy termination of proceedings in which the criminal process has been wrongly invoked.

The predominant attitude displayed by the Judges in the cases discussed is one of extreme reluctance to interfere with the actions of a magistrate presiding over a committal hearing. It is submitted that it is appropriate for the higher courts to continue to display this reluctance, and that intervention should be carefully limited. Nevertheless, intervention is justified when a defendant has not been given that protection against being improperly put on trial which is the system's *raison d'être*. Further, whether the outcome is committal or discharge, review by a higher court should be possible where there has been jurisdictional error or a denial of natural justice resulting in the hearing's failure to operate as an effective and consistent screening device.

FOOTNOTES:

- 1 *Cox v. Coleridge* (1822) 107 E.R. 15, 20; cited in *R. v. Nicholl* (1862) 1 Q.S.C.R. 42, 44.
- 2 *R. v. Carden* (1879) 5 Q.B.D. 1, 6.
- 3 *Ex parte Cousens; Re Blacket and Another* (1946) 47 S.R. (N.S.W.) 145, 147.
- 4 *Kennedy v. Purser and Others* (1898) 23 V.L.R. 530, 538.
- 5 See *R. v. Justices of Roscommon* [1894] 2 I.R. 158, 173.
- 6 *Atkinson v. United States of America Government* [1971] A.C. 197, 235; [1969] 3 All E.R. 1317, 1324.
- 7 *R. v. Manchester City Stipendiary Magistrate; Ex parte Snelson* [1977] 1 W.L.R. 911. In his judgment Lord Widgery, C.J., added that a higher court has a discretionary power to see that the use of repeated committal proceedings is not allowed to become vexatious or an abuse of the process of the court. His Lordship stated that when that point is reached an order of prohibition could be made. (At p.913)
- 8 *R. v. Martin* (1884) 10 V.L.R. (L) 343. See also *R. v. Johnston* [1959] N.Z.L.R. 271.
- 9 *Ex parte Cousens; Re Blacket and Another* (1946) 47 S.R. (N.S.W.) 145, 146. (Emphasis added)
- 10 At p.147.
- 11 At p.146.
- 12 [1971] 1 N.S.W.L.R. 434.
- 13 See pp.454-455.
- 14 At p.457.
- 15 At p.449.
- 16 (1943) 60 W.N. (N.S.W.) 40.
- 17 Roper, J., cited *obiter* statements from *Huddart, Parker and Co. Pty. Ltd. v. Moorehead; Appleton v. Moorehead* (1908) 8 C.L.R. 330. Griffith, C.J., characterised the preliminary hearing as an inquiry which "cannot be regarded ... as an exercise of judicial functions". (At p.357) O'Connor, J., stated that "the magistrate exercises not judicial but ministerial functions". (At p.378) Both Justices relied on *Cox v. Coleridge* (1822) 107 E.R. 15.
- 18 [1892] 1 Q.B. 431, 452.

- 19 (1943) 60 W.N. (N.S.W.) 40, 41. On the facts, however, it was ruled that intervention was not justified.
- 20 [1965] Qd. R. 276. Regarding this case, note that a commentator in the *Australian Law Journal* has suggested that the main weakness in the decision is its reliance on *R. v. Justices of Rōscommon* [1894] 2 I.R. 158. The commentator took the view that the judgment reveals a misunderstanding of the ratio of the Irish case. See (1970) 44 A.L.J., 344, 345.
- 21 At p.284.
- 22 [1924] 1 K.B. 171, 205; [1923] All E.R. Rep. 150, 161.
- 23 (1946) 47 S.R. (N.S.W.) 145, 147.
- 24 (1966) 56 D.L.R. (2d) 25.
- 25 At pp.36 and 37.
- 26 "It is, we think, an error to conclude because the order of a tribunal acting under statutory authority may 'affect rights' of those subject to it that prohibition or *certiorari* will lie." [1971] 1 N.S.W.L.R. 434, 448.
- 27 See also *Ex parte Lyndon; Re Cooper* [1957] S.R. (N.S.W.) 626; *Phelan v. Allen* [1970] V.R. 219; *R. v. Nicholl* (1862) 1 Q.S.C.R.42.
- 28 See also *De Faro v. Rankin* (1899) 25 V.L.R. 170 and *Ex parte Qantas Airways Ltd.; Re Horsington and Another* (1969) 71 S.R. (N.S.W.) 291. In the latter case Sugerman, J.A., agreed that the word "judicial" is ambiguous, and quoted the passage from the *Royal Aquarium* case (*supra*, 40) which distinguished between judges' or justices' discharge of their duties in court, and the performance of administrative duties in respect of which it is necessary to bring to bear a judicial mind. He then ruled: "That in receiving a complaint and issuing a summons thereon ... a justice is not acting merely ministerially in the sense that he is bound to issue his summons upon the mere receipt of the complaint. He is not bound to act mechanically or as a mere rubber stamp. He has a discretion to be exercised by him ... and upon whose exercise a judicial mind is to be brought to bear. He must, that is to say, act 'judicially' in the second of the senses earlier referred to." (At p.301) Here prohibition was granted in respect of the issue of a summons. A commentator on the case has expressed the view that it seems a little incongruous to hold that the issue of a summons is sufficiently "judicial" to attract prohibition, but that commitment for trial is not. (See (1970) 44 A.L.J., 50) Cp. *Donohoe v. Chew Ying* (1913) 16 C.L.R. 364.
- 29 (1968) 12 F.L.R. 1, 6.
- 30 [1976] 2 N.S.W.L.R. 570.

- ³¹ At p.581.
- ³² (1966) 56 D.L.R. (2d) 25, 35. Quoted at p.582.
- ³³ At p.583.
- ³⁴ (1973) 21 F.L.R. 469, 476 (Full Court of the Supreme Court of the Australian Capital Territory). The question of the availability of prohibition was left open as not requiring decision.
- ³⁵ At p.588.
- ³⁶ At p.591. After considering the facts of the case before him, however, Street, C.J., ruled that the plaintiffs had not established any grounds for intervention in the committal proceedings.
- ³⁷ At p.590.
- ³⁸ At p.591.
- ³⁹ At pp.591-592.
- ⁴⁰ (1966) 56 D.L.R. (2d) 25,28. Cited at p.592.
- ⁴¹ At p.608.
- ⁴² (1938) 59 C.L.R. 369, 391.
- ⁴³ (1935) 35 S.R. (N.S.W.) 289, 300. This passage was based on *R. v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128; [1922] All E.R. Rep. 335. Cited at p.611.
- ⁴⁴ At p.611.
- ⁴⁵ At p.613.
- ⁴⁶ At p.613.
- ⁴⁷ At p.614.
- ⁴⁸ At p.625.
- ⁴⁹ At p.588.
- ⁵⁰ At p.618. The recent review referred to was *Ex parte Coffey; Re Evans* [1971] 1 N.S.W.L.R. 434.
- ⁵¹ At p.618.
- ⁵² At p.630.
- ⁵³ (1969) 89 W.N. (Pt.1) (N.S.W.) 462.
- ⁵⁴ At pp.467-468.

- ⁵⁵ At p.467.
- ⁵⁶ At pp.468-469.
- ⁵⁷ At p.470.
- ⁵⁸ At p.470.
- ⁵⁹ (1878) 1 N.S.W.S.C.R. (N.S.) 247.
- ⁶⁰ Queensland Supreme Court, 1978 (unreported). Noted (1978) 52 A.L.J. 386.
- ⁶¹ [1972] 2 N.S.W.L.R. 793.
- ⁶² At pp.797-798. On the facts of the case his Honour ruled that the plaintiff had not made out her claim.
- ⁶³ At p.795.
- ⁶⁴ [1974] 2 N.S.W.L.R. 275.
- ⁶⁵ At p.282.
- ⁶⁶ At p.283. In addition to *Bacon v. Rose* his Honour relied on *Forster v. Jododex (Australia) Pty. Ltd.* (1972) 127 C.L.R. 421.
- ⁶⁷ At p.284.
- ⁶⁸ [1974] 2 N.S.W.L.R. 482. The decision was affirmed on appeal:
[1975] 1 N.S.W.L.R. 212.
- ⁶⁹ At pp.487-488.
- ⁷⁰ See p.486.
- ⁷¹ [1976] 2 N.S.W.L.R. 570.
- ⁷² At p.592.
- ⁷³ At p.594.
- ⁷⁴ At p.623.
- ⁷⁵ [1977] 1 N.S.W.L.R. 470.
- ⁷⁶ (1972) 127 C.L.R. 421.
- ⁷⁷ At p.476.
- ⁷⁸ [1972] 2 N.S.W.L.R. 793, 798.
- ⁷⁹ [1975] 1 N.S.W.L.R. 212, 216.
- ⁸⁰ [1977] 1 N.S.W.L.R. 470, 488-489.

81 At p.493.

82 A commentator on the judgment, after pointing out that Needham, J.'s conclusion "goes some way beyond the view that the Supreme Court should intervene in cases of excess of jurisdiction", adds that it may be doubted whether the decision will be followed in future cases. (1977) 51 A.L.J., 322, 324.

83 His Honour defined injustice in this context as "the exposure of a person, wrongfully, to criminal process". (At p.493)

84 At p.493.

85 (1879) 5 Q.B.D. 1, 5. The case involved an application for *mandamus* directing the magistrate to hear certain evidence.

86 [1894] 2 I.R. 158, 170.

87 At pp.176-177.

88 At p.179.

89 [1909] 2 K.B. 14; [1908-10] All E.R. Rep. 958.

90 [1968] 1 Q.B. 620; [1968] 1 All E.R. 99.

91 Unreported, see *The Times*, 15 February 1978.

92 [1953] 1 Q.B. 503; [1953] 1 All E.R. 346.

93 At p.507, 347.

94 At p.509, 348.

95 [1978] 1 All E.R. 373. See also *R. v. Coleshill Justices; Ex parte Davies and Another* [1971] 1 W.L.R. 1684. This case also involved an application for a writ of *certiorari*. Bridge, J., ruled that the justices had acted in breach of s.6(1) of the *Children and Young Persons Act*, 1969 (U.K.); *certiorari* was granted.

96 (1946) 31 Cr.App.R. 174. The irregularity complained of related to the method of taking the depositions.

97 [1964] A.C. 556, 596; [1962] 3 All E.R. 529, 543.

98 [1968] A.C. 192; [1966] 3 All E.R. 177.

99 At p.235, 188.

100 *R. v. Gee* [1936] 2 K.B. 442; [1936] 2 All E.R. 89 (irregularity in the taking of the depositions; the effect was that there had been no lawful committal for trial and the convictions were quashed); *R. v. Phillips* [1939] 1 K.B. 63; [1938] 3 All E.R. 674,

(irregularity in the taking of the depositions; committal held to be a nullity and conviction quashed); *R. v. Walker* [1950] 2 All E.R. 911 (alleged that evidence before examining justices taken by means of leading questions - appeal dismissed); *R. v. Edgar and Others* [1958] 2 All E.R. 494 (alleged irregularity in manner of taking depositions - appeal dismissed).

- 101 In *Phillips*, however, Lord Hewart did make the point that the refusal in *Bottomley* (*supra*) to grant a writ of *mandamus* reflected the court's reluctance to compel a magistrate to hear a case in a particular manner. Thus, his Lordship said, that case gave rise to considerations very different from those raised by the appeal with which the Court of Criminal Appeal had to deal. *R. v. Phillips* [1939] 1 K.B. 63, 68; [1938] 3 All E.R. 674, 676.
- 102 (1943) 60 W.N. (N.S.W.) 40.
- 103 [1965] Qd.R. 276.
- 104 [1976] 2 N.S.W.L.R. 570.
- 105 For a discussion of this aspect see Chapter III, *ante*.
- 106 As an example see *In re Roberts* [1967] 1 W.L.R. 474, discussed *ante*, p.32.
- 107 (1966) 56 D.L.R. (2d) 25.
- 108 [1978] 1 All E.R. 373.
- 109 (1946) 31 Cr.App. R. 174.
- 110 [1936] 2 K.B. 442; [1936] 2 All E.R. 89.
- 111 [1939] 1 K.B. 63; [1938] 3 All E.R. 674.
- 112 [1974] 2 N.S.W.L.R. 275.
- 113 [1971] 1 W.L.R. 1684.
- 114 [1972] 2 N.S.W.L.R. 793.
- 115 But cp. *R. v. Nicholl* (1862) 1 Q.S.C.R. 42 where an application for a writ of *certiorari* was refused notwithstanding the fact that there had been a committal on the basis of the opinions of a minority of the justices present. The Queensland Supreme Court had no doubt that the committal was irregular, but did not intervene. Mention can also be made of *Maddison and Another v. Goldrick and Another* [1975] 1 N.S.W.L.R. 557, in which the Supreme Court of New South Wales felt able to intervene to rule that the magistrate had no power to order that the defendant be given access to the statements made by the police witnesses. Yet, from our point of view, the decision is not a particularly helpful one. Although a number of decisions on declaratory

relief were discussed in the judgment, no declaration was made. Further, the decision was reversed on appeal: *Maddison and Another v. Goldrick and Another* [1976] 1 N.S.W.L.R. 651. The High Court of Australia refused an application for special leave to appeal: *Attorney-General for New South Wales and Another v. Findlay and Another* (1976) 9 A.L.R. 521. The New South Wales Court of Appeal concentrated on the law relating to a defendant's right of access to statements by police witnesses and, although it said nothing which indicated disapproval of the Supreme Court's intervention, it did not re-examine the superior courts' powers of review. For a note on the case see (1976) 50 A.L.J., 312.

- 116 [1958] 2 All E.R. 494.
- 117 Both in *Ex parte Coffey; Re Evans and Another* [1971] 1 N.S.W.L.R. 434, and in *Sankey Moffitt, P.*, left open the possibility of intervention in situations revealing a denial of natural justice. (At pp.457 and 619 respectively) A case which could be regarded as an example of intervention following a denial of natural justice is *R. v. Colchester Justices; Ex parte North East Essex Building Co. Ltd.* [1977] 1 W.L.R. 1109. Before committing the defendant for trial the examining justices had been told that the defendant had a previous conviction. The judgment did not refer to principles of natural justice, but the committal order was quashed and the justices were directed to hear and determine the case according to law.
- 118 *Connor v. Sankey and Others; Whitlam v. Sankey and Others* [1976] 2 N.S.W.L.R. 570, 592.
- 119 [1971] 1 N.S.W.L.R. 434.
- 120 (1969) 89 W.N. (Pt.1) (N.S.W.) 462.
- 121 (1968) 12 F.L.R. 1.
- 122 [1909] 2 K.B. 14; [1908-10] All E.R. Rep. 958.
- 123 (1879) 5 Q.B.D. 1.
- 124 (1943) 60 W.N. (N.S.W.) 40.
- 125 [1953] 1 Q.B. 503; [1953] 1 All E.R. 346. But cp. *Ex parte Himmelhoch* (1878) 1 N.S.W.S.C.R. (N.S.) 247.
- 126 [1974] 2 N.S.W.L.R. 482.
- 127 [1976] 2 N.S.W.L.R. 570, 613.
- 128 See also *Phelan v. Allen* [1970] V.R. 219 in which the Victorian Supreme Court refused to intervene following a magistrate's ruling that the facts of the case would not support the charge and that the information should therefore be struck out.

- ¹²⁹ *R. v. Governor of Holloway Prison; Ex parte Siletti* (1902) 20 Cox C.C. 353, 358. To the extent that *Bourke and Another v. Hamilton and Another* [1977] 1 N.S.W.L.R. 470 is inconsistent with this principle it is respectfully submitted that it should not be followed.
- ¹³⁰ [1968] A.C. 192; [1966] 3 All E.R. 177.
- ¹³¹ [1922] 2 A.C. 128, 151-152; [1922] All E.R. Rep. 335, 348. Lord Reid has also put the point forcefully: "If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction." (*Armah v. Government of Ghana and Another* [1968] A.C. 192, 234; [1966] 3 All E.R. 177, 187).
- ¹³² R.R.S. Tracey, "Absence or Insufficiency of Evidence and Jurisdictional Error" (1976) 50 A.L.J., 568.
- ¹³³ *Op.cit.*, 573. Although Tracey points to some indications that the higher courts in Australia might entertain "no evidence" arguments in cases involving gross errors, he suggests that the courts might prefer to base their intervention on established grounds.
- ¹³⁴ One other argument can be mentioned. Tracey refers to the possibility that denial of natural justice might be treated as being a jurisdictional error. If, as he suggests, the making of a decision without any evidence amounts to a denial of natural justice, and a denial of natural justice, in its turn, amounts to jurisdictional error, then *Nat Bell* can be effectively circumvented. (*Op.cit.*, 570) Whatever the validity of this argument it is submitted that it is unlikely to be accepted in the context of committal proceedings.
- ¹³⁵ *Connor v. Sankey; Whitlam v. Sankey* [1976] 2 N.S.W.L.R. 570, 592.
- ¹³⁶ [1969] 2 A.C. 147, 195; [1969] 1 All E.R. 208, 233.
- ¹³⁷ This analysis must be read in conjunction with the comments made *ante*, p.34. In every case the wording of the relevant legislation must be examined. If this is drafted in broad terms a magistrate is likely to enjoy greater immunity from review than if he is operating under a statute which indicates that the strength of the evidence is the sole criterion on which he must base his decision to commit or discharge.
- ¹³⁸ (1943) 60 W.N. (N.S.W.) 40, 42.
- ¹³⁹ *R. v. Botting* (1966) 56 D.L.R. (2d) 25, 28.

CHAPTER V

THE ROLE OF THE ATTORNEY-GENERAL

Any analysis of committal procedures would be incomplete without some discussion of the role of the Attorney-General. Notwithstanding a magistrate's decision to commit a defendant for trial an Attorney-General may refuse to file an indictment.¹ Conversely a decision by a magistrate to discharge a defendant does not prevent him from taking the case to trial. Further, he may do so even if no preliminary hearing has been held. As Jordan, C.J., has pointed out:

If the Attorney-General does file an indictment, this is his independent act, not a confirmation of anything done by the magistrate.²

In each of the States and Territories, and in the Commonwealth, the relevant powers are conferred on the Attorney-General by statute.³ In some jurisdictions the power is expressed in general terms and it is clear that the decision to file an indictment rests with him; in these jurisdictions it is not felt necessary to spell out the power to proceed whether or not a preliminary hearing has been held. Thus, for example, in Victoria the "Attorney-General or Solicitor-General for Victoria or any Prosecutor for the Queen in the name of a law officer may make presentment at the Supreme Court or County Court of any person for any indictable offence cognisable by such courts respectively".⁴ More common, however, are legislative provisions which not only confer a general power to file an indictment, but also specify that this may be exercised without examination or commitment for trial.⁵

Let us consider an Attorney-General's power to by-pass the committal process and take a case directly to court. He does this by way of an *ex officio* indictment. In a number of decided cases it has been accepted that an Attorney-General or other authorised officer may proceed in this way and that there are no restrictions on his ability to do so. Thus, for example, in *R. v. Cameron and Cracknell* it was stated:

We have no doubt whatsoever ... that the Attorney-General may file a presentment against any person without any preliminary investigation whatsoever.⁶

In his thorough review of the authorities, Fox, J., in *R. v. Kent and Others: Ex parte McIntosh and Others*,⁷ underlined the fact that the Attorney-General's power is generally regarded as unfettered. It is, however, one which is very rarely used.⁸ Further, when it is used the courts will, as his Honour showed, be concerned to enquire whether the defendant has been prejudiced by being deprived of a preliminary

hearing.⁹ Comments by Wanstall, J., in *Ex parte Marsh*¹⁰ were quoted with approval and, though they relate to the laying of a private information, they indicate the court's attitude to departures from the normal procedure:

Unless the case presents some unusual, if not extraordinary, feature, I should not countenance a procedure which will eliminate all the traditional safeguards inherent in the usual course, the most obvious of which are the requirements of the finding of a *prima facie* case by a magistrate after an investigation in which the accused may cross-examine freely, and of the finding by the Attorney-General of a true bill on the committal evidence; and the assistance in preparing his defence which the accused obtains from the committal proceedings.¹¹

One situation in which the use of *ex officio* indictments has been accepted is where the defendant pleads guilty to a charge in respect of which no committal proceedings have been held. In *R. v. Webb*¹² Philp, J., gave as an example a defendant who is committed for sentence for breaking and entering a particular house, and who is indicted on charges relating to other breaking offences. Indictment on these other charges can occur without committal proceedings. In some cases no injustice arises, but, as his Honour pointed out, there are others in which the defendant's guilt can turn on a nice question of law and in these "proceeding by *ex officio* indictment is fraught with danger".¹³ Stanley, J., added that the use of *ex officio* proceedings is "a highly dangerous expedient" unless the ingredients of the offence charged are absolutely clear and the accused fully understands the charge to which he pleads guilty.¹⁴

*R. v. Maitland*¹⁵ is a decision which went further than any of those discussed. There the South Australian Full Court expressed the view that *ex officio* procedure should be adopted only at the request of the accused and where there is no substantial dispute as to the facts.¹⁶ It is submitted that, though such a clear-cut rule might be desirable, a consideration of the other authorities and of the wording of the relevant section of the South Australian Act does not support the confident assertion that restrictions of this kind can be imposed.

The Attorney-General's power to file an *ex officio* indictment is not limited to cases in which no preliminary hearing is held. Though highly unusual, the facts of *Kent* demonstrate this point, for there the defendants (who were charged with rape) had, in the Court of Petty Sessions of the Australian Capital Territory, been remanded in order to allow a preliminary hearing to be conducted. Before this hearing began the Attorney-General signed an information charging each of the accused with the same rape. Soon afterwards they appeared in the Supreme Court to answer the charges contained in this information. But they also appeared again in the Court of Petty Sessions, and were further remanded. Thus, for a time, two parallel procedures were being employed. Finally, the Deputy Crown Solicitor asked the magistrate for leave to withdraw the informations before him, the ground being that proceedings had been filed in the Supreme Court. Leave was granted

and no evidence was taken in the lower court.

The matter with which Fox, J., had to deal was an application for *mandamus* to compel the magistrate to hold a preliminary examination. His Honour ruled that the magistrate did not have a duty to carry out a preliminary examination. No evidence had been offered by the prosecution, and the only course open to the magistrate was to order what was, in effect, the discharge of the defendants.¹⁷

Although Fox, J., clearly felt uneasy about the Attorney-General's assertion of the right to initiate independent proceedings in a case of this kind, he did not express a concluded opinion on the point. Instead he acted on the assumption that the Attorney-General did have the power to file an *ex officio* information.¹⁸

The case can be viewed as an extreme example of the Attorney-General's ability to circumvent normal procedures. His Honour was unable to find any other Australian case in which a charge of rape had been brought to trial on an *ex officio* information or indictment. Nor was there any precedent for interrupting a preliminary hearing in the manner employed in this case. Yet it seems that the Attorney-General's actions could not be challenged.

It also seems to be established that, when normal procedures are employed and a preliminary hearing is held, an *ex officio* indictment may be filed notwithstanding a magistrate's decision to discharge.¹⁹ Further, a defendant who has been committed for trial on one charge may be indicted by the Attorney-General on a different charge.²⁰

Finally in this outline of the Attorney-General's powers relating to the trial of indictable offences mention must be made of his right to decline to proceed when a defendant has been committed for trial. After considering the depositions prepared at the preliminary hearing he may decide to take no further action²¹ or, after the indictment has been filed, he may enter a *nolle prosequi*.²²

The two powers are quite distinct:

When an accused person is committed for trial, it is for the Attorney-General to consider whether the accused should be put on his trial and for what precise offence, and he does this by filing or refusing to file an indictment. This is an entirely different function from that of entering a *nolle prosequi* upon an indictment after it has been filed.²³

The Attorney-General's power to enter a *nolle prosequi* is absolute and he is not subject to any control by the courts.²⁴ As Viscount Dilhorne has remarked, the Attorney-General may stop any prosecution on indictment merely by signing a piece of paper. "He need not give any reasons."²⁵ It should be noted that when a *nolle prosequi* is entered the indictment remains on the file, the accused is not acquitted, and may be indicted again on the same charge.²⁶ It is fairer to the accused to dispose of the indictment by offering no evidence and then obtaining a directed verdict of not guilty.²⁷

FOOTNOTES

- ¹ To simplify the analysis I have used the term "indictment" throughout this chapter. However, the terminology does vary from jurisdiction to jurisdiction. In Victoria the term "presentment" is used, in New South Wales, South Australia and the Australian Capital Territory the legislation refers to the filing of an "information". Also I have found it more convenient to refer only to the powers of the Attorney-General. In all jurisdictions except South Australia other officials share the Attorney's powers. In New South Wales the Attorney-General or other officer appointed by the Governor may begin a prosecution; in Victoria the process may be initiated by the Attorney-General, the Solicitor-General or "any Prosecutor for the Queen in the name of a law officer"; in Western Australia by the Attorney-General or some other person appointed by the Governor; in Tasmania by a Crown Law Officer; in Queensland by a Crown Law Officer or person appointed by the Governor; in the Australian Capital Territory by the Commonwealth Attorney-General or such other person as the Governor-General appoints; and in the Northern Territory by the Commonwealth Attorney-General or a person appointed by him. When the offence is one against the law of the Commonwealth the Commonwealth Attorney-General or such other person as the Governor-General appoints is empowered to file an indictment. For legislative references see Footnote 3.
- ² *Ex parte Cousens; Re Blacket and Another* (1946) 47 S.R. (N.S.W.) 145, 147.
- ³ *Crimes Act* 1958 (Vic.) s.353. (For a discussion of the words "make presentment" see *R. v. Parker* [1977] V.R. 22. It is interesting to note that in Victoria a common law power is preserved by s.355 and that, under s.354, a grand jury may still be summoned in that State.) *Criminal Law Consolidation Act, 1935-1976* (S.A.) s.275(1) and *Local and District Criminal Courts Act, 1926-1976* (S.A.) s.335(1); *The Criminal Code* (Qld.) s.560; *The Criminal Code* (W.A.) s.578; *Criminal Code* (Tas.) s.310(2); *Australian Capital Territory Supreme Court Act* 1933 (Cth.) s.53(1); *Northern Territory Supreme Court Act* 1961 (Cth.) s.51(2); and *Judiciary Act* 1903 (Cth.) s.69(1). The situation in New South Wales is a special one. There the relevant statute is an Imperial one and was passed in 1828 (9 Geo.IV c.83). Section 5 confers on the Attorney-General, or other officer appointed by the Governor of New South Wales, the power to prosecute by information offences in the Supreme Court. The powers which this section confers have never been abridged: see *R. v. Kent and Others; Ex parte McIntosh and Others* (1970) 17 F.L.R. 65, 82-83; *R. v. Woolcott Forbes* (1944) 44 S.R. (N.S.W.) 333, 337-339 and 346.

With regard to the New South Wales District Court, s.572 of the *Crimes Act*, 1900 provides that all offences cognisable in this court may be prosecuted by persons appointed by the Governor. For a general discussion of the position in New South Wales see R.R. Kidston, "The Office of Crown Prosecutor", (1958) 32 *A.L.J.* 148.

- ⁴ *Crimes Act* 1958 (Vic.) s.353. See also *Criminal Law Consolidation Act*, 1935-1976 (S.A.) s.275(1) and, in New South Wales, s.5 9 Geo.IV c.83. With regard to the South Australian District Criminal Court, although s.335(1) of the *Local and District Criminal Courts Act* 1926-1976 seems to restrict the power to file informations to those cases in which a preliminary hearing has been held, the power to proceed *ex officio* is conferred by s.330(1) and (2) of that Act.
- ⁵ The provisions which make explicit the power to file an indictment without first holding a committal hearing are: *The Criminal Code* (Qld.) s.561; *The Criminal Code* (W.A.) s.579; *Criminal Code* (Tas.) ss.310(3) and 421; *Australian Capital Territory Supreme Court Act* 1933 (Cth.) s.53(2); *Northern Territory Supreme Court Act* 1961 (Cth.) s.51(3); *Judiciary Act* 1903 (Cth.) s.71A(1).
- ⁶ (1896) 22 V.L.R. 481, 484, per Williams, J., delivering the judgment of the Victorian Supreme Court. See also *R. v. Sutton* [1938] St. R. Qd. 285; *R. v. Durnin* [1945] Q.W.N. 35; *R. v. Baxter* (1905) 5 S.R. (N.S.W.) 134; and *R. v. Rocher* (1966) 9 F.L.R. 275. *Durnin* and *Baxter* considered the power of a Crown Prosecutor (as opposed to an Attorney-General) to file an *ex officio* indictment.
- ⁷ (1970) 17 F.L.R. 65.
- ⁸ *Ibid.*, p.76. His Honour qualified this by mentioning two situations in which its use is recognised: where the indictment merely varies the form of the charge or where the accused consents.
- ⁹ At p.91.
- ¹⁰ [1966] Qd. R. 357.
- ¹¹ At p.365.
- ¹² [1960] Qd. R. 443.
- ¹³ At p.448.
- ¹⁴ At p.451.
- ¹⁵ [1963] S.A.S.R. 332.
- ¹⁶ At p.335.
- ¹⁷ (1970) 17 F.L.R. 65, 69.
- ¹⁸ At p.89.

- ¹⁹ *R. v. McConnon and Others* [1955] Tas. S.R. 1 and *R. v. Gamble; Ex parte Cleary* [1947] V.L.R. 491.
- ²⁰ *R. v. Martin* (1884) 10 V.L.R., L.343.
- ²¹ See *R. v. McKaye and Others* (1885) 6 L.R. (N.S.W.) 123. There the magistrate had committed the defendants and the Attorney-General declined to file an information. In refusing to interfere the Full Court stated that in general the court will not act as a court of appeal from an Attorney-General's decision. *Gouldham v. Sharrett* [1966] W.A.R. 129 is another example of an Attorney-General declining to proceed notwithstanding a magistrate's committal for trial. See also *Crimes Act*, 1900 (N.S.W.) s.358(1); *Crimes Act* 1958 (Vic.) s.357; *Criminal Law Consolidation Act*, 1935-1976 (S.A.) s.276(2); *Supreme Court Act of 1867* (Qld.) s.28; *Australian Capital Territory Supreme Court Act* 1933 (Cth.) s.53(6); *Northern Territory Supreme Court Act* 1961 (Cth.) s.51(7); and *Judiciary Act* 1903 (Cth.) s.71. Some of these sections spell out a power to decline to proceed and others deal with a defendant's release from custody when such a decision has been made. Note also *Justices Act*, 1902 (N.S.W.) s.51A(4) which deals specifically with an Attorney-General's power to direct that no further proceedings be taken after a defendant has pleaded guilty at a committal hearing.
- ²² See, for example, *Local and District Criminal Courts Act*, 1926-1976 (S.A.) s.339; *The Criminal Code* (W.A.) s.581; *The Criminal Code* (Qld.) s.563 and *Criminal Code* (Tas.) s.350; and *R. v. Radford* [1951] Tas. S.R. 1.
- ²³ *Commonwealth Life Assurance Society Ltd. v. Smith* (1938) 59 C.L.R. 527, 543. As Edwards points out, the entry of a *nolle prosequi* is strictly confined to cases in which the indictment has been signed: J.L.J. Edwards, *The Law Officers of the Crown*, London, Sweet and Maxwell, 1964, 237.
- ²⁴ *R. v. Comptroller-General of Patents* [1899] 1 Q.B. 909, 914.
- ²⁵ *Gouriet v. Union of Post Office Workers* [1977] 3 All E.R. 70, 88.
- ²⁶ *Commonwealth Life Assurance Society Ltd. v. Smith* (1938) 59 C.L.R. 527, 534 and *Gilchrist v. Gardner* (1891) 12 L.R. (N.S.W.) 184, 187. In both decisions there is a discussion as to whether the entry of a *nolle prosequi* debars the person charged from bringing an action for malicious prosecution.
- ²⁷ J.L.J. Edwards, *op cit.*, 235.

CHAPTER VI

PROCEDURES IN SELECTED OVERSEAS JURISDICTIONS

I. ENGLAND

The Oral Hearing

The provisions governing the normal preliminary hearing in England differ little from those in Australia. The term "examining justices"¹ is used to describe those who preside; under s.4(1) of the *Magistrates' Courts Act, 1952* their functions may be discharged by a single justice. The evidence must normally be given in the presence of the accused² and the defence may put questions to any witness.³ The court's duty is simply stated:

[I]f a magistrates' court inquiring into an offence as examining justices is of opinion,⁴ on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused upon trial by jury for any indictable offence, the court shall commit him for trial; and, if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him.⁵

Committal - either in custody or on bail⁶ - is to the Crown Court specified by the magistrate.⁷

The details of the procedure which is followed when the evidence is given orally are set out in the *Magistrates' Court Rules 1968*, r.4. The evidence is taken down in writing and the depositions are signed by the witness and authenticated by one of the examining justices. At the close of the prosecution case the accused may submit that there is no case to answer. If this submission fails the court must cause the charge to be written down, if this has not already been done, and, if the accused is not represented, must read the charge to him and explain it in ordinary language. The accused is then asked if he wishes to say anything in answer to the charge; the unrepresented defendant must have it explained to him that he need not say anything, but that if he does it will be taken down in writing and can be used in evidence at the trial. He is also told to disregard any promises or threats. Whether or not the accused makes a statement, he must be given an opportunity to give evidence on oath and to call witnesses. Also his counsel or solicitor may address the court. The rule makes provision for committal in respect of a charge different from that previously read out to the defendant.

A distinctive feature of the English system is that the accused

does not plead at the committal hearing. The James Report⁸ touched briefly on this matter, and pointed out that early notice of a defendant's plea is all-important in arranging a court's business. If it is known that a person intends to plead guilty in the Crown Court a considerable amount of preparatory work can be avoided, and the time of jurors, witnesses and others can be saved.⁹ The Report did not, however, agree with the suggestion that the magistrates' courts should be given the power to accept a plea of guilty in respect of an indictable offence. Instead it recommended the revival of an earlier procedure (under s.4(1) of the *Administration of Justice Act, 1920*) which allowed a magistrates' court clerk to send to a higher court a certificate indicating that the defendant intended to plead guilty.¹⁰

Written Statements in Lieu of Oral Evidence

Under s.1 of the *Criminal Justice Act, 1967* committal solely on the basis of written evidence is possible. The procedure may be employed where all the evidence - whether for the prosecution or the defence - consists of written statements;¹¹ the court is allowed to commit the defendant without consideration of the contents of these statements. Section 7(1) of the *Magistrates' Courts Act, 1952* does not apply. A Section 1 committal is permitted only if the defendant is represented by counsel or a solicitor, and he must consent. There is no power under this section to discharge a defendant.

When the court has been informed that all the prosecution evidence is in the form of written statements and that the accused has been given copies,¹² the charge is read out and the accused is given the opportunity to object to any of the statements tendered by the prosecution and to require witnesses to attend to give oral evidence, to give evidence himself or call witnesses, or to make a submission of no case.¹³ If the defendant does take any of these steps, the proceedings must revert to conventional form, in which case the court must proceed under r.4 (*supra*), and must consider the sufficiency of the evidence. However, the evidence may still be in the form of written statements. If the accused does not assert any of the rights given to him by r.3(2) then the court commits him without consideration of the evidence. Under s.1(1) he is committed for trial in respect of the offence charged. However, the prosecution may later add counts to the indictment if the facts support further charges.¹⁴

When a written statement is tendered the court may, of its own motion or on the application of any party to the proceedings, require the witness to appear and give evidence.¹⁵

Publicity

Although committal proceedings must, in general, be held in open court,¹⁶ there are, by virtue of s.3 of the *Criminal Justice Act, 1967*, restrictions on the reporting of English committal proceedings. There is a blanket prohibition on the publication in Great Britain of a report

(of any committal proceedings in England and Wales) which contains material other than that permitted by s.3(4). This subsection lists such matters as the identity of the court; the names of the examining justices and of the parties, witnesses, counsel and solicitors; the defendant's age; the offence or offences with which he is charged; and the court's decision. Full publication is permitted after the court has decided not to commit for trial, and after the trial of a committed defendant has been completed. Similarly full details of committal proceedings may be published in those cases where the court decides to deal with the matter summarily; the account of the committal stage may then be published as part of the report of the summary trial.¹⁷ Further, the court must order that the restrictions on publication are not to apply if the defendant makes an application to this effect.¹⁸ At the beginning of a committal hearing the court must explain to the defendant the restrictions contained in s.3 and inform him of his right to apply to the court for an order removing those restrictions.¹⁹

One question which arises from a defendant's right to opt for full publicity concerns the course which must be followed where a defendant who is jointly charged with others makes an application under s.3(2), but his co-accused do not. Lord Parker, C.J., has given a clear answer:

Take the simple case of two or more men being tried jointly on a single charge. It is clear beyond argument then that if one of those defendants elects for full publicity, that must apply to his co-accused on that charge. Similarly, when one gets not merely a multiplicity of persons but a multiplicity of charges, if they are so interconnected as to be properly the subject of one set of committal proceedings, then as it seems to me it is quite clear that an order under subsection (2) must apply to the totality of the proceedings.²⁰

II. NEW ZEALAND

The Oral Hearing

The procedure is set out in Part V of the *Summary Proceedings Act, 1957*. Hearings are before a magistrate or two or more justices of the peace²¹ and commence with the reading of the charge;²² the accused is not required to enter a plea at this stage. The prosecution evidence is given on oath,²³ taken down in writing, read over to the witness and signed by him and by the presiding magistrate.²⁴ Normally the defendant must be present during the taking of the evidence,²⁵ and he is entitled to cross-examine the prosecution witnesses.²⁶ However, he is not entitled to make an unsworn statement of fact.²⁷ An unrepresented defendant must be cautioned by the magistrate; among other matters, the caution deals with his right to give evidence and call witnesses, and with the fact that his evidence will be taken down and might be used in evidence against him.²⁸ The Act provides that

where the defendant refrains from giving evidence no comment adverse to him shall be made on that fact.²⁹

The criterion on which the decision to commit or discharge is based is very simple. The court must determine whether the evidence is sufficient to put the defendant on trial for any indictable offence.³⁰ Where it is not, the defendant is discharged. Where the evidence is sufficient and the defendant does not plead guilty he is committed to the Supreme Court for trial.³¹ The accused may plead guilty unless the offence is punishable by death; where he does plead guilty he is committed to the Supreme Court for sentence.³² A defendant committed for trial or sentence may be released on bail or remanded in custody.³³ Special mention is made of the court's power to remand, to a psychiatric institution, a mentally disordered person who has been committed for trial.³⁴ A defendant who has pleaded guilty at a committal hearing shall not afterwards be allowed to withdraw the plea except with the leave of a Supreme Court Judge.³⁵

Written Statements in Lieu of Oral Evidence

In 1976, acting on recommendations contained in a Report of the Criminal Law Reform Committee,³⁶ the New Zealand legislature amended the *Summary Proceedings Act*, 1957 in order to make provision for what the Committee referred to as "committal on the papers".³⁷ The amendments were based on ss.1 and 2 of the English *Criminal Justice Act*, 1967 (discussed above) and permit committal without consideration of the evidence. It is interesting to note that the Report emphasised the need for legal representation as a pre-requisite to the use of this procedure:

If an accused is not legally represented, then the Committee thinks it important that examination of the prosecution evidence should be made by someone other than the police officer conducting the enquiry, and in such circumstances it sees a need for the presiding Magistrate to examine the material and to reach a conclusion in the ordinary way as to whether there is sufficient evidence to commit the accused for trial. But where counsel or a solicitor is acting the defendant's own legal advisers will have made such examination already.³⁸

The relevant sections are very simply worded. If at a preliminary hearing all parties advise the court that all the evidence is in written form, the defendant is legally represented, and his legal representative is agreeable to committal on the basis of written statements, then the court may, without considering the evidence, proceed as if the evidence adduced by the informant was sufficient to warrant committal for trial.³⁹

The statute also sets out certain rules as to the formalities to be observed in the preparation of the statements and states that copies

must be given to every other party.⁴⁰ Although a statement is admissible the court may, of its own motion or on the application of any party, require the witness to attend and give oral evidence.⁴¹

Publicity

The court in which a preliminary hearing is held is not deemed to be an open court, and the magistrate has the power to exclude all or any persons from the court when he is of the opinion that this is in the interests of justice or of public morality or of the reputation of any victim of any alleged sexual offence or offence of extortion. He may not exclude any accredited newspaper reporter.⁴² However, the court has a general power to prohibit the publication of any report of the whole or part of the evidence,⁴³ and may also forbid the publication of the name of the accused or of any other person involved in the proceedings.⁴⁴

III. UNITED STATES OF AMERICA

The existence of the federal and fifty state jurisdictions in the United States makes it impossible to speak of "the" committal system in that country. Further, a detailed analysis of the different procedures employed in the various states would be inappropriate in a study of this kind.⁴⁵ All that will be attempted is the presentation of a general account of committal methods in the United States, and a discussion of features of particular interest to an Australian audience.

Practices vary from one jurisdiction to another. Most states make provision for preliminary hearings, but in only some are they mandatory. Griffin sets out the basic ingredients:

Essentially, the preliminary hearing is a procedure by which a magistrate reviews the criminal charge against the arrestee promptly after arrest to ascertain whether he should be subject to further prosecution. The standard utilized is "probable cause"⁴⁶ and the magistrate is the sole arbiter of whether it exists. The hearing is conducted in an adversary manner, although usually with less formality than a trial, and witnesses may be subpoenaed. Additionally, the defendant has the right to counsel, the right to cross-examine witnesses, and he can usually introduce evidence to rebut the charge against him.⁴⁷

Preliminary hearings do not, however, provide the sole means by which defendants reach the higher courts in the United States. To those familiar with the English and Australasian systems the striking feature of procedures in that country is the retention of the grand jury.

In the federal courts a presentment or indictment of a grand jury is a requirement of the United States Constitution. This is set out in the Fifth Amendment, which applies to "a capital or other infamous crime". The Amendment is not applicable to the states: in *Hurtado v. California*⁴⁸ the Supreme Court held that the states do not violate the due process clause of the Fourteenth Amendment if they prosecute a crime of this type without grand jury indictment. According to Karlen about half the states make regular use of the grand jury in criminal prosecutions.⁴⁹

A grand jury sits in private and is not presided over by a judge. The prosecutor may appear to examine witnesses and to lay matters before the jurors. The minutes of the grand jury are ordinarily kept secret and are not available to the defendant at any time, although in some states the accused is permitted to have a transcript. The prosecutor is customarily given access to the minutes. In the absence of a specific statutory provision the defendant has no right to be present. When satisfied by the evidence a grand jury returns an indictment.

In some states, committal for trial is a two-stage process - if the preliminary hearing results in a finding of probable cause the defendant is bound over for action by the grand jury, which must then decide whether or not to indict him. Another possibility is to proceed by way of grand jury indictment without a preliminary hearing; the securing of an indictment can deprive the defendant of the opportunity of having a preliminary hearing.⁵⁰ On occasions prosecutors will go to great lengths to avoid a preliminary hearing, the main object being to prevent the disclosure of evidence.⁵¹

In a small number of states prosecution by indictment is required in all felony cases, but more common are provisions requiring indictment only in respect of very serious offences. For the remainder the prosecutor may proceed by way of information following a preliminary hearing. A further factor is that in some jurisdictions a defendant may waive grand jury action and so avoid the delay which this entails.

Because grand jury indictment is a cumbersome device the trend in the United States has been towards the increased use of the information as a method of initiating prosecutions. Where the prosecutor has the option of by-passing the grand jury he usually does so.⁵²

The most important difference between English and American practice is that a preliminary hearing is held in virtually every case which is to be tried in a higher court in England, whereas this is not so in the United States. As we have seen, grand jury indictment provides one alternative route to a jury trial in that country, but there are others. In a small number of states the prosecutor may, in certain circumstances, by-pass the preliminary hearing and seek leave of the court to file an information.⁵³ Further, some states do not require preliminary hearings; this means that, unless the offence is one which must be dealt with by grand jury indictment, the prosecutor may file an information and take the matter directly to court without there being any preliminary scrutiny of the evidence.

In many of the states which do provide for preliminary hearings the accused is permitted to waive the hearing. It seems that widespread use is made of this power,⁵⁴ the main reasons being the view that the hearing serves little purpose and causes delay. Some jurisdictions require the prosecutor's consent before the hearing may be waived. When the hearing is waived the prosecutor may take the case to court, either directly - by way of information - or following grand jury indictment.

To the outside observer it is somewhat surprising that the preliminary hearing does not occupy a more secure and important place in the United States system. Part of the explanation might be that a preliminary hearing is not regarded as a constitutional right; the Supreme Court of the United States has held that due process requirements can be satisfied without holding such a hearing.⁵⁵ Another factor is the place which the grand jury has traditionally occupied. As Griffin has pointed out:

Historically, the grand jury has been the principal buffer between the individual and the power of the state to prosecute for crime ... [I]t was the grand jury that was canonized in the United States Constitution, not the preliminary hearing.⁵⁶

Reforms Proposed by the American Law Institute

Against this background we can consider the American Law Institute's 1975 draft of a model code of pre-arraignment procedure.⁵⁷ Section 330.1(1) of the proposed Code recognises a defendant's right to a preliminary hearing "to determine whether there is sufficient evidence to proceed to trial".⁵⁸ The prosecution would not be able to prevent the holding of a preliminary hearing by obtaining a prior indictment:

[T]o cut off the defendant's right to a hearing by securing a grand jury indictment deprives the defendant of his opportunity to test the basis for the charge in an adversary proceeding and to confront the witnesses before trial.⁵⁹

It was recommended, however, that a defendant should not have a right to both a preliminary hearing and a grand jury proceeding, and hence s.330.1(3) forces him to choose between the two. Provision is made for waiver of the right to a preliminary hearing, but only if the defendant is represented (s.330.1(2)). A note on the section states:

It is particularly important in the case of an unrepresented defendant to have some judicial test of the evidence at least at one stage in the case before trial.⁶⁰

What emerges is a blueprint for a system which clearly prefers

proceedings by information - with the screening performed by a preliminary hearing - rather than proceedings by way of grand jury indictment. In the commentary on the Code the view is expressed that "the grand jury indictment is not an adequate or fair substitute for a preliminary hearing".⁶¹

Nevertheless, the Code would permit the waiver of a preliminary hearing in favour of an appearance before a grand jury.⁶² It was proposed that the right to a grand jury hearing should be limited to cases commenced by complaint. (See s.340.3(1)).⁶³ Also recommended was that a copy of the transcript should be made available to the defendant (s.340.3(2)), and that he should be permitted to have his counsel with him in the grand jury room.⁶⁴

A defendant who opts for grand jury indictment is not to lose the opportunity of challenging the sufficiency of the evidence against him. Under s.340.5 a defendant against whom an indictment has been filed may move the trial court to dismiss the indictment "on the ground that the evidence heard by the grand jury was insufficient to establish reasonable cause".

But let us return to the Code's proposals regarding the preliminary hearing, for these have greater relevance to the present study. The accompanying commentary makes the purpose of the preliminary examination very clear:

The Institute voted that the preliminary hearing should provide an opportunity for testing the accusation and for "such incidental discovery as may be inherent in such a process", but that the preliminary hearing should not be regarded as an independent discovery device.⁶⁵

It will be remembered that the section conferring the right to a preliminary hearing referred to its aim as being "to determine whether there is sufficient evidence to proceed to trial".⁶⁶ The Code deals with the criteria on which this decision should be based in s.330.5. This directs the court to determine whether reasonable cause exists to hold the defendant for trial. Reasonable cause is defined in s.330.5(3):

Reasonable cause to hold the defendant for trial exists under this section when the evidence introduced at the preliminary hearing would support a guilty verdict. In determining whether reasonable cause exists, the judge may consider the credibility of the witnesses and the quality of the evidence introduced.

The Commentary explains:

Since the Code's view is that the function of the hearing is to screen out charges that should not go to trial, it adopts a standard that requires more

evidence than is required for an arrest ... Sub-section (3) formulates the standard in terms of evidence sufficient to support a verdict of guilty. The judge does not have to be persuaded of the defendant's guilt but should view the case as if it were a trial and he were required to rule on whether there is enough evidence to send the case to the jury. This standard is thus familiar to trial judges and should prove less confusing in its application than the current applicable standards.⁶⁷

On the subject of the judge's function when weighing the evidence the Commentary adds:

Although credibility ordinarily is a matter for the jury, and it is not expected that judges will normally resolve testimonial conflicts at the preliminary hearing, cases do occasionally arise in which a witness's testimony is so weak or contradicted by sufficiently clear facts that the judge should have the power to dismiss the case. Judges will do so anyway and it is best that the Code reflect an explicit basis for this exercise of judicial authority.⁶⁸

Section 330.5 also covers the situation in which the facts disclose a different offence from that charged:

The court shall determine whether reasonable cause exists to hold the defendant for trial for the crime charged in the complaint, for any lesser included crime, or for any other crime based on the same transaction specified by the state sufficiently in advance of the hearing to permit the defendant to examine the witnesses and offer evidence with respect thereto.⁶⁹

The Code also outlines the procedure to be employed at a preliminary hearing. An unrepresented defendant must be advised of his right to representation. If he cannot afford counsel and does not waive his right to representation the court may assign counsel.⁷⁰ The defendant must not be called upon to plead to the charges at the preliminary hearing.⁷¹ A note explains:

The defendant should be given an opportunity to consider what he will plead after he knows that there is enough evidence to hold him for trial and after he has had the benefit of discovery at the preliminary hearing.⁷²

The procedure to be adopted at the hearing is familiar. Either party may cross-examine witnesses, call witnesses, and "offer evidence relating to any relevant issue in the case including affirmative defenses".⁷³ The defendant may testify.⁷⁴ A verbatim record of the

proceedings must be made and must be available to the parties.⁷⁵

Of particular interest are the Code's provisions regarding hearsay evidence. Although the normal rules of evidence for the trial of criminal cases are to apply during a preliminary hearing, an exception is to be made to allow the admission of hearsay evidence

if the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained.

The proposed section continues:

When hearsay evidence is admitted, the court, in determining the existence of reasonable cause, shall consider

- (a) the extent to which the hearsay quality of the evidence affects the weight it should be given, and
- (b) the likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing.⁷⁶

The tasks thus imposed on the court - considering the source and reliability of the evidence and determining whether it is likely that non-hearsay evidence will be available - are consistent with the Code's conception of the court's function: in deciding whether reasonable cause (as defined in s.330.5(3)) exists the court is required to look to the trial and the possibility of a guilty verdict.

Also worthy of notice is the Code's proposal to permit the court to control the number of witnesses and the length of testimony. Under s.330.4(6) the court may

make any order with respect to the hearing that it deems necessary for the ... expeditious conduct of the hearing, including denying a party the right to call a particular witness or examine a witness on a particular issue and limiting the number of witnesses that may be called or the length of examination.

The court's ability to impose restrictions on the defendant is explained:

It is a premise of the Code that the purpose of the hearing is to test the accusation and that there will be discovery procedures available to the defendant

aside from the preliminary hearing. Thus, at the preliminary hearing discovery by the defendant should be seen as incidental to the screening function of the hearing.⁷⁷

As was noted in the discussion of the Australian system, difficult questions can arise with regard to the higher courts' ability to review the conduct of committal proceedings. The Model Code firmly rejected the idea that a defendant should be able to appeal against a court's decision that there is reasonable cause to hold him for trial.⁷⁸

It is doubtful whether a right of pretrial review would result in enough reversals to justify providing such a procedure ... It is not clear that appellate review could generally be had any sooner than trial, and to grant the defendant a right to appeal would introduce an additional pretrial step with the possibility of greater pretrial delay.⁷⁹

However, when a preliminary hearing dismisses a complaint, appeal by the state is permitted by the Code.⁸⁰ This recommendation is in line with existing law, for the double jeopardy provision of the Constitution does not apply to preliminary hearings.

In fact, there are generally no limitations on the prosecution's ability to recharge the defendant, with the result that despite the judicial determination that reasonable cause is lacking, the defendant may at any time be rearrested on the same charge.⁸¹

What is suggested in the Code is a procedure which confers some degree of finality on a determination made at a preliminary hearing, but which preserves the prosecution's right to reinstate the complaint. Section 330.7(1) states that an order dismissing a complaint for lack of reasonable cause shall bar any further prosecution in respect of the conduct which gave rise to the charge, unless within 60 days of the order the prosecutor moves the court to reinstate the complaint. The prosecutor may only take this course (which leads to the re-opening of the preliminary hearing) when he has testimony "establishing new evidence which together with evidence previously introduced at the preliminary hearing establishes reasonable cause".⁸² It is not necessary at the re-opened hearing to recall the witnesses who testified earlier, but the court may order their recall for further examination in the light of the newly offered evidence.⁸³

Delay in the criminal process is a problem on which much attention has recently been focused in the United States. The Institute's Code therefore makes provision for the prompt holding of a preliminary hearing. Section 310.5(3) states that, unless the accused waives the hearing, it must be held within 10 days of the first court appearance (if the defendant is in custody) and within 30 days if he is not in custody.

Finally, another interesting feature of the proposed Code is its section permitting the defendant, prior to or at the preliminary hearing, to move for the suppression of an item of evidence on the ground that it was illegally obtained.⁸⁴ The defendant may choose not to raise the issue at this stage, but if he does raise it at the preliminary hearing he is not normally entitled to a later hearing for suppression of the same evidence on the same basis. However, provision is made for the trial court to re-open the matter in special circumstances.

IV. CANADA

The procedure at a preliminary inquiry is governed by Part XV of the Criminal Code. A justice or magistrate may preside. The evidence is taken on oath in the presence of the accused and cross-examination is permitted. The evidence may be taken down in writing or recorded on tape.⁸⁵ At the end of the prosecution case the accused is given an opportunity to make a statement and to call witnesses.⁸⁶ The criterion on which the decision to commit is based is whether the evidence "is sufficient to put the accused on trial".⁸⁷ Provision is made for waiver of the preliminary inquiry: the justice may, at any stage of the hearing, with the consent of the accused and the prosecutor, commit the accused for trial "without taking or recording any evidence or further evidence".⁸⁸

When conducting a preliminary inquiry a justice may exclude all persons other than the prosecutor, the accused and their counsel.⁸⁹ He may also, if an application is made, forbid the publication of the evidence taken at the inquiry; this embargo remains in force until the accused is discharged or, if he is committed for trial, until the completion of the trial.⁹⁰ The publication of material referring to a confession or admission is also prohibited.⁹¹

In some provinces the grand jury has been retained. This means that in these provinces the prosecutor prefers a bill of indictment, before a grand jury, against a person who has been committed for trial.⁹²

It is possible for the preliminary hearing to be by-passed. The Crown may avoid the hearing by bringing a case directly before a grand jury.⁹³ Those provinces where a grand jury is not used also permit the circumvention of the preliminary inquiry.⁹⁴

Law Reform Commission Proposals

Also worthy of mention in a discussion of Canadian procedures is the fact that in 1974 the Law Reform Commission of Canada⁹⁵ recommended the abolition of the preliminary inquiry. This recommendation was

coupled with proposals relating to the disclosure of the prosecution case to the defence.⁹⁶ The Commission's view was that, once the discovery function of the inquiry has been fulfilled, there is no substantial reason for retaining the preliminary hearing. The Commission added:

Indeed even before the establishment of a discovery system one can challenge the utility of this procedure. Its chief purpose is to provide a preliminary review of the adequacy of allegations of crime and yet it is available in only about five per cent of all criminal cases - and even for these cases it can be avoided by the procedure of a preferred indictment taking a case directly to trial. For all other cases the adequacy of charges of crime are left for determination at trial. But since in more recent times the preliminary inquiry has come to serve a distinct discovery purpose, even though it is a somewhat cumbersome and expensive vehicle for achieving this purpose, its abolition without the provision of an alternative discovery procedure would be too harsh a change. However, with the establishment of procedures specifically designed to provide a discovery system for all criminal cases ... this change can be made - indeed it must be made to avoid a duplication of pre-trial functions.⁹⁷

Nevertheless, the Commission did concede the value of procedures which allow for the adequacy of the prosecution's case to be reviewed. After underlining the screening function performed by crown prosecutors, and pointing out that the number of cases in which the evidence is so weak as to justify dismissal at the preliminary inquiry is very small, the Commission suggested a new form of procedure to allow for these cases to be dismissed before trial. Further, it suggested that this preliminary review should be possible in *all* cases, and should not be confined to those tried in the higher courts.

[A] simple motion procedure could be available to be invoked by the defence where it is believed that, on the face of the documentary and other material, *prima facie* guilt cannot be shown. The motion could be in writing specifying the precise ground on which it is based and supported by the relevant information and material received on discovery. This procedure would be analogous to that available in civil practice where a pre-trial application can be brought to strike out a claim that is frivolous or vexatious.⁹⁸

With regard to cases to be tried in a higher court, committal for trial would, after the completion of discovery procedures, be automatic unless such a motion was presented.

V. SCOTLAND

The Scottish system is quite different from any of those so far described.⁹⁹ To understand it one must understand the role of the procurator fiscal. He is a local official who, under the direction of the Lord Advocate, conducts prosecutions in the sheriff courts. In the case of a serious offence in his district he acts as instructing solicitor to the Advocate Depute who appears for the Crown.

When a crime comes to notice it is reported to the procurator fiscal, usually by the police. Under his direction the police proceed with their investigations; they report to him and make available the statements of witnesses. At no stage does the procurator fiscal interview a suspect.

For the purposes of this study let us suppose that the offence which is disclosed is an indictable one. If the procurator fiscal is satisfied that there is sufficient evidence against the accused and no obstacles to a prosecution exist he lodges a document known as a petition with the sheriff. This requests the sheriff to grant a warrant to imprison the accused in a named prison, therein to be detained for further examination. This procedure - known as committal for further examination - must take place on the next lawful day after the defendant's arrest. He must appear before the sheriff, whose task it is to satisfy himself that the petition is in proper form, that he has jurisdiction, and that the crime specified is a crime according to the law of Scotland. The accused must be given an opportunity to emit a declaration (i.e., to make a statement). The sheriff also authorises the procurator fiscal to cite witnesses for precognition.

The main purpose of the first committal proceedings is to give the accused the earliest opportunity of making, before a judge, any explanation he may think fit. According to Lord Kilbrandon it is "very rare" for the accused to make a statement at this time.¹⁰⁰ No witnesses are called. When the defendant (or his solicitor) has indicated that he does not want to say anything the procurator fiscal usually requests the sheriff to "commit the accused for further examination". As Sheehan points out, this is a meaningless phrase, as the accused has not been examined by the sheriff and will not be examined by him at a later stage.¹⁰¹

No more than eight days later the procurator fiscal again brings the accused before the sheriff. On this occasion he moves the sheriff to grant a warrant to imprison the accused until liberated in due course of law. This second step is known as committal for trial or full committal. The practice is for the sheriff to grant the motion of the procurator fiscal without hearing or seeing any evidence. He proceeds on the understanding that the procurator fiscal would not make the motion unless there was a *prima facie* case.

On occasions the two stages described are telescoped. The procurator fiscal may be in a position to move for committal until liberation in due course of law at the accused's first appearance in court.

Of interest to the outside observer is the fact that the procurator fiscal's requests for committal are granted automatically by the sheriff. There is no judicial hearing of the kind we have encountered elsewhere. The significance of this is underlined by Lord Kilbrandon:

[I]n Scotland persons are committed for trial by the Court, not after a judicial inquiry, but upon an *ex parte* motion of the prosecutor and by judges who are in ignorance of the weight of the case against the accused.¹⁰²

His Lordship is critical of this aspect of Scottish procedure and clearly believes that the sheriff should assess the sufficiency of the evidence and not act as a "rubber stamp".¹⁰³

Notwithstanding criticism of this kind the Thomson Committee recommended against changing this aspect of Scottish criminal procedure. Among the reasons given for the retention of the existing system were the following:

In the first place, since all prosecutions involving committal are undertaken by the Crown, and the procurator fiscal is the officer of the Crown with initial responsibility for deciding whether proceedings be taken, it seems to us perfectly proper for him to decide whether or not the accused should be committed for trial. He will not move for full committal unless he is satisfied there is sufficient evidence to warrant prosecution. Secondly, while the sheriff should retain the power to order committal as a judicial function, we see no reason why he should question the decision of the procurator fiscal in every case. It is always within the power of the sheriff, if he is in doubt, to make the decision personally.¹⁰⁴

As was mentioned earlier the initial warrant granted to the procurator fiscal also authorises him to cite witnesses for precognition. Precognitions are similar to depositions, but are taken in private, by the procurator fiscal. They are submitted to Crown Counsel, and, if the decision to try the case on indictment is confirmed, the indictment is prepared. This states the charge and has annexed a list of exhibits and a list of the names and addresses of the Crown witnesses. The indictment is served on the accused. Not less than six days after service the accused appears before a sheriff and is asked to plead. Not less than nine days after this appearance the trial begins. The defence has no right of access to the Crown precognitions. The procurator fiscal may, however, give the defence some assistance; for example he might reveal the contents of a witness's precognition.

FOOTNOTES

- ¹ This term is defined in the *Criminal Justice Act*, 1925, s.49(2).
- ² *Magistrates' Courts Act*, 1952, s.4(3). Evidence may be given in the absence of the accused if he conducts himself in a disorderly manner or (if he is legally represented and consents) if he is suffering from ill-health: *Criminal Justice Act*, 1972, s.45.
- ³ *Magistrates' Courts Act*, 1952, s.4(3). Harris states that, though there is no specific provision dealing with the prosecution's rights, the practice is to permit prosecution cross-examination of witnesses. B. Harris, *The Criminal Jurisdiction of Magistrates*, 5th ed., London, Barry Rose Publishers, 1976, 40.
- ⁴ Justices evenly divided may adjourn for a re-hearing before a differently constituted bench: *R. v. Hertfordshire Justices, Ex parte Larsen* [1926] 1 K.B. 191. There it was stated that it is desirable for the bench to consist of an odd number of justices.
- ⁵ *Magistrates' Courts Act*, 1952, s.7(1).
- ⁶ *Magistrates' Courts Act*, 1952, s.7(2).
- ⁷ *Courts Act*, 1971, s.7(1).
- ⁸ Home Office, *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts*, Cmnd. 6323, 1975.
- ⁹ *Ibid.*, para.262.
- ¹⁰ *Ibid.*, para.264.
- ¹¹ These statements must be taken in the form prescribed by s.2(2) and (3) of the *Criminal Justice Act*, 1967. See also *Magistrates' Courts Rules* 1968, r.58.
- ¹² As both Carlisle and Bennett have pointed out the Act lays down no timetable for the serving of copies on the accused. The *Criminal Justice Act*, 1967, merely states that a statement must be served before it is tendered in evidence (s.2(2)(c)). Clearly the intention is that the defendant should have a reasonable time to consider the statements and decide whether he wants the witnesses to attend. Otherwise the object of the procedure would be defeated or there would be the risk of the hearing being adjourned to enable a witness to be called. See M. Carlisle, "The Criminal Justice Act 1967 - Its Procedure and Practice", [1967] *Crim. L.R.*, 613, 615, and D. Bennett, "Committal Proceedings - A Change to be Followed?" (1971) 45 *A.L.J.* 363, 365.
- ¹³ *Magistrates' Courts Rules*, 1968, r.3(2).

- ¹⁴ *R. v. James William* [1972] *Crim. L.R.* 436.
- ¹⁵ *Criminal Justice Act*, 1967, s.2(4).
- ¹⁶ See *Criminal Justice Act*, 1967, s.6(1). This directs examining justices to sit in open court unless any enactment expressly provides to the contrary, or unless it appears to the bench that the ends of justice would not be served by sitting in open court.
- ¹⁷ *Criminal Justice Act*, 1967, s.3(3).
- ¹⁸ *Criminal Justice Act*, 1967, s.3(2).
- ¹⁹ *Magistrates' Courts Rules*, 1968, r.2(1).
- ²⁰ *R. v. Russell, Ex parte Beaverbrook Newspapers Ltd.* [1968] 3 All E.R. 695, 697; [1969] 1 Q.B. 342, 347. See also *R. v. Blackpool Justices, Ex parte Beaverbrook Newspapers Ltd.* [1972] 1 All E.R. 388.
- ²¹ *Summary Proceedings Act*, 1957, s.5.
- ²² *Summary Proceedings Act*, 1957, s.160(1).
- ²³ *Summary Proceedings Act*, 1957, s.60 (or as otherwise provided in the *Oaths and Declarations Act*, 1957).
- ²⁴ *Summary Proceedings Act*, 1957, s.161(2).
- ²⁵ *Summary Proceedings Act*, 1957, s.158. The exceptions - set out in ss.174 and 175 - relate to witnesses unable to attend the hearing. See also ss.176 and 177.
- ²⁶ *Summary Proceedings Act*, 1957, s.161(1).
- ²⁷ *Summary Proceedings Act*, 1957, s.163(1).
- ²⁸ *Summary Proceedings Act*, 1957, s.163(2).
- ²⁹ *Summary Proceedings Act*, 1957, s.166.
- ³⁰ *Summary Proceedings Act*, 1957, ss.167 and 168(1).
- ³¹ *Summary Proceedings Act*, 1957, s.168(1)(c). It should be noted that s.168 speaks of "the evidence adduced by the informant"; as Adams points out the section makes no reference to evidence adduced by the defendant. Adams comments that it seems clear that the court's decision does not depend on a consideration of possible defences, and adds, "In New Zealand, the rule may perhaps be that defence evidence may be taken into account in so far as it affects the evidence adduced by the informant, but not in so far as it sets up a defence the evidentiary burden in respect of which rests on the accused". F.B. Adams, *Criminal Law and Practice in New Zealand*, 2nd ed., Wellington, Sweet & Maxwell, 1971, para.2429.

- 32 *Summary Proceedings Act*, 1957, s.168(1)(a) and (b).
- 33 *Summary Proceedings Act*, 1957, ss.153 and 171.
- 34 *Summary Proceedings Act*, 1957, s.171.
- 35 *Summary Proceedings Act*, 1957, s.169.
- 36 *Report of the Criminal Law Reform Committee on Preliminary Hearings of Indictable Offences*. Presented to the Minister of Justice, September 1972 (Mimeo).
- 37 *Ibid.*, para.24.
- 38 *Ibid.*, para.24.
- 39 *Summary Proceedings Act*, 1957, s.160A.
- 40 *Summary Proceedings Act*, 1957, s.173A(2).
- 41 *Summary Proceedings Act*, 1957, s.173A(3).
- 42 *Summary Proceedings Act*, 1957, s.156(1).
- 43 *Summary Proceedings Act*, 1957, s.156(2).
- 44 *Criminal Justice Act*, 1954, s.46.
- 45 For a concise outline of pre-trial procedures in each of the fifty states, see L. Katz, L. Litwin, and R. Bamberger, *Justice is the Crime*, Cleveland, Press of Case Western Reserve University, 1972, Appendix B.
- 46 As an example of the wording used see Rule 5.1(a) of the Federal Rules of Criminal Procedure: "If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in the district court."
- 47 J.R. Griffin, "The Preliminary Hearing Versus the Grand Jury Indictment: 'Wasteful Nonsense of Criminal Jurisprudence' Revisited", 26 *University of Florida Law Review*, (1974), 825, 827. (Footnotes omitted). Griffin seems to be speaking of the Florida procedure, but does not suggest that it is atypical.
- 48 110 U.S. 516 (1884).
- 49 D. Karlen, *Anglo-American Criminal Justice*, Oxford, Clarendon Press, 1967, 149.
- 50 "It is well settled that an indictment itself establishes sufficient probable cause for holding the accused for trial, and that explains why we have consistently held that he is not entitled to a preliminary hearing where he is indicted before a hearing is held." *Coleman v. Burnett* 477 F. 2d 1187, 1207 (D.C. Cir. 1973).

- ⁵¹ L. Katz, L. Litwin, and R. Bamberger, *op.cit.*, 119.
- ⁵² D. Karlen, *op.cit.*, 149.
- ⁵³ It seems that the hearing of an application of this kind is much briefer than a preliminary examination. One advantage of the application for leave to file an information is that it is heard by a judge rather than an unqualified justice of the peace. For a discussion of the use of this procedure see J.R. Beck, "Initiation of Prosecution by Information - Leave of Court or Preliminary Examination?" 25 *Montana Law Review*, (1963), 135; P. Snyder, "Preliminary Hearings - The Case for Revival", 39 *University of Colorado L.R.*, (1967), 580.
- ⁵⁴ D. Karlen, *op.cit.*, 144. See also Miller and Dawson's study of pre-trial practice in three states; they comment: "In the typical criminal case in which a preliminary examination is authorized by formal law, no preliminary is conducted because it is waived". F.W. Miller and R.O. Dawson, "Non-Use of the Preliminary Examination: A Study of Current Practices", *Wisconsin L.R.*, (1964), 252, 253.
- ⁵⁵ *Lem Woon v. Oregon* 229 U.S. 586 (1913). But see the comments on this case in Note, "The Preliminary Hearing - An Interest Analysis", 51 *Iowa L.R.*, (1965), 164, 182. See also *Gerstein v. Pugh* 420 U.S. 103 (1974).
- ⁵⁶ J.R. Griffin, *op.cit.*, 836.
- ⁵⁷ The American Law Institute, *A Model Code of Pre-Arraignment Procedure*, Proposed Official Draft, Complete Text and Commentary, 1975.
- ⁵⁸ Whether this right should be limited - for example to those charged with a felony - is left open.
- ⁵⁹ *Ibid.*, 592.
- ⁶⁰ *Ibid.*, 219.
- ⁶¹ *Ibid.*, 593.
- ⁶² "[T]here will be cases in which, for good reason, the defendant prefers screening of the charge by a grand jury to screening by a magistrate." *Ibid.*, 607.
- ⁶³ The prosecutor's freedom of action is not seriously limited by this sub-section, since it is still open to him to initiate a case by indictment rather than by complaint. If he does so, however, a defendant may, under s.340.1(2), waive indictment, and his right to a preliminary hearing is, as we have seen, unaffected by the prosecutor's election to proceed by way of indictment.

- ⁶⁴ See s.340.3(1). Counsel would not be permitted to participate in the proceedings except by advising the defendant.
- ⁶⁵ The American Law Institute, *op.cit.*, 590.
- ⁶⁶ Section 330.1(1).
- ⁶⁷ *Ibid.*, 597.
- ⁶⁸ *Ibid.*, 597.
- ⁶⁹ Section 330.5(1). Reference should also be made to s.340.4.
- ⁷⁰ Section 330.4(2).
- ⁷¹ Section 330.4(3).
- ⁷² *Ibid.*, 223.
- ⁷³ Section 330.4(5). The raising of affirmative defences is rarely permitted under existing procedures: *ibid.*, 223.
- ⁷⁴ Section 330.4(5).
- ⁷⁵ Section 330.4(7).
- ⁷⁶ Section 330.4(4).
- ⁷⁷ *Ibid.*, 224.
- ⁷⁸ See s.330.6.
- ⁷⁹ *Ibid.*, 226.
- ⁸⁰ Section 330.6
- ⁸¹ *Ibid.*, 598.
- ⁸² Section 330.7(2).
- ⁸³ Section 330.7(5).
- ⁸⁴ Section 330.3
- ⁸⁵ Criminal Code, s.468(1).
- ⁸⁶ Section 469.
- ⁸⁷ Section 475(1).
- ⁸⁸ Section 476(1).
- ⁸⁹ Section 465(1)(j).

- 90 Section 467(1).
- 91 Section 470(2).
- 92 Section 504.
- 93 Section 505(4).
- 94 Section 507(3).
- 95 Law Reform Commission of Canada, *Criminal Procedure - Discovery*, Working Paper No. 4, 1974.
- 96 The discovery procedures proposed are set out in the Working Paper, 33-44. Briefly, what is suggested regarding a case to be tried in a higher court is that there should be a compulsory meeting between the prosecutor and the defence. At this meeting the prosecution would make discovery to the defence in accordance with certain rules. This would be followed by a pre-trial hearing at which the court would review the accomplishment of discovery, settle any disputed discovery issues, and determine whether any admissions might be made to expedite proceedings at trial. At this hearing the defence would be entitled to apply to the judge for an order that witnesses attend for examination.
- 97 *Ibid.*, para.62.
- 98 *Ibid.*, para.63.
- 99 This description is based on the accounts of Scottish procedure contained in A.V. Sheehan, *Criminal Procedure in Scotland and France*, Edinburgh, H.M.S.O., 1975; Lord Kilbrandon, "Scotland: Pre-Trial Procedure", in J.A. Coutts (ed.), *The Accused*, London, Stevens and Sons, 1966; and Scottish Home and Health Department and Crown Office, *Criminal Procedure in Scotland (Second Report)*, Edinburgh, H.M.S.O., 1975, Cmnd. 6218 (Thomson Committee Report).
- 100 Lord Kilbrandon, *op.cit.*, 61.
- 101 A.V. Sheehan, *op.cit.*, 144.
- 102 Lord Kilbrandon, *op.cit.*, 64.
- 103 Lord Kilbrandon, *op.cit.*, 67.
- 104 *Criminal Procedure in Scotland (Second Report)*, Edinburgh, H.M.S.O., 1975, Cmnd. 6218, para.10.07.

CHAPTER VII

CONCLUSION

Before considering some of the issues raised by this study let me draw attention to two striking features of committal procedures.

The first of these is that they exist solely to deal with indictable offences. Yet these offences constitute only a small proportion of those handled in Australia's criminal courts. If the objectives which committal procedures fulfil are important why should they not be incorporated into proceedings designed for summary matters, matters which make up the vast majority of the cases dealt with by our criminal courts? If we believe that a person charged with an indictable offence is entitled to advance notice of the case against him,¹ and that he should not be put on trial unless the evidence is subjected to independent scrutiny, why should these benefits not be provided for someone charged with a summary offence?

It is true that, when the offence is indictable, the issues involved are likely to be more complex and the consequences of conviction more serious. However, this is not a complete answer. Summary offences can involve difficult questions of law and convictions can have serious results. The simple fact is that pre-trial procedure for summary matters compares unfavourably with that employed when the offence is dealt with on indictment, and there does not seem to be a satisfactory explanation for these procedural differences.

The English James Committee considered one aspect of the problem when it dealt with advance disclosure of the prosecution case. It pointed to the lack of formal provision for disclosure in summary trials.² It did not, however, recommend changes which would apply to all summary offences.³ Instead it concentrated on the "intermediate" category of offences.⁴ Its proposal was that, in respect of such offences, the prosecution should supply the defendant with copies of the witnesses' statements. These, the Committee felt, should be provided only if the defendant requests them. Where witness statements have not been prepared it was recommended that a summary of the facts upon which the prosecution intends to rely should, on request, be supplied instead.⁵ The Committee did not recommend that there should be a reciprocal obligation on the defendant.⁶

Section 48 of the *Criminal Law Act* 1977 (U.K.) makes provision for the implementation of the Committee's recommendations. This section is very flexibly drafted and allows for the making of rules regarding the advance disclosure of the prosecution case.

The James Committee proposals and their implementation are an interesting response to questions raised by a comparison of summary and

indictable procedure, but they are also directly relevant to this study.

When charged with an offence which can be dealt with summarily or on indictment a defendant can opt for jury trial in order to obtain the details of the prosecution case which a preliminary hearing or the use of "hand-up" procedures will provide. If advance disclosure were automatically made in all cases involving "intermediate" offences it might be possible to avoid unnecessary recourse to committal proceedings. The defendant would be able to make a more informed choice between summary trial and jury trial, and a more rational system should result.

The second striking feature of the procedures discussed is that they are not compulsory. They can be circumvented at any time. The law does not specify the situations in which this can occur. It does seem odd that what is claimed by many to be a significant stage in the criminal justice system should rest on convention.

A committing magistrate occupies an ambiguous and thoroughly unsatisfactory position. We cannot have it both ways. Either he must be recognised as someone who performs important functions which can involve complex legal issues, or he must be dismissed as an official whose task has little real significance because any errors he makes can be put right by the Attorney-General or by the trial court. Is he a member of the judiciary whose decision is virtually certain to determine whether a defendant is to stand trial, or is he a more lowly officer who makes no more than a recommendation to an Attorney-General, a recommendation which may be accepted or rejected?⁷ Later in this chapter I shall argue that greater use might be made of written statements, but where the traditional form of hearing is employed it seems reasonable to invest it with greater significance. Two methods of achieving this suggest themselves.

First, the Attorney-General's power to file an *ex officio* indictment could be abolished. Instead of this power the Attorney-General could have the right to apply to a District or Supreme Court for permission to prefer an information, presentment or indictment. He would make an application of this kind when he wishes to challenge a magistrate's decision to discharge or when he wishes to dispense with committal procedures. Such a change would bring the Australian law into line with that in force in England. In that country a defendant may be brought before a jury only following a preliminary examination or by the direction or with the consent of a Judge of the High Court.⁸ Thus there is no room for the independent initiation of proceedings by the Attorney-General.

A reform of this kind would underline the point that the normal method of taking an indictable matter to trial is by way of committal proceedings, and their significance would be emphasised. The circumvention of these proceedings would require special approval.

Two comments can be made about the possible abolition of the *ex officio* indictment.

First, the need for such indictments has been reduced by the advent of "hand-up" procedures. Before these were available a defendant

who did not want an oral hearing could avoid one by agreeing to the Attorney-General's use of his *ex officio* power. In those jurisdictions where written statements may be employed and committal by consent can occur there would seem to be little room for the use of *ex officio* indictment as a means of accelerating and simplifying the procedure. It follows, therefore, that the proposal to abolish the *ex officio* indictment should be considered only if "hand-up" procedures are available.

Second, the case for abolition cannot be confidently argued until research into the Attorney-General's use of his power has been undertaken.⁹ It is possible that such research would reveal situations in which the exercise of the power avoids delay and does not prejudice the defendant.¹⁰ Even if such a result were achieved, however, the question would still have to be asked whether, in those situations which do justify the avoidance of a preliminary hearing, it would not be desirable for the Attorney-General to obtain a Judge's consent before proceeding.

The second method of increasing the significance of committal procedures would be to transform the decision reached by a magistrate at the end of the proceedings into something approaching a final determination. This suggestion is to a large extent a corollary of the proposal to reduce the Attorney-General's powers. If a magistrate's decision should not be circumvented by the use of *ex officio* powers it seems reasonable to argue that it should not be circumvented simply by re-instituting proceedings.

I am not suggesting that this possibility should never be open to the prosecution, but, rather, than an effort should be made to define the circumstances in which further committal proceedings can be commenced. It will be remembered that the American Law Institute made such an attempt in its Model Code of Pre-Arraignment Procedure.¹¹ Section 330.7 of the Code states that an order dismissing a complaint for lack of reasonable cause shall bar any further prosecution in respect of the conduct which gave rise to the charge, unless within 60 days of the order the prosecutor moves the court to reinstate the complaint. The prosecutor may take this course - which leads to the re-opening of the preliminary hearing - only when he has testimony establishing new evidence which, together with the evidence previously adduced, establishes reasonable cause.

The 60-day time limit might prove a problem as new evidence might come to light after this period has expired, but the Law Institute's approach does seem worthy of consideration.

The changes which have been outlined - the abolition of the Attorney-General's power to file an *ex officio* indictment and the introduction of restrictions regarding the reinstatement of proceedings - would limit the situations in which a magistrate's decision to discharge a defendant could be circumvented. Where a decision to commit has been made the Attorney-General should retain his existing powers. It is suggested that he should continue to be able to decline to file an indictment. On occasions there will be policy reasons for refusing to take a case to trial, notwithstanding the fact that the evidence is sufficient to warrant consideration by a jury.¹² Such

policy decisions should be made by the Attorney-General. Further, as it is the task of his staff to prepare the indictment, the decision as to the exact charges should be made by his department.

Finally, for the sake of completeness, mention can be made of the Australian Law Reform Commission's discussion of the role of the Attorney-General in criminal prosecutions.¹³ In its Working Paper the Commission raised the possibility that the tasks of determining whether indictments should issue and of prosecuting should be transferred to an independent, non-political officer.¹⁴ If any reform of the existing system is contemplated this suggestion should be given serious consideration.

The Traditional Procedure Re-Considered

It is easy to criticise the oral hearing. It can be dismissed as an expensive and time-wasting ritual. Its critics claim that as a method of informing the defendant of the case which he must meet it is inefficient and laborious, and that as a screening device it has little to commend it, as few cases are discharged by an examining magistrate. On the latter point, for example, Glanville Williams (writing in 1959) stated that the English hearing had virtually ceased to perform the function of safeguarding the innocent. The real filtering, he said, had been taken over by the police.¹⁵

The disadvantages of the oral procedure are well known. The hearing can be lengthy and delay the trial. If the defendant is represented the process can add to his legal expenses. The method of transcribing the evidence is often cumbersome. A good deal of magisterial, police, and witness time is taken up. In view of the lower courts' workload magistrates might be better occupied in presiding over trials. Police officers are taken away from investigations and other police work. Witnesses are inconvenienced and must attend to give evidence which they have already given in statements to the police and which they will have to repeat at the trial.¹⁶ Glanville Williams has suggested that the procedure might bear part of the responsibility for the reluctance of the ordinary citizen to become involved in the working of the courts.¹⁷ Further, the hearing can result in adverse publicity which will influence potential jurors.

What arguments, then, are advanced by those who see the hearing as performing an important function? Many of these are set out by Napley who emphasises the benefits which a competent defence lawyer can derive from an oral hearing.¹⁸ He makes the point that criticism of the hearing does not usually come from those involved in the preparation of cases for trial, and adds that the strongest argument which can be used against the continuation of the preliminary inquiry is that the average practitioner does not make good use of the opportunities which it offers.

Napley draws attention to these opportunities. During the hearing a defence lawyer can assess, challenge and test the prosecution case. He can object to inadmissible evidence, cross-examine in such a way as will demonstrate a witness's uncertainties and bring out new facts, and

generally probe the strength of the case against his client. He might so weaken it that he is able to submit that there is no case to answer, or he might obtain a reduction of the charge or demonstrate that some of the charges cannot be sustained. If the matter does go to trial he can, by his cross-examination, lay a foundation for the tactical conduct of the proceedings.¹⁹ Even if the defendant intends to plead guilty, benefits may be gained, as the cross-examination might uncover mitigating factors. Also, the hearing provides an opportunity to discover what a witness is prepared to swear to, as opposed to what he was prepared to say to the police in private.

All of these statements are valid. Properly used the hearing does offer real protection against being improperly put on trial, and it also can provide a defendant with substantial assistance in the preparation of his case. Further, it is incorrect to assert that written statements provide an equally satisfactory discovery device. As Napley reminds us, a written statement can conceal a witness's uncertainty; only by hearing and cross-examining the witness can the defence detect this uncertainty and discover weaknesses in what might seem, on paper, a strong case.²⁰ And a written statement may omit many facts. Cross-examination can bring these out and open up new lines of defence.

Napley also argues that the functions to which he has drawn attention cannot be appropriately performed at the trial. He states that a trial Judge will not permit counsel to take up the time of the court in probing for possible lines of inquiry. Also he believes that if counsel does unsuccessfully challenge a witness the jury might place disproportionate weight on the fact that the witness emerged unscathed.²¹

This analysis, however, ignores two fundamental questions. We must ask whether an oral hearing should, as a matter of routine, represent the first step in dealing with *all* indictable matters. In view of the disadvantages of this type of hearing it can be argued that an oral hearing should be the exception rather than the rule. Gardner and Carlisle put the point well: "The fact that the [oral] committal procedure can be justified in some cases does not make it necessary or even desirable in all."²²

The other major problem which Napley does not confront is whether it is appropriate for counsel to employ the committal hearing in the manner he advocates. How much assistance is a defendant entitled to derive from the hearing? Disagreement over the answer to this question is sometimes a source of tension between examining magistrates and defence counsel. From time to time magistrates criticise counsel for undertaking extensive cross-examination and turning the hearing into a trial. It will be remembered that the leading authority on the point is *R. v. Epping and Harlow Justices; Ex parte Massaro*,²³ discussed in Chapter II. If the ruling in this case is accepted then the defendant can expect very little from the preliminary hearing: he will learn no more than is necessary for the prosecution to establish a *prima facie* case. Probing for possible leads (i.e., going on a "fishing expedition") and working out tactics to be employed at the trial are not, according to this decision, legitimate pursuits. Of course, the judgment may be rejected as presenting a too restrictive

view, but the point is that clarification of the law is needed if we are to form an opinion on the value of oral hearings. As Hallett has commented, if one accepts Lord Widgery's ruling, many of the arguments in favour of the oral hearing founder.²⁴

Implicit in Napley's defence of the oral hearing is the belief that it is effective as a screening device. Questions about the Australian hearing's efficacy as a sieving mechanism can only be answered by further research. The statement that very few cases are dismissed at the committal stage is a frequently heard one, but statistics are hard to come by. In a report on committal proceedings the Western Australia Law Reform Committee quoted figures given by the English Tucker Committee; at the time that Committee reported (1958) between 3 and 4% of those appearing before examining magistrates were discharged.²⁵ Statistics for Western Australia were not available, but a senior police officer was quoted as saying that in many years of experience he could remember only one case where a court had failed to commit.²⁶ In Victoria in 1976 7.5% of the offences dealt with at committal proceedings resulted in a discharge.²⁷

Where the discharge rate is low this does not necessarily indicate that the procedure is ineffective. The existence of the hearing system might make the police more careful; their preparation of a case might be affected by the fact that they know that the evidence will be scrutinised. Also, where the hearing does not operate as it should this will sometimes be a reflection of defence counsel's failure to take advantage of the opportunity which it offers. Napley is very critical of the so-called "golden rule" that counsel should ask no questions at a committal hearing, for fear of disclosing their hand.²⁸

What is needed with regard to the hearing's screening function is a series of empirical studies which will follow cases from arrest to trial. The attitudes of defence counsel must be explored. Do they frequently fail to take advantage of opportunities to weaken or destroy the prosecution case? Do they normally approach a hearing with the view that a trial is a foregone conclusion? Similarly, questions must be asked about magisterial attitudes. Is it correct to assert, as Griffin does of the unqualified justices who preside in some parts of the United States, that too much reliance is placed on the prosecution in deciding whether to commit for trial?²⁹ Is this comment applicable to qualified magistrates in Australia? Another United States commentator has suggested:

[T]he major function of the preliminary is to bind the accused over for further proceedings. Too often the tenor of the hearing is to overlook the accused's rights at this time, because he will have his chance at trial.³⁰

Is this statement relevant to the Australian system?

In addition to exploring questions such as these, researchers should assemble statistics for each State and Territory. These should indicate the percentage of matters resulting in a discharge.³¹ It should be noted that the Victorian figures quoted above are expressed in terms of *offences* discharged. Even if a defendant has been committed

for trial the preliminary hearing will have performed a useful function if a charge is reduced or if charges are withdrawn. The researcher should continue to follow the cases. He should find out how many of the matters discharged are subsequently brought back into the system, either by way of further committal proceedings or by way of *ex officio* indictment. If the Attorney-General refuses to file an indictment in respect of a matter on which there has been a committal for trial this might indicate a hearing's failure to scrutinise and test the prosecution evidence.³² A similar conclusion might be drawn if, at trial, a submission that there is no case to answer is accepted.

Only when research of this kind has been undertaken will it be possible to assess the efficacy of the committal hearing as a screening device.

Nevertheless, it does seem a little late in the day to proclaim the indispensability of the oral hearing. In each jurisdiction except New South Wales it is possible for a defendant to be committed for trial on the basis of written statements. In four States this can be achieved without magisterial consideration of the sufficiency of the evidence. The view that all cases should be screened before a jury trial takes place now commands less support than it did.

A Suggested Model

Of the various types of procedure described in this study the one which seems the most appealing is that employed in Western Australia.³³ In that State where the accused does not elect summary jurisdiction the prosecution must serve witness statements on the defendant before he is required to elect whether or not to have a preliminary hearing. Thus, at the outset, one of the basic functions of the committal process - informing the accused of the nature of the case which he must meet - is performed automatically.

The right to require a preliminary hearing remains. After considering the written statements the defendant has the opportunity to challenge the State's decision to bring him before a jury. The hearing's screening role is preserved. When the defendant elects to have a preliminary hearing, the magistrate reads aloud the prosecution evidence; the defence may require the presence of the prosecution witnesses and/or call his own witnesses. Having considered the evidence the magistrate makes a determination.

In the absence of a request for a hearing in the traditional form the lower court's role begins and ends with an initial hearing at which the defendant's rights are explained to him. The only exception occurs in rare situations where the prosecutor has to summon a witness to give oral evidence.³⁴

The important difference between the Western Australian procedures

and those employed in other jurisdictions which make use of "hand-up" statements is that the service of these statements is the obligatory method of initiating proceedings. In most of the other jurisdictions discussed in this study it is up to the police to decide whether or not to put the evidence into written form. In England, for example, it seems that a very high proportion of cases reach the higher courts by way of "hand-up" procedures.³⁵ In Victoria, however, little use is made of this method: in 1976 "hand-up" proceedings were employed in 125 cases as opposed to 1183 cases dealt with by way of an oral hearing.³⁶

Tasmania is distinctive in that it is not up to the prosecutor to decide in what form the evidence shall be presented. There a defendant who pleads not guilty may opt to have depositions taken; if he does not so opt he is given copies of the witness statements and is committed for trial.³⁷ The significant difference between this system and the model outlined is that he does not see the statements before making his decision. A defendant who is provided with the statements at the outset is in a better position to make an informed and purposeful decision as to the value of an oral hearing.

Consideration of the model outlined raises several questions. A decision must be made as to whether a system which places substantial reliance on written statements should insist on magisterial scrutiny of those statements. Mention has been made of the possibility that, when committals occur without consideration of the evidence, cases will reach trial when the evidence is manifestly inadequate.³⁸ It will be remembered that the English James Committee drew attention to the problem, which was said to be due to lack of proper consideration of the evidence by the parties and to the prosecution, the defence and the court being too ready to use the section 1 procedure.³⁹

Any system which employs committal by consent must be aware of the dangers and attempt to guard against them. Short of abolishing procedures which permit committal without independent scrutiny of the evidence, the only solution seems to be that suggested by the Committee. This seeks to underline the responsibility of the legal practitioners involved in cases dealt with under section 1. The proposal is that, before a person is committed for trial under section 1, both the defence advocate and the person conducting the prosecution should be required to sign a certificate stating that they have examined the witness statements and are satisfied that the case is suitable for committal for trial without consideration of the evidence by the court.⁴⁰

Certainly this type of committal should not be permitted unless the defendant is legally represented. Also it must not be overlooked that, in Australia, the case must again be scrutinised by a member of the Attorney-General's staff before it reaches a Judge and jury.⁴¹ Thus there are some safeguards. On balance, the risk that ill-prepared cases will, notwithstanding these safeguards, still reach the trial stage seems worth taking. Further, questions must be asked about the care with which the facts are scrutinised when a conventional hearing is held. I have spoken of "magisterial" scrutiny, but it must not be overlooked that many hearings are conducted by lay justices.

Consideration must also be given to the possibility of imposing limits on the legal profession's right to require a preliminary hearing. It will be remembered that in 1974 the Law Reform Commission of Canada put forward the view that once the discovery function of the preliminary inquiry had been fulfilled there was no substantial reason for retaining the hearing. The Commission therefore concluded that the preliminary hearing should be abolished. This recommendation was accompanied by a suggestion that a simple motion procedure should be available to the defence which could be invoked where it was believed that a *prima facie* case had not been made out.⁴² Implementation of these proposals would produce a very simple and efficient system: after being advised of the case against him a defendant would automatically proceed to trial unless he filed a motion challenging the sufficiency of the evidence.

The relevance of the Canadian recommendations to the model which I have outlined is obvious. If a defendant has been given a copy of the witness statements should his right to opt for a full hearing be confined to situations in which he wishes to submit that there is no case to answer?

No doubt experienced defence counsel would object to such a change.⁴³ They would argue that only by hearing and cross-examining a witness can they detect weaknesses in the prosecution case.⁴⁴ Further, they would argue - as Napley does - that the oral hearing provides an opportunity to explore leads, develop tactics and generally prepare their case. Almost certainly they would object that a law restricting their right to opt for an oral hearing to situations in which they felt able to submit that there was no case to answer would be too restrictive.

All of this, of course, brings us back to the most important question facing those concerned about committal procedures. Is one of the functions of these procedures to permit defence counsel to glean what they can from witnesses, to test them, and to rehearse the defence case? Until this question is answered it is not possible to make rational decisions about the design of the pre-court process.

In the absence of a clear decision as to the objectives which counsel may legitimately pursue consideration might be given to incorporating into the relevant legislation a general power enabling magistrates to exercise control over the proceedings. In formulating its Model Code of Pre-Arrest Procedure⁴⁵ the American Law Institute suggested that the court be empowered to:

make any order with respect to the hearing that it deems necessary for the ... expeditious conduct of the hearing, including denying a party the right to call a particular witness or examine a witness on a particular issue and limiting the number of witnesses that may be called or the length of examination.

As the commentary makes clear this section was drafted on the assumption that discovery procedures would enable the defendant to learn the nature of the case against him, and that it was therefore legitimate

for the court to be able to control counsel's use of the hearing as a discovery device.

Whether such a section would be acceptable and appropriate in Australia is not clear. Again, we need to know more about the system in operation. Do counsel abuse the opportunities which the preliminary hearing offers? If so, how widespread are these abuses? Answers to these questions might indicate that, if the system which I have outlined were universally adopted, counsel might opt for an oral hearing for the wrong reasons.⁴⁶ If so the courts should be authorised to exercise control. If not the decision could be safely left to the good sense of the legal profession and no attempt should be made to specify the circumstances in which counsel may require a hearing to be held.

Regardless of how the various questions which I have raised are answered, the Western Australian model does seem to be one which deserves closer examination. Needless to say, more radical reforms could be proposed,⁴⁷ but the model described fulfils the basic objectives of more traditional procedures, and at the same time offers the possibility of avoiding the ritualised committal hearings which attract so much criticism.

FOOTNOTES

- ¹ See Glanville Williams: "The right of an accused person to know the evidence against him before his trial, so that he has the fullest opportunity to prepare his defence, is one of the most important of all safeguards in legal procedure". "Proposals to Expedite Criminal Trials", [1959] *Crim. L.R.* 82, 86.
- ² Home Office, *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts*, London, H.M.S.O. 1975, (Cmd. 6323), para. 212.
- ³ Its main reason for not dealing with summary offences was that these were not within its terms of reference. The Committee did comment that the principle that a defendant should be fully informed of the case against him is equally applicable to summary offences. It suggested that, with regard to these offences, the possibility of the advance disclosure of the prosecution case should be kept under review. *Ibid.*, para. 219.
- ⁴ The Committee uses the term "intermediate category of offences" to refer to offences triable in some circumstances on indictment and in others summarily. *Ibid.*, para. 45.
- ⁵ *Ibid.*, para. 230.
- ⁶ On this subject the Report comments that "there is considerable strength in the argument that it is wrong in principle, in a system which presumes innocence until guilt is proved, to require disclosure of the defence before the details of the evidence for the prosecution are disclosed; and we believe that such a change might be generally unacceptable". *Ibid.*, para. 229.
- ⁷ With regard to the view that a magistrate does little more than assist the Attorney-General note the following comment by Moffitt, P. "[T]he depositions provide the Attorney-General with useful material to enable him to decide whether he will file an indictment, whatever the magistrate's opinion may have been". *Connor v. Sankey and Others; Whitlam v. Sankey and Others* [1976] 2 N.S.W.L.R. 570, 620.
- ⁸ See s.2(2) *Administration of Justice (Miscellaneous Provisions) Act* 1933 (U.K.). There are two exceptions. The Court of Appeal may also direct the preparation of a bill of indictment, and a bill may be preferred under s.9 of the *Perjury Act* 1911. Barnard lists some situations in which applications are made to the High Court under s.2(2)(b). These are: (a) Where the magistrates have refused to commit a person for trial but the prosecution wish to challenge this decision. (b) Where several persons have been committed for trial and it is desired that a co-defendant be added without going through the formality of committing him. (c) Where it is desired that two persons charged in different indictments should be tried together or that two offences charged against one person should be tried together. The procedure to be adopted when such an application is

made is set out in the *Indictments (Procedure) Rules 1971*. The High Court Judge considers the application in private, but may direct the applicant to attend. There is no provision for the proposed defendant to attend or make representations to the Judge. See D. Barnard, *The Criminal Court in Action*, London, Butterworths, 1974, 66.

- ⁹ In Victoria, for example, the Attorney-General used his power to file an *ex officio* indictment in 21 matters in 1976. (Figures supplied by the Law Department of Victoria). It would be interesting to know the type of situation in which this procedure was considered appropriate.
- ¹⁰ Speaking of the New Zealand provision which permits the filing of *ex officio* indictments (*Crimes Act 1961*, s.345(3)) Adams comments:

This provision affords a means of escape from various difficulties. It might be used, for instance, where, although the facts had been fully investigated in the lower court, and the case was in all respects ready for trial, the committal was found to be a nullity, either as being for a non-existent offence ... or owing to some other mistake or irregularity in the proceedings; or where the committal was based on inadmissible evidence ...; or where, the committal having been for attempted murder and death having supervened, the trial ought to proceed as one for murder; or where, depositions having been taken, the lower court has refused to commit, or where ... the presiding magistrate became unfit to proceed after the depositions of many (and some of them distant) witnesses had been taken.

F.B. Adams, *Criminal Law and Practice in New Zealand*, 2nd ed., Wellington, Sweet and Maxwell, 1971, para. 2765.

- ¹¹ Discussed *ante*, 91.
- ¹² *Quaere*, when the Attorney-General's decision not to proceed notwithstanding a committal reflects the view that the evidence is insufficient. Perhaps the prosecutor should be able to request the court to reinstate the proceedings if he is later able to present a stronger case.
- ¹³ Australian Law Reform Commission, *Access to Courts - I Standing: Public Interest Suits*, Working Paper No. 7, 1977.
- ¹⁴ *Ibid.*, 133-134.
- ¹⁵ Glanville Williams, *op.cit.*, note 1, 84-85.
- ¹⁶ The procedure of taking depositions has been described by Lord Devlin as moving statements from one piece of paper to another. Quoted by E. Gardner and M. Carlisle, "The Case for Reform", [1966] *Crim. L.R.* 498, 500.

- ¹⁷ *Op.cit.*, 89.
- ¹⁸ D. Napley, "The Case for Preliminary Inquiries", [1966] *Crim. L.R.* 490.
- ¹⁹ *Ibid.*, 490-495.
- ²⁰ See also the following comment by a Canadian lawyer: "The only way that the Crown's version of the truth is tested is through cross-examination of the Crown witnesses and not through mere disclosure of facts the Crown expects to prove". H.J. Levy, in a letter to the *Toronto Globe and Mail*, 2 July 1976.
- ²¹ D. Napley, *op.cit.*, 493-494.
- ²² E. Gardner and M. Carlisle, "The Case for Reform", [1966] *Crim. L.R.* 498, 499.
- ²³ [1973] Q.B. 433; [1973] 1 All E.R. 1011. Australian cases which have considered Lord Widgery's judgment are discussed ante, 20-22. It is interesting to note that views similar to Lord Widgery's have been expressed in the United States: "Since the prosecution is not required to produce more evidence than necessary to show probable cause, most courts hold that the accused is not entitled to confront and cross-examine those witnesses not relied upon by the prosecution at the hearing, even though they may be called at trial". "It is clear, however, that accused is entitled to knowledge of only the character and outlines of the offense charged". Note, "The Preliminary Hearing - An Interest Analysis", 51 *Iowa L.R.* (1965), 164, 168 and 176.
- ²⁴ L.A. Hallett, *The Preliminary Examination in the Criminal Process*, Unpublished thesis, Monash University, 87.
- ²⁵ *Report of the Departmental Committee on Proceedings before Examining Magistrates*. Cmd. 479, 1958, para. 7. Quoted in Western Australia Law Reform Committee, *Committal Proceedings*, Project No. 4, Report, 1970, para. 4.
- ²⁶ *Ibid.*, para. 5.
- ²⁷ Figures supplied by the Victorian Law Department.
- ²⁸ D. Napley, *op.cit.*, 491.
- ²⁹ J.R. Griffin, "The Preliminary Hearing Versus the Grand Jury Indictment: 'Wasteful Nonsense of Criminal Jurisprudence' Revisited", 26 *University of Florida Law Review*, (1974), 825, 835.
- ³⁰ D.B. Dean, "Preliminary Examination Potential", 58 *Marquette Law Review*, (1974), 159, 171.
- ³¹ It would be interesting to know whether certain types of offence have a higher discharge rate than others. Glanville Williams has

suggested that charges of rape and manslaughter charges against doctors might show a higher than average discharge rate at the preliminary hearing: *op.cit.*, 85. Also the possibility that complaints against the police are more likely to be discharged than other types of complaint could be explored.

- 32 In Victoria, for example, in 1976 the Attorney-General exercised his discretion not to prosecute in 87 matters. In that year 1691 persons were dealt with by way of committal proceedings in that State. Figures supplied by the Law Department of Victoria.
- 33 *Ante*, 3-4 and 7-9.
- 34 See W.A. s.101B(1). The reason for this provision, which enables the prosecutor to supplement the written evidence, is made clear in a report of the Western Australia Law Reform Committee. In some situations (e.g., a family murder) a witness may be reluctant to give evidence unless summoned to appear in court. Western Australia Law Reform Committee, *Committal Proceedings*, Project No.4, Report, 1970, 10.
- 35 Bottoms and McClean followed a sample of cases through the Sheffield magistrates' courts. They found that of the 356 cases involved in committal proceedings only 1 was dealt with by way of an oral hearing. A.E. Bottoms and J.D. McClean, *Defendants in the Criminal Process*, London, Routledge and Kegan Paul, 1976, 50.
- 36 Figures supplied by the Law Department of Victoria.
- 37 *Ante*, 3 and 9.
- 38 *Ante*, 22.
- 39 Home Office, *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts*, London, H.M.S.O., 1975, (Cmd. 6323), para. 232.
- 40 *Ibid.*, para. 239. Hopkins has expressed doubt about this proposal. He states that it is easy for such certificates to be signed without sufficient consideration being given to the matter. R.R. Hopkins, "The Function of Committal Proceedings", *Justice of the Peace*, 140 (9), 29 May 1976, 287.
- 41 Indeed, Hallett goes so far as to assert that, in Victoria, the function of ensuring that there are no indiscriminate prosecutions is performed by the Crown Prosecutors with the assistance of preparation officers in the Crown Solicitor's office. In Hallett's view these officers duplicate the work of the magistrate, and do it much more thoroughly. L.A. Hallett, *op.cit.*, note 24, 107-108.
- 42 See *ante*, 92-93.
- 43 Objections have in fact been raised to the Canadian Law Reform Commission's proposals. The secretary of the Criminal Lawyers

Association of Ontario made the point that "disclosure is no substitute for cross-examination". H.J. Levy in a letter to the *Toronto Globe and Mail*, 2 July, 1976.

⁴⁴ That defence counsel will object to provisions which prevent them from calling and cross-examining witnesses during a preliminary hearing is seen in *R. v. Byczko* (Unreported. A decision of the South Australian Court of Criminal Appeal; judgment delivered 19 August, 1977). The charge was rape. During the preliminary hearing the magistrate had admitted a written statement by the alleged victim. He refused defence counsel's application that the girl be called as a witness. (The procedure at the hearing was governed by s.106(6a) of the *Justices Act*, 1921-1977 (S.A.). This states that at such a hearing the prosecutrix shall not be called to appear unless the magistrate is satisfied that there are special reasons why she should attend for the purpose of oral examination). On appeal to the Court of Criminal Appeal defence counsel complained, *inter alia*, that he had been unable fully to investigate certain matters relating to the girl's morality and prior sexual experience. It is clear that he felt that he had been hindered in the preparation of his client's defence. It should be noted that Bray, C.J., expressed disquiet about s.106(6a) and about s.34i(2) of the *Evidence Act*, 1929-1976 (S.A.) (which places restrictions on the adducing of evidence as to the alleged victim's morality and previous sexual experience). This legislation, he said, reduces the accused's rights "and does place a defendant charged with a sexual offence in a significantly more disadvantageous position than a defendant charged with any other kind of offence". He added that "there is no doubt that the legislation does significantly hamper the defence and increase the chances of convicting the innocent by preventing the exploration of matters which could prove their innocence". On the subject of review of committal proceedings by an appellate court it should be noted that all three Judges agreed that this was not permissible. "[I]t is not appropriate to seek to complain of what took place on a preliminary examination, in an appeal against conviction in this Court." (per Hogarth, J.) The only possible remedy would have been an application for one of the prerogative writs. (See Chapter IV, *ante*.)

⁴⁵ See *ante*, 90-91. Cp. the recommendation made by the South Australian Mitchell Committee. After pointing out that a justice in that State has a discretion to disallow cross-examination the Committee commented: "We think ... that it might be preferable that the justice should have the right to decide, in the case of committal proceedings, firstly whether the witness shall attend for cross-examination and secondly, whether cross-examination should be limited to any particular issue or issues. Witnesses whose evidence is vital to the prosecution case should always be made available for cross-examination upon request, but in the case of a witness whose evidence is peripheral to the main issues the justice may require the defence to justify a request for his attendance for cross-examination." The Committee therefore recommended that no prosecution witness who has made a sworn statement should be required to

attend a preliminary hearing unless the presiding justice orders him to attend and to give evidence. Criminal Law and Penal Methods Reform Committee of South Australia, *Third Report: Court Procedure and Evidence*, 1975, 72-73.

- ⁴⁶ With regard to the making of a decision in favour of an oral hearing the Tasmanian statistics are of interest, although they give no indication of the reasons behind these decisions. From the beginning of 1966 until August 1969, 493 persons were committed for trial in that State. Of these 44.62% were content to be committed on the statements only, while 55.38% elected to have the traditional form of hearing. Source: Western Australia Law Reform Committee, *Committal Proceedings*, Project No. 4, Report, 1970, 6.

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