THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 4

Committal Proceedings

REPORT

MAY 1970

REPORT ON
COMMITTAL PROCEEDINGS

To: The HON. ARTHUR F. GRIFFITH, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. As Project N o. 4 of its first programme, the Committee was asked -

"to consider whether any alteration is desirable in the present procedure for the conduct of preliminary enquiries and committal proceedings and the publication of reports thereof".

THE PRESENT LAW

2. The present law in Western Australia is contained in Parts IV and V of the *Justices Act, 1902-1968*. It is based on the traditional English system of recording in depositions the evidence given orally before the examining magistrate (or justices) in the presence of the accused. If the magistrate is of the opinion that the evidence given before him is sufficient to put the accused on his trial for an indictable offence, he is committed for trial. If the magistrate finds the evidence insufficient, the accused is discharged.

MOVEMENT FOR REFORM

3. The movement for reform has developed in the context of the questions of -

(a) the publicity given to committal proceedings and the possible adverse effects of such publicity;

(b) the inconvenience, waste of time, and unnecessary expense involved in committal proceedings particularly when the accused has pleaded guilty; and

(c) the delay that could result in bringing cases to trial.

4. Those who advocate the retention of traditional committal proceedings do so primarily on the ground that such proceedings afford a protection to the individual against having to face a jury trial when there is insufficient evidence to support a charge against him. This argument is less forceful now than it may have been in the past for, as the Tucker Committee pointed out (see Cmnd 479, para. 7) -

> " About 18,000 persons appear before examining justices every year charged with indictable offences. Between three percent and four percent are discharged, and the rest are committed for trial".

5. Statistics of this nature are not available for this State, but it would seem that the proportion of persons so 'protected' is even less here than in England. In his report to the Commissioner of Police prepared for this Committee, Superintendent H.D. Burrows said that in his many years of experience in the Criminal Investigation Branch he could remember only one case where a magistrate had failed to commit an accused person for trial.

6. Other arguments of merit which are commonly advanced in favour of the retention of committal proceedings are -

(a) they serve to get the evidence into a more acceptable form and to exclude some of the inadmissible evidence ;

(b) they give both the prosecution and the defence the opportunity to test the witnesses and the evidence and, as a result, either the prosecution may reduce the charge or the accused may change his plea;

(c) the publicity given to such proceedings may bring forth new witnesses and fresh evidence.

7. In Western Australia the movement for reform need be traced no further back than 1962 when the Solicitor-General made certain recommendations which may be summarised as follows -

(a) if an accused who **pleads guilty** is represented by counsel the magistrate should be empowered to accept as evidence a witness' written statement if admitted by the

defence or verified on oath provided that the defence may challenge any portion of such statement at the trial.

(b) if an accused **pleads guilty** and is not represented by counsel, the magistrate may accept a witness' statement only if it is verified on oath. A copy would be handed to the accused who could object to any portion of it. The magistrate could decide whether or not the witness should give oral evidence in court and whether to suppress the publication of the portion of the statement objected to. The magistrate should also be empowered to reject a plea of guilty and to accept it at any stage of the proceedings .

(c) where an accused **pleads not guilty** the same procedure should be followed, except that the magistrate should be more careful to suppress the reading out in court of any portion of a witness' proof of evidence to which it seems likely that objection may or should be made at the trial, whether on the grounds of inadmissibility or untruth .

8. Since 1962 this matter has been the subject of several memoranda from the Chief Crown Prosecutor, and of comments by the Senior Stipendiary Magistrate and the Commissioner of Police.

9. An ad hoc Committee was established with your approval, to consider proposals drafted by the Chief Crown Prosecutor and to make recommendations. The ad hoc Committee's recommendations made on 4th October 1967, may be summarised as follows -

> In all cases of indictable offences where a plea is not forthcoming or a person indicates his intention to plead not guilty, normal committal proceedings should be held. In other cases hand-up briefs should be prepared and the system operating in New South Wales should be adopted. That Committee also recommended that no restriction relating to publicity should be adopted, except that contained in s .57 of the *Juries Act* which should apply to committals where viva voce evidence was given.

THE LAW IN OTHER JURISDICTIONS

10. In England since the 1st January, 1968, the *Criminal Justice Act, 1967*, has provided for the tendering by the prosecution or defence of written statements to be admitted in evidence in

committal proceedings "to the like extent as oral evidence to the like effect" subject to certain conditions.

11. The written statement must be signed by the witness and declared by him to be true to the best of his knowledge and belief and before it is tendered a copy of it must be given by the party tendering it to each of the other parties to the proceedings. It becomes admissible if these parties to whom it is given do not object.

12. The court may (not must) of its own motion or on the application of any party, require the witness who made such a statement to give oral evidence.

13. Written statements are also admissible at the trial provided the copies are served before the hearing and not objected to within seven days of service.

14. If all the evidence in the committal proceedings consists of written statements the court may commit the accused for trial without considering the contents of the statements unless the accused is not legally represented or a submission is made that there is insufficient evidence to put the accused on trial.

15. In other cases so much of the written statements as is admitted is required to be read aloud and considered by the court together with any other evidence.

16. The Act restricts press reports of committal proceedings to a limited number of formal details such as the names and addresses of the parties, the name of the magistrate and counsel and a summary of the charges. An accused may, however, require that this restriction be lifted if for any reason he desires publicity to be given to the proceedings. It is not open to the prosecutor to seek publication .

17. The Western Australian ad hoc Committee when making its recommendations (referred to in paragraph 9 above), considered "that the provisions contained in the English Criminal Justice Bill, 1966 (now the *Criminal Justice Act, 1967*, outlined above in paragraphs 10-16), were not acceptable". No reasons were given by the Committee for its rejection of the provisions .

18. In **Scotland** there are no committal proceedings at all. Each prosecution witness is 'precognized' privately, the accused being neither present nor represented. With the indictment the accused is given a list of documents and exhibits which are to be produced and a list of prosecution witnesses, but not copies of their precognitions. He may however, precognize the witnesses. The defence must also provide a list of its witnesses to the prosecutor who may precognize them. The precognitions are merely aids to examination; they are not disclosed to the judge or jury.

19. In **New South Wales**, s.51(a) of the *Justices Act, 1902*, which was introduced in 1955 (by Act No.16 of 1955), requires Justices when they accept a plea of guilty to an indictable offence (other than one punishable with penal servitude for life) 'thereupon' to commit the accused to the Supreme Court or a Court of Quarter Sessions. If the accused does not plead guilty or the Justices do not accept the plea of guilty the committal proceedings are continued in the normal way.

20. In **Tasmania** by an amendment to the *Justices Act of 1963* (Act No. 33 of 1963), **immediate committal for sentence** on pleas of guilty to charges other than of capital offences is provided for. On charges arising out of complaints by the police, the Crown, or the Commonwealth, if the defendant pleads not guilty he must be asked whether he requires depositions to be taken and if he does not so desire he is to be immediately committed for trial.

21. If the accused elects to have committal proceedings the Act makes provision for the statutory declaration of any witness to be admitted in lieu of oral evidence but the court if 'just cause exists for doing so may, or if the opposite party requests, shall summon…the witness for further examination or cross-examination'.

22. The system has, the Committee is reliably informed, so far worked with success in Tasmania. The Solicitor-General's Department provides the accused with copies of statements of witnesses. These are usually the statements made by the witnesses to the police. The number electing depositions in the traditional form during 1966-August, 1969, were as follows -

	1966	1967	1968	1969 (Jan-Aug)
Number committed for sentence -				
(a) on proofs (i.e. statements) only	127	133	130	96
(b) after requests for depositions	2	-	-	-
	129	133	130	96

	1966	1967	1968	1969 (Jan-Aug)
Number committed for trial -				
(a) on proofs (i.e. statements) only	58	56	41	65
(b) after requests for depositions	59	103	87	24
	117	159	128	89

23. Information obtained from the Solicitor-General's Department of Tasmania and the Tasmanian Police Department also indicates that there has been a considerable saving of time of magistrates, prosecutors, defence counsel and Police and other witnesses. Moreover, the system has resulted in the earlier hearing of cases, both on pleas of guilty and when contested.

24. Under the law of **Israel** (*Criminal Procedure Law* 5725 of 1965) committal proceedings have been dispensed with. The accused charged with a felony or misdemeanour 'may at any reasonable time, inspect and copy the investigation material in the possession of the prosecutor' (s.67), and the prosecutor is prohibited from tendering any evidence in court or calling any witness unless the accused has been given a reasonable opportunity to inspect and copy the evidence or statement of the witness during the investigation (s .70). There does not appear to be any obligation on the accused to provide information about his evidence to the prosecution as in Scotland (see paragraph 18 above).

WORKING PAPER AND COMMENTS THEREON

25. The Committee prepared a working paper dated the 21st December, 1968. Copies of the working paper were sent to the Chief Justice and Judges of the Supreme Court, the Law Society, the Law School, the Magistrates Institute, the Justices Association of Western Australia, the Commissioner of Police, the Under Secretary for Law, and other Law Reform Commissions and Committees with which this Committee is in correspondence. In addition, as the question of publication of the evidence at committal proceedings was dealt with in the working paper, a copy was sent to West Australian Newspapers Limited.

26. The Committee received comments from nine magistrates, the Commissioner of Police, and the West Australian Newspapers Limited.

27. It is the unanimous view of the magistrates that procedure by way of preliminary hearing should be available to accused persons who desire them. They all recommend, however, that an alternative shortened procedure should also be available but there was some divergence of opinion as to how this could best be achieved.

28. The editor of the West Australian Newspapers, Mr. G. Richards, confined his remarks to a presentation of arguments for the retention of the present system in relation to the reporting of preliminary hearings. Mr. Richards concluded his submission by saying -

> "The press does not ask for any privilege denied to those of the public who can be present in court, but in the interests of the great majority of people who cannot be present in the public gallery it should not be given any less. Where the public goes the press should go; and what the public can say the press should be able to say. What the public can hear in court and repeat freely outside the court should be allowed to be published at large".

29. The Committee also conferred jointly and discussed its proposals with Mr. O.W. Dixon (the Chief Crown Prosecutor), Senior Inspector T.G. Lee (representing the Commissioner of Police), and Messrs. D. Heenan and T.A.Walsh (representatives of the Law Society) .

RECOMMENDATIONS

30. The Committee is of opinion that the New South Wales system which limits committal without preliminary hearing to cases in which the accused pleads guilty, is too restrictive. The Committee's recommendations which follow, are based on the systems adopted in England and in Tasmania, with some modifications. The variations from the English system were found necessary because the Committee was not prepared to recommend restrictions on publication similar to those enacted in England. The variations from the Tasmanian system have been made in order to conform more closely with the existing practices in Western Australia. In the Committee's opinion its recommendations will also provide a better and more just system for this State.

31. The Committee recommends that the law be amended to permit, subject to prescribed limitations, written statements of witnesses to be admitted in evidence for purposes of the committal, trial and sentencing of persons charged with indictable offences and to permit an accused person to elect to go to trial without any preliminary hearing. The procedure proposed to enable this to be done, together with recommended incidental changes, is outlined in the following paragraphs.

32. The proposed procedure will be as follows -

(a) When the accused is first brought before the court, the magistrate (or justices) will read and explain the charge (or charges) to him but the accused will not be required to plead.

(b) The magistrate (or justices) will then explain the accused's rights to him in the prescribed form (see Appendix to this Report) or in like terms.

Note - If the indictable offence is one that is triable summarily on the accused's election, the procedure after this explanation will only apply if the accused has elected to be dealt with by a superior court.

(c) The magistrate (or justices) will then (before adjourning the hearing) direct the prosecution to serve on the accused and lodge with the court at least four days before the hearing is to be resumed, a copy of the statement of each of the prosecution

witnesses (other than witnesses the prosecution wishes to call to give oral evidence before the magistrate), and a copy or description of each document and of each exhibit which the prosecution intends to tender in evidence.

(d) The magistrate (or justices) will then adjourn the hearing and either remand the accused in custody for a period not exceeding eight days or grant him bail for a period not exceeding thirty days.

Notes - (1) A copy of the statement in the prescribed form explaining the accused's rights to him (referred to in sub-paragraph (b) above) will be given to the accused immediately after the adjournment.

(2) In practice the case is seldom ready to be proceeded with within eight days. The Committee is, however, of opinion that an accused should not be kept in custody for more than eight days at a time without being brought before a court. If the accused is on bail the adjournment may well be for a longer period but to prevent undue delay the Committee recommends that the period of adjournment be limited to thirty days at a time.

(e) When the hearing is resumed the magistrate (or justices) will hear and record the evidence of the witnesses, if any, called by the prosecution to give oral evidence.

Note - The Committee understands that the circumstances in which the prosecution would wish to call witnesses to give oral evidence before the magistrate (or justices) would be rare, e.g. in family murder type cases in which the witnesses may be reluctant to make statements unless summoned before a court.

(f) If any witness be called by the prosecution to give oral evidence, the magistrate (or justices) will warn the accused that if he or his counsel cross-examine any of these witnesses, this will be taken to be an election by the accused for a preliminary hearing.

(g) A copy of the deposition of each witness called by the police to give oral evidence will be provided to the accused who (if at that stage he has not elected to have a

preliminary hearing) will be given such time as the magistrate (or justice) thinks proper for a consideration of the case in the light of the additional evidence.

(h) If no witnesses are called by the prosecution to give oral evidence, or after the accused has been given time to consider the additional evidence, the magistrate (or justices) will ask the accused to elect whether he wants a preliminary hearing or whether he wants to be committed to be dealt with by the Supreme (or the District) Court without any consideration of the evidence by the magistrate (or justices).

(i) If the accused elects NOT to have a preliminary hearing he will be asked to plead to the offence (offences) charged, and then depending on how he pleads, he will immediately be committed to the Supreme (or the District) Court for sentence or trial as the case may be.

` Note -If the accused pleads guilty, the prosecutor in the superior court will be required to outline the facts of the case to the judge in open court. This will be done before the judge considers the question of the proper sentence to be passed.

(j) If the accused elects to have a preliminary hearing it will be conducted in the traditional manner except that the written statements of any witnesses may be tendered as evidence if the opposing party does not object. Such statements will be read aloud in court. If there is any objection or if it is desired to cross-examine, the witness will be summoned to attend to give evidence in the usual way.

(k) An accused will be taken to have elected for a preliminary hearing in each of the following circumstances -

(i) if he states he so elects;

(ii) if he either stands mute or does not answer directly to the question putting him to his election;

(iii) if he cross-examines any witness called by the prosecution to give oral evidence, or requires any witness whose statement has been tendered to be called for cross-examination;

(iv) if he gives or tenders any evidence or calls any witness before the magistrate (or justices);

(v) if he submits that there is no case to answer (i.e. that there is insufficient evidence before the magistrate (or justices) to put him on trial).

33. The Committee recommends the following provisions relating to witnesses and written statements -

(a) That written statements to be admissible be required to be declared by the witness to be true to the best of his knowledge and belief, and signed by him.

(b) That the penalty for a false statement made wilfully or knowingly be seven years. (The penalty for perjury is fourteen years – *Criminal Code* s .125; that for a false statement under oath or solemn declaration is seven years – *Criminal Code* s. 169; and that for other false declarations is three years – *Criminal Code* s.170).

(c) That after the accused has been committed the written statements be of the same force and effect as depositions for purposes of sentencing (see *Criminal Code* s.618) and perpetuation of testimony (see *Justices Act* s .109, *Evidence Act*, s.107).

(d) That written statements of witnesses for the prosecution or for the defence and depositions made before the magistrate (or justices), be made admissible on the trial of or for the purpose of sentencing the accused, provided the opposing side has consented but subject to the discretion of the judge to have any witness whose statement or deposition is tendered, called to give oral evidence. Any written statement or deposition that is admitted at the trial be required to be read aloud in court.

(e) That the attendance of witnesses at court (either Petty Sessions or the Supreme or District Court) if required be enforced in the usual way, i.e. by recognisance if he has already attended at the preliminary hearing, or by summons or subpoena otherwise.

34. **Publicity**. The Committee has sought to avoid the more controversial aspects of the issue of publicity, and at the same time to maintain a balance between the competing interests of the right of the accused in some cases to avoid publicity being given to the case against him before his trial on the one hand, and the right of news media to keep the public informed of proceedings in courts to which the public have the right of access on the other.

35. The procedure proposed in this report will enable an accused person to avoid publicity being given to the case against him before his trial, but only by electing not to have a preliminary hearing. There will then be no proceedings to be reported.

36. In those rare cases in which the prosecution choose to call witnesses to give oral evidence (see paragraphs 32(e), (f) and (g) above), if the accused (or his counsel) does not cross-examine any of the witnesses, the proceedings will be in the nature of an investigation or enquiry, and the Committee recommends that provisions be enacted to ensure that such evidence be not publicised.

37. The Committee, however, also recommends that the provisions of s .57 of the *Juries Act* be extended to all indictable offences. The section empowers a court committing an accused for trial on a capital offence to prohibit the publication of the evidence given at the committal proceedings if in the court's opinion it is in the interests of justice to do so.

38. **Bail**. Although not strictly within its terms of reference the Committee recommends that the *Justices Act* (s .79) be amended to ensure that the committing court has power to grant bail for periods of up to thirty days at a time (and see paragraph 32(d) above).

39. The Committee also recommends that the *Justices Act* (s .114) be amended to enable the committing court to grant bail in appropriate cases to persons who have pleaded guilty and are being committed for sentence. The court can, under the law as it is at present, grant bail to an accused who pleads “not guilty” but not to one who pleads “guilty”. Consequently many an accused person pleads 'not guilty' merely to get time in which to set his affairs in order before he appears before the superior court where he changes his plea.

40. **Outlining of facts on plea of guilty**. To avoid any person being sentenced without any publicity at all being given to the facts of the case, the Committee recommends that provisions be enacted to make it mandatory for the prosecutor in the superior court to outline the facts in open court in all cases in which the accused having elected to be committed without any preliminary hearing, pleads guilty.

MISCELLANEOUS

41. The Committee has, while considering this topic, also been considering the topic of the Summary Trial of Indictable Offences, on which it expects to submit its report shortly. The Committee believes that its recommendations on these two related topics are complementary and, if implemented, will tend to improve the administration of justice, to streamline procedures, to save time and expense and to bring the law more into line with the practice. The Committee also believes that its recommendations have the general support of those whom it has consulted and who are concerned with the practice of the law in this area.

42. The Committee has not yet attempted to draft appropriate statutory provisions but it is willing to do so if required.

B.W. Rowland
Chairman

E. Edwards
Member

C. le B. Langoulant
Member

11 May 1970.

APPENDIX

After the charge is (charges are) read and explained to the accused the magistrate will say -

> You are not required to plead to this charge (these charges) now but I will explain your rights to you.

If the offence is an indictable offence triable summarily, the magistrate will then say -

> This is a charge on which you have the right to be dealt with by the Supreme Court (or a District Court). You may, however, choose to be dealt with in a Court of Petty Sessions by a magistrate (if you plead guilty).
>
> If you wish for time to consider the matter or seek legal advice I shall adjourn the case. Do you want an adjournment?

If the accused elects the superior court either immediately or after the adjournment the magistrate will then continue in the same way as he would for an indictable offence as follows -

> I am going to adjourn the hearing to enable the prosecution to make available to you copies of written statements of its witnesses together with a copy or description of any documents or other exhibits intended to be produced by the prosecution at your trial. These papers will be served on you or your solicitor at least four days before the resumption of the hearing. When the hearing is resumed the prosecution may call witnesses to give oral evidence. If it does, that evidence will be recorded in depositions and you will be provided with copies, and given an opportunity to consider them. You will then be asked to elect whether or not you require a preliminary hearing.
>
> A preliminary hearing is not a trial but an enquiry by a magistrate (or justices) to determine whether there is sufficient evidence to put you on trial for the offence (offences) before a judge and a jury. At this inquiry the prosecution may call witnesses to give oral evidence; it may also offer as evidence the written statements served on you. These statements will be read aloud in court.

You yourself will not be required to say anything, or give evidence though you may do so but whatever you say will be taken down in writing and may be given in evidence at your trial. You may also call witnesses, or offer written statements as evidence.

You will have the right to require that any person whose statement is offered by the prosecution as evidence, be called as a witness and subjected to cross-examination. The evidence of each witness who gives oral evidence at the preliminary hearing will be recorded and if you are committed, then before the trial you will be provided with a copy of this recorded evidence.

If you elect **not** to have a preliminary hearing you will be required to plead to the offence (offences) charged and then, without any further consideration of the matter by me, you will be committed to the Supreme Court (or District Court) for trial, or sentence, as the case may be, on the written statements, documents and other evidence of which you have been given notice. These statements or documents will not be read in court and the evidence will therefore not be publicised before the trial.

The hearing will now be adjourned for days.

Remand/Bail