THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 4

Committal Proceedings

WORKING PAPER

DECEMER 1968

WORKING PAPER
COMMITTAL PROCEEDINGS

TERMS OF REFERENCE

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

2. The related question of extending the provisions enabling the summary trial of indictable offences is being dealt with in Project No. 6. Questions of arrest, remand and bail do not come strictly within the present terms of reference but have been adverted to in earlier discussions on the subject and are dealt with in this paper where they do relate closely.

MOVEMENT FOR REFORM

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

(a) the publicity given to committal proceedings and its possible adverse effects (for the arguments against, see the Tucker Committee Report Cmnd 479);
(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. The movement need be traced no further back in Western Australia than 1962 when the Solicitor-General made some recommendations (see Appendix A).

5. Since 1962 the matter has been the subject of several memos from the Chief Crown Prosecutor and of comments by the Senior Stipendiary Magistrate and by the

Commissioner of Police. An ad hoc committee set up with the approval of the Minister to consider proposals drafted by the Chief Crown Prosecutor and make recommendations, has also discussed the matter (see Appendix B for notes prepared by the Chairman of the Committee).

INTRODUCTION

As part of its first programme the Law Reform Committee has been asked to consider whether the present procedures for the conduct of committal proceedings in the publication of reports thereof should be altered.

The Committee having completed its first consideration of this matter now issues this working paper. The paper does not represent the final views of the Committee.

Comments and criticisms on the paper are invited. The Committee requests that they be submitted by the 1st March 1969.

Copies of the paper are being forwarded 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 Commission of Police
The Under Secretary for Law
Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to the above list.

The research material on which this paper is based is at the offices of the Committee and may be made available on request.

THE PRESENT LAW IN WESTERN AUSTRALIA

6. The present law in Western Australia is contained in Parts IV and V of the *Justices Act 1902-1967*, and is based on the traditional English system of the recording in depositions of evidence given orally before the examining magistrate (or justices) in the presence of the accused, followed by committal if the magistrate is of opinion that the evidence given before him is sufficient to put the defendant on his trial for an indictable offence.

THE LAW IN OTHER JURISDICTIONS

7. In **England** in 1949 the Departmental Committee on Depositions (the Byrne Committee) recommended the retention of the then existing system (see Cmnd 7639) but since 1st January 1968, under the *Criminal Justice Act 1967*, in certain circumstances written statements are accepted in lieu of depositions and committal may follow without consideration of the evidence by the magistrate (see Appendix C for a brief summary of the committal provisions of the Act).

8. The provisions of the English Criminal Justice Bill (which became the Act of 1967) were considered by the Western Australian ad hoc committee (referred to in para. 5 above) to be "not acceptable". The Committee did not give reasons (see Appendix B).

9. In **Scotland** there are no committal proceedings at all. Each prosecution witness is "precognized" privately, the defendant being neither present nor represented. With the indictment the defendant 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.

10. In **New South Wales** in 1955 s.51A was introduced into the *Justices Act 1902* (by Act No. 16 of 1955). The section 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.

11. The New South Wales system has received some support in this State (cf. Appendices A and B).

12. In **Tasmania** the *Justices Act 1959* was amended by Act No. 33 of 1963. The amending Act provides for immediate committal pleas of guilty to charges other than of capital offences (s.63 - cf. N.S.W. s.51A, para. 10 above). 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 (s.56A) and if he does not so desire he is to be immediately committed (s.62).

13. The Act also provides for a statutory declaration of any witness to be admitted in lieu of oral evidence in committal proceedings 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" (s. 57(2)).

14. The committal proceedings may still take the form either wholly or in part of traditional depositions taken on the giving of oral evidence.

15. The system has (we are reliably informed) so far worked with success in Tasmania. The Solicitor-General's Department provides the defendant with copies of statements of witnesses. These are usually the statements made by witnesses to police. The number electing depositions in the traditional form during 1966 and 1967 were as follows -

	1966	1967
Number committed for sentence -		
(a) on proofs (i.e. statements) only	127	133
(b) after requests for depositions	2	-
	129	133
Number committed for trial -		
(a) on proofs only	58	56
(b) after requests for depositions	59	103
	117	159

Though the figures indicate an increase in the number requiring the taking of oral evidence on pleas of not guilty there has been a considerable saving of time of magistrates, prosecutors and defence counsel, and of the police and other witnesses.

The system has also resulted in the earlier hearing of cases, both on pleas of guilty and when contested.

16. 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 may not produce any evidence in court or call 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 para. 9 above).

THE ARGUMENTS FOR AND AGAINST THE RETENTION OF COMMITTAL PROCEEDINGS

17. In the words of the Byrne Committee, "the proper taking of the depositions of witnesses by oral evidence given in the presence of the accused is the bedrock of our system of administering justice in criminal cases" (Cmnd 7639, para. 55) and the arguments for the retention of the traditional form of committal proceedings extracted from the report (see also Napley, *A guide to Law and Practice under the Criminal Justice Act 1967* p.15).

18. The arguments may be summarized as follows -

(a) The committal proceedings afford a protection to the individual against having to face a jury trial when there is insufficient evidence to support the charge against him.

This argument is less forceful now than it may have been in the past. The Tucker Committee pointed out (see Cmnd 479, para. 7) that the courts commit in all but 3% to 4% of preliminary hearings. The statistics maintained in the Statistical Register of Western Australia do not provide information from which similar particulars for this State may be extracted but there is no reason to suppose that the number of people so "protected" is great.

(b) The preliminary proceedings serve to get the evidence into a more acceptable form and to exclude some of the inadmissible evidence.

(c) They also 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.

(d) The publicity may bring forth new witnesses and fresh evidence.

19. The arguments against have already been adverted to in para. 3 above.

POSSIBLE REFORM IN WESTERN AUSTRALIA

The Scottish and Israeli systems

20. The adoption of either of these, or of some modification of either, would completely overcome the controversial issue of publicity given to committal proceedings, and would also satisfy all the arguments in favour of reform, but the substantial weight of opinion would seem to be against the complete abolition of committal proceedings as being too drastic or at least premature.

New South Wales system

21. (a) There would probably be little if any objection to the introduction of provisions along the lines of s.51A of the New South Wales *Justices Act* (see para. 10 above, but cf. Appendix A), substituting death or life imprisonment (or death only?) for "penal servitude for life".

It has been suggested that the provisions requiring immediate committal on pleas of guilty should be limited to offences carrying penalties of less than fourteen years, but this would exclude "breaking and entering", the most prevalent of the offences for which committal proceedings are now held (see working paper on Project No.6, para. 31).

(b) The restriction of the provisions to offences other than those punishable with death or life imprisonment would avoid cases like Sokel in England in which the accused "was sentenced to life imprisonment after a hearing lasting one minute and at which no details of his offence were given" (see West Australian, 30th March 1968).

(c) It may be advisable to ensure expressly that a statement of the facts is made in open court in all cases before the accused is sentenced and that the accused is given sufficient opportunity to dispute any facts or other material on which the sentence is to be based.

(d) To get provisions similar to those operating in New South Wales to work effectively, it may be desirable to permit the committing court to grant bail in appropriate cases when the accused pleads guilty and is committed for sentence only. Since the court has no power to grant bail when the accused pleads guilty, the tendency is for the accused to plead "not guilty" even though he does not intend to go to trial. In 1963 (to 5th November) for example, out of 249 persons committed from the Perth Police Court only 20 had pleaded guilty before committal (cf. figures in Tasmania, para. 15 above). It is reliably estimated that on average about 70-80% of the persons committed in fact plead guilty.

(e) It may also be desirable, especially when the accused is not represented, to enable the magistrate to require evidence to be given and to refuse to accept the plea of guilty (and see Appendix A). Greater flexibility may also be needed enabling the accused to change his plea (see Code, s.618 and *R. v. Popovic* [1964] Qd.R. 561; *R. v. Taylor* [1967] N.Z.L.R. 577).

English and Tasmanian systems

22. (a) Opinion would seem to be more evenly divided on the question of whether reforms should go beyond the New South Wales system and adopt measures along the lines of the English *Criminal Justice Act 1967*, or the Tasmanian *Justices Act 1963*.

(b) The main issue is whether the Court on the preliminary hearing should be empowered to accept written statements of witnesses instead of oral

evidence in the presence of the accused. Both statutes contain provisions in effect requiring the concurrence of the accused to such evidence being admitted. The provisions are permissive and flexible. The proceedings may be wholly traditional, wholly on written statement: or partly on each.

(c) The substantial objection is that the system could nevertheless work to the detriment of the accused in practice. It: has been said that it might "work without injustice if every accused had a solicitor at his elbow but not otherwise". In its short history the Tasmanian statute as far as we know does not seem to have operated so (but cf. *R. v. Rowley*, The Times, 31 July 1968).

(d) Such a system would probably be more efficient and time-saving generally though it might possibly throw a greater burden on the Crown Law Department and the Police as statements might have to be prepared with greater care.

The Question of Publicity

23. (a) If no oral evidence at all is given during the committal proceedings the question of publicity does not arise (see also para. 20 above).

(b) In other cases, the alternatives are -

(1) The present law could be left unchanged. The position is covered by s.66 of the *Justices Act 1902-1967* (see also s.65), s.57(2) of the *Juries Act 1957-1961*, and s.23 of the *Child Welfare Act 1947-1967*.

(2) Section 57(2) of the *Juries Act* which at present applies only to capital offences and murder, could be extended to other indictable

offences and possibly criteria could be laid down for determining "the interests of justice" (see para. 7 of Appendix B).

(3) Publication could be limited to certain particulars as in the English *Criminal Justice Act 1967* (see para. 7 of Appendix C).

(c) Note also the publicity issue relating to the offence of demanding money by threats, dealt with in the Bill at present before Parliament (Code, s.397 and proposed s. 39 9A).

Remand and bail

24. (a) The question of bail on arrest is outside the ambit of our terms of reference.

(b) The provisions relating to remand and bail during committal proceedings and on committal are contained in the *Justices Act 1902-1968*, ss. 79-83, 114-121A.

(c) Suggested reforms include -

(1) Power to the court to adjourn and grant bail for periods in excess of eight days at a time. The time could be extended to fifteen days or even indefinitely. The only objection would seem to be that the pressure would be taken off the prosecution to avoid delay.

(2) Power of the court to remand in custody for periods in excess of eight days. In principle there could be greater objection to this. If the period is to be extended a limit should in any event be fixed.

(3) Power of the court on committing for sentence to grant bail. There could be objection to this if the offence was one for which imprisonment was likely to be the penalty, but the provision would of course be enabling only, leaving the matter to the discretion of the court (see also paras. 21 and 22 above).

(4) Consideration might also be given to providing by statute in all cases in which the accused is remanded in custody either that his sentence commence from the date on which he was first taken into custody or that any period during which he was in custody be taken into consideration when his penalty is being decided. It should not be overlooked however that prisoners on remand are not regarded as prisoners under sentence.

APPENDIX A

SOLICITOR-GENERAL'S RECOMMENDATIONS

(Extract from the Solicitor-General's memo dated
12th November 1962 - C.L.D. File No. 7335/62 Fol. 12-13).

"5. Where the accused is defended by counsel and desires to plead "guilty", it is suggested that the magistrate should be empowered to accept as evidence any witness's proof which is admitted by the Defence or is verified either by statutory declaration or in Court on oath. However, even in this case it may be that the Defence wishes to object at the trial to certain of the evidence, e.g. evidence of similar acts. Perhaps, therefore, even in the case of a plea of "guilty", any admission in the committal proceedings of a proof as evidence should be for the purposes only of the committal proceedings, thus preserving the right of the accused to challenge any portion of it at his trial.

6. Where the accused desires to plead "guilty" but is not represented by counsel, it seems that there should be some further safeguard for the protection of the accused, since in fact the Crown may not be able to prove every ingredient of the defence beyond reasonable doubt, e.g. proof of identify. In such a case, therefore, it is suggested that the magistrate should be empowered to accept the proof of a witness verified on oath in Court; a copy should then be handed to the accused who should have the right to object to any portion of it. The magistrate could then decide whether or not to require the witness to give oral evidence in Court or to suppress publication of the portion objected to. However, the magistrate should be empowered to reject a plea of "guilty" or to accept it at any stage of the proceedings.

7. Where the accused intends to plead "not guilty" it is thought that in the main the same procedure could be followed, except that the magistrate should be more careful to suppress the reading out in Court of any portion of a witness's proof to which it seems likely that objection may or should be made at the trial, whether on the ground of inadmissibility or untruth.

8. It is suggested that the above amendments to procedure and powers would go a long way towards removing the objections to the existing practice. It would also obviate the necessity for legislation along the lines of section 51A of the *Justices Act* of New South Wales. While this latter section would no doubt operate satisfactorily in the great majority of cases, nevertheless, it seems to have possible defects as follows -

(a) It may be that the evidence against the accused can establish a more serious offence than that with which the accused is charged. It is submitted that in such a case the Crown should not be prevented from preferring the more serious charge.

(b) If the trial judge considers that the evidence "does not support" the charge, he makes an order requiring the magistrate to complete the committal proceedings. However, the Crown may independently have the evidence which would support either the actual charge or another charge. In any event, there would be further delays in any case where an order is made by the judge for further hearing before the magistrate."

APPENDIX B
Ad hoc Committee Chairman's Notes

(Notes of ad hoc Committee set up to consider proposals regarding committal proceedings).

1. "That hand-up briefs be prepared and that we adopt the system at present operating in New South Wales.

2. That the provisions contained in the Criminal Justice Bill 1966 of the United Kingdom are not acceptable.

3. That hand-up briefs apply only where the accused pleads guilty.

4. That whenever the hand-up brief is tendered before the plea is taken the prosecutor must read all statements in open court.

5. That the Magistrate on a committal following a hand-up brief have power to grant bail to the date of trial or the commencement of the session.

6. That all other indictable offences should be prosecuted in the same fashion as at present existing. In other words that in all cases where a plea is not forthcoming or a person indicates his intention to plead not guilty normal committal proceedings will be held.

7. That generally no restriction relating to publicity should occur except that the provision in s.57 of the *Juries Act* should apply to committals where viva voce evidence is given, subject, also to some criteria being expressed to define "interests of justice".

The Committee suggests the following criteria as a starting point -

(i) where the evidence is offensive on moral grounds, for example, where women or children are involved in cases of Rape or Indecency, then the court should have the power to suppress names and details.

(ii) to suppress ghastly details in cases of Murder and Bodily injury,

(iii) in cases where evidence is led which is found to be inadmissible or where some doubt exists as to its admissibility, then the court may similarly suppress publication of it - examples which spring readily to mind being evidence of drinking in Manslaughter cases, evidence of contested admissions, etc.,

(iv) where one or more of the number of suspects has not been apprehended at the time of the committal to suppress publication of the whole or part of the proceedings."

APPENDIX C
Criminal Justice Act 1967 (Eng)

Brief summary of provisions relating to committal for trial.

(For an assessment of the provisions see Napley, *A Guide to Law and Practice under the Criminal Justice Act 1967*).

Written statements as evidence.

1. The Act provides for written statements, tendered by the prosecution or defence, to be admitted in evidence in committal proceedings "to the like extent as oral evidence to the like effect" subject to certain conditions.

2. 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.

3. 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.

4. Note - under the Act written statements are also made admissible at the trial provided the copies are served before the hearing and not objected to within seven days of service.

Committal on written statements alone.

5. 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 (or one of them) is not legally represented or a submission is made that there is insufficient evidence to put the accused on trial.

Other cases

6. In other cases so much of the written statements as is admitted is to be read aloud and considered by the Court with any other evidence.

Publicity

7. Note - the Act restricts publicity of reports of committal proceedings to certain particulars which are listed.