PART 1

COMMITTAL FOR TRIAL AND PRE-TRIAL DISCLOSURE

INTRODUCTION

The following five papers were presented at a public seminar held by the Institute of Criminology at the Sydney University Law School on 11 April 1990, under the above title. The seminar was convened to allow public debate on proposals by the New South Wales Attorney General Mr John Dowd for the reform of the process of committal for trial on indictment.

The essence of the proposals, as stated in a Discussion Paper issued by the Attorney General in May 1989, was that "the decision whether to commit a person for trial will no longer be made by a Magistrate but by the Director of Public Prosecutions". Cross-examination of witnesses before the Magistrate was, however, generally to be retained. Full disclosure by the prosecution before trial was also to be required, both in indictable and summary matters.

The Attorney General in his paper, presented the changes as evolutionary rather than radical. He saw the removal of the Magistrate's decision as to whether to commit for trial as a natural consequence of the creation of an independent statutory prosecution agency, noting that the Director of Public Prosecutions already has the power to "overrule" a Magistrate's committal decision through "no bill" and *ex officio* indictment procedures. The Attorney saw the proposed changes as "an immense improvement" on the present system.

The defence of committal proceedings in their current form was undertaken by Mr Peter Hidden, QC, Senior Public Defender, and Mr Greg James, QC, a leading advocate in the criminal courts. Mr Hidden noted high judicial support for committal proceedings as a protection for the accused and emphasised their value in enabling an assessment of the strength of the Crown evidence, in being conducted in public, and in providing a committal decision by a person independent of the prosecution. Mr Hidden argued for a more efficient use of the "paper committal" system and for legal aid for defendants at committal proceedings rather than the abolition of committal proceedings as we know them.

Mr James argued that the Attorney General's proposals would in effect remove all filtering functions except the prosecutor's own decision whether to prosecute or not. It was suggested also that, without proper committal, when cases came on for trial the defence would no longer be aware of the true nature of the prosecution case and, often enough, neither would the prosecution. This would result in applications for particulars and

directions hearings in the court of trial causing much greater delay and cost than at present. Mr James finally suggested that, as well as retaining public, independent screening of all cases for trial on indictment, a Criminal Procedure Code covering the period from apprehension to final appeal should be introduced based on the requirements of pleading, particulars, discovery, and so on, in civil procedings.

Mr John Bishop, previously in academe and now a practising barrister, traced the history of committal proceedings and noted that their primary purpose was the screening out of weak cases. Mr Bishop then referred to study he had supervised and which had been published in 1989 under the title *Prosecution Without Trial* which concluded that committal proceedings in New South Wales were not serving that purpose. Mr Bishop concluded that the proposal to abolish committal proceedings was a "common sense response to the demonstrated weakness of committal proceedings in this State". It was also consistent, he said, with "the mood in the common law world". Mr Bishop was, however, critical of the proposal to retain cross-examination of witnesses before a Magistrate as this would prevent any reduction in delays, one of the benefits claimed by the Attorney General for his proposals.

Mr McKillop, previously a practising barrister and now in academe, examined committal for trial and pre-trial disclosure in selected overseas jurisdictions, particularly England, Scotland, France and West Germany, but also New Zealand, Canada and the United States. He also examined reform proposals in some of those jurisdictions. The position in those jurisdictions, current and proposed, generally involved the judiciary, either at magistrate or trial court level, deciding whether a defendant should stand trial on a serious charge. The only exception was Scotland, where the procurator fiscal exercised the power to commit for trial. Full pre-trial disclosure by the prosecution in indictable cases was also found to be generally required in those overseas jurisdiction, not least in France and West Germany where access to the dossier containing the results of the investigation was available to the legal representative of the accused.

At the time of this seminar the Bill incorporating the Attorney General's reform proposals had not been introduced into the New South Wales Parliament. This happened a few weeks after the seminar. The Bill was, however, rejected by the Legislative Council, where the Government does not have a majority. Reference was made by speakers in the debates both in the Legislative Assembly and the Legislative Council to the papers presented at the seminar and to the subsequent discussion on the papers. At least two of the Members of Parliament, in addition to the Attorney General, attended the seminar. It seems clear that the New South Wales Parliament as presently constituted will not be abolishing committal proceedings. Whether full pre-trial disclosure by the prosecution is to be persevered with by the Attorney General remains to be seen.

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