OUTLINE OF FIRST ISSUES PAPER

CRIMINAL PROCEDURE

ITRODUCTION

GS IN COURTS
ESSIONS

NEW SOUTH WALES
LAW REFORM COMMISSION

OUTLINE OF FIRST ISSUES PAPER

CRIMINAL PROCEDURE

GENERAL INTRODUCTION
AND
PROCEEDINGS IN COURTS OF PETTY SESSIONS

1982

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New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman:	Professor Ronald Sackville
Deputy Chairman:	Mr. Russell Scott
Full-time Commissioners:	Mr. Denis Gressier Mr. J.R.T. Wood, Q.C.
Part-time Commissioners:	Mr. I.McC. Barker, Q.C. Mrs. B. Cass Mr. J.H.P. Disney The Hon. Mr. Justice P.E. Nygh The Hon. Mr. Justice Adrian Roden The Hon. Mr. Justice Andrew Rogers Ms. P. Smith Mr. H.D. Sperling, Q.C.
Research Director:	Ms. Marcia Neave

Members of the research staff are:

Mr. Paul Garde (until 29 November 1982)
Ms. Ruth Jones
Ms. Philippa McDonald
Ms. Helen Mills
Ms. Fiona Tito

The Secretary of the Commission is Mr. Bruce Buchanan and its offices are at 16th Level, Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. 2000.

Preface

The Issues Paper and This Outline

This is an Outline of the Commission's first Issues Paper on Criminal Procedure. The Paper was published in the course of the Criminal Procedure Inquiry presently being undertaken by the Commission at the request of the Attorney General and Minister for Justice, the Honourable F.J. Walker, Q.C., M.P. The relevant terms of reference are reproduced in the appendix to this Outline.

A primary purpose of the Issues Paper is to provide background information for the guidance of people and organisations wishing to make submissions to us. Members of the Commission have formed no final view on any of the issues raised, or the tentative suggestions made, in the Paper. Copies of the Paper may be obtained from the Commission. Not everyone, however, will have the time or inclination to read all of it. It is for this reason that we publish this brief Outline.

The Criminal Procedure Division

Pursuant to section 12A(1) of the Law Reform Commission Act, 1967, the Chairman of the Commission has constituted a Division of the Commission for the purpose of this reference. The members of the Division are:

Chairman:	Professor Ronald Sackville
Deputy Chairman:	Mr. Russell Scott
Full-time Commissioners:	Mr. Denis Gressier Mr. J.R.T. Wood, Q.C.
Part-time Commissioners:	The Hon. Mr. Justice Adrian Roden Mr. I.McC. Barker, Q.C.

Dr. G.D. Woods, Q.C., Director of the Criminal Law Review Division of the Department of the Attorney General and of Justice, and Mr. W.J. Robinson, Deputy Under Secretary of the same Department, are Principal Consultants to the Commission for the purposes of this reference.

Invitation for Submissions

The Commission invites submissions on the issues raised, and tentative suggestions made, in this Paper or on any aspect of the reference.

Submissions should reach us by 1 MARCH 1983. All inquiries and comments should be directed to:

Mr. Bruce Buchanan,
Secretary,
New South Wales Law Reform Commission,
Box 6, G.P.O.,
SYDNEY, N.S.W. 2001.
Telephone: 238 7213

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Outline of Issues Paper

INTRODUCTION

1. This Issues Paper is the first to be published in the course of the Commission's reference

> "to inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings, and matters incidental thereto ..."

The Paper is divided into three Parts.

2. The first Part, chapters 1-4, is introductory. Chapter 1 is mainly concerned with the need for our terms of reference; chapter 2 with some of the idiosyncratic language of criminal procedure; chapter 3 with the structure of the criminal courts system in New South Wales; and chapter 4 with how criminal proceedings are initiated, and the procedures which then come into play.

3. The second Part of the Paper, comprising chapters 5 and 6, outlines our general approach to this reference. Chapter 5 is intended to open wide ranging debate about the principles which ought to underpin criminal procedures. Chapter 6 states our present view on the scope of the review of criminal procedure we shall undertake in the course of the reference. We list there, in broad terms, not only our general objectives but also our long term, short term, and medium term objectives. In addition, we speak of our work program.

4. In this Paper, we are concerned mainly with procedures in Courts of Petty Sessions. A second Paper will consider the period between committal and trial in indictable matters, and trials on indictment in general; a third Paper will consider matters relevant to sentencing; and a fourth Paper will consider appeals.

5. We stress in chapter 6 that we do not propose to defer making reports on this reference until after all the Issues Papers have been published. We will invite submissions on the subject matter of each Issues Paper as it is published, and we expect to make reports from time to time before the last of our Issues Papers, dealing with our long term objectives, has been produced.

6. The third part of this Paper, chapters 7-10, is concerned solely with Courts of Petty Sessions. We consider delays in those Courts, their jurisdiction, and some of their procedural problems. Finally, we examine the subject of committals for trial.

7. We concentrate on Courts of Petty Sessions at this early stage of our work on this reference for two main reasons. First, most of the criminal court work of New South Wales is done in these courts. And, secondly, their work-load at any given time influences the work-load of the entire criminal courts system. Almost all cases dealt with in the criminal jurisdictions of the Supreme Court and the District Court are first dealt with in Courts of Petty Sessions. In short, they constitute a pipe through which most criminal work is conveyed; if the pipe is obstructed, the work cannot flow as it should.

8. Chapters 2, 3 and 4 are descriptive and, for the purposes of this Outline, we make no further reference to them.

CHAPTER 1: OUR TERMS OF REFERENCE

9. We believe that our reference on criminal procedure is timely. Today, both legislatures and courts are coming under increasing public criticism for failing to provide quicker, cheaper, and more efficient systems of criminal justice. There is, of course, no general agreement as to what should be done. Even where inadequacies are acknowledged, the remedies proposed vary with the perspectives of the critic. In turn, these perspectives reflect different ideologies. A civil libertarian, for example, may have views different from those of a law enforcement agency on the desirability of a pre-trial procedure designed to discover details of a defendant's case. We must keep factors of this kind in mind throughout the course of our work on this reference. We must also keep in mind the view that criminal justice systems need to balance competing demands. There are, for example, demands for effective law enforcement and demands for the maintenance of individual rights and freedoms. Both need to be respected, and a proper balance between them must be struck. If changes in procedures interfere with that balance, the effectiveness of law enforcement agencies may be diminished or the protection accorded to the liberty of the individual may be eroded.

10. In speaking of the need for our reference, we ask, by way of illustration, some very general questions. The questions are:

- Is our criminal courts system coping adequately with its work-load of serious criminal cases?
- Can our existing procedures cope adequately with "white collar" and computer crime?
- Is the law relating to criminal procedure readily accessible to those who need to understand the system?
- Can juries, without additional assistance, cope with the complex laws they are called upon to apply?

CHAPTER 5: SOME GENERAL PRINCIPLES

11. Some principles are regarded as fundamental to, and an essential part of, our criminal law. They are commonly referred to as the presumption of innocence, the standard of proof, the right to silence, and the privilege against self-incrimination. Other established rules, as distinct from these principles, are under challenge. They include the following:

- An accused person at his or her trial on indictment may make an unsworn statement without becoming a witness and liable to cross- examination.
- If an accused person opts not to give evidence, no comment on that fact may be made either by the trial judge or by the crown prosecutor.
- The spouse of an accused person is not a compellable witness.
- No comment may be made upon an accused person's failure to call his or her spouse.

12. If these rules, or any like them, are to be changed, by reference to what tests or criteria should specific changes be proposed?

13. Is a general approach, based on balancing the need to protect the innocent from unacceptable risk of wrongful conviction against the need to seek "efficiency" in the criminal justice system, a proper approach? In this context, "efficiency" is used not only in the sense of avoiding unnecessary delay and expense, but also in the sense of facilitating the conviction of the guilty.

14. Is it feasible to go beyond "the balance" referred to and establish a framework of first principles as a means of measuring the adequacy of existing and proposed procedures, for example, by the use of criteria such as "fairness", "openness and accountability", and "efficiency"?

15. Criteria of fairness, openness and accountability, and efficiency may be relevant at different stages of our work on this reference, although not all of them need be relevant at the same stage. Considerations of efficiency are, for example, of importance in determining how any re-organisation of indictable and summary work might proceed. Considerations of fairness are also of basic importance in determining the procedures to be followed throughout a trial. On the other hand, considerations of accountability could not be allowed to impair judicial independence. In any event, criteria of this kind lack precision. What constitutes fairness in a particular instance may call for most detailed analysis and may attract vigorous debate. Perhaps, in the end, they add nothing to the instinctive process implicit in striking a balance between competing values. Nonetheless, criteria of this kind illustrate at least the possibility of framing broad alternative guidelines for evaluating the whole of criminal procedure or some of its constituent parts.

16. In asking the questions listed in paragraphs 13 and 14 above, we are seeking to encourage comment and submissions on the principles which underpin, or ought to underpin, criminal procedure, and its reform.

CHAPTER 6: THE SCOPE OF OUR REVIEW

I. Introduction

17. When considering criminal procedure it is necessary to appreciate that procedural rules cannot be viewed in isolation. They necessarily interact, not only with the substantive law, but also with those individuals and organisations which are the agencies through which that law is applied. Accordingly, criminal procedure should be seen not as an entity in itself but as an integral part of the criminal justice system.

II. Criminal Procedure and the Criminal Justice System

18. The expression "the criminal justice system" is a convenient and short description of a complex whole. Whether the use of the term "system" is justified at all is a matter for debate, and has been debated elsewhere. Criminal justice in Australia has been described by one commentator as "made up of a random and somewhat bizarre collection of individuals and agencies without any organised or interrelated premises or directives".

19. A number of different methods of studying "the system" have from time to time been proposed and we do not rule out any particular approach. At this stage, however, we prefer to consider the decision-making process involved in making the system work, and the impact of any procedural rule upon the parts of the system which may be affected by it. We would

consider it unwise, for example, to contemplate a rule requiring committal proceedings to be completed within a specified time after an accused person's arrest, without assessing the likely impact of the rule on police investigators, prosecutors, and the administrators of Courts of Petty Sessions.

III. Objectives: General

20. Our terms of reference enable us to consider proposals which would have far-reaching consequences for the system as a whole, and others which would involve no more than a minor amendment to an existing rule. Clearly, proposals of the former type will only mature into recommendations after a great deal of deliberation and consultation, while those of the latter type are capable of being given effect much more quickly.

21. Examples of proposals with far-reaching consequences include those which may take some offences out of the criminal justice system altogether and those relating to a possible restructuring of statutes concerned with criminal procedures and related matters. Examples of proposals for minor amendments in existing rules include those relating to the wording and the service of summonses.

22. We believe it appropriate that what we have in mind as long term objectives be made known at this early stage. We expect later to receive detailed submissions concerning them but their statement now puts our current work into context, and enables any who wish to do so to make submissions in general terms.

IV. Objectives: Long Term

23. The matters with which we propose to deal in the long term can conveniently be considered as potential answers to a series of questions. These include:

- What offences should attract the rules of criminal procedure?
- Should there be a standard method of defining those offences?
- How, and where, ought provisions relating to criminal procedure be found in the law?
- By whose decision, made in what circumstances and upon the basis of what criteria, are people to be charged?
- In what courts are these matters to be determined, and how should those courts be structured?
- What roles should be played by the various agencies within that court system, and, in particular, should there be a clearer separation of functions between prosecution and courts?

V. Objectives: Short and Medium Term

24. It seems that there is general agreement that certain rules are in need of change. Section 41(6) of the Justices Act, 1902, for example, is criticised as providing inconsistent criteria upon which magistrates, are to base their decision whether to commit for trial. This matter (considered in chapter 10) may be dealt with by a "short term" recommendation despite the

long term objective to review the whole system of discretionary decisions to prosecute and to send for trial.

25. In the medium term our objective is to isolate some general areas of major concern and, as soon as possible, to make recommendations with regard to them. Examples include committal proceedings and appeals from magistrates.

CHAPTER 7: COURTS OF PETTY SESSIONS: DELAYS

I. Introduction

26. In assessing the effectiveness of any criminal justice system, a criterion of major importance is the absence of unreasonable delay in the disposition of cases passing through the system. The aphorism "justice delayed is justice denied" is especially relevant in the context of Courts of Petty Sessions. As indicated already, most of the judicial work arising out of the criminal law of this State is done by magistrates sitting in these courts. Between them, about 100 magistrates deal with more than 600,000 charge and summons cases a year. The cases range from the trivial to the important; from parking offences to committal proceedings in respect of alleged murders.

27. We stress that we are not using the word "delays" in any pejorative sense. We recognise that some delays are inevitable and that others are positively beneficial. Both the prosecution and the defence must be allowed reasonable time to gather evidence, to organise the attendance of witnesses, and, generally, to prepare their respective cases. Parties and their witnesses are often ill, or otherwise unavailable for good reasons. In short, we recognise that delays are not necessarily bad.

II. Proper Delays

28. A preliminary question is what is a proper delay in disposal of a criminal case in a Court of Petty Sessions?

29. One experienced magistrate, in speaking of delays in criminal proceedings in magistrates' courts in New South Wales, has said:

> "In practice, custodial cases [those involving people in custody awaiting trial] are required as a matter of justice to proceed as soon as the parties are ready to proceed. In non-custodial cases, a delay of up to eight weeks is not regarded as serious, although undesirable, but any delay in excess of twelve weeks is regarded as serious.

30. The distinction drawn between custodial and non-custodial cases is important and we understand that in practice every possible priority is given to custodial cases. But, given this priority, is the present position satisfactory? We are also concerned about delays in non-custodial cases. Is a delay of up to eight weeks to be regarded as not serious? Is only a delay in excess of twelve weeks to be regarded as serious? We specifically invite submissions on what is a proper delay in routine non-custodial cases.

31. We also list what we see as being the most common causes and effects of existing delays and we ask whether we have accurately identified them. And, for the purpose of reducing delays, we raise the question whether magistrates should be given additional powers to control proceedings in Courts of Petty Sessions.

CHAPTER 8: COURTS OF PETTY SESSIONS: JURISDICTION

32. This chapter is concerned with four main issues and foreshadows a later consideration of one other issue.

I. Infringement Notices

33. Parking and many other minor traffic offences are dealt with by a "ticket" system or, as it is more commonly known, an "infringement notice" system. Consideration is now being given by Government to an extension of that system whereby infringement notices may be enforced otherwise than by court action. The new system will involve the use of what are termed "self-enforcing" procedures.

34. Subject to a defendant having the right to elect to have the proceedings disposed of by a magistrate in the usual way, we see many advantages, and few disadvantages, in extending the scope of this scheme to other minor offences, particulary those of a regulatory nature. When we speak of "other minor offences", we have in mind offences such as littering, not registering dogs or not paying a public transport fare. There is, of course, scope for considerable debate about how far the concept of "a minor offence" should extend. Different views may well be held as to what offences are appropriate for an infringement notice procedure.

35. The principal advantage would be that much of the time of magistrates would be freed for more important matters. It has also been suggested that the cost of enforcement would be reduced, and that with enforcement proceedings likely to be closer in time to the commission of the offence, there would be greater prospects of the penalty being recovered.

36. The main disadvantage of the suggested infringement notice procedures is the possibility that a defendant might first become aware of the issue of a Warrant of Commitment only when a constable arrives to execute the Warrant.

37. Issues on which we invite comment are:

- Whether any particular provisions are required to make the procedure more efficient or more equitable.
- Whether such procedures should be extended beyond parking and minor traffic offences and, if so, to what offences, or categories of offences, should they be extended.
- Whether, even if the "self enforcing infringement notice" procedures are not adopted, the present infringement notice system ought to be extended to other offences and, if so, to what offences.

II. Indictable Offences Which may be Tried Summarily

38. Some indictable offences may be disposed of summarily in Courts of Petty Sessions. Most, but not all, of these offences are listed in either section 476 or section 501 of the Crimes Act, 1900. Those listed in section 476 may be dealt with summarily only if the defendant consents and the magistrate is satisfied that the case is one which may properly be disposed of summarily. On the other hand, when a defendant is charged under section 501 with an offence listed in that section, it will be disposed of summarily whether the defendant consents or not.

39. The issues we raise in the context of indictable offences which may be tried summarily vary in complexity. Section 476 offences may be dealt with summarily only with the consent of the defendant, and no defendant would be deprived of the right to opt for trial by jury if the scope of that section were enlarged. The position is otherwise where the decision to proceed summarily is made by the prosecuting authority and the consent of the defendant is not required. Any enlargement of the scope of section 501 would deprive defendants charged under that section with the right to opt for trial by jury.

40. Issues raised in the context of section 476 are:

- Should there be any change in the method of specifying the offences to which section 476 applies, and in particular, should the legislation continue to list specific offences or should the application of the section to any offence depend simply upon the prescribed penalty or some other criterion?
- Should any of the offences now subject to the provisions of the section be removed and should any others be included?
- If a property value limitation is retained, is the present limitation appropriate, and if not, what change should be made?
- Are the present penalty limitations appropriate, and if not, what change should be made?

41. Issues raised in the context of section 501 are:

- Is the present property value limitation in section 501 apropriate, and if not, what change should be made?
- Are the present penalty limitations in section 501 appropriate, and if not, what change should be made?
- Should further indictable offences be made triable summarily without the consent of the defendant?

III. Indictable Offences which Ought to be Summary Offences

42. We have asked whether there are any offences now triable only on indictment that ought to be made triable summarily, either with the consent of the defendant or in the discretion of the prosecutor. A further, and related, question is whether there are any indictable offences that ought to be triable only in a summary manner.

IV. Trial by Judge Alone

43. In New South Wales, the Supreme Court (Summary Jurisdiction) Act, 1967, permits a defendant to choose to be tried by a Supreme Court judge alone but only in respect of a limited class of offence, mainly those involving alleged conspiracies and "white-collar" crime, and only if the prosecution has elected to proceed under that Act. There is no comparable provision in respect of other indictable offences.

44. Should the right to choose trial by a judge alone be extended to other indictable offences, and, if so, to which offences, and which procedural rules should then apply?

V. Trial on Indictment Leading to Conviction of Summary Offences

45. It is a long term objective to consider a proposal for a standard method of prescribing offences, one of the consequencs of which would be to enable juries at trials on indictment to return alternative verdicts by which they acquit on the indictable charge and convict of a summary offence. The intention is that this would do away with the necessity for a separate summary trial in respect of "backup" charges. The details of that proposal will be considered in a later Issues Paper. For the present, we invite comment on the advantages of the proposal in general terms and on any objection in principle that may be seen to it.

CHAPTER 9: COURTS OF PETTY SESSIONS: PROCEDURE

I. Introduction

46. Some of the proposals made in this chapter are at such a level of simple practicality as to approach the trivial. But, in matters of practice and procedure, the simplest of rules can have far-reaching consequences. In dealing with matters of this kind, we often make tentative suggestions for change rather than raising issues. In referring to parts of chapter 9, we use the Roman numerals which correspond with the headings used in that chapter.

II. The Service of Process

47. The provisions of the Justices Act, 1902, as to the persons by and upon whom, and the place at which, service is to be effected may be unduly restrictive and sometimes lead to inconvenience and delay. We raise a number of issues and make some suggestions.

III. Representation

48. Should persons who are not legally qualified be permitted to represent parties to criminal proceedings in Courts of Petty Sessions?

49. To what extent is the "McKenzie friend" procedure (that is, the use of a friend of a defendant to assist the defendant in court with advice and notetaking) seen by magistrates and others as an abuse of the procedures of the court? If it is seen as an abuse, what safeguards might be prescribed to prevent abuse?

IV. Pre-Trial Procedures

1. Introduction

50. We believe that it is essential to consider the desirability of establishing a system of pre-trial procedures for summary trials. By "pre-trial procedures", we mean steps taken before the hearing, either between the parties without the intervention of the court, or, where necessary, by order of the court. Their purpose would be to identify, limit, or resolve some of the issues that are to be determined at the hearing. By "issues", we mean questions which the magistrate will have to decide in order to decide whether the guilt of the defendant has been established.

51. The very nature of some summary matters makes a true "summary" procedure appropriate. Where the issues are simple and clear-cut there is neither need nor room for pre-trial procedures. In such cases, for example, a simple charge of common assault under section 493 of the Crimes Act, 1900, pre-trial procedures could be counter-productive, generating avoidable delays and unnecessary costs.

52. On the other hand, in more complex summary matters, pre- trial procedures of the type that we have in mind could be beneficial. The benefits can be stated in terms of fairness to the person charged, easier preparation and presentation of the case by both parties, and a saving of time for all concerned, including the court, the parties and witnesses.

53. We consider pre-trial procedures under three headings:

- Advance Disclosure of Prosecution Case;
- Limiting the Issues; and
- Resolving Certain Issues.

2. Advance Disclosure of Prosecution Case

General

54. It is obviously desirable in every case that the evidence and the arguments be limited, if possible, to matters relevant to the questions that the magistrate has to decide. The first step towards achieving this goal is to be informed of the matters which the prosecution alleges.

55. If defendants are to have fair opportunities to prepare their cases they must know what the prosecution alleges against them. If they wrongly anticipate allegations that are not made, they can waste time and money on unnecessary witnesses and evidence; if they fail to anticipate allegations that are made, they can be seriously at risk, and either fail to produce available relevant evidence or have to seek an adjournment. These difficulties can be overcome by advance disclosure of the prosecution case.

56. There are different forms of disclosure. These include:

- a statement of the facts alleged;
- an explanation of the way in which it is alleged that those facts constitute the offence charged;
- a list of witnesses;
- statements of witnesses;
- inspection of exhibits.

57. It is only in summary trials before magistrates that there is not disclosure of this kind as a matter of course. In trials on indictment there are generally the depositions of the witnesses at the committal proceedings, and in summary trials in the Supreme Court there are special provisions to which reference is made below.

Proposals

58. The proposition that defendants should know the nature of the allegations they are to meet seems unanswerable but, as with any proposed rule of procedure, there are other factors to be put into the balance. It has been suggested that a great burden would be imposed on prosecuting authorities, that too much time could be consumed, and that there is danger in enabling defendants to know the identity of witnesses and the evidence it is believed they will give.

59. We invite comment on the proposal that there be a more general requirement for disclosure of the prosecution case in summary trials before magistrates, and in particular on the difficulties that such requirement might produce.

3. Limiting the Issues

General

60. Once the prosecution has disclosed the nature of its allegations, in order to know what questions have to be decided by the magistrate, it is necessary to know which of the prosecution allegations are admitted and which are denied by the defence, and what additional facts the defence asserts by way of defence. When we speak of limiting the issues, we have in mind limiting the questions to be decided by the magistrate to those which are really in dispute, with a consequent limitation in the evidence required.

61. In considering procedures which involve, or may involve, disclosure, we stress that we are not necessarily envisaging that the defence would be *required* to make disclosure.

Proposals

62. It seems to us that there are many advantages, mainly related to the avoidance of unnecessary delay and costs, to be derived from disclosure of the defence case. Although traditional attitudes may make further requirements in this regard unacceptable, we suggest that extension of the alibi defence provision to summary matters ought to be considered, and that consideration ought also to be given to whether there are other categories of defence evidence which should be subject to similar provisions.

63. In the case of an alibi defence, the requirement of notice would be prompted by the need to avoid adjournments for the purpose of investigating whether the alibi can be confirmed or rebutted. Similar considerations apply to other defences such as those which depend on medical evidence or expert forensic scientific evidence which the prosecution needs an opportunity to evaluate or in respect of which it may wish to call its own expert witnesses.

64. Are there reasons why, in a pre-trial procedure such as a pre-trial conference, a magistrate should not actively pursue the possibility of a defence being raised which may necessitate an adjournment of the trial? If such a possibility is raised, are there reasons why the magistrate should not direct that particulars of the defence be given to the prosecution?

65. Just as the prosecution should be encouraged, or required, to tell the defence the facts upon which it proposes to rely and to seek to prove, so too the defence should be encouraged, and assisted, to indicate which of those facts it disputes, which it admits, and, in the case of disputed facts, for which alternative version it contends. We invite general suggestions as to the means which might be used to achieve these goals.

4. Resolving Certain Issues

General

66. A decision on a question of law will often determine the outcome of a trial. If answered in favour of the defence, it may mean that the prosecution fails. If answered in favour of the prosecution, it may lead to a plea of not guilty being changed to a plea of guilty. Likewise, there can be a question as to the admissibility of particular evidence. If resolved against the party

wishing to call it, the attendance of a number of witnesses may become unnecessary. In short, pre-trial procedures which led to the resolution of issues of law or the admissibility of evidence would contribute greatly to the quicker and cheaper disposal of cases, with consequent benefits to everyone involved in the trial process.

Proposals

67. We suggest that steps need to be taken to ensure that the existence of questions of the kind we are now considering is made known to all parties in advance of the hearing. Awareness of these questions could flow from information volunteered by the parties, or obtained from them in a pre-trial conference. The conference itself could be ordered by the court of its own motion, or on application made by one or more of the parties. Where convenient, the relevant questions could be dealt with separately and before witnesses are called.

V. Section 476 of the Crimes Act, 1900

68. What should be the criteria by reference to which a magistrate decides that an indictable offence may properly be disposed of summarily? At what stage of the proceedings should the decision be made by the magistrate (at the outset of the case by way of preliminary inquiry, or after the prosecution evidence has been heard, or at some other stage)?

VI. Forms of Summons and Listing Arrangements

69. *We suggest* that forms of summons be amended to provide more information for defendants.

70. If appearance in answer to a summons is to enable the court to fix a date for hearing, or to deal with other preliminary matters, *we suggest* that administrative arrangements be made accordingly; for example, that a magistrate or other court officer set aside specified times for dealing with these matters.

VII. Pleas

71. Section 78 of the Justices Act, 1902, is concerned with the procedures to be followed when a defendant appears at the hearing of an offence punishable on summary conviction. According to the section, the defendant is to be asked "if he has any cause to show why he should not be convicted ...". We are told that in practice defendants are usually permitted to plead guilty or not guilty. *We suggest* that the practice should be given legislative recognition.

VIII. Prosecutors and Court Officers

72. *We suggest* that police prosecutors should continue not to wear uniforms when prosecuting in court.

73. *We suggest* that police officers who are used as court officers, ushers, and attendants, should not wear uniforms when acting in these capacities and, if possible, should be made responsible to the magistrate while on duty in court.

IX. The Mentally Ill Defendant

74. Should there be prescribed procedures to be followed in Courts of Petty Sessions, when a question arises as to a defendant's fitness to plead?

X. Witnesses

75. *We suggest* that the Justices Act, 1902, be amended to provide legislative authority for the issue of subpoenas in criminal proceedings in Courts of Petty Sessions. If this is done, should it be necessary to retain the existing summons and warrant procedures for securing the attendance of witnesses and the production of documents?

76. *We suggest* that any procedures for securing the attendance of witnesses and the production of documents should ensure that the persons concerned are given prescribed information concerning their rights and obligations.

XI. Costs

77. Is the present system of awarding and assessing costs working satisfactorily? Is there any call for the abandonment of "on the spot" assessments and for the substitution of a prescribed scale of costs, or a system for having a court officer certify that a bill of costs is reasonable?

78. *We suggest* that where a court holds that it has no jurisdiction to determine particular proceedings, it should nonetheless be empowered to make an order for costs.

XII. Contempt of Court

79. *We suggest* that procedures be prescribed for dealing with contempt in the face or hearing of a court.

XIII. The FUNCTUS OFFICIO Rule

80. *We suggest* that provision be made for a court to re-open proceedings, and to rectify orders, where, for example, a penalty has been imposed that is contrary to law, or an order has been made that is based on, or contains, an error of fact.

XIV. Civil Liabilities of Justices

81. Should magistrates be afforded protection from civil liability if, in the course of their work, they act, whether ministerially or judicially, on the basis of an honest belief that they had jurisdiction, even though they did not have it, or had exceeded it?

XV. Compensation Orders

82. Should the Crimes Act, 1900, specify the persons who may make applications for orders for criminal injuries compensation under sections 437(1) and 554(3) of that Act, the time within which an application may be made, and the form of the application?

XVI. Recognizances

83. What is the present use, and utility, of the "binding over" aspect of the recognizance process?

XVII. Rules of Court

84. Should there be detailed rules of court applicable to proceedings in Courts of Petty Sessions, and should a Rule Committee be constituted for this purpose?

CHAPTER 10: COMMITTAL FOR TRIAL

I. Introduction

85. The committal for trial is arguably the most controversial part of the criminal process in New South Wales. Some commentators, for example, Mr. Justice Blackburn, Chief Justice of the Supreme Court of the Australian Capital Territory, describe committals as "a total waste of time". On the other hand, Mr. Justice Wilson, of the High Court of Australia, has said that committals are designed to facilitate the administration of justice and they serve this purpose by marshalling the evidence and requiring the magistrate to be satisfied that the evidence establishes a *prima facie* case before the accused person is committed to stand trial.

II. Before the Trial

A. INTRODUCTION

86. In this context, we use "trial" in the sense of trial on indictment before judge and jury. We are concerned here with some of the procedures which lead to trial, with what the objectives of these procedures are, or ought to be, and with how best to achieve these objectives. We consider, first, the committal system now used in New South Wales, secondly, (as an optional alternative) "paper committals", and, thirdly, other pre-trial procedures as a substitute for, or a supplement to, committals, whether oral or "paper".

B. EXISTING COMMITTAL PROCEDURES

1. The Objectives

87. There seems to be general agreement that the primary objective of our committal procedures is to ensure that a person should not stand trial unless evidence has established that there is a *prima facie* case against that person. There is not, however, general agreement on the secondary objectives of our committal procedures.

88. In practice, committals often serve the purpose of enabling the defence to assess the strength of the prosecution case. In this sense, committals act as a form of pre-trial discovery for the benefit of the defence. Prosecution witnesses can be tested under cross-examination and sometimes, but not always, the essential issues to be determined at the trial can be clarified.

89. On the other hand, the courts have generally been reluctant to acknowledge that discovery of the prosecution case is a proper objective of a committal for trial, or that the procedure is designed to provide the defence with an opportunity to cross-examine the prosecution witnesses as a form of rehearsal for the trial.

90. We do not have to resolve this debate at this stage, but we invite comment on it.

2. The Advantages and Disadvantages of Committals

91. Some of the perceived advantages of committals are:

- no person is put on trial without a *prima facie* case having been first established against him or her;
- the evidence is sifted and issues are defined, thus shortening any trial and

ensuring that facts in dispute are put to the jury;

- a weak case against a person will be revealed, and the person concerned will be discharged quickly, a particularly important consideration if the person is in custody;
- if a person is committed for trial the offence charged will be one appropriate to the facts disclosed;
- witnesses are examined publicly and orally, and thus their strengths and credibility are tested in a way which cannot be matched by any other procedure for discovery;
- the costs of a criminal trial, which far exceed the costs of committals, are not incurred in respect of weak cases;

92. Another advantage sometimes claimed for committal proceedings is that they enable the solicitor for an accused person to protect a client against himself or herself by permitting the solicitor to analyse the prosecution evidence, test it by cross-examination, and, if necessary, advise the client that the likely outcome of a trial is that the jury will convict. When this happens the solicitor may be able to suggest that a plea of guilty would be in the best interests of the client.

93. Some critics of the committal system refuse to admit all the advantages claimed for it, and point to disadvantages. They say, for example:

- in practice, little sifting of evidence and defining of issues results from committal proceedings, and the length of the trial is seldom influenced by those proceedings;
- because of the lower level of evidence required for a committal order than for a conviction, a case which is "weak" at trial is frequently enough to warrant a committal order, and the result is that that case is presented twice before the accused is acquitted;
- the costs of committal proceedings plus trial far exceed the costs of a trial alone;
- it is an unwarranted imposition on witnesses and, in many cases, duplicates what is an unpleasant and traumatic experience for them, to require them to go through their evidence and to be cross- examined twice;
- as the prosecution is under no obligation to adduce all the evidence it will call at trial, committal proceedings are not necessarily an adequate means of enabling the defence to discover the prosecution case; and
- committal proceedings are wasteful of time, money, and effort, and their legitimate functions could be more efficiently performed through a system of pre-trial procedures designed to effect disclosure of the prosecution case, and such limiting and pre- trial determination of issues as co-operation by the defence will allow.

94. The committal proceeding has become so established and well entrenched a part of the criminal procedure of this State that the strongest of argument would be necessary to justify its abolition. However, criticism of it has been growing in strength over recent years, as what appear to be shortcomings in the system are recognised.

C. PAPER COMMITTALS

95. New South Wales is the only jurisdiction in Australia where provision is not made for committals for trial to be based on written, as distinct from oral, statements of witnesses. We stress that we see paper committals as possible alternatives to, not necessarily as substitutes for, either existing committals for trials or other pre-trial procedures.

96. We are aware that proposals for paper committals have been drafted by the Criminal Law Review Division of the Department of the Attorney General and of Justice, and we stress that nothing that we say in this Paper is intended to delay the implementation of any recommendations for their adoption made by the Division.

97. 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, if the relevant legislation permits, 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, in effect, replaces the committal hearing.

98. In concluding our examination of paper committals, we draw attention to one problem in New South Wales which the introduction of paper committals might solve. We refer to section 51A of the Justices Act, 1902. The section was enacted in 1955 and is concerned with the effect of pleas of guilty in committal proceedings. If a person is charged with an indictable offence not punishable with penal servitude for life, he or she may plead guilty at any stage of the committal proceedings, and may be committed for sentence, as distinct from trial.

99. Section 51A makes provision for the case where a plea of guilty is changed to a plea of not guilty upon the commencement of the proceedings for sentence in a higher court. The section requires that the case be remitted to the Court of Petty Sessions, and committal proceedings resumed. This procedure is criticised on the ground that it enables an accused person to avoid being sentenced by a judge who is not to his or her liking, and also because of the resultant delay in final disposal of the matter. Changes of pleas are common.

100. If paper committals were introduced in New South Wales, there would cease to be a need for committals for sentence. People who are now ready to plead guilty under section 51A could reasonably be expected to elect for paper committal. They would then be committed for trial, not for sentence. If still minded to plead guilty in the higher court, they would do so and be dealt with by way of sentence as is now the case. If, however, there was a change of mind and a plea of not guilty was entered, the trial could proceed without any reference back to a Court of Petty Sessions for resumption of the committal proceedings.

D. OTHER PRE-TRIAL PROCEDURES

101. The Law Reform Commission of Canada has expressed support for the view that

procedures providing for discovery to accused persons of the prosecution's case should be introduced, and that the preliminary inquiry as it then existed in Canada should be abolished. It suggested that if an accused is fully informed, before the trial, and preferably before plea, of the prosecution's evidence, he or she ought then to be empowered to make an application to the court to be discharged on the basis of an absence of *prima facie* evidence. On such an application, the court should be able to examine all the information disclosed by the prosecution to the defence and to base its decision on this information. In this way, the committal purpose of the preliminary inquiry would still be achieved, but with the advantage that it would be confined to those cases where the question of committal is really in issue. On this approach, ancillary purposes of committals, for example, the perpetuation of evidence, would be dealt with as part of the discovery procedure.

102. The proposals of the Law Reform Commission of Canada have not yet been implemented. But, in 1981, the Philips Royal Commission on Criminal Procedure in England made somewhat similar proposals. The Philips Commission also argued for fuller disclosure of the prosecution case to the defence. It said that this disclosure should enable the defence to make some assessment whether there is sufficient evidence on paper to justify the case going to trial. If the defence wishes to challenge this, it should, unless the case would be brought to trial within a specified period, have the option of a hearing before a magistrate at which to make a submission of no case to answer.

103. The majority of the members of the Philips Commission doubted whether, on an application for discharge, a magistrate would need to make his or her decision upon the basis of oral evidence tested under cross-examination.

E. SOME ISSUES

104. Questions which need to be considered in the context of committals include the following:

General

- Should committal proceedings be abolished in New South Wales?
- If so, what procedures, if any, should replace them?
- If not, are there reasons why New South Wales should not adopt the idea of paper committals for trial as an alternative, at the election of the defendant, to the present proceedings?

Paper Committals

- Generally, in what circumstances should paper committals be used?
- Should paper committals be allowed without consideration of the evidence by the magistrate?
- Should written statements be admissible in proceedings involving an unrepresented defendant?
- Should written statements be admissible in proceedings relating to all indictable offences?

- Should the court be empowered to delete any inadmissible material in a written statement?
- Should there be an alternative method of proceeding whereby the written statements of some witnesses are used and other witnesses are examined orally?
- Should written statements admitted as evidence in a committal be admissible as evidence at a trial if the witness is not then available?

III. Particular Problems in the Present Form of Committals

A. THE TITLE OF THE PROCESS

105. *We suggest* that if committal proceedings are retained, they be called "preliminary inquiries".

106. *We suggest* that only magistrates should be empowered to preside over committal proceedings.

B. THE JOINDER OF ADDITIONAL DEFENDANTS

107. *We suggest* that it may be useful to make provision for the joinder of additional defendants, even after committal proceedings have commenced.

C. THE APPLICATION OF THE RULES OF EVIDENCE

108. Should magistrates be given wider powers to control cross-examinations, and wider discretions in relation to the application of rules of evidence, in committal proceedings?

D. THE CRITERIA FOR COMMITTAL

109. We invite submissions as to the criteria upon which magistrates should be required to act under section 41(2) and section 41(6) of the Justices Act, 1902, and the manner in which those criteria might be stated.

E. GUILTY PLEAS AND COMMITTAL FOR SENTENCE

110. Should pleas of guilty under section 51A of the Justices Act, 1902, be limited to offences not punishable by penal servitude for life?

111. *We suggest* that a defendant should be legally entitled to call evidence as to his or her good character in proceedings under section 51A of the Justices Act, 1902.

112. We invite comment on a proposal that section 51A of the Justices Act, 1902, be amended to provide that if a defendant has been committed for sentence following a plea of guilty, and does not adhere to that plea before the higher court, the judge of that court should have a discretion either to remit the matter to the Court of Petty Sessions or to direct that it proceed to trial without further committal proceedings.

APPENDIX

Terms of Reference

"To inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto; and in particular, without affecting the generality of the foregoing, to consider –

(a) the means of instituting criminal proceedings;

(b) the role and conduct of committal proceedings;

(c) pre-trial procedures in criminal proceedings;

(d) trial procedures in matters dealt with summarily or on indictment;

(e) practices and procedures relating to juries in criminal proceedings;

(f) procedures followed in the sentencing of convicted persons;

(g) appeals in criminal proceedings;

(h) the classification of criminal offences;

(i) the desirability and feasibility of codifying the law relating to criminal procedure."[1]

D. West, Government Printer, New South Wales– 1983