Committal for Trial and Pre-Trial Disclosure: Some Overseas Perspectives

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Proposals for Reform in New South Wales

Discussion Paper

In May 1989, the Attorney General for New South Wales, the Honourable Mr John Dowd, issued a Discussion Paper on Reforms to the Criminal Justice System. The Paper contained a number of reform proposals. The first was in relation to Committal Proceedings. It was as follows:

> The decision whether to commit a person for trial will no longer be made by a magistrate but by the Director of Public Prosecutions. The Director of Public Prosecutions will also decide whether a matter should be dealt with summarily or on indictment. A witness may still be cross-examined before a magistrate, at the request of the defence or the prosecution, where:
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> (1) the witness gives evidence as to identification of the defendant;
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> (2) the witness is an accomplice;
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> (3) the witness gives evidence of an opinion based of scientific examination;
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> (4) the party is able to demonstrate special or exceptional circumstances which require the cross examination of a particular witness; or
>
> (5) the other party consents.
>
> It is intended that a party seeking to cross-examine on grounds (1) to (4) would first be required to seek the consent of the other party.

According to the Discussion Paper the decisions of the Director of Public Prosecutions (DPP) whether to prefer a charge and whether the proceedings should be summary or on indictment would be made after perusal of statements of witnesses taken by the police and conferences with witnesses in appropriate cases. These decisions would be notified to the Local Court when the matter was next before it and the magistrate would (formally) commit

for trial if such was the decision of the DPP. Any cross-examination of witnesses would take place after committal, and after the disclosure by the prosecution as also proposed (see later). The results of any cross-examination would then be considered by the DPP, before trial but after committal (NSW Attorney-General's Department 1989, pp. 35-41.).

The second reform proposal was in relation to pre-trial disclosure. This proposal dealt with disclosure both by the prosecution and the accused. The proposal in relation to pre-trial disclosure by the prosecution was as follows:

> The prosecution should disclose the following information to the accused automatically in summary and indictable matters:
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> 1. The precise terms of the indictment/information;
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> 2. Copies of any documents (or tapes where made) containing a record of the accused's conversations or statements to the police (for example, records of interview, and handwritten statements.);
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> 3. Statements of all witnesses interviewed by the police during the investigation (whether they are to be called by the prosecution at the trial or not);
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> 4. Copies of any documentary exhibits;
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> 5. Details of where and when a non-documentary exhibit may be inspected;
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> 6. The criminal record of the accused;
>
> 7. The names and addresses of any person from whom a statement was not taken, and the ground(s) upon which the witness might be regarded as material; and
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> 8. Copies of any reports from 'expert witnesses'.
>
> Upon request, the criminal record of any witness, or victim, should be made available where the request demonstrates the relevance of such information.
>
> The information need not be disclosed where there would be a danger to the life or safety of any person or where it would interfere with the administration of justice.

Although the Discussion Paper considers sanctions that could be imposed on the prosecution for non-disclosure (NSW Attorney-General's Department 1989, p. 48), those have not found their way into the proposal. Reliance appears instead to be placed 'on the cooperation and professional ethics of those persons who form the prosecution' (p. 48). It is of particular interest that the proposal for disclosure by the prosecution is to apply to summary as well as to indictable matters.

In relation to pre-trial disclosure by the accused the proposal was as follows:

> The accused should be required to disclose to the prosecution and the court:
>
> 1. the general nature of his or defence; and
>
> 2. the areas in which the prosecution case is disputed.

Where the accused departs from the nature of his or her disclosed defence or fails to comply with a requirement of disclosure, the trial judge or the prosecution (with leave of the judge) may refer to this and invite the jury to draw appropriate inferences.

It would seem from the first two proposals above that the Attorney-General has accepted that two important functions of committal proceedings as presently conducted are the disclosure in advance of the evidence the prosecution will seek to present at the trial and the opportunity for the defence to test that evidence by cross-examination. This is indicated both by the proposed retention of the defence right to cross-examine witnesses (although only of specified categories) before a magistrate and by the proposed obligations of disclosure by the prosecution, notwithstanding the proposed transfer of the committal decision from a magistrate to the DPP.

The proposal that the accused be required to make pre-trial disclosure of the general nature of his or her defence and of the areas in which the prosecution case is disputed with the sanction of adverse comment for non-compliance appears to derive from the Report of the Roskill Committee on Fraud Trials (HMSO, London 1986) and the *Criminal Justice Act 1987* (UK) which implemented the recommendations of that Report (NSW Attorney-General's Department 1989, pp. 52-5). That Report and the consequent legislation was confined to serious and complex fraud trials, but the present proposal extends to all criminal trials. The justification for this extension is said to lie in 'the accused's interest in having his or her case dealt with as speedily as possible' (NSW Attorney-General's Department 1989, p. 54). This 'interest' is preferred to the argument that 'compulsory pre-trial disclosure would represent a significant erosion of the rights of the accused and conflict with the basic principle of criminal justice that it is up to the prosecution to prove its case, the accused not being required to prove anything' (NSW Attorney-General's Department 1989, p. 53). The issue of pre-trial disclosure by the defence as a way of 'improving the fact-finding function of the trial process' is said to be beyond the scope of the Discussion Paper (p. 51).

The reduction of delay in the criminal justice system appears to be the primary concern of the Discussion Paper and the proposed reforms. The object of the exercise is stated to be 'to finalise a range of reform proposals directed to reducing court delays in criminal proceedings' (NSW Attorney-General's Department 1989, p. 84). A criminal justice system has, of course, other objectives and concerns besides the reduction of delay and these should be borne in mind when considering reforms.

Media Release

On 18 February 1990, the Attorney-General issued a media release on the reform of committals. He announced that proposed changes, which were said to be the result of extensive consultation after the issue of the Discussion Paper, had been approved by State Cabinet. The main change, in line with the proposal in the Discussion Paper, will be that the DPP will decide whether a person charged should be committed for trial. (It was noted by the Attorney that, with 'no-billing' and the filing of ex-officio indictments by the DPP, the 'decision by the magistrate to commit or not by no means determines the outcome at the moment'). The change would reduce court delays, it was said, in that about one-third of the delay between charge and trial was taken up by the current committal process. It was also stated that the DPP would 'become involved from the very beginning of a planned prosecution' and 'decide whether it should go ahead'.

The 'important safeguard' of allowing the defence to test the evidence of 'key witnesses' in front of a magistrate at a pre-trial hearing would remain, as in the Discussion Paper. It is of interest to note, however, that the category (4) witness of the Discussion Paper is more broadly, if not more loosely described, in the media release as: 'where there are reasonable grounds to suspect that cross-examination will affect either the assessment of the reliability of the witness or would elicit further material to support a defence'. The magistrate will decide if a witness falls into this category if the DPP does not consent. It may prove difficult in the

event to prevent the defence from cross-examining any witness with some appearance of materiality.

The only references to pre-trial disclosure by the prosecution in the media release are to 'stricter requirements for the prosecution to disclose its case and other material helpful to the defence so the accused is not prejudiced by the changes in procedure' and to 'enhanced disclosure rules'. It remains to be seen whether the legislation will include any sanctions for non-disclosure and whether there will be any means of review of the grounds for non-disclosure that are specified in the last paragraph of that proposal in the Discussion Paper.

More significantly, the originally proposed requirement of pre-trial disclosure by the accused was not referred to at all in the media release. Presumably it will not form part of the legislation. This way is assumed to be a result of the 'extensive consultation' after the issue of the Discussion Paper, particularly consultation with defence representatives. Whether pre-trial disclosure by the accused in the manner mooted would, coincidentally, have improved the fact-finding function of the trial process in New South Wales will presumably not now be known.

Legislation

It had been hoped that draft legislation would have been available for debate at this conference but unfortunately it was not. There is in that, perhaps, some advantage in so far as the die may not be irrevocably cast. Doubtless the closer scrutiny this important measure is given by all concerned the better the prospects for success of this large step in the reform of our criminal justice system.

This large step consists in essence in the transfer of the committal decision from a magistrate to the DPP, or more specifically in taking from the magistrate his or her present part in the committal process and leaving to the DPP alone the decision whether to commit for trial or not. This involves a change in the committal process from a decision by a member of the judiciary (albeit exercising administrative functions) after a public hearing (or where there is an opportunity for one) to a decision by the prosecution made in private.

It can be instructive to consider how the committal and pre-trial disclosure processes are handled in other jurisdictions and the nature of any significant reform proposals in those jurisdictions.

The Committal Process and Pre-Trial Disclosure in Selected Overseas Jurisdictions

England

The current committal process in England is similar to the current process in New South Wales, but in England official proposals for far-reaching change have also been made.

The Current Process There are currently two forms of proceedings for committal for trial on indictment before the Crown Court—full committals and paper committals. Full committals take place under section 6(1) of the Magistrates Courts Act 1980 (UK). These are usually requested by the defence and range from witnesses giving oral evidence and being cross-examined, followed by oral submissions as to the sufficiency of the evidence, to a 'read through' procedure based on written statements followed by submissions as to sufficiency. In 1986, about 13 per cent of committals were full committals (an increase from less than 8 per cent in 1981). Paper committals take place under section 6(2) of the Magistrates Courts Act (UK). Under this procedure if the defence and prosecution agree

that written statements (under s.102) will be the only evidence before the Magistrate's Court, the court may commit the accused for trial without considering the content of those statements or the sufficiency of the evidence contained in them. In other words, the defence consents to a committal on the basis of the statements. If the defence wishes to challenge the sufficiency of the evidence, it must opt for the full committal procedure. There can also be no paper committal if the accused is unrepresented. In 1986, about 87 per cent of committals were paper committals (a decrease from over 92 per cent in 1981).

As to the Magistrate's Court serving as a filter of cases that should not be going to trial, a study in 1981 showed that 12 per cent of full committal hearings resulted in discharge by the magistrate. The figure in New South Wales for all committal hearings seems to be no more than 5 per cent (NSW Attorney-General's Department 1989, p. 24).

Apart from committal by a Magistrate's Court, there are two other ways by which an accused can be sent for trial on indictment. The first is by means of a voluntary bill of indictment, a procedure infrequently used whereby a prosecutor may apply for the consent of a High Court judge to a case being brought directly before the Crown Court. This, untypically in the common law systems, involves a committal decision by a superior court.

The second way is the transfer procedure under the Criminal Justice Act 1987 (UK) in serious fraud cases whereby the Director of Public Prosecutions or the Director of the Serious Fraud Office, amongst others, may certify that there is sufficient evidence for committal and that it is appropriate that the management of the case should without delay be taken over by the Crown Court, with the result that the committal functions of the Magistrate's Court cease (s.4). There is provision for the accused to apply to the Crown Court for the dismissal of the transferred charge on the ground of the insufficiency of the disclosed evidence and for the hearing of that application on oral evidence, if such appears to the judge to be required in the interests of justice (s.6). There is also provision under this legislation for a preparatory hearing before the jury is sworn, in which the judge may order the accused to give a statement in writing setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution (s.9), with the sanction of adverse comment to the jury for non-compliance or for departure at the trial from the disclosure at the preliminary hearing (s.10). The serious fraud cases legislation in England is atypical, both in allowing superior court review of a committal decision by the prosecution and in obliging the accused to disclose his or her defence in advance of trial. The present reform proposals in New South Wales appear to have turned way from both these paths for our pre-trial processes either in particular types of case or generally. It is noteworthy that the New South Wales Law Reform Commission recommended in 1987 that the decision to prosecute should be the prosecution's but that there should be a right to challenge that decision in the prospective court of trial (NSWLRC 1987, p. 321).

Apart from the two ways just considered of sending for trial other than through the Magistrate's Court, the main difference in committal procedures between England and New South Wales is that the paper committal in England is a procedural formality in that it can only occur by consent of the parties and without consideration by the magistrate of the sufficiency of the evidence. It is uncommon for a committal in New South Wales not to involve some contest as to the sufficiency of the evidence, even where the evidence is entirely in written statements. If a defendant is unrepresented and does not contest sufficiency, the magistrate should, in the interests of justice, nevertheless consider the question. This form of 'paper committal' in New South Wales is really equivalent to the 'read through' committal in England, which is regarded as a full committal.

The role of the magistrate in committal proceedings in New South Wales and full committals in England is very similar. Also similar is the role of the DPP and his or her officers in the two jurisdictions, at least since the introduction of the Crown Prosecution Service in England in 1985, although there seem to be relatively fewer 'no bills' found by English prosecutors than their counterparts in New South Wales.

As to pre-trial disclosure by the prosecution in England, in cases to be tried on indictment and the subject of committal proceedings, the prosecution is obliged to make available to the defence all 'unused material' (as well as the material used for committal) (Archbold 1988, pp. 4-178). In cases triable either way (on indictment or summarily) but tried summarily before a magistrate, a defendant is entitled to be supplied with either copies of statements or a summary of the facts and matters of which the prosecutor proposes to adduce evidence (Archbold 1988). The New South Wales proposals, it will be recalled, would extend disclosure by the prosecution to summary as well as to indictable offences. At present in New South Wales disclosure by the prosecution, other than where there are committal proceedings, can be minimal. '[T]here are few rules effectively governing the practice of disclosure by the prosecution' (NSWLRC 1987 p. 97, and, generally, Ch. 4).

Pre-trial disclosure by the defence in England is generally not required. The only exceptions of importance are for the 'defence' of alibi and, since 1987, in serious fraud cases. The Royal Commission on Criminal Procedure (the Phillips Commission) recommended in 1981 that the principle on which the advance notification of alibi is required 'could be extended to other defences for example, depending on medical evidence or expert forensic scientific evidence which, by taking the prosecution by surprise, can cause the trial to be adjourned while investigation is carried out to confirm or disprove them', but that recommendation has not yet been implemented in England. It now seems that New South Wales will not even be going as far as the Phillips Commission recommendations.

Proposals for Change In July 1989, the Lord Chancellor's Department of the Home Office issued a consultation paper on the Future of Committal Proceedings. The reform proposal offering the most promise, according to that paper, was referred to by the New South Wales Attorney-General in his media release as going much further than his preferred proposals. The Lord Chancellor's preferred proposal covers both indictable only cases and cases that could be tried either on indictment or summarily ('either way' cases). As to indictable only cases, the prosecution would serve statements comprising the case papers on the defence and a notice certifying that there was sufficient evidence to justify trial on indictment. The defence would have the right to challenge the sufficiency of the evidence in the Magistrate's Court, but any such challenge would be on the basis of written statements (encompassing both witness statements and written submissions) considered 'in open court'. In exceptional circumstances and only with leave of the court, oral submissions could be made. A successful challenge would result in the discharge of the defendant. As to 'either way' cases, the proposal would also transfer the mode-of-trial decision from the magistrate to the prosecution, while preserving the right of the defendant to elect trial in the Crown Court. In this respect the proposal is similar to the Attorney-General's preferred proposal for New South Wales. The Lord Chancellor's proposal in relation to 'either way' cases involves service by the prosecution of the case papers (summary or statements) on the defence with a notice of mode of trial and of sufficiency of evidence. If the case is ultimately to proceed in the Crown Court the defendant has the same right to challenge the sufficiency of the evidence in the Magistrate's Court as he or she would have in an indictable only case. In no case will the defendant have the right to cross-examine prosecution witnesses.

The Lord Chancellor's proposal, unlike that of the New South Wales Attorney-General, preserves the right of a defendant to have a decision from a magistrate on the sufficiency of the prosecution's evidence to support a charge to be heard on indictment. It is true that that decision will be taken in the absence of oral evidence, including cross-examination, and that the proposal in New South Wales is to continue to permit, in limited circumstances, the cross-examination of prosecution witnesses before a magistrate. It is a nice question whether justice is better served by allowing a magistrate to determine pre-trial the sufficiency of the prosecution's evidence entirely on written statements, or by allowing some prosecution witnesses to be cross-examined before a magistrate deprived of a committal function.

Scotland

Committal procedures in Scotland are different from those in England and New South Wales. To appreciate the difference it is necessary to understand the role of the procurator fiscal in the Scottish system. A procurator fiscal is appointed by the Lord Advocate (the Chief Law Officer of Scotland and the Public Prosecutor) to a district in Scotland. He or she is responsible for investigating all crimes in his or her district, may examine witnesses (but not the suspect) and must examine them in cases where the trial is to be on indictment. He or she determines the charge, if any, and the court of trial—the High Court for the most serious crimes (murder, rape), the Sheriff Court (either before a jury for the next most serious crimes or summarily) or the Magistrate's Court (now called the District Court). He or she prepares the case and assists Crown Counsel (the Lord Advocate or an Advocate Depute) in the High Court, and conducts the prosecution in the Sheriff Court. Trial on indictment, whether in the High Court or the Sheriff Court, and the form of the indictment, must be approved by Crown Counsel.

The decision to commit for trial in all cases of trial on indictment is effectively taken by the procurator fiscal. The defendant is brought before the Sheriff consequent upon a petition lodged by the procurator fiscal to be given the opportunity to emit a declaration (make a statement) in answer to the charge, an opportunity rarely availed of by the defendant. The procurator fiscal then, or on a subsequent appearance by the defendant before the Sheriff, asks that the defendant be committed for trial. The Sheriff routinely does this without seeing or hearing any evidence.

As to pre-trial disclosure by the prosecution, the defence has no right of access to statements by prosecution witnesses, but a procurator may reveal the contents of those statements to the defence. Indictments are served on defendants in advance of the trial and they contain the names and addresses of prosecution witnesses and a list of the documents and articles to be produced as evidence. A defendant or his or her legal representative may interview those witnesses and examine the documents and articles listed. This could remove some, though not necessarily all, of the surprise from the prosecution's case at trial.

As to pre-trial disclosure by the defendant, a feature of Scottish criminal procedure has been the pleading hearing ('first diet') at which the defendant's plea is taken and any objections to the proceedings considered. If the defendant seeks to rely on any special defences such as alibi, insanity, diminished responsibility or impeachment (blaming another as the perpetrator), notice of such must then be given.

The prominent position of the procurator fiscal deriving from Continental models in the Scottish criminal justice system appears to have prevented the development of an English-type committal process. With the development of the organisation and powers of the prosecution service in England and New South Wales it is perhaps not surprising that proposals to transfer committal decisions from the magistracy to the prosecution have emerged. If disclosure of the prosecution case—an important practical effect of committal proceedings before magistrates but—not a feature of the Scottish system is retained in New South Wales, then one of the main benefits of the old process will have been preserved and the potentiality for better filtering, by prosecutors involved in the system from the investigation stage, will have been added.

France

There is a neat, hierarchical quality about the French criminal justice system and it might be convenient to start with the related hierarchies of the criminal courts and the offences tried therein.

> The *cour d'assises*, deals with offences (*crimes*) punishable with imprisonment from 5 years to life. The court consists of a president, two other judges and nine lay persons (*jurés*).
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> The *tribunal correctionel*, deals with offences (*délits*) punishable with imprisonment from 2 months to 5 years, or by fine, and with *crimes* treated as *délits* by a process known as 'correctionalisation'. The court consists of three judges or a single judge.
>
> The *tribunal de police*, deals with offences (*contraventions*) punishable by imprisonment up to 2 months, or by fine. The court consists of a single judge.

Criminal investigation in France is under the control of prosecutors (*procureurs*) or examining magistrates (*juges d'instruction*). The judicial police, however, do most of the actual investigation, including the taking of statements. The results of the investigation finish up in a *dossier* which is centrally important in the processing and disposition of a case, the trial being essentially a public confirmation of the contents of the *dossier*. *Crimes* and the more serious or sensitive *délits* are investigated by an examining magistrate with the aid of the judicial police. Other *délits* and *contraventions* are investigated by the judicial police under supervision by prosecutors. Police and prosecutors have coercive powers of investigation in relation to all flagrant offences (*l'enquête flagrante*). An examining magistrate has power to order detention of a defendant during investigation and pending trial and this is generally done in cases of *crime*.

As to committal for trial in France, the decision whether a defendant is sent for trial before the *cour d'assises* for a crime is made by the *chambre d'accusation*, a section of the *cour d'appel*, after the case has been remitted there by the examining magistrate. The *chambre d'accusation* is comprised of three judges, the hearing is on the papers in the *dossier*, and only the prosecutor and the defence lawyer(s) may be present at the hearing. The decision whether a defendant is sent for trial before the *tribunal correctionel* is made by the examining magistrate, if one has been involved in the investigation, or by the prosecutor supervising the investigation. The decision whether a defendant is sent for trial before the *tribunal de police* is made by a prosecutor who cites the defendant to appear for trial on a particular date. All committal decisions are made in private.

Except for cases tried in the *cour d'assises*, all committal decisions are taken by persons closely associated with the investigation of the case, either the examining magistrate or the supervising prosecutor. Both these officials, as well as having knowledge of the investigation and its results, have judicial character—the examining magistrate is a judge of the *tribunal correctionel*, and prosecutors are regarded as part of the magistrature (same training and career service as judges, often called *le parquet*—the magistrate on 'the floor' rather than the magistrate 'seated' (*assis*)). They are thus well placed to act as filters of cases for trial. Even greater screening is provided for the *crimes* going to the *cour d'assises* through the interposition of the *chambre d'accusation*. It is perhaps small wonder that there is such a high rate of conviction in French criminal trials (generally over 90 per cent).

Pre-trial disclosure by the prosecution in France is a function of access by the defence to the *dossier*. In general, the legal representative (usually an *avocat*) of the defendant has a right of access to the *dossier* at all times and is able to obtain copies of documents, such as statements of witnesses, in the *dossier* (*Code de Procédure Pénale*, art. 118). The defendant, personally, has no such right. One of the main functions in fact of the defendant's *avocat* is to discover the contents of the *dossier* (Frase 1988). An accused must be represented before the *cour d'assises* and he or she will generally be represented during investigation by the examining magistrate. A defendant will generally be represented before the *tribunal correctionel* but less frequently during the investigation by, or supervised by, the prosecutor. So while the *dossier* is not secret, the accused needs a legal representative to access it and he or she may not always have one.

The extent of pre-trial disclosure by the defence in France has to be understood in the context of the relationship between the investigator (police, prosecutor, examining magistrate) and the suspect/defendant. Although there is a right to silence in a suspect/defendant, the right is rarely exercised. Only before an examining magistrate is a defendant to be told about it (*Code de Procédure Pénale*, art. 114). Also adverse inferences can and will be drawn at the trial if the defendant does not respond to questioning during the investigation or at trial—this is regarded as part of the 'means of defence' (*Code de Procédure Pénale*, art. 353). For whatever reason, defendants generally respond to questioning during investigation (Stephan 1973). Their responses go into the *dossier* and are thus before the trial court from the outset. The investigator is under an obligation to get at the truth and this involves investigating any exculpatory matters that come to notice (*Code de Procédure Pénale*, arts. 62, 58, 81, 82, 101, 165). Thus by the time a case comes to trial a defendant is unlikely to have anything to say or to advance that is not in the *dossier*, and if he or she did and it was exculpatory it would be regarded by the court as suspect for want of earlier notification and opportunity for investigation.

West Germany

The criminal courts in West Germany are organised on a state (*Land*) basis although they apply federal criminal law and procedure. The higher of the two trial courts is the *Landgericht* of district court (called *Schwurgericht* or *Grosse Strafkammer* when sitting as a criminal court). The court is composed of three professional and two lay judges. It hears cases of homicide and other serious crimes. The lower of the two trial courts is the *Amtsgericht* or local court, and is composed of one professional and two lay judges when hearing the more serious cases (being then called *Schöffengericht*), and one professional judge when hearing less serious cases.

Prosecutors have theoretical control over all aspects of criminal investigations in West Germany, the examining magistrate having been abolished in 1975. However, it is the police (*Kriminalpolizei*) who initiate and develop investigations. Witnesses are examined by the police, usually on a 'voluntary' basis although they can be forced to attend by a prosecutor. The defendant must be examined by the police or a prosecutor and any matter of exculpation investigated before a formal charge (*Anklage*) is filed. The results of the investigation are recorded in a dossier (*Akte*) to which the legal representative of the defendant has right of access when the investigation has been completed (StPO, s.147).

The decision whether to put the defendant on trial is made by the court competent to try the case (StPO, s.199). This decision is made on the motion of the prosecutor, which motion, together with the dossier and a summary of the evidence and of the results of the investigation, forms part of the formal charge. The defendant is given an opportunity to object before the court, on factual or legal grounds, to the convening of a trial (StPO,

s.201). The court orders the convening of a trial if the defendant appears sufficiently suspect of having committed the crime (StPO, s.203). An order convening a trial cannot be appealed against by the defendant but an order refusing to convene a trial can be appealed against by the prosecutor (StPO, s.210).

As indicated, the prosecution can be obliged to disclose its case and the evidence in support, on the completion of the investigation as the defendant's legal representative then has right of access to the dossier. There is not a right of access during the investigation as in France, but access can be well in advance of the date of trial.

As to pre-trial disclosure by the defence, the position in West Germany is similar to the position in France and for similar reasons. Defendants generally respond to questioning by the investigator (Stephan 1973). The right to silence has, however, better legal protection in West Germany. The defendant has to be advised, before questioning either by the police or the prosecutor, that the law permits him to decline to speak about the case (StPO, ss.136, 163a). But under the principle of the 'free evaluation of the evidence' (StPO, s.261) the silence of the defendant, where an innocent explanation if there were one might have been expected, will weigh against the defendant. Also, as in France, any exculpatory matter would be expected by the court to be in the dossier—if it were raised for the first time at the trial it would be viewed with suspicion.

In West Germany, as in France, access to the dossier resolves the problem of pre-trial disclosure by the prosecution. The dossier, also, with its record of the interrogation of the defendant and of the investigation of any exculpatory matter, serves effectively to disclose whatever the defendant has to disclose.

Some Other Overseas Jurisdictions in Brief

New Zealand

The Summary Proceedings Act NZ 1957 provides for three types of preliminary hearing in New Zealand:

(i) by oral evidence from the prosecution witnesses, and any defence witnesses (ss.161, 163-5),

(ii) by written statements of witnesses, subject to the right of the court to receive witnesses to attend and give evidence (s.173A); and

(iii) committal for trial without consideration of the evidence, where there are written statements, the defendant is represented and the representative so consents (s.160A).

Types (i) and (ii) require a consideration of the sufficiency of the evidence to put the defendant on trial (s.168), while (iii), like the English paper committal, does not.

The law and practice regarding disclosure by the prosecution in New Zealand is similar to that current in New South Wales. A Royal Commission has recommended that the prosecution should provide the defence with an outline of the facts upon which it intends to rely in summary prosecutions (NSWLRC 1987 4.54).

Canada

A system of preliminary inquiry in the manner of the traditional committal hearing still operates, but a magistrate may commit for trial with the consent of the defendant without taking any (or any further) evidence. As noted in the Discussion Paper (NSW Attorney-General's Department 1989, p. 22), in 1974 the Law Reform Commission of Canada recommended the abolition of the preliminary inquiry as the establishment of recommended procedures for uniform discovery to the defence in all criminal cases would leave no substantial reason for its continuance. However, in 1984 the Commission recommended that the preliminary inquiry be retained as full disclosure by the prosecution would reduce the length and number of preliminary inquiries so they could perform their true function as a screen against an insufficient case (NSW Attorney-General's Department 1989, p. 22).

The United States

There are two principal processes for screening charges before a trial may be held in the United States. The first and more widespread is the preliminary hearing which still functions in the United States in the manner of the traditional English full committal. The test for the sufficiency of the evidence is 'probable cause'. The other process is review by a grand jury. The grand jury hears only evidence presented by the prosecutor and the hearing is secret. The defendant is not present and has no opportunity to cross-examine the prosecutor's witnesses or to present evidence. The prosecutor proposes an indictment which can be approved by the grand jury (by majority) as a 'true bill' or dismissed. By virtue of the Fifth Amendment all federal felony charges require a grand jury indictment. A few states provide for a preliminary hearing and then grand jury review. In some states also, the prosecution can avoid any committal process and proceed directly from its decision to charge to a trial. This has been held by the Supreme Court not to violate the due process requirements of the Constitution (*Lem Woon v. Oregon* 229 US 586 (1913)).

In 1975 the American Law Institute (ALI) recommended that a defendant have a right to either a preliminary hearing or review by a grand jury, which right could be waived if the defendant were legally represented. The ALI clearly preferred the preliminary hearing to grand jury review which it described as 'not an adequate or fair substitute' for a preliminary hearing. The ALI also took the view that the preliminary hearing should provide an opportunity for testing the accusation and 'for such incidental discovery as may be inherent in such process; but that the preliminary hearing should not be regarded as an independent discovery device'.

It is unlikely that grand jury review would now be considered as an option in New South Wales.

As to pre-trial disclosure by the prosecution in the United States, the federal rules of criminal procedure require disclosure, on request by the accused, of the accused's prior statements and criminal record, documents and tangible objects material to the case for the accused and intended to be used by the prosecution, reports of scientific examinations and tests, and the names and addresses of all prosecution witnesses (but not their statements) and their records of convictions. The regulation of these requirements, including enforcement, is left to the trial courts. Disclosure by state law and practice is variable. The Sixth Amendment prescription that ' in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and case of the accusation' has been interpreted by the Supreme Court to require all prosecutors to disclose evidence which is favourable to the accused and might create a reasonable doubt as to guilt (*US v. Agurs* 427 US 97 (1976)).

The defence also is required on request by the prosecution to make pre-trial disclosures under the federal rules of criminal procedure. These comprise documents and tangible objects, reports of examinations and tests, and the names and addresses of witnesses, that the accused intends to introduce or call in evidence-in-chief at the trial. Regulation and enforcement is again left to the trial courts.

Conclusions

Committal for Trial

The Attorney-General's proposal for New South Wales to vest the totality of the committal power in the DPP to the exclusion of any role by the judiciary is a bold one. Procedures elsewhere in the common law would lend the proposal little support. Even on the Continent, where the prosecutor has traditionally had greater power in the criminal justice system, his or her role in the committal process is subject to significant limitations.

As to the common law world, currently in England magistrates rule, at the option of the defence, on the sufficiency of the prosecution's evidence, except in serious fraud cases. The English proposals for change in this system will allow the defence to challenge the DPP's decision to commit before a magistrate, if generally only on paper. In serious fraud cases and on voluntary bills of indictment, the prosecutor's decision to commit for trial is subject to review by a judge of the Crown Court or the High Court respectively, or, broadly, by a judge of the court of trial. Canada preserves the magistrate as a filter for committals and New Zealand preserves the option for the defence to have a magistrate rule on the sufficiency of the evidence. The United States retains the magistrate or the grand jury to screen the prosecution's charging decisions in indictable cases, although for a prosecutor to send a defendant directly to trial is not unconstitutional and occasionally happens.

West Germany requires the court of trial to decide, on the motion of the prosecutor, whether to convene a trial, although that decision is subject to appeal by the prosecutor. In France, the prosecutor may commit for trial all cases not investigated by an examining magistrate, and in cases so investigated those that are tried in the highest court (*cour d'assises*) must be sent there by an indicting court (*chambre d'accusation*).

It is only in Scotland, where the prosecutor has traditionally had the powers of a Continental prosecutor, that the entire committal power rests effectively with the prosecutor.

Should a prosecutor have the whole of the power to send a person for trial on a serious charge? Generally the response in the jurisdictions considered here has been in the negative. Either the judiciary at a lower level (a magistrate) should make or contribute to the decision, or the judiciary at the trial level should review the decision, at the option of the defendant, made by a prosecutor. The recommendation of this latter procedure by the New South Wales Law Reform Commission appears to have been unavailing. A prosecutor in our system is, in the final analysis and notwithstanding the desiderata of fairness and impartiality, on one side of an adversary process, and the decision to prosecute must be seen in that perspective. The consequences for the accused, even if successful at the trial, are quite different to those for a defendant in a civil case. The administration of justice is involved even at the stage of committal for trial in a criminal case and there is a strong argument for some judicial role at that stage.

Pre-Trial Disclosure

Pre-trial disclosure by the prosecution is not the primary function of committal proceedings, and so is not a substitute for them, as the Canadian Law Reform Commission confirmed. That committal proceedings have in fact served the purpose of pre-trial discovery by the prosecution has doubtlessly led to the claim for its continuance in the event of the abolition of traditional committal proceedings and has probably strengthened the claim for pre-trial discovery by the prosecution generally. The clear tendency in common law jurisdictions is to extend and make obligatory pre-trial disclosure by the prosecution in all indictable cases, whether actually tried on indictment or summarily. The New South Wales proposal extends discovery to all summary matters and it is a full disclosure, including statements of witnesses who are not to be called to give evidence at the trial. It seems, however, that there will be no sanction imposed upon the prosecution for failure to disclose. Indeed, there will often be

no way for the defence to know if there has been full disclosure by the prosecution. In this regard the Continental system of access by the legal representative of the defendant to the investigation dossier is preferable from the defence point of view. While admitting that there are significant differences between the common law and the Continental criminal justice systems, it is at least arguable that if the prosecutor in New South Wales is to make the decision to commit for trial then the investigation file on which that decision is based should be accessible to the party most affected by that decision, or at least to that party's legal representative. The strengths and weaknesses in the basis for the decision should be open for assessment by the defence for the purposes of the trial. This should be more acceptable if the DPP has control over the investigation from the outset, as has been proposed, and is seen as an impartial agent of the state rather than as an adversary in litigation.

The requirement of any further pre-trial disclosure by the defence appears to have been abandoned by the Attorney-General. Yet there are precedents for such disclosure in the Federal Rules in the United States, and recently in serious fraud cases in England. The Continental systems are effective in inducing early disclosure by a defendant through a regime of adverse inferences from belated or non-disclosure. And Scotland actually requires greater disclosure by the defence than by the prosecution. If an important function of our criminal trial is the ascertainment of the truth, then pre-trial disclosure of at least the general nature of any defence should be required.

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