A Critique of Proposed Committal Reform in New South Wales

Clarrie Briese
Commissioner
State Drug Crime Commission
New South Wales

On 11 April 1990, the New South Wales Attorney-General Mr John Dowd delivered a paper entitled 'Committal Reform: Radical or Evolutionary Change', at a seminar organised by the Institute of Criminology in Sydney. He set out in some detail the proposal approved by the cabinet with regard to committal reform in New South Wales At p. 5 of his paper he said:

> I have no doubt that the scheme approved by cabinet is a significant improvement on the present system of sending a person to trial. It does away with the magistrate's function of committing for trial. This is not a step we have undertaken lightly, but is one which had to be taken after the inefficiencies in the present system were so clearly demonstrated.

He went on to indicate that the scheme will, inter alia, do three things:

- it will assist in reducing the delays an accused person now faces in waiting for trial;
- it will reduce the number of witnesses who unnecessarily go through the often harrowing experience of cross-examination; and
- it will allow a more efficient distribution of work between the Local Court and the higher courts.

If in practice it could be guaranteed that the scheme will have these effects, they are good reasons to support implementation of the scheme. However, having read the outline of the scheme provided by Mr Dowd in his paper, I do not believe that these goals will in fact be realised. Additionally, as will be pointed out later in this paper, the scheme is seriously flawed because in the way it attempts to solve the problem of delays, it provides a structural recipe to facilitate expediency in, and manipulation and corruption of, the criminal justice system in New South Wales.

The Present Procedure

In summary the present committal procedure in NSW since April 1988 is as follows:

- section 48AA of the *Crimes Act* (inserted by Act No. 235 of 1987) requires mandatory use of written statements of witnesses to be served on defendants in committal proceedings;

- at an appearance of the defendant in Court in answer to the charge (either by way of arrest or summons), the magistrate will direct that the brief of evidence containing all the statements of prosecution witnesses, be served on the defendant within a stipulated time (for example within one month);

- At the same time the magistrate will direct that if the defendant requires any of those witnesses to be present at the hearing to give oral evidence and be subject to cross-examination, he must serve notice to that effect on the prosecution within a further stipulated time frame (for example within 14 days);

- at the same time the magistrate will fix the case for a committal hearing to take place at a time beyond that indicated in the previous paragraph and the hearing will take place on that date. In long and/or complicated cases a number of consecutive days will be set aside for the hearing of the case, that number being based on an estimate of the length of the case.

This procedure means that if the defendant so wishes, all the witnesses may be required by the defendant to be in attendance at the hearing and all may be required to give their evidence orally and be subjected to cross-examination. It must be conceded therefore that the current scheme still contains deficiencies which prevent it from working as effectively as it might do. Essentially these deficiencies are:

- some committals are still taking too long to hear, adversely affecting delays and costs (however, for an increasingly large number of committals this is no longer the case);

- victims and other innocent witnesses are often still subjected to long and/or harrowing cross-examination; and

- there are still cases where committals for trial are ordered by magistrates and allegedly according to the Director of Public Prosecutions (or, more accurately, solicitors within the DPP) it is said that those committal orders were wrong or inappropriate, or are no longer appropriate for various intervening reasons.

It must be pointed out here that the mandatory paper committal scheme is working much better than it is being given credit for. The time taken for the hearing of committal cases has been substantially reduced. Because the scheme only took effect from 4 April 1988, insufficient time has been given to gauge its ultimate effect. Furthermore many of the criticisms and assessments of the present arrangements are inaccurate or wrong because they use or rely on statistics and data prior to April 1988. The fact of the matter is that delays in the Local Courts in NSW have, since 1988, been substantially reduced and one of the major factors in that reduction has been the effect of the mandatory paper committal scheme. That said, however, there are some valid criticisms to be made:

(a) magistrates still have no power to prevent witnesses being called to give evidence where it is plain they are being called unnecessarily. Unfortunately it is still the

case that many defence counsel continue to call all the prosecution witnesses and this is clearly contrary to the intended spirit of the legislation;

(b) magistrates still have no real power to prevent victims and innocent witnesses being subjected to unnecessarily long and/or harrowing cross-examination. The only power they have in this regard is that provided for in sections 56-58 of the *Evidence Act 1898* (NSW);

(c) magistrates are not clearly given the legal power to refrain from making a committal order in those cases where justice or commonsense would indicate that that should happen despite the existence of a relatively strong prima facie case against the defendant. The test under Section 41 of the *Justices Act 1902* (NSW) is still vague, confused and uncertain in that regard. That particular power is reserved to the DPP when considering whether or not to proceed with a trial.

There are essentially two ways in which the residual problems of the mandatory paper committal scheme might be addressed:

1. Give the magistrates more power to control the proceedings, in particular, to control the abuses which are still occurring;

or

2. Take the power of committal away from judicial officers (that is the magistrates) and make the decision whether or not to proceed with a trial an administrative one, one which is essentially divorced from judicial procedures.

Surprisingly the Attorney-General and the government have opted for the second solution. I agree that if the second solution is the better way to deal with the problem, then any consequential lowering of the future status or role of magistrates should clearly be accepted as necessary in furtherance of the interests of justice. Those interests are always paramount.

However, I have grave fears that the likely practical ramifications of the second option above have been overlooked or not understood, and that these ramifications, quite apart from the question of fundamental principles of justice being abandoned or severely strained, are of sufficient substance and gravity to require consideration. The important question to be asked is what the proposed scheme does in the way of addressing the problems in (a), (b) and (c) above.

The Proposals

As to (a), at p. 17 of his paper Mr Dowd said that:

> Under the proposals approved by Cabinet, the defendant will have a right of cross-examination where there are reasonable grounds to suspect that cross-examination will either affect the assessment of the reliability of the witness or would adduce further material to support a defence . . . I won't take your time by reciting the various formulations that were considered at one time or another but I can assure you that the test approved by Cabinet is the widest of those formulations.
>
> The clear inference is that this test will be likely to mean in practice that all witnesses will be sought to be called by defence counsel. One must therefore expect approximately the same number of witnesses to be called as are being called under present arrangements. Not only is it likely that witnesses will continue to be called unnecessarily, but it is also likely that a great deal of time will be taken up on occasions by counsel endeavouring to persuade the magistrate that certain witnesses

> ought to be made available for cross-examination. Magistrates under the proposal will be charged with the responsibility of deciding whether witnesses fall into the wide criteria to be stipulated in the Act. Inferentially this will sometimes require an additional preliminary hearing prior to the pre-committal hearing itself, at which time these witnesses can be approved or disallowed for cross-examination by the magistrate, allowing sufficient time to call those witnesses who have been approved. The new procedures will not improve the present arrangements; if anything, they are likely to be more time-wasting.

As to (b), at p. 15 of his paper, Mr Dowd sets out his reasons for not proclaiming amendments to the *Justices Act* by the previous government which would have restricted the right of defendants to require the attendance of some witnesses for cross-examination and given magistrates powers to halt cross-examination. As to cross-examination he said:

> A limitation on cross-examination will be provided but this will be basically similar to the existing limitations under the *Evidence Act*.

The practical result to be expected therefore is that there will be no change and the problem will remain.

Furthermore the problem is likely to be exacerbated. Magistrates are to be placed in the uncomfortable position where they have no interest or role to play, in determining whether there is to be a committal for trial. However, because they are judicial officers, they will not want themselves to be seen as an arm of the DPP or to be labelled as being used by the DPP in any way. (From this perspective, of course, magistrates will often find themselves in an intolerable position, one quite antithetical to their recently acquired status as true judicial officers.) Cross-examination is therefore likely to be liberally permitted, even where it offends the provisions of the *Evidence Act*. Why one would want highly skilled and trained magistrates to preside over proceedings of this kind with no powers, save as to admissibility of evidence, is not clear to me.

For the above reasons, committal proceedings are likely to become even lengthier than at present. Certainly they will be at least as long as now. Lawyers will be making every effort and conducting every possible search to find weaknesses in the prosecution case, whether they exist or not, with a view to making detailed submissions to the DPP (not in open court, but in private) that there be no committal for trial. In this regard they will have in mind that they are often dealing with young and inexperienced lawyers in the DPP Office whose views will be crucial in the final decision to be made by the Director whether to file an indictment or not.

As to (c), what is proposed here as a remedy is quite revolutionary for countries enjoying the benefits of the Common Law. Power to commit for trial is taken away from judicial officers in open court (that is magistrates) and given to solicitors behind closed doors in the Office of the Director of Public Prosecutions. It is no answer to say, as the Attorney-General seems to suggest in his paper, that that is what happens now. Certainly it has always been the case that the magistrate's decision to commit for trial is not the final decision. But in the first place, taking the figure of 17 per cent of magistrates' committals allegedly being no-billed at face value (*see* below) even on that figure the DPP is following the magistrates' decisions in 83 per cent of the cases. But more importantly, under present arrangements all the evidence is taken and where necessary, tested before the magistrate, submissions are heard as to whether the evidence warrants a committal order being made and the magistrate provides reasons for his or her decisions. What this amounts to is that a great deal of assistance is given to the DPP when making the final decision to proceed with a trial or not. Under the proposed scheme much of this assistance is removed, leaving the solicitors responsible for that decision in the DPP office to make the decision alone. Even worse, this decision making is then to take place away from public scrutiny.

Decisions by the Director of Public Prosecutions to file a bill or not to proceed will not be able to be tested. In this regard, the Director of Public Prosecutions will assume the mantle of infallibility. It is often stated that magistrates commit too many people for trial (*see* pp. 24-5 of the Attorney-General's Discussion Paper), but which independent body has made any evaluation of the decisions by the Director of Public Prosecutions not to proceed against certain defendants despite a committal by the magistrate? It may be the Director of Public Prosecutions is in error and not the magistrate. It may be too, that the public would be alarmed at the failure to proceed in certain cases. On the other hand, many of these decisions not to proceed despite a committal are made for very good reasons, which reasons only appear subsequent to committal, for example with the experience of a committal proceedings (including cross-examination) behind them, victims change their mind and no longer wish to give evidence, witnesses disappear or new evidence is forthcoming which changes the complexion of the case.

The Attorney's answer to this criticism is quite breathtaking in its audacity, coming from a person with a respected civil libertarian background. He states that 'the new legislation will specifically require the Director of Public Prosecutions to give reasons as to why a person charged with an offence by police will not be sent to trial.'

We remind ourselves that under the proposed scheme:

- the DPP alone will determine the charges to proceed;
- the DPP alone will determine whether they are to proceed summarily or by way of indictment;
- the DPP alone will prosecute those charges; and
- the DPP alone will decide if there is to be a committal for trial before a judge and jury.

Having proposed this totalitarian arrangement, which gives all power (without any checks and balances of any significance) to the DPP, we are told that defendants' concerns and society's concerns are to be protected, not via the checks and balances provided by a judicial procedure, but by the requirement that the DPP give reasons for any decision made by him. This arrangement has parallels with the farcical situation in communist countries where citizens are assured that their rights under a totalitarian government are being safeguarded because a beautifully written constitution with impeccable logic guarantees that. No doubt reasons are given for decisions made there too!

Conclusion

In my view the best answer is not to resort to option 2 above, but to take up option 1 and give to independent judicial officers (that is magistrates) the necessary power they require to control committal proceedings, in particular the power to control the few abuses in the mandatory paper committal system which still remain.

Because magistrates are usually distrusted by those responsible for introducing new procedures, the powers of magistrates remain circumscribed. This is the situation with committal proceedings and it has inevitably produced delays and unduly long hearings. Circumscribing the power of magistrates to control proceedings properly in the fond hope the defendants will thereby be more justly treated and have their rights better maintained, has led to defendants being inordinately punished by long hearings, undue delays and huge expense, and no better off in terms of justice. Most of the residual deficiencies of the present mandatory paper committal procedure can be dealt with by giving magistrates

effective power to control cross-examination. One way of doing this is for the government to proclaim sections 41(9) and 48EA of the *Justices Act*.

What are the advantages of a streamlined paper committal system over a procedure which does away with traditional committal proceedings?

- The structure already exists for this to take place. If it is found that magistrates lack the skills and expertise (which I dispute) to make these decisions, then that ought to be remedied;

- it is consistent with the appearance of justice being done, because it takes place in open court and not behind closed doors;

- it is further consistent with the appearance of justice being done because the person making the decision to commit or discharge in the first instance is a separate person from the prosecuting authority and a judicial officer;

- the sifting which takes place in committal proceedings before a magistrate is a very valuable first screen, serving three major purposes:-

  - it has therapeutic value for the particular community, particularly where that community is a small one;
  - it enables the nature and quality of the evidence against the defendant to be properly assessed; and
  - it assists, sometimes crucially, in the final decision to be taken as to whether a bill should be filed and a trial take place;

- there has always been a big question mark in the mind of members of the public over the 'no bill' procedure and the decisions made not to proceed as the result of a 'no bill' application. A public committal proceedings where the nature and quality of the evidence can be observed and scrutinised by the public and the media, and at least an initial decision given by the magistrate, a judicial officer independent of the prosecuting authority, is very important indeed to ensure that justice is being seen to be done. It should not be lightly taken away;

- abolition of present procedures for committal proceedings will mean that many inappropriate cases will be sent for trial, and some appropriate cases which should be sent for trial will not be sent. Overall, it is likely that the Supreme and District Courts will have more trials rather than fewer, at least initially;

- it is less expensive. Many lawyers and other staff will have to be recruited by the DPP under the proposed scheme and there can be no corresponding reduction in the numbers of police prosecutors who will be still required to prosecute summary matters. (One hears that the Office of the DPP already has 200 lawyers and that that number will have to be increased to approximately 300.) A streamlined paper committal proceeding is certainly more cost-effective than a procedure which means that a veritable empire has to be recruited at the office of the DPP; and

- it will further reduce delays in Local Courts whereas the Attorney-General's solution will not. The latter still requires the use of magistrates and in my judgment, for more time than they presently give to committal proceedings. Also, it is to be pointed out that there are no serious delays in Local Courts, whereas there are in the District and Supreme Courts. It could well be the situation for

the future that all three tiers of courts are seriously in arrears with delays, not just two.

It is ironic that a government which came to power on an anti-corruption platform and which set up an Independent Commission Against Corruption once in power, should now be seen to be introducing procedures in the administration of the criminal justice system which will facilitate expediency, malpractice and even corruption itself in the years ahead. It is quite certain that the reforms proposed by the Attorney-General will mean that there will be criminal trials going ahead which should not be and criminal trials not going ahead which should be. As to the latter I would make these comments:

In recent years the State of New South Wales has passed through a period where serious corruption manifested itself and allegations of corruption were prevalent. Commendable steps have now been taken by past and present governments to deal with corruption and to deter corruption taking place. One certain deterrent is public knowledge that criminal offences, when detected, will be prosecuted through to finality and that prosecution cannot be avoided in any way.

Very often criminal offences by certain individuals are controversial or are of vital interest to criminal organisations. It is important that proper checks and balances are in place to ensure that wrongdoers and their advisers cannot manipulate the system to avoid prosecution.

Under present procedures all criminal charges which are indictable pass through a public inquiry in open court before a magistrate, who at the end of the evidence is required to make a decision whether to commit for trial or not. This decision of the magistrate is reviewable by superior courts and by the Director of Public Prosecutions, the latter official being charged with the final responsibility to proceed or not proceed with a trial. This arrangement provides a system of checks and balances which is not easy to manipulate.

The proposal to vest the decision to prosecute solely in the Director of Public Prosecutions removes all significant checks and balances so that in the course of time it will not be difficult to arrange matters whereby the system can be manipulated to the advantage of professional criminals and wrongdoers.

We have learnt over the centuries that democracy can only survive where checks and balances are in place and they should certainly be provided in the criminal justice system.

If it is intended to continue with the proposal to vest the decision-making power as to trial solely in the Director of Public Prosecutions, this power should at the very least be subject to a review by an appropriate court at the insistence of the informant in all those cases where the Director of Public Prosecutions makes a decision not to present an indictment. The proposal whereby the Director of Public Prosecutions merely provides reasons for not proceeding is simply not sufficient to deal with possible manipulation of the new system in future years by determined individuals or criminal organisations. It is too easy for some official away from public scrutiny to make a determination that the evidence is not of sufficient strength to warrant a trial.

It is my considered view that if parliament permits the scheme outlined by the Attorney-General in his paper to become law, it will have a gravely deleterious effect on the administration of justice in New South Wales.