THE PROCESS OF REFORM

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The fact of delay in processing criminal trials in New South Wales is well known. The causes include an amalgam of neglect by governments to provide capital expenditure and recruitment of judges over many years; archaic procedures for processing those charged with serious crime, and the absence of a cohesive unified supervision of listing and disposition of trials by the judiciary. If the present discussion represents a serious commitment to reforming the system, then radical changes of approach are needed in all areas. And as a pledge of our determination to carry through such a programme, bench-marks must be established, legislated for and carried into effect within a realisable time-frame.

In the recent past there have been sincere efforts to improve things - additional judges and sittings; revised listing procedures; increasing summary jurisdiction for magistrates, and so on. The Director of Public Prosecutions Office (DPP) established two years ago, has rationalised the performance of legal officers and Crown Prosecutors in the areas of trial preparation and actual disposition. All of those initiatives have had good effect and the rate of arrears has been slowed. But even as I write the 'advantage-line' has not been crossed: more trials are coming into the system than are being completed. Hence a thorough reappraisal was essential. The "Discussion Paper on Reforms to the Criminal Justice System" [2] makes a number of recommendations.

It seems to me that any plan for rationalisation and reform of this system must begin with a single goal: that a person charged with a criminal offence should be brought to trial within six months of being charged. If everybody commits themselves to that objective as a standard and realistic requirement, then all other proposals suggested will be seen in proper prospective. Unless that basic stipulation is recognized and endorsed at the outset then all the refinements of preliminary procedures will simply aggravate the delays. The other proposals I recommend later in this paper are all aligned to this 'trial-within-six-months' agenda. We are not breaking new ground in this area: In England and Wales there is legislation to the same effect. The USA has similar time frames in many States, although the literature suggests it is nt all plain sailing in that country. [3] This booklet cites 165 articles, talks and seminars on the subject and 2357 cases Federal and State, on speedy trial law up to that time. Doubtless there are just as many more in the 11 years since. It appears,

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1 Paper delivered at a Public Seminar entitled, "Delay in the Criminal Justice System", convened by the Institute of Criminology, 9 August, 1989

2 "Discussion Paper on Reforms to the Criminal Justice System", Attorney General's Department, (May 1989)

3 **Selected Bibliography - Speedy Trials**, National Institute of Law Enforcement & Criminal Justice, U.S.Department of Justice, (1978)

so far as Britain is concerned that they are achieving this standard and there cannot be any argument that we should not do the same.

The process of reform to achieve this radical turnabout in New South Wales is three-pronged:

- a court system designed to specialise in criminal cases;
- a prosecuting authority that is involved right through the criminal process;
- a legislative programme and government commitment to achieve and maintain the requisite standard and resources.

THE COURTS

Indictable trials are presently dealt with by judges of the District Court in rotation between civil and criminal work, and by Supreme Court judges of the Common Law Division in a similar rotation. The majority of cases are in the District Court - in February 1989, the DPP had on hand 4233 District Court trials and 176 Supreme Court trials. This is about the average proportion.

The distinction between cases that should be heard in the Supreme Court rather than the District Court has become somewhat blurred in recent years. Strictly, the Supreme Court has jurisdiction in all indictable crimes and the District Court has the same except for treason and murder. [4] That some relatively trivial trials are heard in the Supreme Court and many serious and complicated matters are tried in the District Court is just one of the oddities of our system. Both levels of jurisdiction more of less simply deal with the criminal matters committed to their courts. There is a single Criminal Registry and a Criminal Listing Directorate which present the cases while the Supreme and District Courts provide the judges. The supply of judges by the heads of jurisdiction is a constant juggling act between the demands of other areas of the law (with their tremendous arrears) and the criminal law. Individual judges sit a couple of weeks, maybe a month 'in crime' in Sydney or a circuit and then sit for a similar period 'in civil'. Hence there is no ongoing group of judges nor a Division of the Court to provide continuous supervision and development of criminal procedures. Occasionally, where a judge is resident at a particular court for a lengthy period, he or she will develop local customs for pre-trial action, call-overs and so forth. These initiatives are usually practical and beneficial. But these are mere pockets of enterprise and most judges doing their circuit of period 'in crime' simply go their hardest to get through as much of the listed work as they can.

It was this sort of problem that led to England establishing the Crown Court system in the 1960s. Such a Court brings together the judges with expertise in criminal cases, working continuously in this complicated area. Not only does it have the capacity to improve the quality and consistency of approach to criminal cases, it also invests a branch of the judiciary with responsibility for the criminal lists - one of the imperatives for ongoing commitment to early disposal of criminal trials. Such

4 **Criminal Procedure Act**, (NSW) s.5 1986; Regulation, 10 July 1987

courts have their own dedicated court rooms, sittings, circuits, and so on, with an administrative office co-ordinating the effective use of every court room and judge each day.

I believe New South Wales should establish a Crown Court or Central Criminal Court - the name is not important - along these lines. It would comprise those District Court and Supreme Court judges with experience and expertise in the criminal law, headed by a chief judge and supported by appropriate administrative personnel and resources. Where such a Court would stand in relation to other branches of the judiciary must be worked out between the judiciary and the Executive. One would expect that its status would reflect the importance of an effective criminal justice system in a civilised community. The numerical strength of the Bench of the Crown Court cam be supplemented by Recorders. In England, Recorders are experienced criminal lawyers who sit as judges in the Crown Court on a part-time basis, usually a minimum of twenty days per year. (We have at present in this State associate judges who perform a similar function in civil work.) In England, Treasury Counsel are used significantly in this role. In NSW, Crown Prosecutors and Public Defenders would be an obvious source of membership of a panel of Recorders, with the addition of experienced private barristers who specialise in this area.

Somewhere between 30 to 40 percent of criminal trials are presided over by Recorders in England, so they do make a substantial contribution to the judicial function, at the same time reducing expensive outlays for permanent appointments. In addition, the Recorder system enables the authorities to assess practitioners for future permanent appointment as judges. This proposal of a single division of the judiciary devoted to criminal trials is the first part of the process of reform.

THE PROSECUTING AUTHORITY

One of the most obvious defects in our present procedure is that the final assessment of the appropriate charge an accused should face at trial is not done until months after he is first arrested. By that time a large part of the 'delay' has already occurred. It is the finding of a bill that launches the trial process and this is done by a Crown Prosecutor after committal by a magistrate and after the transcript is in hand and any further evidence has been gathered. From that point on the case takes its place in the queue for trial, where the second phase of 'delay' occurs.

Efforts made to reduce delays in the criminal justice system, until now, have been largely directed towards this second phase. While there is an obvious need for more courts to meet that problem, there is greater long-term benefit in addressing the threshold problem. To this end there should be scrutiny and assessment of the case either before arrest or straight after. As the DPP ultimately has charge of the prosecution of the trial his office should become involved at the outset. It would decide what charge should be pursued, whether it should be summary, indictable, or 'summary by consent' of the prosecution and defence. The obvious advantage is that a single prosecution policy is developed throughout the proceedings and the DDP

has control of the case from the beginning right through to the trial or summary disposal.

The process would work this way. After (or in some cases, before) a person is arrested and charged with a serious crime the Police would take the brief to the DDP. At that stage it would be assessed to determine what charge or charges should proceed. If it appears more appropriate to pursue only summary offences, the indictable charge would be withdrawn and the case left to the Local Court to hear and determine. Matters that are to proceed as indictable cases would then follow the 'paper committal' process - a brief delivered to the accused and the matter got ready for trial.

It is necessary at this point of look at the issue of committal proceedings. The Discussion Paper offers a number of options on this question - total abolition of committals; retention in a limited form, and so forth, and discusses the pros and cons of the arguments.

With due respect to everyone who holds sincere views about justice and civil liberties, there is some hollow rhetoric about the efficiency of the committal hearing today. Gone are the days when the accused came before the magistrate with no knowledge of the case he or she had to meet, and had the advantage of finding out at the hearing. The accused now gets copies of statements of all witnesses to be called and gets them some time before the committal, obviating the need to have a committal to find out the case.

The next justification for committals was that the magistrate could assess the case and weed out the weak ones. The figures in the Discussion Paper indicate this seldom happens. But what is important to realise is that whether a magistrate discharges an accused or not, it is the Crown Prosecutors and the DDP who ultimately decide whether the accused should go to trial and on what charges. An argument in favour of retaining committals is that significant witnesses can be tested in cross-examination, particularly in areas such as identification, scientific expertise and others. Such an exercise can be useful (both to the prosecution and defence) but I am not convinced it is necessary. In civil proceedings one does not get a 'trial-run' with witnesses and I cannot see why witnesses in a criminal case should be subject to giving evidence twice. (I remind readers that we are talking now about a system where the trial is to take place within six months of arrest. The arguments I am putting forward on these subsidiary reforms are based on that essential standard).

If the DDP is to be the final arbiter of whether an accused stands trial - which is, strictly, the present position - there does not seem to be any justification for a magistrate to make a decision on the question as well. It is wasteful of time and resources, a serious hardship on witnesses and victims, and on the accused.

A compromise would be to abolish the automatic right to a committal hearing. The DDP, through the Crown Prosecutors, would decide the form of the indictment. If it is required that there should be some preliminary examination of

specified witnesses, it could take place before a magistrate acting as a referee. The outcome would be considered by the Crown in deciding to proceed, but the magistrate would be relieved of a decision-making role in that regard. (It might be remembered that Scotland has never had committal proceedings; New Zealand abolished them 15 years ago, without any apparent diminution of justice; England has them in modified form with the vast majority being 'paper committals'.)

If one accepts that a magistrate's decision to commit for trial be abolished, then the focus of the prosecution becomes simplified - getting the case to trial as soon as possible. The resources will be aimed at early assessment of the evidence; the nature of the charge it supports; and whether it can be tried summarily, at which point it is channelled to the Local Court. If indictable, the accused would be supplied with the statements, the indictment filed, and the case ready to go to trial. A programme along these lines would assuredly enable the trial to take place within six months of arrest, subject to the usual provisos.

Another relevant aspect to this part of the process is the area of charges that are summary by consent. Section 476 of the *Crimes Act* provides for a large range of indictable charges to be dealt with summarily by a magistrate if the accused consents and the magistrate considers it appropriate to do so. The number of cases that come through our office indicates that there are a lot of matters that could properly be heard summarily but are not. Either magistrates are not offering the option sufficiently or, if it is offered, the accused are electing jury trial.

When I was in private practice there was a general attitude among defence lawyers that the interests of a client were best advanced by declining summary hearing. There was the delay factor which usually favoured the accused. There was the chance that in the District Court, opportunities could arise for more favourable disposition of the case; that a magistrate dealing with an indictable case reduced to summary level was more likely to take a severe view than a compassionate one. Whether these attitudes were held on genuine grounds or experience is hard to define, but expressed the accepted philosophy in those days. I would imagine that practitioners probably hold similar views today, although I do not suggest they are justified. The provisions of s. 476 of the *Act* leave the offer of summary jurisdiction entirely to the magistrate. There is no statutory authority for the prosecution to have any say in those considerations, although I have known magistrates to ask the views of the prosecutor on the broad question - Is it a suitable case?

It seems to me that this is an area that needs review. The magistrate has to make his election from a restricted view of the case. He only has the fact that the charge falls within the Section and the Crown evidence. He does not know, nor should he properly be aware of any criminal record or other adverse antecedents of the accused. The nature of the charge means that such a hearing must commence as a committal hearing and the magistrate cam only make a sound decision on offering summary jurisdiction when he has heard the prosecution case.

On the other hand the prosecution has all the available material to make an assessment as to the suitability of the case being heard summarily. Accordingly, I would propose that summary jurisdiction should be offered at the behest of the prosecution and subject to the consent of the accused. This can be arranged in the early stages and the consents obtained before the hearing is launched. In this way any hiatus arising form the changed approach to committal hearings would be avoided.

In summary, so far as the prosecuting authority is concerned, it is proposed that the DDP become involved in the initial stages of each charge of serious crime; that the filtering process be established right at the start; that the decision for a person to be placed on trial be left with the DDP whether of not there is any form of committal hearing; and in cases where it may be appropriate for the indictable charge to be disposed of summarily, that request be made by the DDP and implemented only with the consent of the accused.

THE LEGISLATIVE PROGRAMME

The third element in this process of reform is the commitment of the government to the necessary legislation and the provision of funds. As I said at the beginning, the changes proposed to the present system are aimed at the primary goal: trial within six months of being charged. It is to that ambition that these efforts are directed, not only for the present but for the future. In the short term there must be a huge contribution of effort and resources. If committals are abolished or restricted in the ways mentioned, there will be an immediate 'bubble' of cases waiting for trial - maybe more than twice the existing number. Hence a commitment has to be made to meet that challenge and deal with it. Thereafter there must be a continued resolve to maintain the standard. To that end legislation will be needed to set the time frame, naming the dates for each phase to be commenced so that the pledge of reform is not displaced by other problems. It is also obvious that ambition must be tempered by reason. It would be disastrous to impose a legislative programme of reform on the courts, the prosecution, allied agencies and the legal profession which cannot be achieved. That is the challenge facing the Executive and all of us who sincerely demand a reversal of the cataclysmic path upon which our criminal justice system is presently travelling.