The Public Defenders Criminal Law Conference 2011
Taronga Centre, 26 February 2011

REFORMING THE CRIMINAL JUSTICE SYSTEM

Nicholas Cowdery AM QC
Director of Public Prosecutions, NSW

INTRODUCTION

I wish to thank the Senior Public Defender, Mark Ierace SC, for the invitation to address this conference and for the title he has given to this presentation. It opens up many possibilities, not all of which can be dealt with in the time available. I propose to discuss just a few of the suggestions that have been made for reforming the criminal justice system over the last 20 years or so (some of which have been implemented) and a few "wish lists" that have been put up at various times (again, some of which we now enjoy – speaking as a prosecutor, of course). For example, we have greatly improved the ways in which sexual assault offences may now be prosecuted and vulnerable witnesses protected with the assistance of modern information technology.

As you all should know by now, it is likely that I shall retire as DPP some time this year. I have had to spend some time dealing with the paper and other records that I have accumulated in 16 ½ years in the position and in doing that I have been reminded of many things. For instance, a few weeks after I commenced, on 26 November 1994, I addressed a Public Defenders' conference. The topic on that occasion (also given to me by the organisers, but not Mark) was the rather clunky "The Admissibility of Expert Opinion Evidence to Rehabilitate a Complainant's Evidence after Impeachment in Cross-Examination". (I still have the paper, but I'm not game to read it.) The second occasion on which I addressed your conference (also here at Taronga) was on 8 May 2004, nearly ten years later and nearly seven years ago, when I spoke about the more manageable topic of "The Prosecutor's Duty of Disclosure". So I suppose it is now about time that I turned up again, before I move to my next life.

REFORM

It is important to acknowledge that the criminal justice system is just that – a system, involving many parts and many actors; like a machine of many cogs turned by various forces. It is an essential part of the process of government relied upon by the community, whom we serve, to find the truth (which it sometimes does), to resolve disputes and to administer justice (including the imposition of just punishment if required). By those means, it is said, the criminal justice system serves to protect us (to some extent) from crime. I have often said that the system works best if the various participants concentrate on making their own contributions in the best way possible – if each force or actor turns its own cog in the best way possible and doesn't try to turn any of the other cogs as well. We have rules in place to assist in achieving that.

The word “reforming” is most commonly used in the sense of not just changing, but improving. There is an irritating folk saying: “If it ain’t broke, don’t fix it” (which I have probably been guilty of using myself on occasion). Sometimes it does make sense – but in the present context I think it has little application. It implies that one should wait until something breaks before doing anything about it; but that ignores not only preventative maintenance but also improvement – both of which should be practised in the criminal justice process.

The criminal justice system is not perfect and never will be. It is designed and operated by humans and we cannot get everything right for all time and we do make mistakes. Trial and error still have a place in human development and government, so we should keep on reforming. It is a bit like painting the Harbour Bridge, a never-ending job – but one about which many people might argue, for example in the case of the Bridge, about the shade of the paint, its consistency, the kinds of brushes and rollers to use, the starting point and the frequency of application.

There have been ongoing attempts in many Australian jurisdictions, including NSW, to analyse the criminal justice process and to make it work better. Actual improvements have been incremental and small (but perhaps that is not a bad thing because criminal justice reform should be undertaken conservatively). Before my appointment as DPP in 1994 the Pegasus Taskforce Report in Victoria of September 1992 probably set the scene in modern times. It identified a high proportion of late pleas of guilty in indictable offences, wasting time and money on both sides in preparation for trial and delaying court proceedings. It recommended greater involvement of the DPP and Legal Aid Commission’s offices post-charge and pre-committal and continuity of representation on both sides. It considered that the key to a fair, economical and speedy criminal justice system was early and continuing consultation between opposing parties. The imperatives for reform have not changed much over time.

Coincidentally, on 1 June 1992 Kevin Waller, retired Magistrate and Coroner, had written an article in the Sydney Morning Herald that drew attention to court delays which at that time (but no longer) were quite extensive in NSW. He recommended then that:

- the laws of evidence be overhauled (a consultation process was then under way that led to the *Evidence Act* 1995);
- the courts must regulate and control prolix cross-examination (a 1987 enactment to assist that commenced in 1992);
- the defence should be required to lodge a statement setting out what the defence will be and what facts are in issue; and
- the right to make an unsworn statement from the dock should be abolished.

Not a great deal of significance happened in NSW or Victoria, but in July 1996 the Victorians made another attempt with Project Pathfinder – Re-engineering the Criminal Justice System. It focused on performance measures and suggested a range of specific measures at all stages of the prosecution process with greater utilisation of electronic data exchange and storage, time standards, early involvement of legal representatives and other process improvements (rather than changes). It was produced at a time when managerialism was running rampant in public administration and enjoyed little success.

A year or two later the DsPP and Legal Aid heads around Australia, spurred on by SCAG, developed and produced a Best Practice document for the conduct of indictable prosecutions. The four foundational principles were:

1 guilt determined by evidence and law;

2 sentence based on offence and offender;

3 early guilty pleas made possible by early information and advice rather than inducement; and

4 an open, accountable process using scarce resources efficiently.

More specific and quite detailed recommendations were made for consistent Prosecution Guidelines around the country (now largely implemented), the laying or early screening of charges by the DPP, involvement of the DPP before committal, full and continuing prosecution disclosure, the development of guidelines for defence representatives (to include early assessment of cases, involvement with the accused, advice to be given on possible pleas of guilty, defence disclosure without prejudice and fee arrangements encouraging early resolution), trial by judge alone at the accused's request, status conferences before trial, various measures of accountability, sentence indication hearings and (interestingly) no more than 10% reduction in sentence for a plea of guilty.

Those recommendations, like others, have not been fully implemented or have been adapted; but the document and the others mentioned pointed the way to the sorts of issues that must be relevant to any useful reform of the criminal justice system.

In NSW the Government has attempted very recently to legislate measures of that kind. On 1 February 2010 Division 3 of Part 3 of the *Criminal Procedure Act* 1986 commenced – the case management provisions. I suspect it may be a foredoomed attempt to force litigants into judicial straitjackets that judges do not wish to apply – but we will have to see. The provisions certainly require more effort (and therefore expense) by the prosecution.

I note that in Southon et ors v Gordon Plath on behalf of the Department of Environment and Climate Change [2010] NSWCCA 292 Justices Kirby and Johnson had something to say about these reforms in circumstances where an accused had served an expert report on the prosecution after the close of the prosecution's case and where that had induced the prosecution to withdraw. The accused unsuccessfully applied for costs and unsuccessfully appealed against a refusal. Their Honours said:

> *"83 It is noteworthy that recent amendments, concerning case management and pretrial orders in serious criminal indictable proceedings, permit the Supreme or District Courts to order, amongst other things, the pretrial service on the prosecution of a report of any expert witness whom the accused person intends to call to give expert evidence at a trial… We do not suggest that these provisions applied to these proceedings. Rather, their enactment reflects the fact that the traditional approach, where an accused person could hold back such evidence until the defence case was underway, no longer reflects the law in this State with respect to trials for the most serious crimes."*

> *"85… Where an accused person held back from the prosecution an expert report until after the prosecution had closed its case, this would operate strongly against that person in any subsequent application for costs by that accused person."*

Perhaps the messages behind the legislation are beginning to get through.

The reduction of unnecessary delay is a key target in any reform process and that requires the co-operation of the relevant players. Indeed, by 1999 the District Court in Sydney had so far reduced delays that the Chief Judge wrote in the Annual Review:

> *"The remarkable achievements in the criminal business of the Court are a testament to the co-operation between this Court, The Magistrates' Court, the Legal Aid Commission and the Office of the Director of Public Prosecutions. The magistrates deserve great credit for the extra work they have undertaken and the solicitors in the Offices of the Director of Public Prosecutions and Legal Aid NSW have been extremely responsible and sensible in the way they have gone about the performance of their duties in the committal process."*

THE BEGINNING

At a National Crime Authority conference in Melbourne in 1992, around the time of the Victorian Pegasus Report, while I was still in private practice both prosecuting and defending, I seem to have set out my first wish list for criminal justice reform. I listed the following:

1. a move to paper committals;
2. retention of jury trials;
3. expanded legal aid to enable competent defence representation;
4. retention of conspiracy charges in appropriate cases;
5. pre-trial directions hearings;
6. expanded charge negotiation;
7. reform of some rules of evidence (hearsay rule; best evidence rule; admissibility of foreign evidence; provision of charts, summaries, plans, etc to juries);
8. closer engagement of juries in the course of trials;
9. no arbitrary time limits on addresses and submissions;
10. abolition of the unsworn statement; and
11. less game-playing in advocacy and a greater concentration on the delivery of service, to the accused and the community.

When I was appointed DPP two years later, as seems to happen on such occasions various people asked me to speak or write about any wish list of reforms for criminal justice that I would like to see implemented. I have found a couple more in my cleanup and I am pleased to note that some of the items on the lists have indeed come to pass.

The 1995 edition of Bar News carried a piece I wrote entitled “Hot Seat – or Siberia?” (with a black-bordered, funereal photograph on the cover). In a section entitled “What Changes Would I Like to See?” I listed:

- the ODPP taking over the conduct of summary prosecutions from the police;
- modifications to committal proceedings (to shorten and sharpen them);
- finding ways to bring forward as far as possible the point at which an accused person is to decide on the plea and the issues to be fought are defined, as many as possible of which, if disputed, should be litigated in advance of the trial proper – thereby reducing the proportion of late pleas of guilty (the Criminal Case Conferencing scheme has been most effective here in more recent times);
- limited defence disclosure;
- defence opening addresses;
- the DPP having the power to grant immunities;
- qualification of the so-called right to silence (by allowing limited comment on an accused’s silence in some circumstances);
- exchanges between the Crown Prosecutors and Public Defenders;
- a change to the ODPP logo;
- abolition of wigs;
- majority verdicts of 11/1;
- victim impact statements; and
- Crown appeals from directed verdicts of acquittal on points of law.

We did not have any of those then; now most of them have been done, some quite recently – but a few of them not. We almost took over summary prosecutions in 2000, but the Olympic Games sucked up the small amount of capital funding that was required. The DPP still has no power to grant immunities – a politician, alone, has that power in NSW (but DsPP elsewhere may do it). We have not moved as far as the UK in commenting on an accused’s silence. We still wear wigs (although there has been some loosening up by individual judges). But what I regard as positive progress – that is, reform – has been made in respect of the others.

As I settled into the role of DPP I soon discovered that the actors in the criminal justice system rarely collaborated in the development and reform of the system itself and the mechanisms it employed. In the first couple of years I became increasingly frustrated at what appeared to be simply the consequences of lack of communication and coordinated planning (already identified above as being pivotal in improving the system); so, for the first time it had ever been done, I convened a workshop, held on a Sunday (16 March 1997), to bring representatives of the relevant agencies together to explore reforms that might make the system work better. We did make some modest achievements and a second event was held on another Sunday, 10 August 1997. By then several other *fora* had started involving agencies in the criminal justice system and at least a dialogue was happening at several levels that had the potential for reform and those mechanisms expanded over time. I believe all of these initiatives have contributed to the improvements that have undoubtedly been made in the years since.

I later added to my wish list in various papers, after publication of my book in 2001:

- improvements in dealing with children in the justice system;
- reduction of domestic violence (against women and children);
- ways of reducing the incidence of Aboriginal representation in the criminal justice system;
- drug law reform;
- sentencing reform; and
- a charter of rights.

The wish list had started to become a fantasy list in some respects, but I have still not given up hope.

THE MIDDLE

In 1996 there was a NSW Legal Convention – another example of useful *fora* for discussion of reform. The Hon Justice Davies of Queensland proposed serious changes to the criminal justice system and his paper was published in the Summer 1996 Bar News. Mark Ierace, then with the Commonwealth DPP, in a paper in February 1997 responded and said:

> *"Essentially he proposed we do away with the right to silence, the Bunning and Cross discretion and committals, and also that the accused be required to disclose his or her defence prior to trial.*
> *In the NSW context, these proposals follow on the abolition of the dock statement, the repeal of the statutory bar to judicial comment on the accused not giving evidence and the restriction of committals, and come in the midst of a proposal to introduce majority verdicts. The pendulum has been 'restoring that balance'* [between the accused and the community] *in New South Wales since the 1980's and is not losing momentum."*

Mark then examined in detail issues concerning the right to silence and concluded:

> *"There are simpler and fairer ways to improve our criminal justice system. Reducing delay is the single most urgently required reform, which would impact positively on both the prosecution and defence, and also on victims of crime. The Supreme Court is increasingly expressing reluctance to deny bail to defendants who would otherwise be on remand for extended periods, which then results in the trial losing priority. The memories of both prosecution and defence witnesses fade and become open to attack on that ground alone. Delay has particular relevance to trials where the memories of prosecution witnesses are critical, such as in relation to identification evidence, and in child sexual assault trials."*

Certainly so far as the NSW District and Local Courts are concerned, that reform has taken place and, as noted above, had made significant advances by 1999. The Davies suggestions have been raised again from time to time.

In 1999 I addressed a Law and Order Forum conducted by NSW Young Lawyers. That produced another version of my wish list and I said:

> *My own view is that … a suspect should have the right, without prejudice, to refuse to respond to the questioning of investigators; however, as the prosecution process proceeds from charge to committal there should be an increasing obligation on the defence to cooperate with the court and the prosecution with increasing prejudice for failure.*
> *As part of that cooperation I believe that in a timely fashion before trial an accused should be required to disclose:*
> - *the plea;*
> - *certain defences (alibis, substantial impairment, self-defence, provocation, consent, duress, lack of intent, etc.);*
> - *the issues to be litigated;*
> - *evidence and aids that may be admitted by consent (e.g. continuity, formal requirements, charts);*
> - *evidence of expert witnesses; and*
> - *character witnesses.*

At a time of near universal education, access to legal aid, no more police verbals and increased accountability of law enforcement, I think those remain reasonable propositions.

Some time later, in 2004, the Hon Justice Dunford of the NSW Supreme Court (as he then was) presented a paper at a criminal law conference entitled "Looking Forward – the Direction of Criminal Law". He began with what he described as a "short and rather cynical view" of what he saw as the future of criminal law:

> *"I believe that people will continue to commit offences, a lot of them will be charged, their trials will get longer, and in particular the summings up will get longer as more and more directions are required, a large number of those tried will be convicted, and nearly all of them will appeal to the Court of Criminal Appeal."*

He noted that whereas 20 years earlier the most common sexual assault offence was the rape of an adult woman where the issue was identification or consent, the most common charge of that kind now was child sexual assault, often brought many years after the event. In addition, Parliament had significantly increased maximum penalties. He mentioned other developments that had occurred, including drug offences, jury procedural reforms, the abolition of dock statements, the introduction of the *Evidence Act*, the Commonwealth *Criminal Code*, confiscation legislation, victims compensation, the broadening of punishment options, the Drug Court, DNA evidence, increased surveillance evidence, controlled operations and LEPRA provisions, amendments to the Bail Act, the proliferation of investigating agencies and the increased sittings of the CCA (which 30 years before, he noted, used to sit most Fridays and finish by lunchtime). He mentioned guideline judgments, standard non-parole periods, special circumstances, the "law and order auctions" that we used to see at election time and increasing punitiveness in official criminal justice policy (which has only increased in the 6 ½ years since).

His Honour then looked to the future (now our immediate past and present) and said:

> *"… the community expects those guilty of breaking the law to be convicted and punished appropriately. The community is not interested in elaborate mind games played by the Crown and defence lawyers, they expect the courts to ascertain the truth and having established the truth, deal appropriately with those involved, and if they believe that the rules of evidence or procedure inhibit the discovery of truth, they will push for those rules to be changed."*

His Honour referred to consideration of a review of the principles of double jeopardy (now completed with limited rights of retrial after acquittal now available in some circumstances – Part 8 of the *Crimes (Appeal and Review) Act* 2001). He suggested that consideration could be given to amending section 6 of the *Criminal Appeal Act* 1912 to expressly provide that a conviction appeal be dismissed, notwithstanding that any ground of appeal is established, if the Court itself is satisfied of the guilt of the appellant beyond reasonable doubt (a reform that has not eventuated).

He concluded his paper by noting that if the changes already under way or proposed did not satisfy the community, pressure could build for more radical changes such as the abolition of juries, judicial participation in jury deliberations, modification of the adversarial system, mandatory sentencing or having the jury involved in sentencing (a more recent proposal by Chief Justice Spigelman that was not supported by the NSW Law Reform Commission). He questioned, however, whether these would improve the system or, in some cases, be "positively disastrous".

PROBLEMS

As in all aspects of criminal practice, reform of the system requires balance. On the one side is the need for the system to serve the community effectively and efficiently, in a way that generally satisfies the community that justice is being done. As Justice Dunford observed, if they do not feel that is occurring, there will be demand for change, perhaps not for the best. On the other side of the balance is the need to observe the basic principles of human rights and fairness that any individual caught up in the process should expect to be able to receive. Striking that balance often leads to vigorous debate.

We should ask at this point: is there anything "broke" that needs fixing – or are there even improvements that we can identify as needing to be made now by reforms to the criminal justice system? The system operates within the substantive and procedural criminal laws that are made by Parliament and by the courts. It moves through investigation, prosecution, defence, adjudication and correction. All stages should be under constant examination.

There is plenty of evidence that, certainly in the last ten years or so, the criminal laws have become more punitive. Constant *ad hoc* amendments to the *Bail Act* 1978 have seen the removal of some presumptions in favour of bail, an increase in presumptions against and restrictions imposed on the conduct of bail proceedings. Those changes have tied the hands of the courts, with the result that the remand population in prison has blown out again in a way that first prompted the passage of the *Bail Act* nearly 33 years ago. People, especially juveniles, who do not pose a significant threat of reoffending or non-

appearance gain further education in crime while in custody awaiting trial on charges that often do not result in conviction. (The situation is aggravated by the incompetent computerised JusticeLink program that allows people to be rearrested for breaches of bail that are not breaches. Bail conditions are changed but not recorded – and compensation must be paid as a consequence of that false imprisonment.)

This trend was already quite evident in 2006 when the late Justice Connolly of the ACT Supreme Court said in a paper to a Law Council of Australia conference[1]:

> *"The Queen of Hearts, you may recall had her own views of a proper criminal justice system – 'No No', she said 'First the sentence, then the verdict'. As Parliaments around Australia increasingly intervene to reverse the presumption in favour of bail, or indeed to expressly provide that bail is not an option for certain offences, and as studies show an increasing tendency for increased rates of remand in custody … one might wonder whether the Queen of Hearts' understanding of the criminal justice system is now more realistic. Certainly some media commentators would view such a system with favour, one may assume."*

Sentencing laws have increased the number and length of custodial sentences without any corresponding reduction in crime. Crime rates are steady or falling in almost all major categories, but that is not due to increased imprisonment – indeed, it might be argued, that is in spite of increased imprisonment, because the recidivism rate in NSW is over 40%, well above that in comparable jurisdictions such as Victoria (closer to 30% and with a much smaller prison number per head of population, around half of that in NSW). These have been consequences of so-called "truth in sentencing" (the *Sentencing Act* 1989) and the standard non-parole period regime (introduced in 2002 as a compromise to head off mandatory sentencing, with the SNPPs being taken from the median NPPs recorded in NSW Judicial Commission statistics). The process of sentencing itself, by reason of the myriad legislative provisions (including section 21A of the *Crimes (Sentencing Procedure) Act* 1999) that must now be taken into account, is virtually never correctly carried out. Once we understood what the common law required of sentencing and it could be expressed in half a page. Now judges must take scores of pages in which multiple errors will usually be discernible.

Sentencing will probably always be an area of much debate. On 21 January 2011 Professor Mirko Bagaric of Monash University published a piece in The Australian arising out of the High Court's decision in *Hili v The Queen; Jones v The Queen*[2]. He referred to the High Court's affirmation of the need for consistency in sentencing (but, it is to be noted, consistency in the application of relevant legal principles, not in numerical equivalence) and referred to the *"about 300 variables that supposedly either go to increase or decrease a penalty, and some (such as intoxication and gambling addiction) can do both."* This, he said, *"allows judges to pluck out a vast array of principles to give effect to their judicial whim"*. He made the rather radical call for all current aggravating and mitigating factors to be abolished and for a start to be made *"from scratch in developing a system of smart sentencing"*. He proposed that:

[1] "Golden Thread or Tattered Fabric – Bail and the Presumption of Innocence – National Access to Justice and Pro Bono Conference 2006, Melbourne, 11-12 August 2006
[2] [2010] HCA 45

- there be a matching of the seriousness of the crime with the harshness of the penalty;
- the main determinant in setting the amount of punishment should be the principle of proportionality which prescribes that the pain inflicted by the punishment should be commensurate with the harm caused by the offence;
- distortions to this principle such as rehabilitation, community protection and deterrence should be discarded;
- consequently, most sentences should be reduced, except for offenders with high rates of recidivism;
- the result would be higher sentences for serious sex and violent offenders and lower sentences for most other offences.

He then proposed predetermined grid sentencing with mandatory sentences for crimes that cause the most distress for victims. Apparently something like this is being mooted in Victoria – we wait to see what the new government there proposes.

This rather mixed bag of analysis and proposals sent me to an article that Prof Bagaric co-authored in the Criminal Law Journal in June 2003[3]. It set out a blueprint for reform that would result in reduced penalties and would therefore be unlikely to be politically attractive. Nevertheless, the authors put forward seven steps to sentencing reform:

1 assume that punishment is justifiable;

2 pick a theory of punishment;

3 ignore public opinion;

4 identify the objectives of sentencing: incapacitation, deterrence and rehabilitation? [of which only absolute general deterrence was endorsed];

5 make the punishment fit the crime (both being measured in terms of unhappiness or pain);

6 aggravating and mitigating circumstances: scrutinise each of them; and

7 ongoing reform.

Is this the future for sentencing? Is this "reform"?

Another area of concern is that the investigation of "ordinary" crime has in recent times been influenced by the national reaction to the threat of terrorism. A consequence has been a much increased use of ever more intrusive surveillance methods, some needing to be approved by specially selected "eligible" judicial officers. Even 20 years ago the use of telephone intercepts and listening devices was a comparative rarity, reserved for the most serious suspected offending. Now it seems commonplace for almost any offences. I suppose we should be reassured that police "verbals" are no longer the norm, as they were in my early days of practice. However, full and timely disclosure by the police to the prosecution is sometimes still a problem, notwithstanding section 15A of the *DPP Act* and the Police Instructions, and the ODPP often waits for very long times before receiving police briefs.

[3] (Volume 27, Number 3)

The prosecution is chronically underfunded but prosecutors struggle valiantly to overcome that significant obstacle. The ODPP has also, in recent years, had to cope with a very high level of Ministerial intervention in its management and administration – an unwanted and unnecessary distraction from our core work. In contrast, police and prisons seem to be able to get what they want. The courts, especially in the country, are also grossly underfunded with service and facilities being curtailed as a consequence. It has always struck me as odd that the police and prisons should be increasingly resourced, while all the agencies in the processes between them are cut.

THE END

As I come to the end of my tenure as DPP, people have again asked me to write or speak about my wish list now. At the 2010 Rule of Law in Australia Conference last November I put forward the following.

If I had a magic legislative wand I would create a Bail Act quite unlike the draft that was out for consultation at that time (and since withdrawn) – an Act that enabled appropriate and realistic assessments to be taken into account of the likelihood of conviction and custodial sentence, the accused's prospects of appearance in court, the risk of further offending and the risk of interference with evidence – an Act that specifically required the interests of the accused to be taken into account – an Act that assisted in reducing the number of persons in custody on remand, especially juveniles and Aborigines – an Act that reduced the number of people in custody on remand whose charges are discontinued or who are later acquitted or who are sentenced to non-custodial penalties.

I would abolish the standard non-parole period regime and strengthen the exercise of judicial discretion in sentencing, enabling justice to be done between the offender and the community. I would not, in substitution, introduce any extension of the present range of mandatory sentencing.

I would find more acceptable ways, if possible, of dealing with serious sexual and violent offenders who decline to participate in rehabilitation programs in prison – ways that do not infringe our international human rights obligations. I would expand the range of rehabilitative and therapeutic programs provided in prisons. I would provide more post-release support to prisoners to try to reduce the rate of recidivism in this State. I would expand the number of alternative dispositions already available in NSW to better ensure equal access to justice across the State.

I would simplify the legislation governing sentencing generally – it has become horrendously complex and laborious, preventing judges and magistrates from getting the exercise right in most cases.

I would transfer the conduct of all prosecutions, including summary prosecutions, to the ODPP. In my view it is inappropriate to have an arm of the principal investigators, the police, conducting prosecutions. While the proven instances of improper conduct in the present system have been very few, public acceptance of the prosecution process is enhanced by having an independent prosecutor in all cases, one who is an officer of the court and not subject to the same hierarchical regime as the investigators. The professional quality of the service rendered is also most likely to be enhanced by transfer

to the ODPP. There are reasons of both principle and practice to consider and it is time for the question to be re-addressed.

I would decriminalise personal drug possession and use and small-scale trafficking. I would treat drugs as the health and social problem that they are and not as the subject of criminal law, except for larger-scale commercial enterprises conducted for profit. I would increase the number of Medically Supervised Injecting Centres and Drug Courts in the State – both of which programs have been found to be hugely successful.

To quote Ken Crispin[4]: *"Perhaps such a utopian day will dawn in some future age when new technology provides presently unimaginable investigative tools or introduces such wonders that drugs lose their attraction. But in the world we currently inhabit, these claims are false. They can only be attributable to ignorance, blind faith, an obdurate refusal to acknowledge the truth, or political opportunism. The more strident proponents of these claims strive to support them by dramatic announcements about the seizures of large quantities of drugs that were intended for our cities, and occasional shortages of drugs on our streets. This is supposed to prove that the tide of drugs is being driven back. In reality, it is like a modern-day re-enactment of the legend of King Canute attempting to demonstrate his power by ordering the incoming tide to turn back."*[5]

"… people will continue to suffer and die needlessly while we permit our political leaders to engage in impotent posturing instead of making hard and perhaps initially unpopular decisions. As the Portuguese experience demonstrates, decriminalisation coupled with facilities for effective treatment and rehabilitation can have a dramatic effect on the lives of drug users. Anything that is effective in helping people overcome their addictions will also have beneficial effects on the wider community." And, it might be added,

effects on the profits of drug suppliers, manufacturers and growers.

Our present approach to illicit drugs, after decades of trying, is ineffective, wasteful and inconsiderate of the human rights of those concerned.

I would divert more resources into addressing the underlying social and political conditions that give rise to threats of terrorism and terrorist action, rather than into combative means of addressing the symptoms. I would cease waging war on abstract nouns such as "terror" (or even "terrorism") and on chemical and botanical substances. I would rely on existing, traditional laws to deal with terrorist crimes that are committed. Lord Macdonald, then DPP of England and Wales, said in 2007:

> *"London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were deluded, narcissistic inadequates. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'. The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement."*

[4] The Quest for Justice (Scribe, 2010)
[5] Op cit, page 169

He also said:

> *"It is critical that we understand that this new form of terrorism carries another more subtle, perhaps equally pernicious, risk. Because it might encourage a fear-driven and inappropriate response. By that I mean it can tempt us to abandon our values. I think it important to understand that this is one of its primary purposes."*

And:

> *"We wouldn't get far in promoting a civilising culture of respect for rights amongst and between citizens if we set about undermining fair trials in the simple pursuit of greater numbers of inevitably less safe convictions. On the contrary, it is obvious that the process of winning convictions ought to be in keeping with a consensual rule of law and not detached from it. Otherwise we sacrifice fundamental values critical to the maintenance of the rule of law - upon which everything else depends."*

I would enact a national charter of rights.

And at the more mundane level of criminal legal practice in NSW, I would apply more resources to both sides of criminal proceedings. You have heard me complain often enough about cuts to prosecution funding, but the defence also needs attention so as to prevent knock-on adverse effects to the judiciary in both civil and criminal litigation. In 2004 the Hon Sir Gerard Brennan wrote[6]:

> *"… unrepresented litigants constitute an increasing percentage of those appearing in the courts. The trend is likely to continue. Unrepresented litigants often present a real obstacle to the efficient disposition of the court's lists, as the judge must take additional care to ensure that, even if they be incapable of adequately advancing their own case, no points of merit are buried in what is oftentimes a mass of distracting irrelevancies. There is a tendency to want to even the scales by assisting the unrepresented litigant to develop his or her case or to attack the opponent's case. That is a tendency to be detected and resisted. The judge's role is to keep the ring, not to enter the fight. By all means let the relevant rules be understood, but then the judicial duty is to retreat to the calm isolation of the judgment seat."*

I would introduce the modest qualifications to the right to silence that have been made in the UK without an obvious collapse of human rights and the rule of law in that country. Specifically and subject to appropriate safeguards:

- a reasonable level of defence disclosure;
- adverse inferences able to be drawn from silence at trial, at least;
- requirements for an accused person to disclose the defence case in advance of trial or face penalties or adverse comment.

[6] "Judicial Duties" in "The Role of the Judge", NSW Judicial Commission and AIJA, June 2004

I would add to that list (in no particular order):

- routine admission of previous convictions where relevant to establish propensity;
- joint trial on multiple complainant sexual assault allegations being the norm rather than the exception;
- abolition of the verdict of "not guilty by reason of mental illness" and its replacement by something more accurate;
- better accommodation of the mentally ill in – and alongside – the criminal justice system;
- the ODPP approving all charges before they are laid by police;
- pre-charge bail, being granted by police pending the approval of charges; and
- mandatory procedures of consultation and referral put in place before any criminal legislation could be put to Parliament, so as to avoid the knee-jerk legislative provisions that have given rise to so much that is, in fact, "broke".

I also favour the retention of trial by jury for all serious offences – and not panels of adjudicating "experts" in particular fields.

As Kevin Waller wrote in 1992 of the unsworn statement and the ability of the defence to stay mute throughout the proceedings without prejudice: "*They were rights given to poor, illiterate, unrepresented defendants who could not give evidence themselves even if they wanted to. Times have changed.*"

Indeed, they have – and we must change with them.