DIRECTOR OF PUBLIC PROSECUTIONS AMENDMENT (PARLIAMENTARY JOINT COMMITTEE) BILL

Bill introduced and read a first time.

Second Reading

Mr TINK (Epping) [10.31 a.m.]: I move:

That this bill be now read a second time.

The object of this bill is to amend the Director of Public Prosecutions Act 1986 to establish a parliamentary joint committee to be known as the Committee on the Office of the Director of Public Prosecutions, which will recommend annually the amount to be appropriated out of the Consolidated Fund for the office of the Director of Public Prosecutions and comment generally on the budget for that office; have power of veto over the proposed appointment of a person as Director of Public Prosecutions [DPP]; monitor and review the exercise by the Director of Public Prosecutions of the director's functions under the principal Act and any other Act; and limit the term of office of future Directors of Public Prosecutions to seven years.

The monitoring and review functions of the proposed joint committee will not extend to recommending that the Director of Public Prosecutions make a decision that relates to the institution or cessation of prosecutions or proceedings in a particular case or to reconsidering any such decision. The powers and functions, other than those relating to recommendations of a budgetary nature, are similar to those of the existing joint committees under the Ombudsman Act, the Independent Commission Against Corruption Act and the Health Care Complaints Act.

Having served as the first chairman of the Committee on the Office of the Ombudsman and having also served for some time on the Committee on the Independent Commission Against Corruption [ICAC], I have great confidence in the capacity of members of this House and of the Legislative Council to be able, in a non-partisan way, to play a constructive role in oversighting the DPP's office in the same way as they have oversighted the Ombudsman's office and the ICAC for some years. I note also that the term of office of both the ICAC commissioner and the Ombudsman is a non-renewable term of seven years. I believe it is appropriate to introduce a similar term of office for future Directors of Public Prosecutions.

I do not believe it is right or appropriate in this day and age that the term of office for one of the most vital public offices in the State should be indeterminate, and that fact has been recognised by the Parliament in the case of both the Ombudsman and the ICAC commissioner. If the term is non-renewable the government of the day has no opportunity to influence the holder of the office, who may seek reappointment. By definition, reappointment is not on the agenda. The Director of Public Prosecutions is a difficult and complicated office of State government activity. It involves many professionals working under enormous pressure and public expectation, on a limited budget, in an area of vital importance, and under criticism from the media. For all those reasons it is important to have an appropriate turnover after what I believe is a reasonable period of seven years. It is not in the public interest for such an important office to be held indefinitely.

This is the third occasion on which legislation has been introduced to create such an office, and I understand that both the Law Society and the Bar Association maintain their concerns and objections to this proposal, as they have for some years. However, with respect to both bodies, some of the reasons they put forward for opposing the bill are reasons to support it. Both associations need to give more credit to members of Parliament working together on a bipartisan basis on joint committees. A press release from both associations, which goes back to 1995, states:

Recent public attacks by members of the Government—

That is the present Government—

on the Director of Public Prosecutions (DPP) have been most unfortunate.

An independent DPP is essential to our criminal justice system.

Maintaining public confidence in the independence of the Office of the DPP is equally essential.

There is no reason in principle why the DPP should not make public his views about legislation which is on the public record and which affects the operation of the criminal justice system. That does not constitute a political statement. It reflects genuine independence.

The press release goes on to state:

The Law Society and the Bar Association are opposed to the establishment of a Parliamentary Committee—

Proposed by me; this is back in 1995. The press release continues:

> … establishing such a committee would be to politicise the office of the DPP, rather than support its independence.

I agree with all those sentiments except the conclusion that parliamentary oversight would result in the politicisation of the office rather than support its independence. On the contrary, having oversight from a parliamentary committee comprising members of all parties in this House and the other House would help to underscore the independence of the DPP's office. Nobody is under any illusion that the current DPP has spoken out and will continue to speak out about matters, and to some extent it is in the public interest that he does so. It can be the basis of extraordinary controversy from time to time and, in my view, on some issues it would have been better if he had kept quiet instead of venturing into debate. On other issues it was plainly in the public interest for him to engage in such debate.

There have been some unedifying slanging matches between the current DPP and the Premier and former Attorney General, but what is missing from the current arrangements is a forum for the DPP to have his say and for members on all sides of Parliament to ask intelligent questions to test his proposals. One of the most extraordinary incidents took place a few years ago when the Crimes Amendment (Mandatory Life Sentence) Bill was before the Parliament. A committee was set up to examine that bill. That committee comprised representatives from all parliamentary parties. It is a matter of record that the Premier and the then Attorney General, the Hon. Jeff Shaw, both tried directly to pressure the DPP not to attend a hearing of the parliamentary committee. The Director of Public Prosecutions [DPP] attended, but pressure should never be applied for him not to attend. The incident reflects what is so wrong with the accountability of the DPP to the Parliament. The Bar Association and the Law Society went on to say:

> Appropriate accountability mechanisms are already in place. The DPP is responsible to the Attorney General for the due exercise of his functions. The DPP reports to the Parliament through the Attorney General.

So he does, but in this infamous incident the Attorney General tried to prevent the DPP from talking to a parliamentary committee, which highlights how fragile that accountability to the Parliament is and how, on that occasion, the Government attempted on a strong partisan basis to prevent the DPP from coming to the Parliament to talk about a bill before the House. That is not appropriate, proper, or working accountability of the DPP to the Parliament through the Attorney General. Rather, it is an example of the Attorney General of the day blocking the DPP from coming to the Parliament to be accountable. It is a dangerous, contradictory and nonsensical situation.

Both the Law Society and the Bar Association are wrong: they do not give credit to enough members of this Parliament to provide a level of accountability on a bipartisan basis. In 1997, following objection to the way in which the DPP's office handled a bail application for the alleged killers of policeman David Carty—although, ironically, this drew the Premier to the conclusion that perhaps a parliamentary committee might be appropriate—the Premier told the DPP in public to lift his game and that the failure of the DPP to alert police to the bail application was disgraceful. An article in the *Daily Telegraph* of 11 October 1997 reports:

> But the Premier also said momentum was developing to set up a parliamentary watchdog to monitor Mr Cowdery.
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> "The case is growing for some sort of oversight," Mr Carr said.

The case for some sort of oversight is stronger than ever. Public slanging matches are better dealt with through the parliamentary committee process. One of the major concerns of the legal profession is the lack of appropriate recognition of the separation of powers in the Westminster system: mixing the role of an independent DPP with the Parliament creates difficulty for separation of powers concepts. As I have stated previously, the English DPP has regularly appeared before the House of Commons, through the House of Commons Home Affairs Committee, to answer all sorts of questions relating to the role of the office. Standing order 152 of the United Kingdom Parliament states:

> Select committees shall be appointed to examine the expenditure, administration and policy of the principal government departments.

Committee No. 8, the Home Affairs Committee, examines the administration and expenditure of the Crown Prosecution Service and Serious Fraud Office. The committee has been active for some years and has been the subject of a study. A report by Gavin Drewry entitled "New Select Committees: a Study of the 1979 Reforms", was published in 1985. I note the early concern about restrictions on the terms of reference. At page 200 of his publication, Mr Drewry states:

> In practice the restriction melted away as it became apparent that in many contexts legal administration and policy simply cannot be petitioned off as a "no-go" area in the territory of "home affairs".

Mr Drewry stated that after the Attorney General's initial refusal to appear before the Committee and the Director of Public Prosecution's initial refusal on three occasions:

> … the Solicitor General for Scotland, and even the Lord Chancellor appeared before the committee, and the skies did not fall on the shrine of judicial independence. The Home Affairs Committee has more than enough ground to cover, but this is one omission from its jurisdiction that should never have been countenanced.

For some years the House of Commons has had a level of direct parliamentary accountability, not through the Attorney General's office, but directly with the DPP. It is so established and has become so entrenched that academic studies of the Parliament have indicated that such accountability is very positive. Some years ago Barbara Mills, the then Director of Public Prosecutions, appeared before the committee and was asked a large number of questions about a range of issues that we hear on talkback radio in Sydney every day of the week.

At any public meeting about public safety issues questions are asked about sentencing and the adequacy of procedures. Questions asked of the English DPP are along precisely those lines. What could possibly be wrong with that? The days of the DPP's office or any other group being free or removed from public debate have gone, and I do not believe the DPP thinks that he should be above public debate. On 2 August 1988 an article in the *Sun-Herald* quoted Mr Cowdery as saying that his independent stand on a number of issues and his fights with the Premier—and also at that time with Mr Whelan—only enhanced his status. The article stated:

> It sent the message, he maintains, that he is not beholden to any political master or political dogma and that he will fight for change.
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> "The feedback has been overwhelmingly positive," he said. "People from all walks of life have thanked me and supported me for speaking out on issues—and I take that as a sign that I should continue to do so."

It is important that in speaking out the DPP should also be accountable in a meaningful way and members of Parliament of all persuasions should be able to test his comments on behalf of the public generally. It would be best to do that through a public committee. The Home Affairs Committee last cross-examined the English DPP, Mr David Calvert-Smith; Mr Richard Foster, the chief executive; and Mr Steve Przybylski, head of the resources and performance division of the Crown Prosecution Service on 26 February 2002. Seven members of the House of Commons from all sides of politics were present for the examination. The English DPP was asked 106 questions covering a whole range of matters, such as whether the Crown Prosecution Service should have a greater role in the charging of suspects; whether he thought the Crown Prosecution Service is taking over not only part of the role of police but also of juries, and examining evidence before cases come to court and almost predetermining the outcome. This is the sort of question and answer that might come up at any public meeting that any of us go to as a member of Parliament. I will refer to question 5 and the answer at some length. It reads:

> Sir Charles Pollard, Chief Constable of Thames Valley, has said publicly that "the courtroom has become … the place for legal games to be played by lawyers". Do you agree with the view that the trial system is arcane and riddled with red tape?

The English DPP said on oath in reply to a parliamentary committee, with the press present:

> We have put in some responses (supportive responses, it has to be said) to two recent Law Commission papers on hearsay evidence and on a limited change to the law which prevents previous convictions being admissible in evidence. So to that extent, and to the extent that Sir Charles was thinking of hearsay and previous evidence of bad character as part of this arcane game, we do support the changes which the Law Commission has recommended and which Sir Robin Auld has hinted at. Clearly, there must be rules, which may seem to outsiders to be arcane, to prevent overly prejudicial evidence being introduced. It is one of the prices that I suspect we must pay for the continuation of jury trial. So that to a limited extent, I support Sir Charles, and the particular recommendations he made following that general remark are recommendations which we have supported.

To my mind this is a very serious and important exchange between a member of Parliament in the presence of other members of Parliament from all sides of politics where these people develop an expertise in this area of public administration. Every day on talkback radio in Sydney you are going to hear some comment on this subject. You will hear inflamed arguments racing up and down the airwaves day in and day out. Talkback radio quite rightly—I make no apology for it—is a key and vital part of our democratic system at the beginning of the twenty-first century. It is a legitimate, current part of the debate of the public affairs of this State and this country.

My proposal seeks to allow opportunities for the very sorts of questions and issues that arise daily in debate on the radio to be put directly by the representatives of the public of New South Wales to people who are in a position to be able to give informed comment to make the debate better informed. The interface between police, senior police, police commissioners—or the English equivalent in this case—and the head of the prosecution service is right at the centre of the administration of justice. Why should the interchange of these sorts of ideas be limited to slanging matches in the media when the debate has got out of control and attorneys general, premiers and the DPPs are calling each other everything under the sun in the paper and on radio?

That is completely unedifying and counterproductive. Why otherwise should debate occur solely between the DPP and the Attorney General? I exclude the current Attorney General from these comments but his predecessor had a poisonous relationship at times with the current DPP. Why should this Parliament have to rely on the Attorney General for information about what the DPP does or thinks in a formal parliamentary sense? The precedent is here for this to be done through a parliamentary committee in a direct sense, taking out the partisan politics and allowing everybody to be involved. This is very important from the point of view of both the Law Society and the Bar Association. Another question was:

> Mr Calvert-Smith, are you in favour of the Government's proposals to allow the admission of previous convictions?

This is a vital policy issue. It is an issue that one way or the other we need to have a very serious look at in this current Parliament. And here is the answer by the DPP. It is not settled policy; it is not something that has actually been decided by the Government. The answer to that question was:

> I am in favour, because we have put it in our response to the Law Commission, of the limited extension recommended by the Law Commission, which requires relevance and the judge to rule on relevance, rather than, as some would recommend, a blanket admission so at the beginning of the case the jury is told "This is a man of 42 with X convictions; they may or they may not be relevant."

Mr Calvert-Smith went on to talk in those terms. This statement put to Mr Calvert-Smith is another that is heard on radio every day:

> There is always the temptation … for the police—and the more dreadful the case the greater the temptation—to go and round up the usual suspects.

He replied:

> Yes. I entirely accept that, and it is a risk one would have to guard against. Looking ahead, Crown Prosecutors do not use in their assessment of the strength of the evidence … the failure of an accused to answer questions at interview...

What I am trying to say to the Law Society and the Bar Association in particular is: Here is the evidence. Here is the precedent on an ongoing basis, now working for many years in the United Kingdom, of an intelligent interchange between members of Parliament and the Director of Public Prosecutions about something that is not settled government policy. Does that mean that the administration of justice, that the running of cases, that the trying of cases have suddenly ground to a halt in the courts in England? No, it does not. I would say, on the contrary, that this is the type of discussion that actually enhances the reputation of the Crown prosecution. It enhances the reputation of the administration of justice.

This is fundamentally important for the public and I think more lawyers need to do this and to do it overtly and publicly. There needs to be an admission that significant mistakes are made in the administration of justice in all jurisdictions. We are much better being honest, open and up front about where the shortcomings are. We should speak about them, debate them, and have the experts in so members of Parliament and, through them, their constituents better understand them. We should have this debate about what is right and wrong with the administration of justice, what is right and wrong about prosecution policy and what is able to be done to fix it and make it better. There is, I suppose, also the more traditional issue about resources. That is a valuable interchange that, in the current climate, does not take place. I do not believe that estimates hearings are an effective way of doing this either. Another question was:

> … just concentrating on London for a moment, which is obviously the largest in terms of caseload, the inspectorate has highlighted some serious problems with the performance of the [Crown Prosecution Service] in London. What are you doing to improve the situation? Have you got an action plan?

The answer was:

> Certainly... I will start off by saying that the senior management team in London was criticised for failure to act as a coherent entity, which gave rise to some of the problems, and we are taking active steps to ensure that that situation is improved.

Another question was:

> Are you behaving like a football manager, just shuffling the pack he has already got?

The answer was:

> No. We are bringing in additional expertise to strengthen the existing team, but we are not shuffling out the existing team.

Another question was:

> That suggests there is not the strategy working in London, bearing in mind all the serious cases you have to do. Is it a numbers game? Do you need more physical bodies to do the work? Is it that the numbers are okay but you need people who are more experienced? What is the strategy for the retention of those good staff and recruitment of the good staff that you need to do the job?

Just interposing there, there has been an industrial dispute going on in the DPP's office—I hope it is settled—but these are the sort of issues that are relevant, the public interest to be raised in this Chamber with the DPP. The

response to the question was:

> I think it is very important not to identify one single thing... For my money there are four or five key things that we need to get right … the strength and the skills of the senior management team … making sure that we have got sufficient experienced staff at all levels. The additional money I have referred to, linked to recruitment exercises that are already in train, will mean that we get a lot more experienced lawyers and caseworkers into the area... we need … more up-to-date and accurate information than we have got at the moment... we need … much better communications strategy within London...The final thing, we need well thought-through estates and IT strategy.

They are vital issues this day in the DPP's office. They are appropriate issues for members of all sides of Parliament, in a committee, to be asking the DPP. It is very much in the public interest for the Director of Public Prosecutions to be able to respond. The public should be aware of the problems the DPP is facing when he is under pressure because of a resources issue. That would be better than reading about it in the paper, better than reading about a walkout by prosecutors and better than reading about prosecutors picketing the Supreme Court, as they did a few weeks ago. That is not the way to administer justice in this State; in fact, it is the way to bring the administration of justice into absolute contempt.

I commend the bill to the House. I ask the Law Society and the Bar Association to think carefully about the independence of the DPP being best maintained not through the Attorney General of the day who is a member of a particular party—the person who is solely responsible for communicating to Parliament, despite having been in some public brawls with the DPP—but through a committee that represents all members of Parliament. As has occurred in the House of Commons for many years, such a committee would be able to ask the questions that are constantly asked on talkback radio. If such a committee were appointed we could have a meaningful, accountable and ongoing debate in regard to the administration of justice, which is of paramount importance to everybody in New South Wales.