

NATIONAL CONVENTION ON CIVIL LIBERTIES
TERRACE HOTEL, BRISBANE, 9 JULY 1977

CIVIL LIBERTIES AND LAW REFORM

Hon Justice M D Kirby

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Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

INTRODUCTION

I am glad to have been invited to join participants in this, the Fifth National Convention of Councils for Civil Liberties in Australia. I am honoured to be invited to open the Convention. As there have already been three substantive papers and as many of the participants arrived last night, I am sure that the relevant "openings" have already long since occurred. Mine, however, is the task of performing the "official" opening. Last year the task was performed by Mr. Justice King, of the Supreme Court of South Australia. I am glad to follow him and without more ado, and lest anyone is still in doubt about the validity of earlier events, I not only "officially" open the Convention, I declare previous proceedings validated *nunc pro tunc*. There are, you see, certain things that judges can still do.

Having got this task out of the way, I now propose to review some of the important developments of the past year, as they concern the civil liberties of citizens in Australian society.

International Human Rights

Section 7 of the *Law Reform Commission Act 1973* requires the Australian Law Reform Commission, in proposing reform of the law, to ensure, so far as practicable, that its proposals "are consistent with the Articles of the International Covenant on Civil and Political Rights". This international

statement of agreed principles of civil rights was adopted in December 1966. Australia, with a delegation led by Attorney-General Bowen, was a party to the preparation of the Covenant. It represents the standards which civilised communities around the world agree should govern the civil and political rights of their people. It was signed by Australia in December 1972. With the deposit of sufficient ratifications, it came into force as part of international law in March 1976. It has not yet been ratified by Australia because of local constitutional problems. I do emphasise, however, that, at a federal level, there is broad bipartisan support for the principles of the Covenant. It was the late Senator Greenwood who proposed that this unique provision should be inserted in the statute of the Commonwealth's Law Reform Commission. That proposal was immediately accepted by Senator Murphy (as he then was), the Attorney-General. One of the stated purposes of the *Human Rights Bill* 1973 was to implement the Covenant and to authorise its ratification by Australia. As you all know, controversy surrounded the Bill. The controversy related not only to questions as to constitutional propriety. As Mr. Evans told us in Adelaide last year, controversy also surrounded the question of whether it would be an effective means of upholding civil rights and liberties in a society such as Australia.

I understand that negotiations are still continuing, to enable the Commonwealth to ratify the Covenant. At the moment though part of international law, the Covenant is not part of the domestic law of Australia, except to the extent that its terms become criteria for observation by the Law Reform Commission.

Despite this, during the past year there have been significant developments which must give heart to those concerned with civil liberties and law reform in our society. Mr. Evans, in his paper to the Adelaide Convention, listed the important achievements for protecting civil liberties, made in the year or so before that Convention. It is appropriate that somebody should review the developments of the past year, because they are significant. At a Commonwealth level, they include the following :

- * The Administrative Appeals Tribunal has been established and has begun its operations, to review in an impartial way decisions of the bureaucracy affecting citizens.
- * The Administrative Review Council has been appointed and has begun vital work to review and reform the administrative laws and procedures of the Commonwealth Public Service and Commonwealth instrumentalities.
- * The Ombudsman Act was finally passed in 1976 and the Commonwealth Ombudsman, Professor Jack Richardson, has just commenced his duties.
- * The Family Law Council has been appointed to review the operations of the *Family Law Act* which so closely touches the lives of many of our fellow citizens. As well, steps are in hand to secure the establishment of the Institute of Family Studies, promised by that Act, in order that the real operation of the law in practice can be observed, to promote its improvement.
- * Legislation has been introduced to provide for reform of the rules governing judicial review of administrative decisions.
- * A Bill was introduced in the last days of the Autumn Sittings of the Commonwealth Parliament to set up a Human Rights Commission, the basic purpose of which will be to ensure that our federal law complies with the International Covenant on Civil and Political Rights.
- * Legislation is promised in the next Sitting of the Parliament to ensure freedom of information at a Commonwealth level, i.e. access by concerned citizens to information in the hands of the bureaucracy : a prerequisite to the proper working of the democratic machinery.
- * Important references have been given to the Law Reform Commission concerning a number of subjects vital to civil liberties.
- * Perhaps, most important of all, the *Criminal Investigation Bill* 1977 has been introduced into the Commonwealth Parliament and is presently under scrutiny there.

These are important developments. They are especially important because they demonstrate that, though our political leaders in Australia differ on many things, there is a common concern amongst a great number of them, to ensure that our laws and the machinery of government are modernised and made more relevant to the notions of civil liberties which are current today. Our society is rapidly changing. The standards of education of the community, the modern means of mass communication and Australia'

conception of itself as part of a wider world all herald significant changes in the law upon which, happily, there will be little partisan dispute. The election of Australia to a three year term on the United Nations Commission on Human Rights, which took place in New York on 11 May, indicates, as the Foreign Minister said "The government's desire to contribute more actively to the United Nations in the field of human rights". Introducing the *Criminal Investigation Bill*, the Commonwealth Attorney-General, Mr. Ellicott asserted that the steps already taken or presently in train, and to which I have referred above :

"Reflect the government's concern with the rights of the individual and the need to update the law and legal protective machinery so that these rights can be asserted in the present age".

The security for real progress in the practical protection and advancement of civil liberties, will undoubtedly lie in bipartisanship. These are not matters upon which it is necessary or desirable that our society should be divided on party political lines. That way lies inaction.

POLICE POWERS

When he introduced the *Criminal Investigation Bill*, which aims at reforming and modernising the rules governing police and citizens in the process of criminal investigation, Mr. Ellicott rightly said that :

"This Bill is a major measure of reform ... Although a large number of reports have been produced and many reforms proposed, I think it is fair to say that this Bill represents the most significant legislative initiative in this field to be taken in the Commonwealth of Nations at least since the last war and probably since the establishment of modern police forces. It comes to grips with a whole variety of difficult issues upon which there has been much writing, widespread dissatisfaction, but little legislative action ... [I]t represents an attempt by the law to catch up with the developments of science and technology and to call them in aid, both of the police and of the accused in the process of criminal investigation. But above all, it proposes that these advances which are now available should be brought to the assistance of the administration of justice itself".

The Bill translates the general language of the International Covenant into specific provisions. It does so with "a full knowledge of the tradition of our criminal justice system". Mr. Ellicott described his intention this way:

"[The Bill] exemplifies the approach which this government takes in this field. Basic human rights should not be left in vague general terms. To be effective, they should be translated into specific, clear and simple obligations and privileges. The Bill endeavours to do that".

Among the important provisions of the Bill are some which have been promoted for a considerable time by Councils for Civil Liberties and others. They include:

- * A person held in custody is to be given a specific right to be assisted by a lawyer.
- * Strict criteria are to be laid down for arrests without warrant and the taking of fingerprints will only be permitted for identification purposes.
- * Restrictions are to be imposed on the use of force, including firearms, for the purpose of arrests.
- * Safeguarding provisions are to be introduced as to the identification of suspects by identification parades and other procedures to ensure that injustices are not thereby committed.
- * To ensure that, the interrogation of persons suspected of committing an offence, the rights of the suspect are not infringed and to reduce to the minimum disputes as to the accuracy of records of such interviews, provision is to be made requiring that such interviews be tape recorded or be conducted in the presence of an independent third party and reduced to writing or, if neither of these courses is practicable in the particular circumstances, a written record of the interview be verified by an independent third party as soon as possible after it is made.
- * Restrictions are to be placed on the questioning of Aborigines except in the presence of a "prisoner's friend" and on the questioning of persons not fluent in English except in the presence of an interpreter.
- * Substantial alterations are made to the system of police bail, including the spelling out of criteria to be applied by the police in making decisions as to the grant or refusal of bail; provision is also to be made entitling a person refused bail by the police to appeal immediately to a magistrate, if necessary by telephone.

- * The police are to be given the power to require persons to identify themselves where they may be able to assist police in inquiries in relation to an offence and a reciprocal power is also to be given to citizens in those circumstances to require the police to identify themselves.
- * General search warrants are to be abolished and specific provision is to be made for the granting of search warrants, detailing the situations in which searches may be conducted without warrant and providing for obtaining a warrant over the telephone.
- * In a prosecution for an offence, the onus is to be on the prosecution to justify the admission of evidence obtained in contravention of any of the procedures or requirements laid down in the legislation.

THE RIGHTS OF VICTIMS

I realise that there are many sincere citizens who are concerned about the state of crime in our society. Their concern is no less than that of the Law Reform Commission and the Attorney-General. Mr. Ellicott, introducing the Bill, put it this way :

"A law on criminal investigation must not be a law to protect criminals and stifle police forces in their important role of criminal law enforcement. Crime is too rife in our community to impair the basic efficiency of our police. At the same time the basic rights and freedoms of the individual citizen in our democracy must be preserved."

Now, of course, upon the detail of any major measure of modernisation and reform there will be differences of opinion. One Council for Civil Liberties has, for example, questioned the provision about a reciprocal identification to police. Mr. Bennett of the Victorian Council for Civil Liberties was reported last month as saying :

"Some of us believe the police objections to [the Bill] have some cogency. I personally doubt whether the Bill will solve any basic problems. Right now, for instance, we are in the middle of a crime wave and I doubt whether the police would be able to act according to the rules laid down in the proposed legislation. What's really needed is more police, better training for policemen and a better system of selecting magistrates."

There is a fine line between legislation that protects the rights of citizens and legislation that hampers police operations. I am not quite sure where the Criminal Investigation Bill falls in this area".

These comments were made in an article titled *Are We About to Handcuff our Police?* They appeared in the Melbourne Sun. They contain a number of comments from police sources and from Mr. Bennett. Nobody in the Attorney-General's Department or the Law Reform Commission was invited to comment. This article, like many others about the Bill, contained exaggerations, and mis-statements which are designed to frighten a community properly concerned about crime.

Many of these concerned people ask "what about the victims?" "Why are we so concerned about the accused in the criminal investigation process?" "Why all these protections for the criminal?" "What are we doing about the victim?"

Things are being done about the victims of crime. Criminal compensation legislation is now almost universal in Australia, though it is admittedly inadequate. Everywhere, steps are being taken to diminish the harassment of the victims of rape. Proposals are now being made to compensate people wrongfully jailed. There will be more law reform in this area. I commend the subject to this convention and hope it will be considered here or at the next convention so that Councils for Civil Liberties cannot stand accused of lack of concern for the victims of crime.

Certainly, the Law Reform Commission was not unconcerned. Obviously, in drawing any legal code to govern police duties and rights and to spell out citizens' duties and rights or privileges, it is necessary to strike a balance. Doubtless, we could diminish crime to some extent if there was complete authority in the police to tap any phone at any time. Clearly we could assist police to combat crime if we simply empowered them all with general warrants, so that without any judicial authority they could always enter any home at any time on the merest whim or vaguest suspicion. Obviously, we could fight crime better if an accused had to prove his innocence or if

spouses had to testify against each other or if police could secure confessions by appropriate force. Yet none of us seek reforms of this kind, least of all the police. The society that emerged from such laws might marginally diminish crime. It would, however, be an entirely different society than the one we live in. Precious liberties which it took the genius of British people to develop over many centuries should not be thrown aside in panic.

The principal aim of the *Criminal Investigation Bill* is to modernise this area of the law, to recognise and use the developments of science and technology, to incorporate the principle here in an Australian statute, instead of hiding them in difficult-to-find or completely inaccessible documents. No one can surely argue against moves of this kind. Though I respect his right to differ, and recognise the perils of press reporting, I am disappointed that Mr. Bennett has fallen victim to the panic which I have described. What is vital here is that the Bill should strike a fair balance between* the rights of the citizen when accused and the rights of society (including the victims). If the Bill strikes the wrong balance, the Attorney-General has called for practical suggestion for its improvement. Generalised condemnation is the enemy of reform, modernisation and availability of laws in this country. It should not, I suggest, be the approach of Councils for Civil Liberties. They should set their intellectual standards higher.

The recent report of the Committee chaired by Mr. Justice Lucas of the Supreme Court of this State, differed in some respects from the approach proposed in the Law Reform Commission's report and in the *Criminal Investigation Bill*. On two matters, however, the approach was exactly the same.

* To set at rest the many disputes about confessions to police which presently poison the administration of criminal justice, tape recording of confessions should be introduced. Mr. Murray Q.C. recommended this nearly ten years ago in Victoria. Mr. Beach Q.C. recommended it more recently. Lord Thomson has recommended it in Scotland. A Home Office Committee has proposed its introduction, on an experimental basis, in England. The

Law Reform Commission proposed it in 1975. Mr. Justice Lucas has now suggested it in 1977. The Criminal Investigation Bill stops the talking and does something. I remind you of what Mr. Ellicott said :

"It comes to grips with a whole variety of difficult issues upon which there has been much writing, widespread dissatisfaction but little legislative action".

Who can doubt that in the 21st century tape recording will be the normal means of taking confessional material? Of course there will be teething problems. But the point must be continually made, until police hear it, that once they become used to the tape recorder, police will find it a most powerful weapon in the armoury of the Crown, to fight crime. As a forensic tool, in the trial situation, it will have enormous potency. The pauses, hesitations, inflections of the voice, the contradictions, asides and admissions of the accused will all be there, to be laid before the jury. The reputation of our police services can only be helped by this means. But what is more, the battle against crime will be aided and the fair trial of accused on confessional statement will be assured.

The second point upon which the Lucas Committee agreed with the Law Reform Commission and the *Criminal Investigation Bill* was upon the machinery proposed to uphold the integrity and fairness of criminal investigation by police. Again, I believe this has not been sufficiently appreciated in some quarters. At the moment, where evidence is unlawfully or unfairly obtained, there is a general common law discretion in the judge to exclude it. It is a discretion very rarely used. A federal judge told a recent seminar in Sydney that in 15 years in the criminal courts, he had never seen it used. Another approach is that taken in the United States where such evidence, and its fruits, are generally automatically excluded. The Commission, the Bill and the Lucas Committee rejected these approaches. Instead they preferred to repose a new discretion in the court, requiring judges to balance "the public interest without unduly prejudicing the rights and freedom of any person". The judge is specifically directed to consider the seriousness of the offence, the urgency and difficulty facing police, the extent of the contravention and other matters. It is surely not to be believed that judges will use this discretion capriciously to "handcuff our police".

The *Criminal Investigation Bill* certainly warrants the study of this convention. I am glad to see that there is a seminar later today which will allow for its discussion. I am sure that if there are practical proposals for the improvement of the legislation, they will be welcomed by the Attorney-General. It ought to be possible in Australia to reform and modernise the law by proper public debate. When at last Parliaments do something and stop mere talk, they deserve the support of thinking citizens.

OTHER REFORMS

There are many other matters before the Law Reform Commission that touch civil liberties. Following the change of government policy and the decision not to proceed with the Australia Police Bill, the Law Reform Commission was asked to reconsider its proposals for the handling of *Complaints against Police*, to see whether what was proposed for the former national force was still relevant for the unit parts. A working paper has been published on this subject. Public sittings have been conducted in all parts of the country. Police submissions were generally favourable to the Commission's suggestions. Although the Queensland Police Commissioner did not favour it, it must be said that police forces around Australia in the past two years have come a long way towards recognising the need for an independent element in the receipt, investigation and determination of certain complaints against police. Legislation has now been enacted in the United Kingdom on this subject. I expect that in due course we will see legislation in Australia. Already two State forces have, in advance of legislation taken certain steps to insulate the process of investigation.

The Commission's report on *Alcohol, Drugs & Driving* proposing new Breathalyzer laws for the Capital Territory rejected random testing, principally on the ground that expert testimony suggested that it would have no prolonged effect on the road toll. An important principle in police-public contact would have been overthrown, without any sure gain.

Two reports of the Commission are currently with the printer and will be tabled in the next Sittings of the Commonwealth Parliament. One relates to the means of assisting small but

honest debtors who fall victim to the credit society. Another deals with human tissue transplants and raises the issue of the definition of death and the principles that should govern the donation or taking of organs and tissues, from living persons, from minors and from the dead.

A vital reference is that for the design of new laws to protect privacy in Australia. On this subject we have had considerable assistance from Mr. Ashley Goldsworthy, Past President of the Australian Computer Society. It is important that civil liberties organisations should recognise the truth of Ellul's warning that :

"A dictatorship of dossiers and databanks rather than of hobnailed boots will not make it any less a dictatorship".

One of the Commissioners of the Law Reform Commission is Sir Zelman Cowen, Vice Chancellor of the University of Queensland. He has, for many years, led the debate for recognition of the fact that privacy is bound up in the respect for individual human dignity : a matter of critical concern to this convention.

There are other references. One requires us to consider the issue of standing to sue in federal courts and class actions. I would suggest that this convention reconsider Mr. Evans' paper of last year and his proposals for the increased effectiveness of Councils for Civil Liberties in promoting and assisting in reform of the law. Litigation has been scarcely used in this country to this end. The Law Reform Commission has not yet received submissions from Councils for Civil Liberties on this reference. Clearly it is one which will be of vital concern to civil liberties and other community groups. You ought to consider it.

Our latest and possibly most difficult reference is concerned with the question of Aboriginal laws. Is it desirable or is it too late to introduce legal pluralism in Australia? How can we make the criminal justice system especially more relevant to the Aboriginal community of this country? I am glad to see that there will be debates tomorrow on the rights of Aborigines and Torres Strait Islanders. I hope that the

opportunity will be taken to discuss the reference to the Law Reform Commission and to set up machinery for putting forward points of view and assisting the Commission in the vital tasks that we have before us.

CONCLUSIONS

This convention comes at an important time. There is an international movement for the advancement and protection of civil liberties and Australia should be part of it. Positive practical and specific steps are being taken in this country for the advancement of human rights. Law reform commissions and councils for civil liberties have a role to play in assisting Parliaments to promote and protect human rights. With all of the subjects which are before this convention concern, directly or indirectly, the reform of the law. All of the subjects that have been referred to the Law Reform Commission involve, directly or indirectly, civil liberties and civil obligations. We in the Commission will follow closely the discussions at this convention. We are appreciative of the assistance that has been given in the past. Hopefully, some little time will be spent by the convention in considering Mr. Evans' suggestions of last year, for they are still current. Civil liberties bodies should not be content with good work and occasional conventions. Without joining the bureaucracy, they should focus their activity upon the means that are available to achieve a practical reform of the law. Without claiming too much, it can be said that these means now include support and assistance to the national Law Reform Commission.