THE AUSTRALIAN PSYCHOLOGICAL SOCIETY

THIRTEENTH ANNUAL CONFERENCE, NEWCASTLE, 1978

UNIVERSITY OF NEWCASTLE, N.S.W., 31 AUGUST 1978

PSYCHOLOGY AND THE LAW : A MINUET

The Hon. Mr. Justice M.D. Kirby
Chairman of the Law Reform Commission
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BEYOND THE OVERTURE

In 1976 June Tapp wrote an important review of two disciplines. She titled it *Psychology and the Law : An Overture.* In it, she set out to give a general description of what she described as the "rapprochement between psychology and the law". Her essay took her into a description of historical trends in the uneasy relationship between psychologists and lawyers, an examination of relevant research and a selective survey of a number of features of the legal process which have attracted the particular attention of psychologists. Amongst these were consideration of the judicial process, the problems of the adversary system, the jury decision mechanism and special issues such as eye witness identification. Hers is a bold enterprise, modestly called an "overture". Undoubtedly we are still in the overture but progress is being made. There is an awakening of interest in the reform of the law, its principles and procedures. There is growing self-examination amongst lawyers and a willingness to question even the fundamentals of the legal system. This is not confined to the young and enthusiastic. It is partly a response to changes in social values and the levels of information and education in our society It is also partly a response to science and technology itself. Whatever the cause, the fact is that lawyers and lawmakers are subjecting the legal system to fresh and critical scrutiny. The first Chairman of the Law Commission of England, Lord Scarman,

said last year that our time would be known as a "new age of reform".[3] Every so often the law, its officers, rules and procedures are submitted to considerable change, hopefully for the better. We are now going through one such period. Inevitably reformers and lawmakers look to other disciplines for assistance in developing rational proposals for change and improvement. Among lawyers there is now a greater willingness to look to others, including psychologists, for guidance and assistance in designing reforms. This provides a challenge and an opportunity for psychologists which they have not hitherto enjoyed.

It is not the purpose of this paper to traverse again the work done by Tapp and by other writers who have lately reviewed the law-and-psychology theme.[4] Nor is it to the point to translate Tapp's work to this country and to list the specific projects upon which psychologists are here engaged, relevant to the law and the administration of justice in our society. It does not require a paper to demonstrate the heightened interest of lawyers in psychology and the lessons it teaches. As Tapp says, that conclusion can be drawn from a glance at the *Index to Legal Periodicals* and like works.

This is rather a small *obbligato* in which a couple of relevant themes of special interest to me are drawn together to show the way in which the new sensitivity of the law to the lessons of psychology is bearing practical fruit in Australia. It would be too much to claim that such sensitivity was a universal attitude. Jest and even popular mockery are the common burdens of psychologists and lawyer alike. Nevertheless, there is a new alertness to the lessons psychologis have to teach. The modest purpose of this paper is to illustrate what some of those lessons are and how some of them have been or may be utilised in designing reform of the law.

LAW REFORM IN AUSTRALIA

The bodies and individuals working on the reform of the law in Australia are many I will not list them. They include not only the federal Law Reform Commission but also like commissions or committees in each of the States. These bodies are generally small, ill-funded and required to improvise when it comes to securing the assistance and opinions of scientists, including psychologists. The law reform agencies are not, of course, the only bodies working on law reform. In the Commonwealth's sphere we must add the Administrative Review Council, which is superintending major reforms of our administrative law, the Family Law Council, which supervises the *Family Law Act*, the National Consumer Affairs Advisory Council and many other like bodies of experts and laymen. Add to this the Commonwealth Legal Aid Commission, the Commonwealth Ombudsman, the proposed Human Rights Commission and there is no doubt that we have a multitude of counsellors working to assist the Government and the Federal Parliament in modernising and improving our laws. These bodies are parallelled in each of the jurisdictions of Australia (the Territories and the States). The consequence is a great deal of intellectual and other endeavour directed at improving the legal system.

The Australian Law Reform Commission is the best funded of the permanent law reform bodies established in Australia. Its first members were appointed in 1975. It has four full-time and seven part-time Commissioners, all of whom, but one, are lawyers. The exception, Associate Professor Gordon Hawkins, is a criminologist. The Commission has a research staff of ten and is accordingly a modest investment by which to respond to the demands for orderly law reform. The Commission works upon references received from the Commonwealth Attorney-General but once the reference is received, it is independent of government and its reports must be tabled in Parliament. In all of its tasks, the Commission has sought out relevant expertise, has conducted surveys and empirical research and has sought public experience and opinion before presenting its final recommendations. In the past, law reform bodies have tended to work in areas of the law of a highly technical kind where the elements of controversial policy and the needs

for fundamental change have been few. The tasks assigned by successive Commonwealth Governments to the national Law Reform Commission in Australia have not been of this order. Each of them has required consideration of fundamental criticisms of current legal practice. In finding the solutions to overcome these criticisms, the Commission has turned to psychologists and others in an open-minded way. We are released, as a Minister or a Department of State may not be, from slavish adherence to the models of the past. A common theme of our proposals, and an obligation imposed by our statute, is the modernisation of the law and the adoption of new or more effectiv methods for the administration of the law and the dispensation of justice".[5] Consultants may be appointed with the approval of the Attorney-General to assist, in an interdisciplinary way, in the resolution of the controversies of law reform. Psychologists have been appointed in the past, despite the inability of the Commission to reward their labours with much more than an acknowledgement.

THE POOR RELATION

There is no escaping the fact that psychologists and psychology have been in general ill favour amongst judges and lawyers and the tide is only now beginning to turn. Why should that be so? L.R. Haward pointed out that :

> "Law and psychology are alike in that they both deal with human activities. Both are involved in an attempt to control behaviour."[6]

Collaboration between the two fields is quite recent. Freud recounts how in 1906, in Vienna, he lectured the judges on the practicality of using psycho-analysis in the ascertainment of truth in a court of law.[7] It was inevitable that psychologists looking for interesting and practical studies in human behaviour should turn to the courtroom, the witness stand and the drama by which we ultimately resolve, many of the difficult disputes and tensions in our society. Those interested in an epitome of the early examination of the law and the legal process will find them helpfully collected in Tapp's article.[8]

The problem for the relationship was that what the psychologist saw, he did not particularly like. He exposed and criticised what he saw, with none of the deferential language and elegance of speech which eight centuries of tradition had encouraged in legal writing in the English tongue.

This was the fundamental problem. The law, like Topsy, had just grown. It had all the imperfections of human machinery developed by many hands over a great period of time. The result of this was a different approach to the understanding and control of behaviour :

> "[T]he jurist [attempts to control behaviour] explicitly, rationally and immediately; the psychologist, implicitly, empirically and ultimately. There is ... no common approach to the problems shared by both professions. Whereas the psychologist is concerned with motivation, is deterministic, and considers conduct activated primarily by emotion, the jurist deals essentially with behaviour, assumes free will, and refers to unrealistic ideals of conduct demanding complete emotional control. A more important difference is that the law is based upon common experience, commonly accepted beliefs, and by generally adopted attitudes, whilst psychology restricts its laws to those obtained by the hypothetico-deductive methods of classical science. For criteria the psychologist looks to the standards of Descartes, the jurist to the man on the Clapham omnibus".[9]

Now, of course, things were not so bleak that the law and its procedures could ignore entirely developments in the understandin of human conduct that have occurred, particularly this Century and principally as a result of the empirical and scientific work done by psychologists. As early as 1554 a judge was boasting of the capacity of the common law system, the adversary mode of trial and the rules of evidence to receive and weigh information about scientific developments, even where it was contrary to common sense and previously accepted opinion :

> "[I]f matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation".[10]

Accordingly, courts in our system have for centuries been receiving expert testimony and weighing it in determining the issues for trial. Thus in 1941 the High Court of Australia had to consider the validity of various wills made by a person suffering from acute alcoholism. Dixon J. (as he then was) said this :

> "How far a court should go in treating the consequences of acute alcoholism as common general knowledge is not easy to say, but in the present case the evidence makes it clear enough that the testator was an alcoholic paranoiac. ... We are not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions".[11]

For all this, it must be acknowledged that the impact of psycholo upon the daily life of the law has, so far, been small. Psychologi scrutinise and criticise. They are difficult people who question things long established and carefully ordered. Insofar as they are "expert witnesses" their evidence will be received in the normal way. But even here, they have tended to be regarded more often than not as the mere "handmaiden of the psychiatrist".[12] A recent article in the *Australian Psychologist* asserted that the acceptance of psychologists by the courts is very much less than is the case with his close relative the psychiatrist, who is a "doctor", "more respected whether that title be courtesy or otherwise, because he is a medical practitioner and because he tends to give his opinion largely based upon a generally understood medical model".[13] In proof of this assertion, the authors cite a courtroom transcript which makes the point tellingly :

His Honour : I request a pre-sentence report be obtained accompanied by a medical and psychological - a psychological report ...
Prosecutor : I note your Honour has requested a psychological report. I am not sure whether you want a psychiatric report as well?
His Honour : What's the difference?
Prosecutor : I think they generally go to one of the psychologists at the University for the psychological ones.
His Honour : It is really the psychiatric report I want, really.
Prosecutor : It is covered by the term "medical".
His Honour : I will use the term "medical". I mean it to be a psychiatric report really.
Prosecutor : You do not want a psychological report?
His Honour : No.

Judges and lawyers have been adept, at least since 1554, in receiving and adjudicating upon scientific evidence and expert opinions. Every day, courts receive and evaluate hundreds of such witnesses, often conflicting and usually from the medical specialty. There is no conceptual difficulty in receiving psychological evidence on the same footing. It is because the psychologists' inquiries question some of the fundamentals upon which the administration of justice is carried out, that they have generally been regarded as nuisances, unrealistic or, most pejorative of all, "academic". The law gets on with the busy job of laying down general rules of conduct and resolving interpersonal and intersocietal disputes. Not unnaturally it reacts somewhat peevishly to the suggestion that its premises are questionable and its methods inefficient and, possibly, even unjust.

THE TRIAL PROCESS

Australia inherited from England a special procedure for the ultimate resolution of legal disputes : the adversary trial process. Ideally, the process pits competing adversaries of equal calibre against each other. The aim of the battle is not necessarily the discovery of objective "truth" or even of the

best opinion and latest wisdom. On the contrary, in many criminal cases the accused, if guilty, may actively or passively resist the search for objective truth. If he is guilty, it is plainly imperative to him that he *should* try to conceal his guilt.[14] In a civil case, the role of the tribunal is to determine which of the competing cases is the more credible. Under our system, the tribunal does not normally investigate the truth itself. It sits as an impartial and generally passive and silent umpire, to hear competing contentions and then resolves them, as best it can, on the material placed before it helped along by common sense. The system of trial by jury, still integral to the machinery of criminal justice, grew, like so many other British institutions, out of an entirely different creature. The earlier modes of trial : by ordeal, by battle or by wager of law, were means of preserving the peace in society, by determining disputes according to a ritual. Unless it was by divine intervention, there was no necessity that the party whose cause was just and right should succeed or that objective "truth" should out. Trial by jury began when jurors were drawn from the local neighbourhood and required to resolve disputes out of their own actual knowledge, however obtained, of the facts of the case before them. It was out of this machinery for informed decision-making that the present disinterested fact-finding trial developed. Now the tribunal must not rely upon special knowledge of the facts in issue. Indeed such knowledge must disqualify the person from participating in the process of evaluation. The concept of an independent umpire, merely adjudicating between disputing contentions and awarding the prize to the best is plainly one that offends scientists who asse that the function of a trial should be the search for objective truth. Determining people's rights, including even their liberties is, according to the critics, too important a matter to be committed to a mere game. Frank, in his book *Courts on Trial : Myth and Reality in American Justice* puts it this way :

> "[T]he lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our

> present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation".[15]

Quite apart from the bias which the partisan mode of trial introduces into the fact-finding process, psychologists have criticised the way in which courtroom procedure can positively distort the emergence of truth :

> "Emotional changes in the witnesses, augmented by cross-examining counsel, interfere with the natural processes of recall and testimony. Such evidence undergoes further transformation, as it is rephrased by each counsel in turn and the judge in summing up, suffers a further stage of perceptual distortion in the minds of the jury as they are overwhelmed with conflicting evidence and opinions, and is finally modified during discussions in the jury room. If our search is for truth, then present courtroom procedure may be a very real impediment".[16]

Even allowing that many cases are now tried by a judge sitting alone, without a jury, the opportunities for distortion are still significant. The perceptions and prejudices of one man have been substituted for those of several.

Criticism of the current trial method is helpful in drawing attention to something which tends to be just accepted but which may lend itself to reform and improvement. So far, insufficient attention of psychologists has, as it seems to me, been directed at proposing a better system than the one which is so effectively chastised in psychological writing. Some improvements spring readily to mind. Some have already been initiated. The very design of courtrooms is not unimportant in reducing the stress and tension to which a witness is inevitably subjected in a public forum dealing with a, usually, serious and sometimes solemn matter. The supply of running transcript and even the use of tape recording helps to reduce the vagaries of memory of the testimony of witnesses or the arguments of the parties. The use of videotape testimony to replace a cold affidavit cannot be far off and has already been used, in some

jurisdictions, where an absent witness (or one who has since died) is examined separately from the trial and in this way can take a more active part than cold print allows. The general expansion in legal assistance, the reduction of the barrister's monopoly in audience in certain courts,[17] the facility of being represented by a friend[18] and the general retreat of the law of evidence from its more excessive technicalities all demonstrate the effort that the law has made in recent times to provide, in the courts, a forum that is less frightening for participants and more likely to adduce truth and secure a fair result. The Family Court of Australia has given specific attention to many of the environmental features that I have mentioned. Courtrooms tend to be smaller. The elevation of the Bench is minimal. The decoration is generally modern. Court dress has been discarded. The parties and their representatives may be seated. Counsellors, many of them on the premises, supplement the work of the courts. A baby-mindi facility, which created much mirth in some legal quarters, is, of course, nothing more than a functional and realistic means of removing at least one of the problems of those coming before the court. The experience of litigation is generally a disquieting, frightening experience. It usually follows a protracted period of nervous anticipation and deals with an issue that is serious and important to the person involved. Money, reputation and even liberty can hang upon it. Psychologists do well to teach lawyers (including judges) that there is no need to add environmental or personal intimidation to secure a proper decorum and respect for the law.[19]

Of course, in the end, the procedure remains a judicial one. Whether judge or jury determines the case, human judgment is called upon to determine an issue, with all the opportunities that allow for distortion, prejudice, error and unfairness. Whatever form of resolving issues is devised, we will usually get back to human determination. The civil law examining magistr may avoid the inbuilt prejudices of the adversary trial. So long as he is human, he will have his work attended by other prejudices which may be just as serious, if not more serious. Not everybody is unduly concerned about this statement of the

obvious. One judge, recently called upon to comment on the study by two psychologists of the potential for variance in sentencing, put his views this way :

> "Offenders are infinitely varied, as are sentencers. The ultimate in standardisation will be achieved only by removing the human qualities possessed by the sentencer and ignoring those possessed by the offender. I have always regarded the criminal law and sentencing in particular, as being concerned essentially with humanness. May the sentencing process long be preserved from Komputer Control."[20]

Another judge, in South Australia, drew attention to the great pressures under which courts operate and the need for practicality and expedition in doing their work, particularly in criminal cases :

> "Courts have achieved much in the struggle to suppress crime and will continue to do so. But they have their limitations. They cannot be all things to all men. In the nature of things they cannot, like Ministers of Religion, undertake the salvation of souls; or, like a doctor or psychiatrist, work directly to cure an offender's body, or to restore him or her to mental health. They cannot make a person good by judicial order, any more than Parliament can make men and women loving and charitable by statute. They cannot wholly undo the harm and suffering caused to the victim of a crime, or wholly remove the indignation and resentment of the victim's family and friends. They cannot investigate every aspect of a crime, or of an offender's past and future life, with the pertinacity and comprehensiveness of a scientist immersed in an important experiment, or most offenders would never be dealt with at all - or, at least, would not be dealt with until a wholly unwarranted time had elapsed".[21]

This, then, is our dilemma. The present court environment and systems can positively impede the efficient discharge of the court's functions. Psychologists have made this much clear. Steps have been taken in the right direction but obviously greater measures of reform are needed. Psychologists, critical of the present procedures, must bear in mind the ultimate humanness of any system so far devised (and therefore its fallibility), the necessity to cope with much pressure, (if the business of dispute resolution is to be efficiently discharged) and the need for practical reformers to suggest improvements as well as adduce criticism. Improvements can be achieved, to diminish the perils disclosed by psychological research, as a couple of illustrations will show.

THE MEMORY PROBLEM

The vagaries of human memory, already mentioned in passing, create a special problem for the administration of justice, which depends upon machinery that can ultimately resolve disputes by subjecting recollection testimony to scrutiny. Of course, due allowance is made for the fact that time erodes memory and that self-interest can distort it. These are matters of common sense. Psychology takes common sense a step further in demonstrating empirically the tricks which memory can play. Haward puts it thus :

> "While it is common experience that not all of our experience can be recalled later, we have an unshakeable belief that what we do recall is an accurate replication of the original event. But experimental work shows this to be fallacious. While perception is one stage removed from external reality, so memory is removed a second and even greater distance from objective truth. No less than seven percent of what we remember in any one day will be erroneous and studies have shown depositions to contain an average of twenty five percent error. In one experiment of two hundred and forty testimonies studied, only five errorless reports were found, and these were from cautious witnesses who refused to commit

themselves and made few statements. The more questions that are answered, the more errors we receive."[22]

Now, the first reference which was given to the Law Reform Commission required revision of the law governing criminal investigation by the Commonwealth's police. The report which followed[23] covers a whole range of conduct during the critical period when a person is under police restraint. The report was the basis of the Criminal Investigation Bill, 1977, introduced into the Commonwealth Parliament by Attorney-General Ellicott. He described it as "a major measure of reform".[24] Although the Bill lapsed when Parliament was dissolved in November 1977, his successor as Commonwealth Attorney-General, Senator Durack, announced that he expected to have a revised Bill prepared for the Autumn sittings of Parliament in 1979.[25]

Like many of its predecessors in this area, the report, and the draft legislation, seek to come to grips with disputes which presently poison the administration of criminal justice, relating to the admissibility of confessions allegedly made by the accused to police, whilst under restraint. The Commission had before it a great deal of material, including psychological material, concerning the pressures upon accused persons in custody and the unreliability of testimony as to what was said at a time of great stress, not only upon the suspect but also upon his interrogator. Serious conflicts between the police and the accused as to confessions tend to sap the confidence of the public and the courts in the integrity of police.

> "The liberty of the accused, the reputation of the police and the proper administration of justice are jeopardised by the failure, where opportunity permits, to provide a more independent record of police questioning".[26]

It was to overcome this problem and to ensure that the best possible evidence could be placed before the decision-maker, that the Commission proposed the introduction of sound recordings of confessional interviews. A like proposal has been made by

the Murray Committee in Victoria, the Thomson Inquiry in Scotland, the Beach Report in Victoria, the Lucas Committee Report in Queensland, a Home Office Report in England and numerous other official and semi-official inquiries. Earlier this month, the Queensland Cabinet decided to reject the recommendation, to similar effect, of Mr. Justice Lucas. The Commonwealth's Criminal Investigation Bill, however, does contain provisions for the tape recording of confessional evidence.[27] It is not the only procedure proposed to provide independent safeguards for the interests of the accused and the integrity of the police force. Other, alternative, safeguards are provided for, including corroboration by a third person, reduction of all oral confessions to writing, the presence of a reliable third person during an interview or acknowledgment before a magistrate immediately after its completion.[28] Similar provisions have found their way into the Bill. The aim of this is to reduce, as far as may be, the area of disputation and the potential for the error (deliberate or innocent) which human memory can cause persons, especially interested persons, to make in recalling events of the past.

PERCEPTION AND IDENTIFICATION

It has been psychological and experimental data, rather than common sense, that has demonstrated the dangers that are inherent in individual perceptions of reality. Clearly, the neuro-physiological process of perception selects, organises and transforms objective information, according to conditions existing in the observer at the relevant time.[29]

> "The world we know by experience is a world of probability, and our percepts are consistent with those of others only if our nervous system agrees to give them a higher probability than alternative ones. This explains the lack of correspondence often encountered in law. Parol evidence ... however honestly it is given, may bear little relation to the facts under investigation. In situations which are ambiguous, stressful, or of weak stimulus intensity, people tend to see, hear, or sense in other ways,

> experiences which derive more from their own nervous system than from the outside world."[30]

The strong (sometimes overpowering) pressure to see what is expected or desired or needed is now so well documented by psychological surveys that it is remarkable that not more has been done in the law to take account of it. This is not to say that nothing has been done. The rule against the admission of hearsay evidence itself is, at heart, based upon the unreliability of second-hand evidence. Juries must be warned about the dangers that are inherent in identification evidence. The problem having been so irrefutably stated, what mo is to be done about it? The Law Reform Commission addressed a number of specifics here, one of them identification parades. These parades or "lineups" are a regular part of police investigation techniques in Australia. The Commission referred to the accumulated evidence on the unreliability of such parades and to a list prepared by an English committee of fifteen cases over a period of two years in which there was either admitted or strong evidence of persons convicted or remanded as a result of mistaken identification by witnesses. The Criminal Law Revision Committee of England in its Eleventh Report said that it regarded mistaken identification as "by far the greatest cause of actual or possible wrong convictions".[3]

> "One of the most notorious English cases was that of Alfred Beck, who was picked out in identification parades by twelve women, served seven years and was released. As the offences continued he was again picked out by four women, was convicted and was awaiting sentence when the real villain was finally apprehended. Another notorious case was that of Oscar Slater, who served eighteen years for murder owing to wrong identification. The record of these mistakes makes sorry reading for all those concerned about the integrity and efficiency of our system of criminal justice".[32]

A number of other problems were outlined by the Commission, with the assistance of psychological evidence and actual experience. These included the careless use by police of words such as

"which of them is the one?" rather than "do you see the man here today?"[33] and identification by photographs and identity-kit pictures.

> "The problem of identification by photograph is similar to that of identification parades. Evidence suggests that a person shown a photograph will, if there is a likeness, be likely to substitute the image of the photograph for the vaguer image of the person sought to be identified, the latter possibly obtained briefly, under stress and in poor lighting. It is therefore essential that similar standards of fairness should apply to the use of identification photographs as to the conduct of identification parades".[34]

Courts had, in the past, criticised and commented upon the obviou dangers inherent in identification evidence.[35] Doubtless, on occasion, judicial disquiet followed expert psychological testimony of the vicissitudes of human memory and perception. Courts require warnings to be given to the jury about the special need for caution before convicting on identification evidence. The Law Reform Commission, whilst accepting the utility of this measure, proposed further safeguards. These have found their way into the Criminal Investigation Bill. They include the obligation to photograph an identification parade, with provision for videotaping. The suspect is to be informed of his right not to participate in such a parade and to have a lawyer or an independent witness present during it. Full written records are to be kept of the conduct of the parade, including a written description by the witness of the person he is seeking to identify, before he views the parade. Similar provisions govern the identification of suspects by photographs or identikit pictures. But for exceptional circumstances, the showing of photographs of a suspect to a witness after that suspect has been apprehended, is to be prohibited.[36]
Identification evidence is, on occasion, vital in detecting an offender and combatting antisocial conduct. Its use ought not to be prohibited. But because of the dangers in it demonstrated by psychological research, our laws should include special

measures of control which, so far as possible, prevent deliberate abuse and caution against innocent error.[37]

Prompted by apparently diminished judicial concern in the United States about the "inherent dangers of eye witness identification"[38] Jane Tapp in 1976 lamented that "most law classrooms remain unaffected by the accrued knowledge on mediating psychological processes". A number of psychologists undertook experiments. Buckhout tried in situ settings to reduce potential artifacts and bias.[39] He videotaped a staged assault on a professor witnessed by 141 students. 60% of the witnesses - including the attacked professor - chose the wrong man. Tapp concluded :

> "Despite repeated research and educational efforts, psychologists have had little impact on the law's unwarranted reliance on eye witness reports".[40]

The lesson is at last sinking home. The Criminal Investigation Bill *does* introduce safeguards. I believe that the Prime Minister, Mr. Fraser, was right in saying of the Bill :

> "This is an area in which there has been much dissatisfaction, considerable writing, many proposals for reform, but not much legislative action".[41]

Many other provisions of the Criminal Investigation Bill bear the stamp of the Law Reform Commission's concern to adjust present police procedures, in the light of psychological evidence. For example, written notification of rights is provided for. Although this may still assume free will and require an unrealistic ideal of conduct and emotional control,[42] it is a measure that seeks to take loose talk about rights seriously and at least to diminish present inequalities :

> "Any system which pays lip-service to the existence of rights yet does nothing to ensure that they are known and understood - and indeed which may depend on their not being understood - is a system that discriminates against the weak, the unintelligent and the uncomprehending in favour of the strong willed, the smart and

> the linguistically competent. Or, as one writer has put it, 'if warnings need not be given, the intelligent are favoured over the ignorant, the rich over the poor, the habitual offender, who has learned his rights from experience, over the (possibly innocent) first offender'."[43]

Other examples include special protections for children under interrogation,[44] the provision of interpreters to ensure adequate communication with persons not fluent in English, when they are under police restraint[45] and special protection for Aboriginal suspects. The Commission relied heavily on psychological, anthropological and other evidence which demonstrates the special susceptibility of Aboriginals to authority situations.[46] This phenomenon is now so well documented that it is specifically recognised by the Supreme Court of the Northern Territory, which has laid down special rules with respect to alleged confessions by Aboriginal suspects.[47] The Criminal Investigation Bill incorporates a number of special protections for Aboriginals during the process of criminal investigation. Those who criticise such provisions as discrimination and unwarranted privileges are referred to the dangers of injustice which psychologists and anthropologists have demonstrated are inherent in present procedures.

OTHER TASKS

Other projects before the Law Reform Commission have involved or will involve the consideration of psychological research. The report on *Alcohol, Drugs & Driving*[48] sought, by the use of breath analysis equipment, to reduce the area of disputation which previously surrounded impressionistic police evidence relating to alleged intoxication. A current reference on insurance contract reform requires close examination of the evidence relating to the comprehensibility of insurance contracts, not only for the trained lawyer but also for the average insured. Our task on the reform of compulsory land acquisition law and procedure involves a consideration of "plain English" notices of rights[49] and how procedures can be introduced which overcome the feeling of resignation and

despair generally induced by government acquisition of property. A reference on Aboriginal Customary Laws involves us in fundamental questions about the nature of purpose of law in society. It also involves a critical scrutiny of the impact of our legal system on traditional Aboriginal society and the utter failure of many of its sanctions and procedures to support social cohesiveness and peace in some Aboriginal communities. The Commission reported on the laws that should govern the donation of human tissues and organs for transplantation purposes,[50] and took psychological evidence in judging the way in which to balance the rights of the dying and their relatives on the one hand and the needs of recipients, on the other. Especially within a family, these predicaments can be most stressful and disturbing.[51] The Commission has before it a major task on privacy protection which involves us in close consultation with psychologists and others, seeking to understand why it is that we seek privacy and to what extent, and how, we should protect it by law. The diminution of privacy, under the assault of computers and other modern technology, seems scarcely open to doubt :

> "The possibilities of data surveillance over the individual in 1984 could be chilling. From the time he started driving or took a transportation facility to work (leaving a record at the toll or ticket booth) until he arrived home at night, a person's movements and actions would be in memory systems. At every step - when he parked at the garage, when he entered the office and "registered in", when he used the telephone, his luncheon, his attendance at the theatre... his store purchases, ... his visit to the doctor - all these would be on record. There would be few areas left in which anyone could move about in the anonymity of personal privacy and few transactions that would not be fully documented for government examination".[52]

It is the concern about such a society and its intolerable features that have led the Government to give this reference to

the Commission. Westin has suggested that privacy involves a number of features which are not peculiar to Western society. He listed four : the desire for *solitude* in the sense of freedom from observation by other people; *intimacy* i.e. privacy for members of a family or other small, self-chosen group; *anonymity* i.e. freedom from public surveillance and accountability; *reserve*, the right to withhold one's "essential self" from public disclosure.[53]

Westin and other writers suggest that opportunities for solitude, anonymity and so on are necessary for emotional release from unbearable pressures. Sir Zelman Cowen once put it thus :

> "A man's privacy is his safety valve; he has in it his permissible area of deviation, his opportunity to give vent to what he would not express or do publicly; within these private limits he may share confidences and intimacies with those he trusts and he may set boundaries to those confidences".[54]

To like effect is Sidney Jourard's essay *Some Psychological Aspec of Privacy*:

> "... The state of privacy is related to the act of concealment. Privacy is an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future. The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others' perceptions and beliefs vis à vis the self-concealing person. ... [P]rivacy is essential for that disclosure which illuminates a man's being-for-himself, changes his being-for-others, and potentiates desirable growth of his personality".[55]

The Commission clearly recognises the importance of receiving psychological material in evaluating the importance of privacy and ascertaining those features that should be protected by law.[5

TREATMENT OF OFFENDERS

The most recent task to which the Commission has been assigned relates to the treatment of offenders : the whole question of sentencing and punishment in matters relevant to the Commonwealth's concerns. No task will require greater help from psychologists than this. Sir Leon Radzinowicz once suggested that there had been three stages in the development of social policy with respect to crime and its prevention during the last 150 years. In the first, it was hoped that crime could be reduced by means of terror. Capital punishment was a commonplace. Transportation to Australia was only marginally more attractive. During the second stage, according to Radzinowicz, emphasis was placed upon the idea of retribution : society wreaking vengeance upon those wicked and evil people who broke its laws. The third stage placed great emphasis upon rehabilitation of the offender. The key to social policy with respect to crime was the restoration of the individual to society and his reform.[57] The high noon of rehabilitation was reached in the 1960s. We are now, I believe, entering a fourth phase, which some have described as a "neo-classical revival".[58] There is a great move afoot in the United States in criminological and governmental circles to produce a criminal justice system based upon a so-called "just deserts" model.[59]

> "Current thinking among many jurists, police, and legislators ... is that we cannot do much about the "root causes" of crime, nor that government at any level can legislate love or affect the rate of broken homes. Unemployment, low levels of education, poor housing, and similar social problems among the working classes are issues that the government can and should try to change suigeneris with only secondary reference to crime and only because they are major issues concerned with social welfare. On another level, the criminal justice system is capable of direct manipulation, and federal and state governments should make efforts to effect change. These changes involve the following : increase in the probability of arrest and

> conviction and a positive sanction of incarceration for offenders who have committed offences of injury, theft, or damage;
> elimination of the indeterminate or indefinite sentence by judges and reduction of judicial discretion at the point of sentencing;
> decrease of judicial discretion, which should be substituted by a uniform sentencing process based upon the seriousness of the crime committed rather than on characteristics of the offender".[60]

Evidence that this "just deserts" thesis is gaining strength in the United States can be seen in reforms of the law in California, Maine and Indiana and in a major Bill which is presently before the United States Congress designed to diminish the discretion available to judges in dealing with persons convicted of particular crimes. A major question before the Law Reform Commission in this reference will be whether Australia should take the same path. Are we so disillusioned with the results of our efforts at rehabilitation of offenders that we too should turn to "just deserts"? Is the United States position distinguishable by the relative efficiency of our systems of parole and probation and the relative figures on violent crime which have led to this reaction in America?[61]

> "Rehabilitation will surely continue and will be researched but in a non-coercive style. Imprisonment should be used as infrequently as justice can design, and humane concern for involuntary victims ... as well as concern for captured criminals should govern our democratic justice system. The public, the police, the judiciary, and legislators are now joined by many social scientists in an ethical stance that requests retribution, not revenge, as the definition of justice; that requires an emphasis on stability rather than law and order; that looks to certainty rather than severity of punishment".[62]

Important psychological research relevant to the Law Reform Commission's inquiry is already being done in Australia. The last conference of this Society had a paper by Francis and Coyle which examined sentences imposed by a number of magistrates confronted with a variable situation on a video-module system.[63] With the help of the Australian Institute of Criminology and the judiciary, the Commission hopes to test the effectiveness of our current methods of treating offenders, examine the efficacy of experiments in periodic detention, community work orders and so on and examine the variance, if any, in punishments imposed on Commonwealth offenders in different States and, even, in different courts in the same State. In discharging this reference too, the Law Reform Commission will be looking to psychologists in Australia and overseas for guidance and assistance.

CONCLUSIONS

Where does this all lead? The law makes assumptions about human conduct, motivation and responsibility which psychology questions and frequently shows to be unreliable, if not, plain wrong. Not only does the law assume full knowledge of its fast expanding content. It also assumes standards of behaviour and responsibility that may sometimes be unrealistic and work injustice in particular cases. Although the law has for many centuries accepted expert testimony, and although psychological testimony is received in this way, the resistance of the common sense common law jurist to the persistent criticisms of the psychologist is well documented and will not change overnight. The law tends to speak to each generation in the language and of the values of previous generations. Fundamentals are changed very slowly.

For all this, things are happening. There is a growing sensitivity amongst lawyers and lawmakers to the defects of the law and especially to the need to modernise it to take advantage of new technology and to diminish the more glaring examples of injustice that can arise from its rules and procedures. One body that has been developed to help the Parliament in this process is the Law Reform Commission. The

Commission has not hesitated to secure psychological and other expertise. In a number of ways it has sought, and will continue to seek the views of psychologists and those working in allied disciplines. To the critic who asserts that more radical changes are necessary,[64] that it is "much less expensive to hire a thousand psychologists than to make even a miniscule change in the social and economic structure"[65] one can only respond that reform tends to come in stages. Psychologists in this country should be encouraged to pay greater attention to the administration of justice and to subject its personnel, methods and procedures to the bracing criticism that American psychologists have not hesitated to voice. No longer [illegible] magicians performing intriguing sideshows, psychologists can play a constructive part in the reform of the legal system which governs all of us. In a new age of reform, there are many opportunities to identify defects in the system. Hopefully there will be many opportunities to advance improvements. I have labelled the relationship of law and psychology to date a minuet - a slow, stately measure for two dancers. The tempo quickens.

FOOTNOTES

1. J.L. Tapp, "Psychology and the Law : An Overture" in *Annual Review of Psychology* 1976, No. 258, 359.

2. Tapp, 360.

3. L. Scarman, "The Age of Reform", *The Times*, 5 January 1977, Supplement I.

4. A list of 199 monographs and articles is appended to Tapp.

5. *Law Reform Commission Act* 1973 (Cth), s.6(1)(a)(iv).

6. L.R.C. Haward, "A Psychologist's Contribution to Legal Procedure" (1964) 27 *Modern Law Review*, 656.

7. S. Freud, "Psycho-Analysis and the Ascertaining of Truth in Courts of Law" in *Clinical Papers and Papers on Technique, Collected Papers*, 1959, cited Tapp, 359.

8. Tapp, 359-360. The history recorded is substantially confined to the United States.

9. Haward, 656.

10. Saunders J. in *Buckley v. Rice-Thomas* (1554) 1 *Plowden*, 118, 125; 75 *E.R.* 182, 192. See also A.A. Bartholomew, P. Badger, K. Milte "The Psychologist as an Expert Witness in the Criminal Courts", *Australian Psychologist*, Vol. 12 No. 2, July, 1977, 133.

11. *Timbury v. Coffee* (1942) 66 *Commonwealth Law Reports* 277, 283-4.

12. Bartholomew, *et al*, 137. See also Haward, 657-658.

13. Bartholomew, *et al* citing H. Silverman, "Determinism, Choice, Responsibility and the Psychologist's Role as an Expert" *American Psychologist* 1969, 24, 5-9.

14. R. le G. Brereton, "Evidence in Medicine, Science and the Law" (1968) 1 *Australian Journal of Forensic Sciences*, 9, 15. See also the writer's paper for the 48th ANZAAS Congress, 1 September 1977 "Scientific Communication - Credibility and Responsibility", *mimeo*, 2.

15. Cited in Bartholomew *et al*, 135-6.

16. Haward, 665.

17. J. Disney, J. Basten, P. Redmond and S. Ross, *Lawyers* 1977, Sydney, 470. See also M.D. Kirby, "Futurology" in *Understanding Lawyers*, R. Tomasic, 1978, Sydney. *Cf. Re Neil; ex parte Cinema International Corporation Pty. Limited* (1976) 50 *Australian Law Journal Reports* 501.

18. *Cf. McKenzie v. McKenzie* [1970] 3 *Weekly Law Reports* 472 (Court of Appeal, England). See also Disney, 468-48

19. The Family Court is not the only court in Australia pioneering such reforms. The Administrative Appeals Tribunal which deals with the review of Commonwealth administrative decisions has also modified the design of hearing rooms and procedures and abolished court dress. The industrial tribunals, notably the Conciliation and Arbitration Commission, introduced several of these changes more than a decade ago.

20. Judge A. Roden, "Sentencing, One Judge's Viewpoint" in The University of Sydney, Institute of Criminology, *Sentencing*, Seminar held Sydney, 10 May 1978, *mimeo* 16.

21. Wells J. (Supreme Court of South Australia) in *The Queen v. Kear* [1978] 2 *Criminal Law Journal* 40, 41.

22. Haward, 665.

23. The Law Reform Commission (Aust.), *Criminal Investigation* (A.L.R.C.2.), 1975.

24. R.J. Ellicott, *Commonwealth Parliamentary Debates (H of R* 24 March 1977, 562.

25. P.D. Durack, Speech to the Council of Professions (1978) 3 *Commonwealth Record*, 889,892.

26. Murphy J. in *Burns v. The Queen* cited A.L.R.C.2., 71.

27. *Id.*, 71-2. Criminal Investigation Bill, cl.34.

28. A.L.R.C.2., 72-3.

29. Haward, 663.

30. *Id.*, 663-4.

31. English Criminal Law Revision Committee, Eleventh Report, *Evidence (General)*, Cmnd. 4991, 1974, paras. 196-203.

32. A.L.R.C.2., 52-3. For Australian cases see Bartholomew, *et al*, 144.

33. A.L.R.C.2., 54.

34. *Id.*, 55.

35. See *Craig v. The Queen* (1933) 49 *Commonwealth Law Reports* 429, 448-50; *R v. Boardman* [1969] *Victorian Reports* 151; *R v. Goode* 1970 *South Australian State Reports* 69.

36. Criminal Investigation Bill, 1977, cl.43, 44.

37. The Devlin Committee, *Report on Evidence of Identificatio in Criminal Cases.* April, 1976.

38. *Kirby v. Illinois*, 406 *U.S.* 682 (1972); *U.S. v. Wade* 388 U.S. 218 (1967).

39. R. Buckhout, "Eyewitness Testimony" *Scientific American* 231, 23-31 (December 1974).

40. Tapp, 388.

41. J.M. Fraser, Speech at the Opening of the 19th Australian Legal Convention, July 1977, (1977) 51 *Australian Law Journal* 343, 344.

42. Haward, 656.

43. A.L.R.C.2., 44.

44. Criminal Investigation Bill, cl.32; A.L.R.C.2., 126-7.

45. Criminal Investigation Bill, 1977, cl.31; A.L.R.C., 2., 123-6.

46. Criminal Investigation Bill, 1977, cl.29-30; A.L.R.C.2., 118-123.

47. *R v. Anunga & Others* (1976) 11 *Australian Law Reports*, 412.

48. The Law Reform Commission (Aust.), *Alcohol, Drugs & Drivin* (A.L.R.C.4), 1976. The proposals in this report have passed into law. See *Motor Traffic (Alcohol and Drugs) Ordinance*, 1977 (A.C.T.).

49. The Law Reform Commission (Aust.), Discussion Paper No. 5 *Lands Acquisition Law : Reform Proposals*, 1978, 11.

50. The Law Reform Commission (Aust.), *Human Tissue Transplan* (A.L.R.C.7), 1977.

51. *Id*., 50-1.

52. A. Westin, "Science, Privacy and Freedom : Issues and Proposals for the 1970's", 66 *Columbia Law Review* 1003, 1013-4 (1966).

53. *Id.*, 1020-22.

54. Z. Cowen, "The Private Man", 1969 (Boyer Lectures, A.B.C.

55. S. Jourard, "Some Psychological Aspects of Privacy," 31 *Law and Contemporary Problems* 307, 307-312 (1966). *Cf.* G. Anastaplo, "The Public Interest in Privacy : On Becoming and Being Human", 26 *Depaul Law Review*, 767 (1977).

56. Tapp, 381-2.

57. L. Radzinowicz, cited in S. Mackey, "Parole - Background, Machinery and Statistics" in N. Hinton (ed) *Parole : The Case for Change*, 1978, London, 7.

58. M.E. Wolfgang, "Real and Perceived Changes of Crime and Punishment" 107 *Daedalus* 143, 151 (1978).

59. *Id.,* 152.

60. *Id.,* 153.

61. This explanation for the movement to a new approach is advanced by Wolfgang, 147.

62. *Id.,* 155.

63. For a later paper see R. Francis and I. Coyle, "The Sentencing Process : A New Empirical Approach" in The University of Sydney Institute of Criminology, *Sentencing*, above.

64. Judge David Bazelon at a Conference of Correctional Psychologists, cited in Tapp, 371.

65. *Ibid.*