20TH AUSTRALIAN LEGAL CONVENTION

ADELAIDE, THURSDAY 7 JULY 1979

CRIMINAL INVESTIGATION & THE RULE OF LAW

The Hon. Mr. Justice M.D. Kirby

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A QUESTION OF BALANCE

Cause for Reform: Criminal investigation puts liberal values to the test. There is little doubt that physical torture, widespread telephone interception and limitless detention without trial would increase the prevention of crime and identification of criminals and lead to their more numerous conviction and punishment. We have inherited in this country the British system of criminal justice which asserts, in the words of Blackstone, that it is better that ten guilty persons escape than one innocent suffer. The adversary mode of trial, the principle that the Crown must prove its case beyond reasonable doubt, the general facility of trial by jury, the relief against self-incrimination and the so-called "right to silence" are all at the heart of a system many of whose rules visibly and unashamedly favour the accused.[1]

The development of the modern police service, the perceived growth in the amount and complexity of crime and, lately, the advance of terrorism, provide new pressure for the modification of the rules governing criminal investigation. That pressure finds legitimate outlet in representations made by police and others for expanding law enforcement powers and modifying the rights and privileges of the accused. In the day-to-day practical administration of the criminal justice system, the pressure finds outlet in the "bending"[2] of current rules, the use of "bluff"[3], "stealth"[4] and plain deception by police. It involves courts turning a blind eye to illegal and improper conduct by police. The law "in the books" becomes distanced from the law "on the ground".

The last 20 years have seen an unhappy catalogue of official reports attesting to undesirable practices on the part of individual policemen. The offenders are in the minority. Some of them probably believe that stretching the rules is justified by the unequal fight against crime. This attitude has been condemned repeatedly. In 1962 the Royal Commission on the Police in Britain found

> "There was a body of evidence, too substantial to disregard, which in effect accused the police of stooping to the use of undesirable means of obtaining statements and of occasionally giving perjured evidence in a court of law. Thus the Law Society suggested that the police sometimes use guile, and offer inducements, in order to obtain confessions, in the belief that irregular means of securing the conviction of a person whom they believe to be guilty are justifiable in the public interest and that occasionally police officers colour, exaggerate or even fabricate the evidence against an accused person. ... Practices of this kind, if they exist (and evidence about them is difficult to obtain and substantiate) must be unhesitatingly condemned. The citizen's defence against police misconduct before the courts must be the courts themselves ...".[5]

In 1978, the Metropolitan Police Commissioner, Sir David McNee, told the English Royal Commission on Criminal Procedure that abuse of police authority did occur. He blamed the failure of Parliament to give police the power they need:

> "The effect of this ... is that many police officers have, early in their careers, learned to use methods bordering on trickery or stealth in their investigations because they were deprived of proper powers by the legislature".[6]

This frank admission that present rules are routinely broken in England is reflected in the findings of recent inquiries into allegations of police misconduct in Australia. The Beach Report on the Victoria Police[7] and the Lucas Report in Queensland[8] each contain serious findings of abuse of police authority and the fabrication of evidence by police. Planting of evidence ("giving of presents" in the patois of the police force)[9] was found to be "a pervasive practice and one by no means peculiar to Queensland".[10] The practice of "verballing" has now received the attention of the High Court of Australia.[11] Evidence to the Queensland inquiry "established that assaults upon prisoners are by no means uncommon in the Brisbane Watchhouse:[12]

> "In the ... cases of oppressive conduct discussed ... we see one factor common to all, that is, the exercise of personal power undisturbed by thoughts that there will ever be an accounting for its use".[13]

The frustrations, anxieties and privations of police and other law enforcement officers are acknowledged. The splendid and irreplaceable work done by the majority of them deserves our indiluted praise. Calls for the adjustment of present laws to accord more closely with the needs of police command urgent attention. But so does the problem of abuse of authority. Every case of uncorrected and unredressed abuse of authority blemishes the society which establishes law enforcement machinery. We should be concerned about increasing crime. We should be equally concerned to ensure that the rule of law is upheld in the criminal investigation process.

One of the most important developments in law reform in Australia in the present decade has been the enactment of legislation to bring the rule of law into administrative decision-making and to submit the discretions of government officers to independent, external scrutiny. This is an ultimate aim of the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976, the Administrative Decisions (Judicial Review) Act 1977, and proposed legislation, including the Freedom of Information Bill 1978. It seems scarcely likely that the moves which open up previously secret and unreviewable government decisions will stop short at the criminal investigation process and the conduct of police and prosecutors. The debate about new controls over criminal investigation should be seen in the context of new laws designed to protect the individual against the growing authority of the state.

The purpose of this paper is to explore some of the proposals lately advanced, designed to ensure that lawful and fair conduct is maintained throughout the conduct of criminal investigation. Reports and other writing on this subject are legion. Some evidence complacent calm with present rules. Others exhibit a sense of urgency to right wrongs which are

presently felt to be unredressed. The editor of the Criminal Law Review, writing on two of these reports, one Australian and the other Scottish, concluded:

> "Over the details of the proposals ... people will inevitably dispute. About the need to take duties and liberties seriously, however, there can be no dispute. This is the meaning of the principle that written rules and actual practice should correspond. ... Few people can be expected to welcome increased formalities and procedures with enthusiasm, especially those who have to operate them. Yet if this is the price for the reintroduction of the rule of law into criminal investigation, then it ought to be paid."[14]

It is the thesis of this paper that new safeguards and remedies are needed to uphold reformed procedures for criminal investigation. The need to introduce greater realism and some expansion of police powers to accord with modern realities is not disputed. But it is not the subject matter of this paper. Given that injustice and impropriety will occur, safeguards and sanctions are necessary. Only by their provision will misconduct be prevented or, if it occurs, punished or otherwise redressed.

A Graveyard of Reports: Speaking of the reform of criminal investigation, the Prime Minister, opening the last Legal Convention said, rightly I believe

> "This is an area in which there has been much dissatisfaction, considerable writing, many proposals for reform, but not much legislative action".[15]

In the United Kingdom, a Royal Commission has been established to inquire into criminal procedure. It is the latest in a series of royal commissions, committees and inquiries that have examined criminal law, procedure and police powers regularly since the establishment of the Metropolitan Force in London by the Metropolitan Police Act 1829. For example, in 1928 a Royal Commission on Police Powers and procedure was appointed in Britain. Its terms of reference included inquiry into interrogation "and to report whether ... such powers and duties are properly exercised and discharged with due regard to the rights and liberties of the subject, the interests of justice and the observance of the Judges' Rules, both in the letter and the spirit". A number of recommmendations were made, including

a recommendation that police procedure in the taking of statements should be incorporated in a standard Instruction Book. No legislation followed. The book was never issued "largely because of doubts about the propriety of the Home Office issuing a document which purported to lay down model procedures for police forces".[16]

The Royal Commission on the Police 1960-62 criticised aggressive interrogation techniques but did not extend its inquiry to review the Judges' Rules. One important proposal, which was followed by legislation, was for the acceptance of vicarious liability by the local chief officer of police in respect of the torts committed by constables in the performance or purported performance of their functions.[17]

In September 1964 the English Criminal Law Review Committee was requested by the Home Secretary to review the law of evidence in criminal cases. Its 11th Report on the General Law of Criminal Evidence was presented in 1972.[18] The publication produced a storm of controversy but no legislative reform.[19] Following the report, and as a consequence of recommendations made in it, a committee was established to study the feasibility of "mounting an experiment in the tape recording of police interrogations". That committee published its report in October 1976 and recommended that a limited experiment would be feasible.[20] Following the establishment of the Royal Commission, the Home Secretary announced that he would seek views as to whether the experiment should proceed. This further delay in action did not pass without criticism.[21]

Meanwhile, a number of other reports, relevant to police investigation, were delivered and remain largely unimplemented. The report of the Devlin Committee on Evidence of Identification is an exception. It was commended in a circular of the Home Secretary,[22] largely adopted in the Court of Appeal judgment in R. v. Turnbull.[23]

There are several other relevant, recent reports in England, the most notable of which is that conducted by Sir Henry Fisher into the circumstances leading to the trial of three young men charged with murder. In his report, Sir Henry Fisher voiced a number of criticisms of the conduct of the original police investigation. He considered that the sanction for breach of the Judges' Rules should be certain and regularly applied, proposing that it be made a rule of law that unless there was supporting evidence obtained in different circumstances, no person should be convicted on the basis of confessions obtained in breach of the Rules.[24] Despite his expression of hope that an experiment would be carried out with tape recording, the Home Secretary decided, instead, to establish the present Royal Commission.

In Scotland, a comprehensive package of reform was proposed by a Committee appointed by the Secretary of State for Scotland and the Lord Advocate and chaired by Lord Thomson. That Committee's report "Criminal Procedure in Scotland (Second Report)" was delivered in October 1975. A Bill proposing "a substantial number of changes in criminal procedure and evidence in Scotland" titled Criminal Justice (Scotland) Bill 1978 has now been introduced into the United Kingdom Parliament. Although incorporating a power to detain a suspect and a requirement to accompany police to a police station for questioning, the Bill does not follow the report's recommendations that, as a price of these wider powers, additional securities should be introduced, including an obligation to record on tape the interrogation of all suspects in police stations.

In Australia, there has been similar general inaction upon reports recommending reform. The reports include the Report of the Criminal Law and Penal Methods Reform Committee of South Australia,[25] the Beach Report in Victoria,[26] and the Lucas Report in Queensland.[27] The most recent report in Victoria, that of the Norris Committee,[28] proposed certain reforms and other action, whilst disagreeing with many of the proposals put forward by its predecessors. Even its modest recommendations have not been implemented.

This is not the full catalogue of reform reports. An experiment with tape recording of confessional statements to police, as a security of their accuracy and fair conduct, was proposed in 1965 by the then Solicitor-General of Victoria.[29] The results of limited experiments conducted in 1965 "although not spectacular, were good enough to be regarded as encouraging".[30] Some limited experimentation was introduced but not vigorously.[31] The course of the past decade warrants the Prime Minister's rebuke.[32] Much dissatisfaction. Considerable writing. Many proposals for reform. Not much legislative action.

The New Catalysts: Into this somewhat languid debate there are now injected new catalysts which may serve to focus the discussion and bring together the competing arguments for the decision of our law makers. In Britain, the catalyst is the Royal Commission on Criminal Procedure. It has now been operating for more than a year. It has 16 members, including lawyers, policemen, sociologists and four community representatives (a priest, a television executive, the Secretary of the Fabian Society and a former union executive). The Royal Commission's research programme includes observational research into police interrogation and the gathering of other empirical and academic data.[33]

In Australia, the new catalyst is provided by introduction of legislation based upon reports of the Australian Law Reform Commission[34] and the announcement of the intention to create an Australian Federal Police Force following the Report by Sir Robert Mark concerning the rationalisation of Commonwealth policing.[35] It seems likely that the establishment of a new National Police Force will provide an occasion to introduce new rules to govern the members of that force. It was the earlier proposal to establish an Australia Police which led to the Reference to the Australian Law Reform Commission concerning police powers and criminal investigation.[36] The Commission had, for convenience, reported separately upon two aspects of its Reference. The first report proposed new and independent

procedures for receiving, investigating and determining complaints against police. It also proposed a new discipline code and the adoption of the principle of vicarious liability for the conduct of police officers.[37] The proposals in the report were adopted, in substance, in the Australia Police Bill 1975. That Bill lapsed with the dissolution of the 29th Commonwealth Parliament. However, many of the proposals contained in the report have now passed into the law of New South Wales and so govern the largest operational police force in Australia.[38] They are also reflected in legislation enacted in the Northern Territory.[39] An inter-departmental committee in Canberra is considering their application to the proposed Federal Police.

It was the second report, Criminal Investigation,[40] which sparked the greater controversy. A Bill, following in great part the draft legislation annexed to that report, was introduced into the Parliament in March 1977. Introducing it, the then Attorney-General (Mr. Ellicott) described it as a "major measure of reform".[41] The Bill lapsed with the dissolution of the 30th Parliament. The new Attorney-General, Senator Durack, announced late in 1978 that he was reviewing it in the light of comments and views expressed on it. He expected "to have a revised Bill prepared for the Autumn sittings of Parliament [in 1979]".[42] Just as the Bill must be seen in the context of major reforms of administrative law, Senator Durack asserted that it should be viewed as part of a comprehensive programme to afford practical protection to human rights in Australia. It was "another important measure in relation to the maintenance of individual rights".[43]

The Bill introduced in 1977 attracted criticism and even calumny, much of it uninformed. A meeting of Police Commissioners of the South Pacific region called on the government not to proceed with it. The Victoria Police Association declared "there's no way we will cop this obnoxious Bill".[44] Former Commissioner Whitrod declared that "there are sections ... which tend to interfere with the policeman's capacity to do his job properly".[45] The Capital Territory

Police in a submission on the Bill, described it as "misconceived", "biased", "arbitrary", "obtuse". Opposition to it is declared to be "unalterable" and "strenuous".[46] More sober criticism of some of the measures proposed is recounted below.[47] As against this criticism, the major proposals attracted praise both in Australia and overseas. The Bill was declared to be one of "the most forward looking measures ever introduced into the Commonwealth Parliament".[48] Critical suggestions advanced by the Law Reform Commission were adopted in the Beach and Lucas Reports.[49] Other reports, Commonwealth[50] and State[51] have urged the enactment of particular provisions of the Bill.

It is tempting for law makers in a democracy to shun debates such as this. Indeed, the temptations to inaction are almost irresistible. However, injustices are occurring and will continue to occur, unsupervised by the law, unless the calls for reform are heeded. Frankfurter J. once declared that the rule of law depends ultimately upon public confidence in the fair and honourable administration of justice.[52] There seems little doubt that this confidence has been shaken by recurring scandals and by individual citizen exposure to unlawful and wrong conduct. Public surveys in Britain and Australia suggest growing cynicism in public attitudes to the police and their methods in both countries.[53] It may well be the case that the scandals are exaggerated. The suspicions may be misfounded. The cynicism may be ill-placed. What are needed are new measures of control which will, as far as possible, remove or counteract the poison which is spread by the lack of entire confidence in police integrity.

EDUCATIVE LEGISLATION

Clarifying Rights and Duties: The first and most obvious requirement of the rule of law is that there must be rules. It is unthinkable that we should clothe large numbers of officers with "badges of authority, clubs and guns and then leave them without rules to guide and limit them".[54]

> "No one would favour a complete absence of rules, and the police have always been subject to some rules, including those provided by statutes, judicial case law and orders of superior officers. The problem is not whether, but how much. The surprising fact is that police activities are so little controlled by rules". 55

A recurring criticism of the United States Supreme Court has been directed at the Court's endeavour to fashion the appropriate rules, though not necessarily equipped to do so, in an orderly, coherent and systematic way. In part, legislators have failed to provide rules because of the difficulty of securing agreement between the "experts" as to what the rules ought to be. In part, they have failed because of the feeling that the courts can be looked to to provide the necessary regulation. In part, they have shied away from the controversies inherent in any endeavour to articulate the balance that should be struck between the competing interests of the individual in society and the community's need for effective law enforcement. Whatever the cause, the result is unsatisfactory. What should be clear is unclear or even practically undiscoverable. In the place of plain rules with certain consequences for their breach are extremely wide discretions, largely uncontrolled. Lord Devlin put it this way:

> "It is quite extraordinary that, in a country which prides itself on individual liberty [the definition of police powers] should be so obscure and ill-defined. It is useless to complain of police overstepping the mark if it takes a day's research to find out where the mark is." 56

In the United States, where the courts have taken the lead in stating rules that should govern criminal investigation, they have done so, protesting that the legislature is in a better position to gather relevant information, particularly empirical data, and to make the necessary findings and derive comprehensive rules based upon accumulated experience and an appraisal of competing interests. Police, naturally enough, have little time or inclination to read the decisions of superior courts concerning the limits of their powers. Even if they did read such judgments, it is doubtful if they would fully comprehend their significance without "sustained expert

guidance".[57] Often police in the front line believe they are justified in tailoring enforcements practices to fit in with their understanding of public expectations for effective police service.[58] The problems are compounded by multi-jurisdictional differences and multi-judge courts. It is little wonder that uncertainty, confusion and bitter debate surround this vital area of civil liberties. The rules have developed in a piecemeal fashion, with few attempts to secure a clear, coherent body of law. Fewer have been the attempts to modernise the rules to accord with the developing role of the police in today's society and the increasing availability of relevant technology.

The major attempt to impose order upon the questioning of suspects was the provision of the Judges' Rules devised by the judges of the King's Bench in England in 1912 and 1918. Lord Justice Widgery has said that the rules were laid down with what "we would now regard as considerable presumption".[59] They have been modified from time to time. A completely revised set was announced in England in 1964.[60] In their pre-1964 form, they apply, in one way or the other in most Australian jurisdictions. In some States they are incorporated in Police Regulations or Standing Orders. In others they are the subject of instructions to police that they should "generally speaking" be followed.[61] In some States they have been adopted by the courts as a guide to the exercise of judicial discretion. In other jurisdictions they are displaced by a more general test as laid down by the High Court in R. v. Lee.[62]

Dangers and difficulties attend any endeavour to collect the principal powers, functions and duties of police so that they can be incorporated in a single statute which has the authority of Parliament. About the desirability of the endeavour there can surely be no dispute. Rules which govern the vital rights and duties of police and suspect (and of other citizens) in the criminal investigation process should surely no longer be sought out, in this country, in rules made by English judges with admitted "affrontery", more than 60 years

ago and not available to any but the expert. Both for the education of the citizen and the clarification of police in the front line, society has a responsibility to state these rules most of all clearly and in a public Act, available to all. It is appropriate that the modern, established position of the police service in our community should be recognised and upheld in such legislation. It is also appropriate that the occasion should be taken to infuse greater realism into the rules and the recognition of modern community values and the utilisation of science and technology. The effort to do this provides an occasion to debate the appropriate balance that should be struck between police powers and individual liberties. Postponing that debate will not make it go away. It will simply lead to the stealth, bluffing and community cynicism which must be dealt with if effective law enforcement is to be secured.

Special Australian Concerns: Some features of the investigation of crime in Australia are special. The Federal system, the vast geographical distances which must be policed, the presence of large communities of people not fluent in English and used to a different criminal justice system and the special disadvantages of Aboriginals confronted with authority are just a few of the particular Australian problems which local laws should address. It is scarcely surprising that the English judges of 1912 did not give special thought to our local problems. What is surprising is that we have struggled on for more than half a century with a complex body of law made up of a little legislation, much case law, (in most jurisdictions) the Judges' Rules and administrative directions of varying authority issued by Police Chiefs. The argument for collecting, rationalising, simplifying and clarifying the rules seems incontestable. If the rules are wrong, unduly weighted in favour of authority or of the accused, they should be changed. But we do not help the police or proper law enforcement or the rule of law itself by endeavouring to disguise our confusion by persisting with largely ill-defined powers and duties, the content of which is obscure to the police and largely unknown to most citizens.[63]

It is for others to say whether the Law Reform Commission has succeeded in the endeavour to clarify, modernise and define the relevant procedures of criminal investigation. But a first step in asserting society's legitimate control over police authority (and affording society's guidance to police and others) is the provision of a clearer statement of the way things will be done. There can be no real dispute that such a clearer statement is needed. It should repatriate the relevant principles so that they accord with Australian conditions and address themselves to special Australian problems. It should be available for the education of the community and of police. It should embrace the devices of science and technology that can help to reduce collateral disputes, irrelevant to the guilt or non-guilt of the accused. It will sharpen the debate about just where we strike the balance between individual liberty and effective law enforcement.

NEW CONTROLS BEFORE INVESTIGATION

Selection, Training and Command of Police: The provision of rules of machinery to enforce those rules will be of no avail if law enforcement officers do not generally as a matter of course abide by them. The selection, training, equipment and leadership of police are more effective means of securing lawful and fair conduct in their day-to-day operations than the provision of general laws and the facility of ex-post means of redress. The importance of community confidence to the effectiveness of the police is well recognised, no least by police authorities themselves. There is no doubt that bad cases of police abuse undermine community confidence and reduce that consensus which is necessary for the acceptance of the civic duty to help police.[64] The growth of impersonal, urban communities and the ever-increasing body of the law which police are called upon to enforce, contribute to the "division that has come into existence between the police and the public."[65] A new new effort at a rapprochement of police and public was declared necessary by the Lucas Report in Queensland. The key was considered to be the better selection and training of police.

There is no doubt that society makes unreasonable demands upon its law enforcement officers. Their job, when it is not dangerous, is tedious; uncomfortable and ill-paid. It is not a job that can be left in the locker-room. Some have argued that the police service requires, as a minimum pre-condition, a psychological willingness, or even need, to work "in a structured authoritarian environment pervaded by moral absolutism".[66] Without going so far, it must be conceded the police function in an authoritarian, disciplined, hierarchically organised and cohesive unit. This work environment inevitably stimulates an attitude to authority and a concern about lawlessness which is inclined to regard the protections of individual rights as an obstacle course: impediments to be overcome in the fight against crime. Police training and discipline and the rules laid down by judges and Parliament can be successful only if addressed to people who have the ability and inclination to grasp the information imparted to them and the judgment to act sensitively and intelligently in applying this knowledge in their everyday work.[67] Many commentators in Australia and elsewhere believe that there are some in the police service who do not fit into this category. What can be done about it?

A typical problem of the past has been the rigid enforcement of rules about minimum physical size. Such a rule introduces a consideration that is less important than others and limits the pool of talent whilst perpetuating the myth that brawn and blunder are more important for law enforcement than brain , knowhow, emotional stability and balanced social attitudes. Although there are distinct signs of improvement (usual in periods of economic downturn), the following Canadian observation is probably applicable to Australian police recruitment:

> "Poor selection procedures for recruits, combined with low educational requirements and a promotion-only-from-within policy abets the progressive advancement of mediocrity. If police departments cannot successfully recruit and retain their share of intelligent, educated persons, they cannot perform sensitive policy-making functions. Police personnel must be capable of modern leadership. Rigid physical and social-cultural standards have dominated ... recruitment. Such standards have little relation to the

> difficult problems faced by police today. A careful analysis of the job requirements indicates that physical size, strength and aggressiveness are, at most, appropriate to 20 per cent of the present police functions. Yet such emphasis continues to dominate the recruitment procedures ...".[68]

The need for improved training of better selected police is considered in many recent Australian reports.[69] American studies have demonstrated that whilst a medical practitioner receives some 11,000 hours of training, an embalmer, 5,000 hours and a hairdresser 4,000 hours, a policeman may receive little more than 200 hours of sustained rigorous instruction.[70] The extent of pre-training and in-service training in Australia is undoubtedly improving. But the level remains low. The importance of the tasks assigned to police, the exponential growth in the duties imposed on them by burgeoning legislation and the real complexity of the laws which individual policemen must administer require a system better than apprenticeship. On the criterion of training, it is not, I believe, unfair to conclude that the ordinary policeman emerges as "only marginally a semi-skilled worker masquerading as a professional".[71] We really cannot blame police for not applying what is obscure in the first place, ill-explained (if explained at all) and then not always kept up to date.[72] There is a need for good police administrators who by their honesty, example and discipline[73] instil obedience to the law and ensure that their officers act fairly and reasonably, "well within the wide powers conferred on them".[74]

Limiting Non-Police Policing: There are two recent developments that cause legitimate concern. The first is the danger inherent in the proliferation of police-type duties to organisations which are not subject to the same discipline, traditions and legal controls as police. In part, this is the problem of private investigators and security guards. The growth of "private police" services is well documented.[75] It is not a new development. Railway police sprang up in the 1840s, not long after the establishment of the Metropolitan

Force itself. The utility of developing readily available checks and sanctions in respect of the organised police force will be diminished if large numbers of police-type duties are performed by commercial bodies unrestrained by most of the conventions, laws and usages that apply to the police proper.[76]

This proliferation of policy-type bodies is also occurring within Crown service. Taxation inspectors, migration officers, customs and narcotics agents head the list, with impressive powers, frequently beyond those of the ordinary policeman. For example, certain customs officers still enjoy a general warrant which by virtue of the statute, and without specific judicial authority, empower them to enter and search premises.[77] Lately, it has been announced that customs officers in the Narcotics Bureau may secure authority to intercept telephonic communications,[78] a power hitherto strictly limited in Australia and not available for normal police investigations.[79]

One of the difficulties of building up non-police investigating authorities, whether within or outside government service, is that remedies and sanctions provided by law against the police will not, in terms, apply outside their ranks. This problem was recently called to Parliamentary attention, in the Commonwealth's sphere, by a report of the Law Reform Commission.[80]

Reforming Substantive Criminal Laws: The second cause for concern relates to the substantive law which police are called upon to enforce. Almost every inquiry which has looked at police powers and at police relations with the community, has called attention to the special problems that arise when police are required to enforce "uneforceable laws". The problems police face are minimised where the police have an ascertainable victim. The obligations of police in the area of consensual adult sexual conduct, gambling and like offences undoubtedly have a disheartening affect on morale, discipline and honesty within police service.[81]

This is why observers both within and outside the police call attention to the need to consider what the criminal law is good for[82] and what police are equipped to do effectively, with maximum community support.

> "If suspects may be entrapped into committing offenses, if the police may arrest and search a suspect without evidence that he has committed an offense, if wiretaps and other forms of electronic surveillance are permitted, it becomes easier to detect the commission of offenses of this sort." 83

Reform of the substantive law which police have to enforce cannot be divorced from reform of the conduct of police in the performance of their duties. It is inevitable that the way policemen behave is affected by the rules which they have to enforce. Legislation rarely keeps pace with community attitudes. In consequence police sometimes alienate large numbers of persons in society, and offend public opinion, by enforcing "unacceptable" laws. Otherwise they turn a blind eye to them, with all the dangers of indiscipline and dishonesty which that can imply. The result can become a regime of token law enforcement which serves only to increase community cynicism and contempt for the law enforcement process.[84] It is unjust to blame police and the courts for this predicament. But as they are the visible actors, they attract the opprobrium.[85]

Prior Judicial Authorizations for Action: One of the defects in most of the current controls over criminal investigation is that they are exerted ex-post with all the disadvantages and shortcomings of hindsight judgment.[86] In 1963, Mr. Justice Brennan of the United States Supreme Court detected the trend towards the enlargement of the judicial supervisory role over police law enforcement policies and practices. He was not apologetic. "Plainly", he said "there is no stage of that administration about which judges may say it is not their concern".[87]

The provision of pre-supervision by judicial officers in certain critical cases is a theme of the Australian Law Reform Commission's Report and of the Criminal Investigation Bill. The suggested provision of telephone warrants and other means of judicial supervision are novel.[88] The aim is to provide, in

advance, an orderly procedure involving an impartial, neutral and detached person who can make an independent decision authorising the exertion of State authority upon the individual. The rapid advances in means of telecommunications, so beneficial to efficent law enforcement in a large country, were at last recognised. A century after the invention of the telephone, the facility was provided for telephone warrants and even telephone appeals against police bail decisions.[89] The influence of these proposals is now being reflected in legislation in Australia.[90]

The protection afforded by checks of this kind ought not to be exaggerated. Certainly until now, judicial officers have not usually been consulted in advance of police action which must often take place in circumstances which do not admit of interposing judicial discretion, however swiftly it may be obtained. Furthermore, empirical data in the United States suggests that pre-trial judicial participation tends to be "largely perfunctory".[91] Indeed, one author concludes that it may actually diminish protection to the citizen because it produces a facade of deliberate authority which is unjustified by the actual scrutiny observed.[92] The Criminal Investigation Bill proposed certain safeguards against this danger, including the written specification of the ground relied upon to justify the issue of the warrant.[93] In the nature of things, most controls and sanctions must be applied during and after the criminal investigation process. It is to them that I now turn.

NEW CONTROLS DURING INVESTIGATION

Presence of Independent Persons: A recurring feature of every recent inquiry into police powers has been the endeavour to ensure that interrogation is fairly conducted and accurately reported. Allegations of mis-statement, distortion, "verballing" and abuse of superior position are frequently made. Many allegations of this kind are without a doubt baseless, being founded on nothing more than a change of heart following the natural human instinct to confess and "get it off the chest". However, some complaints are fully justified.

Interrogation will remain an important police procedure. Allegations will continue to be made. These allegations are extremely difficult to resolve in the forensic medium. If the accused has no previous criminal record, there is pitted against the oath of a sworn officer of the Crown, the oath or statement of an accused entitled to the benfit of any reasonable doubt. If the accused has a criminal record, he is in a seriously disadvantageous position to assert distortion and perjury by the police. Speaking of his experience as Lord Advocate, Lord Reid expressed his disquiet in these terms:

> "... I used to be responsible, as a Law Officer, for the conduct of criminal prosecutions in Scotland. I formed two very clear impressions, although they were not based on anything that one could call evidence. One was that the police never harassed a man who had no record - virtually never - but if a man had a record and if they were convinced that he was guilty of the offence in question, then sometimes - not very often, but sometimes - they used very undesirable methods. I have no doubt that the position is not very different today".[94]

Similar conclusions were reached in Australia by the recent inquiries in Victoria[95] and Queensland.[96] The aim of any reformed procedure should be to provide security against abuse of this kind. There is no doubt that repeated allegations of distortion and misconduct are extremely damaging to the good name of the police and the administration of criminal justice. It is important that every effort should be devoted to finding a just and efficient means to grapple with this endemic problem.

Means have been proposed. They include the taking of evidence before a magistrate or a justice, the presence of lawyers, advisers, the family or other friends during interrogation and the provision of assurance by the use of modern technology, notably video tape and sound recording.

In India, no statement made to the police by an accused person, whether in custody or not, can be used in evidence at his trial.[97] However, an accused person may, if he wishes, make a sworn statement before a magistrate. A sworn statement of this kind is admissible in evidence, even if repudiated at the trial by the accused, provided it has been made voluntarily. A similar facility exists in Scotland for a

person accused of an offence to be examined before a sheriff. As is well known, civil law countries provide for extensive interrogation by judicial officers, separate from the police.

The introduction of this system has been repeatedly rejected in England and Australia. The Royal Commission on the Police in 1928-29 rejected it in England. It was considered inappropriate by the Committee appointed by Justice to examine preliminary investigation of criminal offences.[98] It was regarded as too cumbersome and slow by the Law Lords debating the alternatives to the 11th Report.[99] In Australia, although some proponents have suggested that the facility should be available,[100] it was not advanced as the universal solution in the Law Reform Commission's proposals, partly because of constitutional difficulties in the way of the Commonwealth's imposing such non-judicial functions on State magistrates. Nevertheless, the Commission's proposals and the Criminal Investigation Bill included provision for the verification of a record of interview before a "prescribed person". Such a person could be a Magistrate. But it may also be a lawyer who has been requested to assist the accused, a relative or friend or a person in a class approved by regulation.[101]

Sound (and video) Recording: More controversial is the issue of sound recording of confessional evidence to ensure its reliability. Recording by mechanical means has been available now for many years. It is occasionally used in police investigation in Australia, particularly in cases involving alleged police corruption, but also in certain homicide cases in Victoria.[102] Proposals that confessions be recorded by mechanical means have been made for nearly two decades, since wire recorders and tape recorders became available. In the same period, police embraced with enthusiasm and used with skill advancing Breathalyser equipment. The aim of this was likewise to reduce debate about police observations and confessional statements concerning intoxication.

Resistance to sound recording has been strongest in police quarters. The Criminal Investigation Bill, as explained by Mr.

Ellicott has, as a major theme, the utilisation of new technology to set at rest, wherever possible, debates collateral to the guilt of the accused:

> "The Bill is ... noteworthy because it represents an attempt by the law to catch up to 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 ... Just as the law and lawyers must accommodate themselves to technological advances, so should police forces. Resistance to the use of methods that can fairly end controversy are bound, in the end, to fail. It is important that the law should not fall behind technological developments".[103]

The use of sound recording of interviews has been suggested many times, both in Australia and overseas. In 1962 Sholl J. proposed their use as a means of dealing with "a real and important problem in judicial proceedings on the criminal side of the courts".[104] In 1965 the Murray Report in Victoria proposed their introduction on an experimental basis.[105] In 1972 the Criminal Law Revision Committee proposed that tape recorders should be used on an experimental basis in police stations.[106] A minority of three members insisted that the suggested abolition of the "right to silence" during interrogation "should be suspended until such time as provision has been made for the electronic recording of interrogations in police stations in the major centres of population".[107] In 1975 the Thomson Committee in Scotland recommended that interrogation of suspects in police stations "must be recorded on tape".[108] The Commissioners attested to the success of an experiment they had conducted. They asserted the practicability and economy of the measure, as well as the feasibility of proper security arrangements. They acknowledged that difficulties would occur, particularly with inarticulate suspects. The legislation lately introduced following the Thomson Report does not include provision for sound recording.[109] In October 1976 a Committee of the Home Office reported that an experiment in the use of tape recording would be realistic and feasible under specified conditions.[110] In November 1976 the Beach Report in Victoria recounted the arguments for and against tape recording police interviews and

concluded by recommending in favour.[111] The Lucas Committee proposed tape recording as a general rule.[112] However, although the Minister for Justice and Atttorney-General for Queensland, Mr. Lickiss, recommended that the use of tape recorders be endorsed in principle, the Queensland Cabinet rejected that recommendation. Instead, it decided to leave to the Police Department, subject to ministerial approval, the determination of the areas in which tape recording "could be used effectively".[113]

More cautious proposals concerning the use of tape recording have been made in other quarters. The South Australian Committee, whilst concluding that it would not be practicable at present to require that all interviews of suspects should be electronically recorded, recommended that experiments should be made by the installation of equipment in interview rooms at Police Headquarters in Adelaide and by tape recording of interviews in those rooms.[114] The Norris Committee in Victoria, whilst not favouring the recording of all interviews of suspects in indictable offences, nevertheless recommended that police should be provided with much more equipment, accommodation and other resources to stimulate a "more vigorous implementation of the Murray Report", i.e., experimentation with the use of tape recording in appropriate cases.[115]

Justice Mitchell has expressed her view that "notwithstanding all the difficulties which impede the full recording of police interrogation, I believe that the recording of interviews will become commonplace and I trust that ways will be devised to ensure that any recordings which are submitted in evidence are accurate and complete".[116] Commentators have urged acceptance.[117] Police, however, both in Australia and the United Kingdom, continue to express their opposition.[118]

The Criminal Investigation Bill reaches a conclusion. It proposes an obligation on a police officer interviewing a person for the purpose of ascertaining whether he has committed

an offence "unless it is, in all the circumstances, impracticable to do so", to cause the interview to be recorded by means of sound recording apparatus or to interview the person in the presence of an appropriate witness.[119] Specific provision is made for the security of the record, provision of copy to the accused and to the court and admission of the recording into evidence.[120] The obligation is not confined to interviews at police stations. A comprehensive effort has been made to provide for the reliability of confessional statements to police.

It is worth recalling here what Gibbs J. said in Driscoll v. The Queen:[121]

> "If the police wish to have supporting evidence of an interrogation there are other methods, such as tape recording or the use of videotape which would be likely to be more effective than the production of unsigned records of interview, and would not be open to the same objection .... There will of course be cases in which it would be plainly right to admit an unsigned record - e.g., if it had been acknowledged by the accused in the presence of some impartial person, such as a magistrate, not connected with the interrogation, or if the manner in which the trial had been conducted on behalf of the accused made it necessary to admit the record ...."

The provision of assurance about the fairness of police interviews and the accuracy of their record is a constantly recurring theme of our jurisprudence over the past 20 years. The point that has not been made often enough is that, when police become used to the facility of sound recording, it will be an invaluable tool with which to fight crime. Every pause of the accused, every inflection and hesitation will be recorded. In the dramatic medium of the trial, it will provide vital, direct and convincing evidence. It will also help to repair the damage done by acccusations, however false, of wrongful conduct by police interrogators. The issue has had more than enough scholarly debate.

The dangers of distortion of eyewitness testimony in identification raise like problems which are now well documented.[122] A number of reports have proposed photograpy,[123] or videotaping[124] to provide additional

protection against errors in identification. Proposals that additional warnings should be given to juries about the dangers of convicting on identification testimony have now passed into the common law. The Criminal Investigation Bill contains provisions requiring a photograph and permitting videotape recording of an identification parade.[125] It also provides for a specific warning to be given to a jury concerning identification evidence.[126] Other protections against wrongful identification are also suggested.

Prior Notification of Rights: There are two chief matters of controversy concerning the procedural checks available to the accused during interrogation. I leave aside the privilege of the accused to remain silent, an issue that has attracted much debate, particularly since the 11th Report. Subsidiary, but important controversies have surrounded the extent of the duty to alert a person under interrogation as to his rights, whatever the content of those rights may be. Specifically, there is much debate concerning the scope of the right to have a lawyer or other friend present during interrogation.

The Australian Law Reform Commission and the Criminal Investigation Bill propose that a person "under restraint" (relevantly, where the police would not "allow him to leave if he wished to do so") should be warned, in a language in which he is fluent, that he is not obliged to answer questions and may at any time consult a lawyer or communicate with a relative or friend.[127] Where a police officer has decided to charge a person, an obligation would arise to repeat the warnings and to provide a document containing notice of these privileges.[128] The proposals advance the time of cautions, extend the obligation to include notice in foreign languages and introduce, for the first time, an obligation to hand a written document to the accused.

These proposals have been criticised as treating the privilege to remain silent "as though it were a right of a positive nature to be 'enjoyed' as perquisite of citizenship,

such as the right to vote or the like. ...".[129] It is suggested that the Bill and the Commission err in "taking peculiar pains to ensure that suspects do not answer police questions".[130] I do not find these criticisms persuasive. With few exceptions, it is generally accepted that most persons under interrogation are not aware of their rights. Those who do know them are, generally, the educated and the experienced criminal. This issue illustrates the ambivalence of our legal system towards individual rights. The real fear, generally unexpressed, is that a genuine notification of rights will dry up the vital interrogation process. However, empirical studies suggest that too much should not be made of this fear. First, relatively few acquittals are judged to turn upon present reliance upon the privilege of silence.[131] Secondly, despite even the more rigorous warnings required in the United States, the empirical data simply does not bear out exaggerated police fears.[132] Empirical research suggests suspects, whether for reasons of resignation, shock, embarrassment or relief, continue typically to confess and notification of rights has only a marginal effect upon the propensity to assert rights. In any case, if the real fear is that the right to silence will be unacceptably enforced in practice and have unacceptable results, it is this right, rather than the notification of it, that should be criticised. Resignedly to accept that the "weak and ignorant" are discriminated against is, so it seems to me, to perpetuate a dangerous hypocrisy and inequality in the application of our laws. Speaking outside Parliament, Mr. Ellicott put it this way:

> "A hardened criminal doesn't need to be told that he has a right to be silent or the right to a lawyer. He doesn't need to be told that because he has the experience of the past. The people who need the protection are those who are disadvantaged, the uninformed, the overawed. Police power, even in the hands of an incorruptible and benevolent force, is an awesome power with which few but the already initiated feel able to deal".[133]

The proposed obligation to include cautions in minority languages is a concession to the fact, rarely recognised in Australia's laws, that large numbers of persons subject to the law originate in non-English speaking countries where the relevant legal procedure is quite different. The proposal in

this respect has been strongly supported by migrant groups and by official reports.[134] So far as the supply of written notification of rights is concerned, it it is heartening to see that Commissioner McNee has expressed himself in favour of this.[135] About the continuance of the privilege of silence and the rules against self-incrimination, there may well be room for legitimate dispute. About the need to take rights seriously and inform people of their rights, whatever these may be determined to be, there should be no debate. This is not a matter of encouraging suspects to frustrate law enforcement officers. It is simply a small (and, evidently, not particularly successful) effort by the law to redress the disadvantages of birth, education, wealth and station in life or the advantage of previous criminal experience so that such considerations do not determine the outcome of the criminal process so far as it is in the power of the law to ensure otherwise.[136]

Access to Lawyers: A similar debate surrounds the right of access to a lawyer or family and friends. In the United States access to counsel is enforced as a constitutional entitlement.[137] The position in British countries is more equivocal, generally because of the qualified language of the Judges' Rules. If a person knows of the right and asks for a lawyer, the request may be denied where, in the judgment of the police, "unreasonable delay or hindrance" would ensue. If no request is made, the practice in England (and in most parts of Australia) would appear to be as follows:

> "Persons taken into custody are not normally informed of their qualified right to speak to a solicitor or to their friends, nor is their attention normally drawn to the notice [displayed in the police station]. It is usually done at some time, but not until after the interview. 138

It is by no means certain that a lawyer or friends will come.[139] It is entirely just that time and other limitations should qualify on this privilege. The ambivalence of attitudes here is also the product of the fear that positive notification of rights to access to a lawyer will result in serious inhibition of police interrogation. Again, empirical studies in the United States, where a rigorous notification and strict

entitlement is rigidly enforced, simply do not bear out these (generally unexpressed) fears.[140] It is noteworthy that in Driscoll v. The Queen,[141] Gibbs J. expressed the view that if the police did prevent Driscoll from seeing his solicitor "their conduct was not only reprehensible but .... was a matter to be considered by the jury in deciding whether the answers recorded in the records of interview were in fact given".[142] The Criminal Investigation Bill contains not only an obligation to notify a person under restraint of his right of access to a lawyer, but also an obligation to provide reasonable facilities of communication with a lawyer and to wait for up to two hours for appropriate advice to be given.[143]

Notification of Whereabouts: The role of the judiciary during criminal investigation by law enforcement officers is, at present, circumscribed. To ensure access to judicial officers, the first step is to make sure that, unless for proper cause, friends and relatives of the person under investigation are informed of his whereabouts. This principle has now been accepted in England by the passage of the Criminal Law Act 1977.[144] Like provisions are proposed by the Australian Law Reform Commission. Remedies such as Habeas Corpus can be set at nought if the accused person is simply held incommunicado.

NEW CONTROLS AFTER INVESTIGATION

Internal Police Discipline Branch: It is after the completion of investigation or other police action that most complaints are made or come to attention. Important proposals, some of which have already passed into law, have suggested improvements in the ex post control of criminal investigation and other law enforcement activity. In a practical sense, the most effective controls remain within the police service itself, dependent upon its discipline, leadership and disapprobation of wrong conduct. The importance of senior police officers enforcing the law and upholding fairness is universally recognised as the necessary antidote to the perfectly natural propensity of a force such as the police to close ranks, even to protect a colleague in the wrong.

In 1972 a special section of New Scotland Yard, known as A10, was formed by Sir Robert Mark. Whilst preserving the investigation of complaints against police within the police service itself, this special unit has enjoyed much success, particularly in the investigation of alleged corruption. As a direct result of its efforts, hundreds of officers have been dismissed or induced to leave the force. Whilst preserving the investigation of allegations of misconduct to the police service, the separate, specialised and representative nature of the A10 has ensured greater vigour and professionalism than was previously the case where line superiors investigated complaints about men under their command. The introduction of such a unit into federal police forces was recommended by the Australian Law Reform Commission in its first report.[145] Similar recommendation was subsequently made by the Beach Report.[146] The issue is still under the review of the Norris Committee. Meanwhile, a special unit along the lines of A10 was established in the Victoria Police in August 1975. Recent New South Wales legislation indicates that the A10 model is continuing to exert its influence on Australian police forces.[147]

Proper administration of the police will seek to avoid complaints arising. For example, the High Court has said that it is fair and proper practice to serve copy of a record of interview upon an accused person as soon as practicable after it has been made.[148] Failure to serve a statement in this way may give rise to the suspicion that the record has been altered and will be a matter to be considered by the jury if it has to decide whether the record is a true one.[149] Whether witnesses statements should always be handed to the accused has been doubted by some, but urged by others.[150]

Extra Curial and Criminal Sanctions: The armoury of the accused in pursuing complaints about unlawful or wrongful action of police has lately been strengthened and supplemented. There are a number of extra-curial remedies, the effectiveness of which ought not to be underestimated and the application of which can sometimes be heavy handed and unfair

to police. I refer to political and Parliamentary scrutiny of police action and the increasing use of the electronic media as a kind of informal ombudsman, controlled only by defamation law and media conventions. The entitlement of the accused (himself sometimes immune from retaliation) to cross-examine and criticise police in a public trial, likewise cannot be underestimated as a safeguard against lawless or oppressive conduct. The right of the accused to maintain his silence, to make a statement from the dock which is unsworn, to receive increased legal aid and better representation at various stages of criminal investigation procedures are all important weapons with which a suspect may strike at the police and submit police action to judicial and community scrutiny.

A number of remedies have always been available to the citizen, particularly if he is sufficiently determined to pursue formal process against the police. The general ability of any individual to commence a private criminal prosecution is a safeguard which is not available in some countries where the entire machinery of criminal justice is in the hands of public authorities or the police themselves. Law enforcement agencies in Australia do not enjoy a legal monopoly of control over the initiation of criminal proceedings. However, for various reasons inherent in their relative access to the criminal justice system and the potential of proceedings for malicious prosecution or criminal defamation, few citizens initiate criminal process to sustain complaints against the police. Civil suits and administrative remedies remain as viable sanctions.

Tort Action and Vicarious Liability: The utility of civil litigation as a sanction against police misconduct is not borne out by the initiation of civil actions. One of the impediments until now has been the anomalous rule that the Crown and the Commissioner of Police are not, as employers generally are, vicariously liable for the acts of delinquent police officers.[151] This rule was described by Professor Fleming as "incompatible with notions of modern democracy".[152] It has been supported by some police administrators as an inhibition

upon individual police misconduct. American commentators suggest that the abolition of the immunity and the enforcement of civil liability against public authorities would strike a major blow in favour of ensuring effective control of the police and improvement in their performance.[153] Several Australian reports have proposed that the anomaly be removed by legislation.[154] In England, the law was changed in 1964. However, despite this, the claims brought against members of the Metropolitan Police for false imprisonment, malicious prosecution, assault or trespass to the person, etc. were few in number. Fewer still were successful. Verdicts were small.[155]

YEAR	NUMBER OF ACTIONS IN RESPECT OF WHICH PAYMENTS MADE	TOTAL AMOUNT PAID
1973	3	200
1974	2	725
1975	9	2668
1976	7	7521
1977	4	1150

Although it is desirable that the added impediment of doubtful recovery should be removed from civil proceedings, it is most unlikely that these will ever become a major sanction against police abuse at least in Australia. Procedures are slow and costly. The remedy of money damages is generally inapt to the complaint made and the relief sought. The procedures of trial and the formality of courts dissuade all but the most intrepid complainant.

New Complaints Procedures: Much more relevant is the provision of new, informal and accessible administrative remedies. In Britain, legislation in 1977 established a Police Complaints Board which scrutinises police decisions upon the investigation of public complaints. The Board's role is to check all decisions made not to lay a disciplinary charge. It is empowered to direct that disciplinary charges be

brought.[156] In Australia, the South Australian Committee recommended in 1974 that members of the public complaining about the conduct of police should be entitled to lay a charge, should the Police Commissioner decline to do so. Such a charge would come before an independent committee comprising a Special Magistrate, a Justice of the Peace and a commissioned police officer.[157] Rights of representation, appeal and costs were provided for, as was a novel entitlement for the complainant to receive an assessment of compensation.

The Australian Law Reform Commission's proposal has now been largely adopted in New South Wales.[158] In addition to the independent unit of police, previously mentioned, it proposed that the ombudsman should have written additional powers to receive, investigate and direct the bringing of charges against a police officer complained of. The Commission also proposed the establishment of a special police tribunal comprising a judge or other legally qualified person, who would hear a complaint laid in the name of the Commissioner, based upon a reformed and modernised police discipline code.[159] This proposal was adopted in terms in the Beach Report. It was thought to be ineffective by the Queensland Committee.[160] That Committee considered that an independent judicial tribunal would not get to the heart of the matter. The Committee lamented:

> "When ... police officers ... were themselves placed in jeopardy as a result of a chance occurrence, the ranks at once closed. There had been both suppression of evidence and active lying. The sanction of the oath and the requirement to tell the truth in the witness box were as nothing. The only duty truly performed has been the duty to protect one another".[161]

Time will tell whether these pessimistic and despairing remarks condemn the utility of a quasi-judicial tribunal. It is possible that many complaints will be appropriate for informal resolution by conciliation or otherwise, through the intervention of the ombudsman. Some complaints will have to take the course of criminal proceedings. Others will simply raise the issue for trial in the criminal prosecution of the complainant. Success of the tribunal in dealing with the balance remains to be seen. Undoubtedly, it will depend upon

the vigour with which the police service itself pursues those who abuse their office and the effectiveness with which the ombudsman and tribunal discharge their respective functions of external supervision and control.

Immediate Court or Right of Detention?: The rule that once a person is arrested and charged, he must be promptly handed over to the uncommitted judicial arm of government by the committed executive, is itself an important control and check against lawless or wrongful action by police. Numerous suggestions have now been made for the modification of this obligation, to accord with the realities of police needs. Subject to various protections, the South Australian Committee proposed that a person could be lawfully detained for questioning at a police station for a period not exceeding two hours (longer if ordered by a Special Magistrate).[162] The majority of the Australian Law Reform Commission proposed a period of four hours after arrest and subject to safeguards, including the notification of rights and verification of confessional statements.[163] The Lucas Report suggested detention for no longer than two hours, with powers of extension up to eight hours, subject to sundry qualifications and protections.[164] The Thomson Report in Scotland proposed a maximum of six hours.[165] Lately, Sir David McNee suggested a power to hold for 72 hours for questioning, with facilities for extension.[166] So far, none of these proposals has been adopted in whole. The Criminal Investigation Bill followed the dissenting view of Mr. Justice Brennan. It reproduces the rule that once charged, a person must be brought before a magistrate forthwith "to be dealt with according to law".[167] If it is not possible to comply with this obligation, the prisoner must be informed of his rights to bail and a decision made by police, upon given criteria, whether or not to admit him to bail.[168]

There are other well established protections in addition to the duty to take the accused forthwith before a court. The full and disinterested presentation of a case in court by an independent prosecutor is undoubtedly a useful check against

misconduct. The existence of a public trial itself, especially before a citizen jury, is an important public safeguard. Experienced judges have expressed the view that juries will simply not convict if they think that police have acted unfairly towards the accused.[169] Lord Devlin once declared that trial by jury is "the lamp that shows that freedom lives".[170] The criminal onus, that "golden thread of English criminal law", a fearless and independent Bench, ultimate accountability to a jury of laymen and the judicial inclination to criticise law officers where that is considered warranted,[171] all represent time-honoured but still valuable protections against oppression and for the rule of law.

New Judicial Review of Prosecution Decisions: Two new protections are now proposed. The first is the extension of judicial review to discretionary decisions anterior to a criminal trial. The second is a proposal to revitalize the judicial discretion to exclude evidence illegally or wrongfully obtained.

About the first of these proposals, there has been little debate in Australia. Until now, the prerogative writs have not been generally used as a means of securing ex post judicial scrutiny of decisions preliminary to criminal prosecution. A decision to commence an investigation, to interview persons, to appoint investigators or inspectors, to require the production of documents, to arrest and to prosecute and so on have not generally been susceptible to orthodox judicial review by the prerogative writs. The explanation, usually advanced for this, is that "the prosecutor's function is merely to do the preliminary screening and to present the cases and that the decisions that count are made on the basis of the trial".[172] The obligation to proceed immediately after charge to the judiciary is seen as sufficient justification to withhold judicial review.

This view has lately been challenged on the ground that it renders vital decisions of the police and prosecutor immune

from review by the courts, even though our legal and governmental system elsewhere is generally subject to such review:

> "Public accusation and trial often leave scars which are not removed by proof of innocence ... The notion that the tribunal that holds the trial corrects abuses of the prosecuting power is obviously without merit".[173]

A new and local catalyst for this debate may be provided by the passage of the Administrative Decisions (Judicial Review) Act 1977. The commencement of that Act has not yet been proclaimed. It commits to review in the Federal Court of Australia certain discretionary decisions made under enactments of the Commonwealth. It is possible that decisions relevant to the administration of criminal justice are not within the scope of "decisions to which the Act applies".[174] It is possible that it will be decided for reasons of policy to exclude from review decisions relating to the administration of criminal justice. This is a matter that has been considered in the Administrative Review Council and advice tendered to the Attorney-General.[175] The application of the Judicial Review Act to the anterior decisions of law enforcement agencies and prosecutors is attended by difficulties. Not least is the application of the salutary provision in the Act for the giving of reasons for discretionary decisions.[176] Whether the Judicial Review Act applies or not, it is likely that we will see in Australia an increasing debate about the proper role of judicial review of prosecutorial discretions. K.C. Davis argues thus:

> "The reasons for a judicial check of prosecutors' discretions are stronger than for such a check of other administrative discretion that is now traditionally reviewable. Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination and much injustice could be corrected". 177

Without embracing Davis' enthusiasm for judicial review as the remedy for differential prosecution and uneven policing policies, the provision of such review, at least in extreme cases, may be justified as a check against unfairness and an additional weapon against unlawful, dishonest or unfair conduct. Davis points out that only 3 to 4 per cent of the time of police is spent collecting evidence. A judicial scrutiny which is addressed almost exclusively at evidence, is likely to be patchy and ineffective in respect of the balance

of police work.[178] Certainly, present judicial review of a large number of police and prosecution decisions may fairly be described as "irregular and haphazard".[179]

New Rules for Excluding Evidence: The suggestion that the judicial discretion to reject evidence illegally or unfairly obtained by police should be reinforced as a means of improving police performance provokes a livelier controversy.

Despite earlier doubts, it is now well established that a trial judge in Australia has a general supervisory discretion to exclude evidence obtained by illegal or improper means, if its admission would operate unfairly against the accused, weighing this consideration against the public interest in enforcement of the law.[180] Subject to this discretion, relevant evidence, otherwise admissible, will be received, even if it was obtained through contraventions of the common law or statute law and whether it was obtained deceitfully or by fraudulent means.

A different rule was adopted in the United States, where the courts have sought to enforce consitutional protections against unreasonable searches and seizures by the sanction of excluding evidence obtained in breach of them.[181] This rigorous rule has been the subject of criticism from many viewpoints. The notion of inflexibly excluding relevant evidence in a criminal trial, as a means of disciplining the police, has appeared to many English and Australian commentators as an incongruous approach to the law of evidence and to police discipline.[182] Even in the United States, the effectiveness of excluding evidence as a means of promoting police lawfulness and propriety has been doubted. Its impact on the whole range of police behaviour is questioned.[183] It does not inhibit bad conduct which does not lead to the production of evidence. It assumes greater attention to judicial pronouncements than may exist in police practice.[184] A dispute exists as to whether empirical data supports the supposed deterrent effect of the exclusion of such evidence.[185]

Some supporters take the view that the ultimate rationale for the principle of exclusion of such evidence is not its utilitarian consequences but an ethical principle of public policy. One attempt to define this principle asserts that "the protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law".[186] In the High Court of Australia recognition of this consideration has recently been called to attention:

> "There is no initial presumption that the State, by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry. It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired. [187]

Unencumbered by constitutional complications, British courts have taken a much less absolutist position than those in the United States. Although some authorities consider the judges' overall discretion is a useful "bulwark" against misconduct, and others would resist any endeavour to control that general discretion or state its guiding principles,[188] there are still others who consider that the present discretion is too undefined and unstructured and is therefore rarely acted upon. Whether as a means of encouraging proper conduct by law enforcement authorities or as a protection to the integrity of the administration of criminal justice, or merely as a guide to busy courts, a number of proposals have lately been made for action to strengthen the common law discretion and to guide its exercise in particular cases.

In 1974 the South Australian Committee 1974 recommended that the legislature should declare what methods of obtaining evidence were illegal or improper. Subject to certain exemptions, including the need for urgent action by police, the Committee recommended that evidence illegally or improperly obtained should be inadmissible for all purposes and should not

be available to impeach credit.[189] In 1975 the Australian Law Reform Commission proposed a new rule for the exclusion of evidence, based largely upon the laws of Scotland and Ireland, where the courts have taken a middle ground between the absolutist position of the United States and the English common law position which has been regarded by many as excessively timid and unprotective in operation. The Commission's proposal has become the critical provision of the Criminal Investigation Bill.[190] With few exceptions (and as a supplement to criminal, tort and complaints remedies available to the accused), this is the sanction that is provided to work the obligations imposed by the Criminal Investigation Bill. Where a court is satisfied on the balance of probabilities that evidence was obtained in contravention of or failure to comply with the new code, the court's duty is not to admit the evidence unless it is satisfied, also on the balance of probabilities, that admission "would specifically and substantially benefit the public interests without unduly prejudicing the rights and freedom of any person".

Consistent with the moves to expose the principles upon which discretions of this kind are to be exercised, a number of (non-exhaustive) considerations are called to the specific attention of the court. These include:

* The seriousness of the offence
* The urgency and difficulty of detecting the offender
* The need to preserve evidence of the facts
* The nature and seriousness of the contravention
* The extent to which the evidence might have been obtained lawfully.

The Beach Report and the Lucas Report each adopted this vital provision in terms.[191] The Norris Committee, on the other hand, criticised the approach taken as unnecessary and an undue "fetter" on the discretion of the trial judge.[192] Nevertheless, even that Committee suggested a reversal of the present onus of proof.[193] It suggested that the onus should be placed upon the Crown to establish that it would be fair to admit evidence that had been unlawfully or unfairly obtained.

The Norris Committee simply disagreed with the assertion of the Victorian Bar which submitted that the general discretion to exclude is rarely used in practice.[194] This illustrates the empirical vacuum in which much of the writing here proceeds. But considerable evidence was given to the Law Reform Commission, including by judges, one of whom said that in 15 years of busy practice in the criminal courts, he had never once persuaded a trial judge to reject probative evidence on the grounds of its improper or unlawful origins. The Norris Committee's report, published in May 1978, did not have available to it the judgment of the High Court of Australia in Bunning v. Cross.[195] The notable feature of that judgment, delivered in June 1978, was the guidance given by the Court for the way in which the discretion to exclude evidence should be exercised. Stephen and Aickin JJ. (with whom Barwick C.J. agreed on this point) pointed to the competition between the public interest in lawfulness and fairness to the individual and the public interest in securing evidence to enable justice to be done. They then called attention[196] to a number of relevant considerations. It is suggested that these reflect the similar criteria proposed by the Law Reform Commission and contained in the Criminal Investigation Bill:

- The intent and seriousness of the disregard of the law and whether it was mistaken or accidental.
- The effect, if any, of the illegality on the cogency of the evidence so obtained.
- The extent to which the evidence, obtained unlawfully, might readily have been obtained lawfully.
- The nature and seriousness of the offence charged.
- Any legislative intent as to the procedure to be followed.

Criticisms that the guidelines proposed in the statute will "fetter" the exercise of the broad and salutory judicial discretion are misguided. The criteria mentioned are no more than major guide posts to direct debate to obviously important issues.[197] Equally erroneous is the fear that the judges and magistrates will rigidly and inflexibly exclude evidence so that many guilty men go free. A discretion of the kind

proposed commits to the judiciary and to the bench of magistrates the balance which is at stake here between the interests of justice in securing the conviction of guilty men and the interest of justice to uphold individual rights and the rule of law in its proceedings. It is not to be thought that judicial officers, with their long tradition of protecting the community and upholding the rule of law will perform their proposed duties otherwise than sensitively and conscientiously.

CONCLUSIONS

This review has touched only the surface of the debate in Australia, Britain and elsewhere, in which the procedures of criminal investigation are being submitted to fresh scrutiny. The controversies must be seen in the context of the endeavours of the past decade to open up to public examination the decisions and actions of government officers and to submit them to readily available, effective and independent scrutiny by disinterested superiors. The reform of administrative law should itself be seen as part of the general movement toward the advancement and practical protection of individual rights in an impersonal society in which the authority of the State tends to increase rather than diminish.

The growth of the organised police force, the advance of crime both in quantity and kind, the special problems of modern violence and terrorism and the need to take the fullest advantage of science and technology warrant constant, alert review of the laws and procedures governing the investigation of crime.

Mistakes do occur. Injustices are caused by unlawful and unfair acts of police and other law enforcement officers. Such mistakes will continue to occur. It is not the way of our system of justice to shrug them off as the inevitable price of a busy police force and overcrowded courts. Lord Hailsham reminds us that the banner of the West, especially of the English-speaking people, is the subordination of great power to

the law.[198] Because we count it as important to prevent, correct and redress errors of public officers, including the police, numerous controls exist, and new ones are suggested, to keep the power of the State in the business of criminal investigation under constant check. The price of this, it must be frankly acknowledged, is the escape of some guilty men from their just deserts. Considering the alternative, that is a price which most of us will continue readily to pay.

This paper has called attention to suggested improvements in the controls over criminal investigation. Among the many, these stand out:

(1) As a focus for our own clear thinking and for articulating the modern balance which our society is prepared to strike between its need for effective law enforcement and the protection of individual rights, we should endeavour to collect the principal rights and duties of citizen and police in a comprehensive statute. No longer should this area of the law be the province only of the expert. This is one area where knowledge of civic rights is vital. Most Australians do not know their rights. A beginning to proper community legal education is the public declaration of major rights and duties in a single statute, available to all. It is suggested that part of the resistance to this proposal can be explained by the ambivalent attitude of some to the present rules governing criminal investigation.

(2) There is an urgent need to measure current rules against the particular problems of law enforcement in Australia. The special difficulties of policing in a federation of huge distances must be accommodated by the law. The particular disadvantages of our large migrant population, not fluent in English and even more unfamiliar with our procedures than native Australians, deserve special attention. The disabilities of Aboriginals confronted by authority are well documented and are already receiving

attention through the Aboriginal Legal Service and court decisions.[199] They require discrete consideration. Neither the Judges' Rules nor the general discretion of courts ex post provide a sufficient assurance against injustice.

(3) The front-line protection of the citizen against misconduct by police remains the proper selection, training and command of police officers. The need to reform the substantive criminal law which police must enforce is an urgent necessity, if police are to be spared the burdens which unpopular and "unenforceable" laws place heavily on them. Society should also be on its guard against the expansion of commercial police-type services and the proliferation of police-type duties, even within Crown service; to forces that are not subject to the same traditions, discipline and command as the police force is.

(4) As a security against the highly damaging attacks on police interrogation, so difficult of just resolution in court, new controls are necessary. Abuses have occurred and have plainly damaged public confidence and police morale. The presence at some stage of independent witnesses (lawyer, family, friends or Magistrate) would seem a minimum requirement. The real question is whether more is needed.

(5) Despite the well-documented reservation and the painful agonising of public officials and police, the time appears to have come to submit the interrogation of persons suspected of offences to the impersonal security of sound (and possibily video-) recording. Judges have suggested it for two decades. High Court judges have recently commended it as a means of assurance. Committes in England have proposed it and have held it to be feasible. Four major inquiries in Australia have suggested it should be done. It will be an uncomfortable initiation. But I have no doubt that once police become used to this facility, and see its potential impact upon juries in the forensic medium, they will realise what a powerful weapon tape

recorded confessions will be in the armoury of the Crown. It will not remove entirely all collateral debate. However, it will set at rest many disputes and help rebuild the confidence of the community which is vital for effective law enforcement.

(6) Persons under investigation should be informed of their rights, including the right they presently enjoy to remain silent and the right, presently qualified, of access to legal advice on their predicament. Denial of this notification discriminates against the poor, uneducated and those who do not already have a familiarity with the criminal justice system. The rich and powerful generally know of their rights or can speedily ascertain them. The practised criminal may need no such notice. Fear that the exercise of rights will undermine the effectiveness of interrogation may be a reason to change those rights, if the fear be justified. It is not a reason to withhold notification of rights to those who are undoubtedly ignorant of them.

(7) New methods of exerting discipline from within the police force include the establishment of new procedures for internal discipline, upheld by fearless and effective investigation through an independent unit of the police.

(8) The remedies available to ventilate complaints of the accused should be modernised and made more effective. The anomalous immunity of the Crown and police authorities from liability for the individual wrongs of policemen acting in the course or purported course of their duty should be abolished. Although this will remove an impediment to civil proceedings, the general cost, delay and other disadvantages of civil and criminal process make it unlikely that these will become a significant, apt or effective defence against wrong conduct.

(9) More likely to be effective is the reformed procedure for independent scrutiny of the handling of complaints against police. In Britain, the new machinery

provides, essentially, for an ex post facto review of police decisions. A preferable procedure may be that of arming the ombudsman with reserve powers to ensure full investigation and, if necessary, prosecution of police under a new and modern police discipline code, before an independent tribunal, headed by judges.

(10) The passage of the Administrative Decisions (Judicial Review) Act 1977 will provide a new focus in Australia for the debate about whether judicial review (under that Act or otherwise) has a legitimate role to play in scrutinising the exercise of prosecution discretions and opening them up to public scrutiny against such tests as lawfulness and fairness.

(11) Finally, it is suggested that without embracing the puristic absolutism of United States rules requiring the exclusion from the trial of all evidence illegally or unfairly obtained, new attention is needed to the operation in our country of the court's general discretion to exclude such evidence on the ground of its unfairness to the accused. A halfway position between the United States and English rules may revitalise the judicial discretion here. Without unduly "fettering" the exercise of this discretion, some non-exhaustive criteria can surely be stated. The judges and magistrates can be trusted to strike a just balance between safeguarding individual rights and liberties and ensuring practical and effective law enforcement.

The provision of adequate checks and controls over the criminal investigation process was declared, by the minority, in the 11th Report, to be the price of acceptance of the modification of the "right to silence". It may well be that the introduction of the safeguards mentioned in this paper will warrant a modification, at least at the trial stage, of this "right" and that of making a statement from the dock. But this is a different debate. In the meantime, there is no cause for apology about the sanctions and protections outlined. Lawyers have a special responsibility to explain to the community, including police, the transcending importance of upholding the

rule of law and guarding individual liberties. When these values are at risk, or when we are content merely to pay lip service to them, a vital, distinctive feature of our form of society is in danger:

> "The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable, however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be "a less evil that some criminals should escape than that the Government should play an ignoble part". 200

FOOTNOTES

1. Cf. H.L. Packer, "Two Models of the Criminal Process" 113 Uni. Pennsylvania Law Review 1 at p.61 (1964). "The real world criminal process tends to be far more administrative and managerial than it does adversary and judicial".

2. E.g., submission of Sir David McNee, Metropolitan Police Commissioner (London) to the Royal Commission on Criminal Procedure (1978) 128 New Law Journal 769. See also the submission of Sir Thomas Hetherington, Director of Public Prosecutions, reported The Economist 13 January 1979, p.30.

3. The Law Reform Commission (Aust.), Second Report (Interim) Criminal Investigation, 1975, p.62 hereafter referred to as A.L.R.C.2.

4. Cf. Ghani v. Jones [1970] 1 Q.B. 693 at p.705 (Lord Denning M.R.).

5. Royal Commission on the Police (GB). Final Report, 1962. Cmnd. 1728, p.110.

6. McNee op. cit. n.2.

7. Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force (Mr. B.W. Beach Q.C.) 1976, (3 vols.) hereafter referred to as Beach Report.

8. Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (Mr. Justice Lucas, Chairman) 1977, hereafter referred to as Lucas Report.

9. Ibid., p.37.

10. Ibid., p.37. Cf. T. Bowden, Beyond the Limits of the Law, (London, 1978), p.267.

11. Driscoll v. The Queen (1977) 51 A.L.J.R. 731. See also Lucas Report, p.14.

12. Lucas Report, p.76.

13. Lucas Report, p.91. Cf. Report of the Royal Commission Into New South Wales Prisons (Mr. Justice Nagle, Royal Commissioner) 1978, p.108ff.

14. A.J. Ashworth, "Some Blueprints for Criminal Investigation" [1976] Criminal Law Review 594 at p.609.

15. (1977) 51 A.L.J. 341 at p.344.

16. Home Office (England), Evidence to the Royal Commission on Criminal Procedure, Memorandum No.I 1978 at p.15.

17. Royal Commission Report 1962, op.cit. n.5, p.65. See now the Police Act 1964, (GB) s.48.

18. Criminal Law Revision Committee (Eng.) 11th Report, Evidence (General), 1972, Cmnd.4991, hereafter referred to as 11th Report.

19. Ibid., p.169 (draft Criminal Evidence Bill).

20. Home Office (Eng.), Report of Committee on The Feasibility of an Experiment in the Tape-Recording of Police Interrogations 1976, Cmnd.6630.

21. (1978) 128 New Law Journal 175. The Research Programme of the Royal Commission on Criminal Procedure (Eng.), December 1978 provides for an "operational research study" into the tape recording of police interrogations. Report expected, December 1979.

22. House of Commons (Eng.) Official Report, 27 May 1976, cols.287-9.

23. (1976) 63 Cr. App. R. 132.

24. Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait, 1977, p.162, hereafter referred to as Fisher Report.

25. Criminal Law and Penal Methods Reform Committee (SA) Second Report, Criminal Investigation, 1974, hereafter referred to as S.A.C.L.R.C.

26. Beach Report, op.cit. n.7.

27. Lucas Report, op.cit., n.13.

28. Report of the Committee appointed to examine and advise in relation to the recommendations made in Chapter 8 of Volume 1 of the report of the Board of Inquiry appointed for the purpose of inquiring into and reporting upon certain allegations against members of the Victoria Police Force (The Hon. J.G. Norris, Q.C., Chairman), Part I, Police Procedures Relating to the Investigation of Crime, 1978, hereafter referred to as Norris Report.

29. Report of the Solicitor-General for Victoria (Mr. B.L. Murray, Q.C.), Procedure on the Interrogation of Suspected Persons by the Police 1965, mimeo, hereafter referred to as the Murray Report.

30. Ibid., p.13.

31. A.L.R.C.2, p.103.

32. See, e.g., Report of the Royal Commission (Mr. Justice Moffatt), Allegations of Organised Crime in Clubs, 1974 (N.S.W.); Report of the Royal Commission (The Hon. J.G. Norris, Q.C.) into Matters Surrounding the Administration of the Law Relating to Prostitution 1976 (WA); Report of the Laverton Royal Commission (G.D. Clarkson, Chairman), 1976, (WA).

33. Royal Commission on Criminal Procedure, Research Programme, n.21 supra.

34. The Law Reform Commission (Aust.), Complaints Against Police, 1975, hereafter referred to as A.L.R.C.1. See now Police Regulation (Allegations of Misconduct) Act 1978 (N.S.W.); Ombudsman (Northern Territory) Ordinance 1978 (N.T.). In A.L.R.C.2 see Criminal Investigation Bill, 1977 (Cth.) and cf. Bail Act 1978 (N.S.W.), ss.17-21 (Police Bail); Police Administration Bill, 1978 (N.T.) (Police Powers).

35. Sir Robert Mark, Report to the Minister for Administrative Services, The Organisation of Police Resources in the Commonwealth Area and Other Related Matters, 1978. On the establishment of the Federal Police see (1978) 3 Cwth. Record 931.

36. A.T. Carmody, Report to the Attorney-General (Cth.) National Law Enforcement Authority, 1974.

37. See A.L.R.C.1 and now the Law Reform Commission (Aust.), Complaints Against Police: Supplementary Report, 1978, hereafter referred to as A.L.R.C. 9. For a police comment on the proposal, see Commissioner R.A. Wilson (A.C.T. Police) [1977] 1 Criminal Law Journal 282, at p.283.

38. Police Regulation (Allegations of Misconduct) Act, 1978 (N.S.W.).

39. Ombudsman (Northern Territory) Ordinance, 1978 (N.T.).

40. A.L.R.C.2., op.cit., n.3.

41. Commonwealth Parliamentary Debates (House of Representatives) 24 March 1977, p.562.

42. (1978), 3 Cwth. Record 889 at p.892.

43. Ibid.

44. Inspector Tom Rippon, July 1977.

45. Former Commissioner R.W. Whitrod, Arrest and Interrogation: How Much Power Should the Police Really Have?, A.B.C. transcript, 25 April 1977, p.3.

46. The Australian Capital Territory Police, Review of the Law Reform Commission Report No.2 (Interim), Criminal Investigation, mimeo, 1977.

47. See Norris Report, 48; Mr. Justice F.M. Neasey, "The Right to Remain Silent" (1977) 51 A.L.J. 360 at p.366.

48. (1977) 51 A.L.J. 507.

49. Beach Report, Vol.1, p.93; Lucas Report, p.142.

50. Report of the Review of Post Arrival Programs and Services for Migrants (Cth.) (F.E. Galbally, Chairman), Report, 1978.

51. Ethnic Affairs Commission (N.S.W.), Report, "Participation", 1978, pp.285-7.

52. Sherman v. United States 356 U.S. 369 (1958).

53. Bowden op.cit. n.10, p.267; P.R. Wilson and J.W. Brown, Crime and the Community, 1973, Chapter 3.

54. K.C. Davis, "An Approach to Legal Control of the Police", 52 Texas Law Review 703, at p.705 (1974).

55. Ibid.

56. Lord Devlin, "Police Powers and Responsibilities: Common Law, Statutory and Discretionary", Part I, Australian Police Journal, Vol.21, No.2, 1967, p.122.

57. Judge Burger, "Who Will Watch the Watchman?", 14 Am. U. Law Review 1, p.11 (1964). Note that in Miranda v. Arizona 384 U.S. 436 at p.467 (1966) the Supreme Court encouraged Congress and the States to legislation. See Davis op.cit. n.54, p.713.

58. W.R. LaFave, "Improving Police Performance Through the Exclusionary Rule - Part I; Current Police and Local Court Practices", 30 Missouri Law Review 391, at p.443 (1965).

59. House of Lords, Official Report, 14 February 1973, col.1626.

60. [1964] 1 All E.R. 237.

61. Evidence Act 1958 (Vic.) s.149; Evidence Ordinance 1971 (A.C.T.) s.68.

62. (1950) 82 C.L.R. 133. The full details are collected in A.L.R.C.2, p.61.

63. See Wilson and Brown, op.cit. n.53, p.31. This records that 39 per cent of those interviewed in 1972 reported having "great respect" for the police. A similar survey in 1968 found that 64 per cent of Australians had "great respect" for the police. D. Chappell and P.R. Wilson, The Police and the Public in Australia and New Zealand 1969, p.39.

64. R.W. Harding, "Balancing Tyrannies in the Administration of Criminal Justice: The Right to Remain Silent" (1978) 52 A.L.J. 145; (1978) 128 New Law Journal 769.

65. Lucas Report, p.191.

66. Bowden, op.cit. n.10, p.25.

67. W. LaFave, op.cit. n.58, Part II: Defining the Norms and Training the Police, p.607.

68. B.A. Grosman, Police Command: Decisions and Discretion, 1975, pp.59-60.

69. Lucas Report, pp.193-8; S.A.C.L.R.C., Chapter 3.

70. Bowden, op.cit. n.10, p.33.

71. Ibid.

72. W.R. LaFave and F.J. Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions", 63 Michigan Law Review, 987 at p.1007 (1965).

73. Whitrod op.cit. n.45, p.15.

74. Lord Devlin, Criminal Prosecution in England 1960, p.16.

75. Bowden, op.cit. n.10, Chapter 10 ("The Growth of the Private Police Forces").

76. Ibid., p.260.

77. Customs Act 1901 (Cth.) s.200. See A.L.R.C.2, p.90.

78. Announcement of the Minister for Business and Consumer Affairs, 30 July 1978. 1978 3 Cwth Record 968.

79. Telephonic Communications (Interception) Act, 1960 (Cth.). A.L.R.C.2, p.102.

80. A.L.R.C.9, pp.81-2.

81. W.A. Belson, The Public and the Police, 1975, p.78.

82. Packer, op.cit. n.1, p.4.

83. Ibid.

84. LaFave, op.cit. n.58, p.458.

85. Wilson and Brown, op.cit. n.53, pp.36-7.

86. LaFave and Remington, op.cit. n.72, p.991.

87. Ibid., p.987.

88. A.L.R.C.2, p.51 (authorising fingerprinting); p.57 (medical examinations); p.81 (bail appeals); p.95 (search warrants).

89. Criminal Investigation Bill, 1977 cl.54(3)(c).

90. See for example Police Administration Bill, 1978 (N.T.) cl.96(1) (search warrants by telephone); cl.101 (arrest warrant by telephone).

91. LaFave and Remington, op.cit. n.72, p.992.

92. Ibid., p.993.

93. Cf. Criminal Investigation Bill, 1977, cl.8(5).

94. Lord Reid, House of Lords Official Report, op.cit. n.59, col.1613.

95. Beach Report, pp.83ff.

96. Lucas Report, pp.48ff.

97. Indian Criminal Procedure Code, s.164.

98. Justice, (British Section of the International Commission of Jurists) Preliminary Investigations of Criminal Offences, 1960 (F.H. Lawton, Chairman), p.14 (cf. p.31).

99. Viscount Dilhorne in House of Lords Official Report, op.cit. n.59, col.1551.

100. Herron C.J. (N.S.W.) in Proceedings of the Institute of Criminology (N.S.W.), Police Questioning and Confessional Statements (No.18), 1970, p.33.

101. A.L.R.C.2, p.73.

102. Ibid., p.103.

103. Mr. R.J. Ellicott, Commonwealth Parliamentary Debates (House of Representatives) 24 March 1977, 562 at p.566.

104. R. v. Governor of Metropolitan Goal Ex parte Molinari [1962] V.R. 156 at p.169.

105. Murray Report, p.13.

106. 11th Report, p.29.

107. Ibid., p.33.

108. Scottish Home and Health Department and Crown Office, Criminal Procedure in Scotland (2nd Report) (Lord Thomson, Chairman), 1975, Cmnd.6218, p.35, hereafter referred to as the Thomson Report.

109. Criminal Justice (Scotland) Bill, 1978 (GB).

110. Home Office Feasibility Report, op.cit. n.20, p.24.

111. Beach Report, p.93.

112. Lucas Report, p.250.

113. Statement by the Minister, Brisbane, 31 July 1978.

114. S.A.C.L.R.C., p.94.

115. Norris Report, pp.99,100-101.

116. Justice Roma Mitchell, The Web of the Criminal Law, (A.B.C. Boyer Lectures, 1975), p.27.

117. (1978) 128 New Law Journal 770; Harding op.cit. n.64, p.148.

118. E.g., Det. Insp. W.G. Clyne, "The Right to Silence: A Police Viewpoint". In Proceedings of the Institute of Criminology (N.S.W.), The Right of Silence, No.17, 1973, 57 at pp.64-5; Commissioner J.M. Davis, Proceedings op.cit. n.100, p.137; Sir David McNee reported (1978) 128 New Law Journal 770.

119. Cl.31(1).

120. Cl.34.

121. (1977) 51 A.L.J.R. 731 at p.742.

122. Home Office (Eng.), Report of the Committee on Evidence of Identification in Criminal Cases (Lord Devlin, Chairman) 1976.

123. A.L.R.C.2, p.53; Norris Report, p.121; Cf. S.A.C.L.R.C. p.80 (contra.).

124. Scottish Home and Health Department, Working Group, Report on Identification Procedure Under Scottish Criminal Law, 1978, Cmnd.7096, p.49; Lucas Report, p.131.

125. Cl.40 (6).

126. Cl.74.

127. Cl.18(2).

128. Cl.19(2)(a).

129. Neasey, op.cit. n.47.

130. Norris Report, p.47.

131. M. Zander, "Are Too Many Professional Criminals Avoiding Conviction?: A Study in Britain's Two Busiest Courts" (1974) 37 Modern Law Review 28.

132. For some of the literature, see A.L.R.C.2 pp.66-8. See also Harding op.cit. n.64, pp.146-8.

133. R.J. Ellicott, "The Problem of Power in a Free Society", mimeo, 1978, p.9.

134. Galbally Report, op.cit. n.50; Ethnic Affairs Commission (N.S.W.) Report, op.cit. n.51.

135. (1978) 128 New Law Journal 770.

136. See generally Ashworth, op.cit. n.14, pp.605,609; M. Zander, "The Criminal Process: A Subject Ripe for a Major Inquiry", [1977] Criminal Law Review 249 at p.253.

137. Escobedo v. Illinois 378 U.S. 478 (1964); Miranda v. Arizona 384 U.S. 436 (1966); see also Harding op.cit. n.64, p.146 and A.L.R.C.2, pp.46-7.

138. Fisher Report, p.186.

139. Doubts are expressed by Zander, op.cit. n.136, p.253. They were expressed by Lord Goodman in the House of Lords Debate, op.cit. n.59, col.1643.

140. LaFave op.cit. n.58, p.592.

141. (1977) 51 A.L.J.R. 731.

142. Ibid., p.741. Mason and Jacobs JJ. agreed generally with Gibbs J. See also Mitchell, op.cit. n.116, p.25.

143. Cl.20.

144. S.62.

145. A.L.R.C.1, p.18. This was confirmed in A.L.R.C.9. S.A.C.L.R.C., p.49 contra.

146. Beach Report, p.108.

147. Police Regulation (Allegations of Misconduct) Act, 1978 (N.S.W.).

148. Gibbs J. in Driscoll (1977) 51 A.L.J.R. 731 at p.741. See now Criminal Investigation Bill, Cl.36.

149. R. v. Dugan (1970) 92 WN (N.S.W.) 767.

150. Beach Report, p.115; Justice, op.cit. n.98, p.3; Norris Report, pp.66,186.

151. Enever v. The King (1905) 3 C.L.R. 969; Attorney-General for New South Wales v. Perpetual Trustee Co. Limited (1955) 92 C.L.R. 113.

152. J.G. Fleming, "The Law of Torts" (4th Ed.) 320.

153. E.g. Davis, op.cit. n.54, p.716, 721; F.J. McGarr, "The Exclusionary Rule: An Illconceived and Ineffective Remedy", 52 Journal of Criminal Law, Criminology and Police Science, 266 at p.268 (1961).

154. A.L.R.C.1, p.62; A.L.R.C.9, p.80; Lucas Report, pp.110-1. The Australia Police Bill, 1975 proposed adoption of most of the A.L.R.C. recommendations.

155. Home Office Memorandum, op.cit. n.16, Appendix B. Note the figures do not include motor vehicle cases or legal costs.

156. Police Act, 1976 (GB). See A.L.R.C.9, p.26.

157. S.A.C.L.R.C., p.51.

158. Police Regulation (Allegations of Misconduct) Act, 1978 (N.S.W.).

159. A.L.R.C.1, p.21.

160. Lucas Report, pp.48-50.

161. Lucas Report, p.47.

162. S.A.C.L.R.C., p.75.

163. A.L.R.C.2, p.39.

164. Lucas Report, p.260.

165. Thomson Report, p.16.

166. (1978) 128 New Law Journal 770.

167. Cl.49(1), Criminal Investigation Bill, 1977.

168. Ibid., cl.49(2).

169. Judge R.F. Loveday in Proceedings, op.cit. n.118, p.33.

170. Lord Devlin quoted by Mitchell, op.cit. n.116, p.33.

171. E.g. Bowen J.A. (as he then was) in Bilbao v. Farquhar [1974] 1 N.S.W.L.R. 377 at p.390.

172. K.C. Davis, "Discretionary Justice", 1969, p.189.

173. Ibid. Cf. Gibbs A.C.J. in Sankey v. Whitlam (1979) 53 A.L.J.R. 11 at p.17.

174. Either because they are not decisions "of an administrative character" or because they are not made "under an enactment". See s.3(1) of the Act.

175. Administrative Review Council (Aust.) Second Annual Report, 1978, p.21.

176. Administrative Decisions (Judicial Review) Act, 1977 (Cth.) s.13.

177. Davis, op.cit. n.172, pp.211-2. See also Davis, op.cit. n.54, p.704. Cf. R. v. Kent; ex parte McIntosh (1970) 17 F.L.R.65 at p.89 per Fox J., Kumar v. Immigration Department [1978] N.Z.L.J. 185, to similar effect Mason J. in Sankey v. Whitlam (1979) 21 A.L.R. at p.561.

178. Davis, op.cit. n.54, p.704.

179. Grosman, op.cit. n.68, p.100.

180. See cases cited A.L.R.C.2, p.136 and Bunning v. Cross (1978) 52 A.L.J.R. 561 at p.565 Barwick C.J.

181. A.L.R.C.2, p.138.

182. Norris Report, p.11,14.

183. Davis, op.cit. n.54, p.704.

184. LaFave and Remington, op.cit. n.72, p.1003.

185. Davis, op.cit. n.54, p.722 asserts that though cumbersome, the rule has had some success in reducing the worst forms of abuse. LaFave and Remington, op.cit. n.72, p.1002 doubt this.

186. Sorrells v. United States 287 U.S. 435 (1932). For a discussion of the policy, see N.L.A. Barlow, "Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment?" (1978). 41 Modern Law Review 266 at pp.266ff.

187. Bunning v. Cross (1978) 52 A.L.J.R. 561 at p.569 (Stephen and Aickin JJ.)

188. Norris Report, p.51.

189. S.A.C.L.R.C. p.114.

190. Cl.73.

191. Beach Report, p.98; Lucas Report, p.107.

192. Norris Report, p.16.

193. Ibid.

194. Ibid., p.16.

195. (1978) 52 A.L.J.R. 641.

196. Ibid., pp.570-1.

197. See N.S.W. Law Reform Commission, Working Paper, "The Rule Against Hearsay", 1976, p.236. Cf. P. Butt and J. Ritchie, "The Admissibility of Records of Interview" [1978] 2 Criminal Law Journal. 136.

198. Lord Hailsham, Inaugural Robert Menzies Oration, 1978, How Free Are We?, mimeo p.22.

199. R. v. Anunga (1976) 11 A.L.R. 412.

200. Bunning v. Cross (1978) 52 A.L.J.R. 561 at p.570 (Stephen and Aickin JJ.) citing Holmes J. in Olmstead v. United States 277 U.S. 438 at p.470 (1928).