AUSTRALIAN LEGAL WORKERS' GROUP

SYDNEY

WEDNESDAY 12 MARCH 1980

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A MORTUARY OF LAW REFORM REPORTS

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

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On 5 July 1979 Mr. Justice Kirby delivered a paper, "Criminal Investigation and the Rule of Law", to the Australian Legal Convention in Adelaide. The paper is reproduced in the Australian Law Journal. The reference is (1979) 53 ALJ 626. These observations to the Australian Legal Workers' Group represent a short statement of the main points in the article.

LAWYERLY ACTIVITY LEADING NOWHERE

Reform of the conduct of criminal investigation can be described as a "graveyard" of law reform reports. Over the past decade or so, a great deal of intellectual energy by a lot of very busy people has been devoted to the improvement of the unsatisfactory features of the initial stages of the administration of criminal justice. Few indeed of the many reforms proposed (most of them with recurring themes) have been implemented by lawmakers. The list of recent reports makes sorry reading.

* The Murray Report on Procedures of Interrogation (Victoria) 1965

* The Eleventh Report of the Criminal Law Revision Committee (England) 1972
* The Mitchell Committee Report on Criminal Investigation (South Australia) 1974
* The Report of the Australian Law Reform Commission on Criminal Investigation 1975
* The Home Office Report on Feasibility of Tape Recording (England) 1976
* The Beach Report on Allegations Against Members of the Victoria Police (Victoria) 1976
* Sir Henry Fisher's Report on the Confait Case (England) 1977
* The Lucas Report on the Enforcement of Criminal Law in Queensland 1977
* Lord Thomson's Report on Criminal Procedure in Scotland 1978
* The Norris Report on the Beach Report (Victoria) 1978.

This proliferation of lawyerly activity leading nowhere produced the Prime Minister's rebuke at the opening of the 1977 Australian Legal Convention in Sydney. His words should be recalled :

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

The Prime Minister asserted that it required a Cabinet with a majority of farmers rather than lawyers to take action.

The introduction of the Criminal Investigation Bill 1977 by the Commonwealth Government and Senator Durack's assurance that he hopes to reintroduce it in 1980 has livened up the debate. So has the establishment of the Royal Commission on Criminal Procedure in the United Kingdom. After a remarkably long gestation, it seems as if we will soon witness action on the review and modernisation of police procedures.

BALANCING CLEAR-UP RATES AND LIBERTY

We live in an age of information indigestion. The purpose of this address is therefore to pull together some of the threads common to the reports I have mentioned. With so many reports and proposals for reform, what is needed is a compilation of the main recurring themes. That is what I will attempt. Obviously constraints of time, and other constraints, limit what I can properly say.

I start by pointing out quite frankly something that many good citizens (and many police) find it truly uncomfortable to face up to squarely. It is that we, in societies that have inherited the English criminal justice system, have rules of police conduct which result in a number of guilty men going free and avoiding deserved criminal punishment. Of course, if we were to reintroduce the rack to extract confessions, widespread telephone tapping by police, unlimited detention without trial and so on, we would almost certainly reduce crime in our society. We elect not to do these things because, although we would reduce crime, we would also diminish the freedom of many good people in the process. Just where you strike the balance between clear-up rates, on the one hand, and individual liberty, on the other, is a classic dilemma faced by all modern democracies. I often cite an illustration that brings this point home in simple terms. Uruguay was one of the few democracies in South America. Along came the Tupermaros terrorists. Police powers were increased : detention, phone tapping and so on. The Tupermaros were defeated. But a liberal democracy was dismantled in the process. Last week Uruguay was, lamentably, described as one of the most oppressive governments in the world.

Our society's ambivalent attitude towards the rights of suspects stems, I believe, from a persistent unwillingness or inability of many good citizens to face squarely this dilemma. My chief thesis is that lawyers and legal workers have a special role to point out to the community that, even at the almost intolerable price of guilty men avoiding their just deserts, it is essential that the proper balance be

maintained between the authority of the State and individual freedoms. It has just not been our way of doing things to shrug off abuses of authority or indifference to the rule of law.

I want to adopt a chronological format and to proceed through three stages of police contact with the suspect. In each stage I will recount new proposals for the control over investigation of offences by the police. The stages are before, during and after police investigation.

THE LIMITS OF THIS STUDY

I should mention a few preliminary averments. In the first place, it is not appropriate and there is insufficient time for me to catalogue all of the new controls. I will not attempt to justify fully the need for new controls. I do list the acknowledgement by many police officers of the highest rank that "bluff", "stealth", "bending the rules" and "deception" are used at present because of the present rules governing them. Whether there should be revision of the rights of the accused at the trial (as for example to modify the right to make an unsworn statement from the dock or the right, last year exercised by Mr. Jeremy Thorpe to remain silent before the jury) is an important question. Some of you will have seen that last week Judge Thorley of the New South Wales District Court strongly criticised the dock statement and the manipulation of its facility by lawyers and criminals. This is not the subject I was assigned to cover in this talk. I have every personal sympathy with the police view that current laws must be adjusted to accord with the legitimate needs of a modern police, but consistent with the balance I have described, necessary to protect the rights of individuals. I propose to stick to my topic : what new controls are proposed over criminal investigation.

CONTROLS BEFORE INVESTIGATION

Turning first to the checks before investigation, I suggest that whatever dispute there may be about particular proposals, there can really be little doubt that there is a

need to collect the vital rights and duties of police and suspects in an Australian statute which is available to all. If we take rights seriously, the first thing is to have rights. The second is to state them and tell people of them. It is amazing to me that these vital rules are still hidden away in casebooks, in the English Judges' Rules, 1912 and 1918, or in Police Commissioners' Instructions which are not always available to the citizen.

Of course, I acknowledge that it is extremely difficult to collect the rules and state them shortly and clearly. Part of the resistance to stating the rules is, I am sure, the ambivalence felt in some quarters towards the already existing rules when they are put down in black and white. In the process of stating the rules, we may help our own clear thinking about what the rules ought to be and whether we have the correct balance. Lord Devlin put it well :

> "It is useless to complain of police overstepping the mark, if it takes a day's research to find out where the mark is".

Our special problems of policing in Australia (great distances, federalism, ethnic languages, Aboriginal accused etc.) require a code of police conduct more in tune with our needs than those of 1912 London or 1918 Manchester. It is easier in the United States where there is a binding, written, available and well-known Bill of Rights. American lawyers are invariably astonished that we can get by without a Bill of Rights. But we do.

Society makes unreasonable demands upon its policemen. American figures demonstrate the much longer period of formal training required by medical practitioners and even hairdressers than policemen. Policemen who are generally not paid a professional income are certainly skilled workers doing a thoroughly professional job. Even today in some Australian police forces there is undue emphasis on physical size rather than on the tremendous intellectual or psychological demands we make on police today. At a time when Parliament daily imposes new duties upon police, more attention should be paid to the intellectual and emotional qualities that are

needed for the performance of those duties. Rudimentary educational qualifications will simply not be adequate in the future Australian society which looks to its police service to guard it against white collar crime, computer crime, environmental crimes and other modern wrongs against the public. A weakness of the report of the Law Reform Commission was that so little attention was paid in it to police selection, training and education. Get the right police and pay them the right salary and many problems will be averted. I realise that at long last efforts are being made in New South Wales and many other States to improve the continuing training of police. I take part in some of these efforts. More is required.

True reform will require that we get the right people. But it will also require that we give them the right job to do. Police are required to enforce "unenforceable laws" : many of them unreformed relics of previous social and moral attitudes. There is no doubt that the obligation of police in some areas of consensual adult sexual conduct, licensing, gambling and other like offences, have a disheartening effort on morale, discipline and honesty within the force. Reform of substantive laws must accompany reform of police procedures.

CONTROLS DURING INVESTIGATION

Turning to the checks during investigation, I should mention several included in the Criminal Investigation Bill, which followed the report of my Commission. I should also refer to a few recent reports. The High Court of Australia has also alluded to them in strong statements in the case of Driscoll. This is undoubtedly a most vexed area of our jurisprudence. Lord Hailsham, now Lord Chancellor of England, recently declared in the Judicial Committee of the Privy Council, that the rules governing the admissibility of extra-judicial confessions are "in many ways unsatisfactory". D.P.P. v. Ping Ling [1976] A.C. 574; Wong v. The Queen [1979] 2 W.L.R. 90. This was an understatement characteristic of the English though not, I believe, of his Lordship.

The Criminal Investigation Bill, the Mitchell Report and other recent reports on this subject seek to address this unsatisfactory state of affairs. Some of the proposals, I will not deal with. They include proposals for :

* The presence of independent witnesses, including justices and magistrates to verify confessional statements to police and like authorities.
* The presence of friends or family during interrogation by police and other officials.
* The right of access to a lawyer and to notification of that right prior to interrogation.
* Written notification of rights generally, including in the language in which the suspect is fluent.

The most persistent recurring theme relates to the suggestion that there should be sound (and possibly video) recordings of confessional statements to police. I will not list the reports and judicial statements that have proposed this facility to set at rest the disputes about confessions. Suffice it to say that they include comments by Mr. Justice Sholl in 1962, the Murray Report in 1965, the Eleventh Report of the English Criminal Law Revision Committee in 1972, the ThomsonReport in Scotland in 1975, the Home Office Feasibility Study in 1976, the Beach Report in 1976, the Lucas Report in 1977, the Fisher Report in 1978 and the High Court of Australia in 1977. Despite all this talk, nothing of any significance has happened. All we see are more committees and more reports. At last, the Commonwealth's Criminal Investigation Bill proposes action based upon the Second Report of the Australian Law Reform Commission. Perhaps it is appropriate that the new Federal Police of Australia, with their special emphasis on drug and white collar offences, and under their distinguished Commissioner, Sir Colin Woods

should pioneer the nation's experiment in the sound recording of confessional statement. Who can doubt that sound and video recording will be a routine policing method of the 21st century? I assert that in its power to capture every hesitation, every inflection, every error of the guilty

accused, this technology will prove, in the dramatic medium of the trial, a great weapon in the Crown's armoury for bringing guilty criminals to justice.

CONTROLS AFTER INVESTIGATION

So far as new controls after investigation are concerned, several of them can be mentioned :

* The creation of special units of the police to internalise self-control and discipline. The so-called A.I.O.
* New independent complaints mechanisms, utilising the Ombudsman, in an effective and independent watchdog role.
* Removal of archaic laws which frustrate civil recovery (on the basis that the Crown is not vicariously liable for the wrongful acts of police)
* Possible judicial review of prosecution decisions, if these are shown to be motivated by criminal or fraudulent reasons
* Revitalisation of the rules on the rejection of evidence wrongly or illegally obtained by the police.

So far as the proposal for a special unit of police is concerned, since the Australian Law Reform Commission reported in 1975, most of the State police forces have set up their own independent investigating unit modelled on the A.10 unit introduced at Scotland Yard by Sir Robert Mark. In June 1979 Senator Durack announced the Federal Government's intention to accept the substance of the Law Reform Commission's proposals for the new Federal Police of Australia. I expect it to be introduced in 1980. It is already in operation in the New South Wales police and indeed in several other police forces in Australia.

The Ombudsman has already taken up his functions of scrutinising police investigation of complaints under legislation in the Northern Territory and in New South Wales. Under the Federal Government's announced scheme he will also have a vital role in the Commonwealth's sphere, thereby providing

an independnet, neutral, external guardian against unfair closing of the ranks to protect fellow policemen. I realise that the New South Wales Ombudsman has complained to Parliament about his powers and I should say that the powers given to him by statute omit two important provisions suggested by the Law Reform Commission to uphold the Ombudsman's effectiveness.

The abolition of the vicarious liability immunity has already been enacted in Queensland and this anomalous immunity will also be removed in the Commonwealth's legislation.

The revamping of the exclusionary rule : requiring the exclusion of some evidence (however probative) on the grounds of the illegal or unfair way in which it was gathered has actually occurred : very much along the lines proposed by the Australian Law Reform Commission in advance of legislation The High Court of Australia in Bunning v. Cross (in language which was, if I can say so, splendid and perceptive) demonstrated that law reform can still be done by the highest courts grasping and resolving a recurring problem for the administration of justice. The recent decision of the Privy Council in Wong shows that the English judges too are edging towards a similar revived role of the judiciary as active guardians of a principle that transcends even the deserved conviction of a particular accused.

> Lord Hailsham in Wong put it thus :
> "I have stated elsewhere ... that the rule, common to the law of Hong Kong and that of England, relating to the admissibility of extra-judicial confessions is in many ways unsatisfactory, but any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised

> <u>society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions</u>".

<u>KEEPING THE BALANCE</u>

These comments of the present Lord Chancellor of England take us back to the balance that must be struck. The Law Reform Commission's report was prepared in positive spirit. I am not here in a partisan mood to criticise police, most of whom do very important ill paid, unpleasant work on behalf of us all. The last few years in Australia have not been particularly happy from the point of view of police relations with the public. Three State Commissioners have left their posts in advance of due date by resignation or, in one case, dismissal. As well, there have been recurring cases of individual misconduct by policemen. But it must be said that such cases are exceptional. They must not divert us from an appreciation of the irreplaceable work which police do for us. Nevertheless, every unredressed case of abuse of authority stains the society that shrugs it off. We must be sensitive to police calls for greater realism in the law. But we must be equally sensitive to the need to ensure, by practical measures, that the rule of law - that unique feature of liberal Western communities - is not forgotten in our impersonal, anonymous society. I believe that good police and good citizens will support reformed laws which clarify the rights and duties of each of them, bringing greater realism into the law and ensuring that the law is observed and upheld in the criminal process. When it is all boiled down, the issue is whether as a society we are willing to take our rights seriously when they most matter.