AMERICAN BAR ASSOCIATION

LAW COUNCIL OF AUSTRALIA. NEW ZEALAND LAW SOCIETY

A.B.A. MEETING, SYDNEY, 12 AUGUST 1980

THE EXCLUSIONARY RULE AND OTHER CONTROLS OVER ABUSES OF POLICE POWER

TOWARDS EFFECTIVE CONTROL OVER POLICE MISCONDUCT

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

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DIFFERENT STARTING POINTS

As will be evident from the two lead papers presented by Professor B J George[1] and Mr Elliott Johnston[2] we start from different points in considering the rule that judges in criminal trials may exclude evidence otherwise probative, and damaging to the accused, by reason of the illegality or unfairness of its collection by police.

United States lawyers must necessarily start from the terms of and inferences drawn from the Bill of Rights, with its overwhelming concentration upon the rights of the individual, explained at the opening of this Conference by Attorney-General Civiletti. That the application of the guaranteed individual rights will cause inconvenience to police and prosecutors and the escape of guilty accused is not a point of abiding concern. The precise function of the Bill of Rights is to control and limit the reach of government and its agencies, which had proved itself to be a potential for oppression at the time of the American Revolution. Our Century has seen unparallelled evidence of the power of the modern state, its institutions and officers, to overbear and unfairly harrass and oppress the individual.

Though we in Australia have traditions of liberty, we do not start from the accepted absolutes of a Bill of Rights. Such few constitutional rights as exist under our Federal Constitution have been severely circumscribed, and not extended, by judicial decisions.[3]

Furthermore, the bodies sought to be regulated by the exclusionary rule (especially the police) are organised in quite different ways in the United States, on the one hand, and in Australia and New Zealand on the other. In the United States there are hundreds of police forces under differing command structures, of different size and with different traditions and reputations, and difficult to discipline across the nation. We in Australia have one police force for each State, one for the Northern Territory and a new national Federal Police, with responsibilities in areas of federal crime and in general policing in the Australian Capital Territory.

Despite these different starting points, what is remarkable in the two papers before us is the extent to which we in Australia seem to be edging towards a more active judicial role in superintending police conduct by the exclusion of evidence unlawfully or unfairly obtained. You in the United States seem to be retreating from some of the consequences of excluding evidence, probative and compelling, because of minor, harmless or irrelevant infractions of constitutional principles expounded in earlier cases.[4] Perhaps the end result, in practice, is not very different.

In 1975, as part of the run-up to the establishment of a new federal police force, the government of the day requested the Australian Law Reform Commission to propose:

* new procedures for the independent handling of complaints against the force
* a new and modern code of conduct for officers of the force engaged in criminal investigation
* effective sanctions to uphold both fair to police and to the community

As Mr Johnston's paper indicates, the Law Reform Commission, a permanent statutory authority established to report to the Federal Attorney-General and Parliament, proposed a new complaints mechanism and a new detailed code for the conduct of criminal investigations. That code was substantially to be supported by a statutory provision for the exclusion of evidence unlawfully or unfairly obtained contrary to the provisions of the code.[6]

The report on the handling of complaints against police suggested the adoption of a simple new procedure to infuse greater impartiality and external review of the handling of both public and internal complaints against police:

* A special branch of the police should be established, after the Scotland Yard model of A.10, to provide a degree of insulation for police investigating police.

* The Ombudsman, recently established by statute, should be a neutral recipient of complaints from the public and should have independent functions of investigation as well as the power to require proceedings to be brought, even if police did not so recommend.

* A police tribunal, headed by judges, should hear serious complaints against police, short of the criminal.

This scheme, with various modifications, has been adopted already in the N.S.W. Police Force, the largest in Australia.[7] It is shortly to be adopted for the Australian Federal Police.[8] A variant of it has been adopted in the Northern Territory.[9] Aspects of the scheme have been adopted in other States.

It is too early to know whether this administrative check on police misconduct will be effective. It has the advantage of being more neutral, accessible, available to ordinary citizens, inexpensive and facilitating of conciliation and non-employment sanctions than the rather heavy-handed procedures of judicial review. But its effectiveness in Australia is very much a function of relatively few, highly disciplined police forces. The N.S.W. Ombudsman has recently complained about lack of power in dealing with police.[10] Working out the precise power of the Ombudsman in relation to Federal Police has been the major obstacle to the early implementation of the scheme at a federal level.

DISCIPLINE BY CIVIL TRIALS

The rule that the Crown and the Commissioner of Police are not, as employers generally are, vicariously liable for the acts of delinquent police officers, is anomalous.[11] But it has been supported by some police administrators as a check on individual police misconduct. In England the law was changed in 1964. Despite the change, actions brought in respect of which police are indemnified have been few. Fewer still are those which are successful. Verdicts are small.[12] The Australian Law Reform Commission has suggested that the anomalous immunity be removed, as in Britain. This suggestion has already been adopted by legislation in Queensland. It is expected that it will be adopted at a federal level in Australia. But actions are still costly. Procedures are slow. The remedy of money damages is generally inapt to the complaint made. Cost rules discourage litigation in Australia. As a practical matter it is unlikely that civil actions against police will ever loom large in effective police discipline.

OTHER MEANS OF CONTROL OVER POLICE

In a paper I delivered to the last Australian Legal Convention, I sketched the various other sanctions that were available to lawmakers to control police abuse of power.[13] My list goes beyond that of Professor George or Mr Johnston:

* The provision of detailed clarifying legislation setting out with some specificity rights and duties. In respect of controlling police misconduct, Lord Devlin put it well:

> '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'.[14]

* The Criminal Investigation Bill 1977, based on the Law Reform Commission's report, was an endeavour to state these fundamental rules for police and citizen alike. The Bill has lapsed but the government has announced that it will be reintroduced.

* New controls before investigation.

  ** Better selection, training and command of police to prevent abuse before it happens and to secure police more suited to the difficulties of policing today.[15]

  ** Limiting the burgeoning growth of non-police policing, private police, quasi-police government forces etc.

  ** Reforming substantive criminal laws which presently require police to enforce 'unenforceable laws'.

  ** Facilitating effective prior judicial authorisations for invasive actions, especially by telephone warrants to superintend arrests, searches and seizures, bail decisions and so on.[16]

* New controls during investigation.

  ** The presence of independent persons to guard against mis-statements, distortions and 'verballing'. This procedure was thought specially necessary in the case of interrogation of young persons, non English-speaking accused and

** The adoption of sound and video-recording of confessions: a major area of disputed police conduct in Australian criminal trials.

** Prior notification of rights, including by notice in writing.[17]

** Effective rights of access to a lawyer.[18]

* New controls after investigation.

** The provision of new administrative procedures for effective, neutral disciplinary supervision of police, as described above.

** Private criminal prosecutions, where the Crown or police have declined to initiate a prosecution.

** Access to the media and to Parliament, both of which have proved ready to investigate allegations of police misconduct.

** Judicial review of police and prosecution decisions, where these are attacked.[19]

** New rules for excluding evidence, laid down by statute, facilitating greater attention to the role of the court in upholding lawfulness and fairness of police conduct.

THE EXCLUSIONARY RULE

The present definition of the judicial discretion to exclude evidence unlawfully or unfairly obtained has been described, as far as Australia is concerned, in Mr Johnston's paper. Recent decisions of the High Court of Australia have given something of a boost to those who argue for an active judicial discretion as a check against unlawfulness or unfairness and as a protector of the integrity of the conduct of law enforcement officials, particularly police.[20] But there is precious little evidence of the extent to which this decision, at the highest level, is operating in practice in the criminal courts. Australia is poorly served by criminal and penological statistics.[21] One of the factors influencing the Law Reform Commission in proposing the enactment of a statutory provision to guide judges in the exercise of their discretion to exclude was the impressionistic evidence collected from judges and trial lawyers in all parts of Australia, that at least until 1975 (when the report was written) the discretion was rarely exercised in favour of the accused. One experienced federal judge, fresh from a busy practice in the criminal courts, said that in 15 years he had never once been able

to persuade a judge to exclude probative evidence unfairly obtained by police. Two very recent decisions, one of the Full Court of the Federal Court of Australia,[22] and the other of the Full Court of the Supreme Court of South Australia[23] show the disinclination of judges to use the exclusionary rule as a means of disciplining even police conduct that is considered unfair.

The resistance is natural. 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 wide range of police behaviour is questioned.[24] Clearly it does not inhibit bad conduct which does not lead to production of evidence. It assumes greater attention to judicial pronouncements than may exist in police practice.[25] The instinct to 'get his man' may, in the heat of the police investigation, quite overbear considerations of 'fairness to the accused'. It is not effective for redress in the case of persons not charged. Especially in Australia, without the sanctity of constitutional guarantees, such notions may be dismissed by busy policeman as the unrealistic fancies of lawyers.

The extent to which resort should be had in the laws of evidence to social considerations other than relevance and reliability will have to be considered now by the Australian Law Reform Commission in its project designed to produce a law of evidence for federal courts in Australia. But the law of evidence has long recognised competing social forces which may displace even compelling and highly persuasive evidence.

BLACKSTONE AND ALL THIS

In the most recent Australian appeal case, in which the exclusionary rule came under scrutinty, the Full Court of the Federal Court had to consider the fairness of police conduct in the Northern Territory in a murder investigation involving, amongst others, three Aboriginal or part-Aboriginal youths, aged 13, 12 and 14.[26] The court divided. The Chief Judge (Sir Nigel Bowen) was of the opinion that the police failed to give due observance to the rules that had been laid down to be observed by police in the interests of fairness. But the trial judge had considered all relevant matters and his exercise of discretion should not be interfered with.[27] Mr Justice Muirhead did not consider that error on the part of the trial judge had been demonstrated.[28] Mr Justice Brennan dissented and in doing so he made reference to some relevant observations of Blackstone, cited in an earlier judgment of the High Court of Australia:

'The ground upon which I would uphold this appeal is not the setting aside of his Honour's discretion but the setting aside of the finding that the confession was voluntary. I would set aside the convictions. Such a result may appear to place a fetter upon the investigation of crime, at all events when the criminals are young, simple and unsophisticated people. But as Windeyer J. pointed out in Rees v. Kratzmann (1965) 114 C.L.R. 63 at p.80:

"There is in the common law a traditional objection to compulsory interrogations. Blackstone explained it: 'For at the common law, nemo tenebatur prodere seipsum: and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men": Comm iv, 296. The continuing regard for this element in the lawyer's notion of justice may be, as has been suggested, partly a consequence of a persistent memory in the common law of hatred of the Star Chamber and its works. It is linked with the cherished view of English lawyers that their methods are more just than are the inquisitorial procedures of other countries".[29]

The inquisitorial system has no body of rules equivalent to our laws of evidence. The adversary trial and the use of the jury may require such rules, including exclusion of probative evidence which is unreliable, prejudicial, unfair or unlawfully obtained. This may seem irrational and illogial to police and often to laymen. But the adversary combat and the jury system are the 'palladium' of our inherited common law. Sometimes, as we see it, there are even more important purposes in the criminal trial than the establishment of truth or the conviction of the guilty.

FOOTNOTES

1. B James George Jr, 'The Exclusionary Rule and Other Controls Over Abuses of Police Power' in American Bar Association and Ors, American/Australian/New Zealand Law: Parallels and Contrasts, Papers presented in Sydney, Australia, 11-16 August 1980, 175.

2. Elliott Johnston, 'The Exclusionary Rule and Other Controls Over the Abuse of Police Power' in Paper, 187.

3. For example, the guarantee of Jury in section 80 of the Australian Constitution was circumscribed in Buchanan v. The Commonwealth (1913) 16 C.L.R. 315; the reference to freedom of religion was read down in Adelaide Company of Jehovah's Witnesses v. The Commonwealth (1943) 67 C.L.R. 116 but is presently again before the court in a reserved judgment. Only section 92 (the guarantee of freedom of interstate trade, commerce and intercourse) has been given an ample interpretation.

4. See the cases cited in George, 178.

5. The Law Reform Commission (Australia), Criminal Investigation, (A.L.R.C.2), 1975. See also ibid, Complaints Against Police (A.L.R.C.1), 1975, and Complaints Against Police : Supplementary Report (A.L.R.C.9), 1979.

6. A.L.R.C.2, 136 (Chapter 11, Enforcing the Rules).

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

8. Announcement by Senator P.D. Durack (Attorney-General of Australia), July 1980. See also Commonwealth Parliamentary Debates (House of Representatives), 23 April 1980, 2227.

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

10. Report of the Ombudsman of New South Wales for the Year Ended 30 June 1979, 1979, 9.

11. Driscoll v. The Queen (1977), 51 A.L.J.R. 73. See also Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (Mr Justice Lucas, Chairman), 1977.

12. Home Office (England), Evidence to the Royal Commission on Criminal Procedure, memorandum No. I, 1978, Appendix B.

13. M.D. Kirby, 'Criminal Investigation and the Rule of Law' (1979) 53 A.L.J. 626.

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

15. Cf. Lucas Report, 191.

16. See for example Police Administration Ordinance, 1978 (N.T.), s.96(1) (Search Warrants by Telephone); s.101 (Arrest Warrants by Telephone).

17. Criminal Investigation Bill, 1977 (Aust), Cl. 18(2).

18. Driscoll v. The Queen (1977) 51 A.L.J.R. 731.

19. K.C. Davis, 'Discretionary Justice', 1969, 189. See Administrative Decisions (Judicial Review) Act 1977 (Aust), s.13.

20. Bunning v. Cross (1978) 52 A.L.J.R. 561, 569 (Stephen and Aickin JJ). See also a discussion of recent Queensland experience in G Sturgess, Drug Squad Terror Tactics Cause Alarm, in Bulletin, 29 July 1980.

21. The Law Reform Commission (Aust), 'Sentencing of Federal Offenders', (ALRC 15), 1980.

22. Collins and Ors v. The Queen, unreported decision of the Federal Court of Australia (Full Court), 20June 1980. An application for special leave to appeal to the High Court of Australia is pending. See also the recent English case of Queen v. Sang [1979] 2 All ER 1222.

23. R v. Szach [1980] A.C.L.D. 158. Decision of the Supreme Court of South Australia (Full Court) 21 April 1980 (on appeal).

24. Davis, 704.

25. W.R. La Fave and F.J. Remington, 'Controlling the Police : The Judge's Role in Making and Reviewing Law Enforcement Decisions', 63 Michigan Law Review, 987, 1007 (1965).

26. Collins and Ors v. The Queen, op cit.

28. Muirhead J., 66.

29. Brennan J., 78-79.