AUSTRALIAN AND NEW ZEALAND ASSOCIATION

FOR THE ADVANCEMENT OF SCIENCE

51ST ANZAAS CONGRESS, BRISBANE, 1981

CRIMINOLOGY SECTION (NO. 29), PRESIDENTIAL ADDRESS

THURSDAY 14 MAY 1981

CRIME AND PUNISHMENT, '81

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

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A PRESIDENTIAL ADDRESS?

A Presidential Address is a pretentious title for the observations of a lawyer brought up in the ostensibly modest traditions of the common law of England and the decidedly cynical backblocks of the Western Suburbs of Sydney. Lest the President get carried away with his moment of glory, the organisers limit his eloquence to less than an hour. Moreover, they place him at the peril of utter irrelevancy by interposing his thoughts in the midst of busy business sessions of the conference devoted to specific, practical issues of expert dialogue. My effort must be offered squeezed after a day devoted to the study of Aboriginal issues (in which my colleague Commissioner Bruce Debelle took part) and a day addressed to the issues affecting women and crime. A choice must be made: whether to indulge the allotted minutes to a single specific of my own, to add my perspective to the specific topics addressed, or to do something entirely novel and address the overall theme of the 51st ANZAAS Congress, Energy and Equity, so far treated by the Section with virtual disdain.

I do not intend to do any of these things. I have too much to say to pick a specific topic. It would be too dangerous in the presence of such experts to venture upon the special topics of the week. Though I am sure the 'energy crisis', the search for alternative energy sources, the possible decline of cheap energy mobility and especially the possible use of nuclear energy, bring portents of significance for criminology, these are not matters to which I have given special study. Observations upon them should be left to experts.[1]

I was invited to be President of the Section because I am Chairman of the Australian Law Reform Commission. That Commission has, from its foundation six years ago, received a number of tasks from successive Commonwealth Attorneys-General of significance for the advancement of criminology in our country. It is exactly a year since the report of the Commission on Sentencing of Federal Offenders[2] was tabled in the Federal Parliament. The report was based upon a programme of empirical research and investigation led by Professor Duncan Chappell, now of Simon Fraser University in Canada. In preparing the report, the Commission enjoyed the collaboration of the Australian Institute of Criminology and the Law Foundation of New South Wales. A feature of the report was the collection and use of information and opinion by surveys directed to judicial officers, Federal prosecutors, prisoners and the general public.

I propose to utilise my allotted time for a review, necessarily selective and somewhat superficial, of some of the chief developments which I have seen relevant to the Criminology Section in the year past. I will not trespass upon the matters especially considered in the sessions of the Section this week. And if you do not agree with my review, you must ascribe its perspective to the special interests of the Australian Law Reform Commission and the well known fact that people tend to note most carefully those matters in which they have an interest. I will therefore arrange these remarks in four segments:

* First, a general review of some notable events of a year in criminology, as the public rather than the expert sees the discipline.

* Secondly, a few observations on developments affecting the police, up to the report of Mr. Justice Lusher, tabled in the New South Wales Parliament this week.[3]

* Thirdly, I will say a few things about the Law Reform Commission's current inquiry into the law of evidence and its relevance for criminology.

* Fourthly, I will revert to our report on sentencing and to the never-ending debate about criminal punishment and its reform.

THE YEAR IN REVIEW

United States. The year past has been a busy one for the public debate of issues concerning the police, crime and punishment. Governments throughout the Western world have been confronted by calls for reform of the criminal justice system coinciding with razorly activities designed to cut back public expenditure. Improvement of the system at lower aggregate cost to the community seems to be the order of the day.

In the United States, the attempted assassination of the President has focused attention once again upon the right to bear arms and the relationship between private gun ownership and homicide rates. One of the most readable Australian texts of the year past is Professor Richard Harding's 'Firearms and Violence in Australian Life'.[4] Harding points out that there are two and a half million privately-owned guns in Australia. On average, one in every four households contains a gun. Every year another one hundred thousand weapons are added to the armoury. Every week an Australian is killed as a result of a firearms accident. About one quarter of Australian gun owners (the figure rises to one third in Queensland) state they keep guns for self protection. The protection they provide is largely illusory and is bought at a great aggregate social cost. Yet our position in Australia pales by comparison to that of the United States. Two hundred million guns in private hands have resulted, in that country, in patterns of use which are 'destructive, volatile, self perpetuating and intractable'. Harding warns that Australian laws should be amended to prevent the drift in this country in the same direction as the United States.

That drift has caused despair at the highest judicial levels in America. In an important address to the American Bar Association's February 1981 meeting, the Chief Justice of the United States, Warren E. Burger, emphasised one theme only: the need to revitalise the criminal justice system to make it an effective means of dealing with the 'crime and fear of crime [which have] permeated the fabric of American life'.[5] Burger's diagnosis was grave:

> We are approaching the status of an impotent society — whose capability of maintaining elementary security on the streets, in schools, and for the homes of our people is in doubt. [At every stage of the criminal process] the system cries out for change. ... We have established a system of criminal justice that provides more protections, more safeguards, more guarantees for those accused of crime than any other nation in history. ... Is a society

> redeemed if it provides massive safeguards for accused persons including pre-trial freedom for most crimes, defense lawyers at public expense, trials and appeals, retrials and more appeals — almost without end — and yet fails to provide elementary protection for its law-abiding citizens? ... [Governments which fail in this basic duty] are not excused or redeemed by showing that they have established the most perfect systems to protect the claims of defendants in criminal proceedings at the expense of the public at large. A government that fails to protect both the rights of accused persons and also all other people has failed in its mission. I leave it to you whether the balance has been fairly struck.[6]

The Chief Justice, having diagnosed the problem, called for reforms which he declared would be costly, though less costly than the billions of dollars and 'thousands of blighted lives now hostage to crime'.[7] He called for reforms of bail law, of delays in trials and appeals, improvement of prison conditions and prisoners' rights, and generous steps to encourage rehabilitation and family support for prisoners. He had a few plain words to say about the ever-popular call for a 'war on crime'. This war, he declared:

> will not be won simply by harsher sentences; not by harsh mandatory minimum sentence statutes; not by abandoning the historic guarantees of the Bill of Rights. And perhaps, above all, it will not be accomplished by self-appointed, armed citizen police patrols. At age 200, as this country now is, we have outgrown the idea of vigilantes.[8]

In February 1981, one of America's most distinguished judges and legal philosophers, Judge David Bazelon, a firm exponent of the liberal tradition, commented on the U.S. Chief Justice's call:

> The nightmare of street crime is slowly paralysing American society. Across the nation, a terrified people have altered their lifestyles. They purchase guns and double locks to protect their families against the rampant violence outside their doors. After seething for years, public anxiety is now boiling over in a desperate search for answers.[9]

But then Judge Bazelon defined the role of the criminologist in these conditions:

> As criminologists, I believe you can play an important role in this debate. Public concern is sure to generate facile sloganeering by politicians and professionals alike. It would be easy to convert this new urgency into a mandate for a 'quick fix'. A far harder task is to marshall that energy towards examining the painful realities and agonising choices we face. Criminologists can help make our choices the product of an informed, rational and morally sensitive strategy. ... [Y]ou have a special responsibility to contribute your skills, experience and knowledge to keep the debate about crime as free of polemics and unexamined assumptions as possible. ... I offer no programs, no answers. After 31 years on the Bench, I can say with confidence we can never deal intelligently and humanely with crime until we face the realities behind it.[10]

Judge Bazelon then turned to various options. One, popular in the United States as in Australia, is the call to send more criminals to gaol more often for more time:

> We already imprison a larger proportion of our citizens than any other industrialised nation in the world, except Russia and South Africa. This dubious honor has cost us dearly. A soon to be published survey ... reports that the 1972-78 period saw a 54% increase in the population of State prisons. The survey predicts that the demand for prison space will continue to outstrip capacity. It has been conservatively estimated that we need $8-10 billion immediately for construction just to close the gap that exists now. Embarking on a national policy of incapacitation would require much more than closing the gap. One study has estimated that, in New York, a 264% increase in State imprisonment would be required to reduce serious crime by only 10%. Diana Gordon has worked out the financial requirements for this kind of incapacitation program. In New York alone, it would cost about $3 billion just to construct the additional cells necessary and probably another $1 billion each year to operate them. The public must be made aware of the extraordinary financial costs of a genuine incapacitation policy. And of course there are significant non-monetary costs as well.[11]

As David Biles' figures, so carefully and regularly placed before the Australian community, show, in some parts of Australia, we approach the levels of per capita imprisonment equalled only in the United States, South Africa and Russia. The Australian public must be told often and loudly of the costs and ineffectiveness of imprisonment as a punishment and the need to find cheaper and, it is to be hoped, more effective responses to crime.

United Kingdom. In the United Kingdom, probably the major event of the year, so far as this Section is concerned, was the publication of the report of the Royal Commission on Criminal Procedure.[12] The report proposed major changes in police powers of arrest and interrogation in Britain. Although not adopting for the time being a suggestion of universal tape recording of confessions to police, the report did urge experimentation with tape recording as a means of preventing disputes about confessions and admissions. Other proposals included the provision of a detailed code of practice to replace the Judges' Rules, wider police powers to enter premises, enhanced police powers to stop and search people in the street on condition that the reasons for doing so are noted and the persons informed, and a preliminary power to hold a person without charges for up to six hours (extendable by a senior police officer to 24 hours and thereafter by a magistrate, appealable after a second 24-hour extension).

The failure of the Royal Commission to recommend comprehensive tape recording was denounced by the Sunday Times as 'timid'.[13] The London Times was more blunt:

> The Commission has been unnecessarily cautious about tape recording. It recognised that the recording of police interviews with suspects would be the most appropriate way of protecting the suspect against being 'verballed', would monitor the way in which the police behaved, and provide the police themselves with protection against false allegations about their conduct. It then shied away from the logical conclusion that all interrogations in police stations should be recorded. The Commission did so mainly on the grounds of cost, though the amount involved — £6.5 million annually — is relatively modest and would form only a very small proportion of the total budget for the administration of justice.[14]

One of the most significant aspects of this Royal Commission report — and one which distinguishes it from just about every earlier British Royal Commission exercise on similar themes (of which there have been so many) — is the unique collection of research papers which accompanied the report. The Royal Commissioners sought papers from some of the most experienced criminologists of Britain. They are presented on topics ranging from confessions in Crown Court trials[15] to a survey of prosecuting solicitors' departments[16], a psychological approach and case study of current practice on police interrogation[17], and an examination of current practice and resource implications of change in arrest, charge and summons procedures.[18] There were others. This empirical data was available to the Royal Commissioners in reaching their conclusions.

It perhaps signals the recognition, at long last, that Royal Commissions into complex and controversial matters of public poolicy can no longer rely solely on the names of a few distinguished appointees or even a cross section of impressive members. From now on, the path to reform in the justice system plainly lies down the track of empirical research about how the law actually operates in practice, not just how it appears in the books. This is a tenet to which the Australian Law Reform Commission has adhered since its establishment, not, let it be said, without resistance and opposition from some sections of the legal profession.[19] When a survey of judicial opinion on sentencing was conducted in connection with the reform of punishment of federal offenders, a small but important section of the judiciary, especially in one State, declined to take part. But 74% of the Australian judiciary did and we can take comfort from that fact.

There have been other relevant developments in Britain. The Criminal Justice (Scotland) Bill, based in part on the Thompson Report, has completed its stages through the British Parliament. It introduces into Scottish law enhanced powers for the police to stop, search and detain 'suspects' without arrest, charge or formal caution. Suspects may be held up to six hours for interrogation. An analysis of the way in which the original and more liberal 1978 Bill, based more closely on Lord Thompson's 'package', was turned into a 'new tough Bill' is outlined in an interesting commentary by Baldwin and Kinsey titled 'Behind the Politics of Police Powers'.[20] There is much in this article instructive for the observers of the Australian scene and possibly for those who await the re-emergence of the Australian Criminal Investigation Bill 1977.

Also in Britain, at the beginning of the year, the doyen of English criminology, Sir Leon Radzinowicz, issued a blueprint on social response to 'the realities of crime'. In an article, 'Illusions About Crime and Justice', he asserted that in most Western countries crime was rising at an annual rate of between 5% to as much as 20%. It could not be explained away in terms either of population increase or of augmented police efficiency in identifying crime. When it is considered that no more than 15% of crimes come to police' notice to be followed, possibly, by criminal sanctions, it can be seen that the 'penal panaceas' of the past have failed. Radzinowicz listed his ten basic essentials of a 'decent criminal justice system'. It is instructive to measure his list against current Australian standards and needs:

- A clear and well publicised criminal code.
- A police force with precisely defined powers and limitations, backed by independent investigation of complaints.
- Openness in processes of prosecution, trial and sentence.
- The right of the suspect to keep silent, not to be forced to confess.

- Strict rules of evidence, strictly enforced.
- An independent judiciary.
- Appeals against conviction and sentence.
- Independent complaint machinery for the rights of prisoners.
- Independent inspection of prisons.
- Careful selection, thoughtful training and satisfactory remuneration of all involved: police, magistrates, prosecutors, prison and after-care staff.[21]

New Zealand. In New Zealand, vocal media coverage of the increase in street violence (later shown to be based on exaggerated statistics) led to many calls for the restoration of corporal punishment. Now, the reform-minded Minister of Justice of New Zealand, Mr. McLay, has established a committee headed by a High Court judge (Mr. Justice Maurice Casey) to conduct a comprehensive review of New Zealand penal policy. The committee's terms of reference include examination of existing means of dealing with criminals, consideration of the means to reduce the incidence of imprisonment, the establishment of clear criteria for imprisonment, the investigation of non-prison sanctions and consideration of the position of victims of offenders in the criminal justice system.

Preliminary work for the New Zealand committee has already begun. When I was in that country last month, I was told that one innovation of the Australian Law Reform Commission would be copied: the survey of judicial officers engaged in sentencing would be adapted to New Zealand problems. The comparison between the Australian and New Zealand responses will provide an interesting field of future criminological endeavour. It will also be instructive to compare the levels of response to the survey and the number of judges denouncing it as a mere exercise in 'sociology'.

Australia. In Australia, not a week has passed in the last year but controversial issues of criminology have confronted the community. Even in the past seven days, we have seen public agonising about Dr. William Russell of Yarralumla, who choose six days in prison in preference to the payment of fines totally $27,800. That this was possible stirred the editor of the Canberra Times to denounce the 'odd' result and to call for 'special attention' to the reform of sentencing, particularly for persons convicted of the so-called 'white collar' crimes.[22] This week, a major report was tabled in the New South Wales Parliament proposing reorganisation of the State Police Force. The report recommends the abolition of the present promotion appraisal scheme based on points and priority lists. It suggests that police promotion should be based on merit, not seniority, and 'assessment of applicants should be on the basis of their efficiency and the relevance of their experience and qualifications to the job specification'.[23]

The report has had a cool response from police, used to the old rules of promotion and career advancement. Yet it may be specially apt if police are to retain the key role in the investigation of 'new crime' such as 'computer crime' and complex corporate offences. If police are not to be painted into the corner of dealing only with crimes against the person and simple crimes against property and if they are to resist their replacement by specialist policing units in the more complex areas of operations, there is no doubt that new avenues of recruitment and advancement (including even lateral recruitment) will be needed.

Other developments of the past year have been the introduction by the Commonwealth Attorney-General, Senator Durack, of legislation based upon the first and ninth reports of the Australian Law Reform Commission to establish a fairer system of handling complaints againt Federal Police.[21] The provisions passed through Parliament with expressions of satisfaction from many quarters. It will now be for the Commonwealth Ombudsman, the new Internal Investigation Division of the Police and a Police Disciplinary Tribunal to carry out the letter and spirit of the system. The aim is:

> to establish a system which permits just and thorough investigation of complaints against police, while at the same time upholding morale and discipline in the difficult work police have to do.[25]

Introduction of a fair system for handling complaints against police is on the 'shopping list' of every writer, within and outside the police service, who seeks to identify the priority needs of an effective criminal justice system.

The year past has also seen the consolidation of the Australian Federal Police. Under Sir Colin Woods, an experienced policeman with years of operational policing, the Force has managed to weather the inevitable storms of its establishment. One sign of this was the announcement in February 1981 of the creation by Ministerial agreement of an Australian Bureau of Criminal Intelligence. The Bureau is to:

> provide facilities for collection, collation, analysis and dissemination of criminal intelligence to combat organised crime in Australia and in particular, to assist Police to fight illicit drug trafficking.[26]

The agreement, approved by the Australian Police Ministers' Council, lists more than a dozen major areas of crime in which the Bureau will take particular interest. In addition to drug trafficking, these include illicit gambling, the infiltration of criminal figures into gambling, company fraud and fraudulent dealing in shares and securities, corruption in public life, national and international movement of profits of organised crime, and pressures exercised to control or influence persons or organisations with a view to corruption or extortion. The Bureau is to be established in Canberra and staffed by police seconded from the Federal, State and Territory services.

The report of the Australian Law Reform Commission on sentencing which began the year under review has continued to provide the focus for much debate on the topic throughout Australia. The report is an interim report. When a Commissioner is appointed by the government to continue and complete the project, public hearings and consultations with officials, Commonwealth and State, will explore the reactions to the proposals contained in it. At present, there is no Commissioner available to lead this major national exercise to conclusion, Professor Chappell's period as a Commissioner having expired. In his academic capacity, Professor Chappell is continuing his contribution to sentencing and criminological writing in Australia. With the approval of the Law Reform Commission, he plans to publish an edited volume of the original research papers which were prepared for the Commission and which support the sentencing report. These papers, which will be published under the title 'Australian Studies in Sentencing' contain much novel material, including detailed legal analyses enlivened by thorough empirical research. Professor Chappell and Mr. Peter Cashman of the N.S.W. Law Foundation will also be publishing, with the help of computer analysis, a more detailed study on the results of the judicial survey. A fuller report on that survey was promised when the interim report was published last May.

These are some of the chief developments of the year past. Many others could have been mentioned, including developments outside the English-speaking world whether it is France[27] or even the Soviet Union (where once crime, like the State, was said to be 'withering away')[28], the problems of antisocial conduct in an urbanised society, though differing in degree, are remarkably similar in kind.

I now turn briefly to criminological developments of special interest to the Australian Law Reform Commission because of its programme. I refer to developments in the area of police affairs, trial evidence and the sentencing of offenders.

POLICE DEVELOPMENTS

Perhaps the most notable movement of the year past has been the greater willingness of police leaders to come forward to debate publicly the difficult issues of policy facing them. Typical of the new mood was the invitation extended to me on 1 April to attend the conference in Adelaide of the Commissioners of Police of the Australian and Pacific Region. I was the first 'stranger' invited into their midst. The encounter was a stimulating one. I hope I was able to convey some of the probable directions of law reform. The Police Commissioners conveyed to me in no uncertain terms some of the difficulties confronting them.

The Commissioner of the Australian Federal Police has been active in public exposition of such matters as the impact of new technology on policing[29], public accountability of police, and the problems of terrorism, including international terrorism.[30] The Chief Commissioner of Victoria Police, Mr. Miller, has entered the fray on a number of important issues: not simply to defend his service but to assert a police perspective on topics of lively concern. Thus in September 1980, he questioned the continuance of the right to silence during police investigation and later at the trial.[31] He questioned the jury system and called for modification of the jury trial to respond to, what he described, as the excessively high acquittal rates. His call led to an article by Mr. Peter Sallmann analysing the overall acquittal rates in Victorian County Courts.[32] Mr. Sallmann asserted that in the past eight years the average has been steady at about 13%. Exercising a right of reply in the same journal, Mr. Miller claimed that the figures indicated that persons who elected to stand trial by jury had an acquittal rate of about 50%. He questioned the accepted infallibility of the jury system. Most novel of all, he urged that it was 'about time' we investigated what goes on behind the closed doors of the jury room: a proposal which led to vigorous commentary from editorial pens.[33] Short of fundamental surgery, Mr. Miller urged introduction of majority verdicts, greater provision for judge-only trial and the substitution of lay assessors, particularly in lengthy trials involving commercial or technological questions.

The articulate assertion of a police viewpoint by these and other Australian Police Commissioners is an entirely healthy development, to be welcomed by all criminologists. All too frequently, in the past, the running has been left to others. There will be a clearer public debate after an informed exposition of police perspectives. Perhaps the happiest development is that these perspectives are now being stated not simply in reaction to the propositions of others. Police are now increasingly taking their own initiative to enter the market place of ideas. The old-fashioned secrecy which surrounded police policy-making is beginning to crumble. This is a good development for policing. And it is good for society.

In a thoughtful article in the Australian and New Zealand Journal of Criminology, Sallmann has urged criminologists to encourage a more positive and introspective contribution to the debate by police:

> One of the products ... has been the emergence of the police into the public debating limelight. In my view this emergence should be encouraged and nurtured. In the initial stages perhaps the police have been venting their spleens over issues in relation to which they have for a long time held strong but private views. Now that they have begun to contribute to academic and public level debates on criminal justice issues, enormous opportunities are open for 'dialogues' to commence between components within the system, between the system and the public and between the police as a separate entity and the public. There is no guarantee whatever, nor reasonable prospect, that any of these endeavours will lead to greater 'crime control'. What may be expected to result from such a process is a much greater understanding of the complexity of the 'crime control' notion, and the role of the criminal justice system in its attempts to 'control' crime, and very importantly, a clarification of the invidiously complex and onerous task of the police in the whole exercise.[34]

Another feature of the year has been the growing realisation of the difficulties that face police in a community undergoing rapid change. Frequently the role of police is ambiguous, requiring the rapid interpretation of grey areas of the law and resolute action in stressful circumstances. The public image of police is dented by proved or alleged cases of malpractice or corruption. These undermine morale. Many police suffer from work overload and the burdens of continual shift work, contributing to stress, especially in circumstances of quick shift changes and changes to rosters at short notice. Police, like other functionaries of the criminal justice system, all too frequently suffer from inadequate resources. Family and social life are interfered with. Isolation from the community sometimes drives police into the defensive circle of the police 'brotherhood' to the exclusion of others. These and other problems have been disclosed in numerous reports, one of the most detailed of which is the report of the Police Service Board of Victoria, headed by Judge N.A. Vickery and delivered in December 1979.[35] The reactions to the problems identified in such reports include frustrated outbursts by representatives of the Police Association. Speaking to the Police Federation in Brisbane in October 1980, the President of the Police Federation of Australia and New Zealand, Chief Inspector Tom Rippon, had his say:

> We will see in the next ten years some startling developments within all police unions in this country, all of them based upon community movement and standards. We have seen since the late 1960s a dramatic upsurge in police militancy, brought about primarily by two factors. Firstly, by attacks on both traditional policing and our members by Law Reform and civil liberty groups producing a seige response from the younger members and, secondly, by the marked decrease in the age of police officers. ... The first problem of law reform groups and civil liberties people is a political one. Police Associations must handle this themselves by ensuring that any change is balanced change, not the sort of nonsense which the Australian Law Reform Commission attempted to inflict on policing in the form of the Criminal Investigation Bill which falsely pretended to protect the little person against the police. It would have only succeeded in assisting the hard-core criminals and their legal advisers at the expense of the victims of law and order generally.[36]

The Criminal Investigation Bill, to which Inspector Rippon referred, has made no apparent progress during the year under review. In part, this may be because of attitudes such as he so vocally expressed. The Bill, based on the second report of the Australian Law Reform Commission, was introduced into Federal Parliament in 1977 by Attorney-General Ellicott. It sought to place the important rights and duties of the public in dealing with the police into an Australian statute, available for the instruction of all. It sought to introduce science, where this would set at rest disputes otherwise difficult to resolve in the criminal trial. Thus it introduced tape recording for confessional evidence, video taping of identification evidence, telephone warrants for urgent arrest and search and so on. To a very large extent it repeated the present rights of citizens in their dealings with the police, although certain additional legislative protections were provided for children, persons not fluent in English and Aborigines. The key provision in the Bill, as in the Commission's report, was the reinforced power of the judiciary to exclude evidence obtained in unreasonable breach of the safeguards in the Bill. Mr. Rippon is wrong to mistake the efforts of the Law Reform Commission as an attack on police. Furthermore, the so-called 'hard core criminals and their legal advisers' are already amply protected by the letter of the present law. The criminal investigation proposals are directed to ensure the integrity of the trial of ordinary citizens, to see that, when they most matter, we take the boasted rights of our traditions seriously. Unfortunately, Mr. Rippon's comments, in sharp contrast to the recent comments of the police commissioners, may only add strength to the verdict of the Lucas Committee in this State:

> No person can afford to be complacent with respect to the criminal justice system. One not infrequently hears extravagantly high praise given to it. We would like to share this estimation, but cannot. The truth is that it has at times worked well and at times badly. And in these remarks we include the performance of the police force of this State. There has been too much inertia or unreasoned opposition to change.[37]

EVIDENCE REFORM

The most recent task assigned to the Australian Law Reform Commission is perhaps the most challenging. The Commission is asked to report on the reform of the law of evidence in Federal courts in Australia which, until now, have applied the law of evidence of the State in which they happened to be sitting. Among factors requiring a fresh look at evidence rules are the declining use of jury trials, the higher educational standards of those juries which are empanelled, declining reliance, in practice, upon technical evidence rules (especially in civil trials), the inconvenience to witnesses called for oral proof of reliable documentary or electronic material, and the advances in new technology, including computer-generated evidence.

Amongst the issues identified in a discussion paper of the Law Reform Commission as warranting study are some that will be of interest to criminologists.[38] These include the re-examination of the psychological assumptions upon which a number of the rules of evidence, currently in force, are based. Amongst these are assumptions about memory, the reliability of evidence of the young and of the old, identification evidence (a matter upon which the High Court of Australia has recently passed)[39] and so on. The effectiveness of the adversary trial is being considered, as is the question of whether the purpose of the criminal trial should be a search for truth or should remain an examination of whether the Crown has established the precise charge it has brought. Inevitably in this examination, the right to silence and the right to make an unsworn and untested statement from the dock in the criminal trial must be examined.

Within its limited resources, the Commission will be endeavouring to study these questions with the aid of empirical data. Two empirical studies, commissioned by the English Royal Commission on Criminal Procedure, provide information on the extent to which experienced criminals refuse to answer questions when cautioned. One such study analysed interviews with 187 suspects for the purpose of determining the extent to which the suspects refused to answer questions and to determine whether there was any relationship between age and experience and such a refusal.

The conclusion reached by the author of the paper is that the large majority of suspects in all age groups do not exercise their legal right to silence.[40] In the sample, only seven suspects (4%) exercised their right to refuse to answer all questions. The older and more experienced suspects are more likely than others to assert the right to silence. This argument is based on the figures obtained for suspects who exercise their rights 'to some degree'. Of the suspects in this category, some 18% over the age of 20 exercised their rights 'to some degree' while only 5% of those under the age of 17 and 7% of those under the ages of 17 and 20 exercised the right 'to some degree'. As to experience, they found that 17% of those known to have a previous record exercised their right 'to some degree' while 6% of those known not to have a criminal record exercised the right 'to some degree'.[41] Thus age and experience appear to combine and overlap. When the facts are gathered, very few exercise the right to silence at all. There is nothing like a hard fact to spoil a good argument.

The other paper which looked into this matter investigated the extent to which younger defendants and those without prior criminal experience were more likely to confess than their older or more experienced counterparts. Research in America had suggested that those older than 25 make far fewer confessions than those under 25. It was suggested that this could be explained on the basis that older people were 'better equipped psychologically to cope with the interrogation situation'. The recent English study showed a strong association between the age of the defendant and the tendency to make a written or oral confession — a confession being defined as a full admission to the offences charged. The younger the defendant was, the more likely he was to confess. The authors of the English paper stated that the trend was statistically highly significant.[42]

The inference for evidence law to be drawn from these criminological studies is not yet clear. But it does tend to suggest that, at least in England, those who assert that many guilty people escape their just deserts because of the right to silence and the protection against self incrimination, are simply not borne out by such studies as have been done as what is actually happening in police stations and courts. Sound law reform that is likely to last must be based upon empirical studies, not hunches and guess work.

SENTENCING REFORM

The Australian Law Reform Commission's interim report on Sentencing accepted this principle and is replete with the first comprehensive study ever done of the sentencing of Federal offenders in Australia. It says something for the progress of criminology that it took 80 years of federation before the Australian Commonwealth launched a detailed study of the punishment of persons convicted of offences against its laws. As I have mentioned, the report relies upon much new statistical and opinion data, including surveys of judicial officers, prisoners, prosecutors and public opinion.

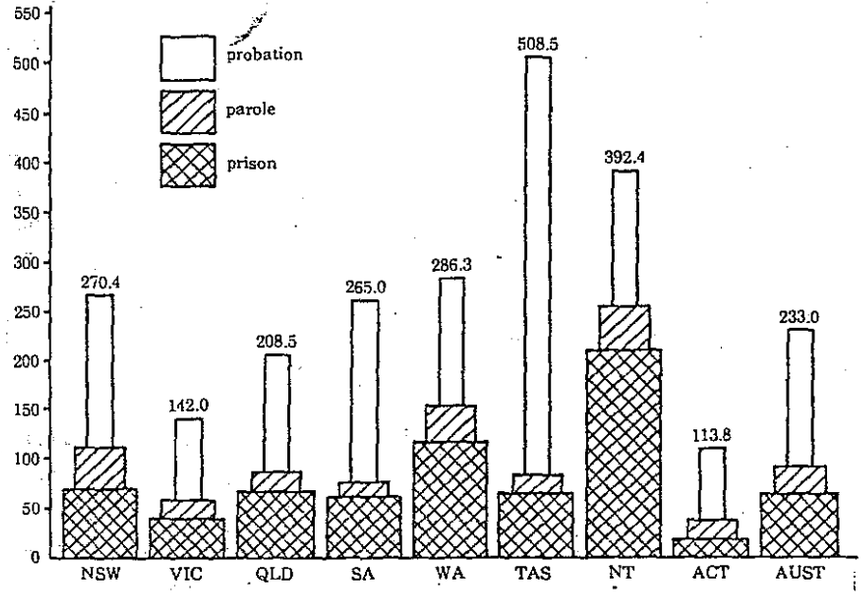
The report suggests the establishment of a national Sentencing Council which will provide detailed, publicly available guidelines, designed to ensure greater consistency in the sentencing and punishment of Federal offenders. It proposes the overhaul of the Commonwealth statute book to remove identified anomalies and inconsistencies, comprehensive new Federal legislation for the victims of crime, new rules of prison conditions and grievance machinery, and new alternatives to imprisonment to avoid the costs and other disadvantages of that form of punishment. To reduce caprice, idiosyncratic differences and simple conflicts of views in punishment, the Commission proposed institutional means of infusing greater consistency. Apart from the Sentencing Council, it was proposed that appeals in Federal cases should lie to the Federal Court of Australia and that parole, a practical source of disparity in punishments, particularly at the Commonwealth level, should either be significantly reformed or abolished.

The Australian Law Reform Commission's report comes against the background of a plethora of sentencing reports, some of which I have identified elsewhere.[43] Every one of these reports provoked a public debate of high temperature. Our report was no exception, though it was exceptional in the reliance it placed upon empirical data, the careful scrutiny of prisons and other modes of punishment, the detailed review of the literature and the novel examination of the specific Federal problem.

At the heart of the report is an extremely difficult issue upon which a decision, partly philosophical in nature, must be made. It is whether it is better to maintain the approach substantially adopted since federation of integrating Federal offenders into the criminal justice system of the States or whether, in the name of the greater uniformity and evenness of Federal punishments, and even at the price of disparity with State offenders, more efforts should be made to punish the Commonwealth offender approximately equally, whether he offends in Sydney or in Perth.

The figures produced by the Commission tend to show, as David Biles' figures repeatedly have, that attitudes to various forms of punishment differ between the jurisdictions of Australia. Thus, in the Capital Territory, the rates of imprisonment (doubtless because of the absence of a prison) are as low as those of some of the 'enlightened' countries of Northern Europe. In other jurisdictions, notably Western Australia and the Northern Territory of Australia, rates of imprisonment rank with those of the United States, the Soviet Union and South Africa, lamented by Judge Bazelon. The latest published part of the Australian Law Journal contains an excellent review by David Biles of 'Imprisonment and its Alternatives' with a graphical portrayal which shows the variants clearly and dramatically.[44]

PERSONS IN PRISON, ON PAROLE AND ON PROBATION
PER 100,000 OF POPULATION, AUSTRALIAN STATES AND TERRITORIES,
NOVEMBER 1979



Faced with this variance, established in the Commonwealth area as well by additional material, an issue of principle had to be addressed. Was it better to accept State by State variation, lest the relatively small number of Commonwealth offenders upset the majority State or Territorial offenders by marginally differing standards and rights. Or was it better to ignore the variance and simply continue overwhelmingly to integrate Federal offenders into the differing State systems? David Biles has argued for the latter approach. The Law Reform Commission has unanimously concluded that, allowing for inevitable differences to some extent, laws and institutions should not tolerate significantly differing punishment for the same offence made under the same statute of the same polity in different parts of the country. Hence, the suggested solutions of the Commission which projected deep animosity and strong dissent amongst State correctional authorities and even some State Ministers. The Chief Secretary of Western Australia accused the Law Reform Commission of 'sticking its nose' into State concerns. Far from accepting the entitlement of the Commonwealth to unify and equalize its treatment of its own offenders, he called for the abandonment of Federal parole and its integration, at long last, into the State system to 'close the circle' of State absorption of Commonwealth offenders. The issue is an important one. It is a matter of regret to me that when I sought, with the aid of the Australian Institute of Criminology, to arrange discussion with State officers on the problems they perceived in the Commission's report, I was told that there was 'no interest' in doing so. It will be a sad day for criminology and penal policy development in Australia when those involved in the business refuse to talk and rely upon influence and muscle rather than argument and reason to resolve such debates:

> The time is right for the Commonwealth to adopt a leadership role in the area of sentencing reform. This role should be exercised by persuasion, with reforms introduced gradually, but no-one should assume that there is an unlimited time to continue talking rather than acting.[45]

CONCLUSIONS

This, then, is the year in review. Rising frustration in the United States about the balance of the criminal justice system and growing, proper concern about the proliferation of hand guns, also a problem in Australia. At the same time, the recognition is that there are no easy answers. Above all, a recognition that more imprisonment will be costly to the community, probably ineffective and carry in its train elements of the continuing the cycle of

criminality.In the United Kingdom, a major report on criminal procedures reinforced, for once, by sound empirical data by which the Commission's conclusions could be tested and even criticised. In New Zealand, a fresh inquiry into penal policy. In Australia, regular debate about policing, sentencing and criminal justice.

It has been a year in which police commissioners have come into the open to debate, with the benefit of their unique knowledge and experience, important issues of public policy. Undoubtedly, this has been the happiest feature of the year past. The Criminal Investigation Bill appears to have made no progress in its passage to Federal Parliament. Nor has the Lucas Report or the Beach Report enjoyed any better fate.

The Australian Law Reform Commission has commenced its work on examining the laws of evidence in Federal courts. This will be a fruitful source of empirical research. An examination of the material for the English Royal Commission on Criminal Procedure shows that popular assumptions about the 'right to silence' do not appear to be borne out by data when it is gathered. Very few elect to remain completely silent (only 4%). Reform must be based upon facts, not hunches.

The Law Reform Commission's Sentencing report, with its strong component of empirical data, remains before the Australian community with its interim proposals for machinery to promote just a little more science in the 'painful and unrewarding' task of sentencing. At the heart of the report is the difficult issue for the future of penal policy in Australia, but one inherent in our Federal system of government. Should we continue to integrate Federal offenders into State measures of punishment or does equal justice require roughly equal punishment of a Federal offender, whether convicted for the same offence in Broome or Hobart?

Despite resistance in some quarters and second thoughts in others, criminology is definitely becoming respectable. When an English Royal Commission publishes detailed criminological studies, one can surely say that the age of criminologists has arrived. It is a happy sign of growing maturity of our lawmaking institutions and of the growing realisation of the subtlety and complexity of the social response to crime. Let me finish with the words of Judge Bazelon:

As criminologists, you have no more important task than to help society face the facts it needs to make its agonising choices. ... Your professional role carries with it a responsibility to speak up. Albert Einstein spoke of all scientists when he said, 'The right to search for truth implies also a duty; one must not conceal any part of what one has recognised to be true'. If you ignore what you know or can find out about the realities of crime and merely submit to shortsighted demands for easy answers, you will have applied your enormous talents to a fraud. But if, instead, you educate the public about crime and thereby ensure that it makes the most informed choice from among the unhappy alternatives, you will enoble your profession.[46]

FOOTNOTES

1. For a paper specific to this topic, see e.g. W. Clifford, 'Developmental Criminology and Planning for Shortages', Papers of the 47th ANZAAS Congress, Hobart, May 1976, mimeo.

2. ALRC 15, 1980 (Interim) AGPS, Canberra.

3. Report of the Committee of Inquiry on Police Administration (NSW) (Mr. Justice Lusher), 1981, as reported in the Sydney Morning Herald, 13 May 1981, 1, 2, 12, 13.

4. University of Western Australia Press, 1980.

5. W. Burger, Address to ABA Mid-Year Meeting, digested in 49 USLW 2522 (1981).

6. id., 2522-3.

7. id., 2523.

8. loc cit.

9. D.L. Bazelon, 'Crime : Towards a Constructive Debate', mimeo, Paper for the 8th Annual Conference, Western Society of Criminology, San Diego, California, 28 February 1981, 1.

10. id., 2.

11. id., 11.

12. The Royal Commission on Criminal Procedure (England) (Sir Cyril Philips, Chairman), Report, January 1981, Cmnd 8092, HMSO, London.

13. Sunday Times, 11 January 1981.

14. The Times, 9 January 1981.

15. Royal Commission, Research Study No. 5, 'Confessions in Crown Court Trials' (John Baldwin and Michael McConville), 1980.

16. id., Nos. 11 and 12, 'The Prosecution System : Survey of Prosecuting Solicitors' Department; Organisational Implications of Change' (Molly Weatheritt and D.R. Kane).

17. id., Nos. 1 and 2, 'Police Interrogation : The Psychological Approach : A Case Study of Current Practice' (Barrie Irving).

18. id., No. 9, 'Arrest, Charge and Summons : Current Practice and Resource Implications' (R. Gemmill and R.F. Morgan-Giles).

19. See M.D. Kirby, 'Sentencing Reform : Help in the "Most Painful" and "Unrewarding" of Judicial Tasks', (1980) 54 ALJ 732, citing J. Hogarth, Sentencing as a Human Process at 735.

20. R. Baldwin and R. Kinsey, 'Behind the Politics of Police Powers', (1980) 7 British Jnl of Law and Society, 242.

21. L. Radzinowicz, 'Criminal Illusions' in Encounter (February-March 1981).

22. Canberra Times, 9 May 1981, 2.

23. As reported in the Sydney Morning Herald, 13 May 1981, 1.

24. Complaints (Australian Federal Police) Act 1981 (Cwlth) and Australian Federal Police Amendment Act 1981 (Cwlth).

25. Australian Law Reform Commission, Complaints Against Police (ALRC 1), 1975, Canberra, AGPS, cited P.D. Durack, Commonwealth Parliamentary Debates (The Senate), 26 February 1981.

26. Australian Police Ministers' Council, Perth, media release, 6 February 1981, mimeo.

27. See the note in Le Monde, 2 May 1980, setting out details of a Bill for changes in the French penal system. Cf. [1980] Reform 75.

28. Radzinowicz, n.21 above.

29. See e.g. C. Woods, 'Forensic Science and Technology', Address to the Australian Seventh International Symposium on the Forensic Sciences, 9 March 1981, mimeo; id., Address to the Royal United Services Institute of Australia, 4 March 1981, mimeo.

30. id., 'Problems of International Terrorism', Address at the Commonwealth Club, Adelaide, 12 February 1980, mimeo.

31. The Age, 3 September 1980 ('Police contest the right to be silent').

32. P. Sallmann, 'Victoria's Criminal Courts on Trial' in Laura (La Trobe University Legal Students' Association) 1981. Cf. [1981] Reform 4.

33. The Age, 5 November 1980; Melbourne Herald, 4 November 1980.

34. P.A. Sallmann, 'The Police and the Criminal Justice System', (1981) 14 Aust & NZ Journal of Criminology 23, 38.

35. The Public Service Board (Victoria), Report of the Police Service Board, Determination 308, 1978-79, Reasons for Decision, 1979.

36. Courier Mail, 30 October 1980, 5.

37. Committee of Inquiry into the Enforcement of Criminal Law in Queensland (Mr. Justice Lucas, Chairman), Report, June 1977, para. 24, cited in Queensland Council for Civil Liberties, 'Police Malpractice : a Judicial Response', mimeo, 10 December 1980.

38. Australian Law Reform Commission, Discussion Paper No. 16, 'Reform of Evidence Law', 1980.

39. Alexander v. The Queen, unreported, High Court of Australia, Print, 8 April 1981.

40. P. Softley, 'An Observational Study in Four Police Stations', Research Paper No. 4 for the Royal Commission on Criminal Procedure, cited with discussion in T.H. Smith, 'An Approach to Criminal Evidence Law Reform', in Papers, University of Sydney, Institute of Criminology, Seminar, Criminal Evidence Law Reform, 29 April 1981.

41. Softley, 74-5.

42. Baldwin and McConville, 22.

43. See generally Kirby, n.19.

44. D. Biles, 'Imprisonment and its Alternatives', (1981) 55 ALJ 126, 130.

45. D. Chappell, 'Sentencing Reform and the Issue of Uniformity', mimeo, 1980.

46. Bazelon, 16.