

ACPC ELEVENTH BIENNIAL CONFERENCE

POLICING A DEMOCRACY

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The key-note address was delivered by Mr William Clifford, the Director of the Australian Institute of Criminology. Throughout his address Mr Clifford emphasised the need for a balance between, on the one hand, individual freedoms and, on the other, adequate police powers for the control of crime. In a democracy great stress is placed on freedom. Yet crime is one of the prices which must be paid for this freedom.

It was pointed out that, historically, the police have regularly encountered resentment and opposition. Distaste for official police forces is long-standing. In addition to this, the police must cope with unrealistic community expectations. They are required to enforce a mass of laws. They must 'cut corners' to do what is expected of them. Hard decisions must be made about the extent to which the police should be permitted to 'bend the rules' in order to prevent crime. When criticised for a failure to contain crime, it is a natural reaction for the police to call for greater powers. Mr Clifford also drew attention to the fact that, in a democracy, the police can all too readily become a beleaguered and isolated group.

Having assessed the role of the police in a democracy, Mr Clifford made a series of recommendations for the future. These included the following:

- * More information should be assembled about police effectiveness. There is a need for a deeper understanding of the role of the police. Unexamined beliefs should be tested. Cost effectiveness research is needed to examine how money is being spent on the police and to scrutinise the benefits accruing from different types of expenditure.
- * There should be greater public participation at the higher levels of the police.
- * Bias in the criminal justice system should be examined. In some ways the operation of the system makes bias inevitable.
- * There is a need for all those involved in the criminal justice system to have higher levels of education.
- * Attention should be paid to the role of private security organisations, the work of which is expanding because the police cannot meet all the demands placed on them.
- * Greater management skills are needed in the higher levels of the police forces.
- * Better public relations should be fostered, although this is difficult in view of the way that the media operate.
- * Independent prosecutors should replace police prosecutors.
- * More attention should be paid to the special skills needed to control riots and demonstrations.
- * The police should consciously develop their role as a reliable 24-hour social service.

A commentary on Mr Clifford's paper was provided by Professor J.A. Passmore, Emeritus Professor, History of Ideas

Unit, Research School of Social Studies, Australian National University. Like Mr Clifford, he emphasised that there is not a natural harmony between the police and the public in democracy. In Western countries the powers of the police have long been viewed with suspicion. Although it is sometimes said that in British countries the man in the street trusts and respects the police, the questions which must be asked is *which* man in *which* street? At one time the middle class trusted the police but the working class did not. Now, however, members of the middle class are becoming sceptical. Perhaps this is because of greater middle class contact with the police as a result of apprehension for traffic offences and in demonstrations. Further, the police image is changing. The Professor suggested that there are two reasons for this:

- * Patrol patterns have changed and the police have disappeared into cars. As a result, police officers are no longer known as individuals.
- * Media reports, films and books now present the police in a different way. They are frequently depicted as breaking the law and engaging in violent acts.

The Professor also drew attention to the deteriorating relationship between the police and young people. This is an ominous sign, for anti-police attitudes will remain with these young people into adulthood.

(t) Mr Bailey, head of the Commonwealth Human Rights Bureau, outlined the long history of the Human Rights Commission Act 1981 (Commonwealth). The first Bill — a comprehensive Human Rights Bill — lapsed when Parliament was dissolved in 1974. Further Bills were introduced in 1977 and 1979. However, in 1981, after eight years activity, the present Act was passed. The length of the legislative process indicated, Mr Bailey said, just how difficult and controversial the area of human rights is.

He listed a number of problems raised by a consideration of legislation dealing with human rights.

- * **Nature of human rights.** Human rights are a difficult and controversial area of the law. Sensitive issues, with strong political and emotional overtones, are raised. Vigorous debate rages around matters like the right to life, to freedom of association and privacy. These are areas in which the courts have traditionally been very cautious.
- * **Conservatism.** The community is cautious when it comes to legislating for human rights and hesitates before changing the ground rules. People fear that precise legislation will result in the reduction of rights.
- * **Legislative power.** Laws are passed by those in power and naturally tend to reflect the views of a particular group. Yet human rights are important to all. There should be no change in the law unless it is clear that improvements will result.
- * **Nature of federal system.** The inexorable requirements of the Constitution must be observed. The powers of the Commonwealth are limited. Perhaps each jurisdiction should assume responsibility for legislation in the area of human rights rather than seeding a nation-wide approach.

A piecemeal approach might be preferable in waiting for widespread agreement.

Mr Bailey also discussed the difficulty of defining human rights. He suggested a three-fold classification:

- * legal rights such as the right to vote;
- * rights in the process of formation, such as the right to representation by a lawyer; and
- * indistinct rights which are really fundamental interests not enforceable at law.

The role of the new Human Rights Commission was then explained. The Commission was described by Mr Bailey as 'a midwife of human rights law'. Under the Act it has a number of functions:

- * To review Commonwealth laws and actions and practices under those laws. It must determine whether these laws and practices are consistent with the international instruments appended to the Human Rights Commission Act. If inconsistencies are found the Commission will make recommendations as to necessary changes.
- * To inquire into complaints regarding the violation of human rights.
- * On its own initiative to inquire into and report on matters affecting human rights.
- * To promote understanding and discussion of human rights.

Finally Mr Bailey emphasised the importance of a Human Rights Commission in a modern democracy. The state is intervening in more and more areas of its citizens' lives. Yet the more we ask the state to do, the more we must insist on the protection of human rights. Governments are constantly being made more accountable. The Human Rights Commission has an important role to play in setting standards for the making and administration of Commonwealth laws.

Like a number of other speakers, Senior Inspector John Avery of the New South Wales Police Force, emphasised the complexities and difficulties of the tasks facing the police in a democratic society as 'achieving an acceptable level of tranquility in the community'. Pursuit of this objective involves the police in the performance of a number of tasks:

1. Protection of life and property.
2. Prevention of crime.
3. Detection of crime and apprehension of offenders.
4. Prosecution of offenders.
5. Maintenance of public safety where this is threatened by accident, foolhardiness, crowds, or disaster.
6. Control traffic.
7. Establish and maintain close co-operation with the clerical and administrative supporting services within the Police Department and with other Government Departments and organisations working in related fields.
8. Pursue a continuing programme of development for all police.
9. Maintain an action based research programme directed toward the identification of improved force objectives, strategies and tactics and to provide source material for law and administrative reform.
10. Provide a central registry search and communication service for missing persons and those who have been the victims of tragedy and disaster.
11. Where required, exercise non-police regulatory and service functions of government where the policeman is the only appropriate responsible officer available.

The Inspector pointed out that the nature of our society, particularly the impact urbanisation, has rendered police work more difficult. City life is marked by insularity and anonymity. People play increasingly specialised roles. An example of this is the development of the social work profession, the members of which perform the tasks previously per-

formed by family and friends in smaller communities. Also there is now more questioning of the social order and of authority. The police must be sensitive to the changes which have occurred and able and willing to adapt to them. The police must actively concern themselves 'with the socially catastrophic consequences of unordered intensive urbanisation'.

Attention was drawn to different types of analyses of police work. One form of analysis concentrates on law enforcement and peacekeeping and the provision of wide range of services. Another type of analysis classifies police work into reactive and pro-active. Reactive policing involves responding to calls from the public, and can be described as 'fire brigade' policing. Pro-active policing is preventative policing; it requires omnipresence and high visibility.

Mr Avery then dealt with the need for community involvement in police work. The police depend on the public for information and support. But, as he pointed out, the police must be prepared to respond adequately to any increased public participation. Any program which generates public interest and involvement will soon collapse if the public are met with rudeness, ineptness, indolence or disinterest. Another aspect of contact with the public is the need for greater police involvement with research. 'We police must overcome our inhibitions about working with researchers,' Mr Avery said.

As a means of promoting greater interaction between the police and the public, Mr Avery suggested the formation of social safety councils. These would allow police and members of a local community to come together to discuss problems. Each side would benefit from the information provided by the other. Representation on the council could come from the local government authority, business people, sporting organisations, service clubs, ratepayers' organisations, church groups and the like, together with the inspector of police, his senior uniformed sergeant, detective sergeant, traffic sergeant and licensing sergeant. If the council met quarterly and the meeting was publicised and open to the public it would provide an opportunity for citizens to put ideas and propositions in the area of social control and discuss local social issues which might benefit from police assistance and involvement. Complaints about the police should still be forwarded to the office of the Ombudsman, the police commissioner or the relevant official channel, for to use this meeting for this purpose would create disharmony, but it would be a useful arena to discuss police strategy and objectives and get citizen reaction to them. It would provide an avenue for people who were reluctant to approach the police themselves to furnish information to the police.

Commenting on Inspector Avery's paper, Inspector John Murray discussed the problem of measuring police effectiveness. It was pointed out that Inspector Avery had discussed police objectives and it is desirable that success in achieving those objectives should be measurable. In the past the tendency has been to look at crimes cleared, but this is an inadequate measure for success. A rise in reported crime might not reflect police effectiveness. More crime coming to notice might indicate a change in police policy or greater willingness to report. Also crime has natural peaks and troughs. And there is the continuing problem of the dark figure: we have no way of knowing how much crime there is in the community. Suppose other objectives, such as the delivery of services, are accepted. How do we measure achievement of these? It is difficult to measure community satisfaction. Even more difficult is assessment of preventive efficacy. By definition crimes which have been prevented do not show up and so it is not possible to measure how effective the police are at preventing crime.

Inspector Murray then discussed the police image, particularly in the minds of the police. Catching or even seeing criminals occupies a very small part of their time. The Inspector spoke of the way in which a TV nourished image can affect the behaviour of young police. It is easy for a young constable to engage in role-playing and to see himself as a crime fighter. Also if he finds that he is too inexperienced to handle patrol work he can adopt an aggressive approach and see it as demeaning to admit he is wrong. It is not only a question of training but also of maturity, discretion and experience. Awareness of problems which can arise when young officers are on patrol has led the South Australian police to give patrol work a higher status and not to assign it to young, inexperienced officers. Patrolwork is not, it is felt, the area in which to start a career. Young officers should be specially trained for this work and should share patrol with older, experienced colleagues.

Mr Murray also stressed the value of a multi-disciplinary approach and gave as an example the Crisis Care Unit run by the Department of Community Welfare. Police called to a case of domestic violence can hand such a case over to this unit and thus reduce the risks which arose in the past when the police left the scene.

Ms Gamble, of the Law School, Australian National University, explained that lawyers give a precise and narrow meaning to the term 'the rule of law'. Dicey identified the following characteristics of the rule of law:

- * the absolute predominance of formal, regular law as opposed to arbitrariness or resort to broad discretionary powers;
- * equality before the law; and
- * the emergence of constitutional protections from the law of the land.

In summary, the ideal of the rule of law means that the government in all its actions is bound by rules fixed and announced beforehand; such rules make it possible for a citizen to foresee with fair certainty how the state will use its coercive powers. In the area of the criminal law the application of the rule of law means that a person should be punished only for the breach of a clearly stated prohibition. It also means that penal laws should be strictly construed and should never have retrospective effect.

The classic formulation of the rule of law has been subjected to two types of criticisms. First, it can be argued that the rule does not apply to our complex society. The rule assumes the supremacy of the legislature, whereas today the legislature has delegated much of its authority to a wide range of administrative agencies. Thus many matters are not determined on the basis of formal, public laws, or are they handled by way of open, court-room procedures. Secondly, it has been claimed that in a number of areas — notably the area of civil liberties — the rule of law is not observed.

Ms Gamble then examined compliance with the rule of law in Australia. Examples of formal compliance are not difficult to find. In all Australian jurisdictions much of the criminal law has been put into statutory form. Thus the law in this field is made known and theoretically can be discovered in advance. However, in contrast, there is in Australia today much administrative decision-making which, though not technically in breach of the rule of law, is not in accord with the spirit of the rule. As an example Ms Gamble cited *Green v. Daniels* (1977) 13 ALR 1.

Administrative decision-making occurs in a number of areas relevant to the criminal justice system. For example, parole boards exercise wide discretion, and, notwithstanding the existence of legal aid schemes, not all citizens have equal access to legal representation. Further, it is simply untrue to assert that all criminal laws are clearly stated and readily dis-

coverable. In many areas of the criminal law it is extremely difficult to ascertain what is the law.

Finally Ms Gamble dealt with a misconception about the term 'the rule of law'. It is not, she pointed out, a synonym for law and order, or for respect for the law.

Commenting on Ms Gamble's paper, Mr Rodney Purvis, QC, pointed out the need to look not only at the substantive law, but also at the way it is applied in our society. In a number of areas, he said, the implementation of the law lacks the certainty demanded by the rule of law. He drew attention to the following stages of the criminal process:

- * arrest;
- * procedure following arrest;
- * bail;
- * procedure by which cases are brought to court, especially the choice between summary proceedings and proceedings by way of indictment;
- * remand;
- * trial procedure; and
- * sentencing.

Mr Purvis drew particular attention to the sentencing stage and commented on great disparities in sentencing. There is, he said, no certainty in the law relating to punishment. Attention was also drawn to the fact that, notwithstanding legal aid and public defender schemes, not all individuals have ready access to the courts or to appropriate legal assistance.

Mr David Murray, of the Welfare Branch of the Department of the Capital Territory, spoke on the subject of after-care in the A.C.T. He explained administrative and government arrangements in the Territory in order to make members of the conference aware of the more important features of the A.C.T.'s criminal justice system. Three Commonwealth Departments — the Departments of Administrative Services and of the Capital Territory and the Attorney-General's Department — are involved in the operation of this system. Mr Murray also noted some of the characteristics of the A.C.T. population. The 1976 census showed that the population is young, well educated and relatively affluent.

Included in the Welfare's Branch's functions is responsibility for the operation of the Belconnen Remand Centre and the Quamby Children's Shelter. The practices in the remand centre are, Mr Murray pointed out, based on United Nations standards. The absence of a prison in the A.C.T. is a controversial issue. Attention was drawn to the Australian Law Reform Commission's analysis of the arguments for the establishment of a prison in the A.C.T. If a prison were built this would permit the Commonwealth to create a model institution. Further, the fact that the A.C.T. is forced to rely on New South Wales facilities is objectionable: the Territory's prisoners are 'transported' to another jurisdiction and A.C.T. authorities lose control over them.

Awareness of this background is necessary for an understanding of the Territory's aftercare system. There are no formal arrangements by which members of the Welfare Branch are able to visit A.C.T. prisoners before they are released from New South Wales prisons. In addition to the particular problems which this causes, there are a number of general problems with the supervision of released offenders. Mr Murray characterised these as follows:

- Problems for the client:
- * the supervision occurs long after the offence;
 - * in many cases the offender's problems have been resolved and he feels that there is no need for supervision;
 - * many offenders do not know why supervision is required;
 - * the member of the Welfare Branch is seen as an authority figure while a volunteer may be seen as a 'nosey parker';
 - * the official supervisor and the volunteer may adopt con-

flicting approaches; and

- * the offender may wish to co-operate but his family express opposition to the idea of supervision.

Problems for the worker:

- * often clients are unwilling to explore their problems;
- * some have very radical views about society and the way it has dealt with them;
- * some clients are unco-operative;
- * authority figure/helper conflict;
- * providing supervision when the client is unsuited to this measure, in particular when the worker made a recommendation against supervision;
- * lack of privacy; and
- * lack of resources, particularly restrictions on overtime.

The Reverend Dennis Johnson, of the A.C.T. Civil Re-habilitations Committee, concentrated on the differing roles of voluntary and government agencies. He stressed the need for a close relationship between the two kinds of agencies. The voluntary worker supplements the work done by the government official. Volunteers have a flexibility which government workers do not. Mr Johnson commented particularly on the inflexibility of the Department of the Capital Territory. He described it as a 'juggernaut' which controls everything in the Territory. He also commented on the low status and difficult position which the Welfare Branch occupies in a multi-purpose Department. Decisions relevant to welfare matters could, he said, be made at senior levels of the Department of persons with no knowledge of welfare issues. Mr Johnson also stated that, though statutory

and voluntary organisations should work closely together, this did not always happen. Some professionals resent volunteers and some volunteers are unwilling to accept advice from professionals.

On the subject of aftercare and the work of his society, Mr Johnson commented that the system would be greatly improved if those who provide aftercare could make contact with their clients *before* they were released from prison he also pointed to the society's need for wider membership in the A.C.T., but stressed the difficulty of finding volunteers with the appropriate personal qualities. Volunteers in aftercare work must be carefully selected and carefully trained. Finally Mr Johnson pointed to the pervasive problem of unemployment and to the need to study this problem carefully.

During discussion of the papers delivered by Mr Murray and Mr Johnson, Chief Inspector Claydon of the Australian Federal Police pointed out the danger of overlooking the needs of the victim. He commented on the fact that such pains are taken to provide support for the offender and urged that the victim should not be overlooked. Judge Grubb pointed out that the Australian Crime Prevention Council had shown awareness of this aspect and had in fact recommended that, Australia wide, a fixed percentage of all fines should be set aside for the assistance of victims. There was also some discussion of the desirability of the police informing the victim of an offence of the outcome of the case.

The title of the paper delivered by Sir Colin Woods, Commissioner, Australian Federal Police, was 'Policing the Police'. Sir Colin noted the increasing demands that the police be made accountable for the way in which they exercise their powers. Concern about policing the police is worldwide. So far as the public is concerned the most controversial issue is whether the police should act as judges and jurors in their own cause. On the one hand is the view that the police should have full control over internal investigations. On the other is the view that an independent agency should investigate the police. Independent review is seen by many as being

necessary to the preservation of community confidence in the police. However, as Sir Colin pointed out, a policy of internal regulation is not peculiar to police forces. He instanced lawyers and doctors as groups which rely on internal procedures. Lawyers and doctors undertake their own disciplinary actions. As noted by the Australian Law Reform Commission in its inquiry into procedures for handling complaints against the police, the problem to be solved is how to develop a system which allows just and thorough investigation while at the same time upholding morale and discipline in the police force.

Sir Colin stressed the difficulty and complexity of investigations into alleged police impropriety. For such investigations to be successful it is essential that persons who are skilled in investigation undertake them. He pointed out how difficult it is to obtain the conviction of a police officer with a previously good record. Assembling the necessary evidence requires great investigative skill and experience. Yet if police undertake the task they must also be an appearance of independence if the community is to accept that the job has been well and honestly done.

With regard to the Australian Federal Police, the Commonwealth Ombudsman provides a degree of independent oversight of the investigation of complaints against the police. In Sir Colin's view the arguments in favour of the police undertaking the initial investigation of a complaint involving a police officer are overwhelming. He gave three reasons for this view. These are:

1. An investigating police officer understands police procedures and the rules under which the police operate.
2. The police officer will have unrivalled experience of such investigations.
3. The investigating officer will derive a certain authority from his rank in what is essentially a hierarchical structure.

There is also another reason for entrusting to the police the initial responsibility for investigating complaints against the police. This is that if any other agency becomes involved at an early stage this could, as he put it, muddy the waters and therefore make subsequent investigation more difficult. If this occurs the likelihood of convicting the police officer concerned is reduced. It is therefore, in Sir Colin's view, appropriate that the Commonwealth Ombudsman should exercise a residual power. He pointed out that the fact that the Ombudsman could carry out a further investigation was an excellent spur to the detectives carrying out the initial work. The possibility of a re-investigation stimulates a careful inquiry. With regard to the police role, however there is a need for the highest possible standards. Experienced, trained investigators must be employed. In short, it was Sir Colin's opinion that the best people to undertake the task of investigating the police are the police themselves. However, combined with police procedures there must be a system promoting openness and therefore ensuring public confidence.

Commentary on the paper by Sir Colin Woods was provided by Dr Alan Preston from the office of the Commonwealth Ombudsman and by Mr Bob Page, Secretary of the New South Wales Police Association. Dr Preston paid tribute to Sir Colin's role in working with the Commonwealth Ombudsman towards the development of investigative procedures. In the view of Dr Preston investigative procedures with regard to complaints against the police should exhibit two principles. The first of these is what he described as 'the first bite of the cherry'. He agreed with Sir Colin that the police have the experience and expertise to conduct investigations involving complaints against the police. He therefore agreed with various arguments advanced by Sir

Colin as to why the police should adopt the initial investigative role. He pointed out that such an approach is consistent with the approach adopted by the Commonwealth Ombudsman with regard to other Commonwealth authorities. It is normal practice for these authorities or agencies to conduct their own inquiry and therefore to be given 'the first bit of the cherry'.

The second major principle which must always be observed is that the Commonwealth Ombudsman must avoid being or being seen to be a rubber stamp. However, having said this, Dr Preston pointed out that no investigative procedures are perfect. Some complaints simply cannot be resolved. Therefore Dr Preston was in broad agreement with Sir Colin that the police should undertake the initial investigative work with regard to a complaint against one of their members and that the Ombudsman should properly play a residual role.

Dr Preston then went on to draw a distinction between complaints directed towards police practices and procedures, and complaints directed towards the conduct of individual officers. He pointed out that the tendency in the public mind is to concentrate on the conduct of individual members but experience shows that the Ombudsman's office is much more likely to deal with complaints relating to departmental procedures. It is, he said, a rare occurrence for the Ombudsman to consider a case of individual misconduct. He stressed the importance of this dichotomy between investigations into departmental procedures. Of the complaints handled by the Commonwealth Ombudsman, only a limited number have related to individual police officers. Most have been directed at departmental procedures. Dr Preston also made some general comments on the role of the commonwealth Ombudsman. He pointed out that it is not for the Ombudsman to take sides. Some people believe that it is for the Ombudsman to support the complainant but this is not how the system works. Secondly, he conceded that the Ombudsman must work in secret and in private. The Commonwealth Ombudsman is unable to make public comment. Also he is not in a position to disclose sensitive information.

Dr Preston returned to the notion of irreconcilable conflicts. There are some complaints which cannot be resolved. The community must simply accept that this is a fact. He gave as an example a dispute between a police officer and a citizen. The police officer may assert that one thing occurred and the complainant may assert the opposite. Yet if there is no independent witness there may be no way for the Ombudsman to choose between the two versions. Dr Preston stressed that the community must accept this even though it is a difficult notion with which to come to terms. Certainly individual complainants find it difficult to accept that it is sometimes impossible for the Ombudsman to resolve a dispute.

The fourth point related to sceptical and hostile complainants. Dr Preston pointed out that it was the experience of the Commonwealth Ombudsman that these had been very few in number. It is difficult to identify such complaints at the outset. They do cause problems for an agency such as the Ombudsman for they result in substantial cost and a diversion of resources from more important matters.

Comment was also made on the standing of complainants. For example, a complaint may be made by a convicted drug offender. This must not, Dr Preston emphasised, affect the way the case is handled by the Ombudsman. Every citizen is entitled to have his complaint investigated whatever his standing or status.

Mr Page pointed out that by reason of the nature and intensity of police contacts with the public, complaints are inevitable. The police are in an exposed and difficult position. It is not the policy of his Association to seek to shield mem-

bers who have acted improperly. However, Mr Page said that his Association does insist that members against whom a complaint is brought should have as many legal protections as any other person in a similar situation. He pointed to the importance of effective and acceptable complaints procedure. If these procedures are unsatisfactory police morale is seriously affected.

Mr Page then went on to discuss complaints procedures presently operating in New South Wales. He pointed to the serious problems caused by delay. If an officer is under investigation this can delay his promotion. He emphasised the importance of a quick resolution of complaints against the police. He stated that in general the New South Wales police were experiencing serious morale problems as a result of the new complaints procedures. He pointed out that complaints procedures to be effective and satisfactory must be acceptable to the majority of police. When the new legislation was introduced into New South Wales an undertaking had been given that it would be reviewed. Mr Page thought that the time for such a review had come. One serious criticism of the present legislation, said Mr Page, was that it does not provide for the informal and speedy handling of certain complaints. He pointed out that when a complaint is made this puts into motion a careful and thorough investigative process. Many matters he believed could be handled more simply and more quickly. In general, he and his members believed that the legislation is oppressive and has a number of disturbing features. He pointed out that a large number of complaints against police officers related to their handling of traffic matters. In his view it is clear that motorists have tried to influence the result of their case by lodging a complaint about the apprehending officer's conduct. Members of his Association also feel very strongly that they should have the same rights as other Crown employees under the Ombudsman's Act. In fact individual police officers do not, for example, have a right to the information which is furnished to the Ombudsman regarding their behaviour. In contrast other Crown employees do have this right in New South Wales.

Reference was also made to the difficulties which can arise in the course of criminal proceedings. On occasions defence counsel will force detectives under oath to admit that they are under investigation. This obviously has an adverse effect on the evidence which they present. Mr Page also asserted that the police do not, as do other citizens, have a right to remain silent when they are under investigation.

Dr Tony Vinson, the Chairman of the New South Wales Department of Corrective Services, spoke of concepts which he described as having the potential to re-shape the prison system. Profound changes, he said, are occurring in prisons in Australia and overseas. The basic assumption underlying these changes is that inmates rights and freedoms should be limited only to the extent necessary to maintain security and order. There is growing acceptance of the view that a prisoner is a citizen with rights. Yet putting this view into practice is difficult. Dr Vinson drew attention to certain problems:

- * sluggishness of staff in accepting change;
- * the political and industrial advantages which staff can obtain from exploiting the changes;
- and
- * possible adverse effects on prison security.

Dr Vinson then asked the question why is it necessary to bother to increase inmates' freedoms. The answer to this question is that prisons are part of the wider community. They are not isolated from social change. Greater freedoms and an increased concern for rights outside the walls should be reflected inside the prison. However, there are also sound pragmatic reasons for increasing prisoners' freedoms. All but

Prisoners will return to the community and will be allowed upon to exercise responsibility. Wherever possible should be given an opportunity to exercise in prison.

Prisoners were drawn to certain basic freedoms which were available in prison. These concern matters such as visits, letters, leave, the right to free expression and free assembly, the right to choose to work or not to work, and to read uncensored literature. Yet the opportunities to make these freedoms available are often limited by resources. Staff shortages sometimes make it impossible to allow prisoners to exercise freedoms. It must be realised that allowing prisoners greater freedom involves the administration in extra costs.

Dr Vinson then considered a number of legal rights. These included a right to legal representation, to fair hearings, to make complaints, to lodge appeals and to vote and to sue. With regard to prisoner grievances, emphasis was placed on the importance of thorough independent review of the treatment of prisoners, the role of the Ombudsman was stressed, as was the need for him to have independent access to prisons. Dr Vinson spoke particularly of the right to vote and the right to sue, allowing prisoners to exercise the right to vote would reflect their new status. It is also important to permit prisoners to bring defamation actions. Dr Vinson expressed the view that if prisoners are granted the right to sue, the media will exercise greater responsibility as to what they print about prisoners. Mention was made of the New South Wales Felons (Civil Proceedings) Act 1981, which is intended to remove certain civil disabilities from prisoners.

Dr Vinson also drew attention to the fact that prison officers occupy an extremely vulnerable position. They may be subjected to allegations by unscrupulous prisoners with nothing to lose. Also prisoners may collude against officers. In spite of these dangers, however, it is most important that the right of an innocent prisoner to make a complaint against an officer be preserved.

Finally, Dr Vinson criticised the media and certain politicians for their tendency to make superficial comments without any understanding of the deeper issues of panel policy. An outcry about the abuse of privileges by one prisoner could lead to the withdrawal of privileges from all prisoners. Dr Vinson commented harshly on certain New South Wales newspapers, whose regard to trust and accuracy he described as 'minimal'.

Commenting on Dr Vinson's paper, Mr Bob Downes of the New South Wales Prison Officers' Association denied that members of his association had adopted a specific ideological stance with regard to prison reform. Any opposition to change which the Association had displayed, he said, has been based on concern about security or about threats to prison officers. He also pointed out that when extra freedoms are given to prisoners this affects all people in jail. The people most likely to suffer are weak prisoners. Prison officers do not suffer as a result of liberalisation in the way that these vulnerable prisoners do. The discipline imposed by prisoners is much more fierce than that imposed by prison staff.

Mr Downes then commented on a number of features of the existing system. The Prison Officers' Association is seriously alarmed about the drug trade in prison. It is also concerned about poor facilities in New South Wales jails. Prisoners are confined together who should be kept apart. Also, although the Association accepted that the Ombudsman had an important role to play, members were concerned about his power to re-open cases after they had been dealt with by the department. Mr Downes cited two cases where prison officers had been punished for breaches of prison rules and then the matters had been re-opened by the Ombudsman.

He said that he found this difficult to understand. Mr Downes added that he believed it was an error not to censor mail. He suggested that random censorship of mail should be employed.

Finally, Mr Downes expressed strong support for work release schemes. He said that release to work is a desirable incentive and is a goal to which all prisoners should work. Prisoners on work release should be in a special category and should be subjected to minimal restrictions.

During the discussion which followed Dr Vinson's paper, Dr Vinson pointed out that the differences of opinion which exist on the subject of prison reform indicate how complex and controversial the matter is. He agreed with Mr Downes that prison officers do not consciously develop an ideological stance, but, in Dr Vinson's view, they are regretful of the passing of the old order and have difficulty accepting the granting of greater freedoms to prisoners. The prison officers, said Dr Vinson, feel concern for the passing of certain values. In this they reflect wider community feelings. On a number of points Dr Vinson expressed agreement with Mr Downes. He agreed that prisoners are ruthless with each other and commented that sometimes this ruthlessness challenges the philosophy which he espouses. He also agreed that drugs represent a serious problem in prison. However, they are also a problem in the wider society. Dr Vinson shared Mr Downes' view on work release. He commented that it was 'tragic' that it had not developed as it should. Much of the blame, he said, rests on the media whose sensational coverage of a small number of cases has led to cut-backs in the scheme. Dr Vinson was also critical of the detention of short-term prisoners — particularly fine defaulters — in maximum security prisons. With regard to prisoners at present in New South Wales he pointed out that three out of 10 are illiterate, and that it costs \$27,000 to keep a man in maximum security for a year in New South Wales. Mr Downes made the general comment that it is necessary to look at the costs of extended freedoms and to ask whether these costs are acceptable. For example, greater freedoms in prison might lead to weak prisoners being harassed. If to avoid these pressures a prisoner escapes, is this an acceptable cost?

Mr John Basten of the Faculty of Law of the University of New South Wales emphasised the need to avoid talking of *prisoners'* rights. A prisoner is a citizen and retains the rights of a citizen. If the state wishes to assert the contrary, it should do so explicitly. It is wrong to assume that certain disabilities automatically flow from prisoner status. It is necessary, therefore, to identify restrictions which may legitimately be imposed on prisoners. However, attention should not be confined to restrictions. An effort should also be made to identify the responsibilities which the state assumes when it incarcerates a person. The state must accept responsibility for meeting an inmate's basic human needs. Hence it must provide food and shelter, fresh air, clothing and medical treatment, and must ensure an inmate's safety. It must also have regard to secondary rights, such as the right to work and to enjoy communication with the outside world. Finally, it must respect political rights such as legal protections and the right to vote and to assemble.

Mr Basten then dealt with two political rights. In New South Wales, he said, prisoners have a right to vote if their sentence is less than 12 months. Yet this right has been ignored and eligible prisoners have not been given an opportunity to vote. Mr Basten estimated that at any one time one-third of the prisoners in New South Wales prisons are entitled to vote but are not able to do so. He said that this matter requires immediate attention. He then spoke of what he described as a 'legal vacuum' in prison. He drew attention to the need for legal remedies and procedural protections to

permit prisoners to enforce their rights. He said that often prisoners are unable to enforce the rights which they do enjoy. He drew particular attention to the loss of civil rights suffered by a person convicted of a felony. Like Dr Vinson, he referred to the Felons (Civil Proceedings) Act 1981. However, Mr Basten criticised the Act. Although it removes certain disabilities, under the new Act a felon must obtain court leave to institute proceedings. This places an unjustifiable burden on the felon.

Comment was also made on the impact of administrative decision making. This should be open to review. Prison administrators are able to make decisions on such matters as placement, classification, transfers and segregation. Hence the administrators have the power to determine the nature of a sentence of imprisonment. Like other speakers, Mr Basten also expressed concern about serious disparities in sentences. Like other speakers, too, he discussed parole. He pointed out that judicial concern for a prisoner ceases when he is led from the court. However, although describing parole as a 'blight on the legal system', he did not consider that it should be abolished. He felt that it should be retained, but that new procedures should be introduced to protect inmates' rights. Overall, said Mr Basten, there is a need for greater accountability on the part of the prison administration. A system of checks and balances should be introduced. He particularly emphasised the role of the Ombudsman and the need for increased prisoner access to the courts.

The final paper of the conference was presented by Mr Fiori Rinaldi, Senior Lecturer in Law at the Australian National University. Like Mr Basten, he was critical of talk of 'prisoners' rights'. Efforts should be made to indicate precisely what is meant by the term. A concern for prisoners' rights may take the form of efforts to restore to prisoners those civil rights which are lost following a conviction. Or it may take the form of trying to give prisoners a social organisation similar to that enjoyed on the outside. This, however, is really a concern with amenities and comforts and represents an appeal to humanity and decency. Another approach is to urge that prisoners be given greater access to the courts. Mr Rinaldi pointed out that, though access to the courts is urged as being necessary to protect prisoners' rights, in fact judges and magistrates have no special qualifications to make rulings unless specific legal issues are involved. Mr Rinaldi did agree that there should be speedy mechanisms for resolving grievances.

Mr Rinaldi devoted most of his attention to what he regarded as a prisoner's most basic right, the right to be subjected to no more punishment than is fair. He stated that this right is not observed in Australia. In his view Australia has a 'primitive' penological system and sentences of imprisonment are far too long. In his view the imposition of long term of imprisonment reflects the ignorance of magistrates and judges. There is a need for judicial education. Australia's criminals are, said Mr Rinaldi, asked to serve longer terms than are imposed in other countries. The remedy does not lie in tinkering with the parole system but in training judges to behave fairly. The problems of judicial incompetence, bias and ignorance should be tackled. Judges and magistrates should be required to give reasons for their sentences. Until judges and magistrates become aware that the penalties which they are regularly imposing are excessive, prisoners will continue to be deprived of the basic right to fair punishment. A further need is for lawyers' training to be improved so that they will recognise excessive sentences and disparities in sentences.

Finally, Mr Rinaldi expressed the view that Parole Boards should be abolished. These boards, he said, have no legitimate function. The parole system is inhumane and the philosophy

on which it is based is unsatisfactory. A prisoner should be able to calculate his release date the day he enters prison. Mr Rinaldi therefore urged that a system of determinate sentencing be re-introduced.

Summing up the conference, Dr John Seymour, of the Australian Institute of Criminology, said that a number of themes had emerged from the various papers. These could be grouped under the following headings:

The Nature of Australian Society Today

Several speakers commented on the nature of Australian society and indicated the implications for the criminal justice system. The old order is changing. We live in a volatile society in which much is being questioned. This creates problems, both for the police and for prison officers. Authority is being challenged. New freedoms are being asserted. The police, for example, must cope with the assertion of the right to demonstrate. Prison officers must cope with articulate prisoners claiming the rights and freedoms of citizens outside the walls. Thus the criminal justice system must be seen as part of the wider society. For Mr Clifford, crime is one of the costs of our form of society. Another is an uninhibited and sometimes irresponsible press. The power of the media is immense. These are facts of life in our society. A number of speakers drew attention to the impact of the media. Mr Clifford commented on the media's preference for sensational news and its unwillingness to report on the unspectacular, routine performance by the police of their duties. Dr Vinson had some harsh things to say about certain New South Wales papers which had made his job harder. Mr John Murray developed another aspect of this subject when he suggested that some police play the role in which they are cast by the media. This affects the way the public view them and makes their work more difficult. Another aspect of Australian society which drew comment is the loss of community and the adoption of impersonal, isolated, anonymous life styles. This has had a particular impact on the police. Urbanisation has thrown great strains on them. They must assume roles which in the past were played by members of the community. The small, close knit society is remembered with nostalgia. In such a society people knew each other, and knew the police, as individuals. Professor Passmore lamented the fact that the police had disappeared into their cars. However, it is not only the police who have changed. Society has changed. The impact of the motor car, for example, has made reliance on the local 'bobby' style of policing less appropriate.

Community Participation

Linked with comments about the changing nature of our society were statements that the community must become more involved in the operation of the criminal justice system. Senior Inspector Avery suggested one model when talking of the police. He described the role of social safety councils. However, if the community is to participate more closely in the criminal justice system this requires members of the community to be well informed as to its problems. Again, the role of the media is crucial. Television and newspapers have a duty not to present distorted information. Equally, public understanding demands a willingness on the part of police and prisons to be open about their activities and to make information available.

Formal Controls

Insistence on rights and protections has led to demands for more formal procedures to control the actions of police and prison officers. Old ways of doing things, particularly substantial reliance on administrative discretion, are being

questioned. During the conference there was much discussion of the need for, and the problems associated with, formal review procedures. Procedures for ensuring that complaints against the police are dealt with fairly were discussed, as were procedures for ensuring that prisoners had access to the courts. Particular attention was paid to administrative procedures in prison. It was felt by a number of speakers that methods of dealing with alleged breaches of discipline in prison and the making of parole decisions should be subject to review. In short, much emphasis was placed on official accountability. A broader perspective was adopted by Mr Bailey. The proposed Human Rights Commission will, with regard to Commonwealth matters, provide a different level of oversight. Yet this formal organisation to protect rights must proceed with caution in what is a complex and controversial area.

Balance

Throughout the conference there was emphasis on the need to balance the rights of the offender against those of the community, the concerns of police and prison officers against the rights of those with whom they deal. A number of speakers drew attention to the importance of making decisions as to the acceptable costs of criminal justice policies. Often we must 'trade off'. For example, the imposition of greater controls on the police might make them less effective, but this might be a necessary price in a democracy.

Training and Qualifications

The changing nature of our society is imposing greater demands on police and prison officers. They must have the training and qualifications to help them to adapt to change. Again the theme of community involvement emerged. Several speakers expressed the view that the community should be involved in training police and prison officers. If 'in house' training is all that they receive, a narrow perspective can result.

Vulnerability

The police and prison officers are particularly vulnerable. They do a difficult and demanding job. It is important that society recognise the difficulties which they face and adopt realistic attitudes to the problems which they face in a rapidly changing democracy.

Conflict and Compromise

Throughout the conference there was an awareness of the conflicts inherent in a criminal justice system. Resolving these conflicts requires understanding and a willingness to compromise.

(†) Paper published ACPC Forum, Vol.5, No.2 May 1982 (Page 63).
"Difficulties of Legislating for Human Rights" — P.H. Bailey — Commonwealth Government Human Rights Commission.

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