

DISCUSSION

Brett Collins, Prisoners Action Group

We prepared this paper because we feel that the debate about the issue of police investigation has been diverted in a very dangerous way. We have raised the issue on the public agenda for a long period as a major campaign. The points we have been making have been accepted by authorities in almost all jurisdictions, so the promised legislation in N.S.W. should now be finalised and implemented in the spirit of the concessions.

We are unhappy about the police attempt to alter reality where they would suggest that videotaping of interviews was their idea and initiative instead of the final result of decades of exposure of the practice of police verballing.

This understanding is extremely important and indisputable. Numerous inquiries both overseas and in Australia have all said that the police have acted illegally and exploited and abused the trust put in them. Any reform must take into account that the police have been found guilty of that abuse and must assume that the police will continue to behave in that way unless the new structure prevents them.

On that basis the proposed videotaping must have effective protections built into it and cannot give more power or opportunity to the police. It is the obligation of everyone with honesty and goodwill or who purports to have that, to speak out and not to ignore what amounts to an attempted hijacking.

Our paper lays out necessary conditions in a very conservative way, not doing more than drawing on settled principles and laying out rational practical methods of securing them.

Paul Byrne

I agree with almost everything that you have said Mr Collins but there are a couple of matters I think should be said. In your paper that you have distributed you said that every New South Wales Attorney-General for at least the past 90 years has acquiesced in the current situation by inaction. I think it is probably fair to put on the record here that before December 1984 the then Attorney-General was due to leave New South Wales to go to London and to Scotland to return early in January of 1985, and during that trip to examine all the installations that were currently in England and in Scotland at that time using either audio tape equipment or I think some of them were experimenting at that stage with video tape equipment. It is a matter of record of course that Paul Landa died in November 1984 so that trip wasn't taken but had he gone, knowing his enthusiasm for this particular reform, I think it is fair to say that at least the proposal would have been enthusiastically put before the cabinet early in 1985. His attitude towards the scheme was one of complete enthusiastic endorsement. It is simply an accident of history that he didn't get the chance to do anything about it.

Ian Fraser

My name is Ian Fraser. Unlike Brett, who was telling you he got convicted on a verbal, well I got verballled in 1978 and I beat mine but still the memory still sticks

there and what we have been talking about here this afternoon has all been theoretical. We are talking about the law, we are talking about things like giving rise to judicial discretion to exclude when in fact it is very rarely ever exercised and I think to even talk in those terms is just a farce.

My verbal. I was arrested in Annandale and taken over to Newtown police station and after a couple of back-handers and a belt or two here and there when I have hit the deck he has run over and put his boot into my stomach and said "That one is for Ellis" - Jack Ellis we are talking about - and he said "Throw him in the cells". Well they threw me in the cells and about a month later my solicitor says "you have been verbally" and I was charged with shooting offences and the verbal was "Bad luck I missed this time I won't miss next time" and this is a real situation. Now the civilian witnesses fell apart so I beat the case. Lucky for me otherwise I would still be sitting out there. This sort of thing has been going on for years.. In 1973/74 I wandered around Maitland Gaol with Duggan taking up information about who had been verbally and who by and it is always the same old names. The Armed Hold Up squad from the early 70s - everyone of them was a verbal. I say that without doubt and you still see the same old names popping up. Julie Wright, she has been verbally we intend to be there and let the public know about this. These are people. They are being buried by lies and I am sorry I feel angry about it. Thanks very much.

Greg James, QC

The Institute is once again to be congratulated on producing a seminar which perhaps it is timely to remind everybody is entitled "Criminal Investigation: The Law Under Suspicion". At least since the decision in the High Court and the subsequent Royal Commission or Commissioner's decision in *Chamberlain* the law throughout Australia has fallen in criminal cases under a degree of suspicion. That suspicion operates in two ways. Firstly, on the adequacy of the conclusions of our criminal trials when they define guilt, and secondly, on their acceptance of modes of proof which have been under attack for some 200 or more years. In particular I refer to the confession, sometimes referred to as the best possible evidence of guilt, sometimes referred to as the most suspicious item in the Crown's armory. What has been said today illustrates a vast breadth of opinion and a debate which has been going on for a very long period of time across the common law world. Confessional evidence is regarded carefully in two ways. Firstly, as to its acceptability in terms of reliability, and secondly in terms of the civilization, as Mr Byrne put it, of the State which admits it in allowing circumstances attendant upon its making to affect its acceptability in court. Perhaps this seminar cannot resolve the problems attendant with its acceptability and attendant upon the circumstances of its making but every step, every constructive step we can take to present corroborated, accurate evidence of this nature, if it is to be used in court, will save valuable community costs and time, and will avoid the suspicion that confessions resulting in convictions were unreliable and the consequence that our system of justice will always remain under suspicion.

Geoffrey Dabb

The only thing I wanted to refer to was a largely factual matter. The Commonwealth is keenly interested in these proceedings. There has been set up a committee reviewing Commonwealth criminal law under the Chairmanship of the

former Chief Justice of Australia, Sir Harry Gibbs. They have published, as most people here probably know, a wide range of discussion papers on all kinds of subjects. Their first Report which came out a couple of months ago was on computer offences and likely to be subject of early legislation by the Commonwealth. The point I wanted to bring to the attention of this meeting is that their second Report is going to be on this very subject and is likely to come out very soon indeed.

Could I just add finally that Commonwealth investigators, for the Commonwealth police, have the problem of investigating cases and preparing cases across a wide range of jurisdictions and we are now seeing the adoption of different rules in different jurisdictions with legislation in Victoria, the Northern Territory, some earlier legislation in South Australia which creates a particular problem. I had a quick ring around the various jurisdictions in Australia to see the background against which some of these rules are operating. In the *Williams* case I think it was fairly clear because the error in not putting the person before the court emerged pretty clearly - because I think there were windows of opportunity for a person to be brought before a court at 10 a.m., 2 p.m., or 4 p.m., and they missed these consecutive windows.

There are jurisdictions in Australia or places in jurisdictions where there is an obligation to bring a person before a court as soon as practicable, or without undue delay. Given the practical circumstances of non-availability of courts or justices it could mean that a person is in custody for one day or possibly two days, depending upon the time of arrest, even if the *Williams*' rules apply. So if someone was interested in doing measurable research on this subject I think you would find a wide range of actual situations.

Dr Jeff Sutton

I just wanted to make a comment on something Stephen Odgers said and then go on to another matter. It is a question of the use of truth in court, and the pursuit of truth by the court. One of the difficulties I think is that the court's capacity to seek truth is limited by the matters which are brought before it, and consequently it doesn't quite stand in relation to its data as does a scientist who has the further requirement to seek out the entire population of possible instances and then draw from them - an unbiased sample - and then make inferences from that set. So the protection in science is on the methodology and although I can agree it also falls flat sometimes and needs the kind of treatment that the court can provide. Nevertheless, to put the issue of finding the truth solely in the hands of the court in the case of criminal investigation is, I think, to miss another point. That is, that the process of criminal investigation itself is by way of an investigation and has certain parallels to the pursuit of science, or perhaps it might be said ought to have in a sense that the court and the adversarial system throws upon the accuser the requirement to put up the best possible case no matter what, and to restrict this evidence as a scientist would be required not to do in order to put forward a case which would be persuasive in court. Similarly of course the defence must do the same to the best of its ability.

Therefore, I think one issue which ought to be brought to notice here is that in looking at the protections which an accused person might have, the court must stand above all as the final point of appeal, of course, but we must also require of the criminal investigation process a professional capacity, a pursuit of truth, and a desire to place in the open as far as possible. And if not entirely in the open, able to be examined by other persons who can at least make some independent view of whether the methodology is satisfactory. We ought to be requiring that of police officers and to some degree I think it could be said that the New South Wales police have been moving in that direction, although it might be said, as in the case of the pursuit of the provision of video recordings which is probably the responsibility of others, not as fast as they ought to be. Nevertheless, I think it should be borne in mind otherwise we end up with a sort of view where everything takes place in a kind of gladiatorial battle and the concept of truth is I think not quite accurately presented.

John Kable

I just wanted to make a comment following on Chief Superintendent Drew's observation when he said that philosophically the police had no apprehension, were his exact words, as to the innovative use of electronic recording devices. That was exactly the situation that existed in Tasmania many many years ago and nothing happened for a very long time. The catalyst at home to the introduction of the video recording of interviews was an enquiry into police officers who were alleged to have fabricated a breathalyser reading and when those two officers were interviewed by Senior Inspectors they wired themselves for sound. Their sworn statement before the enquiry was that almost every police officer who had been interviewed by the Internal Division of the Tasmanian Police Force in the past four years had wired themselves for sound. That the records of interview showed not necessarily fabrications but that the type of conversation hadn't been recorded came as no surprise to those us who practice at the criminal bar. The person who conducted the enquiry, who was then a legal practitioner and who is now a Supreme Court judge, made the comment that he found it to be very strange that all the police officers who were being interviewed found the need to wire themselves for sound, but that that was not a privilege available to others. Further, an occasion arose when somebody had a voice activated tape recorder in their pocket when they were about to be interviewed and they were divested of this item as it was not seen to be a necessary part of the interviewing technique. The final straw that I believe broke the camel's back was a judgment in fact of Mr Justice Neasey under an Act we have in Tasmania called the *Costs in Criminal Cases Act* the background to which is quite involved and I won't go into it here, but His Honour made an order for costs against the Crown of about \$8,000 with the accused having her costs paid, and that was a front page story on each of the three newspapers in the whole of the State. It thus became clear that the political pressure that had been put on for a number of years and which had failed was then supported by legal pressure from within the courts and in consequence of the results of particular court cases, and thus it was in that environment that we now have certainly in one location - that is Hobart - the videoing of interviews and we are hopeful (we have a bit of a problem with north/south parochialism) it will come to the north of the State soon.

But certainly we were told that we had support there but I observe here, and I sound a note of caution to you, it is not happening. Somebody has got to get things moving so that you almost force the politicians who are reluctant to move into a position whereby they would do something, and there is nothing like, if somebody does the work on the figures at \$6,000 a day for a trial, working out the costs over the twelve months with all the courts you have got here. The figure would be incredible.

Beverley Schurr

In 1984 I was a member of the Consultative Committee on Tape Recording conducted by the Criminal Law Review Division and I remember on Easter Eve 1985, almost four years ago today, there was an announcement that the Criminal Law Review Division supported the introduction of tape recording of confessions. Since then nothing has happened and the only real excuse that I have heard is that 3M has had some production problems up in Silicon Valley somewhere, with a very complex tape recording machine. Since that time of course we have had extended telephone tapping in New South Wales and the police proposing other extensions of the use of technology but there has been no introduction of tape recording and the Council's view at the very least is that there has been a gross misallocation of resources and wrong choice of expenditure by successive governments.

Chairman

Is there anybody here who knows why that delay has occurred? - *No response*
- Any other questions?

John Duff

I suspect that a lot of the delay about this is connected to the corruption in New South Wales. I mean I feel that I have been verballed and I have done some time in gaol on that, and one thing I have differed from a lot of people is that I am middle class, and I was quite shocked to get the verbal treatment. It wasn't until I got into gaol I realised how widespread it was. Why I think it has gone on for so long is because it is a very good mechanism for putting people in gaol and for clearing up crime rates and both politicians and police gain quite a lot of advantage for clearing up crime rates. I can understand why they do not want to get rid of this mechanism and it is only because middle class people get verballed or because something embarrassing happens like in Tasmania this law will change, because while it is being used against working class and illiterate people and criminal classes the verbals are very good technique for doing deals. I mean wonderful deals can be done with the threat of the verbal. I mean you can do deals with say a heroin dealer, "We are going to verbal unless you give up, you know, the top dog". It is just a wonderful mechanism I don't see why we think the police will give this away and I think we all realise while these advantages are there we can cynically go through this whole business. It won't change.

Chief Superintendent Drew

I did say I did not wish to enter the arena of alleged police verbals but I feel with the incidence of the speakers rising tonight it would be remiss of me not to.

It is probably for others to judge just how effective and how ethical the New South Wales police service is but I would like to invite you all to contemplate that the New South Wales police service of 1989 and into their 1990s is a vastly different organisation to the one that existed in New South Wales some five or ten years ago. Probably the best evidence of this is that audio recording is widely used informally within the organisation both for criminal investigations and internal investigations, so I mean we await eagerly legislation which will compel us to carry these things into effect but budgetary restraints being what they are the introduction of video equipment across the State as vast as New South Wales is no small undertaking and it would require substantial supplementation.

Brett Collins

I just want to ask a question of Chief Superintendent Drew. Did you say audio taping was being used at the moment?

Chief Superintendent Drew

Yes definitely.

Brett Collins

Are all the protections that you said were accepted being used?

Chief Superintendent Drew

It is being used in addition to the customary methods of recording. It is a safeguard. It is not being used as a mechanism on its own and I can't suggest that to you. What I am saying is that a lot of very thoughtful police officers are using tapes to support what they are taking down by way of record of interview so that the two will coincide. I think there is an understanding within the police environment of the need. That is what I am saying to you.

Brett Collins

Does that mean accused people are being counselled before the interviews?

Chief Superintendent Drew

No, I am not talking about that full range of issues. No I think you misunderstand the position entirely. I think I have explained it enough now.

Terry Healey

This question is addressed to Chief Superintendent Drew. Are you able to advance what policies are taken by the Police Department to enforce the principles of *Carr's case*, *Williams' case*, and *Klever's case* upon police officers to ensure that they operate within the law in dealing with suspects?

Chief Superintendent Drew

Well there will always be police instructions of course and they are quite specific but subsequent to *Williams' case* all the police were circularised and advised of the substance of the case and what was required of them.

Terry Healey

I think that most of the criminal lawyers present here today would agree with me that they have little or no regard to decisions of the High Court and constantly we have these continual *voir dire*s challenging the admissibility of confessional material.

Chief Superintendent Drew

I regret to hear what you say but I can't take it any further.

Question

I believe Mr Byrne mentioned that there is U.N. Charter and those sort of things which I believe are being addressed by the federal government. I would like to ask him what role he sees for the Federal Government in constitutional delay of enforcing these rights down to the level of verballing and

Paul Byrne

I am not a constitutional lawyer. Perhaps the Chief Justice might be better equipped to answer that question.

It seems to me that the federal government has an obligation to establish some sort of standards. The situation is unlike, for instance, Canada which is also a federation in the same sense as Australia but the administration of the criminal law in Canada is the responsibility of the federal government. It is not in Australia, of course, so it is a matter for the individual States to make their own laws effectively. The Constitutional Commission did say, and by majority only and not unanimously, that those standards which they recommend should be established should not be capable of being opted out of by the States. In effect I think it is right to say that the majority of the Constitutional Commission recommended that those rules relating to criminal investigation and criminal procedure generally should be binding on the States. That is as far as I can take it I think at this stage.

David Brown

Just perhaps on the record we might express what I think has been apparent right through the meeting. It is quite distressing that apparently there is no one here from the New South Wales Attorney-General's Department to inform us what is happening in relation to the Criminal Law Review Division Reports. I mean at such an august gathering it seems to me a bit discourteous really that we are not able to be informed more accurately of the current state of affairs in New South Wales on such an important matter.