

## CRIMINAL INVESTIGATION - THE POLICE PERSPECTIVE.

Chief Superintendent K.J. Drew,  
Police Department, N.S.W.

### Introduction

It is axiomatic that the law should balance those two aspects of public interest which so often compete - personal liberty and the need to bring criminals to justice.

From the police perspective, attempts to strike the appropriate balance have failed and the 'rights' of the guilty are paid for by placing an unjustified charge upon the innocent.

Implementation of legislation similar to some of the proposals made by the New South Wales Law Reform Commission, in the Consultative Document, will see that charge escalate and the 'rights' of the community, to peace and order, diminish even further.

Should the rights of the community be subjugated to the rights of the individual?

Mr Justice Dixon in the case of *In Re Richard Foreman & Sons Pty. Ltd.; Uther v The Federal Commissioner of Taxation and Another*<sup>1</sup> considered the legislative power of parliament<sup>2</sup> and the relationship between the rights of the community and those of the individual. He concluded that the former were to be preferred and pointed out:

The rule that when the title of the Crown and the title of a subject concur, that of the Crown is to be preferred, is a general rule of the common law of the Constitution. "It is founded not so much upon any personal advantage to the sovereign as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts (Per Story J., *United States v State Bank of North Carolina* (1832) 31 U.S. 29, at p.35) "From Lord Coke's time to the present day it has never been questioned as a rule of law" (Per Lord Macnaghten, *Commissioner of Taxation for New South Wales v Palmer* [1907] A.C. 179 at p.182.). "It only means that the interests of the individuals are to be postponed to the interests of the community" [emphasis added]. (Per Lord Macnaghten, *Commissioner of Taxation for New South Wales v Palmer* [1907] A.C. 179 at p 182).<sup>3</sup>

Whether one accepts or rejects the view of Mr Justice Dixon, it is submitted that, as direct and indirect victims of crime<sup>4</sup>, members of the community have a right

---

1. (1947) 74 CLR 508

2. Under s. 5 of the Constitution Act 1902 (NSW)

3. (1947) 74 CLR at 527

4. To the extent of approximately 400,000 reported offences per year - New South Wales Police Crime Statistics Report, Research and Development Branch, 1987

to be consulted in legal reforms. This right is particularly heightened in the area of police powers and the ability of police to investigate crime and place evidence before the court.

However, it appears from the very constitution of the Commission, on this reference, and the acknowledged responses to an earlier consultative letter, that the wider, that is non-legal, views of the community have not been obtained - yet it is the community as a whole which will be affected by any eventual legislation.

It is suggested that the Commission should, in this and future instances, conduct surveys to gauge the public attitude to proposed reforms. Further, a true representation of the views of the community on such a crucial area of law reform as police powers of arrest and detention, can only be achieved by providing for wider representation of the community on those bodies charged with law reform. The wider community should be represented by persons other than members of the legal profession. Such an approach was adopted in the United Kingdom when similar legislation was being considered.<sup>5</sup>

Not only should there be true consultation with the community but, more importantly, subsequent legislation should reflect those views. Also, where law reform touches upon the functions of any government department or other group with a substantial interest in the area under consideration such department or group should also be represented.

So important is the need for consultation with the public and interested groups, it is suggested that the *Law Reform Commission Act 1967* should be amended by inserting a provision compelling such consultation.

## The Proposals

In a paper of this nature it is not possible to deal with each of the sixty-seven proposals of the Commission. The Commissioner of Police responded to the Commission in February, 1988.<sup>6</sup>

Many of the proposals are supported, a few are strongly opposed on the basis that they will unjustifiably restrict police investigations and thereby adversely affect the public interest in having offenders convicted. It is now intended to deal with those proposals which deal directly with police investigations and the ability of the police to obtain evidence and place it before the court.

---

5. See Appendix

6. See Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document, "Police Powers of Arrest and Detention." (February 1988)

## 1. Power to Demand Name and Address

Such a legal obligation, placed on both suspects and witnesses, would be welcome and not only assist police to investigate crime but also assist courts to determine guilt or innocence, by increasing the likelihood of hearing from witnesses.

The grant of a power to demand the name and place of abode will not be effective without a concomitant power to detain a person for a reasonable period to verify the name and place of abode given<sup>7</sup>

It should be an offence to refuse to give the required particulars or to give false particulars.

Consideration should also be given to authorising police to demand the date of birth and any alias of such person.

## 2. Questioning Before Arrest

One aspect of the proposal which causes considerable concern is the requirement that a caution be given at a stage earlier than when a police officer has acquired that degree of satisfaction necessary to arrest and charge a person.

As the law now stands a police officer is required to give a caution when a determination has been made to charge a person with an offence. Under the proposal, the caution may, in many cases, have to be given before a police officer talks to the suspect, that is, because from the information given to him, he may have reasonable grounds to believe the suspect may have committed a criminal offence. The dilemma for the police officer is complicated by the potential for the evidence to be excluded, under the Commission's exclusionary proposal, if it is held to have been improperly obtained that is, after the caution should have been given.

The proposal has potential to seriously impede police inquiries at a stage too early in the investigatory process. Its effect may be interpreted to prevent police from questioning suspects at a crucial time viz., when they are endeavouring to ascertain what took place so as to determine what action, be it urgent or otherwise, is necessary.

Such a requirement is inconsistent with protecting the public interest in providing effective law enforcement. Additionally, it is inconsistent with the individual's interest in having suspicion resolved at an early stage, if he/she so elects. In addition, the combined effect of this proposal and that of Proposal 29 (Caution

---

7. See for example, *Criminal Justice (Scotland) Act 1980*, s.1. This section also permits a member of the police force to detain a witness as would the Commission's proposal.

Following Arrest) is to require police to issue cautions on two occasions viz., at the time a person is "reasonably suspected of having committed an offence" and "at the time of making the arrest".

### 3. Voluntary Attendance at a Police Station

The Commission's proposal, that a person in the voluntary company of a police officer be informed immediately his or her status changes to that of one who would be arrested if he or she attempted to leave, has the potential to promote constant legal argument as the four hour detention period commences from the time the status changes.

It appears from the proposal that the court will be required to look at the relationship between the police officer and the volunteer and determine when the status of the person changed, in the mind of the police officer, and thereby activated the detention clock. If legislation similar to that proposed is enacted it will most certainly form the basis of defence arguments as to when the status of the person changed. Such arguments will be designed to have evidence declared inadmissible. Take for example the following scenario:

Police commence to speak to a volunteer at a police station at 1 p.m. and do not suspect that the person has committed an offence until 2.30 p.m. At that time he is informed that he is suspected of committing an offence and will be arrested if he attempts to leave (under the proposal the detention clock would be activated at this time).

The police officer now believes the four hour period will commence from 2.30 p.m. At 5.45 p.m. the suspected person signs a confession and hands police a weapon used in connection with the offence. *Prima facie* it would appear that the evidence is admissible.

However, if defence counsel can successfully argue that in reality the status of the person changed to that of a suspect, who would be arrested if he attempted to leave, at 1.30 p.m. then the evidence obtained at 5.45 p.m. would arguably be inadmissible.

This fine distinction will at times be difficult to determine, both at the time and in subsequent court proceedings. The proposal, especially when coupled with the application of the envisaged exclusionary rule, will be too restrictive to police investigations and should be rejected.

The proposal, arbitrarily requiring that a suspect shall not remain in police custody for more than four hours, lacks the necessary flexibility to meet the needs of various circumstances such as travelling, waiting for a legal adviser or interpreter, interviewing victims or witnesses.

One further issue which might arise is which police officer's mind would be looked at, the first officer at the scene or a more experienced officer sent for the purpose of investigation. The exclusionary rule has the potential to promote considerable legal argument.

If the Commission aims to provide a fixed period of detention, a course which is not supported, it should be clear to the court and the investigating police just when this time starts. The time a person is informed he is under arrest is the most readily identifiable time and is consistent with current practice and legislation in other jurisdictions.<sup>8</sup>

#### 4. Detention Following Arrest

The four hour maximum police detention is not supported nor is it justified by comparison with any other jurisdictions.

Support for the four hour period is to be found in a majority recommendation of the Australian Law Reform Commission in 1975<sup>9</sup> and the current detention law in South Australia.<sup>10</sup> However, neither the recommendation, nor the South Australian provision, are as restrictive as that sought to be imposed by the New South Wales Law Reform Commission. The Australian Law Reform Commission qualified its recommendation of four hours by recognising the need to exclude certain time periods from consideration.<sup>11</sup> The South Australian legislation also recognised the need to allow for 'dead time' and, additionally, provides for a further four hour detention period on police application.<sup>12</sup>

The New South Wales Law Reform Commission's proposal makes no allowance for 'dead time' sets a four hour maximum and even proposes to leave the commencement time, in some cases, to be determined in court proceedings after the event.<sup>13</sup>

An examination of overseas jurisdictions indicates the unreasonableness of the proposal. Section 454 of the *Canadian Criminal Code* provides that where a justice is available within twenty four hours of arrest the person is to be taken before the justice without unreasonable delay and in any case within the twenty-four hour period. If a justice is not available within that period then the person is to be taken before the justice as soon as possible. In *R v Koszulap* (1974) 20 CCC (2d) 193 it was

---

8. Crimes Act 1958 (Vic), s. 460; Summary Offences Act 1953 (SA), s. 78; Police and Criminal Evidence Act 1984 (Eng), s. 41

9. ALRC 2, *Criminal Investigation* (1975) paras 87-102

10. Summary Offences Act 1953, (SA) s. 78

11. ALRC 2 *Criminal Investigation* (1975) para 92

12. Summary Offences Act 1953, (SA) s.78

13. See comment to proposal No.13

held that a person may be detained for a reasonable time for the purpose of interrogation.

Under Rule 6 of the *United States Federal Criminal Code and Rules*, an arrested person must be taken 'without unnecessary delay' before a federal magistrate, or if unavailable, a state or local judicial officer. 'Without unnecessary delay' has been interpreted to mean reasonable time having regard to all the facts and circumstances of the case.<sup>14</sup>

Section 825 of the *Penal Code* of California provides that a "defendant must in all cases be taken before a magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following."<sup>15</sup>

The English *Police and Criminal Evidence Act 1984* authorises detention, on police authority, for an initial period of up to 36 hours.<sup>16</sup>

The *Criminal Justice (Scotland) Act 1980* permits detention for up to six hours following upon arrest for the purpose of investigating the offence. However, as pointed out in the Commission's Discussion Paper:

Lidstone and Early have observed that the six hour period is more than enough to deal with most arrested people *but is hardly adequate for more difficult and complicated cases* [emphasis added].<sup>17</sup>

The overseas detention periods when considered along with the Victorian experience, set out below, highlights the unreasonableness of the Commission's proposal.

In 1984 Section 460 of the Victorian *Crimes Act 1958* was amended to provide for a six hour detention period. Dissatisfaction with the provision led to the formation of a Consultative Committee, which subsequently recommended the replacement of the six hour period with one of detention for a 'reasonable time'.<sup>18</sup> The Northern Territory has also introduced detention for a reasonable time.<sup>19</sup>

---

14. *Federal Criminal Code and Rules* (1985) p 17

15. *West's California Codes Compact Edition Penal Code*(1985) p 335

16. ss. 41 and 42

17. Lidstone, K W and Early, T L "Questioning Freedom Detention: Detention for Questioning in France, Scotland & England" (1982) 81 *International Comparative Law Quarterly* 488 at 499; referred to in New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Arrest and Detention, Discussion Paper 16* (1987) p 76

18. Consultative Committee on Police Powers of Investigation, *Report on s 460 of the Crimes Act 1958 (Vic)* (1986) 111

19. *Police Administration Act*, s. 137

It is clear, in the light of provisions applicable in other jurisdictions, that the investigatory period of detention must be 'reasonable'. What is reasonable should depend upon the circumstances surrounding the particular offence or offences under investigation. To assess the ramifications of the Commission's proposal, to introduce a four-hour investigatory detention period, the New South Wales Police Force undertook a survey, over a three month period, covering all police stations at which persons are charged. The survey revealed the following:

- In 9.5% of cases where persons were charged with indictable offences the period of time between arrest and charge exceeded four hours
- During the 3 month survey period 1652 persons were detained in excess of four hours.

Extrapolating on those results it may be anticipated that over a twelve month period there would be more than 6500 persons detained in excess of four hours. It can be reasonably expected that the number of detention applications would be considerably in excess of 8000. This projection is based on the assumption that in those instances where the investigatory detention period approached the four hour limit it would be reasonable to expect that an application might be made at approximately 3 or 3.5 hours.

Further, the number of detention applications would be influenced by multiple applications, that is, where a court approves a period of detention which is insufficient to complete the investigation and a further application is necessitated. The proposal also creates further practical and or legal problems such as the need to speak to witnesses prior to interviewing the suspect. It would not be prudent to conduct an interview without considerable knowledge of the circumstances surrounding the offence.

A typical example is where an offender is arrested shortly after a serious sexual assault. In these instances there will be a considerable delay between the time the offence is reported and when police are able to interview the victim.

In a brief survey conducted at Royal Prince Alfred Hospital the average period required for emotional support and forensic examination of victims of sexual assault was 3.8 hours.<sup>20</sup>

Also, where juvenile offenders are to be interviewed it is necessary for a 'prescribed person' to be present during the interrogation. Problems can be expected where such persons are less than co-operative or have to travel a considerable distance to the police station where the interview is to be conducted.

---

20. Conducted during 1987 by Claire Vernon of the Social Work Department.

Multiple offenders and persons charged with multiple offences are also of concern as the offender or offenders must necessarily await processing of other charges.

It also appears from the proposal, that in every case where police intend to bring a detained person before a court, for a detention application, they must notify the court of the arrest and detention of the person and of their intention to bring the person before a court. This requirement is not only an unjustifiable burden on police at a critical time of the investigation process, but also presupposes that shortly after arrest the police will know whether they will be unable to complete their inquiries within four hours and will therefore be making a detention application.

## 5. Access to Legal Advice

The right to contact a lawyer, of the suspect's choice, should have the same restriction upon it as the right to contact a friend that is, it may be denied in prescribed circumstances. Alternatively, the person might be permitted to contact the Legal Aid lawyer, who should, in such prescribed instances, be under an obligation not to inform the suspect's lawyer of the detention.

It is only rarely that police officers would take such a course but the role of lawyers in criminal enterprises is not non-existent. As the Honourable Mr Justice D.G. Stewart pointed out:

Any large criminal organisation requires the assistance of lawyers in order to operate successfully. This assistance may be legitimate but it often involves unlawful or unethical practices.<sup>21</sup>

Further problems which may arise include:

- how long are police to wait for the lawyer (bearing in mind that it is proposed there be no allowance for 'dead time')?
- once at the police station, over what period of time may private conversation take place?
- will police have any power to terminate the private conversation once it has proceeded for an unreasonable time?
- what liability will there be for a lawyer, or other person, who deliberately seeks to frustrate police from conducting their investigation?

## 8. Questioning Following Arrest

This proposal advocates an extension of the law against self-incrimination beyond the right to silence in that it seeks to extend the right to one of refusal to be even asked questions.

---

21. Report of the Royal Commission of Inquiry into Drug Trafficking (Royal Commissioner, The Honourable Mr Justice D.G. Stewart) p 170



It is submitted that the proper investigation of criminal offences requires police to put evidence, obtained during the course of an investigation, to the suspect. If the suspect elects not to reply he is merely exercising his right. However, if the right is exercised it should not, as it now does, preclude the court from being advised accordingly.

Commenting on the so called 'right to silence' the former Chief Justice of the High Court of Australia had this to say:

...I must confess that I can see no great virtue in the present rule, misdescribed as the right to silence, under which no inference may be drawn against an accused person for his or her failure during police questioning to answer questions or to mention some fact upon which reliance is placed for the first time at the trial.<sup>22</sup>

Jeremy Bentham, after the turn of the nineteenth century, said the rule of silence was:

One of the most pernicious and irrational rules that ever found its way into the human mind - if all the criminals in every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it: innocence claims the right of speaking as guilt invokes the privilege of silence.<sup>23</sup>

In addition the rule has been criticised by Mr Desmond Sturgess Q.C., the Director of Prosecutions in Queensland, who concluded:

"The rule, of course, is profoundly illogical - I may choose to answer or not to answer when questioned as a suspect by a police officer. This is my right in the sense that I commit no offence by following either course. But if, in all the circumstances and, in particular, in view of a defence later set up by me, my choice appears to be completely at odds with my later claims, the evidentiary value of making such a choice does not disappear because I have committed no offence when making the choice."<sup>24</sup>

Further support for the abolition of this unwarranted protection of an accused person is to be found in a number of reports.<sup>25</sup>

Clearly the right to silence is an anachronism used in many cases by the guilty to shield themselves from the criminal justice system. The New South Wales Law

---

22. Sir Richard Blackburn Lecture by The Right Hon. Sir Harry Gibbs, GCMG, AC, KBE, delivered to the The Law Society of the Australian Capital Territory, Canberra, 11 June 1987, at pp 2 and 3

23. Quoted by Meagher, D., Q.C. "Organised Crime" pp 106ff (paper delivered at 53rd ANZAAS Congress, 1983)

24. (1982) 24 (6) *Queensland Police Journal* 28-29

25. *Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (1977)* p 261, recommendation 32; see also the recommendations of the Criminal Law and Penal Methods Reform Committee of South Australia, *Second Report, Criminal Investigation*, p 103; England, Criminal Law Revision Committee, *Eleventh Report (1972)* paras 28-52

Reform Commission should heed the advice of many eminent lawyers and take the opportunity to place the right on a responsible footing so that those who claim its benefit, do so in the knowledge that the jury will be entitled to draw an appropriate inference.

The 'right to silence' is currently being developed, along the abovementioned lines, in England; the Commission should at least monitor that development and promote public debate, to assess the expectations of the 'wider' community, on the future of the rule in New South Wales.

## **7. The Use of Electronic Recording Equipment**

There is no objection to the use of electronic recording of police interviews. However, the courts should retain a discretion to admit certain interviews which have not been electronically recorded due to certain circumstances. Also, once it has been shown that an interview was correctly recorded it should be admissible in evidence.

The Commission's proposal seeks to preclude police from suspending a record of interview. Such a proposal fails to recognise logistic realities, emergency situations or circumstances where information demands that the investigators suspend an interview to make further inquiry.

It is felt that this proposal is unjustified. There will be cases which call for a cessation of interview for example, after commencing a record of interview additional information about the offence might be received; as a result of what police are told in the interview they have to make further inquiries; the police are called out as a matter of urgency.

Allowance should also be made for the situation where a person consents to being interviewed but, refuses to permit the interview being electronically recorded. This may occur where a person is afraid of repercussions from criminal associates or co-offenders. In such cases police should be entitled to interview the offender and the admissibility of any evidence obtained left to the discretion of the court.

## **8. Obtaining Forensic Evidence**

The proposal in respect to obtaining forensic evidence is supported although provision should also be made for handwriting. The requirement that a court order be obtained when a person does not consent raises issues concerning the nature of these proceedings and the procedural difficulties of telephone hearings. These issues need to be clarified and not become dependent upon judicial interpretation, as to do so will only serve to prolong trials and allow offenders to escape conviction on technical grounds.

Further, it is questioned whether authority, of either a court or a member of the police force, should be required to:

- permit the scientific analysis of any material obtained through the exercise of the power to take forensic evidence,
- seize clothing,
- obtain certain relevant measurements of an arrested person e.g., height and weight.

The detention of a person, for the purpose of obtaining forensic evidence, needs to allow for the taking of a person under arrest to various locations which are relevant to the investigation, for example, a crime scene; a location where evidence has been disposed of; where it is necessary in the interests of public safety, etc.

## 9. Conduct of Identification Parades

The Commission proposes that identification parades be strictly regulated. While there is no objection to the proposal, in principle there is a need to preserve the identity and/or safety of the person seeking to identify a suspect.

It is suggested, that in court approved instances consideration be given to allowing an identification parade to be conducted out of the view of the suspect.

## 10. The Admissibility of Evidence

The presumption of inadmissibility of evidence for a breach of procedural rules is strongly opposed. Chief Justice Cardozo of the New York Court of Appeals in *People v Defore* succinctly evaluated the rule in 1926, saying "the criminal is to go free because the constable has blundered".<sup>26</sup>

Control of improper or illegal police behaviour can be achieved by either direct legislation aimed at the wrongdoer or by effective internal police discipline. It is not the function of the court to discipline police. Neither is it the of the community generally, or a victim specifically, to suffer the consequences of improper police activity. Confidence in justice is not enhanced by denying justice, to the victim and the community, on the ground that another as erred.

The exclusionary rule emanates from the United States of America, where, with over 40,000 law enforcement agencies,<sup>27</sup> policing is approached on a much more fragmented basis than in New South Wales, where there is a single police force under the 'superintendence' of the Commissioner of Police. Such centralised control can

---

26. Royal Commission on Criminal Procedure (1981 Cmnd. 8092) para 4 p128 (Chairman: Sir Cyril Phillips).

27. Ingleton, R.D., *Police of the World* (1979)

ensure that any bona fide breach of procedural rules can be remedied quickly by direction while disciplinary action can be taken where police act mala fides.

The bait of procedural inadmissibility will be irresistible to defence lawyers seeking to exclude damaging evidence. The Phillips Royal Commission on Criminal Procedure referring to an automatic exclusionary rule took the view that:

There would thus be an increase in court time spent on matters which are not concerned with the innocence or guilt of the accused, which would risk a diminution of public respect for the institutions of criminal justice.<sup>28</sup>

The Commission's proposal that breaches of the required procedure will give rise to a presumption of inadmissibility which *should apply*, in other than *unusual and exceptional circumstances*, will serve to promote additional legal argument to that already created by the presumption of inadmissibility rule. What will constitute unusual and exceptional circumstances will have to be determined by the court as they arise. In addition, there will be other cases when a "rule of reason" will apply which will take into account all the circumstances.

The contention that a breach of a procedural rule should be seen to be 'conscious and deliberate', except in 'unusual and exceptional circumstances' is reasonable if the procedural rules are 'unambiguous and readily understandable'. But the procedural rules envisaged by the Commission fall far short of being 'unambiguous and readily understandable'. A cursory examination of some of the proposals clearly illustrates the vagueness and interrelated complexity of the guidelines laid down to control police conduct. For example:

- what will constitute "reasonable grounds for suspecting"<sup>29</sup> or a belief that a particular course of action is "necessary on reasonable grounds and in the interest of public safety"?<sup>30</sup>
- when does a volunteer become a 'suspected person' and thereby activate the detention clock?<sup>31</sup>
- for how long is an arrested person allowed to have a 'private conference' with his lawyer?<sup>32</sup>
- what will constitute an 'indication' of willingness to answer questions?<sup>33</sup>

It should be obvious that the procedural rules are not and arguably will never be capable of precisely identifying, in every instance, what a police officer may or may not do. Each case has to be judged according to its own peculiarities to determine whether the police officers actions were justifiable.

---

28. Royal Commission on Criminal Procedure (1981 Cmnd. 8092) para 4 p 128 (Chairman: Sir Cyril Phillips)

29. New South Wales Law Reform Commission Criminal Procedure, Police Powers of Arrest and Detention, Discussion Paper 16 (1987) p 133 Proposal 9

30. *Ibid* Proposal 9

31. *Ibid* Proposa1 13.

32. *Ibid* Proposa1 32.

33. *Ibid* Proposal 45.

Such judgement must, of necessity, take place after the event and thereby places the police officer in the difficult situation of not knowing with certainty, at the time of taking a particular course of action, whether his or her actions are going to be assessed as procedurally correct or otherwise.

The envisaged 'rule of reason' may be a reasonable approach to the admissibility of evidence improperly or illegally obtained, provided it is not shackled by the conscious and deliberate breach provision or a presumption of inadmissibility.

However, while Mr Justice Murphy refers to the rule in *Cleland v The Queen*<sup>34</sup> it would first be necessary for the Commission to indicate the import of such a rule, especially as Justice Murphy draws a distinction between applying the rule in minor as opposed to serious cases. It would also appear from His Honour's words that he was not contemplating an exclusionary rule as extensive as that sought to be imposed by the Commission.

The test for admissibility of evidence should accord with the well established principles enunciated in *R v Ireland*<sup>35</sup>, *Bunning v Cross*<sup>36</sup>, and *R v Cleland*<sup>37</sup> where the trial judge carefully weighs the interests of the community together with the interests of the accused.

The proposal that evidence should be inadmissible unless the person seeking to have it admitted can show that its admission would not be 'unfair' implies that law enforcement equates with a contest where the parties (in reality only the police) must play 'fair'.

Perhaps the Commission could indicate what constitutes 'fair' play, particularly in a changing investigative environment where police are constantly seeking to improve methods of investigation but at the same time avoid acting illegally or being criticised for invading privacy.

Finally, the degree of 'unfairness', or impropriety, should be extremely high and the exclusionary rule should not come into operation as easily as the Commission's proposal envisages. In *R v Dugan*<sup>38</sup> Street CJ pointed out:

The court is required to make a relative, balanced assessment of the interests of the community in facilitating the apprehension of offenders and bringing them to conviction, on the one hand, and, on the other hand, repudiating conduct and subterfuge in the process of criminal investigation that are *unfair or unlawful in*

---

34. (1983) 57 ALJR 15 at 22

35. [1977] 126 CLR 321

36. (1978) 52 ALJR 561

37. (1983) 57 ALJR 15.

38. [1984] 2 NSWLR 554

*the sense of bearing so gross a character* [emphasis added] as to offend relevant concepts of democratic decency.<sup>39</sup>

The Commission's proposal in respect to the exclusion of evidence is unacceptable and will only serve to prolong legal proceedings, protect individual offenders at the expense, and to the detriment, of the community.

## CONCLUSION

The contention that the Commission's proposals " ..would define the way in which police are expected to exercise their powers of arrest and investigation" is not readily supported.

Many of the proposals border on turning police investigative procedures into a legalistic game fraught with technicalities, with offenders being constantly presented with the opportunity to rely on procedural rules to escape conviction. The rules should be balanced and reasonable with the interests of the community, in securing proper convictions, being given priority.

---

39. Ibid at 558

## APPENDIX

**The Royal Commission on Criminal Procedure (HMSO 1981 London Cmnd 8092) (Chairman: Sir Cyril Phillips). The members of the Royal Commission were:**

<b>Professor Sir Cyril Phillips</b>	<b>Vice Chancellor University of London (1972-76). Professor of Oriental History University of London.</b>
<b>Professor Michael Banton</b>	<b>Professor of Sociology, University of Bristol.</b>
<b>Rt. Hon Lord Justice Everleigh</b>	<b>A Lord Justice of Appeal.</b>
<b>Mr W A B Forbes QC</b>	<b>A Law Commissioner. A Recorder of the Crown Court.</b>
<b>Mr. Paul Fox</b>	<b>Managing Director of Yorkshire Television.</b>
<b>Mrs Daphne Gask OBE JP</b>	<b>Vice-Chairman of Drayton Justices and a Member of the Executive Committee of the Magistrates' Association for many years until 1980</b>
<b>Ms Dianne Hayter JP</b>	<b>General Secretary of the Fabian Society.</b>
<b>Mr Jack Jones Ch MBE</b>	<b>General Secretary of the Transport and General Workers' Union 1969-78.</b>
<b>Mr Cecil Lathan OBE</b>	<b>Stipendiary Magistrate, Greater Manchester since 1976. Clerk to the Manchester City Justices 1965-76.</b>
<b>Mr J C K Mercer</b>	<b>Solicitor. Partner in the Firm of Douglas-Jones and Mercer, Swansea.</b>
<b>Mr Walter Merricks</b>	<b>Solicitor. Director of Camden Community Law Center, 1972-76. Lecturer in Law at Brunel University.</b>
<b>Sir Douglas Osmond CBE QPM</b>	<b>Chief Constable of Shropshire 1946-62 and of Hampshire 1962-77.</b>
<b>Mr Richard Pamplin OBE</b>	<b>Secretary of the Police Foundation 1967-75.</b>
<b>Sir Arthur Peterson KCB MVO</b>	<b>Permanent Under Secretary of State at the Home Office 1973-7.</b>
<b>Miss Joan Straker MBE JP GF</b>	<b>Personnel Services Controller, Northern Cooperative Society, Gateshead-on-Tyne.</b>
<b>Rev. Canon Wilfred Wood JP</b>	<b>Vicar of St Lawrence, Catford. Chairman of the Martin Luther King Memorial Trust.</b>