PRESENTATION OF PAPER

Chief Superintendent Drew

Chief Justice, fellow panel members whom I will no doubt shortly offend in some measure, ladies and gentlemen. I should make it plain from the outset the New South Wales police response or the preparation of this paper for this seminar has nothing to do with a reply to Mr Kable's address on *William's* case and the dwelling on the question of police verbals. It has everything to do with a response to the Law Reform Commission's community consultative document last year on police powers of arrest and detention. As a result of that the issues I will be speaking about are far wider than the mere question of police verbals.

I was listening recently to a talkback radio program conducted by one of the more irascible and unlovely proponents of the talkback art and as he reached for that little grey button that some of you will have seen - that button which despatches the unwanted caller into oblivion - he said "Don't be stupid! Of course they can ask you for your name and address. You ring any police station and they will tell you". By the time I got through to the switchboard he was probably through his entree and into his main course but he wasn't entirely right was he? Because if you or yours offend the general *Traffic Act* provisions, for example, by your negligence or by excessive speed, there enshrined in the legislation is authority for police officers to demand that you give up your name and your address and in order to establish that what you have said is true it also affords them the authority to demand that you produce your licence. Conversely, if you happen to be a suspect for murder or you happen to be a potential witness to a murder quite different considerations apply. I raise the example for two reasons. First, it shows how little informed even the best informed people are about the extent of police authority to investigate and it identifies. Secondly, the example indicates that peculiar imbalances have grown up in the various areas of our legislation.

But first things first. The efficacy of this paper is in our view impaired by the fact that the Law Reform Commission's consultative document did not reach final print as was believed would be the case last year. In the absence of that final report it has been necessary to produce a paper on the very broad range of proposals contained in the consultative discussion paper. Given that those proposals number sixty-seven in all it is understandable that no attempt has been made to address them in this paper or this brief overview. What has been sought to be done is to touch upon those recommendations in the consultative paper which are perceived by the police community, and this is a consensus document, to act to the detriment of efficient investigation and consequently against the interests of our society. This approach has also resulted in the absence of any comment on a number of very, very cogent and satisfying recommendations from the policing perspective. Recommendations touching upon the power to demand name and address, the issue I raised earlier, authority to set up road checks, authority to stop and search on reasonable grounds, and authority to fingerprint and photograph are most timely in the context of a larger less homogeneous and more mobile community. The proposals to make arrest a function of last resort, to make legal aid available to accused at police stations, to

make provision for interpreters on request, and for the electronic recording of interviews all cause no apprehension in a philosophical sense but there is a need for refinement to avoid difficulties which have the potential to impede efficient investigation.

It will be seen from these short comments that the response from the New South Wales police service is far from negative. However it should be recognized that our principal problem is that the Commission has failed to provide in its own constitution for a broad representation of society. The British Royal Commission on Criminal Procedure in 1981 when it considered almost identical reforms included in its constitution *inter alia* a Professor of Sociology, a Managing director of a television station, the General Secretary of the Fabian Society, a Vicar, and dare I say it, a police officer. So it is while we accept the integrity of the Commission and while we accept and recognize all the very valuable and hard work that has been done we question the validity of any examination of police investigatory authority which lacks the broad base of community involvement.

Might I turn to a few of the more contentious issues. The power to demand name and address is an issue I have already touched upon briefly. The proposal is applauded for it provides facility not only to assist in the identification of witnesses and offenders but to swiftly establish innocence. What is noticeably absent from the proposal however is a concomitant power to detain for a sufficient period to verify the name and address given. Additionally the disclosure of a date of birth is essential in any identification process, and as a logical extension to all of these things the lack of any offence for failing to provide information or providing false information make any proposal of the type quite ineffectual.

Questioning prior to arrest

The substance of the Law Reform Commission proposal is that a suspect not be required to answer any question until such time as a caution has been administered. As the law presently stands a police officer is required to give a caution when he has decided to bring a suspect into the criminal justice system. Under the proposal a caution may have to be given before even one word is uttered. The dilemma for the investigator is exacerbated by the potential for the evidence to be excluded under the Commission's Proposal 56 which presumes the inadmissibility of evidence obtained in contravention of the proposed procedural rules. One of which, of course, is the caution. The combined effect of the Proposal and that of Proposal 29, which requires caution following arrest, is to require the investigator to issue two separate cautions. One at the time an individual is reasonably suspected of committing an offence and one again at the time of arrest.

Voluntary attendance at a police station

The status of an individual who voluntary attends a police station in the company of a police officer may alter should that individual become a suspect. On the one hand the Commission recommends that a suspected person who has not been arrested shall not remain in police custody for more than four hours, on the other hand he may apparently stay at the police station indefinitely so long as he is considered to be voluntarily there. The defect in the proposal will be readily

identified when a court is required retrospectively to determine when the status of this individual changed, thereafter activating the four-hour detention clock. The incidence of *voir dire* hearings I suggest will be significant.

In addition to the foregoing, the arbitrary detention limit of four hours fails to take account of a variety of investigatory realities, such as waiting time pending the arrival of an interpreter or a legal adviser, travelling time from point of arrest to point of interview, and time spent interviewing witnesses in order that the offender may be properly questioned. If there is to be a fixed detention period, a proposal which is not supported by the New South Wales police service, there must be no uncertainty surrounding the point when the detention clock is to commence. In our assessment the most readily identifiable point is the point where the offender is informed that he is under arrest. In our submission the failed Victorian experience with a fixed six-hour detention period and the Australian Law Reform Commission recommendation which recognizes that some periods must be excluded from fixed detention periods should be lesson enough.

Questioning subsequent to arrest

This proposal advocates an extension of the law against self incrimination beyond the right to silence to a right to refuse to be asked questions after arrest. The recommendation is not supported. Police should be entitled as an investigatory tool to put proper questions to an arrested individual and courts should be entitled to draw appropriate inferences from the responses to those questions or the absence of them.

Gathering forensic evidence

The Item 42 proposal which identifies the need for police to carry out forensic procedures on arrested individuals is supported. The absence of authority to require handwriting samples in appropriate cases such as fraud is questioned.

Admissibility of evidence

The presumption of inadmissibility of evidence for a breach of procedural rules is vehemently opposed. The 'fruit of the poisoned vine' principle was bluntly put into perspective by Cardozo C.J. in the New York Court of Appeal in *The People v. Defore*, and I quote: "The criminal is to go free because the constable has blundered". No doubt the presumption of inadmissibility has superficial attractions provided of course that the procedural rules are without defect. However the comments emanating from the Phillips Royal Commission on criminal procedure should not be ignored: "There would thus be an increase in court time spent on matters which are not concerned with the innocence or guilt of the accused and which would risk a diminution of public respect for the institutions of criminal justice".

It is our sincere view that the police experience in the investigation of crime should be a vital resource in any assessment of the appropriate balance of tension between police investigatory authority and personal liberty. We do not seek authority for authority's sake. It is sought only to meet the increasing sophistication of crime on society's behalf.