Silencing in Court: The Abolition of the Dock Statement in New South Wales

Introduction

Wujalwujal, September 1988, the Royal Commission into Aboriginal Deaths in Custody is in town to investigate the death of an 18 year old Aboriginal man who died in police custody. Anthropologist Chris Anderson comments on the hearings:

> My observation was that it was the rule rather than exception that witnesses misunderstood questions. Witnesses were frightened; they spoke tentatively, often answering yes or no to agree with the perspective implied in the question. In the transcript one lawyer says: "You don't have to agree with me because I put it that way".[1]
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> Often it seems that the Aboriginal person thinks that if they agree with whatever the non-Aboriginal person in authority is suggesting, then they will get out of trouble more quickly. The agreement is made regardless of either an understanding of the question or a belief about the truth or falsity of the proposition being questioned. Thus, it does not necessarily mean that the Aboriginal person agrees with the proposition.[2]

These observations provide a rather different perspective from which to assess the arguments leading to the New South Wales government's abolition of unsworn statements by defendants in criminal proceedings (the dock statement) in May 1994. Now that the abolition announced by the Attorney General Mr Hannaford in August 1993 has been secured, it might seem there is little point in rehearsing the arguments for and against the dock statement. But even a brief review of the debate might serve to illustrate some more general issues concerning the highly rhetorical and ideological nature of criminal justice debates, the lack of any informed research findings against which contending claims might be evaluated, the strategic alliance between certain victims organisations and conservative law and order forces, and our collective inability to think about criminal justice issues in other than adversarial terms.

From Deep in the Bunkers: The Dock Statement as Signifier

The reasons given to justify the planned abolition as contained in a press release put out by the Attorney General on August 16 1993 (subsequent quotes of the Attorney General are from this source) were: anachronism, delay, imbalance/abuse, confusion, and following the trend. These arguments were echoed by an alliance of mostly conservative retired judges, victims organisations, *The Sydney Morning Herald* editorials, and politicians from all major parties.[3] The main media responses from lawyers' representatives opposing the

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1 *The Independent Monthly* 6 September 1990.

2 Eades, D, *Aboriginal English and the Law* (1992) at 51.

3 See for example Ken Gee QC, retired District Court judge, "Abolish the Dock Statement" *The Sydney Morning Herald* 2 May 1994; Meares, C L D, Woodward, P M, Lee, J A, Reynolds, R G, Slattery, J P, Cripps, J S, Moffit, A R, Yeldham, D A, Holland, K J and Allen, P H, all retired NSW Supreme Court judges, "Letter to the Editor" *The Sydney Morning Herald*, 2 May 1994; Brown, M, Community Representative, NSW Sexual Assault Committee, "Letter to the Editor" *The Sydney Morning Herald* 26 August 1993; Slee, J, *The Sydney Morning Herald* 19 August 1993; Editorial, "The Death of Jasmine Lodge" *The Sydney Morning Herald* 23 March 1994; Editorial, "Dock Statements Fail Their Trial" *The Sydney Morning Herald* 20 April 1994.

move were couched in terms of the presumption of innocence. This argument sees the likely effect of abolition as being to force the accused into the witness box to give evidence and face cross examination, thereby striking at the accused's right to silence and weakening the fundamental obligation of the Crown to prove the guilt of the accused beyond reasonable doubt.[4]

I do not wish here to discount such arguments, although like many legal debates couched in terms of general principles such as the presumption of innocence and the right to silence they have a predominantly civil libertarian and rather rhetorical character.[5] Arguably the mundane day to day operation of the criminal justice system with its overwhelming preponderance of guilty pleas and its effective denial of trial by jury in all but the most serious cases tends to contradict such general principles or at least render them somewhat arcane. In 1991 only 1.4 per cent of people charged with criminal offences in New South Wales courts were tried by jury (and thus had the option of making a dock statement).

Opposition to the abolition of the dock statement conducted in such terms has a tendency not to meet some of the very real complaints of victims which have been mobilised in support of the abolition. It also feeds in to a rather ritualistic debate in which the dock statement is attacked or defended not in and for itself but for its symbolic status in a much wider struggle between competing notions of justice. This tendency of the contending parties to speak past each other is illustrated in the exchange of letters in the *The Sydney Morning Herald* between Marion Brown from the Women's Legal Resources Centre and Community Representative on the New South Wales Sexual Assault Committee "congratulating" the Attorney General on the move[6] and Michael Green QC, Deputy Senior Public Defender, opposing the abolition.[7]

"Anachronistic, Delaying and Abolished Elsewhere"?

Justifying the planned abolition the Attorney General described the dock statement as an "anachronistic criminal privilege", a reference to its origins at a time when the accused was not entitled to give sworn evidence. But particular practices can take on new functions beyond their origins. The existence (and abolition) of the dock statement might usefully be considered against the overwhelming tendency of our current methods of counsel-controlled giving of evidence in court to distort or preclude accurate recall and presentation of events. This tendency is most apparent in relation to vulnerable, inarticulate, non-English speaking, nervous and overawed witnesses. Once the unsworn statement is relocated in the concern to allow the accused an opportunity to put themselves before the jury or Court in a manner not directly controlled by defence or prosecution counsel, then the anachronism argument dissolves.

The Attorney General's "dock statements cause delays" claim is specious. The vast majority of dock statements are brief, certainly briefer than the time taken should the defendant choose to give sworn evidence. Such claims (both the Attorney General's and

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4 For various responses from a defence lawyers' perspective see: Green, M, Deputy Senior Public Defender, "Letter to the Editor" *The Sydney Morning Herald* 31 August 1993; Barker, I, QC, President, Criminal Bar Association, "Letter to the Editor" *The Sydney Morning Herald* 19 April 1994; Nicholson, J, "Keep the Dock Statement" *The Sydney Morning Herald* 2 May 1994.

5 For contributions to the debate which attempt to avoid the alternatives of defendant's v victim's rights, see Brown, D, "No Time to Tie on the Gag" *The Sydney Morning Herald* 2 September 1993; Scutt, J, "Retain it, but Rules of Evidence Must Apply" *The Sydney Morning Herald* 2 May 1994.

6 See above n3.

7 See above n4.

mine) are able to be made unhindered by reference to any research which might establish exactly how long a particular sample of dock statements did in fact take. Just as we are unable to evaluate the accuracy of advocate-of-abolition and retired District Court Judge, Ken Gee QC's claim that the dock statement is relied on by the accused in "most" defended higher court cases.[8] As a letter to *The Sydney Morning Herald* which was not published put it, "we have no reliable information about crucial matters such as how often dock statements are made, what kind of alleged offences are involved, what kind of defendants make them and what effect they have on the outcome of trials".[9]

The lack of very basic information applies not only to the New South Wales context but also to those jurisdictions that have abolished the dock statement, highlighting the inadequacy of the "they've done it nearly everywhere else" cry of the supporters of abolition. In the words of Public Defender Mark Ierace, in yet another unpublished letter[10] to *The Sydney Morning Herald*, "conformity replaces research. Your unquestioning editorials on this issue maintain this legal cringe; if it is abolished elsewhere, you are content that we simply follow suit and not inquire as to whether the interests of justice have actually been served elsewhere by abolition".[11]

"Unchecked and Unfair"?

"It is an unchecked process whereby the accused can make unchallenged allegations and attacks on the character of witnesses and victims" said the Attorney General. The reference to an "unchecked process" is incorrect. Under s409C of the *NSW Crimes Act* 1900 ("Limitation on dock statements in certain sexual offence proceedings") restrictions on cross examination of complainants in sexual assault trials on prior sexual behaviour also apply to the dock statement. The fact that it is already "checked" in certain respects indicates an alternative to outright abolition: the devising of further checks which attempt to meet the unfairness to victims complaint. Jocelynne Scutt sketched out a few options:

> Why doesn't NSW amend the law so that: a dock statement must be given on affirmation or oath; an accused is open to perjury charges in relation to any statement so made; rules of evidence as to admissibility apply to dock statements; and an accused's character is put into evidence if the complainant's character is challenged?"[12]

The approach of maintaining dock statements but with more effective checks built in was supported by both the Australian Labor Party and the independents in the Legislative Assembly, with a particularly thoughtful speech by independent member Peter MacDonald.[13] However amidst the drama of the Hatton speech on police corruption which resulted in the establishment of a Royal Commission and exhaustion in the face of the large number of Bills being rammed through the Parliament agreement could not be

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8 See above n3.

9 Dixon, D, unpublished Letter to the editor *The Sydney Morning Herald* 21 April 1994.

10 *The Sydney Morning Herald* letters editor seemed happier to run letters in favour of abolition rather than open up the question of lack of information and research.

11 Ierace, M, Public Defender, unpublished letter to the editor, *The Sydney Morning Herald* 20 April 1994. Ierace goes on to argue that intellectually disabled, mentally ill or brain damaged accused and those suffering dementias, will be particularly disadvantaged, especially in relation to the verification of what has been told to an expert witness such as a psychiatrist or doctor.

12 See above n5.

13 See Murphy, C, "Smell of Democracy" *Sun Herald* 8 May 1994.

reached on the exact form the restrictions or right of comment might take, and the simpler solution of abolition won out.

Recruiting Victims to Law and Order

The impression of unfairness as between victim and accused is clearly the key public justification for the abolition of the dock statement. The aim is to harness the increasing political power of the victim's movement and especially domestic violence, sexual assault and rape crisis support groups, to the government's "rationalising" law and order agenda, however cynical such recruitment might be. As Chris Murphy pointed out, while Environment Minister Chris Hatcher, intent on ramming the abolition through claimed "the Government is taking the side of victims; ... of honest citizens" the same government so concerned about victims is amending the *Victims Compensation Act* to cut off claims under $4000 and cut appeal rights.[14]

The political linkage is possible because many complainants in sexual assault trials *do* feel it is unfair that they have been subject to vigorous cross examination while the accused who has opted to make a dock statement can avoid cross examination. In addition many witnesses and victims feel profoundly dissatisfied with their treatment at the hands of criminal justice agencies. They feel that their concerns and needs are secondary to the attention devoted to the accused, who is centre stage. In this context the dock statement becomes a signifier of the powerlessness and dissatisfaction of the victim. Herein lies the paradox. A movement which has made good use of the metaphor of "breaking the silence", of enabling different voices to be heard, is positioned as silencer.

There are a number of problems with this alignment. First, and most directly, the positions of accused and victim/witness cannot be reduced to that of two private parties in a civil dispute. The state funds and conducts the trial and calls the prosecution witnesses on its behalf. If convicted the accused becomes liable to state sanction, including in serious cases a significant period of imprisonment.

Secondly, while the overwhelming majority of accused are men, there is not an exact correspondence between gender and the statuses of victim or accused, as women charged with killing assaultive spouses will attest. As Jocelynne Scutt put it: "women are vulnerable in the courtroom as accused, not just as victim witnesses".[15] Mark Ierace illustrates this point by reference to the Robyn Kina case, now widely publicised following a *Four Corners* program. At the same time that a *Sydney Morning Herald* editorial writer was waging a campaign against the dock statement the *Good Weekend* section ran a seven page story on her trial and gaoling under the headline: "How did the legal system fail so badly when it came to dealing with this long-suffering victim of rape and domestic violence?".[16] The answer suggests Ierace, "was in part the abolition of the dock statement, by Premier Bjelke Peterson in 1975. At her trial the defence was unable to use the social worker's evidence of abuse, without Kina confirming the truth of what she had told the social worker. Since the dock statement had been abolished this meant that she had to go

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14 Ibid.

15 See above n5.

16 Robson, F, "The Terrible Trials of Robyn Kina" *The Sydney Morning Herald Good Weekend* 26 March 1994.

into the witness box to do so" but both her lawyer and she thought this inappropriate in view of her depressed and remorseful state.[17]

Thirdly, a more effective means of addressing the concerns of victims would be to investigate the introduction of some similar space or practice through which victims might speak in their own terms. Victim/witnesses themselves, as distinct from some of their spokes*men*, may well feel more empowered by being able at some stage to tell their story unmediated by police and lawyer speak, than by being invoked to silence the one opportunity which the accused has to communicate directly to the jury, court, and observers. While this is a difficult task within the existing framework of the laws of evidence and procedure, debate as to how this might possibly be achieved could have done far more to promote an understanding of the problems faced by victims in the criminal process than the simple "solution" of abolition which operates rather to close off such debate.

Fourthly, and most generally, it is important to resist the tendency to see the interests of accused persons and victims as totally opposed. Such a view feeds into a punitive cycle in which victim groups are recruited to call for heavier penalties, stricter penal discipline, "truth in sentencing" and even the return of the death penalty. But none of these "solutions" really do anything to address the concerns and needs of victims for compensation, counselling, a voice in the criminal process. Indeed the financial costs involved in funding the explosion of the New South Wales prison population from under 4000 in 1988 to 6,400 in 1993 is an impediment to the introduction of properly resourced victim support schemes and community based corrections for offenders.

The abolition of the dock statement will fall most heavily on vulnerable and inarticulate defendants, forced either to keep silent or to run the risk of being bamboozled by a skilful Crown prosecutor. Unless that is, one ascribes to the view put by 10 retired Supreme Court judges in a letter to *The Sydney Morning Herald* that "if a person is innocent of crime he or she need fear nothing from having to submit to cross examination by a Crown Prosecutor".[18] So Santa Claus lives, together with the pixies, at the bottom of the garden, watching reruns of Dad's Army.

The abolition of the dock statement in New South Wales highlights a number of tendencies in criminal justice and criminological debates: the difficulties of transcending the polarised and adversarial discourses of law and order v defendant's rights, the lack of any criminal justice research against which competing claims might be tested and changes based, the political alignment of certain victims groups with conservative law and order forces, and our collective inability to identify and grapple with the various unfairnesses located in the "normal" functioning of the criminal justice system.

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17 See above n11.
18 See above n3.