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Abstract
In The Queen v The Commissioner of Police for the State of Tasmania ex parte North Broken Hill Limited (Trading as Associated Pulp and Paper Mills and APPM), (hereafter called the APPM case) Justice Wright has foreshadowed the possibility that the scope and ambit of police discretion may be under severe, judicial threat in the state of Tasmania, if not Australia. The facts of the APPM dispute are destined to be replicated in one degree or another during the 1990's as Australian industrial relations undergo fundamental change. The system of industrial relations being created in Victoria and Tasmania, under Liberal State Governments, has the potential for generating a repetition of the APPM dispute. Therefore the APPM ruling will be of considerable importance in future industrial disputes.

Keywords
police discretion, industrial relations, The Queen v The Commissioner of Police for the State of Tasmania ex parte North Broken Hill Limited (Trading as Associated Pulp and Paper Mills and APPM)

THE APPM STRIKE: AN EXERCISE OF POLICE DISCRETION; A POOR EXAMPLE OF JUDICIAL OVERSIGHT

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> ...the exercise of discretion lies at the heart of the policing function. It is undeniable that there is only one law for all: and it is right that this should be so. But it is equally well-recognised that successful policing depends on the exercise of discretion in how the law is enforced. The good reputation of the police as a force depends upon the skill and judgment which policemen display in the particular circumstances of the cases and incidents which they are required to handle. Discretion is the art of suiting action to particular circumstances. It is a policeman's daily task.[1]

Introduction

In *The Queen v The Commissioner of Police for the State of Tasmania ex parte North Broken Hill Limited (Trading as Associated Pulp and Paper Mills and APPM)*,[2] (hereafter called the *APPM* case) Justice Wright has foreshadowed the possibility that the scope and ambit of police discretion may be under severe judicial threat in the state of Tasmania, if not Australia. The facts of the *APPM* dispute are destined to be replicated in one degree or another during the 1990's as Australian industrial relations undergo fundamental change. The system of industrial relations being created in Victoria and Tasmania, under Liberal State Governments, has the potential for generating a repetition of the *APPM* dispute. Therefore the *APPM* ruling will be of considerable importance in future industrial disputes.

Justice Wright refused a writ of mandamus against the Commissioner of Police directing him to assist the breaking up of a strikers' picket line outside the *APPM* mill in Burnie. However His Honour indicated that he believed that the police had little or no discretion about whether to intervene in such circumstances and indicated his willingness to grant a writ of mandamus if the police continued to avoid making arrests in an attempt to keep the dispute

1 Report of an Inquiry by Lord H Scarman: *The Brixton Disorders*, Cmnd. 8427 (1981), para 4.58 quoted in Christopher L Ryan and Katherine S Williams, 'Police Discretion', Public Law, Spring 1986, 305.

2 Tasmanian Unreported No 41/1992.

from escalating into violence. Justice Wright held that the strikers' actions of obstructing pedestrian and vehicular access to and from the plant gave rise to possible actions under the *Police Offences Act* 1935 (Tas), the *Traffic Act* 1927 (Tas) and the *Criminal Code* 1924 (Tas). Therefore in the light of evidence indicating the likelihood of such offences occurring, the police had a duty to intervene.

The ruling of Justice Wright flies in the face of previous judicial approaches to police discretion and ignores the position of police within the constitutional and administrative law framework of Australia. To expect the police to enforce all the laws all the time would be unreasonable and impracticable. In *Wright v McQualter*,[3] Justice Kerr expressed the view that it is permissible and sound policy in some circumstances for the police to pursue a process of selective law enforcement. His Honour stated that the decision whether or not to make arrests in a given case when offences have been or are reasonably suspected of having been committed, is a matter within police discretion and is hardly likely to raise a legal issue in the courts. This case was not referred to by Justice Wright. This is a pity because the question of selective law enforcement in the context of mass action has arisen infrequently for judicial consideration to date and the approaches adopted by Justices Kerr and Wright are in direct conflict on a number of crucial points. Accordingly, the controversy in this area concerning police discretion has, if anything, been intensified by the decision in the *APPM* case and critical questions concerning what is and what should be the ambit of that discretion remain unanswered.

Background to the *APPM* Dispute[4]

The dispute began in early March 1992 and effectively ended in early June 1992. A gradual escalation of employer and union actions and reactions culminated in full scale strike action and the establishment of a picket line by the strikers and their supporters in May. Prior to this point a number of flashpoints had occurred bringing the parties in dispute to increasingly higher plateaus of stalemate. Throughout May and early June a police presence was maintained at the mill site but police took no steps to remove the picket line. Inspector of Police at Burnie, Roy Fox, claimed that the police would not be arresting picketers because his role was to keep the dispute as non-violent as possible.[5] For several weeks the mill management attempted a range of actions to breach the picket lines, including the driving of trucks by management, the ordering of apprentices to return to work and threatening to sack workers who failed to report for duty inside the mill.

Throughout this period the police under Inspector Fox's command had

3 [1970] 17 FLR 305 at 318.

4 For an informative and extensive coverage of the APPM dispute and its legal implications see Margaret Otlowski, 'The Legal Fallout from the APPM Dispute', South Australian Journal of Labour Law 287.

5 The Mercury 15 May 1992.

been successful in maintaining peace (watching brief over) in an increasingly bitter dispute. However *APPM* management were critical of the police handling of the dispute. The company had written to the police requesting assistance to clear the picket lines and in late May demanded that the police assist the company in conducting its lawful business.[6]

Legal action against the Police in the Supreme Court

In a surprise move *APPM* commenced legal action in the Supreme Court seeking a writ of mandamus against Police Commissioner, John Johnson, requiring him to issue instructions to his police force to take action to prevent the strikers hindering access to the mill site in Burnie. After three days of legal argument Justice Wright refused to grant the order sought but strongly indicated that if the police continued to take no action against the strikers he would be likely to consider favourably a future application by the company.

The ruling of Justice Wright, on 3 June 1992, led to a series of violent confrontations. The day after the ruling, police numbers at the Burnie mill were increased and used to break through the picket line. Forty-one picketers were arrested. Many media commentators viewed Justice Wright's order as the catalyst that forced the parties to quickly hammer out a settlement to the long running dispute.[7] This positive reading of the ruling ignores the belief held by the police officers in charge of operations at Burnie that the use of force could have also resulted in a series of running battles between the police and strikers. The positive interpretation of the impact of Justice Wright's ruling also ignores the accusations of 'political interference' which could have been levelled at the police if they had intervened in the absence of Justice Wright's surprise ruling. Throughout the dispute the Police Minister, Frank Madill, had stressed in Parliament and media appearances that he would not interfere in the way that the police were exercising their discretionary powers of arrest or intervention.

Police Discretion - The Constitutional Position

Police, whether as individual officers or as an organisation, occupy a special position in the Australian constitutional framework. Effectively police are seen and treated, legally and politically, as direct representatives of the community and have a separate accountability to Parliament, to the Minister of Police, to Police Commissioners and to judges under the common law.[8]

6 The Mercury 21 May 1992.

7 The Mercury 13 June 1992.

8 There has been a long series of cases and articles outlining the traditional independence of police eg *Enever v R* (1906) 3 CLR 969, *Fisher v Oldham Corporation* [1930] 2 KB 364 and articles such as Wettenhall, 'The Government and the Police, Current Affairs Bulletin Vol 53, no 10, March 1977; Plehwe, 'Some Aspects of Constitutional Status of Australian Police Forces,' Journal of Public Administration, Vol 32, 1973; Avery, *Police: Force or Service*? Butterworths, Sydney 1981.

Flowing from this constitutional position of the police is the logical acknowledgment that police cannot enforce all of the laws all of the time. Therefore police discretion becomes a necessary part of law enforcement. While there are frequent calls for tighter controls to be placed on the use of that discretion, critics and judges do not often call for the complete removal of that discretion. In the *APPM* case Justice Wright has adopted this extreme position in relation to the use of police discretion in the case of disputes occurring within the industrial arena.

Police Discretion In General

It is generally acknowledged that discretion is a major aspect of police work. For the individual police officer whose primary function is the maintenance of public order (Travis),[9] the exercise of this discretion is part of his daily routine. He must decide whether to investigate an offence, whether to proceed by way of arrest or summons, whether to charge and what charges to lay and whether, in the appropriate case, to grant bail. Senior officers invested with administrative and organisational functions must exercise broader discretions. They decide which offences are to be policed, how they are to be policed and where officers are to be deployed.

La Fave[10] identifies four main reasons for maintaining police discretion in law enforcement. First, no legislature has succeeded in formulating laws which encompass all conduct intended to be made criminal and which clearly exclude all other conduct. Second, the failure to eliminate poorly drafted and obsolete legislation renders the continued existence of discretion necessary in the interests of fairness. Third, discretion is necessary because limited resources make it impossible to enforce all laws against all offenders. There are simply too few police.

In the *APPM* case Justice Wright vehemently rejected this as a valid basis for the exercise of police discretion. He held that it was a truly frightening proposition which would endorse the law of the jungle and lead to anarchy. With all due respect to His Honour, the fact is inescapable that the State clearly does lack sufficient resources to enforce all the laws all the time. To date this has not caused any collapse in the fabric of society. Even if Justice Wright's concern can be taken to be limited to a lack of resources to control mass demonstrations, it is still clear that many public assemblies, both lawful and unlawful, can be so large as to be beyond the capacity of the police to control in any real sense of the word. Accordingly, in such cases, should strict enforcement of the law require dispersal of these crowds, it would be impossible to achieve. Many of the Vietnam moratorium marches of the

9 Travis, 'Police Discretion in Law Enforcement, A Study of Section 5 of the NSW *Offences in Public Places Act* 1979' in Findlay, Egger and Sutton (eds) *Issues in Criminal Justice Administration* George Allen and Unwin, Sydney 1983.

10 La Fave, 'The Need for Discretion' in Sykes and Drabek (eds) *Law and the Lawless*, Random House, New York, 1979.

1970's fell into this category, as did the Franklin River Dam demonstrations in the 1980's. In such cases, the numerical inferiority of the police force must surely be a valid consideration to be taken into account by the police in deciding what to do.

The final reason advanced by La Fave for the maintenance of police discretion is that the strict enforcement of the law would have harsh and intolerable results. This is particularly obvious where aged and juvenile offenders are concerned. Therefore, to quote Egger and Findlay,[11] police discretion is both inevitable and unavoidable.

Discretion and a full enforcement mandate

Relevant legislation and Police Standing Orders seem to leave little room for police discretion. The legislation and orders are expressed in terms that appear to impose a duty on police officers to enforce all laws at all times. In Tasmania, the Tasmanian *Criminal Code* confers a right and a duty on the police to arrest anyone found committing a crime.[12] In addition, it is the right and duty of the police to arrest anyone seen committing a breach of the peace or believed on reasonable grounds to be about to commit or renew a breach of the peace.[13] Further, a police officer has both the right and duty to arrest anyone found at night in such circumstances as to afford reasonable grounds for believing that he has committed or is about to commit a crime.[14] No warrant is required in any of these situations.

The other major statutory source of police arrest powers in Tasmania is the *Police Offences Act* 1935. This Act empowers the police to arrest without a warrant any person found committing various offences of the public nuisance type, offences involving dishonesty, injuries to property and to the person and offences relating to trespass to land.[15]

Does this legislation annul police discretion in the area of arrest? A literal interpretation suggests that it does. The fact that the Code specifically imposes a duty to arrest where there is the right to do so suggests that no discretion exists. Harding[16] further argues that because Acts such as the *Police Offences Act* make specific provision for proceeding otherwise than by way of arrest in denoted circumstances[17] there is an implicit requirement that the right to arrest be exercised in all other situations.

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11 Egger and Findlay, 'The Politics of Police Discretion' in Findlay and Hogg (eds), *Understanding Crime and Criminal Justice*, The Law Book Co Sydney, 1988 at 210.

12 Tasmanian *Criminal Code* s 27(1) and (9).

13 Ibid s 27(6) and (9).

14 Ibid s 27(7) and (9).

15 *Police Offences Act* 1935 s 55(1) and (2B).

16 Harding, 'The Law of Arrest in Australia' in Chappell (ed) *The Australian Criminal Justice System*, Butterworths Sydney, 1977 at 259.

17 Ibid s 5(2).

Tasmanian Police Standing Orders appear to endorse Harding's approach to the question of discretion or full enforcement. Standing Order 400.3 states unequivocally:

> 400.3 - EXERCISE OF POWERS:
> (1) subject to Order 400.12, the power to arrest a person committing an offence within the view of a member shall be exercised at once. It shall not be unnecessarily delayed and then used.
>
> (2) The power of arrest and duty to do so apply to members at all times and places, irrespective of whether a member is on or off duty or the duty being performed.[18]

However, the courts have not hitherto adopted a literal interpretation of such provisions.[19] Justice Wright initially followed the general tenor of the common law when he said that police officers undoubtedly possess a discretion as to how they will deal with any situation.[20] He further stated that it is not always necessary for the police to arrest and charge an individual whose conduct amounts to a breach of the peace.[21] On this view of the law the police officer's duty to arrest is, in the words of Lord Diplock, one 'of imperfect obligation'.[22]

However, whilst paying lip service to this generally accepted position, Justice Wright differed markedly from the common law in defining the practical limits of police discretion. His Honour was clearly of the view that the actual scope of police discretion to enforce the law is minimal. He held that, when faced with actual or potential criminal conduct it is not proper for the police to take no action at all. They should take steps to prevent an offence being committed or continuing, though those steps may fall short of effecting an arrest. For example, some form of temporary detention not amounting to an actual arrest might be imposed, or the offender might be physically removed from the scene or persuaded to leave before an offence is committed. In any event, a police officer cannot ignore the commission of an offence in his presence. Accordingly, if he finds a person obstructing others in a public street, it is his duty to move him along.

As far as general policy decisions are concerned, His Honour similarly held that there would be little room for the exercise of discretion in cases like that before him except as to the vigour and formal consequences of the intervention employed. A policy to refrain from breaking a picket line could

18 *Tasmania in Police Standing Orders and Reference Manuals*, 1982. These orders were acquired by the University of Tasmania Law Library under the *Freedom of Information Act* 1991 (Tas).

19 See for example *Wright v McQualter* [1970] 17 FLR 305; *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118; *R v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 3)* [1973] 2 WLR 43; *R v McAulay* (1979) 41 FLR 267; *Innes v Weate* [1984] Tas SR 14.

20 Unreported No 41/1992 at 5.

21 Ibid at 6.

22 *Albert v Lain* [1982] AC 546 at 565.

not be supported. Nor did his Honour view the police as having much discretion about whether or not to intervene when a specific offence such as a breach of the peace occurs or is threatened or anticipated. In addition, in His Honour's opinion it was not relevant that, in refraining from taking preventative action, the police were motivated by a desire to prevent the occurrence of violence or its escalation. He stated that a police officer cannot allow a desire to avoid violence to deflect him from enforcing the law.[23] On this view, it is not legitimate for the police to desist from intervening when criminal conduct is anticipated.

Police Discretion Following the *APPM* Case

Following the decision in the *APPM* case, what discretion is left to the police in Tasmania? Whilst Justice Wright was prepared to leave the actual response employed by the police within their discretion, that, in reality, has left them with very little choice indeed. The police must act and that action must be to enforce the law. The fetters applied by Justice Wright to the exercise of police discretion in this area are thus very firm. The practical effect of this decision is almost completely to erode any effective use of police discretion in the handling of picket lines or mass demonstrations in Tasmania.

Yet it may be that Justice Wright has charted a solo course for the law relating to police discretion. In *Wright v McQualter*, for example, Justice Kerr was prepared to accord the police wide discretion in enforcing the law. This case also considered the question of selective law enforcement in the context of mass action, the action in question being student demonstrations during the 1960's. The problems relating to the policing of that type of demonstration relate also to demonstrations by picketing strikers. In contrast to Justice Wright, Justice Kerr held that, even where demonstrators had broken the law or intended to do so, as for example by obstructing traffic on a busy street, police discretion and policy would nevertheless determine what was to be done. The police were not bound to act; they might resort to a policy of selective law enforcement in favour of those believed to have committed offences. In so doing, it would be proper for them to take into account the risk of unintentionally producing further disorder whilst seeking to maintain order. Accordingly, on Justice Kerr's analysis and, again, in contrast with that of Justice Wright, the desire to prevent any escalation of violence might provide a legitimate reason for the police to exercise their discretion not to enforce the law. Further, Justice Kerr did not regard selective law enforcement as promoting mob rule or the disintegration of society. Rather, he argued that the interests of the community might best be served by such a policy. In particular, he held, that by avoiding retaliatory violence, police restraint might promote the peaceful exercise of their lawful rights by demonstrators.

23 Unreported No 41/1992 at 8.

Similarly, in *R v Commissioner of Police of the Metropolis, Ex parte Blackburn*;[24] *R v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 3)*;[25] *R v McAulay*[26] and *Innes v Weate*,[27] the courts were all of the view that, in carrying out their duty of enforcing the law, the police have a wide discretion with which the courts will not interfere. This means, of course, that there are cases where the courts will interfere. But that interference will not be motivated merely because the law has been broken and the police have decided not to intervene. In *R v Commissioner of Police, Ex parte Blackburn*, Lord Denning MR and Salmon LJ gave specific examples of cases where it would be entirely proper for the police to refrain from prosecuting even in the face of a clear breach of the law. These include cases of unlawful sexual intercourse by teenage boys and attempted suicide. Their Lordships made it clear that, any assessment of an exercise of police discretion, should have regard to the evil which the law sought to prevent and to the social effects of any failure to enforce it. Such an approach enables the police to weigh the ramifications of strictly enforcing the law against those of not doing so when deciding what action to take in any particular case. This, in turn, opens the way for considerations of the kind referred to in *Wright v McQualter* to come into play.

These cases also make it clear that it is only in extreme cases of failure to enforce the law, that the courts would be justified in intervening.[28] Such would be the case for example where the Police Commissioner had 'turned his back on his duties'.[29] Where the Police could show that there was some sound basis to the exercise of discretion, to avoid violence or because of resource problems, all of these authorities have clearly indicated that the discretion will not be overturned.

Additionally, in *R v Police Commissioner, Ex parte Blackburn (No 3)*, Lord Denning MR was prepared to judge the propriety of the Commissioner's policy on the basis of the resources available to him to enforce the law. As noted above, this was not considered by Justice Wright to be a proper basis for the exercise of the Commissioner's discretion in the *APPM* case. Justice Wright has charted a solo course.

Where To Now: Blackburn or *APPM*?

The basic distinction between the *APPM* case and *R v Commissioner of Police, Ex parte Blackburn* and the Australian case of *Wright v McQualter* is that the first case accords the police minimal practical discretion whilst the

24 [1968] 2 QB 118.
25 [1973] 2 WLR 43.
26 (1979) 41 FLR 267.
27 [1984] Tas SR 14.
28 To this effect, see *R v Police Commr, Ex p Blackburn (No 3)* [1973] 2 WLR 43 per Lord Denning MR at 51, and per Phillimore LJ at 55; *R v McAulay* (1979) 41 FLR 267 at 27-8.
29 Ibid.

last two cases grant them the maximum, fettered only by careful and very reluctant judicial scrutiny. It is submitted that if the choice is limited to these two extremes then Justice Kerr's approach in *Wright v McQualter* is the better choice.

However, there are a number of fundamental problems associated with police discretion not addressed by any of these cases. The approach taken in both *Wright v McQualter* and *R v Police Commissioner, Ex parte Blackburn* is flawed because it ignores the essentially, and unavoidably, political nature of every exercise of police discretion. It is based on the premise that it is the police officer's duty to act in the interests of the community as a whole, but fails to acknowledge that decisions as to what the interests of the community are and whether police intervention will best serve those interests are necessarily political in nature.

The concept of 'the interests of the community' is unavoidably subjective and vague. Any assessment of what may best serve those interests must depend upon the assessor's particular standpoint at any given time in relation to any given issue. For example, those who have been campaigning for tougher police action in relation to domestic violence may regard any curtailment of police discretion not to act as serving community interests. Accordingly, they are likely to greet the decision in the *APPM* case with enthusiasm. A recent study of the Victorian Police Force noted the regular refusal by the police to treat criminal assault in the home as 'real' police work with the consequence that they consistently failed to enforce the law.[30]

On the other hand, those who favour a 'softly softly' approach to law enforcement where, for example, particular offences like vagrancy and public drunkenness are concerned, are likely to view the curbing of police discretion with dismay. Clearly, then, the concept of 'the best interests of the community' is too fluid and too prone to yield different results to provide a satisfactory standard by which to assess the proper exercise of police discretion.

Nor is a satisfactory test supplied by the process indicated in *Blackburn*, that is, by weighing the evil the law seeks to prevent against the social effects of not enforcing it. Again, this procedure is essentially political in nature and the outcome will still largely be dependent upon the particular point of view of the enquirer. Take, for example, the question whether the police should arrest someone who has just assaulted his spouse. One view says 'yes, domestic violence is a social evil which must be discouraged vigorously by strict enforcement of the law'. Another view says 'not necessarily - enforcing the law may deprive the offender's family of his

30 McCulloch and Schetzer, 'Brute Force: The Need for Affirmative Action in the Victoria Police Force', *Police Issues Group*, Federation of Community Legal Centres (Vic) Inc, March 1993. The majority of information for this report had been obtained from the Victorian Police under the Victorian *Freedom of Information Act*.

financial support and cause them greater hardship than would letting him off with a warning'. It is submitted that the same difficulties will be encountered no matter what test is constructed to assess the propriety of discretionary decision making. As Hogg and Hawker point out:

> there are always, by definition, a number of possible ways in which a discretion may be exercised all of which will be equally lawful, but not all of which may be equally desirable.[31]

It is this characteristic which is the major source of concern where discretionary decisions relating to law enforcement are concerned. In the first place, it can lead to inconsistencies in law enforcement, with different action being taken by the police on different occasions in relation to different offenders. Further, it makes it difficult to detect illegitimate exercises of discretion. For example, discriminatory decisions against particular segments of the community may be masked behind an apparently legitimate exercise of discretion. There can no longer be any doubt that discrimination is a factor in law enforcement generally and in police law enforcement in particular. For example, crime censuses and statistics dealing with the matter have consistently shown the over-representation of Aborigines at every stage in the criminal justice process.[32] In view of this, the courts' persistent failure to recognise the political nature of law enforcement decisions must be a matter of concern. Almost a decade ago Hogg and Hawker[33] pointed out that this failure has granted the police effective autonomy in deciding law enforcement practice, and has allowed them to determine those practices free from public scrutiny and accountability and according to untested and unstated criteria and assumptions.

However, it is submitted that the approach adopted in the *APPM* case is equally flawed, and does not offer a viable solution to any of these problems. In the first place, as noted earlier, it is an unworkable over-simplification to say that the law must be enforced and that the police have responsibility for enforcing it. Further, this approach may have undesirable, long-term social effects. It may erode public confidence in the police force; it may create an escalation in the very circumstances sought to be controlled, and it may lead to a change in crime control practices which undermines traditional freedoms and expected standards of civil liberties.

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31 Hogg and Hawker, 'The Politics of Police Discretion, Pt II,' Legal Services Bulletin 8 (5) Oct 1983 at 222.

32 See for example Walker, (1989) 'Prison Sentences in Australia', *Trends and Issues in Crime and Criminal Justice*, 20; Walker and Biles (1985) *Australian Prisoners: Results of the National Prison Census*, Canberra: AIC; Cunneen and Robb (1987) *Criminal Justice in North West New South Wales*, Sydney NSW Bureau of Crime Statistics and Research; International Commission of Jurists, Australian Section, (1990) *Report of the Aboriginals and the Law Mission*; Swanton (ed) (1984) *Aborigines and Criminal Justice*, Canberra AIC; Biles (1989) *Aboriginal Imprisonment: A Statistical Analysis*, Research Report No 6, Australian Royal Commission into Aboriginal Deaths in Custody; Hazlehurst (ed) (1987) *Ivory Scales: Black Australia and the Law*, Sydney, NSW University Press.

33 Above n 31.

Justice Bright in the 1970 South Australian Royal Commission Report on the September Moratorium Demonstration[34] discussed the importance to police decision making of any potential erosion of public confidence in the police. His Honour noted that strict enforcement of the law may cause a polarisation in public attitudes towards the police. This is a particular danger where the police seek to suppress an activity which those engaged in regard as important, necessary and valuable. Such, of course, would be the case with picketers seeking to protect their conditions of employment. Where such polarisation occurs, with one segment of the population disapproving the police action, while another section approves it, there may be long-term ramifications for police ability to maintain public order.

In cases of collective action where the participants are deeply antagonistic towards the police, there will, at least, be a significant reduction in the police ability to control that action, and, at worst, the police may become the focus of that action with the result that it is converted from peaceful protest into violent confrontation. The Brixton riots in the United Kingdom provide a frequently cited example of such a situation. This is not to say, that detestation of the police was the sole or even the most significant cause of those riots. Nevertheless, suspicion of the police and antagonism towards them was cited by participants in those riots as one factor determinative of their violent conduct.

Cunneen and Findlay[35] also argue that this process was evident in the Bathurst Motorcycle Race riots during the 1980's. They suggest that the decision there to strictly enforce public order legislation had a spiralling effect, with the result that the seriousness of the offences committed increased as the level of police presence and response increased. What began, in early years, as initially minor breaches of public order, ended, in later years, as full scale confrontation and conflict in response to what race goers perceived to be police harassment and unjustified intervention. Clearly, if this analysis is correct, police action caused an escalation in the very situation sought to be controlled. Arguably, the same process occurred during the *APPM* dispute in Tasmania. It was not until the police acted in accordance with Justice Wright's views and moved from merely monitoring the situation to attempting to break the picket line, that any violence occurred.

A Flexible Alternative for Police Accountability

The suggested alternatives to the *Blackburn* and *APPM* approaches clearly suffer from a number of shortcomings. What is needed is a recognition that discretionary decision making by police at both macro and micro levels

34 House of Assembly Royal Commission, 1970, *Report on the September Moratorium Demonstration*, South Australia.

35 Cunneen and Findlay, 'The Functions of Criminal Law in Riot Control' 19 Australian and New Zealand Journal of Criminology, 1986 163.

needs to be considered a sphere of public policy which must be subject to effective public scrutiny and accountability.[36]

The macro level of decision making relates to general policies of law enforcement (usually determined by senior officers) such as a crackdown on burglaries in one vicinity as opposed to traffic offences in another locality, or the decision not to exercise arrest powers unless absolutely necessary during the course of an industrial dispute. At the micro level decision making is, for example, the decision by the beat officer whether to arrest a drunk person or to organise a safe passage home having administered a stern warning. As Travis quoted:

> To the patrolman, the law is one resource among many that he may use to deal with disorder, but it is not the only one or even the most important-beyond that, the law is a constraint that tells him what he must not do but that is peculiarly unhelpful in telling him what he should do. Thus, he approaches incidents that threaten order not in terms of enforcing the law but in terms of handling the situation.[37]

Single global solutions to the problems of police discretion are impractical and apocryphal. What is required is a practical multi-faceted approach which recognises that there are limitations on the power to control effectively the exercise of discretion by the police. Any proposed guidelines to police discretion in this sphere of public policy must recognise that

> Discretion is exercised within the police force in the course of performing a range of heterogeneous tasks and functions which are subject to different internal hierarchies of control and supervision.[38]

This does not necessitate, however, the construction of 'any grandiose system of accountability'.[39] It should be possible to trial a series of measures which recognise the need for flexibility to deal with a range of heterogeneous tasks. A first step would be to construct a number of broad categories of police work which require different levels and forms of accountability for the exercise of police discretion. A simplistic, but illustrative arrangement might be for example:

High Profile Problems
Important but Everyday Problems
Intermediate

High Profile Problems

In this sphere it is not unreasonable to expect the police to issue explicit policy statements about how a discretion will or will not be exercised and

36 Above n 31.
37 Above n 9 at 211.
38 Hogg and Hawker above n 31.
39 Ibid.

under what conditions. These explicit statements can then be evaluated by public debate. A clear example of this approach is the *APPM* dispute. The validity or desirability of the particular approach to police discretion in this area can be tested by exposure to public debate, by the citizen, media and parliament. The police can gain some feedback, albeit often conflicting, about their discretionary decisions. The exercise of discretion can be evaluated by consideration of such policy justifications as the need to avoid violence; the legitimate right of the private citizen to invade public space peacefully to demonstrate, and the finite nature of police resources.

There are, of course, precedents for the adoption of such an approach. It is already in use on an everyday basis in the area of traffic control, for example. The police will often announce that during a certain period in a certain locality a particular method of law enforcement will take place. Accordingly, a certain highway may come under heavy police scrutiny but drivers will only be stopped if they drive faster than 10km above the speed limit. The reason given for this policy is that it provides a means of reducing general breaches of the speed limit while enabling time and effort to be concentrated on more flagrant breaches of the *Traffic Act*.

Important but Everyday Problems

In controversial areas like domestic violence, sexual assault, public drunkenness, vagrancy etc, issuing broad public policy statements may not be sufficient to achieve the desired control of police discretion though it will nevertheless, remain necessary. This is because the practical implementation of such statements can too readily be undermined by cultural, racist and sexist attitudes at both the individual officer and the force levels. Accordingly, what is required in these cases is some measure which effectively confines police discretion in these areas. This might be achieved by issuing specific detailed instructions to officers indicating precisely how they should respond in cases like these. Removal of the decision making responsibility here from the individual has the advantage that it obviates any need for the individual officer to confront his own system of beliefs in deciding a course of action and so reduces the potential for police action occurring in contradiction to official policy. The disadvantage is that by not challenging unacceptable attitudes this approach does not promote their change. However, given the current evidence of police unwillingness to intervene in cases of domestic violence and their overzealousness in cases involving members of the aboriginal community, it seems appropriate to institute measures, even if only in the short term, designed to circumvent these problems effectively.

It is, of course, recognised that not all cases in this category will be amenable to being dealt with according to the issued instructions. Consequently, even in this category there is the need for flexibility in the system, but not such flexibility that the system itself is rendered redundant.

Accordingly, in recognition of the diversity of cases which confront the police in these areas, but to ensure the effectiveness of the issued instructions, a process of accountability might be developed which enables police to depart from issued instructions in given cases but which requires them to account for that departure. Such a process might range from an officer being required to justify such a departure in particular instances, to the establishment of a review process that monitors the overall implementation of the issued instructions and the stated policy.

The major difficulties confronting decision makers in respect of this category of problems will be first, to identify those matters in respect of which strict procedural instructions are required to be issued to ensure compliance with stated policy and second, to formulate appropriate instructions to achieve the implementation of that policy. The first difficulty might be resolved in much the same way as was proposed earlier in respect of high profile problems. A great many of these areas have, of course, already been identified through a long process of public debate and the attention of law reform and other community bodies. The treatment by police investigators of victims of sexual assault, the treatment of aboriginal offenders and police inaction in domestic violence cases provide probably the most prominent examples of such matters. In respect of these areas, then, little more is probably required than the formulation of policy to effect change in current practices and the development of the relevant instructions.

Intermediate

This category represents a wide continuum of circumstances which needs a range of measures. Hogg and Hawker have suggested the following:

> Police rules and instructions should be published, much more information should be provided in police Annual Reports (as recommended in the Lusher Report), external review of police decision making (by courts, the ombudsman, parliament and any other machinery that may be established) should be linked to detailed requirements for the internal recording of decisions, the publication of criteria upon which decisions are taken, etc.[40]

Most reports of the State Ombudsman highlight the effectiveness of independent external review in exercising a loose control over police discretion and operations without imposing too many constraints upon the case by case exercise of individual discretion. During 1992 the Tasmanian Ombudsman noted that a number of police officers were clearly unaware of

40 Ibid. A recent Tasmanian Audit Department report outlined the shortcomings of the annual report process for public service departments in general. The Annual Report for Police fits many of these audit criticisms such as being padded with material but short on relevant material. See Prismall 'Auditor's Bad Report' The Examiner 17 May 1993 at 1-2.

the limits to their powers with respect to search and entry. This shortcoming was solved by the distribution of a circular clarifying the extent of these powers.[41]

Conclusion

The decision by Justice Wright in the *APPM* case highlights the need for a re-evaluation of the supervision of police discretion within the Australian legal system. We have argued in this article that the approach taken in the *APPM* case is in direct contrast to the preferred line of judicial authority. The *APPM* case strips police of their ability to use a vital and indispensable tool in the performance of their multifarious duties - discretion. Nevertheless we have also maintained that the preferred line of authority, represented by cases such as *Wright v McQualter*, is at best a second rate solution to the entwined issues of police discretion and police accountability.

Our preferred solution would be the adoption of a deliberate multilateral and flexible approach to improve the accountability of police in the necessary exercise of their discretion. This approach would recognise that police discretion is a fact of life but that it needs to take place within the sphere of public policy. Recognition would also be taken that such scrutiny needs to recognise and respond to the wide ranging and heterogenous nature of police work. The *APPM* solution is wrong. As with any discovery of a simplistic panacea, its widespread application is not desirable and even where it has appeared to work (the patient survives or the strike is resolved) it is often more the case of despite the new treatment rather than a vindication of the risky experiment.

41 Ombudsman: Tasmanian, Annual Report for the Year Ended 30 June 1992.