CRIMINAL INVESTIGATION: THE NEED FOR REFORM

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Various law enforcement agencies have expressed concern over the practical ramifications of the decision of the High Court of Australia in the case of *Williams v The Queen*.[1]. This particular concern probably reflects a more general public anxiety based on the current incidence of crime and an apprehension among some members of the public that the laws which govern the conduct of police investigation make it difficult for police to do their job effectively. It is further suggested that the ineffectiveness of police investigation allows people who are guilty to escape conviction and consequently diminishes public confidence in the administration of justice. This is the way the argument in favour of extending police powers has been presented by its proponents to the public.

In *Williams*, the High Court held that, under the law of Tasmania, which is in every relevant sense the same as the law in New South Wales on this aspect of the criminal process, it is unlawful for a police officer to delay taking an arrested person before a justice. Police are not entitled to delay this process for the purpose of questioning the arrested person or for conducting any other form of investigation into the suspected criminal conduct of the arrested person. That is to say that where it is practicable for the police to bring the arrested person before a justice, this must be done without delay. In so holding, the court reaffirmed a principle of the common law which had been unambiguously established in New South Wales at least fifty years previously and which had probably existed for centuries before that in England.[2]

While *Williams* did not change the law, the judgments underlined the practical difficulties which police encounter in ascertaining the law and in adhering to its strict requirements when investigating criminal offences in a 'modern urbanised society'. Each of the judgments acknowledged the problems which the current law was likely to create for police. For example, Wilson and Dawson JJ observed in their joint judgment:

> It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime and the institution of proceedings for its prosecution. And these are functions which are carried out by the police, not for some private end, but in the interests of the whole community.[3]

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1. (1986) 161 CLR 278
2. **Bales v Parmeter** (1935) 35 SR (NSW) 182; **Clarke v Bailey** (1933) 33 SR (NSW) 303; **Ex parte Evers; re Leary** (1945) 62 WN (NSW) 146
3. **Williams v The Queen** (1986) 161 CLR 278 at 312

Elsewhere in *Williams'* case, there is an acknowledgment, if not an implied exhortation, that if the law is to be changed, this should be done by Parliament rather than by judicial regulation, as originally occurred in England.

> The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. King CJ in *Reg v Miller* [4], in a passage[5] with which we would respectfully agree pointed out the problems which the law presents to investigating police officers, the stringency of the law's requirements and the duty of police officers to comply with those requirements - a duty which is by no means incompatible with efficient investigation. Nevertheless, the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck: see, for example, the Australian Law Reform Commission Interim Report on 'Criminal Investigation'.[6] But the striking of a different balance is a function for the legislature, not the courts. The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement. It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation. If the legislature thinks it right to enhance the armoury of law enforcement at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.[7]

The essential question in the police powers debate was squarely raised in Williams. Is there really a need to erode the traditional common law protection of personal liberty in order to enhance the armoury of law enforcement?[8] Put very briefly my answer to that question is no, but I consider that both the effectiveness of law enforcement and the real enjoyment of personal liberty will be significantly enhanced by establishing clearly formulated rules which can be applied with far greater certainty than the current law.

The Objectives of Reform

Any change in the law governing criminal investigation should be directed towards a number of specific objectives. Firstly, there is a need to clarify the current law by removing doubts about its operation in practice. There is an unhealthy degree of uncertainty in both its express terms and its application by the courts. Secondly,

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4. (1980) SASR 170
5. at 203
6. ALRC, **Report No 2**, Ch 4
7. **Ibid** at 296 per Mason, Brennan, JJ.
8. (1986) 161 CLR 278 at 296

any new law must maintain an acceptable degree of individual freedom within our society. That requires clearly defined and effective protection against unjustified interference with the liberty of the individual.

It is necessary to define the boundaries within which the police force, and to a lesser extent private individuals, should be permitted to restrict the freedom of movement and interfere with the individual privacy of people in the name of prevention of crime and effective law enforcement. Other objectives may be achieved by a body of rules governing criminal investigation. Important among these is the need to prevent crime by deterring criminal activity and, recognising this as an unattainable ideal, enhancing the ability to identify and take action against those who commit crime. By defining clearly the limits of police powers, the rules should inform both the police and the public of their rights and obligations under the law. The effective detection and prosecution of crime is a fundamental objective of our system of criminal justice. It has long been recognised that a system of criminal investigation which increases the likelihood of detection and consequently conviction and punishment is the most effective method of crime prevention. Rules relating to arrest should be designed to promote the overall prevention of crime but in a manner which is generally consistent with individual liberty.

It is clear that some police officers believe that they do not have adequate powers to perform their function. It is equally apparent that some are prepared as a result to use methods which are deceptive or unfair and ultimately break the law themselves by fabricating evidence or obtaining it illegally in order to overcome what they regard as a deficiency in the methods legitimately open to them. This has been admitted by senior police in England and more recently in the proceedings of the Fitzgerald Royal Commission in Queensland.[9] Relatively recent Commissions of Inquiry in Australia have also made specific findings of misconduct and illegality among members of the police forces of Victoria[10] and Queensland[11]

The Need for Rules of Practical Utility

It should also be recognised that written rules which may appear to provide the necessary level of protection cannot be regarded as satisfactory unless they do so in practice. The rules and actual practice must correspond. This demands the creation of a body of rules which are expressed in simple terms so as to enable both ease of understanding and certainty in their application. The rules should be simple enough to allow every person who is affected by them to understand how they

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9. The evidence presented to the Commission has been extensively reported in the media up to the middle of December 1988. The comments of Mr Jack Herbert in relation to the widespread incidence of "verballing" are of particular relevance
10. **Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force** (1976), Chairman: Barry Beach QC
11. **Report of the Committee of Inquiry into the Enforcement of the Criminal law in Queensland** (1977), Chairman: Mr Justice Lucas

operate. From the point of view of police called upon to apply the rules, the need for certainty is paramount. The current law is highly confused. In practice a police officer often has to decide immediately what action to take. Because the officer's action may later be analysed and discussed at length by people who have a long time to consider the kind of criticism which can be directed at it, the position of the officer is precarious indeed. The point should not be overlooked that police officers vary greatly according to their age, background, attitude, training and experience. Rules which are uncomplicated and clear will assist in overcoming the current state of ambiguity and uncertainty.

The current rules governing criminal investigation are also undoubtedly responsible for causing long arguments in court. The expense and the delay which thereby result are costs ultimately if not directly borne by the community as a whole. Where the operation of the rules is clear, one of the desirable consequences will be to limit the scope for disputes in legal proceedings in which the application of those rules is called into question. Reducing the incidence and the extent of disputes will in turn result in a reduction of the time taken up by court proceedings. This will free up valuable resources, so that court delays are reduced and police will spend less time in court.

Another objective which should be borne in mind in this area is the desirability of improving in the quality of evidence which is to be presented in court proceedings. The reliability of the evidence produced in a criminal trial naturally has a crucial impact on the standard of justice achieved in that trial. The importance of producing evidence which is both effective and reliable should not be under-estimated as one of the goals of reform of the law and practice of criminal investigation.

Some of these objectives may appear at first blush to be in such conflict that their resolution demands a degree of compromise in order to balance what are apparently competing interests. There is on the one hand, a danger that laws governing police powers are so protective of individual liberty that they render the police impotent and encourage crime by making it more difficult to detect and prosecute offenders. On the other hand, the manner of law enforcement should not be permitted to cause harm disproportionate to the impact of crime. To this end it must be accepted that the only realistic objective of law enforcement in a free society is the containment, and not the elimination, of crime.

One of the practical limitations on the nature and scope of reform in this area is the perennial question of its cost. The money saved in reduced court time spent dealing with disputes arising in the conduct of criminal investigation would outweigh the expense involved in providing the additional facilities and equipment necessary for the implementation of new procedures. The improvement in the quality of the administration of criminal justice, and the consequential enhancement of public confidence in that system are not readily quantifiable in financial terms but they must be taken into account in any consideration of cost.

Even if the cost of criminal prosecutions is not ultimately reduced by the implementation of new procedures, it must in any event be recognised that there can never be a strong case, if there can be a case at all, for denying procedures designed to ensure that any interference with the liberty of the subject is done in accordance with rules of procedural fairness on the ground that the provision of those procedures involves the imposition of financial or administrative burdens on the agency charged with the responsibility in question. If this were done, the executive government could control not only compliance with basic legal rights but their very existence by declining to provide adequate facilities to ensure those rights are enjoyed in practice.[12]

The Debate on Police Powers

There has been a great deal of misleading material published in the debate on police powers of investigation. It should not be seen as a contest between the rights and interests of the general community on the one hand and the rights and interests of 'the individual offender' on the other.

The valid comparison in this context is to maintain an appropriate balance between two separate requirements of the public interest.- on the one hand the need to protect personal freedom and on the other hand the need to bring criminals to justice. Both are matters of public interest. One should not be emphasised over the other. Our laws should be designed not only to protect personal freedom but also to facilitate. effective law enforcement.

It should also be pointed out that the use of an expression such as 'the individual offender' misconceives the nature of the process with which the law of criminal investigation is concerned. It is restricted by its very nature to dealing with procedures which occur before plea or trial. It is dangerously misleading and legally inaccurate to refer to people suspected of offences as 'offenders'. They are not offenders. They are suspected of being offenders. It must be carefully borne in mind that one of the fundamental principles on which our system of criminal justice is based is that a person is presumed to be innocent unless and until he or she is convicted before a court of competent jurisdiction after a fair trial of the allegations made. The basic entitlement to protection against arbitrary and unfair treatment is one which must be enjoyed by all members of the public, and especially those charged with or suspected of criminal offences.

Moreover, from a practical point of view, it must always be remembered that people who are entirely innocent of any wrongdoing are not infrequently caught up in the process of police investigation. We should be concerned to ensure that people in this position are not treated under the law as if they were guilty.

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12. See the discussion in the judgment of the Court of Appeal, Supreme Court of New South Wales in **Johns v Release on Licence Board** (1987) 9 NSWLR 103 at 113-116.

Police Powers and Human Rights

Throughout the history of this country there has been consistent opposition to the unjustified encroachment upon individual liberty occasioned by an expansion of the powers of the state. There is clearly a need to establish powers and procedures which are effective to deal with criminal offenders and with other threats to peace and good order. But it has never been accepted that the interests of the individual should be subjugated to the interests of a pervasive and all-powerful government. The point has been made, quite accurately that 'there are not many free countries left'. We should be wary to ensure that our response to perceived problems of law enforcement does not introduce features of life characteristic of societies we are quick to condemn as being without genuine freedom. It is at best inconsistent and at worst simply hypocritical to brand regimes in foreign nations as oppressive because they allow imprisonment without trial and yet advocate what amounts to imprisonment without trial as an aid to effective law enforcement.[13]

We should be conscious of those provisions of the International Covenant on Civil and Political Rights which are of significance to the criminal law generally, and to the law of criminal investigation in particular. Australia ratified the Covenant on 13 August 1980, and Australian governments should therefore apply, and where necessary supplement, the standards established in the Covenant for the protection of civil rights.[14]

Regard should also be had to the recommendations made in the final report of the Constitutional Commission[15] so far as they relate to criminal investigation. In that report, the Commission recommended that there should be a new chapter in the Constitution containing a comprehensive statement of constitutionally protected rights and freedoms including specific rights governing search and seizure, the liberty of the person, rights of people who have been arrested and the rights of people who have been charged with an offence. The effect of the proposed new chapter would be to guarantee specific rights and freedom against acts done by the agencies of government. A majority of the Constitutional Commission recommended against giving the states a power to 'opt-out' of or override constitutionally guaranteed rights and freedoms.[16]

Powers of Arrest and Detention

The current law, as it is defined in *Williams* and the several cases which preceded it, does not recognise any right in police to delay bringing an arrested

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13. Editorial (1988) 12 **Criminal Law Journal** 2
14. See generally Review of Commonwealth Criminal Law, Discussion Paper No 15, "Human Rights in Relation to the Commonwealth Criminal Law" July 1988
15. **Report of the Constitutional Commission**, September 1988 p 39 ff
16. **Ibid** p 43

person before a justice in order that the police may conduct further enquiries relating to the offence for which the person has been arrested. One consequence of the rule which has proved to be of particular concern to police is that it operates to deny to a police officer any right to question an arrested person where in all the circumstances it would be practicable for that person to be brought before a justice. There is also an appreciable problem caused by the fact that in *Williams*, the High Court was not required to and did not consider the power of the police to permit an arrested person who has been charged to be released on bail pending his or her appearance before a court at a specific date in the future.[17] The question of how the requirement to bring an arrested person before a justice may be reconciled with the power to release that person on bail if a charge has been laid is an important question which demands the formulation of a comprehensive set of rules to govern police powers of detention if the question is to be satisfactorily and clearly resolved.

The general scheme proposed in the New South Wales Law Reform Commission's discussion paper on the topic[18] was that there should be a change to the current law and practice by creating a procedure which would permit police to detain a person after arrest for a reasonable period but for no longer than four hours before either releasing the arrested person (whether unconditionally or on bail) or bringing that person before a court, in which case the court would have the power to order an additional period of detention if the circumstances warranted it. It was proposed that this period of detention following arrest could be used for the purpose of conducting further investigations authorised by statute.

It was envisaged that these investigations would include questioning, searches of person and premises, fingerprinting, photographing, obtaining forensic evidence, holding an identification parade or any other investigative procedure related to identification, the questioning of other people and the investigation of other offences suspected to have been committed by the arrested person.

The proposal that detention for a period in excess of four hours should not be permitted unless authorised by a court would effectively mean that in all serious and complex cases, detention following arrest would require judicial authorisation. Another aspect of the proposed scheme was in the establishment at each police station of the position of the custody review officer, a police officer who would have responsibility for supervising compliance by other police with the rules relating to powers of arrest and the detention of arrested people. The scheme was designed to provide a tangible level of protection of individual liberty while at the same time permitting the conduct of criminal investigation after arrest where a court was satisfied that this was justified.

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17. See generally the **Bail Act** 1978
18. NSW Law Reform Commission, **Police Powers of Arrest and Detention** (DP 16, 1987); **Crimes (Domestic Violence) Amendment Act** 1983, see now **Crimes Act** 1900 ss 357F-357H

Judicial Supervision of Police Conduct

The general principle that there should not be lengthy periods of detention following arrest without judicial authorisation of that detention is a sound one. It is vitally important that there be independent review of decisions made by police which involve an interference with, and indeed, denial of, the personal liberty of the individual. The law should not be changed so as to permit police to detain arrested people in custody unless there is some mechanism provided for independent review of that process, and where it is considered appropriate, authorisation of that detention. The law relating to arrest should embody as a matter of principle a rule which provides that an arrested person should not be detained in the custody of police without judicial authorisation. The concept of judicial authorisation for conducting investigative procedures which intrude upon personal freedom has always existed under the common law and has been given recognition in legislation passed in New South Wales in relatively recent times. A person's home cannot be searched without a warrant from a judicial officer; a person's telephone cannot be tapped without a warrant from a judicial officer and the privacy of personal conversations cannot be invaded without a warrant from a judicial officer. In recent years legislation such as the *Search Warrants Act* 1985, *Crimes Act* provisions enacted in 1983 permitting entry onto premises to investigate complaints of domestic violence and the *Listening Devices Act* 1984 have all been based on the proposition that serious interference with individual liberty is not acceptable without judicial authorisation. In our view it follows that, in the absence of overwhelming arguments or policies suggesting a contrary conclusion, a person should not be deprived of his or her liberty without the authorisation of a judicial officer. This is the law where people are arrested by warrant. There is no legitimate reason why it should not be applied to people arrested without warrant. The right to liberty is more basic than the rights which currently require judicial authorisation before any incursion can be made upon them.

It cannot be suggested that the courts are not adequately equipped to fulfil this function. The courts in Australia and elsewhere have long recognised that the right of an individual to personal freedom is one which they have a duty to uphold. The Chief Justice of the High Court has observed in a recent address that "our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for in the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the

democratic process".[19] His Honour's judgment in the case of *Van der Meer*[20] is a recent and convincing demonstration of his commitment to that principle.

> In similar vein, a prominent national leader has observed:
> "Freedom is not created by Government, nor is it a gift from those in political power. It is, in fact, secured more than anything else by limitations placed on those in Government authority".[21]

The Importance of Clarification of the Law

In general, the law governing criminal investigation is poorly defined. Apart from being confused, it does not reflect current practice. There is, accordingly, a need to eliminate the vagueness generated by the broad discretions given to police under the current law by making police powers more specific. This process must also take account of the need to provide real and realistic safeguards to protect the legitimate interests of the people who may be affected by the exercise of those powers.

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19. Sir Anthony Mason "Future Directions in Law" (1987) 10 **University of New South Wales Law Journal** at 182 (the Wilfred Fullagar Lecture 1987)
20. **Van der Meer v The Queen** (1988) 62 ALJR 655
21. Ronald Reagan, Speech at the Independence Day Celebration, The Jefferson Memorial, Washington DC, 3 July 1987