THE SALISBURY AFFAIR: SPECIAL BRANCHES, SECURITY AND SUBVERSION

RICHARD G. FOX*

Our liberal-democratic constitutional arrangements assert that the doctrine of separation of powers with its checks and balances offers a judiciary independent of government influence, a public service free from political bias and a police force accountable generally to government, though largely exempt from state direction in respect of specific cases. Theoretically, police and similar agencies of executive government are able to command public confidence because they are above sectional interests and act as neutral arbiters in the name and interest of society as a whole. This is not true. At least so far as the Australian domestic security bodies are concerned, these agencies are not subservient to government, as the liberal-democratic ideal suggests, but, rather, are independent centres of state power with practices and values which, through design or ineptness, operate to serve sectional political interests.

The dismissal of the South Australian Commissioner of Police, Harold Hubert Salisbury, on 17 January 1978 and its sequel in New South Wales, provided a disturbing insight into the functions and values of state police Special Branches and raised important questions regarding the accountability and independence of such services. This article will describe the security aspects of Commissioner Salisbury's dismissal and, in one which follows,[1] Professor Louis Waller will explore the uncertain and often disturbed balance between police independence and political accountability which once more has been brought into question by the Salisbury affair.

ROYAL COMMISSION ON INTELLIGENCE AND SECURITY

The story starts in August 1974, when the Whitlam Government established a Royal Commission on Intelligence and Security with Mr Justice Hope of the New South Wales Supreme Court as the sole Commissioner.[2] In Australia, there are, in addition to State police Special Branches, five

* Reader in Law, Monash University.

1 P. L. Waller, "The Police, the Premier and Parliament: Governmental Control of the Police" (1979) 6 *Mon. L.R.* (forthcoming December 1979).

2 He was also a former President of the N.S.W. Council for Civil Liberties. His report was submitted in 1977 in eight volumes. Only half have been tabled in Parliament and published: *Royal Commission on Intelligence and Security* (Hope Royal Commission), First, Second, Third (Abridged) and Fourth (Volumes I and II) Reports, Canberra, Australian Government Publishing Service, 1977. The remainder have been withheld from publication in the interests of national security. The other major critical examination of the Australian security scene, is Richard Hall's, *The Secret State—Australia's Spy Industry* (Sydney, Cassell, 1978).

national intelligence agencies whose existence has been publicly acknowledged by the Federal Government. They are the Australian Security Intelligence Organisation (ASIO),[3] the Office of National Assessments (ONA) created at the beginning of 1978 in response to Hope Commission recommendations,[4] the Australian Secret Intelligence Service (ASIS),[5] the Defence Signals Directorate (DSD),[6] and the Joint Intelligence Organisation (JIO).[7] ASIO is principally concerned with domestic security, ONA and ASIS concentrate on overseas and international intelligence of relevance to Australia while the remaining two, DSD and JIO, are primarily military in operation. Each of these organisations has a three-fold function: the gathering, assessment, and dissemination of intelligence data.

It is a special feature of the Australian intelligence scene that the national security agencies do not have police powers to detain and interrogate members of the public, make arrests, or engage in other similar forms of executive intervention. In some countries the security organisation is a branch of the nation's police force and its officers possess and rely on all the rights and powers of police officers. But Australia, New Zealand and the United Kingdom have adopted a different approach and bestow upon their national security organisations no such powers. The *Australian Security Intelligence Organisation Act* 1956 expressly declares that it is not a function of the organisation to carry out or enforce measures for security within a Department of State or authority of the Commonwealth[8] and Mr Justice Hope stressed the desirability of it continuing solely as an intelligence organ of government

> ". . . ASIO has not had, and it should not have in the future, power to make arrests or to take other similar executive action, as does a police force. . . . It is important that the security organisation should not have the role or powers of a secret political police, and should not act so as to permit a belief to develop that it has the character and powers of a secret political police."[9]

Though a significant extension of ASIO's powers to intercept messages and engage in surveillance has been recommended,[10] the organisation

[3] *Australian Security Intelligence Organization Act* 1956 (as amended to 1976) (Cth.). This legislation is to be repealed and replaced by a new enactment which gives substantial effect to the recommendations of the Hope Royal Commission: see *Australian Security Intelligence Organization Bill* 1979.

[4] *Office of National Assessments Act* 1977 (Cth.). Commenced operations in February 1978.

[5] H.R. Debates, 25th October 1977, p. 2339.

[6] Ibid.

[7] Hope, *Third Report; Australian Financial Review*, 7-10 August 1978.

[8] S. 5(2). This limitation on ASIO's functions will be preserved in the new legislation: see cl. 17(2). See also *New Zealand Security Intelligence Service Act* 1969, s. 4(2).

[9] Hope, *Fourth Report*, Vol. I, paras. 441 and 444.

[10] Ibid., paras. 138-166, 763-7 and Vol. II Appendix 4. Presently it only has the powers of telephone interception granted under the *Telephonic Communications (Interception) Act* 1960 (Cth.) but the Bill by clauses 24-6 will give ASIO power to enter, search and inspect premises and records, to use listening devices and inspect postal articles.

basically relies upon Commonwealth and State police forces to exercise powers of arrest, entry, seacrh and seizure. It utilizes the Australia Crime Intelligence Centre of the Commonwealth Police[11] and the Special Branches of each of the state police forces.

The published reports of the Hope Royal Commission on Intelligence and Security painted a miserable picture. The Royal Commissioner reported that the Australian intelligence community was fragmented, poorly organised and co-ordinated, inadequately staffed and equipped and, in many cases, directed towards inappropriate goals. His Honour had no doubt that Australia required security intelligence services to investigate and provide intelligence about threats to its internal and external security and that there was proper constitutional authority in the defence power and elsewhere for the existence of such organisations.[12] He considered that Australia possessed information which the government had a duty to protect in the national interest and that such secrets were not limited to matters of national defence or foreign policy—they also extended to information concerning national resources and the economy. The security checking of public servants who were likely to be entrusted with such material was a proper function of the security services though their assessments should, in future, be subject to review by a Security Appeals Tribunal.[13]

Significant uncertainties concerning ministerial control of the security services were identified. These were similar to those which have long existed in respect of the political control and direction of police forces, but the necessity for secrecy in the operations of security agencies created the additional difficulty that the normal governmental processes of checks and balances could not be applied. Ministerial accountability was the main means of control but, in the case of ASIO, uncertainty existed about which Minister was responsible, the nature of the ministerial link and whether the Director-General of Security possessed some discretionary powers not subject to any ministerial direction or control.[14]

[11] The establishment of a police Special Branch at Commonwealth level was recommended by Sir Robert Mark (former Commissioner of the London Metropolitan Police) in his report calling for the establishment of the Australian Federal Police as a new national force following the Hilton bomb explosion in February 1978: *Report to the Minister for Administrative Services on the Organization of Police Resources in the Commonwealth Area and Other Related Matters* (Mark Report), Canberra, Australian Government Publishing Service, 1978, paras. 37-40. See now *Australian Federal Police Bill* 1979.

[12] Hope, *Fourth Report*, Vol. I, paras. 27-31; F. M. Auburn and P. W. Johnston, "Some Constitutional Aspects of ASIO", paper delivered at the AULSA Conference, Perth, 1978.

[13] Hope, *Second* and *Third Reports*.

[14] The new legislation, following the Hope recommendations now guarantees the Director-General independence of action in respect of (a) the question of whether the collection of intelligence by the Organization concerning a particular individual would, or would not, be justified by reason of its relevance to security; (b) the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security; (c) the nature of the advice that

When it came to the relationship between ASIO and the state police Special Branches, Mr Justice Hope noted that not only did the Special Branches properly provide police executive powers for the security services, they were also the appropriate vehicles both for communicating security information from the Commonwealth to a state (insofar as it affected state organisations) and for gathering state intelligence for the benefit of ASIO. Nevertheless major defects were apparent

> "Thus far, as regards the police forces of the states, the relationship has been based on arrangements of a rather informal kind made between ASIO and each police force; the arrangements have not been made between the Commonwealth Government and the relevant state government. Sometimes it has appeared that a State Government is not aware either of the details of operations or intelligence collected and communicated or even the nature of the arrangements made between ASIO and its own police force. The relationship should be regulated by proper arrangements made at government level."[15]

Before the vague and informal ties between ASIO and the Special Branches could be placed upon a more secure footing, the operations of the South Australian Special Branch became a matter of public concern and widespread controversy.

SOUTH AUSTRALIA SPECIAL BRANCH

Special Branches in Australia have vague origins, some dating back to the first world war[16] but most appear to have been established at about the time the Commonwealth *National Security Act* 1939 came into operation. It must be recalled that ASIO was not established until 1949[17] and the Commonwealth police force, in its present form, until 1957.[18] The weakness of the Commonwealth policing authorities until that date, and for some time afterwards, provided a vacuum in which the Special Branches flourished. Their original functions were to co-operate with military and civil intelligence departments in scrutinizing aliens and potential enemies. The branches went under different titles; in South Australia the section was originally called the Intelligence Section and then the Subversive Section. But following the establishment of ASIO in 1949, a conference of State Commissioners of Police decided that those sections of their forces which dealt with subversive organisations should each be known thenceforth as Special Branch.[19]

should be given by the organization to a Minister, Department or authority of the Commonwealth. See clause 8 of the Bill. On the general question of accountability see P. L. Waller, fn. 1, supra.

15 Hope, *Fourth Report*, Vol. I, para. 447. An attempt to do so has been made by clause 18 of the *ASIO Bill* 1979.

16 The N.S.W. Branch was created in 1916, Hall, p. 29.

17 Pursuant to a Directive of Prime Minister J. B. Chifley, 16th March, 1949.

18 *Commonwealth Police Act* 1957 (Cth.).

19 *Royal Commission Report on the Dismissal of Harold Hubert Salisbury* (Roma Mitchell, Royal Commissioner), Adelaide, Government Printer, 1978, para. 40.

It is symptomatic of the uncertainty regarding the accountability and functions of the Special Branches that former long-term Premier of South Australia, Sir Thomas Playford, told the South Australian Royal Commission into the dismissal of former Commissioner Salisbury that he believed that the members of the South Australian police force who worked in Special Branch were working for and paid by the Commonwealth.[20] But they were not. Members of the Special Branch are, and always have been, members of the state police force, paid by the relevant state and no way responsible to the Commonwealth government. Within the South Australian force (and this seems also true of other states) the degree of supervision of the work of Special Branch by the Commissioner of Police or his subordinates was minimal. There was no high level supervision of the day to day activities of the five man Branch; no high ranking officer stood between the Commissioner and the detective-sergeant in charge; and the latter made his own decisions regarding the nature and extent of Branch enquiries, the degree to which it co-operated with ASIO and other bodies and the detail of its record keeping. Mr Salisbury's understanding of his own responsibility, as Commissioner, to supervise the work of Special Branch, the degree of its independence and its link with the Commonwealth is well reflected in his statement to the press upon his dismissal on January 20th 1978.

> ". . . Special Branch work is a continuing operation and has to go on as it has done since 1939, despite the policies of the State and Federal governments in power. In other words, it must be and is, totally unpolitical. It serves the nation. Its responsibility to the Commonwealth seems to be pointed by the fact that the combination lock to the strongroom in Special Branch had to be approved by the Commonwealth Attorney-General. I think this is a most important pointer to what I have always construed as Special Branch's real job. It is the reason for which I have never probed into or interfered with their activities. I reiterate that I had never been in the strongroom, let alone inspected the files, before this matter came to a head. My attitude was the same in England. I left Special Branch severely alone and never had any reason to doubt their performance."[21]

In November 1977, following tabling in the Hope Royal Commission Fourth Report which contained criticism of the unstructured links between ASIO and state Special Branches, allegations were made that up to 10,000 secret dossiers on South Australians existed in the Special Branch. As a result of these allegations the state government appointed Judge J. M. White, an Acting Justice of the Supreme Court of South Australia, to ascertain and report on the criteria used to determine what information was being collected, how it was recorded and who had access to it. The

[20] Ibid. para. 41.
[21] *Adelaide Advertiser*, 21 January 1978.

White Report[22] appeared in December 1977. It stated that though Special Branch files contained a core of genuine security intelligence material relating to extremist left-wing and right-wing organisations and persons reasonably suspected of being potential risks in the security areas of espionage, terrorism, sabotage and like activity, the greater part of Special Branch records related to matters, organisations and persons unrelated to genuine security risks. These records took the form of some 300 separate dossiers or files in a secure strongroom together with about 40,000 index cards. About 28,500 cards referred to individual persons.

Categories of information in these files and cards which His Honour identified as not being legitimate Special Branch business included information on non-communist socialist parties, political files relating to Australian Labor Party personalities and information on federal, state and municipal elections. Files were also maintained on the Australian Council of Trade Unions and personalities on its Executive. Additional material entirely irrelevant to security issues consisted of files on university matters, including all university personalities with strong views on political or social issues, usually designated as "left" or "radical" and "subversive", campus activities and participants, particularly those concerned with the Vietnam war, peace and anti-uranium activities and university sit-ins and student involvement in various public demonstrations. Similarly there were files on the peace movements, the Council of Civil Liberties, homosexuals, Eastern and Orthodox Church groups, worker participation in industry, campaigns against racial discrimination, divorce law reform, constitutional reform, the Cairns-Morosi controversy and the raid by former Attorney-General Murphy on ASIO headquarters in 1973. Index cards existed on about half the judges of the Supreme Court, previous State Governors, some magistrates, all Australian Labor Party parliamentarians, state and federal, but very few Liberal or Country Party parliamentarians.[23]

The Report described two vices in the collection of security information. The first was the biased identification of imagined enemies of the state. The mass of information about left wing political organisations and personalities stood in contrast to the paucity of data on those of the conservative parties. Yet even then Mr Acting Justice White had to report that one card characterised a senior Liberal parliamentarian as a communist because, some decades before, he had been seen at or near a communist bookshop.[24] The second vice was the procedure for opening cards, subject sheets and files, on "persons coming under notice". There appeared to be an indiscriminate selection of "persons coming under notice" as in most cases the selecting officer could not have entertained

[22] *Special Branch Security Records, Initial Report to the Honourable Donald Allan Dunstan, Premier of South Australia* (White Report), Adelaide, 1977.
[23] Ibid. para. 4.23; but see comment in Mitchell, paras. 128-30.
[24] White, para. 16.2.4.

any reasonable suspicion that persons had committed, or were likely to commit, a security offence or were otherwise security risks. The perusal of Special Branch files demonstrated that many hundreds of persons who had done little more than take an active part in many causes which time and changing opinion had vindicated—campaigns against involvement in the Vietnam war, the importance of the environment and ecology etc. were branded as suspected subversives. The report commented both on the unfairness of this invasion of privacy and on the cost and waste involved in the mindless collection of masses of useless information based on false and unjust premises. Moreover the mass of apparently innocuous and irrelevant material took on a greater significance when it was appreciated that it formed the basis of exchange of information with ASIO, Special Branches in other forces, and international intelligence services.

The bulk of the records was found to be objectionable principally on the basis that they were entirely unnecessary. They were founded not on the basis that those on whom records were kept were likely to overthrow government or to engage in espionage, but rather, on the unreasoned assumption that all persons who thought or acted less conservatively than suited the security force were likely to be potential dangers to the nation.[25] Grave mistakes, in Acting Justice White's opinion, had been made by the members of the Special Branch in attempting to apply vague and erroneous concepts of subversion to particular organizations, persons and activities. Mr Salisbury thought the concept applied to "[any] deliberate attempt to weaken public confidence in the government and/or the Constitution",[26] though he conceded that the term was not defined by state legislation. And the situation was compounded by the lack of guidance and initiative within the Branch itself. For most of 1975 only a senior constable was in charge of Special Branch and of security in the state. The White Report found that neither he, nor the sergeant usually in command, had the necessary training, breadth of vision or discretion to adequately review procedures or police decisions regarding the proper acquisition, analysis and dissemination of intelligence data in South Australia.

Mr Acting Justice White also reported that there was substantial proof that, from 1970 onwards, the Premier of South Australia was prevented, despite specific enquiries on three separate occasions, from learning of the existence or nature of substantial sections of Special Branch files. On each of the three occasions the Commissioner for the time being (including Salisbury in July 1975 and October 1977) gave answers which were uninformative and unrepresentative of the actual categories of subject matters in the files. The request did not ask for details of specific files but

[25] The Hope Report specifically commented on the tendency of ASIO officers to think of anyone they chose to call "left-wing" as subversive: *Fourth Report*, Vol. I, para. 255.

[26] Letter 16th October 1975, White, Appendix 7 at p. 68.

merely a description of the categories of files held but, in each written reply, no reference to the sensitive files on political, union, university and other matters appeared. In the letter which accompanied his Report, Acting Justice White told the Premier that

> ". . . Special Branch has maintained records on political, trade union and other sensitive subjects for twenty-three years. Their existence was not mentioned to the government in spite of several requests for information about them. Special Branch believed that it owed greater loyalty to itself and its own concept of security than to the government. . . ."[27]

and in the text of the document he explained

> "This failure was due to ambivalent loyalties within Special Branch towards ASIO and imagined security interests, on the one hand, and to the state government, on the other."[28]

On 16th January 1978, the South Australian Cabinet considered the White Report and the Commissioner of Police was invited to resign. When he declined to do so he was dismissed from office by the Governor-in-Council on the afternoon of 17th January 1978.[29] In announcing the dismissal Mr Dunstan, the Premier of South Australia, asserted that Commissioner Salisbury had mislead the government regarding the compilation and content of Special Branch investigations and that he was accountable both for the material collected and the information supplied. He said that the Commissioner of Police had failed in his duty to give accurate information to specific enquiries of the government

> "We cannot absolve him of the responsibility of having so mislead the government that wrong information was given to Parliament and the public."[30]

At the same Executive Council meeting, directions were given which limited further Special Branch collection of security information to material which gave rise to a reasonable suspicion that some criminal offence had or was likely to be committed including offences relating to the overthrow by force or violence of the constitutionally established government of South Australia or other acts of violence against persons. Existing Special Branch records not conforming to this criteria were to be destroyed. All but the two most senior officers of the Special Branch were to be transferred elsewhere immediately, no new appointments to the Branch were to be made without government approval and the consent of the Chief Secretary was to be obtained before information gathered or held by the Special Branch was made available to ASIO, the Special Branches of other forces or any other group or organisation. The Special Branch was also to cease recruiting, paying, servicing or otherwise acting as intermediaries for agents of ASIO.[31]

[27] Letter 21st December 1977, White p. ii.
[28] White, para. 21.8.
[29] See generally Mitchell, paras. 22-7.
[30] *Adelaide Advertiser*, 18th January 1978.
[31] Ibid.

In giving evidence to the Royal Commission which was subsequently conducted by Justice Roma Mitchell into his dismissal, Mr Salisbury said that he did not treat the Special Branch as being directly under his control and indicated that he regarded its members free to act totally at their own discretion so far as operational work was concerned. He said that Special Branches of police forces had responsibilities only to the Crown, to the law and not any political party or elected government.[32] The validity of this position is discussed in Professor Waller's article[32a] but Salisbury's narrow view of the accountability of Special Branch must be contrasted with his generous perception of its proper data collection and record keeping functions. When cross-examined by the Solicitor-General concerning the reasons for maintaining Special Branch files on citizens such as the Premier of South Australia, Mr Dunstan, and the former South Australian Governor, Sir Mark Oliphant, Mr Salisbury explained that the fact that the Premier had once been a member of the Communist Party was reason enough to have him on record and that an attempt, at one time, by Mr Dunstan to join the Liberal Party showed a certain volatility which was further reason for having him on file. He said that the file on Sir Mark Oliphant had probably been kept because he had marched in anti-Vietnam war demonstrations. Files on members of the Council for Civil Liberties were similarly justified because many of them had questionable attitudes to the western way of life and the police. He also told the Commission that when he had investigated the claim by Mr Acting Justice White that all Labor members of parliament were on file, but no Liberal members, he found that records were kept as a matter of course on all members of the government in power. He said that he could not find any reason for doing this, but nor was there a reason for not maintaining the practice.[33]

How representative is the South Australian experience of Special Branch operations in the other States?

NEW SOUTH WALES SPECIAL BRANCH

Following the publicity given to the South Australian Special Branch the Labor Premier of New South Wales, Mr N. Wran, undertook to have an examination made of the records of the state's Special Branch. Arrangements were made for the New South Wales Privacy Committee, established under the *Privacy Act* 1975 (N.S.W.) to inspect the Branch files. This statutory committee is responsible for investigating record keeping and invasions of privacy both in the public and private sectors of New South Wales. It had already made an initial enquiry into police criminal records late in 1977, before release of the White Report in South Australia and, on the basis of answers given to it by police (and without inspecting Special

[32] Mitchell, para. 52; *Melbourne Age*, 14th March 1978.
[32a] Supra fn. 1.
[33] *Australian*, 9th March 1978.

Branch files), did not report that any action was required in relation to the activities of the Branch.

The N.S.W. Special Branch was primarily established to co-operate with military intelligence services in war time. In 1975 its functions were re-defined in a Directive from the then Commissioner of Police, Mr Hanson, who declared that its aims were:

— To be aware of subversive and extremist activities . . . and advise the Commissioner of Police of any incidents likely to result in violence or civil disorder;

— To gather information on various factions within the ethnic communities, so as to avoid violence between rival groups or attacks against consular representatives;

— To assist where necessary with security measures for visiting royalty, heads of state and controversial figures from overseas;

— To pass information to ASIO where national security was at stake.[34]

In its Report,[35] released in March 1978, the New South Wales Privacy Committee advised that the eighteen member Special Branch had compiled records on almost 80,000 individuals or organisations. There were more than 20,000 current cards and about 50,000 filed in the non-active section. Some 4,800 individuals appeared in a photographic index which contained police arrest photographs, passport photographs (routinely passed on from ASIO), newspaper photographs and those taken by the Special Branch and ASIO without the subject's knowledge. About 35% of the files were concerned with communism. About 15% were concerned with social action groups, environmental protection organisations, resident action groups, prison reform groups and women's liberation movements. The main reason given for individuals "coming under notice" in these areas was that they had attended protest meetings over a particular social issue. Special Branch officers stated that the purpose of maintaining such files was to enable recognition of the more volatile participants in a demonstration. The Privacy Committee noted a strong ethnic bias in the compilation of the records and although it found only one dossier on a politician, there was circumstantial evidence suggesting that many files on state politicians had been removed or destroyed before the committee's investigation had commenced. The same high degree of autonomy, vague objectives and wide-ranging data collection practices as existed in South Australia (what one newspaper editorally described as a "dedicated policy of bower-birding information relating to any form of dissent"[36]) were revealed in New South Wales. Parking a car close to a building in which a

[34] New South Wales Privacy Committee, *The Special Branch Criminal Records in N.S.W.*, Report B.P. 44, March 1978, para. 1.2.
[35] Ibid.
[36] *Newcastle Morning Herald*, 30th March 1978.

Communist Party meeting was being conducted was sufficient to get some persons listed on the files, while other motorists were carded because certain political or social issue stickers were attached to their vehicles.

The Committee was very critical both of the excessive keeping of records by the Branch and also of its inefficient administrative procedures for handling them and disseminating their contents. Information contained in the files was not only made available to ASIO, other Special Branches, military intelligence, and crime intelligence but, despite denials from the Branch, the files revealed that other informal access was also given to consular officials, the Public Service Board and, in at least one case, a university.[37]

The Privacy Committee's conclusions were shaped by its general policy "to oppose the collection of information about individuals by public authorities where this is unrelated to the functions of the authority in question".[38] In such cases, the committee explained, there were no counterbalancing considerations to offset the dangers of the misuse of information by those in power or the uneasiness of individuals caused by feelings that they are under surveillance by those who could harm them

> "The above considerations apply more acutely where the collection of information is by a police body. The ordinary citizen expects that he will come under surveillance by police, except where he seeks protection, only if suspicion arises that he has been guilty of a breach of the criminal law or is planning one. As soon as the suspicion is removed, the thoughtful citizen requires not only that the surveillance will cease but that no records of the matter will be retained. Anxiety on these scores is much increased by the Special Branch's involvement in political matters and especially by its duty under the Police Commissioner's directive to 'be aware of subversion'. Even if the citizen can form some idea of what this vague expression means, he is likely to be suspicious concerning the ability of those operating the branch to distinguish between subversion and ordinary dissent from prevailing policies or established ideas."[39]

Reference was made to developments in South Australia and the committee expressed concern that there existed, in New South Wales, "a police organization with a political character of a degree of independence of vague extent from the Government of which the entire police force is an instrumentality". Concern was also expressed that the definitional vagaries of "subversion" had made the Branch's directive to "be aware of" subversive activities too ambiguous, and had led to much of the indiscriminate data collection practices

[37] Privacy Committee Report, para. 5.3.2. The university apparently requested the Branch to use its overseas information services to check the credentials of a teaching staff member. The Branch carried out a search and advised the university that the subject did not hold such qualifications. The university nevertheless retained the staff member's services.

[38] Ibid. para. 6.1.2.

[39] Ibid. paras. 6.2.1. and 6.2.2.

> "Where records are kept of what is nothing more than dissent of a character which points in no other direction than the mere continuance of dissent, the result can be nothing but a pointless waste of time and energy. . . . It seems almost equally obvious that a Special Branch cannot undertake general surveillance of all individuals connected with all organizations which purport to look forward, however remotely, to revolution as a strategy for achieving political objectives. . . . [Because of these reasons], it is not a proper and practical function of the Special Branch to 'be aware of' subversion in the sense simply of political dissent . . . to the extent of recording information on individuals simply on that ground."[40]

The committee preferred to confine the Special Branch to the task of providing information on areas of calculated political violence and the control of violence in politically charged situations, irrespective of the political end the violence was directed towards, or whether it came within a subversive context in New South Wales or not. The committee also proferred additional advice on the culling and destruction of unnecessary records. On 14th June 1978 it was announced that 50,000 of the 80,000 cards and dossiers held by the New South Wales Special Branch had been destroyed on the orders of the state Premier.[41] This figure accords with the number filed in the "non-active" section.

OTHER STATES

Because of the inter-relationship between the Special Branches of each of the states and their general superintendence by ASIO, it seems likely that each Special Branch adopts the same standards and criteria and is subject to the same vices as were exposed in South Australia and New South Wales. The attitudes of the other state governments towards the disclosures in South Australia and New South Wales has been one of continued non-interference with Special Branch operations. The Victorian Acting Premier, Mr Thompson, said at the time of the White Report publicity that he had no knowledge of Victoria's Special Branch records system[42] because he had made it his business "not to interfere". He had been assured that the files had not been used for "party political purposes" and he stated that the Victorian government had made no attempt to monitor the activities or the information gathered by the Special Branch. He was reported as saying that "we do not interfere in the activities of the Special Branch—we rely on the sound judgment of the Police Commissioner for

[40] Ibid. paras. 6.3.2., 6.3.3. and 6.3.4.
[41] *Melbourne Herald*, 14th June 1978.
[42] It apparently has a present staff strength of eight and is said to have records on some 30,000 persons. According to newspaper reports the special branch has, since 1972, carried out surveillance on State Liberal and Labor politicians (including government Ministers) and kept files on journalists, academics and top trade union officials as well as maintaining records on political extremist groups such as Croatian activists, communists, the League of Rights and the Nazi Party: *Melbourne Herald*, 19th January 1978; *Age*, 20th January 1978.

administering the security organisation . . . the test of what is reasonable is left to the security forces to decide".[43]

Details of Special Branch operations in the more remote states is even more skimpy[44] but, in each case, the Branch is supported uncritically by the government in power. Predictably the Premier of Queensland Mr J. Bjelke-Petersen, said that the Special Branch did not seek out ordinary Queenslanders

> ". . . but concentrated its efforts on the hard core of professional communist and extremist agitators. This included a group of about 200 spearing the Co-ordinating Council for Civil Liberties, the campaign for an independent East Timor, the campaign against nuclear proliferation, the peace movement, the anti-freeway protest group, and similar 'front' groups."[45]

SUBVERSION

The practices and records of security forces in Australia at both federal and state levels are inexorably linked with their concept of subversion. The main purpose of a security force is defence of a nation against its non-military enemies[46] and the initial functions of the Special Branches properly emphasised the prevention of espionage and sabotage and the control of enemy aliens during conditions of war. But in the post-war years the Special Branches drifted away from the detection of spying into the investigation of subversion and from there slid into the monitoring of lawful dissent. Thus, for example, South Australia's Special Branch originally confined its records to organisations and persons at the extreme right and left of the political spectrum who, it was believed, might commit or aid in the commission of acts of espionage, terrorism or sabotage. However, from about the time of the Petrov Royal Commission,[47] it began to maintain extensive records not only on extreme left and right wing activists, but also upon anyone perceived to be "left" of its own point of view. Half the "non-terrorist" records examined by Acting Justice White related to organisations and persons suspected by Special Branch of holding or supporting "subversive" views by reason only of the fact that they adopted policies or opinions which were "radical", or "to the left" of an arbitrary centre-point fixed by someone in Special Branch. His Honour

[43] *Age*, 19th and 20th January 1978. Subsequently the Premier announced that the government would impose tighter controls on the Special Branch though rejecting opposition requests for an enquiry. Details of the specific guidelines have not yet been disclosed.

[44] See *Hobart Mercury*, 19th January 1978; *The West Australian*, 20th January 1978.

[45] *Australian*, 19th January 1978.

[46] White, para. 10.1.1.

[47] *Report of the Royal Commission on Espionage* (Owen, Philp and Ligertwood, Commissioners), Sydney, Government Printer, 1955. See also N. Whitlam and J. Stubbs, *Nest of Traitors: The Petrov Affair* (Milton Qld, Jacaranda, 1974). For a description of the broader political and legal context see S. Ricketson, "Liberal Law in a Repressive Age: Communism and the Law 1920-1950" (1976) 3 *Mon. L.R.* 101.

had no doubt that this arbitrary centre-point was established with the assistance of ASIO either by means of information fed into the Branch by ASIO as being relevant to security, or by ASIO's periodical training seminars for state Special Branch officers.[48]

The term "subversion" has always caused difficulty. Although, in times of war, a common meaning has been assumed,[49] no adequate legal definition exists. The 1969 Canadian Royal Commission on Security observed that

> "The area of subversion involves some . . . subtle issues, and the range of activities that may in some circumstances constitute subversion seems to us to be very wide indeed: overt pressures, clandestine influence, the calculated creation of fear, doubt and despondency, physical sabotage or even assassination—all such activities can be considered subversive activities in certain circumstances. Subversive activities need not be instigated by foreign governments or ideological organizations; they need not necessarily be conspiratorial or violent; they are not always illegal . . . fine lines must be drawn. Overt lobbying or propaganda campaigns aimed at effecting constitutional or other changes are part of the democratic process; they can however be subversive if their avowed objectives and apparent methods are cloaks for undemocratic intentions and activities."[50]

The Commissioners reported unhappily that they had "been unable to trace any legal or other references or devise themselves any satisfactory simple definition of subversion".[51]

Though the word "subversion" appears both in the explanation of "security" in s. 2 of the *Australian Security Intelligence Organisation Act* 1956 (Cth.) and in s. 3 of the *Telephonic Communications (Interception) Act* 1960 (Cth.), it is nowhere defined. Nor is it a state, commonwealth or common law offence though it might be expressed in specific crimes such as treason, treachery, sabotage, sedition, espionage or breach of official secrets provisions etc.[52] The United Kingdom similarly possesses no legislative definition of subversion, not the least because there is no statute expressly related to subversive activities. Lord Denning, in his report on the Profumo Affair,[53] defined subversion simply as the overthrow of the Government by unlawful means but he did not elaborate the meaning of unlawfulness. Under the *New Zealand Security Intelligence Service Act* 1969 reference is made to the protection of New Zealand from acts of espionage, sabotage, and subversion. The last is defined, in s. 2 as

48 White, para. 2.8.
49 For example, see *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1943) 67 C.L.R. 116, 132-3 per Latham C.J.
50 *Report of the Royal Commission on Security*, Ottawa (Queens Printer, 1969), para. 6.
51 Ibid. para. 7. See also discussion of subversion in Hope, *Fourth Report*, Vol. I, paras. 55-83 and source material presented in Vol. II, Appendix 4-H.
52 *Crimes Act* 1914 (Cth.) ss. 24, 24AA, 24AB, 24C, 24D, 70, 78 and 79.
53 *Lord Denning's Report*, Cmnd. 215 (London, HMSO, 1963), para. 230.

"Attempting, inciting, counselling, advocating, or encouraging—
(a) the overthrow by force of the Government of New Zealand; or
(b) the undermining by unlawful means of the authority of the State of New Zealand."

Again, subversion is neither made an offence nor specifically defined in terms of offences and it is entirely possible that some acts regarded by the New Zealand Security Intelligence Service as unlawfully undermining the authority of the state are not unlawful in any criminal sense. The New Zealand Council for Civil Liberties regarded it as clearly undesirable to have an organisation charged with protecting the government or the country from actions which the law permitted. In its view, though subversion included the crimes of treason and sedition, it was defined so widely as to also validate surveillance of almost any political activity

> "It is the word subversion in this Act which provides the New Zealand Security Intelligence Service with the authority to continue its long standing surveillance of political, mainly left-wing, activity in New Zealand. As such it unreasonably limits that free exchange and development of political ideas which is fundamental to democratic practice. This wide-ranging surveillance should be reduced, and it appears that the most appropriate way to do this would be to substitute treason for subversion as the third threat to security in the Act. The service would then be responsible for collecting and correlating intelligence relevant to protecting New Zealand from attempts to overthrow the Government by force and by conspiracy to that end. Its responsibilities would not extend to political activity even though such activity might be seditious in nature."[54]

It had been similarly suggested to the Hope Royal Commission on Intelligence and Security that ASIO (and, impliedly, the Special Branches) also should not be concerned with subversion since such conduct was not criminal. Only when subversion expressed itself in incidental crime should it be the subject of police or security attention. The Royal Commissioner rejected this argument and in doing so stressed both the incipient criminal nature of subversion and the importance of the preventive role of police and security agencies. Though individuals might engage in subversive activity alone, more commonly it involved agreements between people organised together to give effect to an intention, sooner or later, to commit criminal offences in order to undermine or overthrow governmental processes and this would, incidentally, constitute a sufficient head of unlawfulness to sustain a prosecution for criminal conspiracy. Moreover, since the security of the state was at risk, it was not enough, as in ordinary criminal offences, to wait for conduct sufficiently proximate to constitute

[54] New Zealand Council for Civil Liberties, *Report on the New Zealand Security Intelligence Service Act* 1969 (Wellington, New Zealand, 1971), p. 10. See also B. R. Hancock, "The New Zealand Security Intelligence Service" (1972) 2(2) *Auckland University L.R.* 1 at 7-8 and *Report by the Chief Ombudsman on the Security Intelligence Service* (Wellington, New Zealand, Government Printer, 1976), at 26-31.

incitement or attempt before investigating it. Because by its very nature, subversion was clandestine and deceptive, a generous interpretation of what was proper intelligence gathering and preventive intervention was warranted.[55] Hitherto the Australian response to the problem of defining subversion had been to leave it to the judgment of the security organisation itself, but this was demonstrably unsatisfactory and at least some legislative guidelines were required to delimit its meaning. It was recommended that the *ASIO Act* be amended to insert a definition of "subversion" which would allow investigation of

> "Those activities which involve, or will involve, or are intended ultimately to involve the use of force or violence or other unlawful acts (whether by themselves or others) for the purposes of:
> (i) overthrowing the constitutional government of the Commonwealth of Australia or of a State or Territory; or
> (ii) obstructing, hindering, or interfering with the taking of measures by the Commonwealth government in the interests of the security of Australia."[56]

The South Australian and New South Wales responses to this proposal were ambivalent. Both saw the threat of force or violence, rather than any other dimension of unlawfulness as the touchstone upon which any policing of domestic subversion was to be predicated.[57] But Mr Justice White regarded the proposal as unduly broad and, particularly in its reference to inchoate force or violence as a means and interference with the security of the nation as an end, as giving inadequate weight to considerations of individual privacy and freedom.[58] The Privacy Committee noted that an existing government in power was well equipped and possibly better able to subvert the lawful processes of constitutional government than individuals

> "At any time over the globe there will not only be governments which have established themselves by revolutionary means, but governments which have preserved themselves in power in violation of the constitutional system and institutions whether by force or, as in the case of the Watergate affair, with the assistance of other illegal tactics."[59]

A fluid definition of subversion, such as that proposed, could constitute a mandate for the security agencies to automatically monitor members of

[55] Hope, *Fourth Report*, Vol. I, paras. 79-81.
[56] Ibid. para. 66. This recommendation is the basis of the proposed definition of subversion to be included in the *ASIO Act* 1979; see cl. 5(1)(a) and (b). There is, however, an additional component in cl. 5(1)(c) which defines subversion in terms of the promotion of violence or hostility between different communal groups to the detriment of the Commonwealth.
[57] Privacy Committee Report, para. 7.1.5.; White, para. 10.7.1.; cf. Mark Report, para. 39: "It is essential that the police in a free society should take careful note of overt or clandestine activities which allow even the suspicion of subversion. Far from there being a need to justify a Special Branch, it should be made clear that any government unwilling to establish and maintain one is failing in its duty to protect those freedoms regarded as essential to democracy".
[58] White, paras. 10.2.-10.10.
[59] Privacy Committee Report, para. 6.2.5.

the government, which was precisely what had occurred in South Australia (and on all accounts in New South Wales and Victoria as well). Neither Acting Justice White nor the Privacy Committee was willing to allow their state's Special Branch to assume such a role. The New South Wales committee went further and asserted that any reference to the prevention of subversion in the directives of Special Branch was not only dangerous to privacy, but was positively inimical to the proper focussing of the Branch's energies, namely, the control of politically motivated violence.[60]

In New Zealand the Chief Ombudsman, in reporting on that country's Security Intelligence Service, resisted the security service's view that the statutory definition of subversion (which is broader than that proposed for Australia) would countenance surveillance of non-subversive movements and organisations in case they might be penetrated by those with subversive aims.[61] The Ombudsman's view was that the gain in terms of security in compiling background information on organisations and individuals not yet reasonably suspected of subversion was too small to justify the threat such surveillance posed to rights of privacy, freedom of opinion and expression. The Ombudsman saw that the danger in allowing a security service, which was properly concerned with activities which were actually subversive, to interest itself in activities which were not was that it would tend to confuse the two. In a telling parallel to the Australian scene he pointed out that, prior to 1957, when the police Special Branch performed the functions of the intelligence service, its members had, through political naivety and acting on inadequate evidence, fallen into this precise trap.[62] The security service also claimed that espionage and subversion were interrelated and complementary activities constituting threats of approximately equal significance but the Ombudsman denied that this was correct. He reported that in his opinion subversion was no real threat to New Zealand national policy and he specifically recommended that the priorities attached by the New Zealand Secret Intelligence Service to espionage, subversion, and terrorism be re-considered with the object of allotting higher priorities to investigating espionage and terrorism, and lower to subversion.[63]

The White Report complained that

> "The concept of domestic subversion has 'run riot' in the United States in past decades, with consequential misconceptions in Australia at federal level in ASIO and at state level in Special Branch. The misconceptions involve security forces keeping under surveillance persons with a legitimate right to dissent. Thousands of loyal citizens in this State 'come under notice' and were recorded on security files when they were

[60] Ibid. para. 7.1.3.
[61] *Report by the Chief Ombudsman on the Security Intelligence Service* (Wellington, New Zealand, Government Printer, 1976), p. 28.
[62] Ibid. pp. 28-9.
[63] Ibid. p. 31.

> either exercising their democratic right to dissent or were members of legitimate organisations or political parties."[64]

The primary source of these misconceptions has been that police Special Branches and ASIO have uncritically and mistakenly applied the concept of subversion to the *ideas* of communism and other revolutionary movements without accurately assessing their potential for actual violence.[65] In a liberal democratic society security surveillance should not be maintained simply because of the political content of ideas alone, but should be a response to actual or reasonably apprehended violence which is a product of the dissemination of those ideas. It is regrettable that the lessons of the Victorian Royal Commission into Communism[66] and the Communist Party Dissolution Case[67] have been so quickly forgotten. At the height of the anti-communism of the 1950s and the emotive demands for repressive state and commonwealth legislation, the more detached assessments of members of the judiciary reported that, despite the radical rhetoric of the "subversives", the actual danger they posed to the social fabric had been much over-rated—a view clearly accepted by a majority of Australians at the subsequent referendum.

In delineating the proper role of the New South Wales Special Branch, the Privacy Committee took a strongly offence-orientated approach. It recommended that the major function of the Branch should be confined to the control of violence and disorder in politically charged confrontations. Though it was proper that it should gather intelligence upon such events irrespective of the political end to which the violence might be directed, it was not appropriate for it to undertake surveillance of persons merely because they expressed dissenting opinions on any political matter or were associated with organisations which had a revolutionary plank in their platform. There always had to be a real and serious potential for violence before Special Branch intervention was justified.[68] Similarly, the terms of reference set out by the South Australian Government for the White Inquiry proposed that Special Branch records should only relate to matters

> "which give rise to a reasonable suspicion that [a] person has committed an offence, or . . . has been charged with an offence . . . or . . . may do any act or thing which would overthrow, or tend to overthrow, by force or violence, the established Government of South Australia or of the Commonwealth of Australia, or may commit or incite the commission of acts of violence against any person or persons."[69]

64 White, paras. 21.4. and 21.5.
65 Hall, op. cit., pp. 112-3.
66 *Report of the Royal Commission Inquiry into the origins, aims, objects and funds of the Communist Party in Victoria and other related matters* (Sir Charles Lowe, Royal Commissioner) (Melbourne, Government Printer, 1950).
67 *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1.
68 Privacy Committee Report, paras. 7.1.3.-7.1.5.
69 White, pp. iii-iv.

That is the correct approach. Whatever the permissible latitude for surveillance at federal level because of ASIO's special vetting functions in respect of public servants, immigrants and others and its lack of enforcement powers, there is no justification for similar latitude at state level. The functions of ASIO should no longer define those of the Special Branches. The two agencies serve different purposes. Ironically, in his letter of 1st July 1975 to the Premier's Department, Commissioner Salisbury had correctly identified the proper functions of Special Branch as the countering of politically motivated violence, provision of security coverage for state and commonwealth ministers and visiting VIP's, and the protection of state property.[70] But he went on to add "containing subversive activities within the state" as the fourth function of the Branch and then, having done so, he persistently omitted to give a full account of the measures taken by the police to "contain" such "subversion". This, ultimately, was his undoing.

CONCLUSION

The Salisbury affair in South Australia and the further enquiries in New South Wales revealed the existence at state level of special security units of the police force each operating under a poorly defined mandate, with ill-defined goals and subject to inadequate or non-existent political control and internal supervision. This lack of direction and guidance in state police agencies posed dangers enough but was compounded by them being staffed with poorly trained personnel working in secret. The spotlighting of Special Branch operations so soon after the publication of the Hope Royal Commission report served to illuminate Australia's vulnerability to what Marchetti and Marks have called, in the American security context, the cult of intelligence.[71] This proposes that secret agencies of government have a powerful propensity to equate their own sectional political interests with the common weal even though their values are covert and, within the wider community of intelligence and security services, their biases inbred.[72] All this is true for Australia. Special Branch members perceived themselves aloof from the policies of the government of the day—their loyalty was to some higher abstraction in the form of the "Crown" or the "Law"—yet they were unaware how deeply entrenched was their conservatism and how remote were their standards from the pressing issues of the times. Nor were they able to perceive how completely their independence had been subordinated to the dictates at ASIO. The evidence thrown up by the Salisbury affair is incontrovertible. By denying the

[70] Mitchell, Appendix M.

[71] V. Marchetti and J. D. Marks, *The CIA and the Cult of Intelligence* (New York, Knopf, 1974).

[72] As amply documented by Hall, op. cit. See also other problems of secrecy adverted to in Hope, *Fourth Report*, Vol. I, paras. 131-4; J. Spigelman, *Secrecy: Political Censorship in Australia* (Sydney, Angus and Robertson, 1972, pp. 75-7).

legitimacy of governmental direction and accountability, and because of political ignorance or ineptness, state police Special Branches have been allowed to take on a life of their own and, for the last two decades or more, in at least two major Australian states (and perhaps all), have dissipated public funds in pursuing vague and speculative dangers and, by their surveillance activities and indiscriminate collection and dissemination of personal data, posed serious threats to the privacy, political rights and careers of citizens engaged in entirely lawful activities.

THE BAR, IMMUNITY AND SAIF ALI

PHILLIP SUTHERLAND*

A recent decision of the House of Lords that will be of particular interest to the legal profession in Australia is *Saif Ali* v. *Sydney Mitchell & Co. (a firm) and Others, P third party.*[1] The House held, by a majority of three to two, that the barrister's immunity from suit extended only to include those matters of pre-trial work, which are so intimately connected with the conduct of the case in court that they could be said to be preliminary decisions affecting the manner in which that cause was conducted when it came to a hearing.

Saif Ali has maintained that trend adopted in other recent cases[2] of extending liability for negligence in relationships where previously such relationships had not been found to give rise to a legal duty of care.[3] It fell to the House in the instant case to reconsider for the first time since *Rondel* v. *Worsley*[4] that much debated issue, the immunity of the Bar.

PAST CASE LAW

Although it would seem that English law had at one time permitted the client to recover against his barrister (or serjeant-at-law as he was then known[5]) it appears that this right of action disappeared at some time during the 16th Century.[6] It was well-established by the end of the 18th Century that barristers could not be found liable in respect of an action for negligence. In *Fell* v. *Brown, Esq.*,[7] for example, the plaintiff had brought an action against his barrister for "unskilfully and negligently"

* LL.B. (Lond.); Faculty of Law, University of Sydney.

1 [1978] 3 All E.R. 1033.

2 E.g. *Pacific Acceptance Corporation Ltd* v. *Forsyth and Others* (1970) 92 W.N. (N.S.W.) 29 (auditors); *The Tojo Maru* [1971] 1 All E.R. 1110 (salvors); *Sutcliffe* v. *Thackrah* [1974] 1 All E.R. 859 (architects); *Arenson* v. *Casson Beckman Rutley & Co.* [1975] 3 All E.R. 901 (accountants); *Anns* v. *London Borough of Merton* [1977] 2 All E.R. 492 (building inspectors); *Richardson and Another* v. *Norris Smith Real Estate Ltd and Others* [1977] 1 N.Z.L.R. 152 (estate agents); *Elderkin* v. *Merrill Lynch, Royal Securities Ltd* (1978) 80 D.L.R. (3d) 313 (stockbrokers). See generally C. R. Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 *Modern Law Review* 394 (Part 1) and 528 (Part 2).

3 See *Charlesworth on Negligence* R. A. Percy, (6th ed., 1977) (hereinafter *Charlesworth*) pp. 554-616.

4 [1969] 1 A.C. 191.

5 *Rondel* v. *Worsley* [1967] 1 Q.B. 443, 457-8 per Lawton J.

6 R. F. Roxburgh, "*Rondel* v. *Worsley*: The Historical Background" (1968) 84 *L.Q.R.* 178, 179.

7 (1791) Peake 131; 170 E.R. 104.