Proceedings · Training Project No. 43

# The Magistrates' Court 1976: What Progress?

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

Proceedings · Training Project No. 43

# The Magistrates' Court 1976: What Progress?

Canberra · 26-28 November 1976

AUSTRALIAN INSTITUTE OF CRIMINOLOGY
CANBERRA 1978

The J.V. Barry Memorial Library has catalogued this work as follows:

347.9402

The MAGISTRATES' COURT 1976: what progress? Proceedings, Canberra 26-28 November 1976. Canberra, Australian Institute of Criminology, 1978.

93p. 30cm. (Australian Institute of Criminology. Proceedings - Training project no. 43).



1. Criminal courts - Australia - Congresses 2. Judges - Australia - Congresses 3. Sentences (criminal procedure) - Australia - Congresses I. Australian Institute of Criminology.

ISBN 0 642 91870 8

This report is published by the Australian Institute of Criminology as an account of the proceedings of the seminar. However the views expressed in this publication are not necessarily endorsed by the Institute.

Further information may be obtained from:

Training Division,
Australian Institute of Criminology,
P.O. Box 28, Woden, A.C.T. Australia. 2606

# CONTENTS

# NOTES ON AUTHORS

Dr. D. O'Connor
Reader in Law
Australian National University

I. Cameron, S.M.
Adelaide

A.W. Ghows
Solicitor-General
Singapore

Royce Miller
Senior Crown Prosecutor
Queensland

Emeritus Professor H. Manning Clark
Australian National University

Professor Douglas J. Whalan
Dean of the Faculty of Law
Australian National University

W.J. Lewer
Deputy Chairman
Bench of Stipendiary Magistrates of New South Wales

The Hon. Mr. Justice M.D. Kirby
Chairman of the Law Reform Commission

# INTRODUCTION

The seminar 'The Magistrates' Court 1976: What Progress?' was conducted by the Australian Institute of Criminology at the Australian National University from 26 to 28 November 1976. It took place as a result of a request made at a seminar held the previous year and the Institute plans to hold regular meetings of this type.

The report which follows contains the papers of the seminar and an outline of the discussion which followed them. In addition to formal sessions, provision was made for an open forum at which magistrates could raise problems of particular concern to them.

The seminar was attended by representative magistrates from all the Australian States, the Northern Territory, the Australian Capital Territory and Papua New Guinea. A list of participants appears at the end of this report.

# OPENING OF THE SEMINAR

In opening the seminar the Institute's Director, Mr. William Clifford, said how happy he was that it had proved possible for the Institute, in cooperation with Mr Kilduff, to arrange this informal gathering of magistrates. He extended a special welcome to Mr Ghows, the Solicitor-General from Singapore.

Mr. Clifford emphasised the importance of the lower courts and of the work they do. There are, he said, certain obvious problem areas for those concerned about the future of these courts, some of which he had seen at first hand on a tour he had recently made of the Aboriginal reserves and settlements in North Queensland. The more he saw of this, the more he felt that magisterial discretion could be a way of dealing with some of the issues raised by conflicts of laws and law enforcement.

There was, he said, a need to explore a range of approaches. Further work needed to be done on customary law and on the concept of a village court system. In this connection he referred to a special workshop held earlier in the year by the Australian Institute of Criminology. The purpose of this workshop had been to explore possible courses of action which might introduce diversity and flexibility into the system. The workshop's conclusion had been that no one system could be applied satisfactorily because of the diversity of Aboriginal societies in the States. In certain areas where there was a settled, geographically identifiable community, village courts on the Papua New Guinea model might be appropriate. In other situations customary law had to be taken into account. Also there were some urban fringe areas where assessors might profitably be used to sit with the magistrate - though custom itself was in a process of change.

The basis of a solution as seen by the workshop, said Mr Clifford, was the granting to magistrates of discretionary powers to recognise customary law where this seemed necessary in the determination of guilt as well as (at present) in the sentencing. If this discretion were added to their existing freedom regarding the choice of sentence, progress might be made in solving many of the present problems. The important point to notice, he said, was that there was no *one* Aboriginal crime problem. There were varying areas with varying needs.

Mr Clifford said he hoped that the magistrates' seminar would become a regular event. If regular meetings were held, he said, more could be achieved. He suggested that such seminars could select areas requiring further research.

Society rightly looks to academics for research, said Mr Clifford, but research activity should not be limited to them. There is a real need

*OPENING OF THE SEMINAR*

for the involvement of practitioners. The person in the field could suggest projects and collect data; in doing so he would bring to bear a kind of expertise not readily available to the academic. There is room, said Mr Clifford, for a more systematic approach to the use of practitioners in the research field, and he looked to the seminar for assistance in this respect. He emphasised that there was nothing in the way of an organised project at this stage, but that such seminars as this, regularly held, could produce suggestions which could lead to valuable practitioner involvement in research.

# THE FUTURE OF THE MAGISTRATES' COURTS

Dr D. O'Connor

SUMMARY OF DR O'CONNOR'S PAPER

In introducing his paper, Dr O'Connor pointed out that the development of the lower courts in Australia had been very different from that which had occurred in England. The reason for this was that in the early stages of the colony these courts had had to deal with a very different population from that which confronted the English courts of summary jurisdiction. The major task of the Australian courts was to deal with persons who had been transported. This meant that the early magistrates were much more akin to the English visiting magistrate than to the justices or magistrates who sat in England.

The result was that in the initial stages of Australia's history, the justices had very wide powers. They had the authority to deal with all crimes and misdeameanours not punishable by death which had been committed by felons or other offenders who had been transported. Thus the jurisdiction of the early Australian magistrates was far wider than that of their English counterparts. Another difference was that at this time there were in Australia no stipendiary magistrates. The system relied entirely on lay justices of the peace. Dr O'Connor commented that there is a great need for a definitive history of the courts of summary jurisdiction in the various states of Australia.

Another interesting difference between England and Australia is that in the 18th century magistrates in England exercised control over the police. The police were seen as an arm of the courts, collecting evidence for them. Early in the 19th century this control came to an end, and the separation of the lower courts from the police was established. At no stage did magistrates control or seek to control the police in Australia. Nevertheless the question of a possible association between the police and the magistracy is an important one, for in many persons' minds there is believed to be some association between the two. For example, a defendant observes the friendly contact between the police and the magistrate in court. An impression is created which, although it may be a false one, is very real to the defendant. From time to time one still hears the term 'police magistrate'. Perhaps historic links between police and magistrates in England are still reflected in the attitude described. At one time magistrates and police were interconnected aspects of a system of social control. Both were concerned with keeping the streets clear, both were united against the poor and unemployed, both shared social hygiene as their objective.

In addition to the need for the magistracy to assert its independence from the police, Dr O'Connor suggested other areas which might be

examined. He made the point that there is no necessary connection between the lower courts' civil and criminal jurisdictions. There is, he said, no real reason why the same person should preside over both sides of the court's work. There could, he said, be different judicial officers presiding, for example, over traffic matters, licencing, and children's court matters.

He did feel that there should be a distinct group of magistrates dealing only with criminal matters. He felt strongly that this aspect of this work should be separated. A quite different approach was needed from that which was required for non-contentious matters such a traffic offences. Dealing with these was not, he thought, the function of a judicial officer. These should be diverted from the court and the magistrate should be permitted to concentrate on his proper functions. At present, said Dr O'Connor, the magistrate's court has too much of a 'rag-bag' of functions, especially on the civil side of its work. He advocated the removal from the magistrate's court of mundane, non-contentious matters.

Dr O'Connor said that we might learn from developments overseas. In England, magistrates sit, with a judge, on appeals from the magistrate's court. This, said Dr O'Connor, has an educative function and allows magistrates to rise above the hurly-burly phase of the initial hearing. It enables them to see a case from a different point of view. In Canada also the powers of the magistracy had recently been increased. They were now called judges and had the status of judges. Dr O'Connor also pointed out that stipendiary magistrates in England have had to have legal qualifications since 1792. The delay in accepting this idea in Australia is surprising, he said. Originally the explanation for the Australian acceptance of lay persons on the bench was that no lawyers were available. Now, he said, there are plenty of qualified people who could sit on the bench and there is no reason to perpetuate a system of unqualified magistrates. It must be borne in mind, he said, that if magistrates' qualifications are not beyond reproach, then the chance of improving their status and integrating the magistracy with the judiciary are slight.

Another aspect of the need to improve the lower courts is that in past centuries they dealt with the lower classes who were thought to have no rights. Now, he said, the working classes are more affluent and more conscious of their rights and are less willing to accept perfunctory justice. This reinforces the point made earlier about the need for a clear distinction between the police and the magistracy. He argued that the separation must be complete. Police should not appear in court as ushers, nor should they appear 'disguised' in plain clothes.

They should, he said, have nothing to do with the magistrates' courts.

Dr O'Connor pointed to the widespread feeling among the public that the police will always be believed by the magistrate and suggested that a person often pleads guilty simply because he feels that the magistrate' will accept a policeman's word regardless of the evidence which he, the defendant, puts forward. This criticism is heard far less often with respect to judges. Many people do not regard magistrates as impartial. It follows that the police stations should not be part of the court. When this does occur, the court lacks a sense of independence. One would not, Dr O'Connor pointed out, expect a supreme court to be attached to a police station. When this combination occurs, the frightened citizen does not get the impression of independence. He feels that he is the victim of a police-magisterial conspiracy. He feels alienated and unable to affect the system.

## DR. O'CONNOR'S PAPER

In the *Task Force Report: The Courts*, it is stated that[1]:

> No program of crime prevention will be effective without a massive overhaul of the lower criminal courts. The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situations and to the ideals of fairness, equality and rehabilitation professed in theory yet frequently denied in practice. The result may be a hardening of antisocial attitude in many defendants and the creation of obstacles to the successful adjustment of others.

It is not to be supposed that the work of magistrates could be viewed only in relation to their criminal jurisdictions. But it is in the area of magistrates' criminal law work that the most sensitive questions arise and it is in this area of their work that most people in the community see the magistrate as an agent of the law. The

---

[1] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (1967), p.29.

determination of civil disputes, the approval of licences, the courts' work in conjunction with electoral matters, and the great range of other incidental functions are only vaguely understood by the general public. If the magistrate is not conceived of an an arm of the police force, (that is, as a 'police magistrate') he is at least seen as a criminal law enforcing agency and one much more likely to have an effect on the lives of ordinary citizens than the judges of the intermediate and superior courts.

It is therefore necessary to bear in mind in any consideration of the future of magistrates, possible changes both in their criminal and non-criminal jurisdictions. In particular, attention should be paid to work in non-contentious traffic and specialist children's courts. In this paper, however, I shall concentrate on the criminal side.

It is not enough to attempt to predict the future of the magistracy as if that future were wholly within the control of the magistrates themselves. Any forecasting must be subject to the degree of activity or inactivity both from within the magistracy itself and from the people and the government. What is submitted here is that certain objects ought to be aimed at, and the objects will be attained only if there is pressure from all quarters brought to bear to reform and reconstitute not only the courts of summary jurisdiction, but also the whole of the administration of criminal justice.

## The Justices of the Peace and the Magistrates

To understand the present position of the magistracy it is necessary to realise that the original system of justices of the peace from which it derives has, in Australia, as well as in Canada and the United States, largely been abandoned in favour of the appointment of professional and qualified magistrates. The importance of this change cannot be overstated. This change meant a change in the position of the magistrates themselves, the extension of their jurisdiction and the increased influence of their work on the ordinary citizen's day-to-day life.

## The Magistrates' Status

In the period when a relatively small number of offences was triable summarily, the social importance of the magistrate and his court was relatively low. The people he would have to deal with were generally

of the lower orders and it was probably not considered very important, at least until very late in the 19th century, to give any special consideration to the trial of petty offenders who came before the justices of the peace. The Vagrancy and Poor Laws formed a large part of the courts' work.[2]

The 20th century has produced not only a transformation in our social attitude to the lower orders, but, with the advent of the motor car and the spread of affluence among the working class, there has been a growing pressure that equal justice should be administered whatever the status of the alleged offender and whatever the nature of the charge that is brought against him. This demand for equality before the law means that that phrase is no longer acceptable as a pious platitude but as a strong and insistent demand. Few would now dispute that the working man who loses his licence, and perhaps his occupation, as a result of a magistrate's decision will not be very severely punished. The determination of his culpability should be as scrupulously dealt with as any other criminal matter.

The effect of this change is that the magistrate has become a very much more important judicial officer than he was during the period when justices of the peace administered summary justice which came very close to perfunctory justice.

The development of stipendiary magistrates in Australia has not been exactly paralleled in the development of the Magistrates' Bench in England. There is still in England a tendency to perpetuate the use of an unqualified Bench of Magistrates and to treat the stipendiary magistrate as rather exceptional. In Australia, I believe, in all States it is now commonly accepted that the use of justices of the peace will constitute a rare exception and stipendiary magistrates are accepted as the normal judicial officer in courts of summary jurisdiction.

Despite this divergence from the development that has taken place in England, many of the attitudes and policies which were appropriate to the earlier, and to some extent current, English system still prevail in Australian thinking about the magistrates' courts.

---

[2] See generally Milton, *The English Magistracy* (1967); and Jackson, *The Machinery of Justice in England*, 5th ed., (1967), at pp.98 *et seq*.

*THE FUTURE OF THE MAGISTRATES' COURTS*

The magistrate in Australia must reconsider his position. He must be seen now as an important part of the general system of administration of justice rather than as an exceptional and unconnected independent administrator of a different and unconnected aspect of criminal justice.

The status of magistrates has been affected by a number of factors which have operated during this century to transform their role. The first of these changes has been the increasing demand that magistrates should possess legal qualifications rather than the qualifications which are attained, for example, through specialist magistrates' courses combined with administrative and court experience.

The second important change which has come about in this century has been the extraordinary enlargement of the ambit of matters with which a magistrate may be called upon to deal.

It is interesting to look at, for example, the range of penalties and the range of offences which were provided for in the NSW Crimes Act as it was originally enacted in 1900 and compare this with the most recent changes in jurisdiction introduced in NSW in the amendment to the Crimes Act of 1974. For example, in respect of the offences which were otherwise indictable, but punishable summarily with the accused's consent, the value limit on the subject matter of the charge or property involved was 20 pounds. In the 1974 amendment the value limit in respect of property was $1,000. More important, perhaps, is that the range of matters which is now set out in s.476 includes not only some matters where a $2,000 fine may be imposed, but also that this section empowers the magistrates to impose prison sentences of two years. Convictions under the section could, where appropriate, be deemed to be convictions in respect of felonies.

The effect of this enlargement in NSW has been to even further increase the range of matters that can be dealt with summarily, and proportionately to decrease the number of matters which will be dealt with by the traditional jury trial on indictment. The obvious effect of this change is that some very serious matters can now be determined by a single magistrate sitting alone.

In these circumstances it is obvious that the community can and should demand the highest possible quality in the judicial officer making such determinations. It is therefore necessary to reconsider the status of magistrates, since it can be assumed that the greater the responsibility the magistrates must undertake the more their status within the judicial hierarchy should be improved.

## Professionalism

One effect of this requirement that magistrates be given an improved and elevated status within the judicial hierarchy is that the occupation of magistrate must consolidate its professional standards and internally regulate the standards, both educational and professional, that will be demanded before entry into the profession. What is proposed is a much greater voice from the profession itself in the establishment of standards and qualifications necessary for practice as a magistrate.

## Independence

As a by-product of the increased demand for professionalism, there arises a greater need for the profession itself to gain its independence from direct administrative control by the government. There are many ways in which this severance from government control must be approached, but the ties to the various ministries of justice which still exist must be broken before the magistracy can reach judicial independence in the way that the other judicial officers in the superior courts have established their independence. There is a further sense in which magistrates must strive for independence and this involves a reconsideration of the continuing association with the police force. There have been some moves to take the police out of the courts, but the degree to which this movement has been successful varies considerably in the different Australian jurisdictions. Not only is there a need for police to be taken out of courts as officers assisting in the actual management of court business, but there is also a need for courthouses to be clearly separated from police buildings and for prosecutions within the magistrates' courts to be removed from police control. There is also a need for a conscious effort on the part of magistrates to avoid the possibility that the ordinary citizen can mistakenly believe that in some way the magistrate is an agent of the police. Lord Hewart's famous statement in *R.* v. *Sussex Justices* [1924] 1 K.B. 256 at p.259, cannot too often be repeated and remembered:

> ... it is not merely of some importance but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

*THE FUTURE OF THE MAGISTRATES' COURTS*

## The Judicial Hierarchy

Perhaps the most significant change that can be expected, and the one which ought, it is submitted, to be aimed for, is the complete integration of the magistracy within the judicial hierarchy. There is at present in most jurisdictions an unreasonable and unnecessary separation of the magistrates' courts, with the result that magistrates are placed in a special position at one end of the scale, and middle and superior courts and judges at the other.

It is important that the administration of justice on the criminal side be carried out by properly qualified and competent professional judges. However, it is also important that the suggestion that may well be entertained by many members of the community that there is a different quality of justice at the lower end of the scale from that at the other be dispelled. To bring this about, greater integration between the different levels in the administration of justice is necessary.

## A New Court Structure

It is proposed that we should aim for a reconsideration and review of the present court structure to bring the magistracy more closely into conjunction with the middle and superior courts. One way in which this interchange between the various branches of the judiciary could be promoted and developed is by an adaptation of the system at present in use in the Crown courts in England wherein magistrates sit with the judges of the superior court in a range of circumstances and, in particular, sit with the judges of the middle courts to hear appeals brought from the magistrates' courts. Even a limited enlargement of the functions of the magistrate to bring him into contact with the work of the middle court, sitting as an appeal court, must have considerable benefits for both the magistrates' courts and the middle courts. For their part the magistrates could observe the application of the more rigid requirements imposed by the middle court as a court of review and would, I submit, undoubtedly learn from that experience. The superior court would have the considerable advantage of being assisted by magistrates skilled and experienced in fact finding. There could then be an abandonment of the *hearing de novo* aspect of appeals from magistrates which is offensive to the magistrates and time consuming in the higher court.

There is no reason why this element of mobility should not be increased

and magistrates required to sit either as assessors or co-adjudicators in a wide range of matters brought up to all the superior courts.

To ensure that the magistrates' courts be given a status that is warranted, considering the seriousness and importance of the matters that can be dealt with in these courts, it might be timely to suggest the abandonment of the now familiar title of magistrates' courts in the same way that we earlier abandoned the term 'police courts' which became pejorative. There could, for example, be established simply a division of the courts to be known as the criminal courts which would be divided into different branches, each branch reflecting the statutory jurisdictions within the legislation of each State. It would then be only necessary to speak of the First, Second and Third Divisions of the Criminal Courts[3] and the adjudicating officers in those courts be called judges.

I have not considered here the special questions that relate to the appointment and tenure of magistrates and how their independence might be guaranteed, but, with regard to these matters, it is necessary to ensure that there is that same independence and professionalism among magistrates, however they are called, as there is in the judiciary.

## DISCUSSION OF DR O'CONNOR'S PAPER

A speaker stated that he was concerned about fragmentation in the court system and strongly favoured the end of the isolation of the magistrate's court. He felt that the legislature should introduce changes directed towards the creation of a unified, integrated court system. He favoured interchange between the courts, so that magistrates would be able to sit as judges in the intermediate courts. He therefore fully supported Dr O'Connor's suggestions. He also agreed with the speaker's comments on the need to make a clear distinction between the police officer and the magistrate.

Another speaker commented on the necessary qualifications for magistrates. He said that he would like to see an end of the system in Western Australia by which magistrates reached the bench as a result of internal examination. He said this change had been resisted and he

---

[3] 'All criminal cases should be tried by judges of equal status under generally comparable procedures', President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967), p.129.

found this surprising as an end to the old system would mean in improvement in the magistrate's standing and status.

The comment was made that in Tasmania, magistrates' courts were now being built separatelv from police stations and the speaker favoured this. He also strongly supported Dr O'Connor's recommendation regarding the diversion of a large volume of mundane work from the magistrate's court. Dr O'Connor was asked to enlarge on the matter of diverting a substantial proportion of the magistrate's workload. The questioner pointed out that this could lead to the development of a number of different bodies and he asked the speaker to enlarge on this in terms of the total pattern. Dr O'Connor relied that he saw the role of the criminal court as being a clear one. He saw criminal matters as presenting a unitary area. The similarity of criminal matters makes a uniform system practicable. The criminal courts could, he said, readily be developed into a single system with a series of judges and a series of different methods of trial.

Mr Ghows pointed to the dangers of restricting magistrates to criminal court work. He felt that this work could quickly become boring and that it was preferable to allow magistrates to do both civil and criminal matters. Civil work, he said, would relieve the boredom. Also, a magistrate who had experience in both civil and criminal matters had the prospect of promotion to a district court. In short, he felt that if a magistrate was restricted to the criminal court, he would find this boring and would have little chance of promotion as he would lack all-round experience. Dr O'Connor replied that he had not intended to suggest that they should not have a role in non-criminal matters.

On the question of promotion a speaker stated that this was a difficult matter to determine and control. He pointed to the danger that those promoted would be those who were in favour with the government. He asked how promotion of magistrates should be determined. Dr O'Connor agreed that the question of promotion was a difficult one, but argued that his broad scheme should not be rejected on this account. He said that the details regarding promotion procedures would have to be examined.

Another speaker agreed with the suggested change in title from stipendiary magistrate to judge, but thought this change might be difficult to achieve. Nevertheless, he thought the objective worthwhile as he felt that the term 'magistrate' continued to have an association in the public mind with the police. He also pointed out that the term 'police magistrate' still lingers. He thought that a change of title to judge

would be a means of improving the image of those who sat in the lower court.

Another commented that a change in title had been suggested in the ACT. He said that magistrates are judicial officers, they are judges. However, this suggestion had not yet been acted on. The comment was made that in Melbourne, the term 'police magistrate' had died. In that city the members of the lower court had been called magistrates for many years. The speaker stated that magistrates there had managed to hold themselves apart from the police. On the question of the boredom involved in the work, he stated that as the lower court's jurisdiction kept expanding and was now very wide, there was no chance of boredom.

# THE ROLE OF THE MAGISTRATE IN THE CRIMINAL JUSTICE SYSTEM

I. Cameron, S.M.

I believe that a mother's place is in the home. If there were family allowances payable by the Australian Government to mothers of families then the role of the magistrate in the criminal justice system would, in my opinion, be greatly reduced.

In South Australia some progress can be reported in that, following the lead of interstate magisterial appointments, we have a lady magistrate who has proved herself in the courts for adults and in the juvenile court. We also have a lady prosecutor who in a less enlightened age would have been described as a woman police officer. Assistant Police Prosecutor Prestwood is now a member of the police force without any discrimination in the title of her position. All references to her in police regulations will shortly be as a 'member' of the police force.

A 'role' may be defined as 'an actor's part'. Is there an element of showmanship in the magistracy as part of the system of criminal justice? The second question is 'how is that actor's part seen by those other people who have an interest in it?'

In my opinion, there is definitely a large element of showmanship required by the magistracy if it is to fulfil its function successfully in the administration of criminal justice.

The system of courts administering criminal justice at first instance in South Australia is three tiered. Within that broad scope it is like a tangram. In descending order there are the Supreme Court, the District Criminal Court, and the Courts of Summary Jurisdiction constituted by a magistrate or two justices of the peace. The juvenile courts are constituted by a specially appointed District Criminal Court Judge or a magistrate or justices of the peace, including a special justice sitting alone.

The role of the magistrates in the juvenile court system is indirectly involved in the scope of a Royal Commission functioning in South Australia now.

The facts are that at least some magistrates have been sitting for the whole of the last year in the Adelaide Juvenile Court. All juvenile courts sitting outside the metropolitan area have been constituted by the various itinerant or circuit magistrates. I have done some of that work on a visiting basis.

The maximum monetary penalty under the Juvenile Courts Act is $100. Trials for alleged capital offences are heard in the Supreme Court.

*THE ROLE OF THE MAGISTRATE*

A judicial officer in the juvenile court may not make an ancillary order for detention, for example, by way of remand, for more than 21 days. Juveniles reach statutory maturity at 18 years of age. Factual maturity requires a subjective rather than an objective test. There are many instances of persons in custody as adults being rather distressed by their first contact with harsh cellular reality.

In South Australia the role of the magistrate in the adult criminal justice system is many sided. He or she has jurisdiction to conduct a preliminary inquiry into serious charges. The bulk of preliminary inquiries result in trial or sentence in the District Criminal Court. Only a few very serious alleged offences reach trial in the Supreme Court. We also have a class of offences called 'minor indictable offences'. Any alleged offender against whom the prosecution make out a *prima facie* case in a case of this class has a right to elect to be tried in the appropriate higher court.

If the alleged offender does not exercise his right of election on a charge in that class, a magistrate has a discretion to hear and determine the matter summarily or to commit for trial. In any case which he has the power to determine summarily he may accept a plea of guilty either when the charge is read or once the prosecution has established a *prima facie* case. Not universally, but almost invariably, he does decide to hear summarily and adjudicates accordingly. He may, at the end of the prosecution case, formulate a new charge in the same class (if it appears from the evidence given to be more appropriate) and proceed to hear and determine that charge.

If a magistrate exercises his discretion to hear and determine summarily he or she *ipso facto* becomes a court of summary jurisdiction with all his or her usual powers. The Crown, strangely enough, has no right of appeal from a dismissal of a charge in these circumstances. The defendant's appeal, against an adverse finding, is to a full Supreme Court unless he or she elects to have the appeal heard by a single judge of that court, which is the normal court before which an appeal from a magistrate is heard.

Broadly speaking, magistrates in South Australia hear about 90 per cent of the cases before the courts. The role of the magistrate is, therefore, in my opinion, critical to the criminal justice system.

But let us look at the role of the magistracy as seen by the judges of the Supreme Court. There are, very roughly, 30 appeals a month - say 350 a year - from Courts of Summary Jurisdiction, whether those Courts are constituted by justices of the peace or a magistrate. The total

number of cases heard at the lower court level was 75,166 last year. The figure is an ascending one.

As one might imagine, when the number of appeals is such a small proportion of the cases heard, the Supreme Court judges frequently remark that the penalty involved is more severe than he or she might have imposed if sitting at first instance.

In any case, if all 350 appeals a year against magistrates' decisions were allowed, arguably it would still be satisfactory that so many other decisions were not subject to appeal. I realise that there are arguments to the contrary in that a number of people would not be aware of their right of appeal and a number might not have the necessary finance to take on the appeal, but the latter is perhaps a diminishing factor in our present legal aid system.

The District Criminal Court has no part in appeals from magistrates.

Public interest in all 'court cases' is high. The function of the media was once to report 'news'. It is now very selective as to what is 'news'. Unless an offender can think up interesting circumstances to surround, for example, the offence of larceny, such as stealing golf balls from the golf course frequented by the Chief of the CIB and having him observe the commission of the offence, publicity is most unlikely in Adelaide. In the ordinary cases of larceny and shoplifting no publicity is likely.

In the media, therefore, there is very little comment about the magistracy and its role in the criminal justice system. People generally continue to be very interested in all that happens in magistrates' courts because they or their friends are more liekly to be involved in a magistrates' court than in any other court. Also, as the facts are usually more prominently in issue than the law ordinary people can understand what is happening in such a court even if they do not agree with it. I am not saying, however, that a magistrate's reasons for decision are followed by each defendant.

Magistrates, from my contacts with them, see the role of the magistracy in one sense as an extension of the teaching profession. They also see it as a part of crime prevention and surely the latter should be the primary purpose of any system of criminal justice.

In the South Australian system the present influence of statutory penalties is towards higher monetary penalties. The Pollution of Water by Oil Act allows a fine of up to $50,000. The Narcotic

and Psychotropic Drugs Act, as applied in a magistrates' court, allows a penalty of up to $2,000 or two years imprisonment or both. Consumer protection legislation allows for a wide range of fines.

Proposed amendments to the Road Traffic Act, introduced but not yet passed by Parliament, indicate a maximum of $300 in *lieu* of $200 for a first offender guilty of driving under the influence of alcohol or a drug, with no alteration to the maximum prison sentence for a similar offence.

It is fair to point out that in 1962 when the national average weekly wage was $40 the maximum fine was $200. Now the national average weekly wage is hard to fix but say it is taken at $175 with a maximum fine of $300, is it any wonder that some people apparently regard that sort of penalty as a tax on liquor rather than a real deterrent to the driver who is incapable of exercising effective control of his vehicle? That is apparently one example of the way in which Parliament sees the magistracy.

But what of the other teaching aids available? Bonds are an extremely useful and well proven device which need no comment of mine. When a bond includes a term for supervision by a probation officer I believe that an offender receives an opportunity to obtain great help from an over-worked and conscientious section of the Correctional Services Department.

In my own experience, resulting from a tip from an experienced senior colleague, I have included in occasional bonds on very serious charges a term for a few reappearances by the defendant before me during the term of the bond. With one exception, in a very small number of such cases so far, this method appears to have provided a teaching aid of an appropriate dimension.

Suspended sentences, combined of course with bonds, have worked reasonably well in my experience. However, either because the offender has hardened or the court appears to be soft when granting this type of exemption from imprisonment, the results are encouraging but not convincing.

Jurisdiction to suspend a portion of the sentence in conjunction with power to order a short custodial sentence, would, in my opinion, be desirable as a weapon in the magistracy's armour.

If the magistracy requires an element of showmanship, what of the other players?

*THE ROLE OF THE MAGISTRATE*

For the most part they are law enforcement officers. Can anyone here imagine a police officer who does not step into the witness box and, with appropriate background facts, recite something like this. 'I said to the defendant, "Mr Smith, I am a police officer. I am armed. If you do not come out slowly from under that bed I shall be forced to follow you and arrest you there. I request you to slowly place your own firearm on the floor between us and then come out".' Any magistrate would be quite unmoved by that sort of documentary but, as all the players know, what was much more likely to have happened was that the policeman on finding an armed offender under a bed would have said something akin to: 'Got ya shorty. Some out with your hands up or I'll drill ya'.

There have been recent books on rape. There have been recent developments in law on rape so that if the accused has an honest and reasonable belief that a woman is consenting he is not now guilty of rape.

The Bill introduced into the South Australian parliament to exclude matrimony as a defence to rape has provoked a little criticism and a great deal of debate. The role of the magistracy will remain unchanged and the question for the magistrate will remain: 'Is there credible evidence, on the prosecution case, to find a *prima facie* case against the accused?' The Bill, if it becomes an Act, should assist a number of neglected wives and beaten wives to regain some protection from assaults of that kind.

Prophecy is dangerous and therefore to be avoided, but it would not surprise me to see a number of preliminary inquiries founder for lack of evidence from the principal witness.

The magistrates' court is seen by many members of the legal profession as a training ground for their articled clerks, by others a lucrative field in which to practise and, in one outstanding instance in South Australia, as a preferred jurisdiction to that of trial before jury.

The role of the magistrate as seen by at least one academic is a biased one.

In May 1971 during 'the demonstration era' one seminar paper which I read but did not hear delivered divided this possible bias into three

*THE ROLE OF THE MAGISTRATE*

main sub-topics[1]:

A bias towards maintaining the *status quo*, or a bias towards 'law and order'.

A bias towards accepting police evidence.

A personal bias within the magistracy against the demonstrators.

These divisions are fairly arbitrary, and in some cases overlap.

The author commented very favourably on a judgment of Mr Carter in *Samuels* v. *Dalton*. It is perhaps entirely coincidental that that judgment resulted in the dismissal of a charge against demonstrator Dalton.

The author found the following grounds of complaint in a number of judgments which he had examined. Perhaps it is unnecessary to say that all those judgments confirmed a result unfavourable to the demonstrator. The principal grounds taken were:

1. A desire to belittle the defendant in *Bruer* v. *Medlin*. In that case the learned Chief Justice of the Supreme Court gave character evidence for Medlin. His evidence of Medlin's general reputation for truth was accepted, but the magistrate's description of Medlin's veracity while giving particular evidence before him caused that magistrate to use very strong language indeed.

2. The very close relationship between magistrates and the police.

3. The apparent fear on the part of the magistracy that the police will lose public confidence if 'exposed' too much.

4. That magistrates get into the habit of accepting police evidence.

---

[1] H.J. Barrett, *The Possibility of Bias in the Magistracy* (1971).

*THE ROLE OF THE MAGISTRATE*

5. That the burden of proof was put upon the defendants and not on the prosecutors.

6. The penalties, when a conviction was recorded, or a defendant released on a bond, were too harsh and took no account of the proportion of a defendant's income involved in meeting the fine or an order under a bond.

My time limit prevents a detailed analysis of those views. Apparently they were seriously advanced and reflect great academic disquiet on our acting performance.

The other matter which I must mention is that of custodial sentence for contempt of court. Public opinion has not crystalised on this topic but there no longer seems to be any tolerance for a magistrate who commits a person to prison unless that contempt is insolence in the face of the court.

I think there is a difference in the part as played by a newly appointed magistrate and one of some years' standing. The new appointee is avid to dismiss cases during his first sittings. Shortly thereafter, a defendant puts up a story which even the 'new chum' does not fall for and after that the 'try ons' are much less successful.

A magistrates' court is, although it ought not to be in my opinion, quite a technical court. Citizens have come to expect it to do 'justice' as they see 'justice', or as they more frequently put it, 'British justice'. Invariably the vocal ones on that score are those for whom the technicalities or the broad merits hold very little comfort.

Magistrates in South Australia are public servants. All legal departments were recently placed in a Department of Legal Services so that the officers prosecuting before us were in the same department as ourselves.

A colleague adjourned one case for this situation to be argued before him. The matter was taken to the South Australian Full Court which, in broad terms, found for our independence. We are now in the Premier's Department, receive our pay from the Department of the South Australian Tourist Bureau, and make our complaints about late pay to the Department of Recreation and Sport.

I have been asked to speak about the role of the magistracy and not about what that role ought to be. My prophecy is that in a materialistic society the magistrate will be given more and more power to fine - that

is to augment the 'coffers' of the State - and less and less power to denude the 'coffers' of the State by orders for imprisonment.

DISCUSSION OF MR CAMERON'S PAPER

The question was raised as to the use of special magistrates. A speaker pointed out that these were employed in the children's court in Western Australia. He instanced persons such as a retired chief probation officer and a doctor sitting in this capacity. The speaker asked whether any other State had part-time magistrates sitting in this way. Mr Cameron replied that special magistrates were used in South Australia for minor traffic cases.

In reply to an enquiry about South Australia's panel system for juveniles, Mr Cameron stated that he believed that these panels had been most successful for first offenders. He said that he believed that the new system was working well for young offenders who appeared before the panel on a limited number of occasions.

The speaker was asked whether he believed that magistrates should be part of the public service or completely independent. The questioner referred to changes in Papua New Guinea which had been designed to produce magisterial independence. He explained that the magisterial service had been set up by the constitution in such a way that magistrates were not subject to governmental control in the exercise of their functions. All magistrates were placed outside the public service and the Chief Magistrate was deemed to be the departmental head responsible for the administration of the courts. All the court staff were answerable to him and the Minister of Justice had no control over the courts. The court service is under a Judicial and Legal Services Commission. He stated that a flexible magistracy had resulted. Also he commented that a greater team spirit had developed. Magistrates were aware that they were separate from the public service and this, in the speaker's view, gave them authority and confidence. It is the task of the Chief Magistrate to make a report to the Governor-General. This duty is imposed by the constitution. The speaker felt that the resulting independence made the magistracy more effective.

Much discussion ensued as to the conditions of appointment and removal of magistrates. A speaker pointed out that in the ACT consideration had been given to applying the same conditions of appointment and removal to magistrates as for judges. He asked whether this applied in Papua New Guinea. He was told, in reply, that this was still

being worked out by the Judicial and Legal Services Commission. This was a matter which would be considered by magistrates who would then make their submissions to the Commission. This Commission was an independent body making its own rules.

There then followed a general discussion on appointment and removal of magistrates. It was stated that Tasmanian magistrates felt strongly about questions of status and independence. They were appointed by statute and could be removed only by a motion of both Houses. Another speaker pointed out that the position was similar in Western Australia with regard to the need for a motion by both Houses to permit dismissal.

Another speaker urged the need for legislation to take magistrates out of the public service and so make them truly independent. One of his colleagues supported this suggestion, but make the point that magistrates should be careful not to lose the advantages of public service membership. It was agreed that many factors are involved. All seemed to believe that it is essential for magistrates to have the status of a judicial officer with regard to appointment and removal. All were of the opinion that the status of the magistrate should be clearly defined. In addition, there were such matters as salary and superannuation to be considered. One speaker made the point that judicial officers should not have to argue with the Public Service Board over salaries. On the other hand, there was the question of whether or not the Public Service Board would want to lose control over the magistrates. It was pointed out that these were some of the highest paid public servants in the States.

Another speaker reminded the meeting that although conditions of service were important, the question of status was much more important. He said it was necessary to separate the two questions. On one hand is the matter of status and on the other the conditions of service. Debate about the second should not be allowed to over-ride discussion about the former. The former, the question of status, was the more important of the two matters.

There was some discussion of the names which should be applied both to the court and to those who sat on it. One speaker pointed out that the name 'petty sessions' does not sound as impressive as 'magistrates' court', and that the term 'magistrates' court' was to be preferred. A number of speakers made the point that magistrates might, perhaps, be better called judges. One speaker, however, was of the opinion that it was difficult to get magistrates interested in the question of status. Many of them, he said, do not see that they would be helped by moving out of the public service. This speaker added that in Victoria,

magistrates felt that they could act independently.

Returning to the question of status, an earlier speaker said that it was important for magistrates to be seen as judicial officers and to escape from traditional attitudes to magistrates. In his view, the way to do this was to make it clear that there was to be no distinction between magistrates and judges. Difficulties as to the maintenance of independence were also raised. One commentator pointed out that there will, from time to time, be conflict with other branches of government. It is not easy for magistrates to escape from being seen as part of government; they still tended to be too strongly connected with the executive. When there is conflict, their position is invidious. The division between the bench and the executive should be clearer. There is need for true independence of the bench. Again and again distinctions were made between magistrates and judges.

On the question of whether or not a magistrate is a public servant, it was pointed out that many people might believe that he is, but few would say the same of a judge. However, there was some disagreement here. Another speaker said that the public tends to classify judges and magistrates in the same way and does not make the distinction suggested bv the previous speaker. There was some disagreement in the meeting over whether the public does see the magistrate in the same way as a judge. One speaker suggested that perhaps the magistrate is closer to the people than a judge.

Finally, the topic of the age at which a child passes out of the jurisdiction of the juvenile court was raised. One magistrate strongly suggested that it was desirable to lower the age of juvenile court jurisdiction. He thought that older juveniles who have committed serious offences should not have all the protections of the juvenile court. Other magistrates agreed with his point of view and stated that the older juvenile in the juvenile court does cause difficulties. Some urged that there were reasons for placing them in the adult court. However, other speakers pointed out that the more serious juvenile offenders could always be referred to an adult court. There was also some discussion on the age of criminal responsibility.

# CRIME CONTROL PROCEDURES IN SINGAPORE

A.W. Ghows

## Introduction

Singapore is roughly of the same shape as the Isle of Wight but is slightly larger. It has a population of two and a quarter million people. It has no natural resources of its own. We became independent quite by accident in August 1965 and since then we have tried every means to become viable. The control of crime is therefore of vital importance because unless we have peace and security in Singapore there is no likelihood of our being able to attract foreign capital and expertise.

In Singapore the police face two major problems - secret societies and drugs. Secret societies have been in operation in Singapore for over 100 years now and despite vigorous police action they pose the greatest threat to law and order. The drug problem recently took on serious proportions and we hope the measures we introduced last year and this year will contain it to a certain extent.

## Secret Societies

Secret society gangsters are parasites who prey on the weak and helpless. They extort protection money from shopkeepers, bar owners, brothel-keepers, small businessmen, hawkers, waitresses and prostitutes. They protect gambling and opium dens. They try to get their fingers into every lucrative racket in Singapore. It is known that secret society gangsters are responsible for most of the robberies in the streets and in the lifts of the blocks of flats in the new towns being developed all over Singapore. Inevitably, disputes and differences break out between members of the different gangs and pitched battles often take place between them wherein spears, long knives, acid, iron rods, bicycle chains and even firearms are used. The gangsters run little risk of prosecution in court as witnesses refuse to give evidence for fear of reprisals.

The secret societies in Singapore are the descendants of the triad societies which were formed in China towards the end of the 17th century to fight the Manchu rulers. Originally, the triad societies were political and religious in nature and were governed by strict codes of conduct. In order to ensure loyalty amongst the members, recruits had to participate in elaborate initiation ceremonies. These triad societies, which were brought to singapore and South East Asia by the Chinese immigrants who started to arrive in these parts in large numbers in the latter half of the 19th century, soon degenerated into

instruments of criminal aggression. The only similarity between present day secret societies and the triad societies of old is in the initiation ceremonies which every recruit has to undergo.

During the Japanese occupation the secret societies in Singapore became dormant for fear of the Japanese Kempetai. But soon after the end of World War Two they grew up again. In 1955 the Criminal Justice (Temporary Provisions) Ordinance was passed to enhance the punishment of secret society members found guilty of any offence described in the schedule thereto. It also enabled the police to oppose bail to prevent the gangsters from intimidating or interfering with prosecution witnesses before their trial. A subsequent amendment empowered a police officer, not below the rank of inspector, to arrest and bring before the court any person suspected of being a member of a secret society found in the immediate vicinity of or fleeing from a place where a gang fight was about to take place or had just taken place, to show cause why he should not be bound over.

This Ordinance, although helpful, was not adequate. By 1957 the situation was intolerable. During that year there were 400 secret society incidents including stabbings, gang fights, assaults, riots and murders, not to mention robberies, extortions and intimidations committed by members of secret societies.

In 1958 the Criminal Law (Temporary Provisions) Ordinance was amended to empower the police to detain any person suspected of being an active secret society member for a maximum of 16 days pending inquiries for the purpose of submitting an application to the Minister for a detention order or a police supervision order. The suspect may be released at any time during the 16 days he is in police custody if the evidence does not justify his further detention. If the Minister is satisfied from the police submission that it is necessary that the suspect be detained in the interests of public safety, peace and good order, he may order the person to be detained for any period not exceeding one year. If the Minister is satisfied that it is necessary that the person be subject to police supervision, he may direct that the person be subject to such supervision for any period not exceeding three years from the date of such an order.

No detention or police supervision order may be issued without the consent of the Public Prosecutor. Every detention or police supervision order, together with a written statement of the grounds upon which the order was made, must be referred by the Minister to an advisory committee within 28 days of the making of such an order and the committee must submit to the President a written report and may

make such recommendations as it thinks fit. The President then considers the report and may cancel or confirm the order. When confirming the order he may make such variations as he thinks fit. The detainee or supervisee may appear before the advisory committee and state his case. The period of detention may be extended year by year and every time it is extended the detention order must be referred to the advisory committee and the committee's report and recommendation has to be referred to the President.

Normally a secret society gangster does not have to be detained for more than two or three years for by the time he is released he is no longer welcome in his old secret society, if it is still in existence, as he is a marked man. When a secret society gangster is released he is normally put on police supervision which is cancelled if he shows good behaviour.

The usual conditions stipulated in a police supervision order are that the supervisee must live at a given address and must not change his place of residence without police approval; that he reports once a week to the divisional police station at the time and date stipulated in the order; that he remains indoors between 7.00 p.m. and 6.00 a.m. and that he does not leave Singapore without the written authority of a police inspector. Sometimes, where it is deemed expedient, an additional clause is included to prohibit the supervisee from entering a specified area. Breaches of these conditions are triable by court and the minimum punishment on conviction is 12 months imprisonment. Police supervisees are not permitted to consort with other police supervisees and if a police supervisee is convicted of an offence described in the Schedule to the Criminal Law (Temporary Provisions) Ordinance, which is now known as the Criminal Law (Temporary Provisions) Act, he is liable to have his sentence doubled and he is also liable to be caned.

A criminal law detainee is not required to do any work in the prison while under detention but if he volunteers to work he is assigned to one of the workshops in the prison and given industrial training. One of the workshops outside the prison walls is manned entirely by criminal law detainees under the supervision of experts. This workshop repairs and paints motor cars and has become a commercial success. A criminal law detainee employed in any workshop within the prison or outside the prison walls is paid a basic minimum wage of $4 a day which could increase as he acquires more skill. The Criminal Law (Temporary Provisions) Act , has achieved a large measure of success.

Corporal Punishment

Secret society gangsters usually operate in groups. As a member of a group the gangster is a bully and although he is capable of inflicting injury on his victims with or without pretext, he personally fears pain. When he is ordered to be caned he will plead with the court to impose upon him a longer sentence of imprisonment instead of the caning.

This prompted the government to recently enact legislation to make caning a mandatory punishment for most crimes of violence. By the *Penal Code (Amendment) Act*, 1973, every person convicted of robbery can be punished with a specified number of strokes of the cane and with imprisonment. For instance, a person committing simple robbery in the daytime can receive not less than four strokes of the cane plus imprisonment but if the robbery is committed at night he can receive not less than six strokes plus a sentence of imprisonment. A robber who is armed with or uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt at the time of committing or attempting to commit robbery can receive not less than 10 strokes of the cane in addition to imprisonment. A person who commits theft after preparing to cause death or hurt or restraint in order to facilitate the committing of theft can be punished with imprisonment and also with caning with not less than three strokes.

Caning may only be inflicted under medical supervision on the buttocks with a rattan not more than half an inch in diameter. Youthful offenders may be caned only with a light rattan. Neither females or males under sentence of death or over 50 years of age are punishable with caning. Although caning has been made a mandatory sentence for certain types of offences, the courts have a discretion in regard to the length of imprisonment they may sentenced the accused to undergo. The court also has the right to amend the charge preferred against the accused to one where caning is not mandatory if it is of the opinion that the offence committed by the accused does not deserve caning. Experience has shown that a sentence of caning followed by a short term of imprisonment is sufficient to deter most prisoners from reverting to a criminal career. Caning has proved to have a salutary and deterrent effect especially on the younger criminals. According to Singapore's Director of Prisons, less than one per cent of those who have received caning have come back for a second dose.

## Arms Offences

Towards the end of the war in Vietnam, more and more pistols and revolvers found their way into Singapore and more and more robbers were armed with them. In one case, a person dressed in yellow robes as a Buddhist monk came into Singapore bringing guns tied round his waist under his robes. Altogether he brought 12 pistols and revolvers into Singapore and when caught was sentenced to undergo imprisonment for some years. In those days there was no special punishment for trafficking in firearms.

In 1973 a new Arms Offences Act was enacted, under which a person found guilty of trafficking in firearms can be punished with death or imprisonment for life plus caning with not less than six strokes. Any person proved to be in unlawful possession of more than two firearms can, until the contrary is proved, be presumed to be trafficking in arms. A person who discharges a firearm with intent to cause physical injury to any person can be punished with death. Another section in the new Arms Offences Act provides that where any firearm is used by any person in committing or attempting to commit any offence, each of his accomplices present at the scene of such offence who may reasonably be presumed to have known that such person was carrying or had in his possession or under his control the firearm can, unless it is proved that he has taken all reasonable steps to prevent the use of the firearm, be punished by death. This last provision caused the use of firearms in robberies to drop to an all-time low as most criminals are loathe to accompany any person to commit a robbery or any other offence if he is carrying a firearm as he is liable to be hanged if his accomplice discharges the firearm in his excitment.

Since the passing of the Penal Code (Amendment) Act and of the new Arms Offences Act in 1973 there has been an actual and marked decrease in the number of serious offences committed. The number of robberies recorded in 1975 was the lowest since 1970. However, there has been an increase in petty thefts, snatch thefts and housebreakings as these offences are not punishable with caning.

## Drug Offences

In 1973 and 1974 most of the young people convicted of drug offences were in possession of either cannabis (marijuana) or methaqualone. In 1973 only 10 persons were arrested for being in possession of heroin. In 1974, 110 persons were arrested for this offence and in 1975 more

than 1,700 persons were found to be in possession of heroin when arrested - the majority of whom were between 17 and 25 years of age.

As the problem was getting out of hand the *Misuse of Drugs Act*, 1973 was amended in 1975 to increase the penalties for unauthorised trafficking in, manufacture of and import or export of controlled drugs. Under these amendments, any person convicted of unlawfully trafficking in, or unlawfully importing or exporting a controlled drug containing more than 30 grams of morphine or 15 grams of heroin can be sentenced to death. If the amount of morphine is less than 30 grams or the amount of heroin is less than 15 grams, the person who is convicted of unlawfully trafficking in or of importing or exporting such controlled drugs is liable to a long sentence of imprisonment and a mandatory sentence of caning. Another section provides that any person found guilty of manufacturing morphine or heroin can be sentenced to death. The Misuse of Drugs Act also prescribes minimum and maximum terms of imprisonment for offenders involved in other drug offences.

To overcome the difficulty of proving 'possession' and 'trafficking', the Misuse of Drugs Act contains various presumptions. Any person who is proved or presumed to have had a controlled drug in his possession shall be presumed to have known the nature of the drug. A person proved or presumed to be in possession of 100 grams of opium or 3 grams of morphine or 2 grams of heroin contained in any controlled drug or 15 grams of cannabis or cannabis resin shall be presumed to have the drug in his possession for the purpose of trafficking therein. If any controlled drug is found in the urine of a person as a result of a urine test, he shall be presumed to have consumed that controlled drug in contravention of the Act. All the above presumptions are however rebuttable.

An officer of the Central Narcotics Bureau of an immigration officer may, if he suspects that any person has any controlled drug in his body, require that person to provide a specimen of his urine for a test. Any person, other than a Singapore citizen or a permanent resident, arriving in Singapore by land, sea or air who, if required to do so, fails to provide a specimen of his urine for a test, or is found as a result of a urine test to have consumed a controlled drug, may be prohibited from entering or remaining in Singapore.

The Misuse of Drugs Act gives the courts in Singapore jurisdiction to try any offence involving drugs even if the offence is committed outside Singapore.

However, not every young addict is dragged before the court to be

punished, unless he also happens to be a drug pusher. Approved institutions have been set up for the treatment or rehabilitation of drug addicts. If it appears to the Director of the Central Narcotics Bureau that it is necessary for any person to undergo treatment or rehabilitation at such an approved institution, he may require that person to attend for treatment or rehabilitation for a period that he determines after consulting that institution. A drug addict may volunteer to undergo treatment at an approved institution and he may be admitted to the institution on such terms and conditions as may be prescribed. In the approved institution the drug addict is subject to the so-called 'cold turkey' treatment, that is, no medication is given during the withdrawal process unless he is above 50 years of age or is weak or sickly.

The treatment and rehabilitation of drug addicts presents special problems, especially when the addicts have developed criminal tendencies and have resorted to crime to support their craving for drugs. Drug addicts tend to retain a psychological desire for drugs even after they have been successfully treated. Aftercare therefore has a significant role to play in the rehabilitation of such addicts.

Experience has shown that, to be effective, aftercare for those released from rehabilitative institutions has to be compulsory. So this year the Misuse of Drugs (Approved Institutions and Treatment and Rehabilitation) Regulations were enacted. They provide, among other things, for the mandatory aftercare of persons released after having completed treatment at an approved institution. Compulsory aftercare can ensure that the drug addict receives appropriate support and assistance in the initial stages after his release and that his activities during this period are strictly supervised.

## Rehabilitation Program

Crime control must include a rehabilitation program so that prisoners who have served their sentences do not have to return to crime to provide a living for themselves and their families. With this in view the prison program in Singapore has been modernised.

Steps are being taken to introduce sound rehabilitation schemes, including the provision of a prison social assistance/counselling service for prisoners, vocational/industrial job placement for prisoners and a prison education service staffed by fully qualified teachers. Young offenders are encouraged to attend literacy classes. Prisoners

below 16 years of age may be excused from work so that they may attend classes and pursue a formal education. Many young prisoners have sat for and passed their 'O' level examinations while serving their sentences in prison.

Work is compulsory for every other prisoner serving a sentence but before he is assigned to a workshop he appears before a classification board to assess his aptitudes. In the workshop he works not more than eight hours a day and gets a basic minimum wage of $4 per day if he is unskilled. This rate could increase to 85 cents per hour for the really skilled worker. A prisoner who is in receipt of wages is required to pay $1.50 a day towards his food. Out of the balance of his wages each prisoner is allowed to spend not more than $3 a week on canteen purchases. The rest of his money is kept in the post office savings bank where each prisoner has a separate account.

The industrial training provided within prisons makes it easier for prisoners to obtain employment after their discharge. Employment opportunities do exist for ex-prisoners in Singapore as there is no lack of employment openings for able-bodied young men, and the majority of prisoners fall within this category. The building industry, for instance, is faced with a recurrent labour shortage and the majority of building contractors do not discriminate against ex-prisoners. However, what is worrying is the fact that many ex-prisoners, having obtained employment, fail to stay in their jobs. It may be necessary to amend the Prison Regulations to provide legal sanctions against those who will not stay at a job. For instance, a prisoner released on licence may be required to obtain a job within one month of his release or to accept any job obtained for him by his aftercare officer and he may not leave or change any employment, whether obtained by himself or for him, without the written permission of his aftercare officer.

## Community Probation Service

Recently the Probation of Offenders Act was amended to give legal recognition to the volunteer probation officer and to vest him with statutory powers to supervise probationers. The volunteer probation officer is the product of the Community Probation Service initiated in 1971 to provide an opportunity for concerned citizens to participate directly in the rehabilitation of offenders. At present the Community Probation Service has 260 volunteers out of whom 52 have been gazetted under the Probation of Offenders Act as volunteer probation officers. As more volunteers qualify for appointment under the Act as volunteer

probation officers the professional probation and aftercare officer will have a smaller case load. By distributing the less difficult cases to the volunteer probation officers, the professionals can then fully concentrate on problem cases where the delinquency of the probationer stems from deep-rooted causes.

To provide aftercare service to drug addicts, 51 special constabulary national servicemen have been trained to supplement the work of professional probation and aftercare officers. This group of national servicemen are mostly professionals and persons holding managerial positions who have shown a special aptitude for and interest in working with drug addicts. A second batch of 100 part-time special constabulary national servicemen is at present attending a course on the aftercare of drug addicts released drom the drug rehabilitation centre. It is proposed to increase the number of special constabulary national servicemen trained in aftercare work to 240 by the middle of next year.

## DISCUSSION OF MR GHOWS' PAPER

Mr Ghows was asked whether there was any move in Singapore to abolish appeals to the Privy Council. When he answered that there was not, the questioner asked how this could be justified. Mr Ghows replied that in Singapore a pragmatic approach was taken. It was felt that if other countries could help Singapore in the administration of justice, this help would be gratefully received.

On the subject of detention without trial, another speaker asked why these persons were not brought to trial; was it because of lack of evidence? Mr Ghows answered that it was not because of lack of evidence but because the witnesses were afraid to testify in court. The questioner commented that this meant that there was no opportunity for the defendant or his counsel to cross-examine the witnesses. Mr Ghows agreed that this was unfortunately so.

In reply to a question about the prison population in Singapore, Mr Ghows said that the number in prison at any one time was approximately 4,000. Mr Ghows was also asked about penalties for juveniles. He answered that the court was an informal one and that there was special institutions for juvenile delinquents, that is, those up to the age of sixteen.

A speaker asked about membership of the various secret societies in

Singapore. He made the point that a person arrested on suspicion of being a member of such a society seemed to have to prove that he was not a member of this society. He also added that the interrogation was all in private. However, he was informed by Mr Ghows that the suspected person could be represented. Another speaker pointed out that the important issue was the shifting of the burden of proof.

# SENTENCING AND CURRENT ALTERNATIVES

Royce Miller

The role of the magistrate in the criminal sphere is increasing. He is being given jurisdiction to sentence in cases where previously judges alone had that responsibility.

In bygone ages, sentencing was a relatively simple process. The legislature fixed the sentence for most crimes and the court had no discretion to exercise. In the reign of George III there were at least 220 capital offences.

Today, with the exception of murder and perhaps a few other crimes, a maximum is set by law, and it is then left to the sentencing tribunal to assess the appropriate penalty.

This task is an onerous one. The principles of punishment - sometimes they are referred to as theories - have been subjected to a great deal of analysis and a great deal of criticism and from time to time emphasis seems to be placed on one to the exclusion of the others. The reformers have a free hand in expressing their no doubt enlightened views but they have no judicial responsibility and any sentencing tribunal, whether it be constituted by a judge or a magistrate, is bound to follow the principles laid down by the courts which bind them.

Prevention and deterrence have for centuries underlain the English philosophy of criminal punishment even though effectiveness of the death penalty was doubted, for it is recorded that even under the very shadow of the gallows while public executions were taking place pick pockets plied their trade.

The deterrent theory was held so strongly however, that Lord Ellenborough opposed the abolition of the death penalty for thefts of five shillings or upwards. He said in an address to the House of Lords:

> Your Lordships will pause long before you assent to a measure so pregnant with danger for the security of property. The learned judges are unanimously agreed that the expediency of justice and public security require there should not be a remission of this part of the criminal law.

Times have changed and ideas have changed but fundamentally the purpose of punishment has remained unaltered: the protection of society against those who breach the law, those who have little or no regard for the rights of others to the security of their person and their property.

*SENTENCING AND CURRENT ALTERNATIVES*

It has been said: 'Life in an orderly society would be impossible *unless* the powers and duties and the rights and obligations of the individual members are determined by a set of rules. The criminal law is part of those rules and, if it is not obeyed, life in society will become impossible. The function of the criminal court is to force the public to obey those rules. This is done by imposing a punishment on the offender.'

Punishment predominantly must be a means to an end, not an end in itself.

Once it was said that courts ought to standardise sentences for a particular offence. Happily there has been a movement away from that idea. Sir Stanley Burbury in *Lahey* v. *Edwards* [1967] Tas. S.R. 266 put the sentencing tribunal's function in these words:

> Sentencing is a matter for the exercise of a discretionary judgment within wide limits in the particular circumstances of each case and it is not for this Court (the Appeal Court) to define or restrict that discretion by attempting to prescribe anything in the nature of a standard punishment to be imposed unless exceptional circumstances are found. It is for the sentencing tribunal to weigh all the varying factors relating to the circumstances of the particular offence and the individual who commits it and to exercise a judicial discretion. *The choice of the appropriate punishment is not a matter of rule* ... it is a matter of a wide judicial discretion.

In *Geddes* (1936) 36 S.R. (N.S.W.) 554, Sir Frederick Jordan said that with regard to sentencing, the only golden rule is that there is no golden rule. This is not to say that the tribunal may do as it likes. It must determine the facts; it must examine the personality of the offender in relation to the offence he has committed; it must weigh up the various theories of punishment and then, doing the best it can, in the interests of society (which incidentally may coincide with the interests of the offender but which may on the other hand be in conflict with his interests) decide the appropriate way of disposing of the case.

Perhaps the deterrent principle is best exemplified by the New South Wales case of *Aitken* [1961] N.S.W.R. 914. In that case the applicant for leave to appeal against a sentence of 18 months hard labour for his first offence - one of larceny of a motor vehicle - was a young man

of good character. He has been educated to the age of 17 at two great public schools. He was in regular employment and came from a good home, the Court expressing great sympathy for the parents whom it described as 'estimable citizens'. The Court of Appeal said that perhaps the applicant was overindulged by his parents and lacked some elements of discipline. He was weak enough to give way to temptation to help in stealing and stripping a car because of a false sense of loyalty to his fellows.

In its reasons for refusing the application the Court said:

> We have given every consideration to the extenuating circumstances pressed upon us; and it is with some regret that we feel that the application must be dismissed. We say with regret because we do not overlook that the applicant is being sent to prison for the first time and for his first offence. But this Court is bound to consider not only the interests of the applicant himself and his family, but the community. The *retributive* aspect of punishment must be given full weight. Perhaps this would be met in this case by the exposure of the crime, the arrest of the applicant, the disgrace with which it is accompanied, and the disruption of his life of previous good character. We do not think that the applicant is likely to be led or to fall again into a crime of dishonesty. His school and family background should be a guarantee of this. But there remains the question of the *deterrent* aspect. A sentence such as this is imposed to *deter others* as much as to deter or punish the individual. For many years Judges at Quarter Sessions have taken a serious view of car stealing owing to its prevalence and serious loss of property involved, and have frequently imposed sentences of two or three years imprisonment on young offenders and the Court has consistently supported them ...

Four years later in 1965 in the case of *Williams* [1965] Qd.R. 86, the Court of Criminal Appeal was called upon to decide whether the granting of probation for four years was an inappropriate method of dealing with another youthful offender. This crime was attempted rape. I shall not relate the facts of the case for they are set out in the report. It is enough to say that he occasioned his victim bodily harm, and had expressed his intention that he was 'going to have her whether she liked it or not'.

Mr Justice Hanger said merely:

> Notwithstanding the very considerable experience of the learned trial judge in criminal cases, the sentence cannot, in my opinion, be allowed to stand. The offence was serious - the maximum penalty provided for it is imprisonment with hard labour for 14 years. The attack upon the victim was violent and brutal. There was no suggestion that the appellant was led on or encouraged by any loose or otherwise improper behaviour of the victim; and the only excuse suggested was lack of sexual experience and the consumption of alcohol.

Mr Justice Wanstall expressed the view that the Trial Judge had erred in 'overlooking the call of these circumstances for punishment which would act as a deterrent to others'.

Mr Justice Stable said of the Trial Judge: 'He was faced with a difficult decision'. He went on:

> The young man is only 20 years old with a good record and an impeccable family background. He had had no sexual relations with women and was unaccustomed to drinking whisky. Perhaps he had been too sheltered. The judge considered that his passion was aroused by alcohol and that the appellant did what he did in an endeavour to satisfy his curiosity with relation to sexual intercourse. He was not one of a gang of youths ... The appellant is 'a cut above the average type' whom the courts are used to seeing arraigned on such charges.

His Honour then referred to *Aitken*'s case and then went on:

> I consider that the substance of this statement expresses the problem in the present case and helps in the making of the hard decision whether or not to send a young man such as the appellant to gaol. For years sentences of imprisonment have been imposed by our courts for violent sexual offences, and I have no doubt that one result is that many young men who would otherwise have offended have been induced to turn aside and walk straightly. Of course punishment can never prevent or stamp out crime. Wilful murder continued despite the punishments of mutilation or deportation,

> or both imposed in earlier days. But for *serious* crime, imprisonment remains the only effective brake upon anti-social pressures and passion which may be indulged bringing fear and agony to men whomen and children who are entitled to live freely in the protection of the law. While imprisonment may not be the perfect answer in such a case as this I consider it is the only real answer available to the court.

In the result the probation order was set aside, and Williams was ordered to be imprisoned for three years.

In *Aitken*, the powerful considerations were: prevalence of the offence and the property damage. In *Williams*, prevalence and sexual attack involving violence. Both of these cases involved young men of extremely good background, and whose previous conduct was impeccable. But both were sent to jail, for their first offence.

Of course all courts are reluctant to send offenders to prison and rarely are youthful offenders sentenced to imprisonment, except in the case of an offence of considerable gravity or in the case of a persistent offender who has not shown himself amenable to disciplinary methods short of jail.

The courts have recognised that imprisonment is likely to expose a youth to corrupt influences and to confirm him in criminal ways, thus defeating the very purpose of punishment.

There has accordingly been a universal acceptance by the courts of the view that in the case of a youthful offender his reformation is always important, and, in the ordinary run of offences, the dominant consideration in determining the appropriate punishment to be imposed. One should always have in mind what was said by Lord Goddard, a former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility.

But one must also keep at the front of one's mind what has been referred to in recent times as the denunciatory theory or aspect of punishment.

From time to time magistrates, like judges, are called upon to deal with an offender on whose behalf it is submitted that he needs treatment not punishment, and one suspects that the courts are in a dilemma

of great dimensions. On one hand the prospects of treatment are said to be good, and if the treatment is effective it is highly likely that the offender will not repeat his offence; on the other hand the offence was a serious one.

The Victorian case of *Dole* highlights the various and conflicting considerations which confronted both the Trial Judge, and the Appeal Court which was asked by the Attorney General to set aside the Sentencing Judge's Order.

In *R.* v. *Dole* [1975] V.R. 754, the Victorian Full Court was concerned with a problem which I daresay you face from time to time when dealing with offenders who commit offences of a sexual nature against children. Very likely you do not get that assistance which the Trial Judge got in this case.

Dole was convicted, on his own confession, on three counts of indecently assaulting a nine year old girl in 1974. The Trial Judge had before him a psychiatric report which stated:

> It is my opinion that a prison sentence would not act as a deterrent to this man, though the threat of a sentence would. I respectfully suggest that the measures most likely to reduce the chances of further anti-social behaviour would be to require him to attend for psychiatric attention together with a suspended sentence.

The Trial Judge, upon each charge, made an order that Dole be released on his entering into a $100 bond to be of good behaviour for three years and to come up for sentence if and when called upon, and within seven days to report to a named doctor at the Parkville Psychiatric Unit and thereafter undergo such medical or psychiatric treatment, either as an in-patient or an out-patient, as the doctor should prescribe.

Dole was 36 years old, a fitter's assistant in the railways at Bendigo. In March 1961 he was convicted on two charges of obscene exposure. He was then living with his first wife and their three children. He was placed on probation for two years and ordered to seek medical attention and psychiatric treatment if deemed necessary. However, on two further occasions in 1962 and 1963 he appeared before the same court on charges of obscene exposure and the cases were adjourned and ultimately disposed of without conviction. His wife died and he married again in 1963 and had two more children. In 1966

he was convicted again on two charges of obscene exposure. Again he was placed on probation, this time for three years, and was ordered to seek psychiatric treatment and observe the treatment prescribed. In 1968, 1969, 1971 and August 1974 he was convicted in all of seven charges of obscene exposure and the cases were adjourned and ultimately disposed of without conviction.

Before the Trial Judge, it was stated that Dole had attended the Parkville Psychiatric Unit in 1968, and in 1971 he received treatment described as 'vigorous and unpleasant' with which he was said to have cooperated and which it was said had 'apparently successful results'; thereafter he was seen at the Unit once a month as an outpatient.

The three counts of indecently assaulting the nine year old girl related to conduct committed first in August, and then on two occasions in October 1974. The child belonged to a family that lived nearby. Apparently on these three occasions he had picked up the child together with his own children from school and had taken them home. He had then had a shower and committed the offences after inviting the nine year old into the shower.

Counsel for Dole informed the Trial Judge that Dole was a devoted father, who had helped pensioners and had acted as an umpire in junior football matches, and submitted that the circumstances and the history showed that Dole was in dire need of substantial and intensive psychiatric treatment. He said his client had for over eight years been an irregular attendant at a number of psychiatric institutions but only as an outpatient and that now he appreciated that he needed substantial assistance and was prepared to submit himself as an in-patient in some institution under any conditions imposed for any period necessary to assure proper rehabilitation.

I have related to you the recommendations made by the psychiatrist. His report also stated that during the time that Dole had been under the Unit's care, there had been many observations of abnormalities of personality including diminished ability to see himself as others saw him. He had a poor perception of the accepted bounds of society (especially an impaired respect for truth) and a very poor ability to foresee the future consequences of his action. The report continued: 'His indecent assault on the child does not have the quality of a compulsion. In other words it is my opinion that he is able to cease his behaviour easily, and he is not a danger to young girls in the future'.

*SENTENCING AND CURRENT ALTERNATIVES*

Mr Justice Gowans in his judgment quoted a statement made in sentencing by the Trial Judge and then continued:

> From this it is clear that the learned Judge classed the offences in the circumstances in which they were committed as grave and abhorrent. He adopted the view that they were not the product of compulsive behaviour and that the respondent's conduct was of a kind that could and ought to have been controlled. On the other hand he took the effect of the material placed before him to be that the respondent had a present need for intensive psychiatric attention directed to achieving a rehabilitative effect more lasting than that so far achieved by the treatment he had undergone.

In his report to the Full Court, the Trial Judge indicated that he recognised that in dealing with Dole as he did he had taken a calculated risk.

Mr Justice Gowans and Mr Justice Nelson held that the Judge was wrong in taking that risk, that he was wrong in overvaluing the prospects of reformation and in undervaluing the deterrent and retributive aspects of sentencing.

I am now going to quote at some length a passage taken from the judgment of Mr Justice Gowans, which to my mind is 'like a beacon in the darkness'. Magistrates today in many jurisdictions deal summarily with indictable offences, and these remarks ought always be kept in mind for they hold true, not only in the State of Victoria, but throughout this country.

He referred to *R.* v. *Williscroft* an earlier Victorian case, in particular a passage from the joint Judgment of Adam and Crockett JJ. It reads:

> We should have thought that in any case where an offender is released on probation or granted a good behaviour bond for an indictable offence, *ex hypothesi*, it is implicit that in the circumstances the offence is sufficiently lacking in heinousness as to permit all other considerations to be treated as subsidiary to the prospect of the offender's rehabilitation.

That statement, though reiterated here in the circumstances where the offender was 36 years of age and where he had in the past conducted

himself in such a way as indicated that he was a threat to society, is as applicable in the case of *Williams* - the attempted rape case referred to earlier - and to the case of *Aitken* (the theft of the motor car case).

In other words if the indictable offence is sufficiently heinous as to require the court's denunciation by a sentence of imprisonment then even for a first offender every other consideration must give way and this is so in spite of the remarks of Lord Goddard that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility.

Mr Justice Gowans, almost at the conclusion of his judgment, said this:

> Counsel for the respondent (Dole) submitted that the protection of the community is the ultimate objective and that the learned judge was entitled to take the view that it would be sufficiently secured by the course taken. It is true that the protection of the community is the ultimate objective of the system of law. It may or may not be correct to say that it is the ultimate objective of punishment under the law. For this formulation would appear to exclude the element of the community's demand to be satisfied that those who depart from the standards which others feel obliged to observe should not be allowed to do so with impunity. But even accepting the formulation it does not follow that the requirement is sufficiently satisfied by the taking of adequate steps to deter the individual offender from repetition of the offence. The deterrence of others from committing grave offences by making it manifest that culpability in relation to them is not to go unpunished is not to be disregarded.

The Full Court sentenced him to two years on each count, with a minimum terms of nine months after which he would be eligible for parole.

In that case it is readily seen that there was a conflict between the interests of the offender and the interests of society. No one would argue that the decision of the Full Court was not right, for that offender had the capacity to control his actions and had repeatedly offended.

Where an offender is clearly shown not to have the capacity to control his actions then punishment is not the answer or the remedy. Treatment

is the remedy. Of course the major difficulty in dealing with any offender is in knowing what caused him to do the act which brings him before the court. Some commit offences because they are anti-social, some because it is their way, perhaps their only way, of putting excitement into an otherwise dull life, some commit offences out of necessity, some because of greed, and some for revenge or spite against a particular person. Where certain types of personality are concerned, ordinary methods of punishment may well fail, unless psychotherapy removes the mental factors which are the real cause of delinquency. Some may benefit from understanding treatment. With some there may be little prospect of successful treatment and society must be protected from them by custodial sentences if their offences are of such gravity that those offences should be 'denounced'. Even, as in *Dole*, where there are prospects of successful treatment, the court may have no alternative but to impose a jail term in the interests of society. A wide power to order psychiatric treatment would add to, not diminish, the effectiveness of the law but the practical difficulty, as you would realise, is to isolate the cases in which such treatment will be useful, for to order psychological examination of all offenders would be impracticable.

## Methods of Disposal Not Involving a Jail Sentence

Once the court has determined against the imposition of a sentence of imprisonment, it then has to decide which of the other alternatives, or combination of alternatives, open to it should be employed.

Which of those alternatives should be adopted will depend of course on the determination as to how best the community's interest will be served.

If the purpose is rehabilitation or reformation of the offender, then a fine is completely inappropriate. If deterrence is the aim, then a fine of sufficient proportions as to be calculated to deter that offender and others will be the order of the court.

If rehabilitation is the objective then it may be achieved either by a suspended or deferred sentence, the offender being released on a bond, or the granting of probation. Some offenders are in need of guidance, some need to be separated from their former associates, and must be steered into a new course of living, a way of living which will enable them to have a proper respect for the rights of their fellow citizens.

With some the shock of arrest, the disgrace of arraignment before the court and then being put on a recognisance will be sufficient punishment and deterrent against similar conduct in the future. Probation for them will not be necessary.

For others however probation will be necessary. Their upbringing, their environment, their attitude towards life and their lack of respect for the rights of others will require that they be supervised, and made by a probation officer to do as they are told. It is this discipline, which can be enforced, and the guidance they receive which will give them the chance to change their outlook on life and cause them to exercise control over themselves and gain that self respect and sense of social responsibility which ordinary law abiding members of society possess.

Many people, one may suspect with a great measure of confidence, are deterred from committing offences not so much by the fear of imprisonment or of a fine but by the knowledge that they will face public disgrace if found out. Their good name, their reputation, will be forsaken if they offend, and it is of importance so far as the element of reformation and rehabilitation is concerned that every attempt should be made to give even persons who have fallen from grace the chance to recapture that lost good reputation, for that reputation once regained will be some sort of guarantee against recidivism. Probation in most jurisdictions avoids the stigma of a conviction and this I feel is a weapon in the battle for reformation of the fallen.

*The fine:* In most areas of the criminal law the tendency has been away from fitting the punishment to the offence and towards fitting the punishment to the offender. Yet when we come to what may be regarded as purely statutory offences, that do not involve either an infringement of another's rights to security of property or person, there is a tendency to make the punishment fit the offence rather than the offender. Let us take an example. Two men are apprehended for travelling on the same occasion at 100 kph through an area were the speed restriction is 50 kph. One is on a salary of $20,000 per year, and has a wife but no children. The other is a factory worker and is in receipt of $5,000 per year. He has seven children to support. Is there any justice if both are fined the same sum?

Of course I recognise that courts are not always put in the position where they are enabled to do equal justice. The necessary information is not provided to them, and they cannot be expected to seek out

information which may go to show that they are in fact doing an injustice.

Fines are purely punitive, and their imposition can be justified on the basis of particular and general deterrence. Perhaps they are not imposed often enough. Perhaps courts fear that if they impose a substantial fine, the offender pressed with the need to find the means to pay it will resort to an offence of dishonesty. But is there any impediment in the way of ordering a substantial fine to be paid in instalments over a period of time? While the offender is paying it off he will be constantly reminded of the seriousness of the conduct which brought him before the court and I suspect the deterrent effect will be greater than, say, the granting of a bond.

There are some jurisdictions where a fine can be imposed in addition to the giving of a good behaviour bond, but in Queensland at least, and perhaps in New South Wales too, this can only be done with respect to a person convicted upon indictment.

Before concluding I wish to say two further things. While the administrators of justice over the generations have always been called upon to secure the protection of the community against offenders, it has never been asserted that mercy can play no part in determining the course a court should adopt, but is right that the words of Mr Justice Cowans in *R. v. Kane* [1974] V.R. 759 should be kept in mind. His Honour said this:

> ... justice and humanity walk together. Cases frequently occur where a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just desserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well balanced judgment. If a court permits sympathy to preclude it from attaching any weight to the other recognised elements of punishment, it has failed to discharge its duty.

Lastly, in discussing a subject of this dimension one cannot hope to deal with all the alternatives which courts are faced with in their day to day administration of justice. At best one can only hope to deal with a few aspects and thereby cause discussion and positive and critical analysis of the sentencing system.

DISCUSSION OF MR MILLER'S PAPER

There was considerable discussion of the fine. The procedure in Fremantle was outlined whereby if an offender had a fixed address he was allowed 14 days in which to pay. Also a senior court officer examined him as to his means and commitments. This officer then made a recommendation as to the amount which the offender could pay weekly. A speaker said that this system had worked very satisfactorily and the police in Western Australia was to discourage sending fine defaulters to jail.

The question arose as to how fines should be fixed. Should they fit the offence or the offender? One magistrate commented that he disliked a tariff system of fining. He thought that if this was employed there was no need for the magistrate. A question was asked as to what would happen if an offender's circumstances changed after the imposition of a fine. In answer, it was pointed out that in New South Wales a clerk has a discretion to vary the amount payable by the offender.

One speaker strongly urged the seminar to consider the implications of imposing very heavy fines. There were, he said, enormous social implications. For example, an offender's ability to pay his mortgage or buy sufficient food might be affected. This meant that his wife and family would suffer. Hie children's education might be affected also. In short, the offender's whole economic situation can be changed by an unnecessarily heavy fine. He therefore urged the seminar to look at the wider social implications of heavy fines.

Another speaker pointed out that if the legislature makes heavy fines available, magistrates are bound to impose them. By making them available, the legislature had shown how seriously a particular crime was viewed and it was the court's duty to reflect this attitude.

There was also some discussion of fairness between the offender earning a high salary and one on a low salary, for example, as between a company director and a labourer. One magistrate made the point that if a particular figure is considered an appropriate penalty, that is what the magistrate must fix. It was not his prerogative to increase the fine if he felt that the offender could pay more. He suggested that perhaps a magistrate merely had power to reduce the fine if the defendant could not afford it. Another speaker objected that this analysis ignored the real problem. How are magistrates to cope, as he put it, with fines for very rich people which amounted to no more than a drop in the bucket. Another adopted the earlier commentator's point of view. He said that if a penalty is appropriate, it is not up

to the magistrate to increase it on the basis of the offender's means. The chairman pointed out that they might valuably consider the Swedish day-fine system.

Another magistrate said that fines had caused him some anxiety. He made the point that if the upper limit of the fine is not very high, he has very little room to manoeuvre. Say, for example, the maximum fine is $400. The only real flexibility available to him is in the granting or withholding of time to pay.

A question was raised about the use of work orders as an alternative penalty. The speaker wanted to know how many States made this measure available and was told that the work order was available in Victoria, Tasmania and Western Australia.

A speaker pointed out that it is the magistrate's job not only to punish the offence but also to punish the offender. In his view a court could very quickly get an idea of a man's means and take these into account. On the question of imprisonment for default, he said that this should be avoided if at all possible. However, he felt that further hearings to determine whether a man should be imprisoned on default would take up unnecessary time. He preferred a system whereby imprisonment for a set number of days was an automatic penalty for a failure to pay a fine. He said that he had found this remarkably effective in securing payment of fines.

On the question of driving offences, this speaker stated that the removal of the offender's licence had proved particularly effective. He preferred this penalty to the fine. He did not agree with the use of hardship orders regarding a licence, that is, the granting of a limited power to drive. He felt that this destroyed the effectiveness of the cancellation or suspension. Another speaker disagreed, however. He thought the limited licence worked very well. He thought it was satisfactory and produced social justice. He pointed out that loss of a licence was extreme social hardship. It could, for example, mean that a man lost his job. He therefore favoured the granting of limited licences provided the conditions were strict. Another speaker agreed with him stating that flexibility was essential. If it was not possible to grant an offender a limited licence, he said, the family could be affected.

On the subject of persons who drove while disqualified, a magistrate pointed out that a work order can be particularly effective in these cases. He also reminded the seminar that an offender is always at liberty to reject this measure. He spoke very highly of the work

order scheme in Tasmania, his own State. This prompted one speaker to ask whether any of his colleagues had ever had an offer of probation turned down. Others present informed him that it did happen on rare occasions. For some offenders a fine was preferable. The offender thought it better because it got the matter over and done with. In New South Wales, it was pointed out, the offender is not asked whether he will accept probation. It is not necessary for him to consent before being placed on probation.

# INDIGENOUS PERSONS AND THE LAW

Emeritus Professor H. Manning Clark

If a traveller wants to know that a country is really like he should visit its lower courts. In the magistrates' courts he can learn who are the victims and who are those in power; court proceedings give an indication as to the real nature of a society. In Australia any examination of the criminal process raises the problem of the Aboriginal offender. It is the purpose of this paper to outline the historical background of the relationship between Aborigines and Europeans in Australia.

The first and fundamental point is that the white man stole the black man's land. It is not a question of assigning guilt and determining that the white man is wholly guilty and the black man entirely innocent; that is a caricature of the situation. It is not intended to assess blame. In Auden's words, 'No, no-one was to blame, blame if you like the human situation'.

The white man came to Australia in 1788, offering to the Aboriginals what he believed to be a great gift - his civilisation. The Europeans also saw themselves as bringing the gift of Christianity and the gift of the rule of law. Their assumptions were that others would see the value of this civilisation and accept it. Yet, wherever they went attempting to spread their civilisation, they found to their enormous surprise that the Aboriginal rejected this gift.

The white man's astonishment at the Aboriginal's refusal to accept the offered gift of European civilisation was replaced by an attempt to explain this refusal. The result was a number of ingenious explanations. One was that the Aboriginal had received a special punishment from Jehovah at the time of the fall of man. Linked with this was the view that a special punishment had been inflicted on the land of Australia. The land itself was seen as cursed, sterile and hostile; a forbidding place which had been cursed by its Creator. Another explanation was that the Aboriginal who had been cursed was condemned to remain uncivilised until he heard of the Christian religion.

The Aboriginal failed to make the expected progress after the arrival of the European. This led to a suggestion that the Aboriginals were naturally inferior, that they were monkeyfied men, that they were permanently inferior and were to be seen at the bottom of the scale of creation.

Baudin, a French navigator, asked the question as to why the Aboriginals had not made progress. In his answer he pointed out that there were not the resources in Australia. There were no suitable crops or animals. Thus, his explanation was in terms of the Australian setting.

This did not explain why the Aboriginal did not later take on European civilisation. The more contact with European civilisation he had, it seemed, the worse he became. He took on the vices of the white man but not his virtues. The longer his contact with European civilisation, the more degraded he became. The closer his contact with the life of the white man the more his own culture was disrupted and the result was that it decayed.

The early 19th century was marked by attempts to break down the barriers between European and Aboriginal culture. An attempt was made to civilise the Aboriginal, but the Aboriginal resisted. By the middle of the century, most Europeans regarded the task of 'civilising' the Aboriginal as hopeless. They resigned themselves to the idea that the Aboriginals were dying out, and that all they could do would be to make this process as painless as possible. Nevertheless, there were some terrible and bloody encounters. The Aboriginal was driven from his hunting grounds. He was driven to areas where opportunity for survival was further diminished.

By the 1850s, officialdom had given up the idea of integration and the aim of segregation had been adopted. The hope was that the Aboriginal race would simply disappear,that it would vanish before the immeasurably superior culture of the Europeans. This was thought by some Europeans to be a not undeserved fate, as the Aboriginal had failed to make use of the land. It was thought that the white man was entitled to it because he was making it productive. Hence, up to 1900, the major development was the adoption of a policy of reserves, the idea being that the Aboriginals should be treated gently while they were in the process of dying out.

The second half of the 19th century was also characterised by brutality between the whites and Aboriginals. This could be explained in several ways. One explanation was a Darwinian one, that what was occurring was the result of survival of the fittest, that the white man would survive and that his survival was simply a fact of life. Another factor was that the restraining influences of the missionaries were reduced. There was less feeling aroused by the brutality which the white man showed to the Aboriginal. A third matter, a practical one, is that towards the end of the century, the white man had available to him more effective methods of destruction. The Colt revolver had been introduced and the Snyder rifle (in 1860). These weapons were used in many frontier encounters and they made the European able to kill more Aboriginals more quickly.

By the late 19th century the feeling was widespread that the Aboroginals

were going to disappear, that this was a natural process and not to be regretted. This was the feeling reflected in the press.

The 20th century has shown a gradual recovery from this all-time low. The white man is grudgingly acknowledging that there is more than one culture in Australia and that these might exist side by side. This continues to surprise the European who has, deep down, the feeling that all men should want to adopt his culture. However, slowly there is emerging an acceptance of the view that there are other possibilities, other life styles than his own. Some Europeans accept that the Aboriginal may wish to live in his own way, and that it is his right to retain his own culture.

## DISCUSSION OF PROFESSOR MANNING CLARK'S PAPER

A speaker made the suggestion that the Government had for some years been adopting a *parens patriae* approach to the Aboriginals. This was seen in its policy of placing Aboriginals in reserves. This, the speaker said, showed a fatherly, benevolent attitude. He added, however, that this relationship had not been fully worked out. Though the Aboriginal was installed on reserves, the white man still retained the right to encroach upon these reserves, for example, for mining purposes. It was his view that this benevolent approach to the Aboriginal was rather confused. He thought that in time the approach might change so that the land would actually be vested in the Aboriginals.

Professor Manning Clark agreed that the Australian Government's attitude towards Aboriginals was one of ambivalence. On one hand the Aboriginals are given citizenship and equality before the law but on the other they were still placed under some limitations. For example, the European thought that as the Aboriginal had no idea of God, he could not take an oath and therefore was incapable of giving evidence in court. Also he was thought to be unable to cope with alcohol. He agreed that the State displayed paternalism towards the Aboriginal, that it regarded him as a child, one who could not manage in our complex society. The philosophy was therefore that the European needed to look after him.

The Professor also asked whether it was morally justified for the white man to impose his ideas and standards on another group. Perhaps the answer was that this was not justified and that these other groups, particularly Aboriginals, should be allowed to do what they want to do.

However, a crucial difficulty arises when this behaviour is so offensive to the white man that he cannot tolerate it. This is a key problem today. Some people say that the trouble with the European is that he just cannot leave other people alone; he must try to make them like himself.

One speaker praised an innovation in one area by which an Aboriginal elder can be called into the court to advise a magistrate. Another praised a system arranged through the Aboriginal legal service whereby very experienced counsel give a year during which they are available to defend Aboriginals. The magistrate said that he and his colleagues had found this helpful. On the subject of Aboriginal elders however, the point was made that in some areas the role of the elder is being reduced and the elder no longer exercises so much control over young people. This was a development which many of those present regretted.

Professor Manning Clark concluded the session by pointing out that the Aboriginal has no general word for work. He has words describing specific tasks but is not familiar with the general concept of work. Thus, for example, he might work two days to the European's six. Also the Aboriginal is a communalist whereas the European tends to be an individualist. The point to notice is that there *are* other ways of life. Gradually the white man in his colossal insolence is beginning to realise this.

# THE COMPUTER IN THE COURTS - THE USE OF COMPUTER TECHNOLOGY IN THE ADMINISTRATION OF JUSTICE

Professor Douglas J. Whalan

## SUMMARY OF PROFESSOR WHALAN'S INTRODUCTION

In introducing his paper, Professor Whalan said that we should ask ourselves several questions about the use of computers. These are:

- Why should we become involved with computers?
- How should we become involved with computers?
- Who should become involved with computers?
- When should we become involved with computers?

He pointed out that we cannot remain indifferent to the computer revolution. We cannot stem the automation tide. We should not, as he put it, become 'legal King Canutes'. He pointed out that lawyers in the past have not been receptive to new ideas. He also emphasised that he was not advocating that computers should be a bloodless substitute for Shakespeare's Dick Butcher who would first kill all the lawyers.

The computer cannot act as a decision-maker, he said. All it can do is provide useful information for those who are making the decisions. The computer is not a substitute for thought and judgment. We must not create a system which inhibits human intuition and intelligence. Properly used, the computer can allow society to make more efficient use of the time of judicial officers. It simply makes them more effective. Judicial officers are a valuable resource and their time must be used to the best advantage. In routine matters computers are so much more efficient than human beings will ever be.

He gave the general warning that everything depends on the computer's input. As he said, 'If you put in garbage, you get out garbage'. One problem is that we tend to think that even though we have put in garbage, gospel will come out. He also emphasised the point that as costs had dropped dramatically we should not be deterred by the cost of computers.

## PROFESSOR WHALAN'S PAPER

These days we take electricity and all its gadgetry for granted. Occasionally, we do dine by candlelight; perhaps I am in a minority, but I am not sure that this does much more than increase the fire

hazard. Sometimes we build a fire and have a barbeque; most people swear that billy tea is best. But most of the time we use our modern technology. In many respects, I fear that we are still in the billy tea age in much of the operation of our judicial system at all levels. I feel that we ought to see what the computer can do for us. I think it can do a lot.

## Costs

Costs are a very big consideration when the question of automation is being contemplated. But the cost problem is not the bogey that it has been. Indeed, this is one of the very few areas where costs have tumbled in recent years. Costs have diminished greatly since the days of this man's mistake:

> A computer salesman named Ben
> While pricing made a slip of the pen
> He sold automation
> For the whole of the nation
> By dropping nine factors of ten.

The development of computer technology has probably been the most spectacular technological development in mankind's history. In 20 years speed has increased 50,000 fold; size has decreased 10,000 fold; and cost has decreased 100,000 fold. If we contrast this spectacular development with progress in transport, we note that we could perhaps crawl at half a mile per hour (but I do not want to be put to the test!) and supersonic transport travels somewhat in excess of 1,000 miles per hour. Thus, there is only a factor of something over 2,000 involved.

I give but one illustration of the diminution in cost that has occurred in the computer technology area. It has been estimated that in 1964 it cost about fifty dollars to store one English word. In the computer world, they talk in terms of five letter words. Within the next year or so, the price dropped to perhaps four dollars. By 1974, it had dropped to about fifty cents. Now, it is about one cent and there is a good chance of it being one-seventh of a cent in a year or two and, possibly by the early 1980s, one-two hundredth of a cent. These figures demonstrate the fantastic rapidity with which technological progress is occurring in the industry.

Despite this sort of optimistic report, there are still problems to be

encountered. For example, the hardware technology is only part of the story. Developing the software to go with the hardware for the particular use is a time and resource consuming business. Nevertheless, on the software and programming side, rapid progress is also being made. Again, there is always a problem with the conversion of existing materials. As yet, this is something of a bottleneck because changing non-computer compatible material into a form suitable for computer use does involve the intervention of the very slow (in computer terms) typing up of material. Optical readers for reading conventional typescript are being developed and, once this breakthrough is made, this roadblock will disappear.

Of course, in many respects there is considerably less need to transcribe existing court records into computer compatible form than there is in many other areas that turn to computer technology for help in solving their problems. I feel that most existing court records would not need to be changed into computer compatible form. For most purposes, it may be sufficient if we only put into the computer material that comes into the court system from the date of the introduction of automated data processing techniques. Throughput of particular cases would ensure that quite soon the manually available material would atrophy and the computer material take over. It is only when we get to the point of making legislation and case law available that we do run into this problem of having an enormous backlog of vital legal material which needs conversion.

In summary then, all I am suggesting about cost is that, although there are still some difficult areas, it is no longer valid simply to say, 'Let us forget computerisation for the cost will be too great'.

## Judicial Management Functions

In my view, there certainly is a role for computers on the managerial side of the administration of justice. Already considerable use is being made of automated data processing techniques in many jurisdictions.

I am not speaking here of such uses of the technology as record keeping by law enforcement agencies (for example, the virtually instantaneous checking of a vehicle to see if it is a stolen vehicle) or the keeping of criminal statistics or criminal files. Of course, these are useful and important applications of the technology, but they are not so close to our own particular interests.

However, our interest does pick up considerably when we get to the point of the issuing of proceedings, whether in civil or criminal matters, and in the conduct of litigation.

It is a function of the State to provide for the dispensation of justice. It is also a precept of our judicial system that the delivery of justice ought not to be long delayed and any acceptable techniques should be adopted to hasten the judicial process. Automated data processing has considerable potential for so doing. The use of computer technology in this aspect of the administration of justice ranges from the simple administration of motoring offences through to judicial officers being able to manage their lists effectively.

Although the backlog in the general field of justice dispensation in Australia has not reached the kind of proportions which it has in the United States, we constantly do hear criticisms of delay. In many cases, of course, these criticisms are unjustified; or, even if the criticisms are accurate, the delays are not caused by those officially concerned with the administration of justice. But if we can use the new technology to solve some of the problems at the pressure points, then we should try to do so. In many cases, problems presently occur because there is a general shortage of resources in the field of administration of justice.

However, it is not only an absolute lack of resources. Skill in the disposition of justice is at a premium and it is just not possible to deal with backlogs by simply adding to the number of judicial officers disposing of cases.

Although it is necessary to expand numbers on the bench as business increases, it is not simply a matter of adding judicial officers and hey presto, the backlog disappears. There are only a limited number of people available for appointment who have the requisite skills, qualities and experience. Judicial manpower is the most important ingredient in sustaining the quality of justice and the most efficient use of its time must be made. The more time that judicial officers can spend actually disposing of cases and not being involved in routine administrative detail, the more effective will their courts be. This is a truism, of course, but we need to recall it regularly. Judicial officers then, are a valuable and scarce resource who must use their time to best advantage.

Difficulties exist in regard to all other resources in the court system. Part of the answer is to endeavour to use the people and resources more efficiently than at present and there is no doubt that automation can

provide at least part of the assistance needed. The speed and accuracy of the computer and its ability to deal logically with complex problems can be a help.

We humans are very slow and relatively inaccurate. The computer is fact and accurate. Computer men talk in terms of a pico-second one thousand millionth of a second. To gauge how small this is, we can say that a one thousand millionth of a second is proportionate to one second as one second is proportionate to thirty years. A comparison can also be made on this basis: during our session this morning a modern computer could process a number of steps equivalent to the number of key depressions made during the working life of two competent typists.

A computer obeys orders implicitly. It will do exactly as you tell it. Indeed, one of its most irritating characteristics is that it *does* obey its instructions precisely. If you give it bad instructions you will get foolish answers. This point is also relevant to what I shall say later about the possible introduction of the computer into the area of judicial decision-making.

A computer also has a large, infallible memory. Unlike our human fallibility, the computer can store as much information as we care to put in its memory system and recall it virtually instantaneously on command.

The computer does then have characteristics that can be used in some aspects of a system of judicial administration.

Simple illustrations, which are already operative in many jurisdictions, range over a wide area. Operative systems include handling the following functions: the simple administration of summons issuing, warning notices, warrants; addressing notices to parties and their lawyers; accounting methods for collecting court fees; the listing of cases for hearing by particular courts; the printing of simple court orders or execution documents such as garnishments; organising payment of bonds, fees and fines or arranging payment of allowances for assigned counsel or witnesses' expenses; and supervising records for maintenance payments or even probationers' reports.

But there can be much more sophisticated uses than these ones which are, to a great extent, clerical functions. Perhaps, there can be a move towards the use of the technology for which I would describe as more clearly managerial purposes. The features that put constraints upon the administration of the judicial system are often those such as the availability of judicial officers, lawyers, witnesses, administrative

personnel and accommodation. To these variables can be added additional ones such as the need for particular periods of notice to be given between different stages of an action, and the fact that there are limits to the jurisdiction of particular courts within the same hierarchy.

The computer could help in the scheduling and assignment of judicial officers, of dates and of court rooms. Tentative trial schedules could be worked out and constantly updated much more easily by using computer techniques. Calendars must, of course, be in a constant state of flux. People get sick, pleas of guilty do occur unexpectedly, civil cases near hearing do get settled or need to be adjourned because necessary parties or counsel are not available. All of these, and many others, have to be taken into account in ensuring the smooth running of judicial business. A computer could advise those responsible for making the decisions on scheduling much more quickly and accurately than any manual method could do.

In addition to the more usual factors that could be assessed, others, too, could be evaluated. For example, a simple exercise could be run to rank cases by particular practitioners to indicate concentrations of practice so that particular bottlenecks could be foreseen and avoided.

Most of these possible applications that I have mentioned so far are uses for management purposes in the more immediate future.

In addition, longer term future planning and management could be assisted by using the past to plan for the future. Congestion delayed (or counsel delayed) cases could be pin-pointed, settlement or guilty plea percentages could be printed out, even the use, or over use, of adjournments could be seen.

Of course, most of the matters that I have mentioned have to be done at the present time. Almost all the remainder could be usefully done if resources were available to do them. I emphasise that all of these problems are very much more straightforward than many management and analysis problems, the solution of which is being assisted already by the use of computer technology in Australia.

The management of the court calendar is an enormously intricate process with a very great number of interacting variables. It is my view that computer techniques which are already being used in many jurisdictions could be applied with great benefit to the judicial system in Australia. Moreover, I feel that they may well yield on the financial side enough to pay for their costs.

## Evidentiary Problems

In 1968 Lord Gardiner, the then United Kingdom Lord Chancellor, asserted[1]:

> I do not believe in the law of evidence at all ...
>
> I am quite sure that within twenty years we shall have no law of evidence at all.

Already eight years have gone by since that comment was made and, although there have been a lot of reports and a considerable amount of talk about reforming the law of evidence, not a great deal of reform has been achieved. Certainly no fundamental reforms have been instituted. Thus we still have to cope with the law of evidence. There are at least three aspects that can cause us difficulty with the advent of the computer age.

*The Problem of Proving:* Here we run into problems with the hearsay rule.

Radar records as evidenced on a strip of film of echoes of two colliding ships have been admitted in evidence and Simon P., in so doing in the *Statue of Liberty* case, said[2]:

> The law is now bound to take cognizance of the fact that mechanical means replace human effort.

But this does not help us with computers for, in the radar case, it was not a process where human agency produced the material introduced in evidence. However, once human agency does come into it, we are in trouble with the hearsay rule. Most computer data are supplied to computers by human agency, and, as we know, the hearsay rule will apply unless all the data are sworn to by the particular human who supplied the data.

---

[1] 13 H.L. Deb., Vol. 289, Cols. 1461-1462, 7 March 1968.

[2] [1968] 1 W.L.R. 739, 740.

Like so many other problems thrown up by the technological age, this particular evidentiary problem is not a new one at all, but merely the old one multiplied by a hundred thousand or a million. But, unlike the problem in the *Statue of Liberty* case, I think it is one that we need to solve statutorily as it will take too long for the common law to work out a solution. Of course, as we all know, this is just what is happening and this particular difficulty has attracted legislative action in a number of jurisdictions now, and this legislation has lessened the difficulties. Nevertheless, not all jurisdictions have changed the law, and not all aspects are covered in those jurisdictions where there is ameliorating legislation.

*The Problem of Probing:* Despite what I have just said it is important to strike the correct balance; it must not be made too easy to prove computer records for, as has been pointed out[3]:

> [i]dentical output can be produced from the same programme and the same data on any computer comparable with one specified, and identical output can be reproduced indefinitely at any later date.

There are practical difficulties in reproducing the appropriate conditions, just as there are difficulties in any situation where someone sets out to 'manufacture' evidence, but the possibility of the creation of evidence, the veracity of which cannot be probed in the way that most documentary evidence can be probed, has very serious implications. The possibilities, the potential and the profits for the computer crook are immense.

Even when the genuineness of the computer material produced is not in issue, problems of probing the source or sources of any particular piece of material may be substantial as networks of computers are built up for use on a time-sharing basis. As Mr Pope has said[4]:

> Under these conditions the user of a computer may not be aware on which computer (or even computers) his work is

---

[3] K.S. Pope, 'A General Survey', *Computers and the Law* (Faculty of Law, University of Sydney, Sydney, 1968), 1, p.6.

[4] *Ibid.*

> being done, and the owner of the network may have no knowledge of the detail of any programme entered into the network once deleted from the memory of that computer in which it was last resident.

Yet on questions of both civil or criminal liability it may be important or vital in a particular instance to know where, how, and when the evidence under scrutiny originated. Traditional methods of evidentiary enquiry may well prove inadequate in these circumstances.

This problem, too, is being overcome by the building-in of sophisticated identity marks, but it is still a problem that courts can run up against.

*Computer Use in Obtaining Evidence:* There are two main uses of computers in obtaining evidence.[5] First, there is the use of the computer to digest a mass of evidentiary material in actual pre-trial preparation. I leave aside strict legal materials for the moment. Here I suggest that massive records which, because of their sheer volume or the time scale or the cost involved, could not be handled or probed by manual means, can nevertheless be searched, handled or analysed using electronic techniques.

Second, computers can be used in simulation processes. That is, the 'ifs' and 'buts' experimental testing situation can be set out and tests made. Here, too, there is nothing new; chemical analysis, ballistic analysis and other experimental testing has been done for many years. I am merely suggesting an extension which becomes possible because of the computer characteristics of speed and capacity to deal with masses of information.

Of course, it does open up the possibility of even more expert evidence being offered to the courts. It is often said that trial by ordeal was finally abolished in the 18th century.[6] I suggest that trial by ordeal still occurs sometimes - in the form of expert witnesses.

---

[5] In both instances lawyers will need to acquaint themselves with computer-based techniques in order that they may be qualified to test such evidence by cross-examination.

[6] It became practically obsolete in England after 1215 when the Lateran Council withdrew the sanction of the Church from the ordeal, but the ordeal of cold water continued in witchcraft trials until these were abolished by statute in 1736: 9 George II c.5.s.3.

*Retrieval of Legal Information by Computer:* I now turn to look very briefly at the retrieval of legal information by the use of automated data processing techniques.

There has been an enormous amount of work done in the last 15 years or so on the possibility of the storage, retrieval and analysis of information concerning statutory materials, court decisions and, a little more sophisticated, information concerning legal literature. I should mention that there are very close correspondences between legal information retrieval systems and the retrieval of information in any field in which the knowledge of precedents or of the past is important. So there are inherently similar problems in the legal area to those in other disciplines such as history, medicine or engineering.

There are many legal information retrieval systems actually or partially operative in many jurisdictions. The systems that have been developed vary enormously in their aims, their content and their origins, ranging from purely research exercises, usually within a university, through combined university and government or legal profession backed systems, to internal government lawyer oriented operations, to the totally professionally or commercially operated systems.

Perhaps I should mention very briefly something of the STATUS I system that very recently has become operative in the Faculty of Law of the Australian National University. STATUS I is a search program that was developed at the Atomic Energy Research Establishment at Harwell in England and one of my colleagues, Mr D.L. Pape, worked on extensions of the system during his study leave in England in 1975. While he was in England, Mr Pape was fortunate enough to obtain the STATUS I program on loan and, having overcome difficult computer compatability problems, the system is now working in the Australian National University. Indeed, we hope to have our own terminal in the Law School before the end of the year and to have it operative in the early part of 1977.

This is a very great advance for us in our research on legal information retrieval by computer means and we hope to attempt a number of experiments over the next year or two. In some ways we may be repeating what has been achieved overseas. However, not only will we be using local materials, but also I have a very clear feeling that our methods of legal research in Australia are not identical with those of overseas lawyers.

I believe that computerised legal information retrieval is not yet a replacement for the traditional methods of retrieval, but merely an adjunct to the established research techniques. Indeed, I believe it

will be a very long time before established means of legal information retrieval become redundant.

There are two ways in which systems have been developed. First, there can be a system under which the person wanting to have the information simply frames his question for someone else to operate the system and give the answer to the question. The second kind of development is the one in which the person wanting the information conducts his own search. Each has its own advantages, but I feel that the system under which the searcher can do his own searching in direct contact with the computer terminal has the same advantages as being able to conduct your own search in the conventional library. Of course, this means not only that those using the system need to have some training in the use of the system, but also that the system itself needs to be more fully developed so that it permits a fairly freely structured system of searching in ordinary language (rather than computer language) interwoven with opportunities to modify as the search develops. In other words, a computerised system needs to have most of the characteristics of other more traditional search methods.

In the past, there has been argument about whether or not a digest or point-of-law kind of computer data system should be used or whether there should be a full-text storage approach.

The point-of-law technique is largely computerisation of conventional indexing and, apart from the disadvantages of the narrow end produce of a search under such a system, its value and the quality of its output are very dependent upon the quality of its original indexing.

I do not think now that many would argue in favour of the point-of-law technique as against the full-text storage and retrieval. The tumbling costs of storage that I referred to earlier in the paper have reduced the costs of full-text storage dramatically, and the advantages of having a system which has, as the product of the search, the text of the actual section, or case, are fairly clear.

Two further advantages of the full-text method would seem to be: first, a search can be made for any word in the total data bank and thus a searcher can search fact situations as well as legal topics; and second, the searcher ceases to be entirely dependent on the subjective juegment of the fallible human indexer. In effect, having the full-text available for search in this way allows the searcher to browse in the materials by surveying the results of each command and framing the next command either wider or narrower depending upon the result of his previous work. In a sense, this is what we tend to do when conducting

research in conventional materials.

Of course, the full-text approach, as opposed to the 'point-of-law' system, does create problems for the searcher because of its very open-endedness. I illustrate. A layman would not have too much difficulty in finding his way around the slim volume of *John Citizen and the Law*; he might have more difficulty with *Halsbury* or the *English and Empire Digest*; and he might be quite baffled if simply put into a major law library and asked to find quickly the law relevant to a particular problem. Similarly, if a searcher started with a 'point-of-law' or index type of system, the very index terms will simplify (but also limit) his search. But with a full-text system greater responsibility is placed on the user to understand how the storage and retrieval system actually works and to learn to phrase his questions appropriately. It is certain that whatever computerised system he uses, the searcher is going to have to reason his problem through more than he does at present and become very aware of language ambiguities.

Although I am optimistic about the use of computers in legal retrieval, I always warn against the dangers of going too far too fast. In more than one overseas exercise, those involved have tended to promise the moon (a perfectly credible thing to promise these days) and have attracted financial support. Development difficulties have occurred and what has been delivered has been a piece of green cheese. The result has been massive disillusion and the melting away of financial support. On the nothing-succeeds-like-success principle, I argue that modest successful exercises that grow are the appropriate mode. This is why I am keen both on the small system that we are getting going in the Australian National University, and on the modest and stage by stage approach to retrieval that was recommended by the Australian Committee on Computerization of Legal Data two years ago.

I have always said that it is not simply enough to adopt everything that has proved workable overseas, because some of those systems (and particularly those in the USA) have been developed to suit the research habits and needs of lawyers operating in a different system and perhaps in a different way to which we operate in Australia. There are many things that we need to find out about the research habits of those seeking legal information in Australia.

I believe that the use of computerised legal retrieval systems for legislation, case law and journal articles is an important tool for future usage. But I also think there are many unanswered questions in the area.

## Computers Not to Decide Cases

A lot of interesting research work has gone into the area of prediction of judicial attitudes in relation to the law by using past precedents, past judgments, past texts and pertinent comments. It is probable that future developments of this work will play a part in the administration of justice, but there is a long way to go before this will happen at a practical as opposed to a theoretical level.

Even then I am not suggesting that the computer should be called upon to act as judge and jury and to decide issues and award damages on the basis of a digest (or perhaps it may more aptly be called in indigestion) of past decisions. Of course, it may be useful for those deciding cases to have available on computer recall the kinds of information about comparable awards of damages or standards of penalty that are already available in a rudimentary form in present publications. But this is merely an aid to better decision-making or advising and still permits the intervention of human intelligence, judgment and intuition.

To go further in the present (or even in the relatively far distant future) state of computer technology would result in the elimination of the development of thought and judgment and freeze the law into the cold opinion of the past - whether that past be good or bad, just or unjust, in the unfolding circumstances. That would be *stare decisis* gone mad. Judicial officers act as catalysts in the law's development to reflect the aspirations of the community. At the present time computers would act as fixing agents.

## Conclusion

Man invented instruments to add to the strength of his body and mind and he has developed from a man who lived in a cave to one who explores the moon. Probably, most of our tools developed in the first Industrial Revolution were ones which strengthened man's muscle and improved his dexterity. With computers, we are probably improving the use of our brains by increasing the amount of material that we can deal with and the speed and accuracy with which we can deal with the increased information. It is probably true to say that the law has been slower than most disciplines in making use of the new technology. There are very many areas in which computer technology can assist the process of the administration of justice. Let us begin to use the technology. I think it can help us to solve some of the problems that are occurring

in the judicial administration field. But let us not imagine it to be a panacea; at best it may prove to be a palliative.

## DISCUSSION OF PROFESSOR WHALAN'S PAPER

There was a general discussion of the possible uses of computers in the justice system. Some of the difficulties, particularly their cost, were stressed. Mr David Biles, Assistant Director (Research) at the Australian Institute of Criminology, pointed out that the Institute is at present employing a computer as a means of storing criminological bibliographical material. Professor Whalan said that this was an extremely good use of the computer and that it would make the researcher very much more efficient.

A speaker raised the problem of privacy and access to the information stored on a computer. Professor Whalan agreed that there were serious dangers here. He warned that we should beware lest technology turned against man. If the information is collected it can be used. We must always be conscious of the need to limit its availability. A computer makes information very readily accessible and we should develop principles to control access to information.

One basic principle within organisations was to restrict access to those with a 'need to know' the particular facts. He pointed out that any protective devices can be destroyed; a dictator can dismantle them and he then has the information available to him. He also reminded participants that a good case can always be made out for giving access to information. As an example he cited a request for medical information regarding an aeroplane hijacker. But one such 'good' reason can lead to another, and so principles with regard to restrictions on access to information are whittled away. In the wrong hands this information can become dangerous. Although he had not covered this question in his paper, he emphasised his deep concern as to this aspect of the use of computers.

In concluding the session, Professor Whalan stressed that those who are going to use a system must be involved in its initial planning and development. If they are not, technology will take over and the computer planners will dictate the way the system operates. He urged magistrates to become involved in the development of the system. If they did not, he said, they would not get a system which worked in the way they wished. They would, as he put it, be 'blinded with science' by the technologists. He said that magistrates had to be sure of what

they wanted and how to get it. He also re-emphasised the point that the aim should be a modest program which would work effectively. Such a program could later be expanded.

# OF JUDICIAL ADMINISTRATION

W.J. Lewer

Judicial administration is an old wine in a new bottle. Courts have always been administered in some kind of fashion. It is unfortunate that the literature upon the subject is scanty and scattered. I must, therefore, be forgiven if I rely much on local experience. In New South Wales until within living memory, the overall administration of the courts was but one of the many functions of the Department of the Attorney General and of Justice. That Department was also responsible for the administration of the Public Trustee, the Master in Lunacy, the Department of Prisons, the Sheriff, the Registrar General, the Supreme Court, the District Court, Courts of Petty Sessions, the Licences Reduction Board, the City Morgue, Court Reporting Branch, the State Superannuation Board and others I cannot remember. Various officers were responsible for various activities and it was difficult to sheet home responsibility for whatever administrative inactivity and debacles may have occurred.

Some five and a half years ago, the Public Service Board commissioned me to explore all possible ways to conserve magisterial resources. This was not long after the creation of the Institute of Judicial Administration at Birmingham University. We were fortunate that shortly afterwards the Chairman of the New South Wales Bench was able to visit the Institute and confer with its Director, Professor Gordon Borrie. Regrettably, little of the work they had done to that time (and so far as we know since) has been of much service to us in New South Wales because their efforts are mostly involved with the solution of problems thrown up by the predominant use of honorary justices and with the mixed administration of the Lord Chancellor's Office, the Home Office and local government. There is, it seems, some advantages in having a State-wide administration.

We have been fortunate in having met Professor Delmar Karlen, the Director of the Institute of Judicial Administration at the University of New York, when he was visiting Professor at the Law School of the University of Sydney. His, we believe, is the first Institute of Judicial Administration in the English-speaking world. It has been a fruitful relationship. This Institute published a bibliography of the subject in, I think, 1962. It is a most useful starting point in any investigation of the subject.

A proper question here is: what is the relevance of judicial administration to a course in an Institute of Criminology? I think the relevance comes about in this way. All that I have learned about criminology in quite a few years of intense study brings me to a profound scepticism of the likelihood of any breakthrough of the dimensions of, for example, the medical applications of penicillin. It seems that whatever improvements we might obtain in the foreseeable

future in the reduction of criminal and deviant behaviour will be achieved by the refinement and improvement of our methods and procedures. I regard it as axiomatic that, insofar as deterrence exists, a powerful factor in its creation is the speedy and certain detection of offenders and their prompt and adequate disposal through the courts. We can here do nothing about detection - the function of other bodies - but we may profitably ask ourselves how much of the manpower and resources of the detection arm of criminal justice we waste by our own inefficient methods. That is the relevance of judicial administration to criminology.

What was said in *The Challenge of Crime in a Free Society* is important to all involved in the criminal courts[1]:

> The Criminal Court is the central, crucial institution in the criminal justice system. It is the part of the system that is the most venerable, the most formally organized, and the most elaborately circumscribed by law and tradition. It is the institution around which the rest of the system has developed and to which the rest of the system is in large measure responsible. It regulates the flow of criminal process under governance of the law. The activities of the police are limited or shaped by the rules and procedures of the court. The work of the correctional system is determined by the court's sentence.
>
> Society asks much of the criminal court. The court is expected to meet society's demand that serious offenders be convicted and punished, and at the same time it is expected to insure that the innocent and the unfortunate are not oppressed. It is expected to control the application of force against the individual by the State, and it is expected to find which of two conflicting versions of events is the truth. And so the court is not merely an operating agency, but one that has a vital educational and symbolic significance. It is expected to articulate the community's most deeply held, most cherished views about the relationship of the individual and society.

---

[1] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967), p.125.

How, one may ask, are these responsibilities to be undertaken within a framework of adjectival law evolved by a small, mostly agricultural society, over 500 years, and in large part solidified for the last 200 years. And this took place in times when only a small part of the population ever journeyed more than 50 miles from their birthplaces in the whole of their lives. Ours is a community where even in Australia one may leave the country, do some business and return home, all on the same day (for example, go to New Zealand and return). It is a community where nearly all the population is highly mobile and most people are literate to some extent. The concentrations of population in the United Kingdom are grotesque exaggerations of those for whom the adjectival law last functioned efficiently (if it ever did).

This brings me to what judicial administration is about. Its first concern must be the extraction of maximum output for judge/magisterial time consistant with efficiency and decency. Of course one might imagine a magistrate confronted with a list containing 100 defendants calling them before him in batches of 10, and without any formality whatever, summarily fining them. That would not be decent, but it might pass for good administration. Do not smile too widely - worse is happening in the world.

Turn the penny over. A magistrate and his back-up staff have spun the morning out till after morning tea, trifling with one or two questions of bail and a plea. The defended case set down was settled shortly after the last day it was in the list and by noon they are all playing golf, fishing, mowing the law, propping up the bowling club bar or whatever you fancy. That too is not decent from the viewpoint of the taxpayer, the parties who will be 'not reached' on some future day and who could have had their case disposed of in the unused time, and so on. It is the business of judicial administration to obviate or at least minimise such a waste of time and money.

Let us look at a country town of modest size which gets a court day once a fortnight. In the list are, for example, 30 traffic cases, a dozen arrest cases, eight miscellaneous cases, a civil list and one adjourned matter for hearing. At 10 a.m. there they all are, police, parties, witnesses, lawyers and spectators, milling about, waiting, and costing the community money through lost production. Why do we not deal with the arrest cases at 10, the traffic cases at 11.15, the miscellaneous at noon, leave the civil list till 2 p.m. and put the defended matter on telephone standby?

Take a busy suburban court sitting daily. Every morning at 10 a hundred or so people are there, mostly workers. Many are still there at

noon; some at two and perhaps one or two sets of parties will have wasted the day and departed 'not reached'. How much better to have one, two or three 'list days' with just sufficient defended material to round the day out and the balance of the week devoted to matters for evidence. Obviously this kind of arrangement occurs in many places - why not everywhere? Split lists are most useful.

Another picture, regrettably common, is of a magistrate costing the taxpayer something on the healthy side of $25,000 a year, sitting patiently attending to a witness doing his best to keep his speaking rate down to the speed of a not very competent typist. Why should such a record be made? Some jurisdictions get by very well with no more than a breif note and an entry in a bench book. Is not the frenetic spoiling of vast quantities of paper some remnant of an atavistic awe for the magic of the written word? Doubtless it is in part attributable to the self-acknowledged inefficiency of the legal profession, which in spite of an unparalleled intellectual arrogance, revels in and profits by a complicated and unjustifiable appeal structure with attendent waste of time and money.

Let us look at what we do through commercial eyes and see ourselves as a service industry, providing not, for example, transport facilities or a cleaning facility, but community safety, good order and a speedy, effective and peaceful method of settling social disputes with certainty. What can you say of cost-productiveness, of the relation between effort and result, of return to the shareholders (the taxpayers) and of certainty of result? Little wonder that most commercial people will do almost anything to avoid litigation. The only obvious financial beneficiaries are the practitioners - and overheads are beating some of them. Surely the only way such a structure could endure is because it is a self-created and self-perpetuating monopoly. Service industry! Service to whom?

One might continue for a long time about what is wrong. What can be done? What have we done? What follows is a summary.

In New South Wales we have over 90 stipendiary magistrates - too many, I think. Quite recently we have followed American practice. We have almost severed the umbilical cord with the department which now attends to little more than salaries, personal records, building and finance. Following American practice, the Chief Stipendiary Magistrate is head of Magistrates' Courts Administration. There is a Chief Executive Officer and a Senior Administrative Officer and a corps of inspectors. Most administrative tasks are delegated to the Chief Executive Officer and the Senior Administrative Officer apart

from matters of policy and matters touching the actual work of stipendiary magistrates.

The statistical system is such that, month by month, the Chief Stipendiary Magistrate and I know with reasonable precision the time lag between entry into the list and the hearing of cases. A month is ideal, six weeks to two months generally acceptable. Above eight weeks remedial action is applied.

We are now forming an operations and research division, directly under the Chief Stipendiary Magistrate's control and headed as a part-time project by the Senior Administrative Officer. Next to him there is a senior inspector.

There is liaison with police, the legal profession (commonly regional groups but also the Law Society's Council and the Bar Council); the Commissioner for Legal Aid; and various prosecuting authorities, for example, local government councils, the Commissioner for Main Road and the Public Transport Commission.

We keep in touch with the Law Reform Commission, the Health Commission and the Probation Authority, as well as with our Bureau of Crime Statistics and Research.

We maintain a corps of shorthand writers and as capital permits, we are extending the use of sound-recording apparatus.

The training of clerical and administrative staff is a constant concern. We try to simplify clerical procedures, although I could wish for more success in this. Structured interviews of senior administrative staff by the Chief Stipendiary Magistrate and myself are constantly undertaken. Secondments of these officers to other departments to gain forensic experience also occurs regularly.

We plan in the near future to construct mathematical models of the provision of magisterial service outside Sydney to see if it is possible to make it more flexible in whole or in part, by working from Sydney rather than from district headquarters. Naturally we are interested in comparing costs.

We try to be alert to improvement and simplification of the adjectival law. There is no hesitation in making recommendations to the government, although these are not always adopted - but governments generally are interested if money will be saved.

*OF JUDICIAL ADMINISTRATION*

The training and retraining of magistrates is a perpetual concern. We have residential seminars, conferences and, to a less extent, have recourse to post-graduate courses and seminars held by non-official bodies.

The Chief Justice, from time to time, calls a 'heads of jurisdictions' conference. One project is for making civil process uniform in all jurisdictions, so far as may be possible.

We try to learn by studying what others are doing. Call this if you will comparative judicial administration.

Perhaps I may conclude with some points worthy of notice:

- Impetus to good administration comes from the stipendiary magistrate who sits in the seat where the buck stops
- A good diary (docket) system is the core of an efficient court and magistrates should oversee it constantly
- Unnecessary adjournments are thieves of time and breeders of arrears
- Lawyers should be kept to the point
- An efficient support staff is essential and magistrates must not shirk the responsibility to assist in their training
- Useful and accurate statistics must be kept
- The man where the buck stops must be able to find where the shoe is pinching
- Beware of Parkinson's Law
- There must be constant self-audit and
- We must be receptive to new ideas. We can learn much from commerce. We must get out of the courts all that which is not truly justiciable and that which is better handled by administrative procedures.

NOTE: *In addition to presenting his paper, Mr Lewer made available further material on the topic. This consisted of a paper, 'Management and Organization of the Courts', by Mr M.F. Farquhar, Chairman of the Bench of Stipendiary Magistrates of New South Wales; and a collection of readings, 'Judicial Administration, Some Readings', compiled by Mr Lewer. Copies of either or both of these papers are available from the Librarian, J.V. Barry Memorial Library, Australian Institute of Criminology.*

## DISCUSSION OF MR LEWER'S PAPER

There was a general discussion of administrative problems encountered in running the magistrates' courts system. A number of magistrates expressed concern about members of the legal profession asking for unnecessary adjournments. These adjournments caused serious difficulties for they meant that on some days the court's list was not full while on others the court was overloaded. Questions were asked as to how pressure could be put on the legal profession to stop asking for unnecesssary adjournments. One suggestion was that court staff should check in advance, say a fortnight before, as to whether a case was ready to come on. They could make sure that counsel and all witnesses were prepared.

In objecting to this, one speaker pointed out that many legal practitioners do not see their client until the day before the hearing. Thus they would say, if contacted a fortnight beforehand, that the case would be ready, but on the day they would come to court and state that they were not ready to proceed to a hearing. Mr Lewer pointed out that for some lawyers, delay is a way of life and that their actions sabotage the criminal justice system. Another speaker pointed out that some solicitors had cases in so many courts that they simply could not control their daily calendar. A number of speakers agreed that courts can be planned on the basis of a 25 per cent overload. The assumption here is that approximately 25 per cent of the cases will not go to trial as a result of adjournments.

Related to the question of adjournments was the fact that inevitably these produced delays in the imposition of punishment. Mr Lewer said that, as a general principle, the sooner criminal punishment is inflicted the better. A speaker emphasised that this is particularly desirable for children. If the punishment is not inflicted very soon after the offence occurs, it becomes meaningless. It was agreed by a

number of speakers that it was an excellent idea for a magistrate to adopt the policy of refusing the police any adjournment in a case involving a child.

Other matters which were discussed were the tape-recording of proceedings and the use of demerit points. With regard to records of proceedings, there was some praise for the system used in Victoria by which a bench book is employed for many matters. It was thought to be quite unnecessary to record as much as seemed to be recorded in many States. It was pointed out that appeal procedures can be delayed by the need to produce a written record. Mr Lewer strongly favoured electronic recording, and also said that he was surprised that more States had not followed the lead provided by Victoria.

Another matter which was discussed was the reporting of lower court decisions. It was stated that it was general practice not to have reports of these decisions.

An issue which raised some concern was the status of pre-sentence and psychiatric reports. One speaker asked whether they should be confidential to the Bench. He wondered whether it was proper for him to disclose the contents of these reports to members of the Bar and asked generally what information members of the bar are entitled to. He said that this question was an especially important one in a children's court. He added that if disclosure is required, those who write the reports will be reluctant to include so much information in future. In reply, another speaker said that at common law it is a ground for appeal if a court bases a decision on material which is not available to the defendant. Mr Lewer stated that it was his understanding that a court may not use material adverse to a defendant without communicating it to him and giving him an opportunity to reply. He pointed out that the New South Wales Probation Service has no objection to disclosure as it adopts the policy that it does a person good to know what others think of him.

Another topic which was briefly raised was the problem of remand of children in custody.

# REFORMING COMPENSATION FOR ACCIDENTS

The Hon. Mr Justice M.D. Kirby*

Grant me to be a plaintiff, Lord,
And be it understood
I crave nought further of your grace
Than constant plaintiffhood.

And from my growing hoard I'll make
Thee offerings resplendant,
But save me, Lord, at any price
From being a defendant.

A.G. Crawford *A Plaintiff's Prayer*
(1973) 47 *A.L.J.* 409.

## Introduction

At the Institute seminar on 'The Magistrates' Court: 1975 and Beyond' held in May 1975, Professor Harold Luntz presented a stimulating paper on 'No Fault Liability'. Those were heady days. The Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia[1] was then under active review. Legislation appeared imminent. The participants asked Professor Luntz to return to continue the debate.

Since then Harold Luntz has picked up his Chair. He is presently at Oxford. The debate on the National Committee's Report has waned somewhat. It has fallen to my lot to respond to the 1975 call. I set myself modest aims. They are in short:

- To put the National Committee's Report in its historical context
- To explain why pressure has built up for various schemes of no fault compensation
- To outline some of the principal objections to those schemes
- To examine the National Committee's Report in the light of those objections and

---

* The views expressed are the author's own and not those of the Law Reform Commission.

[1] The National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (A.G.P.S., Canberra), 1974.

. To catalogue the principal objections that have been voiced to the Report, as presented, and to evaluate them.

## A Chronology of Inquiries

The social movements in Germany and England which produced the Australian Workers' Compensation Acts demonstrate a recognition in the last quarter of the 19th century that the common law of negligence provided inadequate redress for some classes of injury and damage. But it was not until the 1930s that proposals for a more general no fault liability scheme gained wide currency. No doubt the advent of the motor car and the growing toll it took upon life and limb provided the catalyst for such moves. In 1932 a detailed report was made to the Columbia University Council for Research in the Social Sciences. The report advocated a form of schedules benefits providing compensation for the victims of motor car accidents, analogous to those found in workers' compensation legislation.[2] It took 30 years for the proposal to get anywhere in the United States. It was consistently opposed by the American Bar Associations.

In 1933 a Select Committee of the House of Lords was established to consider the Road Traffic (Compensation for Accidents) Bill.[3] The Bill proposed compensation, also along the lines of the Workers' Compensation Act without regard to negligence in the case of motor car accidents. The committee reported against the scheme on the basis that 'any such scheme would necessarily have a purely arbitrary basis'.[4]

In 1934 a resolution of the American Bar Association condemned the proposal and similar resolutions have recurred since then, based upon the same arguments. But in 1947, the Government of the Canadian Province of Saskatchewan received a report on the study of compensation for victims of motor car accidents. It proposed legislation along scheduled compensation lines, analogous to workers' compensation and without proof of fault. The scheme left unaffected the right to a common law action. It was adopted by the Province in the *Automobile*

---

[2] 'Liability without Fault: The Claim that a Change of Law is Necessary' (1963) 37 *A.L.J.* 209 at p.210.

[3] *Ibid.*, p.214.

[4] *Ibid.*

*Accident Insurance Act* 1952.

In 1957 the Province of Nova Scotia established a Royal Commission, which recommended against a no fault scheme along Saskatchewan lines. The same recommendation emerged from a Victorian Royal Commission in 1959. The Royal Commissioner, Dr Coppell Q.C., relied heavily on the views of the House of Lords Committee. He also pointed to the anomalies that would arise if, in Australia, this issue were dealt with differently from State to State.[5]

In 1963 the New Zealand Government received a report from a committee under the chairmanship of the Solicitor-General for New Zealand, Mr Wild Q.C. The committee did not feel able to recommend a no fault scheme but suggested that the idea needed more study. In 1963 a committee of the New South Wales Bar addressed its attention particularly to the possibility of no fault motor accident compensation. It recommended against the idea in terms akin to the resolutions of the American Bar Association. At the heart of the New South Wales objection was a fear that jury trial would be lost. As events transpired, jury trial was lost in New South Wales motor car cases but without the compensating benefit of a no fault scheme. Negligence continues to rule the plaintiff's entitlements.

In 1967 a Royal Commission was established in New Zealand under the chairmanship of Mr Justice Woodhouse. The original Terms of Reference related to amendments to workers' compensation entitlements. However, these were subsequently extended to a general enquiry into personal injuries. The result was an important report which produced 1972 legislation.[6] The legislation, which commenced in April 1974, abolished workers' compensation and common law damages in New Zealand, set up an Accident Compensation Commission and substituted for previous remedies an entitlement to no fault statutory compensation for injuries.

Not to be left behind, in 1972 the Tasmanian Law Reform Committee, as it then was, produced a report on No Fault System of Compensation for Motor Vehicle Accidents. This report resulted in the Tasmanian *Motor Accidents (Liability and Compensation) Act* 1974. The Victorian

---

[5] *Ibid.*, p.214.

[6] *Accidents Compensation Act* 1972 (N.Z.). Commenced 1 April 1974. See National Committee Report p.132. *Cf* J.C. Clad, 'Fault and Social Insurance in Tort: New Zealand and the Soviet Union' [1976] *N.Z.L.J.* 211; D.R. Harris 'Accident Compensation in the New Zealand Insurance System' (1974) 37 *Modern L.R.* 361.

Parliament in 1973 passed the Motor Accidents Act. This Act gave compensation without fault to various victims of Victorian motor car accidents. The scheme has now been operating for several years. It provides scheduled payments for a limited time. It is said to have replaced common law litigation in all but major cases.[7]

In 1973 the New South Wales Government, not to be found wanting in this, announced the establishment of its own committee under Mr Justice Meares to report on liability without fault in motor car cases. But the work of that committee was suspended when, immediately after the election of the new Labor Government in Australia in December 1972, a National Committee of Inquiry was established under the chairmanship of Mr Justice Woodhouse. Mr Justice Meares was also appointed a member of this inquiry. The committee proceeded with speed to report upon its Terms of Reference. That report was delivered on 27 June 1974 and tabled in the House of Representatives on 10 July 1974.

Meanwhile, in the United Kingdom a Royal Commission on Civil Liability and Compensation for Personal Injury was appointed under the chairmanship of Lord Pearson in March 1973. That committee has sent representatives to Australia and New Zealand to study the Woodhouse scheme and its variant. Other countries and many other law reform bodies have produced reports dealing with no fault liability for injuries. In the United States legislation came into force in Massachussets in 1971 based on the no fault philosophy and despite the opposition of the legal profession. It has now spread to a number of States. The Saskatchewan and New Zealand models continue to exert very consideration influence upon the thinking of governments, law reformers and lawyers throughout the common law world.

## Reasons for Reform

*Injustices:* The common law in this area calls out for reform. In the factory, large numbers of employees were put into close contact with fast moving and dangerous machinery or simply in environments which exposed them to far greater risks of injury than was formerly the case. The necessity to prove fault, the defence of common employment and the defence of contributory negligence all stood as barriers between an

---

[7] A.K. Clarke 'Motor Accidents: No-Fault Compensation in Victoria' August (1975) 49 *The Law Institute Journal* p.314. See also p.350.

injured worker and his recovery of damages. The result was the gradual mitigation of the harsher aspects of the common law. Workers' compensation legislation was followed by the creation of statutory duties. The doctrine of common employment was abolished. Apportionment was introduced for contributory negligence. In the United Kingdom national insurance was introduced in 1946.

So far as motor car accidents were concerned, the injured plaintiff faced many perils. He had to prove negligence. He had to avoid the pitfall of latent defects or inevitable accidents. He had to circumvent the barrier of contributory negligence. If his injury was caused by his spouse, he had no recovery at common law.

Again, piecemeal reforms were attempted to mitigate this situation. Apportionment was introduced for contributory negligence and proscribed in the case of claims by dependent relatives. Late in the day, statutes were passed to entitle a spouse to sue for damages. Insurers lost a meritless defence that had caused much injustice.

*The Problem of Numbers:* However, it was the sheer growth in the numbers of persons injured that put pressure upon governments for reform. At least 7,000 persons die annually in Australia from injury, more than half on the roads. Approximately 170,000 are injured at work each year.[8] These figures leave few families without victims. The advent and proliferation of the motor car and the growth of industrial society exposed more and more people to the risk of fortuitous injury. Add to this the increasing education of members of our society, the expanded availability of legal aid, particularly through the trade union movement, and the general pressure for social reform, and governments became faced in the 1960s by pressure for fundamental change.

*Fundamental Change:* The pressure I refer to was the claim for a speedier trial from which was removed the miscellaneous and often meritless dangers inherent in negligence litigation. The fact that at least 85 per cent of persons recovered compensation on the fault

---

[8] National Committee Report, Volume 2, *Rehabilitation and Safety* pp.98ff.

principle was hardly a reassuring figure for those who failed to recover because of a capricious jury, amnesia on the part of witnesses, unfavourable impressions caused years after the event by a fading recollection, and legal anomalies, some of which have been recounted. In Australia there was also a general call for a uniform approach to the problem, especially because of increased motor car movement between the States and Territories. Many asserted that the present workers' compensation and damages schemes did little to promote rehabilitation. On the contrary, the adversary system might even discourage recovery. Above all, there was a feeling that the removal of litigation about fault would save significantly the fees and costs that were being incurred in delivering compensation to the victims of accidents in Australia. It was said that it cost forty cents to deliver one dollar's compensation. This was too much.

## The Objections

The chronology of reports and legislative inactivity is sufficient to make it clear that no fault liability is not without its opponents. This is not the occasion to catalogue the grounds of opposition. At the heart of the opposition is the fact, which can scarcely be denied, that the notion of 'fault' is deeply ingrained in our society. It offends our sense of justice that people who bring accidents upon themselves should recover to the same extent as those who are innocent victims of the fault of others. Yet, the effectiveness of fault as a deterrent is immediately diminished by the realities of life. The existence of widespread, even compulsory, insurance makes the claim of personal cost and liability a theoretical one. If liability can be passed on to an insurer, it is scarcely a matter that will greatly deter the insured.

But there were other objections. It was said that the premium to cover no-fault liability would have to rise fourfold. That, especially in the area of motor car accidents or injuries at home, it would give rise to much fraud and malingering. Whereas there is enough link between a worker and his employer to diminish fraud, the link between the participants in a motor car accident is transitory in the extreme. The opponents of no fault schemes point to the disadvantages of bureaucratic and particularly governmental controlled administration. They see such schemes as yet another example of 'creeping socialism'.[9]

---

[9] (1963) 37 *A.L.J.* at p.225.

In the United States, the American Bar Association in 1960 listed many of the above objections. It pointed to the inadequacy of workers' compensation benefits and suggested that if all victims of injury are inevitably to be compensated, adequate compensation for the victims of wrongful and negligent injury will have to be pared down in order to ensure that all may recover, no matter who was to blame or who was at fault.

The Woodhouse Report

*Benefits:* It was against this background that the Report of the National Committee of Inquiry was delivered in July 1974. Volume I of the report deals with the injury and sickness scheme. Volume II deals with safety and rehabilitation. This is not the occasion to list all of the benefits proposed. Some are already set out in Professor Luntz's paper. I will do no more than sketch the broad outline.

It was proposed that the injury compensation scheme should commence in July 1976 and should be immediately effective. The sickness scheme was not to commence until 1 July 1979 because of the additional cost that would be incurred by extending benefits beyond injury to cases of illness.

At the heart of the report was the intention that the scheme proposed should be exclusive of common law and workers' compensation entitlement. Clause 91 of the Bill attached to the report is in these terms:

> 91(1) It is the intention of the Parliament that a benefit in respect of incapacity or death as the result of personal injury or sickness is to be in substitution for any damages recoverable or payable in respect of that injury, sickness or death, whatever the cause of action or basis of liability and whether the cause of action is actionable at the suit of, or the liability is enforceable by, the incapacitated person or some other person ...
>
> (3) An action or other proceeding does not lie in respect of damages to which this section applies.

The substituted benefit was a weekly entitlement equivalent to 85 per cent of the average weekly earnings of the person injured. If the person injured was not in receipt of earnings (for example, housewives, communards, children etc.)a national wage of $50 was arbitrarily fixed.

To compensate for inflation, allowance was made to update the average by reference to a price index and a fixed allowance for national productivity.

The benefit was not to commence until after the completion of the first week of incapacity. 'Incapacity' was to be calculated by reference to the American Medical Association Guide to Impariment in 5 per cent rests.

The second Volume titled 'Rehabilitation and Safety' was described by the committee and the Government as even more important than the first. It proposed the establishment of a National Safety Office with proper statistical, research and inspectoral facilities to promote safety and rehabilitation.

*Machinery:* The cost of the scheme, estimated to be $324 million in the first year (for the injury scheme alone) was to be borne by a 10 per cent levy on petrol (to compensate for motor car accidents) and a 2 per cent levy on employers and self-employed persons. As well, the savings in administration by the avoidance of litigation was, it was said, a major fund available to finance the scheme.

Essentially the system was to be operated in a Department of State. However, appeals against departmental decisions would lie to appeals tribunals. These would comprise a lawyer, a medical practitioner and a third person. On a point of law, an appeal would lie to the proposed Superior Court of Australia.[10]

*Whatever Happened to the Report:* Soon after the Bill, based on the draft attached to the report, reached the Parliament, it was referred by the Senate to the Standing Committee on Constitutional and Legal Affairs. This committee was especially concerned about the constitutional validity of the Bill, particularly Clause 91. Other assaults on the scheme arose from quarters closer to the Government. The trade union movement was concerned with some of the proposals and its concern

---

[10] J.F. Keeler 'Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia' (1975) 5 *Adelaide L.R.* 121 at p.131.

was supported by the legal profession. Anomalies were pointed out so that the responsible Minister, Senator J.M. Wheeldon, established a working committee in his department to re-examine the proposed scheme in the light of the complaints made. In October 1975, Senator Wheeldon proposed a new method of funding the scheme. This involved a petrol tax of five cents per gallon and a tax on employers which, it was said, would bring in 89 per cent of the necessary revenue for an injury scheme.[11] The departmental working committee was about to produce a major report suggesting a large number of changes when the Government was dismissed in November 1975. On 18 November 1975, the caretaker Government announced its proposals for a national compensation scheme. In essence, it supported the 'no fault' entitlement in principle. However, it favoured the maintenance of common law rights and the achievement of a national scheme by cooperation with State Governments, the trade union movement and the insurance industry.[12] At the same time the Departmental Committee's Report was released, proposing a large number of important amendments to the original Woodhouse Report.[13]

Following the election, the new Minister, Senator Guilfoyle, established a National Compensation Programme Steering Committee.[14] This committee, armed with the Woodhouse Report, has sought to secure State cooperation in a national scheme. On 9 November 1976 Senator Guilfoyle in answer to a question in the Senate had to confess:

> Not a great deal of progress had been made ... not all States are prepared to commit themselves to participating in a national compensation policy.[15]

That is where the matter rests at the moment. The scheme lies becalmed in the doldrums of Commonwealth-State relations. There is not a hint of the fair wind that is needed to put it on its course again.

---

11 *Australian Financial Review* 29 October 1975, pp.1,8.

12 *Australian Financial Review* 18 November 1975, pp.1,13.

13 *Ibid.*

14 (1976) 1 *Commonwealth Record* 89.

15 *Commonwealth Parliamentary Debates (The Senate)*, 9 November 1976, p.1708.

Devaluation

*Criticism:* Any law reformer soon learns that it is easier to criticise than to construct. Nevertheless, important objections have been voiced to the Woodhouse proposals and they must be recountered.

1. *The Approach:* Fundamentalists point to the Terms of Reference and the choice of Sir Owen Woodhouse as chairman. Far from seeking the best possible national system of compensation, the Government avowedly sought rather the adaptation of the existing New Zealand scheme. The Terms of Reference make it plain that the Government had 'in principle ... decided to establish' a national scheme. According to some, this led to a result oriented study and affected the whole way in which the Committee of Inquiry approached its task.[16]

2. *Diminished Benefits:* The trade union movement emphasised the step backwards involved in certain of the benefits. The first advance which had been gained in workers' compensation law by gradual legislative amendment in the 1930s and 1940s was lost. One hundred per cent compensation which had been gained in South Australia[17] and by industrial decisions throughout the country[18] was to be substituted by 85 per cent. The benefits for young widows particularly were criticised. The absence of provision for pain and suffering, loss of the enjoyment of life and other intangibles was objected to. The inconsistency of providing up to $10,000 for cosmetic injury but not for other intangibles was noted. In South Australia, the loss of statutory solatium in the case of death was seen as the abandonment of an imaginative indigenous benefit.[19] Calculation of compensation on the basis of the last job was criticised as artificial. Many other anomalies were attacked. In fairness, it should be said that many of these anomalies were in the process of correction by the departmental committee which had charge of review of the scheme. Significant improvements were announced in November 1975, after the change of Government.[20]

---

16 Keeler, *op.cit.*, p.123.

17 *Ibid.*, p.124.

18 *In Re Dispute - Building Trades Re Accident Pay* [1974] *A.R.(N.S.W.)* 24 *Cf Ex parte Master Builders' Association of N.S.W.*[1971] 1 *N.S.W.L.R.* 655.

19 Keeler, *op.cit.*, p.125.

20 *Australian Financial Review*, 18 November 1975, p.13.

3. *Administration:* The administrative arrangements were criticised as neither fish nor fowl. The scheme was not to be administered wholly as a social service benefit. Yet doubts existed about the independence of the proposed tribunals to resolve differences. It was feared by some that they would not be sufficiently independent of the department. It was criticised by others that they would not be sufficiently integrated into the social security system.[21]

4. *Funding:* The proposals for funding the scheme were attacked as unsophisticated and insufficiently thought out. Quite apart from the retrogressive nature of indirect taxation, taxes on petrol obviously burden country dwellers more heavily than those living in the city. The report generally dealt inadequately with the financial side of the scheme. The Bill ultimately left the problem to the Treasurer, although revised systems of funding were subsequently announced.

5. *Constitutional:* Most fundamental of all objections, however, was the constitutional objection. Here too, the report was curiously silent. There is hardly a word about the scope of *placitum* xxxiiiA adopted after the Referendum of 1946. The scope of the insurance power (*placitum* xiv), the incidental power and other Commonwealth powers is not reviewed. Certainly opinions have been expressed that the scheme, as drafted, went beyond present Commonwealth constitutional competence. The history of *placitum* xxiiiA might, however, give confidence to those who, in this area, would seek an extension of Commonwealth power from the people.

## Evaluation

All this being said, the fact remains that the debate can never be the same in Australia following the Woodhouse Report. Already Victoria and Tasmania have limited no fault schemes. The scope of social security in a modern State expands apace. Society grows increasingly intolerant of the injustices inherent in the fault principle. Excruciating legal anomalies may be cured by *ad hoc* legislation. The fundamental problem remains for the victims of injury: the maimed and his relatives, the deceased and his dependents. There would seem to me to be little doubt that no fault liability schemes will continue to

---

[20] Keeler, *op.cit.*, pp.126-7.

exert their persuasive influence over legislatures. Whether they should be to the exclusion of common law and other rights, is a matter of judgment. I believe that those who expect that they have heard the last of the Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia have a few shocks coming to them. The question is not whether no fault entitlements will come. The question is how it will come, when and from whom.

## DISCUSSION OF MR JUSTICE KIRBY'S PAPER

A question was asked regarding the Judge's view of the fairness of the State compensating a driver who had been at fault; for example, a driver who had been drinking and thereby brought about an accident. His Honour agreed that this is a crucial question. He said that we must ask ourselves whether we are dealing in punishment or with the creation of a social service. If we favour the former view then we do regard the drinking driver as being at fault and conclude that assistance to him is not morally justified. However he pointed out that we must look at the overall result of the accident, including its effect on the man's relatives. A person should not suffer all his life for a momentary error. Also, the Judge reminded his audience, the idea of fault is greatly weakened by insurance. The driver does not pay the costs himself anyway. The risk is spread and is borne by his insurance company.

His Honour agreed that the notion of fault *is* deeply ingrained our society, but he said that it was his view that the aim should be to provide assistance and that society should accept that it is its responsibility to look after people who have fallen on hard times. He added that fault is not a potent weapon in controlling behaviour and that it ignores this idea of social responsibility. He was firmly of the view that it is in the interests of the community to look after its members. He said that we must grasp the nettle and be very firm that the aim is to provide a social service and not to impose punishment. He conceded however, that there will be some troubling cases. In some matters one might well feel that compensation is not justified. However, this feeling should not be allowed to destroy the overall system. Punishment was usually the business of the criminal law.

A question was asked about the relationship between the Commission's recommendations and existing schemes to compensate victims of crime. His Honour relied that it was the aim of the Woodhouse Report to abolish these existing systems. The overall aim was that all persons injured

with very few aggravated exceptions should receive payments and that these payments would replace compensation in respect of injuries arising out of criminal acts.

A question was raised regarding the value of the retention of common law actions side by side with the new scheme. The Judge was asked whether he felt that there was any value in retaining these common law rights as a precaution. His Honour replied that he completely agreed with Mr Justice Woodhouse on this point. He did not believe that we should keep alive remedies which preserved the idea of fault. The aim, he said, must be to get society to accept a social welfare approach. This could not be done if a competing notion was retained. In the words of Mr Justice Woodhouse, he said that it is necessary to be 'very firm on this'. Complementary schemes could only be competing schemes as they would keep alive old notions. These notions would never die so long as the common law approach was retained.

His Honour also made the point that we should not be intimidated by claims of 'creeping socialism'. This, he said, was an emotive term and could be used to attack all forms of benefits, many of which were well accepted in our society.

A speaker made the point that if we abandon the notion of fault, society should look very hard at means of reducing the causes of injury. For example, society should endeavour to reduce the number of injuries occurring on the road. His Honour strongly agreed with this comment. He said we must avoid simply papering over the cracks, leaving the real problem untouched. He pointed out that the speaker's comment really implied that if we abolish fault, the risk is that people will become indifferent and leave matters to the Government. He agreed that we must go beyond compensation and look at methods of preventing injuries from happening. He pointed out that in Volume II of the Law Reform Commission report he committee dealt with the need for safety and rehabilitation. Among the duties of Inspectors appointed to promote safety would be to advise on safety methods. Thus, he said, the importance of preventive work was recognised by the Commission.

This reference to preventive activity led to a general discussion on the law relating to breathalysers and blood alcohol and the Law Reform Commission's latest report *Alcohol, Drugs and Driving*. A participant asked about the value of random testing and also about the value of imposing very high maximum penalties on those found to be driving with blood alcohol above the permissible limits.

Answering the first question, His Honour said that he was not in favour

of random testing. He pointed out that the idea of random testing had not been carefully researched. It was his feeling that it would work for a short time, but that when people discovered that lack of police resources meant that their chances of being apprehended were low, the offending rate would increase again. Also, he said, any gains would be outweighed by the costs involved. The cost to which His Honour referred was the destruction of the principle that the police should interfere in a citizen's life only when they have reasonable cause. He felt that this cost was too high and should not be paid, particularly in view of the fact that it seemed that the law under discussion was unlikely to be effective. In short, it was his view that random testing would not produce a significant reduction in drinking and driving, and that its introduction would seriously impair relations between the police and the public. This view was advanced before the Law Reform Commission by experts on road traffic safety. He said that he favoured the principle of reasonable cause before the police were able to intervene in a citizen's life. This, he said, was an important principle which should not be lightly sacrificed. It was, he said, necessary to be firm without throwing away the fundamental principles of our criminal justice system.

With regard to penalties for the drinking driver, His Honour stated that he favoured higher penalties. He pointed out that in the hierarchy of crime, drink driving is a very serious offence. The system should clearly indicate this by setting a high level of penalty. It was simply not good enough that the criminal justice system designated this crime as a relatively minor one. It was questionable that many property offences should be liable to higher penalties.

However, he did not favour the idea that the legislature should prescribe minimum penalties. He felt that it was important that magistrates retain a wide discretion here. They should be given the power to impose heavy fines, but should not be compelled to do so. His reason for this was that he felt that the magistrate should always be able to take into account, among many other things, an offender's means. A fine on a rich man might have very little impact, but a similar fine on a poorer person might be devastating. This should always be taken into account. A system which prescribed minimum penalties would not allow a magistrate to keep this consideration in mind. However, he reiterated his view as to the seriousness of drinking and driving and said that the bench ought to be equipped with penalties which would reflect society's judgment of the seriousness of this offence.

Following the previous question, another speaker suggested that minimum penalties do not reduce the incidence of offences. His Honour

agreed and made five points:

- We should trust the Bench
- We should allow the Bench to exercise its discretion
- The maximum penalties available should indicate the seriousness of the offence
- The Commission's report on the subject of drinking and driving had suggested that the ordinance on the subject should permit reference to the report. The report would indicate the reasons for viewing drinking and driving so seriously and some of the considerations the Commission had in mind. This might assist members of the Bench in imposing sentences
- He stated that we should not impose special burdens on the poor.

Again on the subject of mandatory minimum penalties, a speaker raised the possibility that such penalties might have a valuable place in the system in that, if a magistrate is left with a wide discretion, he might impose a penalty which he personally feels is appropriate without regard to community attitudes. His Honour agreed that this is a possibility but, on the subject of driving offences, he stated that the principal penalty is suspension of the licence. He stated that this is what really affects most defendants most closely. This penalty was mandatory in every case. He agreed that a Bench should not act on personal whims but pointed out that standards with regard to this offence, as for all others, would gradually emerge, as, for example, from decisions in appeal courts.

A questioner stated that a statute which directs members of the Bench to have regard to the report which led to its passing could be regarded as revolutionary. His Honour agreed that this was a new idea but pointed out that if society calls together experts it should be possible for members of the Bench to have regard to the views of these experts. The traditional legal view, His Honour said, is that Parliament speaks directly to the courts and that no other sources can be taken into account in interpreting Parliament's words. However, His Honour stated that he did not altogether agree with this principle, and felt that there was value in the gradual development of the practice of courts being permitted to refer to the Reports of Law Reform Commissions, at least in particular cases such as this.

# CLOSING OF THE SEMINAR

Mr Kilduff, on behalf of the magistrates, warmly thanked the Australian Institute of Criminology for arranging the seminar. He expressed particularly gratitude to Messrs Barnes, Bevan and Watt. He also said that the magistrates had been delighted to welcome Mr Ghows to their seminar.

Mr Kilduff stated that he hoped the seminars would continue. He said that they should be held annually and that magistrates from New Zealand and Papua New Guinea as well as from the States and Territories should be invited. A motion (moved by Mr Webb and seconded by Mr Danaher) was unanimously passed that the seminars should continue on an annual basis.

Mr Pritchard of Papua New Guinea expressed special thanks to the Australian Institute of Criminology. He said he hoped that Papua New Guinea would continue to be represented. He pointed out how important it was at this stage of Papua New Guinea's development for his country to receive all possible advice on the reform and operation of the criminal justice system. Mr Carter stated that he was in favour of broadening the seminar beyond Australian representation. He stated that the present seminar had been enriched by the presence of delegates from Papua New Guinea and Singapore.

In reply, Mr Bevan said that the Institute wished to see the continuation of the seminars for magistrates. He said that the Australian Institute of Criminology benefits enormously from such seminars. All members of its staff learn a great deal and gain many insights from contact with members of the Bench. These seminars are of great value to the Institute and the Institute derives great benefits from them, he said.

The seminar was then formally closed.

# APPENDIX 1

## LIST OF PARTICIPANTS

### RAPPORTEUR

| | |
|---|---|
| Dr John Seymour | Senior Criminologist (Legal)<br>Australian Institute of Criminology<br>Australian Capital Territory |

### SPEAKERS

| | |
|---|---|
| I. Cameron, SM. | Magistrate<br>Adelaide<br>South Australia |
| A.W. Ghows | Solicitor-General<br>Singapore |
| The Hon. Mr Justice M.D. Kirby | Chairman of the<br>Law Reform Commission |
| W.J. Lewer | Deputy Chairman<br>Bench of Stipendiary Magistrates of<br>New South Wales |
| Emeritus Professor H. Manning Clark | Australian National University<br>Australian Capital Territory |
| Royce Miller | Senior Crown Prosecutor<br>Queensland |
| Dr D. O'Connor | Reader in Law<br>Australian National University<br>Australian Capital Territory |
| Professor Douglas J. Whalan | Dean of the Faculty of Law<br>Australian National University<br>Australian Capital Territory |

### PARTICIPANTS

| | |
|---|---|
| New South Wales | W.J. Lewer, Deputy Chairman, Bench of Stipendiary Magistrates |

*LIST OF PARTICIPANTS*

| | |
|---|---|
| New South Wales | K.G. Hammond, SM.<br>K.R. Webb, SM. |
| Victoria | E.J. Danaher, SM.<br>W.M. Murray, SM. |
| Queensland | J.O. Lee, SM. |
| South Australia | G. Carter, SM.<br>I. Cameron, SM. |
| Western Australia | J.F. Syme, SM.<br>C. Zempilas, SM. |
| Tasmania | B.S. Sproule, SM. |
| Northern Territory | R.S. Watson |
| Australian Capital Territory | J. Dainer, SM.<br>C.F. Kilduff, CM. |
| Papua New Guinea | J. Pritchard, CM.<br>R. Senge, SM. |