

ACCOUNTABILITY OF POLICE OFFICERS

- On 26 November 1986 the then Chief Justice of Australia, The Right Honourable Sir Harry Gibbs, G.C.M.G., K.B.E., spoke to members of the AFP Commissioned Officers Qualifying Course No. 8003. Here is an edited text of his address.

A POLICE officer is accountable for his actions, or for his failure to take action, when he is liable to be called to account or to answer to be made responsible for what he has done or failed to do. Readers will understand that when I use the masculine I intend to include the feminine. The question to whom, and in what circumstances, a police officer is bound to account for his action or inaction is an important one, not only from the point of view of the police officer himself but also from the point of view of society.

A closely associated question is that of control — by whom, and to what extent, can a police officer be given directions as to the way in which he should perform his duties. In spite of the importance of these questions, it is not always easy to answer them, particularly in relation to some police forces, such as those in England and in some Australian States. Answers have been given by the courts, and by Royal Commissions, and by those in charge of police forces but the answers do not always agree. The position is however clearer so far as the Australian Federal Police are concerned.

At the outset I should digress to explain briefly why this question is so important to society. The fundamental aim of any society is to protect the lives and property of its citizens and to enable them so far as possible to live safely and peaceably and to order their affairs on the confident assumption that the law will be observed. In a simple or primitive society, where everyone knows everyone else in the village or tribe, wrongdoers can be kept in check by other members of the group, sometimes simply by the weight of the opinion of their fellows. That is not possible in a modern society. Most people live in cities and even those who do not can rapidly move from one place to another with the aid of modern transport. Police forces, efficient and organized, are necessary to protect modern society against crime, violence, terror and fraud. Members of the police perform a function which is quite indispensable; it is no exaggeration to say that they provide a bulwark against the tide of disorder which would threaten to overwhelm society without their protection.

The need for a police force to maintain order is true of any society, but we live in a special sort of society, which we are rather inclined to take for granted, although societies like ours form a small minority of the countries of the world. We live in a democracy and under the

rule of law. The fact that we live in a democracy presents a dilemma so far as the organization of the police forces is concerned. On the one hand it would be impossible in a democracy to allow a police force to operate free from governmental control; an army of men, responsible to no one but itself, might take over the state rather than protect it. A democracy can be turned into a police state, as Nazi Germany showed. On the other hand, it is essential that the powers of the police should be exercised fairly and impartially, and for that reason the police, at least in the performance of their ordinary routine duties, must be free from the control of politicians, who are not required or expected always to act impartially.

This dilemma is solved, in the case of the Australian Federal Police, by vesting the general administration and control of the operations of the police in a Commissioner whose appointment may be terminated only by reason of misbehaviour or physical or mental incapacity and who, speaking generally, is subject to ministerial direction only with respect to general policy and not with respect to the performance of police duties in particular cases. The distinction is an important one, because there would be great potential for abuse if any Minister or indeed any outsider could interfere in the day to day performance of the duties of the police. The *Australian Federal Police Act* allows the Minister, after obtaining and considering the advice of the Commissioner and of the Secretary of the Department of the Special Minister of State, to give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police. In addition, the Minister may make an arrangement with a State Minister for the use of such common services as computer systems, forensic science laboratories, research and planning systems or training institutions and may give written directions (either specific or general) to the Commissioner in relation to the use of common services in accordance with any such arrangements. The Commissioner must comply with all directions of the kind to which I have referred but is free to disregard directions or suggestions of any other kind which the government or the Public Service may seek to give as to the administration or operations of the force. Since the government is ultimately responsible for the performance by the

police force of its duties, the Commissioner no doubt would be likely to give careful consideration to any suggestion designed to improve the efficiency of the force, or to make the best use of its resources or as to the general nature of the operations which the government thought necessary for the welfare of the country but would be free to disregard any such suggestion unless embodied in a written direction of the kind to which I have referred.

The Commissioner is bound to furnish to the Minister annual reports on the administration and operations of the Australian Federal Police and such reports (which would be expected to be full and frank) are laid before Parliament. In these ways the Act tries to strike a proper balance between the overall responsibility of the government on the one hand and the necessary independence of the police force in the everyday performance of its duties on the other hand. Not all police forces are in quite such a good position.

The Commissioner is empowered to issue General Orders with respect to the general administration of the police and General Instructions for the effective and efficient conduct of the operations of the police and it is the duty of any member of the force (commissioned or otherwise) to comply with such of those provisions as are applicable to him. Then below the Commissioner is a hierarchy of commissioned officers each of whom has power to give orders to those members (commissioned or otherwise) who perform duties under his control. The failure of any member to comply with General Orders, General Instructions or any lawful order is a disciplinary offence punishable under the Regulations.

It will be seen then that the Commissioner is accountable to the Minister and the government only in a strictly defined and limited way but that each member of the force below the Commissioner is accountable to his superiors and may be punished if he commits a disciplinary offence.

Members of the force have, however, a higher duty of accountability than that of obeying directions, Orders or Instructions. That is a duty of accountability under the law. Police forces, in the performance of their duties, are not exempt from observing the law; their duty is to uphold the law and to do so only by lawful means. Of course, the law itself may exempt them from compliance with some of the obligations which ordinary citizens must observe, e.g., a member of the Federal Police does not need a State licence to drive a police vehicle. However, speaking generally, a police officer who commits a breach of the law may be liable in civil or criminal proceedings just as any other citizen would be. A police officer who shoots and kills someone without legal justification may be convicted of murder or manslaughter. If a police officer makes an unlawful arrest

or enters someone's house when he has no authority to do so he may be made personally liable for damages for assault or trespass at the suit of the person arrested or the occupier of the house. It is true that proceedings of that kind are not very common, but they are sometimes brought. In addition, members of the public may make complaints of conduct on the part of the police which they believe to be illegal or improper, and the law provides procedures for the investigation of such complaints and for necessary consequential action.

There is another sanction against breaches of the law by police officers in the execution of their duty. The courts have a discretionary power to reject evidence which is unlawfully or unfairly obtained, even if the evidence is legally admissible, although they will exercise that power only in exceptional cases.

In a recent case from Tasmania a person was lawfully arrested at about 6.00 a.m. It was practicable to bring him before a magistrate at 2.15 p.m. that day. However, he was questioned until about 9 o'clock that night and was detained until he was taken before a magistrate the following morning. In the course of this questioning he voluntarily confessed to certain crimes. The law in Tasmania required an arrested person to be brought before a magistrate as soon as practicable. The trial judge held that evidence of the confessions made after the time when it was practicable to bring the arrested person before a magistrate — that is, between 2.15 and 9.00 p.m. — should be rejected and since those confessions were the only evidence of certain offences the accused was acquitted of those offences. This decision was upheld on appeal.

Some police officers consider that the courts go too far in this respect. They think it strange that at a criminal trial sometimes just as much attention seems to be given to the conduct of the police as to the conduct of the accused. It seems to them unfortunate that a person who appears to be obviously guilty should be acquitted when evidence of his guilt is available but is not allowed to be put before the jury. This attitude is understandable. However, the rule of law would be seriously undermined if those whose duty it is to enforce it did not themselves observe it. In some countries, which do not enjoy the rule of law as we do, the police resort to crimes which may be far worse than those of the supposed offenders with whom they are dealing — they make arbitrary arrests, they use torture to obtain confessions and they kill suspects whom they have no evidence to convict. One of course hopes that abuses of that kind would never be committed in Australia but it is necessary for the courts to take a stand against any illegal use of power in the enforcement of the law. Where it is appropriate in all the circumstances the court will refuse to admit evidence obtained in breach of the laws

which protect citizens from arbitrary arrest and detention and from improper treatment in custody and which protect their homes from wrongful invasion, even if the result is to fetter the investigation of crime and sometimes to enable the guilty to escape. In some, but not all cases, the court will act on the view that a conviction of a guilty person which has been obtained by a breach of the law is obtained at too high a price. Of course it is necessary that the police should be given adequate powers to enable them to perform their difficult task of protecting the community against crime. It may be that some of the laws which protect the citizens in their dealing with the police do go too far and place obstacles in the way of efficient criminal investigation to an extent which is not really necessary for the protection of individual rights and liberties. There is a case for reviewing some of the laws governing the arrest and questioning of suspects, but so long as the laws exist they have to be observed.

As I have told you, a police officer is himself accountable for unjustifiable acts done in the intended exercise of his authority. It has been held in a series of cases that those who appoint or control a police officer are not legally liable for his wrongful acts (unless the person exercising control has actually authorized the police officer to commit the wrongful act). The reason for this is that a police officer is not regarded as being a servant of his superiors or of the government; it is said that by virtue of his office he has an authority which he exercises according to his own discretion. In a well known dictum Lord Denning described the position of a Police Commissioner in the following words:

... I have no hesitation in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive ... I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself.

Although that statement has often been quoted it does not fully express the law in Australia. It is true to say that a police officer may exercise his powers independently — he does not need to be told to make an arrest, for example. However, every police officer is subject to control within the force in the way I have already mentioned. Even the Commissioner is bound to obey the directions of the Minister if given in accordance with the Act, and any other police officer is bound by the General Orders and General Instructions and by the orders of his superiors, provided they are lawful orders. In other respects however a police officer is not subject to control or

interference from outside the force, although some officials (such as judges, and the Director of Public Prosecutions) are entitled to give directions to the police in some circumstances where that is necessary to enable the functions of those officials to be properly performed. It will be seen that a police officer will be placed in dilemma if he is ordered to do something which is unlawful. In that case it is his duty to obey the law. If, for example, he is ordered to make an arrest without warrant when he has no reasonable grounds for suspecting that the person to be arrested has committed any offence he would not be protected from an action for assault if he made the arrest. If he were ordered not to arrest an offender who was obviously committing a breach of the law the person giving the order might well be guilty of the offence of attempting to pervert the course of justice and the officer himself would commit a breach of his duty if he failed to make the arrest.

In most cases the dilemma will be more apparent than real since it would not often happen that a superior would give his subordinate police officer a direction that was unlawful. The exercise of ordinary common sense by those concerned usually avoids difficulties of this kind. So far as prosecutions are concerned the statement by Lord Denning has to be qualified in the light of the fact that there is a Director of Public Prosecutions who is responsible for the institution of prosecutions for indictable offences against the laws of the Commonwealth.

In summary, police officers other than the Commissioner are accountable under the law and to their superiors and to no one else; the Commissioner is accountable to the government subject to the limits I have described. Besides their legal duty of accountability, police officers owe to the citizens with whom they are dealing a moral duty to act impartially and with ordinary courtesy and consideration, remembering that not all offenders are evil, although some are. Others may simply be weak or emotionally disturbed. The duty of impartiality not only involves the equal treatment of all persons high and low; it also requires that police officers should maintain a sense of proportion and should not let themselves be carried away by any hysterical reaction which the public may display towards crime generally or crimes of a particular kind. Crime is a great and insidious evil but those fighting it have to respect the rights and legitimate feelings of members of the public. If they do, police officers will maintain public respect and confidence which is so important to the efficient operation of any police force. In spite of the bad publicity sometimes occasioned by the misdeeds of a minority of corrupt officers I believe that the police in Australia generally are trusted and highly regarded and that is particularly true of the Australian Federal Police.