PRESENTATION OF PAPER

Paul Byrne

I intend to approach this topic from a slightly different perspective - from the point of view that the issue scheduled for discussion tonight is one of crucial importance because it affects our standing as a free state and a free nation.

The law and practice of criminal investigation obviously involves fundamental aspects of individual liberty but its impact goes beyond those who are the immediate participants in the process. Chief Justice Earl Warren in the United States Supreme Court in 1962 said this:

> No general respect for, nor adherence to the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been described as the measures by which the quality of our civilization may be judged.

I suggest that a first step in making that assessment is reference to the International Covenant on Civil and Political Rights established by the United Nations. I think it important to remind this meeting of the precise terms of those provisions. Many people talk about them and many people make reference to them but I think often people forget or perhaps sometimes didn't ever know what they actually say. But if I can just for a moment refer in abbreviated form to Article 9 of the International Covenant on Civil and Political Rights. The first paragraph of that Article is in these terms:

> Everyone has the right to liberty and security of person, no one shall be subjected to arbitrary arrest or detention; *Secondly*: Anyone who is arrested shall be informed at the time of arrest the reasons for his arrest and shall be promptly informed of any charges against him; *Thirdly*: Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release; *Fourthly*: Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful; *Fifthly*: Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

I go on to quote from the second paragraph of Article 14. It reads:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Paragraph 3 of that Article:

> In the determination of any criminal charge against him everyone shall be entitled to the following *minimum* standards. Firstly to be informed promptly and in detail in the language in which he understands of the nature and the cause of the charge against him. Secondly, to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. Thirdly, to be tried without undue delay. Fourthly, to be tried in his

> presence and to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance of that right and to have legal assistance assigned to him in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.

Article 14 goes on to make further provisions in these terms:

> Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. When a person has by a final decision been convicted of a crime and when subsequently his conviction has been reversed or he has been pardoned on the ground that a newly discovered fact shows that conclusively there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law unless it is proved that the non-disclosures of the unknown fact is wholly or partly attributable to him.

And lastly:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedures of each country.

Turning from what the United Nations has said about rules relating to criminal investigation generally, it is instructive to look at what the Constitutional Commission recently said in its final report. These were not, of course, topics which were put to the populace by way of referendum but they are I think an important part of that Commission's work. I can summarise perhaps what the Commission said. They recommended unanimously that there should be a new chapter of the Constitution and in that new chapter certain rights and freedoms should be constitutionally protected. In relation to the liberty of the person the Constitutional Commission said this:

> Everyone has the right not to be arbitrarily arrested or detained. Everyone who is arrested or detained has the right firstly to be informed at the time of the arrest of the detention the reason for it. Secondly, to consult or instruct a lawyer without delay and to be informed of that right. Thirdly, to have the lawfulness of the arrest or detention determined without delay, and fourthly, to be released if the detention or the continued detention is not lawful.

In relation to the rights of arrested people the Commission recommended this:

> Everyone who is arrested for an offence has the right firstly to be released if not promptly charged. Secondly, not to make any statement and to be informed of the right not to do so. Thirdly, to be brought without delay before a court or a competent tribunal. Fourthly, to be released on reasonable terms and conditions unless there is reasonable cause for the continued detention.

The Commission then made recommendations relating to the rights of persons charged. They specified twelve separate grounds and I think it is fair to summarise them by saying they effectively mirrored the minimum standards that I earlier read out as part of the International Covenant. The Commission unanimously recommended that those should be constitutional guarantees and finally made this observation about the recommendations they made:

> We have deliberately omitted from the report recommended guarantees, rights and freedoms which in our judgment are likely to be controversial or whose aptness for constitutional protection is a matter on which there are likely to be sharp differences of opinion.

What the Constitutional Committee was saying was that the recommendations it had made, in the same sense that the International Covenant provisions are minimum standards, are essentially minimum standards: self-evident matters which in their opinion were simply unarguable.

It is in the light of those standards - and I stress *minimum* standards - that the Commission's recommendations were made. In asking the question "how does New South Wales fare?", some of those standards would give rise to disturbance regarding New South Wales' position. Much worse than that is the apparent mood in the air for rules or laws to be implemented which will make the situation worse.

I suggest that the first principle of reform in this area is that New South Wales must act in accordance with not only the letter but the spirit of those general statements of principle that have been established not only by the United Nations but by the Constitutional Commission.

If I can turn for a moment to the work of the New South Wales Law Reform Commission in this area. On the essential question which was raised by the judgment of the High Court in *Williams v. The Queen*, to which Mr Kable has already referred in his paper, the Commission's proposal, put in the Discussion Paper which it has published, was this: "Detention for a period in excess of four hours should not be permitted unless it is authorised by a court". That would effectively mean that in all serious and complex cases detention following arrest would require judicial authorisation. The scheme was designed to provide a tangible level of protection of individual liberty while at the same time permitting the conduct of criminal investigation after arrest where a court, not a police officer who was involved in the investigation, was satisfied that further investigation was justified. The essence of the scheme is that there should be judicial supervision of police conduct. The general principle that there should not be lengthy periods of detention following arrest without judicial authorisation is in my view a sound one. It is vitally important that there be independent review of decisions made by police which involve interference with and indeed a denial of the personal liberty of the individual. The law should not be changed so as to permit police to detain arrested people in custody unless there is some mechanism provided for independent review and authorisation of that process.

The concept of judicial authorisation for conducting investigative procedures which intrude upon personal freedom has always existed under the common law and has been given legislative recognition in New South Wales in relatively recent times. Without going into detail I refer in particular to the provisions of the *Search Warrants Act* of 1985, the *Listening Devices Act* of 1984 and those sections of the *Crimes Act* passed in 1983 which governed the right of police to enter a house in which they suspect an offence of domestic violence to have been committed. It seems to me that in those actions covered by those particular items of

legislation there is a less intrusive interference with personal liberty than the interference that we are talking about when we are discussing the right of police to detain people following arrest or as in some cases it has been suggested the right of police to detain people without arresting them.

The Law Reform Commission, in its Discussion Paper on that topic, proposed a system of judicial authorisation.

On the role of the courts in protecting individual liberty I would refer to with, I was going to say 'approval' - 'reverence' is almost a better word - the judgment of Deane J. in *Van der Meer's* case that has been quoted in John Kable's paper. I would commend that to you as a particularly vivid description of the role which the courts should take in ensuring the observance of reasonable standards of fairness in criminal investigation.

I want to say one thing which is not included in my paper but I think is raised squarely by the leaflet that has been distributed prior to this seminar on the question of tape recording. That is a subject which has been discussed at length. Someone would probably fairly say *ad nauseam* in recent years but the position as it exists in New South Wales with regard to tape recording is that there is no system of tape recording. That seems to me to be lamentable. I suggest that the single most important reform that can be made to the criminal law in this State is the introduction of a system of tape recording of police confessions. The implementation of a procedure such as that would go a long way, according to my assessment of the situation, towards overcoming the problems that we have in relation to trial delays generally.

I have only recently returned to full time practice after an absence of something like four years. The first trial that I was involved in covered four hearing days and about 80 per cent of the time at that trial was spent arguing over what was said in conversations between the accused person and the police. The second trial I did occupied three days of court time, and in that trial about 75 per cent of time involved arguing over what was said between the accused and the police in conversation. It is depressing, I really think it is nothing short of depressing, to realise that after an absence of four years very little has actually changed. The arguments in favour of tape recording are so overwhelming they do not need repetition here but it defies reason so far as I am concerned that no action has apparently been taken to introduce such a system. Comparing New South Wales' position with that of other states and territories, it is the situation now that in the Northern Territory they have had tape recording for some considerable time, in Queensland it is coming in, in Victoria it is coming in, in Tasmania as you have been told it is being used, and in South Australia it has been used for some time (I am not sure about Western Australia). Each of those jurisdictions has a scheme of tape recording.

If I can now go back to the issue that I started with. We constantly read in the daily press of references to concerns about violations of human rights in other places. It is prominent in the United States, criticism of what goes on in the Soviet Union, and it dominates discussion of what occurs in South Africa.

I do not think that we can be too complacent that we are immune from similar kinds of criticism. The one critical issue that is likely to affect this country's international standing so far as human rights is concerned is the Royal Commission into Aboriginal Deaths in Custody. It should be borne in mind that because most of those deaths in custody occur in the period immediately following the arrest of the person that that Royal Commission is very closely concerned, indeed it might be said primarily concerned, with rules governing powers of arrest and detention. It seems to me that an extension of police powers of arrest and detention is only likely to aggravate the kinds of problems that have been illustrated in the work of that Royal Commission. About ten years ago it might have been unthinkable to suggest New South Wales would have a bad international record on human rights. That standing may be in question now perhaps because of the current position, but I think even more so if some of the more radical proposals for change that have been put forward are adopted. If changes are to be made to the law of criminal investigation in this State, then those changes should comply with the minimum standards established by the United Nations not only for other countries but for this country.