CRIMINAL INVESTIGATION AND THE RIGHTS OF VICTIMS OF CRIME

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> At the present time the victim is the subject of fewer rights . . . than any other group coming in contact with the criminal justice system.**

INTRODUCTION

As in the United Kingdom and the United States, in Australia a tradition has grown up whereby the rights of accused persons and suspects in criminal cases are protected.[1] Sometimes such protection has been embodied in procedural rules;[2] in other instances long drawn out legal battles have been fought to establish the content of fundamental rights said to accrue to an individual at various stages of the criminal process.[3]

It has become increasingly obvious that in Australia the rules, regulations and procedures governing interrogation of suspects and accused are a motley bag. This was recognised by the Australian Law Reform Commission in its Report on *Criminal Investigation*,[4] and an attempt

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** Law Enforcement Assistance Administration, United States Department of Justice, quoted in Citizens Initiative Grant—Creating a Philadelphia Office of Victim Counselling Service, Philadelphia Bar Association Unpublished Grant Proposal to the Law Enforcement Assistance Administration, March 1975: cited McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim' (1976) 13 *Am. Crim. L. Rev.* 649.

1 See Gobbo, *Cross on Evidence* Aust. ed. (1970) 576; Practice Note (1964) 1 All E.R. 237; Campbell and Whitmore, *Freedom in Australia* New ed. (1973) at 78 et seq; *Halsbury's Law of England* 3rd ed., Vol. 10, at 129 et seq; Neasey, 'The Rights of the Accused and the Interests of the Community' (1969) 43 *A.L.J.* 482.

2 See e.g. Judges' Rules (U.K.) cited Practice Note (1964) 1 All E.R. 237; Devlin, *The Criminal Prosecution in England* (1960) 11; R. v. Ragen (1964-64) N.S.W.R. 1515 (re Police Commissioner's Instructions, New South Wales); in Chappell & Wilson (ed.) *Australian Criminal Justice System* (1972) (hereinafter cited as Chappell & Wilson (1972)) 333.

3 Ex parte Corbishley; re Locke and Another (1967) 67 S.R. (N.S.W.) 396; Christie v. Leachinsky (1947) A.C. 573; Gideon v. Wainwright (1963) 372 U.S. 335; Miranda v. Arizona 384 U.S. 436 (1966); Escobedo v. Illinois (1964) 378 U.S. 478.

4 The Law Reform Commission (Cwth), Report No. 2 (Interim) *Criminal Investigation* (1975) (hereinafter cited A.L.R.C. 2) 10 et seq.

was made to formulate a series of rules[5] which would be capable of acting as a model for the whole of the Commonwealth, should the various State governments, in addition to the federal body, be minded to pass legislation putting such rules into effect.

Certainly, moves to protect the interests of individuals who stand accused of crimes must be applauded. Further, the idea that such interests should be protected under easily accessible legislation bringing clarity to a previously murky area is easily supported. Nonetheless it may also be remarked that in the midst of the clamour for clear adumbration of the rights of suspects and accused the question of the rights of witnesses and victims of crime go unadvanced.[6] [7] It may be suggested that the rights of these categories of people exist 'naturally'; that they stand embodied in unwritten form—some type of 'gentlemen's agreement'; that individuals merely reporting upon the commission of offences need no legislative protection.

Such claims may, however, be misguided. To determine their validity a review of those rights devolving upon the accused, and a study of procedures adopted in the questioning of witnesses and victims may fruitfully be undertaken. The *Criminal Investigation Bill of* 1977, now standing in abeyance[8] but framed upon the Law Reform Commission's Report,[9] provides a convenient guide for weighing up the concern directed at the rights of one of the parties in a criminal affair against the concern which fails to be articulated for another of those parties.

5 Id.

6 See e.g. comments by Chappell and Wilson (ed.) *The Australian Criminal Justice System* 2nd ed. (1977) (hereinafter cited as Chappell & Wilson (1977)) at vii-ix; Hall, 'The Role of the Victim in the Prosecution and Disposition of a Criminal Case' (1975) 28 *Va. L. Rev.* 931; Brownell, 'The Forgotten Victims of Crime' (1976) 31 *Record of N.Y.C.B.A.*

7 It is only very recently that concern has been expressed in the form of setting up victim compensation schemes and this appears to be the limit of enquiry into the rights of the victim. See e.g. Lanborn, 'The Methods of Government Compensation of Victims of Crime' (1971) *U. Ill. L.F.* 655; Chappell, 'The Emergence of Australian Schemes to Compensate Victims of Crime' (1970) 43 *So. Calif. L. Rev.* 69; McCaw, 'Report on the New South Wales Criminal Injuries Compensation Act' in Chappell and Wilson (1972) supra n. 2, at 785; Delamothe, 'Victim Compensation : The Queensland Scheme' in Chappell and Wilson (1972) 791; Waller, 'Compensating the Victims of Crime in Australia and New Zealand' in Chappell & Wilson (1977), supra n. 6, at 426.

8 The Bill was introduced into the Australian Parliament in 1977 and following the Second Reading went into Committee for further study. Upon the calling of an election in late 1977 the Bill went into abeyance with the prorogation of Parliament. During its time before the legislature the Bill was subject to much debate in the public forum, principally from law enforcement agencies. See e.g. the debate that took place under the auspices of the Commonwealth Attorney-General's Department and the Australian Institute of Criminology of 7 May 1977 in Sydney (NSW).

9 A.L.R.C. 2., supra n. 4.

THE POWER TO QUESTION

At common law no duty devolves upon a citizen to answer questions put by a police officer;[10] this includes questioning for the purpose of ascertaining name and address.[11] Nonetheless it has been recognised that in certain circumstances the police may require, for investigatory purposes, names and addresses of witnesses, victims and suspects.[12] Thus the *Criminal Investigation Bill* contained a provision that, where on reasonable grounds a police officer believes that an individual 'may be able to assist him in his inquiries in connexion with an offence that has been, may have been or may be committed', the police officer 'may request the person to furnish to him his name or address'.[13]

The provision was not restricted to suspects; clearly it was designed to deal with witnesses. In discussing such provision the Law Reform Commission in the Report *Criminal Investigation* noted 'three distinct contexts' in which the need for such a power might arise. Primarily, knowing that a crime has been committed in a particular location, the police may need to question all persons who happened to be in the vicinity at the time of the offence:

> The taking of names and addresses for subsequent follow-up is a far more satisfactory way of coping with this than seeking to detain what may possibly be a large number of people for interviews on the spot.[14]

Secondly, sometimes the police may have a reasonable suspicion that a crime has been committed, and may wish to make enquiries for the purpose of establishing whether or not that belief is correct; again, the taking of names of possible witnesses may be necessary for future investi-

10 Hatten v. Treby [1897] 2 Q.B. 452; Rice v. Connelly [1966] 2 Q.B. 414; Kenlin v. Gardener [1967] 2 Q.B. 510; and see Campbell and Whitmore, supra n. 1, at 78 et seq. A.L.R.C. 2, at 10 citing Lord Parker in Rice v. Connelly [1966] 2 Q.B. 414 at 652 : 'It seems to me quite clear that though every citizen has a moral duty or, if you like, social duty to assist the police, there is no legal duty to the effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority . . .'

11 See Campbell and Whitmore, supra n. 1, at 89; A.L.R.C. 2 at 34-35.

12 See Criminal Law and Penal Methods Reform Committee of South Australia, *Second Report—Criminal Investigation* (1974) at 71; A.L.R.C. 2, at 34-35; Campbell and Whitmore, supra n. 2, at 89-90. Where such a power has been incorporated into statute, however, it has generally been held that it must be used reasonably: 'If the power is used wantonly or otherwise then for the purpose of bringing an offender or suspected offender to book, there is an abuse of power which may give rise to a cause of action'. Trowbridge v. Hardy (1955) 94 C.L.R. 147 per Fullagar J. (Police Act (W.A.) s.50).

13 Criminal Investigation Bill 1977 (Cwth) s.16.

14 A.L.R.C. 2, at 34; a similar view was adopted by the Criminal Law and Penal Methods Reform Committee of South Australia (S.A.), supra n. 12, at 71.

gations.[15] The third situation anticipated by the Commission involved individuals who might more clearly be viewed as possible suspects than as witnesses or potential witnesses: police may consider a crime is about to be committed by the person who is the subject of questioning, having seen that person lurking in a suspicious manner.[16]

Following the Commission's recommendations the *Criminal Investigation Bill* went considerably further than is usual in similar legislation, such as the various Police Acts.[17] where more commonly the position taken is that an officer may request name and address of a person whom he finds committing an offence, or whom he has reasonable cause to suspect of having committed an offence.[18] The power to take names and addresses of witnesses and victims is usually confined to the occasion of the traffic offence, a development that is easily understood.[19]

Whatever the merits of empowering law enforcement officers to request names and addresses of all possible 'suppliers of information', and the debate on this issue is certainly not one-sided,[20] under the Bill the rights of citizens, whether interrogated for name and address purposes as witnesses, victims or possible suspects, were alike. Each individual was possessed of the power to make a reciprocal request: that the questioning police officer supply his own name and address of his place of duty in exchange.[21] The officer was placed under a duty not to refuse or fail to comply with the request and not to furnish a false name or address.[22]

15 A.L.R.C. 2, at 34.

16 Id. see also Criminal Law and Penal Methods Reform Committee (S.A.) supra n. 12, at 71.

17 see e.g. Police Offences Act 1953 (S.A.) s.75; Police Offences Act 1959 (Tas.) s.55A.

18 s.50 of Police Act 1892 (W.A.) is not so restricted, however, and is akin to the provision in the Criminal Investigation Bill in providing: 'Any officer or constable of the Police Force may demand from and require of any individual with whose person he shall be unacquainted his name and address, and may apprehend without warrant any such person who shall neglect or refuse to give his name and address or either of them when required so to do as aforesaid; and every person so neglecting, or refusing, or who shall give a false name or address when applied to as aforesaid, shall upon conviction forfeit and pay any sum not exceeding five pounds or at the discretion of the convicting Justice be committed to any goal or lock-up, there to be kept to hard labour for any term not exceeding three calander months'.

19 e.g. Motor Traffic Act 1900 (N.S.W.) s.5; Traffic Act 1949-1976 (Q'ld); Traffic Act 1925 as.) s.39; Motor Car Act 1958 (Vic.) ss.78 and 81; RoadTraffic Act 1919 (W.A.) s.34. See also comments by the Commissioner of the Victorian Police Force in Jackson 'Law Enforcement—Problems of the Police' (1970) 3 *ANZJ Crim.* 30, reprinted in Chappell and Wilson (1972), supra n. 2, 277 at 284.

20 Compare the views put forward in Campbell and Whitmore, supra n. 1, at 89 et seq.; A.L.R.C. 2, at 34-35; Whitaker, *The Police* (1964) 60; Williams, 'Demanding Name and Address' (1950) 66 *L.Q.R.* 465.

21 Criminal Investigation Bill 1977 (Cwth) s.16(3).

22 Id., s. 16(3) (a), (b) and (c).

The discrepancies arise, however, where powers to question beyond the supply of name and address are to be put into effect. Thus, section 17 of the Bill provided:

> (1) Where a Police Officer who is investigating an offence believes that a person (including a person believed by the Police Officer to have committed the offence) may be able to furnish information that may assist the Police Officer in his investigation of the offence, that Police Officer may . . . ask the person questions relevant to his investigation of the offence.

The section goes on to state that any individual questioned in such circumstances is not bound to answer, unless failure to do so would constitute a contravention of another provision, or a provision of another Act.[23] The Bill then outlined the rights, during interrogation, of 'persons under restraint', and the duties of police officers in dealing with such persons. It thereby failed to enumerate the rights of others than the accused or suspects in the course of questioning.

'PERSONS UNDER RESTRAINT'

Section 18 of the Bill was headed 'Police Officers to inform persons of rights'. 'Persons' was restricted to mean 'persons under restraint', so that in effect it is only the latter who were to be informed of rights, rather than, as may appear on first glance, all individuals happening to be the subject of police questioning.

A person is under restraint according to the Bill where he is in the company of a law enforcement officer in connection with the investigation of an offence and:

> (a) the Police Officer would not allow him to leave if he wished to do so, whether or not the Police Officer has reasonable grounds for believing that he has committed an offence, and whether or not he is, for the purposes of [the Bill], in lawful custody in respect of the offence; or (b) the person is being detained in custody while awaiting trial for an offence or is serving a term of imprisonment.[24]

Clearly this definition was not designed to include witnesses and/or victims of crimes.[25] Further, the Law Reform Commission's Report contemplates that those 'under restraint' will be persons from one of three categories.[26] The first includes those persons under formal arrest: that

[23] Id., s.17(2).

[24] Id.

[25] Or those classified as complainants or prosecutrixes, etc.

[26] Adopting the categories put forward in the Victorian Chief Justice's Committee Report, *Powers of Police After Arrest* (1972) para. 8; see also Criminal Law and Penal Methods Reform Committee (S.A.), supra n. 12, at 115 et seq.

is, where the arresting officer has reasonable grounds for suspecting that the individual has committed a particular offence.[27] The second category, of *de facto* custody, 'describes the situation which arises, not uncommonly, where a police officer, lacking the reasonable belief that might ground an arrest and without actually purporting to make an arrest, requests a person to accompany him to a police station or elsewhere'.[28] This is unlawful custody.[29] The third is 'an arrest analogous situation', where at a point during investigation a person in the *de facto* custody category may be said to be lawfully in custody, because at that point the police have accumulated information sufficient to found a reasonable belief that the person has committed a particular offence: 'it is at this stage that hitherto unlawful custody becomes lawful'.[30]

Thus in terms of the Bill and of the Commission's Report it is considered that whether custody is lawful or unlawful, all subjects of restraint should be informed of their rights; protections accruing under the proposed legislation should have been provided for those under restraint. As in the Bill, the Report makes no mention of mere victims or witnesses, and does not seek to extend protections to the latter categories.

PROVISION OF LEGAL ADVICE

Sections 20 and 21 of the Bill dealt with the provision of facilities for enabling persons under restraint to contact a lawyer. The Minister is obliged 'so far as it is reasonably practicable to do so' to 'establish and maintain' a list of lawyers willing to assist persons under restraint; such lists should be placed at or in the vicinity of premises wherein individuals are likely to be under restraint.[31] An individual should be permitted to contact a lawyer of his choice, and where unable to communicate with that lawyer, then the police officer was required to show to the party under restraint the list of lawyers willing to assist.[32]

Persons not under restraint, but to whom the traditional warning 'that he is not obliged to answer any questions asked of him'[33] had been

27 A.L.R.C. 2, at 36.

28 Id.

29 See R. v. Banner [1970] V.R. 140, at 149; R. v. Amad [1962] V.R. 545; Smith v. The Queen (1957) 97 C.R.L. 100, at 129; see also Symes v. Mahon [1922] S.A.S.R. 447 and A.L.R.C. 2, at 36.

30 A.L.R.C. 2, at 36-37, quoting from Victorian Chief Justice's Committee Report, supra n. 26, at para. 9.

31 Criminal Investigation Bill 1977 (Cwth) s.21.

32 Id., at s.21(4).

33 Id., at s.21(3) and see s.18(2): '[T]he following warning [must be given] in a language in which he is fluent, namely, that he is not obliged to answer any questions asked of him and that he may, at any time, consult a lawyer or communicate with an appropriate relative or friend, if he wishes to do so.'

given, were also to be provided with facilities for contacting a lawyer and to be given the list of lawyers available to assist.[34] Again, these individuals would classify as accused or suspects.

Is there any need for extending such provisions to individuals not under restraint and to whom no 'warning' has been given? Perhaps all witnesses and victims will be capable, where necessary, of contacting a lawyer. They can, after all, leave the police station to seek such help. However, those persons not 'under restraint' but to whom the traditional warning has been given are similarly at liberty to contact a lawyer independently of police notification of the existence of lawyers, yet are considered to have a right to be shown the list of practitioners in addition to being 'provided with facilities' for contacting one.[35] Perhaps during questioning police automatically notify witnesses and victims of persons such as lawyers who may be of assistance. Perhaps witnesses and victims of crime do not need to be notified; they do not require a lawyer's help. It may be that to require police officers to make provision for this group of individuals could introduce into the questioning situation a note of adversity—the suggestion that the police, who traditionally are viewed as sympathetic to the plight of victims, are on the contrary antagonistic to them.

However, there is evidence that in some instances, at least, victims have not been given any opportunity during questioning by police to contact a lawyer.[36] It has been found that particularly in the field of sexual offences individuals are questioned *'in camera'* despite their wishes in the matter.[37] If the victim of an offence is in a dishevelled or distressed condition or has received a shock from the attack, probably the notion of seeking assistance from a legal practitioner would not occur to that individual without prompting by the police. Should the victim decide to leave the police station to telephone a lawyer, evidence

34 Id., at s.21(3).

35 Although it is difficult to envisage an instance where a person has been given the traditional warning, yet is not under restraint—at least until such time as the police have completed their investigation and are prepared to let that person go. Obviously, arrest will follow hot on the heels of the warning—at least on most occasions. This does not detract from the argument that victims and witnesses may be in a comparable situation, however, in that the practicalities of being questioned by a police officer, particularly in the precincts of the police station, may lead to a certain 'restraint' whatever the purported nature of the relationship.

36 Information from members of the Sydney Rape Crisis Centre; the Victorian Women Against Rape; the Western Australian group, Women Against Rape; and testimony given at the Women and the Law Conference held at Monash University 14-15 May, 1977.

37 Id., and see report, *The Sydney Morning Herald* (hereinafter cited as SMH) 15 April 1976 at 7; also Summers, 'New deal for victims . . .' *National Times* 26 Jan. 1976, at 31.

which is available shows that this action may well be considered by the police to support the allegation that the complaint is false.[38] Thus the victim may be placed in the position of having to answer all questions without the help of a legal practitioner, or of losing any opportunity of having the crime classified as 'real'. Further, at the stage of leaving the station to seek legal advice the victim may become a candidate for a charge of 'false complaint', and thus subject to prosecution.[39] [40] Of course, should such a charge be made then the provisions of the Bill relating to suspects and accused would come into operation; however, such a drastic circumstance would clearly not occur were police obliged in the first instance to display to all persons seeking police help or questioned by the police a list of available practitioners, together with the information that should the individual wish to contact one of them facilities will be provided. Whatever the case, police assistance may not be all that is needed by witnesses and victims of crime.[41]

[38] See e.g. Helmer, 'In Australia the Stigma Remains' *Nation Review*, March 19-25, 1976 at 564-65; *Union Recorder* v. 56, No. 9, at 5; Summers, supra n. 37; Chappell, 'Rape in Australia and the United States—Some Cultural Observations' (1977) *Oracle* 44 at 49: ,The meaning and accuracy of unfounded information provided the F.B.I. by United States, police agencies is open to substantial question. In a Recent nation-wide survey of police agencies, the Battelle Law and Justice Study Centre found that responding departments employed a wide variety of founding procedures which bore no relationship to [F.B.I. guidelines drawn-up to assist police in determining validity of the evidence presented by victims that a crime had been committed] . . . [O]nly 8% of agencies said they based an unfounding on insufficient evidence criteria. On the other hand, 36% said that lack of victim co-operation or withdrawal of the complaint by the victim could lead to the unfounding of the report, although the F.B.I. Uniform Crime Report guidelines state specifically that lack of victim support is *not* a legitimate reason to unfound the report of any crime. The rationale for this guideline is clear—the victim's decision whether or not to co-operate with the police and other criminal justice agencies is very frequently not at all related to the validity of the initial crime complaint. A crime has in fact been committed but for a variety of reasons the victim does not wish to pursue the matter further . . . .' This view is also borne out in a study of the Australian scene, conducted in N.S.W. by the Select Committee set up under the auspices of the Premier's Department in their *Report on Procedures for Victims of Rape* (1978).

[39] See Campbell and Whitmore, supra n. 2, at 94; Helmer, supra n. 38, (citing two recent cases in Queensland); McCarthy, *The Australian* 20 March 1976; *SMH* 15 April 1976, at 7; R. v. Manley [1933] 1 K.B. 529; but see Newland [1954] Q.B. 158; Kataja [1943] V.L.R. 145 and see further comments infra.

[40] Or offences such as obstructing the police or misprision of felony: Sykes v. D.P.P. [1962] A.C. 528; R. v. Crimmins [1959] V.R. 270. See also Additional Factors, infra.

[41] It has constantly been pointed out that law enforcement officers are not generally highly educated, and may not necessarily be aware of all legal issues involved in contacts with the public. As the United States' President's Commission on Law Enforcement and Administration of Justice stated: 'A policeman today is poorly equipped for his job if he does not understand the legal issues involved in his everyday work. . . .' *The Challenge of Crime in a Free Society* (1967) 107. To date it would seem that in

COMMUNICATION WITH RELATIVES AND FRIENDS

Subject to restrictions relating to escape of accomplices and loss, destruction or fabrication of evidence,[42] section 22 of the Bill provided that where a police officer was informed by a person under restraint that the person 'wishes to communicate with a relative or friend' then the police officer is under a duty forthwith to provide reasonable facilities to enable communication with a relative or friend of the individual's choice. Further, where an officer has reasonable grounds for believing that a person under restraint wishes to communicate with a relative or friend, under the Bill facilities should immediately be provided to enable such communication to take place.

Again, witnesses and victims fail to make an appearance in the terms of the proposed legislation. Similarly it could be asked whether legislative provision should be made. Likewise, allegations have been made that in certain instances victims of crime have been precluded from contacting persons of their choice.[43] A group in Victoria set up for the purpose of counselling victims of crime has alleged that victims have been prevented from contacting them, at least whilst they are at a police station giving information as to an alleged offence.[44] In New South Wales instances have been cited where the friend with whom the victim seeks to communicate is actually on police premises, yet police have

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Australia, at least, educational programmes for law enforcement officers leave those officers not necessarily 'well equipped'. Chappell and Wilson 'Police in Australia' in Chappell and Wilson (1972), supra n. 2, at 253; Chappell and Wilson, 'The Australian Police and Public re-visited' in Chappell and Wilson (1977), supra n. 6, at 179. Additionally the requirement that all citizens know their legal rights has been the subject of some emphasis; dealings with the police in the victim or witness role may be one way of learning—or failing to learn—these rights, and the assistance of an independent person trained in the law may well be indispensable to this need. Buckley, *All About Citizens' Rights* (1976) 3-5; Braybrooke, 'Community Legal Education or What Should Everyman Know About the Law' (1974) *Legal Service Bulletin* 88 at 89. In England 'lawyers kits' for emergency situations (e.g. assault) are produced by Law Centres; yet obviously these will be of no avail to victims unless police notify them of their right to seek legal advice during questioning. Goode, 'The Operation of the a Law Centre—The U.K. Experience' (1975) *Legal Service Bulletin* 253 at 254.

42 Under s.22 (2) it is provided that a police officer may refrain from contacting relative or friend for the purpose of preventing '(a) the escape or an accomplice of the person under restraint; or (b) the loss, destruction or fabrication of evidence relating to the offence'.

43 Information from members of the Sydney Rape Crisis Centre; the Victorian Women Against Rape; the W.A. group of Women Against Rape; testimony given at the Women and the Law Conference, supra n. 36; Summers, supra n. 37.

44 Information from members of Victorian Women Against Rape.

refused to allow the victim to communicate as desired.[45] In Western Australia it has been reported that in an assault case police attempted to separate victim from spouse, to question the victim alone as to the circumstances of the assault.[46] Thus in most of the States of Australia, at one time or another, similar difficulties have been found in interrogations by police, and similar complaints have been voiced.[47]

Thus if concern for the plight of the victim is said to be 'automatic' on the part of those investigating crimes, precluding any need for legislative intervention, it is puzzling that grievances should arise. The dangers cited in the *Criminal Investigation Bill* and in the Law Reform Commission's Report[48]—of escape of accomplices, loss, destruction or fabrication of evidence— as capable of arising where communication is allowed to an accused or a suspect, would not appear to be applicable to the case of the victim or the witness. Even should they arise, this does not seem to justify the existence of a legally acknowledged right for the one type of party being questioned by law enforcement officials and the failure to grant legislative recognition to such a right vesting in another type of party the subject of interrogation. Perhaps the problems, being procedural, require intervention at the procedural level only, rather than at the level of Parliamentary concern. However, it would appear to be ironic that the rights of suspects and accused should be acknowledged as requiring legislative approval, whilst those of victims and witnesses should be relegated to the status of 'procedural rules'.[49] If an accused should have a statutory choice as to those with whom he wishes to communicate, surely this choice should devolve upon all who are the subject of police interrogation.

45 In some cases victims have specifically been excluded from communicating with members of a co-operative set up to assist the victims of crime, and police quoted as stating that they will refuse to listen to a victim's story unless she is questioned alone. No access to the member of the group who has come in company with the victim to report the crime has been allowed during questioning. (Information from members of Sydney Rape Crisis Centre).

46 Summers, supra n. 37.

46 See also comments in Wilson, 'Victims of Rape—the social context of degradation' Chappell and Wilson (1977), supra n. 6, at 443. Wilson, *The Otherside of Rape* (1978); Royal Commission into Human Relationships, *Final Report* v. 5 (1977).

48 A.L.R.C. 2, supra n. 4.

49 The secrecy surrounding police procedural rules must also be commented upon. Clearly, both public and police should, if the system is to function properly, know the rules. Apparently legislation is the only answer to this, for rules are 'for the eyes of the police only' in current times. See R. v. Ragen [1964] N.S.W.R. 1515. In New South Wales the Police Rules and Instructions book is 'issued for the information of members of the [police] force only, and is not to be shown to, nor left about where it may come into the hands of other persons'. In Chappell and Wilson (1977), supra n. 69, the editors highlight the 'veil of secrecy' surrounding the rules, pointing out that the reason for secrecy is in order that those being interrogated by police may be

TREATMENT OF SUBJECTS OF POLICE QUESTIONING

According to section 24 of the *Criminal Investigation Bill*:

(1) A person shall, while under restraint, be treated with humanity and with respect for human dignity.
(2) No person shall, while under restraint, be subjected to cruel, inhuman or degrading treatment.

Once more the suggestion that it is unnecessary to provide, in legislation, for humane treatment for those persons not under restraint yet interrogated by law enforcement officers, and that a belief in procedural rules of 'gentlemanly conduct' is sufficient, is strange in view of the evidence. Shortly before the *Criminal Investigation Bill* went before Parliament, the Tasmanian Law Reform Commission had produced a Report,[50] the implication of which was that certain categories of victims of crime do not necessarily receive treatment commensurate with respect for humanity and human dignity.[51] Additionally, procedures and training of police officers in dealing with victims of sexual offences, in particular, had in Victoria,[52] Tasmania,[53] South Australia,[54] Western Australia[55] and Queensland[56] been the subject of recent

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deceived as to the reason for the collection of particular information (at 329). If deception is practiced upon one specific group coming into contact with police (e.g. those filling out fingerprint forms), there is no reason to suppose that deception is not, where considered necessary by police, practiced on all outside the police force not only on, say, suspects and accused persons. The rules are kept secret not simply from this latter group, but obviously from *all* outside the force.

50 Law Reform Commission of Tasmania, *Report and recommendations for reducing harassment and embarrassment of complaints in Rape cases* (1976).

51 Id. See also Victorian Law Reform Commission, *Rape Prosecutions (Court procedure and rules of evidence)* (1976). Newspaper reports have also contained allegations of abuse by police during interrogation of victims. See e.g. *SMH* 15 April 1976, at 7: victims can be 'kept for hours at a police station going over the [details of the crime], 'faced by a [law enforcement officer] who lacks understanding and sympathy—and even appears sceptical about the story: *The Australian* 20 March 1976 (by McCarthy); *National Times* 26 January 1976 at 31; Chappell and Wilson (1977) supra n. 6, at 49.

52 See report *SMH* 15 April 1976; see also Law Reform Commission of Tasmania, supra n. 50.

53 *Mercury* 14 August 1976.

54 See Criminal Law and Penal Methods Reform Committee of South Australia, *Second Report—Criminal Investigation* (1974); also the same Committee's *Special Report—Rape and Other Sexual Offences* (1976) 35-37.

55 See 'Cabinet Report', *The Australian* 30 Oct. 1975, at 5; *National Times* 26 Jan. 1976 at 31; an education programme was established in the Western Australian Institute of Technology for training of police officers designed 'to make them more sympathetic' toward assault victims; the programme is to deal with treatment by police of victims of 'child abuse', wife abuse and all sorts of violence in society'.

56 See report *SMH* 15 April 1976.

changes taking place before the Bill was introduced.[57] Further, research studies carried out in the United States and available in Australia prior to 1977 reveal that it is not only in sexual crimes that victims are dealt with peremptorily, without respect, or with abuse and cruelty. Victims of crimes involving property, and crimes against the person in addition to sexual offences, are often dealt with with scant regard for personal rights.[58] That such abuses may go on in Australia cannot be ignored.[59]

Obviously the rights of accused and suspects have in the past been relegated to procedural rules;[60] until legislation such as that contained in the *Criminal Investigation Bill* passes through Parliament, such rights remain there. However, the driving force behind the original Bill was that to relegate rights to the status of rules is insufficient; a clear legislative statement is of fundamental importance.[61] Further, the

57 See also Victorian Law Reform Commission, *Rape Prosecutions (Court procedure and rules of evidence)* (1976); Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report—Rape and Other Sexual Offences* (1976); Tasmanian Law Reform Commission, supra n. 50.

58 See e.g. Ash, 'On Witnesses: A Radical Critique of Criminal Court Procedure' (1972) 48 *Notre Dame Law* 386; Hall 'The Role of the Victim in the Prosecution and Disposition of a Criminal Case' (1975) *Va. L. Rev.* 931; McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim' (1976) 13 *Am. Crim. L. Rev.* 649. McDonald points out that 'today in the opinion of many commentators, both victims and witnesses receive . . . what has been called the 'administrative runaround'. Both are required to . . . tell and retell their stories . . . and often to sit for prolonged periods of time in dirty waiting rooms or corridors, frequently with the defendant nearby.' (At 661), 'Studies have found that victims are critical of the professional attitude of modern police and find them cold and impersonal . . . Victims also resent repeating their stories to various officers'. (At 668) citing MdDonald, 'Criminal Justice and the Victim: An Introduction' in *Criminal Justice and the Victim* (1976) (unpaginated).

59 Claims that police questioning is 'insulting and prurient'; victims are 'kept for hours' at police stations, etc. are similar to those claims being made in the United States and backed up by hard, empirical evidence (see sources at n. 5 supra). There does not seem to be any value in denying that abuses by police occur, and that some means of controlling or eliminating such abuses should be sought, just as it is being acknowledged and sought in the United States. See brief outlines of approaches taken in the United States in McDonald, 'Towards a Bicentennial Revolution in Criminal Justice', supra n. 58, at 668 nn. 103-4. In Fremont, California, the programme is designed to create a manual 'to convey very important information to victims and to standardize police practices', as well as to 'develop a technique using the police report form to focus and reinforce officer concern for victims' amongst other aims.

60 See e.g. Victorian Chief Commissioner's Standing Orders for comment, see Murray, *Memorandum to the Victoria Attorney-General Procedure on the Interrogation of Suspected Persons by the Police* (1965) reprinted in Chappell & Wilson (1971), supra n. 2; New South Wales Police Commissioner's Instructions (see R. v. Ragen [1964] N.S.W.R. 1515); Judges' Rules (U.K.), reprinted in Chappell and Wilson (1972), supra n. 2, at 401; for general comments as to police procedure during interrogation, see: Crowley, 'The Interrogation of Suspects' in Chappell and Wilson (1972) 419.

61 See the view put in A.L.R.C. 2, at 6.

stated intention underlying the formulation of the Bill was to 'cover the field' of criminal investigation:

> The proposals for reform of particular procedures have been carefully weighed and are reflected in the Bill. But the advantage of dealing with the whole procedure, from first police contact until the criminal trial, is that it permits the development of an approach to the relationship that should exist between citizens, including the accused, the police and courts in the procedures involved in investigating crime. If the relationship is defined it is more likely to be understood and room for disputation, which often occurs in these matters, should be diminished considerably.[62]

In view of this statement, it can only be assumed that witnesses and victims are not considered to be part of the 'whole procedure'. Or perhaps those formulating the Bill did not have access to that large body of documentation[63] relating to the lack of humanity and dignity accorded, in some instances at least, to victims of crime in the course of criminal investigation.

PROVISION OF MEDICAL TREATMENT

Under section 24 it was provided that persons under restraint should be enabled to undergo medical treatment in respect of illness or injury, where a police officer is informed by the person that he wishes such to be made available to him. Where the officer has reasonable grounds for believing medical treatment is wished for by the person under restraint, again the officer was, under the Bill, vested with a duty to take reasonable action immediately to ensure that such treatment should be pro-

62 Attorney-General of Australia, The Hon. R. J. Ellicott, 2nd Reading Speech on the Criminal Investigation Bill 1977 (Cwth) in Australia, H. of R., *Debates*, vol. 104 at 562-7.

63 In addition to the material contained in nn. 37-39, 50, 51, 58, 59 supra, considerable written comment has appeared recounting the difficulties experienced by minority groups in dealings with police—not only as suspects and accused. See, e.g. 'Race Relations—Reconciling the Conciliators' *The Economist* 5 July 1975, stating that in England 'independent research shows a significant measure of discrimination' against immigrants necessitating the setting up of a single institution to be responsible for enforcement of discrimination laws, public education, and monitoring policies affecting immigrants. Such difficulties were also alluded to at a seminar organised by the Outer Eastern Region for Social Development, N.S.W., entitled 'Ethnic Communities and the Law' where the need for teaching elementary law at school level was emphasised in addition to the mention of language difficulties, and calling for 'demystification of the law'. (*SMH* 22 Nov. 1976, at 2.). A graphic outline of discrimination experienced by black women in dealings, as victims of crime, with police is contained in Sykes, 'Black Women in Australia—A History' in Mercer (ed.) *The Other Half: Women in Australian Society* (1975) 313.

vided.[64] Reasonable refreshments and reasonable access to toilet facilities were also provided for.[65] Further, where practicable to do so, a person under restraint should under the Bill be provided with washing or showering facilities and change of clothing, where he is to be brought before a court more than four hours after coming under restraint.[66]

The inclusion of these provisions raises questions as to the role of the police force. Certainly a contention might again be that members of the force are humane and would of course assist those witnesses and victims who are the subject of interrogation to secure medical help where necessary. It might also be said that those individuals who are not under restraint are free to seek medical attention and that the police force should not be required to act in a 'caring capacity' when its role is to investigate crime. These arguments would also extend to the provision of toilet and washing facilities, and to providing witnesses and victims with refreshments: the job of the police is not to hand out endless cups of tea, and public conveniences are available elsewhere; where necessary, these will be provided in the normal course.

The role of the police force would seem to be a dual one. No one could deny that although perhaps the greater part of the time of the force should be spent in solving crime, on the other hand law enforcement officers play an important welfare role. A part of their task is surely to assist those in trouble. Thus those rights written in to the *Criminal Investigation Bill* and envisaged by the Law Reform Commission in its Report as essential to the cause of justice[67] would seem to be applicable to all persons questioned by police, whether under restraint or not.[68]

Instances have been cited of witnesses or victims being questioned whilst suffering from injuries, and not 'forthwith' being assisted to

64 Criminal Investigation Bill 1977 (Cwth), s.24(3)(a) and (b).

65 Id., at s.24(5).

66 Id., at s.24(6).

67 A.L.R.C. 2.

68 Indeed, the view of the police as having a duty to assist those in trouble is put forward by those in charge of police forces and directing policy on the matters. See e.g. Jackson (writing as Commissioner of the Victoria Police Force) (1970) supra n. 19; Lenton (writing as Superintendent in the South Australian Police), 'Administration of a Modern Police Force' reprinted in Chappell and Wilson (1972), supra n. 2, at 287; Whitrod (writing as Commissioner of Police in Papua and New Guinea) 'Some Problems of Policing Papua and New Guinea' in Chappell and Wilson (1972) 293. See also *Royal Commission on the Police* (U.K.) (1962) Cmnd 1728; Banton, *The Policeman in the Community* (1964); Cumming, Cumming and Edell, 'Policeman as Philosopher, Guide and Friend' (1965) 12 *Soc. Problems* 276; Lilly, 'What are the Police Now Doing' (1978) 6 *Jrn. Police Sc. and Administration* 51.

secure medical help; the interrogation has continued.[69] No doubt these instances are rare. Nonetheless it has been reported that the provision of medical care and washing facilities for injured victims have in some cases been the subject of complaint.[70] Again, the Report of the Tasmanian Law Reform Commission provides evidence of complaint.[71] In Victoria a group assisting victims of crime alleges long delays in receiving medical treatment and in enabling victims to wash and change.[72]

Where the type of crime committed requires medical investigation, it can be understood that washing may destroy vital evidence. Nevertheless were medical aid forthcoming immediately, there would be no necessity for a time-lag between the hour at which the victim is questioned by police, and that at which showering and changing may be permitted. That police procedure in investigation of a crime may *require* medical treatment—both in terms of the investigation and in the sense of helping the victim—appears as things stand under current rules, at least in some reported cases,[73] to be of no avail in securing medical attention for victims 'forthwith'. Perhaps the rights contained in the *Criminal Investigation Bill* should be extended legislatively to victims and witnesses were the Bill once again to be introduced into the legislative arena. An extension would seem necessary, as it appears that two issues are in some disarray here. First, the person who has been the subject of attack must have a right to the provision of treatment—particularly when presenting self at the police station to report on the crime and (presumably) to seek help; that treatment should be forthcoming as soon as possible. Second, where a crime has been committed a duty is cast upon police to institute an investigation in order to detect the party responsible.[74] When medical evidence is vital to the investigation of the crime and to detection of the criminal, to delay seeking that attention on behalf of the victim and on behalf of the State, is no less than severe derogation of duty.

69 Information imparted by Victorian Women Against Rape; see also Editorial, *The Age* 27 July 1976; Report on Forum, Women in a Violent Society in *The Union Recorder* v.56. no. 9, at 5; *SMH* 15 April 1976, at 7; *National Times* 26 Jan. 1976, at 31.

70 See *SMH* 15 April 1976, at 7.

71 Law Reform Commission of Tasmania, supra n.

72 Victorian Women Against Rape; also testimonial given at the Women and the Law Conference, Monash University, 14-15 May 1977. For the position in N.S.W., see *Report of the Department of the Premier, Task Force* (1978).

73 See sources cited nn. 69-72 supra.

74 See *Royal Commission on the Police* (U.K.)., supra n. 68.

ABORIGINALS AND TORRES STRAIT ISLANDERS

The *Criminal Investigation Bill* sought to protect certain categories of individuals who might suffer disabilities not applicable to the majority of persons falling into the suspect or accused class. Thus, where a police officer has reasonable grounds for believing that a suspect or person under restraint whom he wishes to question might be an Aboriginal or a Torres Strait Islander, the Bill required the officer not to 'ask, or cause the person to do anything, in connection with the investigation of the offence', unless the individual should expressly and voluntarily waive his right to have a 'prisoner's friend' present; otherwise, a prisoner's friend was required to be present during interview. Further, where the individual is believed by the police officer to be an Aboriginal or Torres Strait Islander, then unless to the knowledge of the officer the individual has arranged for a lawyer to be present during interview, a representative of an organization providing legal aid for Aboriginals and Torres Strait Islanders was required to be notified unless the individual objected to this procedure.[75] The onus of proving waiver of objection was to lie, in any proceedings, on the prosecutor.[76]

So far as reasonably practicable to do so, a duty was cast upon the Minister to establish and maintain a list of prisoners' friends, being persons willing to assist those under restraint, at or in the vicinity of the place at which persons may be restrained.[77] A 'prisoner's friend' was defined to include:

> (a) a relative or other person chosen by the person who is under restraint . . .; (b) a lawyer; (c) a representative of [a legal aid organisation]; (d) any other person whose name is included on a list[maintained by the Minister] . . . .[78]

The introduction of such a provision into the law should be welcomed. In supporting this type of inclusion, the Law Reform Commission in its Report commented:

> There are a number of groups in the community who, because of their status, background or intelligence, may be at a particular risk when made the subject of police investigation. [Amongst the] candidates for this description [are] Aboriginals and Torres Strait Islanders . . . The risks are serious enough to justify the enactment of special protections for the members of those groups when in police custody . . . .[79]

75 Criminal Investigation Bill 1977 (Cwth), s.25(1) and (2).
76 Id. at s.25(3) and (4).
77 Id. at s.26(1).
78 Id. at s.25(5).
79 A.L.R.C. 2, at 115; see also generally Webber, 'Interpersonal Behaviour in Relation to Aboriginal Programs' (1978) 13 *Aust. Jrn. Social Issues* 61.

The Report went on to cite instances of difficulty experienced by these individuals in contacts with Europeans:

> Aboriginal people are severely limited in their understanding of English . . . The people have no understanding of connecting or qualifying words like "if", "but", "because", "or". For these there is one ending that goes on other words. Most of the people when they speak English leave out these words. When they hear them they don't understand their meaning. [They] have a different idea of time . . . They are confused about place. If asked "Did you go into his house?" they will say "yes". It may have been only in the driveway, or inside the fence, but that means "in the house" to them.[80]

And:

> Though some of the people do understand English, the majority of them do not understand English concepts. Those concepts are very difficult; there is no equivalent in their own experience.[81]

The Commission stated further:

> Another aspect of Aboriginal susceptibility to authority situations which has caused concern is the tendency to give the answer thought to be expected, rather than that which is necessarily the case. The point was made to [the Commission] by many persons.[82]

Thus it was considered that the difficulties encountered by Aboriginals and Torres Strait Islanders warranted, at least where the charge was of a 'serious offence'—one relating to a crime for which the penalty would be more than six months' imprisonment[83]—the presence of a prisoner's friend during questioning. However it could be asked whether such difficulties are met with not only by suspects and accused, but by Aboriginals and Torres Strait Islanders questioned in any capacity by police officers. Such difficulties could warrant the presence of a 'victim's friend', at least in the similar case—where the crime alleged is a 'serious one'. That the law enforcement officer acts as 'the victim's friend' is not a valid consideration here, as the very reason for instituting the office of 'prisoner's friend', amongst other issues, is that law enforcement officers are not trained in dealing with the difficulties arising in the instance of the questioning of Aboriginals and Torres Strait Islanders.[84] Additionally racial discrimination has been found to occur in Australia not

80 A.L.R.C. 2, at 119; supra n. 79.
81 A.L.R.C. 2, at 120.
82 A.L.R.C. 2, at 120.
83 Criminal Investigation Bill 1977 (Cwth), s.3(1).
84 See generally comments of the Australian Law Reform Commission in relation to its enquiry, supra nn. 79-82. (Note that these excerpts from the Report of the Law Reform Commission have a somewhat paternalistic flavour to them. However if what

only in the area of police-suspect relations, but also in general terms.[85] As has often been pointed out 'equality of opportunity can only follow equality of respect',[86] which blacks do not appear, in many instances, to have.[87] 'Equality of opportunity' and of 'respect' in relation to dealings with law enforcement agencies cannot be limited to those suspected or accused of crimes; they must also be capable of extending to witnesses and victims within the system, who must have an equal right to facilities provided for having their stories understood.

Additionally, there is considerable evidence that Aboriginal women in particular encounter extreme difficulties when presenting evidence of the commission of crimes, especially where they are the victims.[88] For them, the presence of a 'friend' and a member of the Aboriginal Legal Service could certainly not be guaranteed under current procedures.[89] And as to the presence of a member of the legal service, it is timely to observe that the Service 'establishes a legal facility to meet the special needs of Aboriginals and Torres Strait Islanders . . .'[90] Its facilities are not limited to those accused or suspected of crime; all Aboriginals and Torres Strait Islanders are to be legally represented, not only those allegedly involved as protagonists in crime. Such representation cannot take place unless notice of problems is given to the Legal Service and it would thus be appropriate, where victims and witnesses are being in-

is there stated is taken to be a correct view of the situation, founding the basis for providing 'special protections' for individuals questioned by police in the capacity of suspects or accused, then the statements should found with equal certainty the basis for providing similar protections in the case of similar individuals questioned in other capacities by the police. If 'Aboriginal people are severely limited in their understanding of English' (A.L.R.C. 2, at 119); if they have a 'susceptibility to authority situations', (Id., at 120); if 'the majority of them do not understand English concepts' (Id., at 120) then it is difficult to understand why these problems are not similarly seen to exist where individuals are questioned by police in the capacity of witness and victim. If police training is deficient in terms of relating to Aboriginal suspects and accused, then the same deficiencies should be seen to exist in police training in terms of relating to other Aboriginal persons who are subjected to questioning).

85 Research carried out by Prof. Knud Larsen, University of Q'ld, reported 'Racial Discrimination Seen in Townsville' *Canberra Times* 15 March 1977; Ligertwood, 'Aboriginal-Police Relations in S.A. '(1975) *Legal Service Bulletin* 270; Nettheim, *Aborigines, Human Rights and the Law* (1974); Nettheim, *Outlawed: Queensland's Aborigines and the Rule of Law* (1973); Stone, *Aborigines in White Australia—A Documentary History of the Attitudes Affecting Police and the Australian Aborigine 1697-1973* (1974).

86 Faulds, 'Laws Alone do not Bring Racial Harmony' in *The London Times*, 23 August 1976.

87 See e.g. Sykes, supra n. 63; *National Times* 26 June 1976, at 31; also Hamilton, 'Aboriginal Women: The Means of Production' in Mercer (ed.), supra n. 63.

88 See Sykes, supra n. 63; *National Times*, supra n. 87.

89 See sources cited supra nn. 85-87.

90 See report Eggleston, 'Aboriginal Legal Services' (1974) *Legal Service Bulletin* 93; Ligertwood, supra n., at 85.

terrogated by police, for the law enforcement agency to notify the Service. The recognition of disadvantages suffered by accused and suspects in crime should surely have led, in the framing of the Bill, to a recognition of disadvantages of a like kind suffered by victims.

MIGRANTS

Section 27 of the original Bill required a police officer, having reasonable grounds for believing that a person under restraint 'is a person who is unable to communicate, orally, with reasonable fluency in the English language', to ask questions in connection with the investigation of an offence only where 'a person competent to act as an interpreter is present and acts as interpreter during questioning'. The inclusion of the section was based on the view of the Law Reform Commission that:

> The plight of the person in Australia not proficient in the English language is in many ways similar to, and indeed overlaps with, that of the Aboriginal. Not only can he not know or understand what the law is, he is not able to properly fend for himself when confronted with it. The problem of persons not fluent in the English language is part and parcel of the rapid intake of migrants to this country following the Second World War. Unhappily, the administration of criminal justice on a police level at least has not caught up with the radically changed society in which it can no longer be assumed that every person has English as his mother tongue.[91]

Unhappily, again 'the administration of criminal justice' is not considered to include those questioned as witnesses and victims of crime.

Once more it can be contended that the person reporting a crime should have a means provided whereby his story can be understood; this should be made available as of right, rather than being based upon notions of chivalry on the part of the criminal justice system, or that victims and witnesses can 'look after themselves'.[92] In Sydney the 'inadequacy of interpreter services and the lack of multi-lingual pamphlets with information and international warning signs' has been the subject

91 A.L.R.C. 2, at 123-24.

92 This is particularly so when current and past reviews of 'what the police are doing' recount that the major part of their time is spent 'responding to requests for assistance', (see Banton, supra n. 68, at 2.); that 'over half the calls to the metropolitan police department (covering an unevenly observed period of 82 hours) were for some sort of assistance, many involving a family crisis or complaints of a personal or inter-personal nature' (Cumming, Cumming and Edell, supra n. 68); that the majority of calls and the major involvement of police is, apart from requests for information, spent in dealing with those who report crimes or who request help in violent situations, 'family trouble' (no doubt involging victims), problems with 'prowlers', calls about theft (Lilly, supra n. 68, at table at 56-57).

of comment;[93] the need for all individuals to receive instruction as to the law has been recognised;[94] in New South Wales generally the provision of interpreters for service in hospitals has been announced following upon reports that 'lack of interpreters at the hospitals has been a major source of grievance among migrants'.[95] The situation is acknowledged to be equally worthy of complaint in each Australian State.[96] Obviously, if it is considered imperative that interpreter services be set up for dealing with medical questions, it should be considered equally imperative to set up interpreter services to deal with police interrogation of all persons not fluent in English.

The rule that individuals should have an interpreter made available to them when reporting crimes and being questioned generally by law enforcement officials would mean that a source of interpreters would need to be found. In its Report the Law Reform Commission recognised this problem in the instance of the provision of interpreters for accused persons and suspects;[97] nonetheless the belief was adhered to that should the right be made law, then a supply of interpreters would develop on a scale equivalent to need:

> Though there may be many practical problems in the short run, given the present supply of interpreters, the Commission believes [language difficulties] to be a great source of confusion and injustice. It is accordingly minded to recommend that legislation for the provision of interpreters be enacted immediately. The Commission believes that interpreter services will develop on the necessary scale to meet the necessities of such a law. No person who has travelled in a country in whose language he is not fluent can doubt the justice of this proposal or the need for it, in Australia, where a large minority of the population now comes from non English-speaking countries.[98]

93 'Danger of Mental Conflict—Migrants warned of cutting ties suddenly' *SMH* 22 Nov. 1976, at 2 (report from Ethnic Communities and the Law Conference).

94 Id.

95 'Interpreters at Hospitals Soon' *SMH* 28 June 1976.

96 Brennan, 'Contracts and Migrants—Some Backward Steps in Modern Soceity' (1976) *Legal Service Bulletin* 6; Staples, 'Justice in N.S.W. Means We are Not all Equal Under the Law' *National Times* 10 September 1974, at 6; Report on Forum—Women in a Violent Society, *Union Recorder* v. 56, no. 9 at 4-5; Jakuvowicz and Buckley, *Migrants and the Legal System. Report to the Law and Poverty Section of the Australian Commission of Enquiry into Poverty* (1975). In trips into country centres of N.S.W.—including Wagga, Griffith, Tumut and other areas—the N.S.W. Women's Advisory Council has found on many occasions the need to recommend to the Premier the appointment of interpreters in hospitals, and has also commenced publication of information booklets in six languages (information from the Women's Advisory Council of N.S.W.)

97 A.L.R.C. 2, 125-26.

98 A.L.R.C. 2, 126.

In placing the provision in the *Criminal Investigation Bill* those responsible for its drafting, in acknowledging the importance of language difficulties, accepted that such a supply of interpreters as necessarily required would be created. Such an important issue might, however, have been recognised as containing a general principle. The provision should have been extended to persons not under restraint, yet interrogated and lacking English speaking ability; for surely the source of interpreters could have been expected to expand equally to meet this generalised need. If language difficulties are said to be 'a great source of confusion and injustice' for accused and suspects, they cannot be said *not* to be such a source for witnesses and victims. Or should the onus be placed upon the victim to come complete with interpreter?

ADDITIONAL FACTORS

The basic contention is that simply because any person is the subject of police interrogation and is thereby involved in the criminal justice process, he or she should have rights that are recognised and clearly acknowledged by law, and not the subject of 'secret rules'.[99] However, for those viewing the criminal justice process in what appears to be the conventional manner—that is, as composed of suspects, accused and the system, victims and witnesses being outside this realm—several factors remain for discussion which should act persuasively in the argument for codification of witnesses' and victims' rights. The issues are those of charges of making a false complaint, and misprison of felony. Additionally there is the question of the recent development of the now burgeoning discipline of victimology.

(a) *The false complaint.*

Individuals representing themselves to police as witnesses or victims of crime may, after interrogation, find themselves charged with having made a false complaint. Thus in *R.* v. *Manly*[100] a complainant was charged and convicted of 'conduct causing or tending to cause public mischief'. The conduct alleged was to give a false report of robbery to the police, so that officers were 'led to devote their time and services to the investigation of an idle charge, and members of the public, or at any rate those of them who answered a certain description, were put in peril of suspicion and arrest'.[101] In Australia, to answer disputes as to whether such an offence exists at common law.[102] statutory provisions have been

99 See comments supra n. 49.

100 [1933] 1 K.B. 529.

101 R. v. Manley [1933] 1 K.B. 529 at 534-35 per Lord Hewart C.J.

102 See R. v. Newland [1954] 1 Q.B. 158; R. v. Kataja [1943] V.L.R. 145; and see discussion Campbell and Whitmore, supra n. 1, at 93-95.

passed to deal with the matter. Thus under section 90A of the *Police Act* 1892 Western Australia it is provided:

> (1) Every person who, by a written or oral statement made to a member of the Police Force, represents, contrary to the fact and without a genuine belief in the truth of his statement, the existence of a circumstance reasonably calling for police investigation or inquiry commits an offence.

The penalty is two hundred dollars or imprisonment for six months, or both. Similar provisions exist in other States.[103]

Owing to the existence of such laws, any person who is questioned by police may be placed in a position where eventually a charge may be made.[104] In Queensland in recent times two charges of false complaint as being laid by police have been reported.[105] so that the offence is by no means obsolete. If rights were clearly outlined before any interrogation, such instances might well not occur. 'False complainants' would have had an opportunity to confer with a legally qualified person, for example, and thus to gain expert knowledge as to whether a crime had occurred, and whether complaint should be made or continued with. Further, the presence of a 'victim's friend' or interpreter may be indispensible in eliminating on the part of police, any erroneous devotion of time and services to an allegation where they have not understood the import of what a victim or witness was attempting to communicate, and where finally the police may, after expenditure of time and effort, come to a conclusion that the complainant was 'making an idle charge'.

In addition, in view of research clearly showing that charges are sometimes labelled 'false' by police when they may not be false at all, but the complainant chooses, for reasons of varying nature and sometimes connected with the manner of the police in conducting their interrogation,[116] not to take the matter beyond initial questioning,[117] the fact that this will appear on the police record will be a severe abrogation of the rights of that party. First, the mere existence of the 'false com-

103 See e.g. Police Offences Act 1935 (Tas.) s.44A; Police Offences Act 1953-2976 (.SA.), s.62; cf. Summary Offences Act 1966 (Vic.), s.53; also n. 104 infra.

104 Under Summary Offences Act 1966 (Vic.), s.53, it is interesting to observe that it is provided any person who falsely and with knowledge of the falsity voluntarily reports or causes to be reported to the police an act calling for investigation will be guilty of an offence; however 'voluntarily' is defined as 'otherwise than in the course of an interrogation made by a member of the police force'. Thus in Victoria, at least, the perils of interrogatory situations are realised.

105 See Helmer, supra n. 38.

106 See Chappell, supra n. 38; Chappell, 'Reforming Rape Laws (and attitudes . . .?) (1977) *Legal Services Bulletin* 269; also supra n. 41.

107 see comments in *Report of the Department of the Premier, Task Force* (N.S.W.) (1978), supra n.

plaint' record may endanger the civil liberties of the individual.[108] Second, evidence shows that police records are sometimes disseminated beyond the precincts of the police force.[109] Thus others may learn, wrongly, that the individual has 'made a false complaint'. This may be damaging in outside society,[110] or may simply give rise to embarrassment or other discomfort on the part of the complainant which should not occur.[111] Further, should the same individual become a victim or witness in another incident, the existence of such a record may interfere with police attitudes in interrogation as to the subsequent crime and may lead to dismissal of that crime as 'just another false complaint': a victim or witness may be 'type cast' on erroneous grounds. Again, clarity of victims' and witnesses' rights in police interrogation would well eliminate these consequences.

(b) *Misprision of Felony*

Where a person having knowledge of a felony fails to disclose it to the police, this will be an offence to be prosecuted. In *R.* v. *Arberg*[112] the defendant was convicted on a count of misprision, but on appeal some doubt was cast upon the parameters of such an offence. Lord Goddard C.J. said:

> Misprision of felony is an offence which is described in the books, but it is an offence which has been generally regarded nowadays as

108 This raises the whole issue of the right to privacy, in the context of 'what information may be collected about individuals'; the literature on this topic is immense and constantly being added to with the introduction of legislation in the United States and Europe, and with the current Privacy Reference in train at the Australian Law Reform Commission. See e.g. Miller, 'Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society' (1969) 67 *Mich L. Rev.* 1089; Neier, *Dossier—The Files They Keep on You* (1975): Westin and Baker, *Databanks in a Free Society* (1972).

109 See *Annual Report of the Privacy Committee* (N.S.W.) (1976) 14-15.

110 The N.S.W. Privacy Committee found that the second largest number of complaints coming before them related to records created within the criminal justice system. (*Annual Report*, supra n. 109, at 14-15.) In the U.S. it has been shown that numerous uses are made of information coming into the criminal justice system, and that adverse affects are many. Information may be used to build up dossiers on individuals to be used in a negative manner, with little or no justification. See e.g. Note, 'Police Records of Arrest: A Brief for the Right to Remove them from Police Files' (1972) 17 *St Louis U.L.J.* 263; Note, 'Branded: Arrest Records of the Unconvicted' (1973) 44 *Miss. L.J.* 928; Askin, 'Police Dossiers and Emerging Principles of First Amendment Adjudication' (1970) 22 *Stan. L. Rev.* 196; see also 'Job Rejects to See Own Records' *West Australian* 25 Nov. 1976; 'False Criminal Record Cost Hundreds P.S. Jobs' *The Australian* 25 Nov. 1976; 'Misuse of Criminal Records Attacked by Privacy Body' *National Times* 19 April 1976; 'Police Computer a 'Threat to Privacy' *The Australian* 30 July 1975.

111 See generally Neier, supra n. 108; Westin and Baker, supra n. 108.

112 [1948] 2 K.B. 173.

> obsolete or fallen into desuetude. . . . [It] seems there have been recent cases at the Central Criminal Court in which counts of misprision of felony have been preferred, [but] if this count appears in any subsequent indictments, or if it is made a substative charge against a prisoner, it may be that this court will have carefully to consider what are the real constituents of that offence and whether it is necessary to prove, not assume, a concealment for the benefit of the defendant charged.[113]

Despite these remarks it is now accepted that the offence exists, and that a simple failure to disclose, where the individual knows that a felony has been committed, constitutes the crime. Thus in *R.* v. *Crimmins*[114] and *Sykes* v. *D.P.P.*[115] in the Victorian Supreme Court in the one case, and in the House of Lords in the other, it was considered that there was no authority for the proposition that in a charge of misprision, it must be shown that the party was seeking some benefit for himself from the concealment. The Victorian Supreme Court, in discussing the culpability of a man who was feloniously wounded but refused to disclose the identity of the party who did the wounding although he knew of that identity, stated:

> Misprision of felony has . . . come to us from the earliest times in the development of the common law. . . . Now it may be that in . . . times . . . long before the creation of any criminal investigation department, the detection of offenders very largely depended upon citizens performing [the duty of disclosing knowledge of treason or felonies]. And no doubt today, with modern methods of detection, its performance may not appear of such importance. . . . In our opinion, however, the citizen's duty to disclose to the appropriate authorities any treason or felony, of which he has knowledge, remains the same and is still binding upon him as it was in the early days of the common law. And no doubt cases will arise, from time to time, when the public interest will be best served by the citizen, who fails in this duty, being prosecuted for misprision of felony. There is certainly no justification for the view that such a prosecution is no longer available to the Crown.[116]

It is therefore clear that despite the commonly expressed view[117] that at common law no person is obliged to give information to the police, there is strong evidence to the contrary. Should any person questioned by the police conceal knowledge of a felony, he could be charged with

113 R. v. Arberg [1948] 2 K.B. 173.
114 [1959] V.R. 270.
115 [1962] A.C. 528.
116 R. v. Crimmins [1959] V.R. 270 at 272.
117 See sources cited supra nn. 10-12.

misprision. It is not enough to contend that such a circumstance would probably arise in a very unusual situation. It can arise, and all interrogated individuals should be made aware of this possibility. Again this renders it imperative that police should, in all interrogations—whether of persons under restraint or of persons not under restraint, witnesses, victims, accused persons or suspects—alert them to their rights. Here it should once more be emphasised that it is not enough that the right to consult with a lawyer will accrue when the individual is charged with misprision, as at that time he will become an accused; rather, the information that any person may contact a legal practitioner and may be extended facilities to do so, should be imparted prior to charging with an offence, and prior to the individual being placed 'under restraint'. This approach may have a dual effect—of assisting the person questioned, and in assisting the police in their investigation of a felony: the party questioned will know what his or her rights and obligations are, and the police may thereby not be frustrated in their attempts to follow-up suspected criminal activities.

(c) *Victimology*

Recently, the science of studying the actions of the victim and the circumstances in which the crime was committed has developed apace.[118] The rationale is that for too long criminologists, legal practitioners in the criminal field, and the criminal justice system as a whole have regarded the criminal and his actions as unrelated to and not really a part of the actions of the victim;[119] the selection of a victim is looked upon as a random event, the mind of the accused and the actions of the accused being the primary matter for investigation by the court.[120] With victimology the approach is that perhaps the crime and the criminal may be dependent upon, or inter-related with, the acts of the party chosen to be the subject of the criminal offence.[121] Thus, studies have dealt with

118 Howard, 'Police Reports and Victimization Survey Results: An Empirical Study' (1975) 12 *Criminology* 433; Baldwin, 'Role of Victim in Certain Property Offences' (1974) *Crim. L. R.* 353; Gubrium, 'Victimization in Old Age: Available Evidence and Three Hypotheses' (1975) 20 *Crime and Del.* 245.

119 See e.g. Franklin and Franklin, 'Victimology Revisited. A Critique and Suggestions for Future Direction' (1974) 14 *Criminology* 125; Kaplun and Reich, 'The Murdered Child and His Killers' (1976) 133 *Amer. Jrn. Psychiat.* 809.

120 See e.g. Bender, 'Self-Chosen Victims: Scapegoating Behaviour Sequential to Battering' (1976) 55 *Child Welf.* 417; Miller, *Battered Spouses* (1975) (Occasional Papers on Social Administration, No. 57); Notman and Nadelson, 'The Rape Victim: Psychodynamic Considerations' (1976) *Amer. Jrn. Psychiat.* 408; Hilberman, 'Rape: The Ultimate Violation of Self' (1976) *Amer. Jrn. Psychiat.* 436.

121 See e.g. Franklin and Franklin, supra n. 119; McDonald (1976) supra n. 58; Nuvolone, 'The Victim in Criminogenisis: Criminological and Legal Problems, with a brief survey of Italian law' (1975) 26-27-28 *Etud. int. Psycho-Soc. Crim.* 49.

victims in the murder situation: have victims in some way precipitated the crime?[122] Similarly, in sexual offences it has been mooted that victims may fit particular personality patterns or may in other respects 'contribute' to the commission of the crime.[123] The field is now spreading to the investigation of robberies and other similar offences.[124] It may be, for example, that particular types of individual are prone to become victims: they may be in the habit of walking in areas where offences are common; they may frequent lonely places; they may have a habit of leaving keys in cars or house-doors, or be careless in placing wallets in open pockets, purses in open shopping-bags.[125]

In the context of victimology it has sometimes been suggested that as victims are in some way 'responsible' for the commission of criminal acts, they have some sort of 'liability' or contributory negligence in that act.[126] Thus it may not be unwise to anticipate the effect of such theories upon the criminal justice system[127] and more particularly upon the role played by police in criminal investigation—most especially in terms of interrogation of victims. It would well be prudent to provide that victims be included in any legislation setting out the rights of individuals questioned by police. Certainly the right to know one's rights would be even the more pressing if victims were to be considered to be a precipitating factor in the very crime it is their intention to report.

122 Herjanic and Meyer, 'Psychiatric Illness in Homicide Victims' (1976) 133 *Amer. Jrn. Psychiat.* 691; Kaplun and Reich, supra n. 119; Swart and Berkowitz, 'Effects of a Stimulus Associated with a Victim's Pain on Later Aggression' (1976) 33 *J. Pers. Soc. Psychol.* 623; Nuvolone, supra n. 121; Franklin and Franklin, supra n. 119.

123 See e.g. *Report of the Select Committee on Punishment of Crimes of Violence in Queensland* (1974) s.9 at 5: 'The general lack of prudence exhibited by some girls . . . was also seen as a factor aggravating pack rape . . . .'; Newton, *Factors Affecting Sentencing in Rape Cases* (1976); Note, 'Definition of Forcible Rape' (1975) 61 *Va. L. Rev.* 1500; Weis and Borges, 'Victimology and Rape: The Case of the Legitimate Victim' (1973) 8 *Issues in Criminology* 71; see also Note, 'The Victim in a Forcible Rape Case: A Feminist View' (1972) 11 *Am. Crim. L. Rev.* 335; Schwendinger and Schwendinger, 'Rape Myths: In Legal, Theoretical and Everyday Practice' (1974) 1 *Crime and Soc. Justice* 18; Comment, 'Rape and Rape Laws: Sexism in Society and Law' (1973) 61 *Calif. L. Rev.* 919; Chappell, 'Forcible Rape and the American System of Justice' in Chappell and Monahan (ed.), *Violence and Criminal Justice* (1975) 85; Amir, *Patterns in Forcible Rape* (1971).

124 See generally Gobert, 'Victim Precipitation' (1977) 77 *Colum. L. Rev.* 511.

125 See e.g. Gubrium, 'Victimization in Old Age: Available Evidence and Three Hypotheses' (1975) 20 *Crime and Del.* 245; Franklin and Franklin, 'Victimology Revisted. A Critique and Suggestions for Future Direction' (1974) 14 *Criminology* 433.

126 See e.g. Amir, *Patterns in Forcible Rape* (1971); M. Wolfgang, *Patterns in Criminal Homicide* (1959); Gobert, supra n. 124.

127 For a preliminary view of the effect of 'victimology' on rules relating to the criminal trial, see Gobert, supra n. 124.

CONCLUSION

The rationale underlying development of such rules as 'the right to silence',[128] the caution or warning by police during interrogation and other rights of accused persons,[129] was that during police questioning those who are the subject of interrogation may not be fully aware of the implications; or they may be in a less advantageous position than their interrogators. Persons accused, or suspects, may be less well informed than law enforcement officers; they may tend to say and do things which persons with more education may not say and do.[130] In addition the authority figure of the police officer and the authority situation inevitably arising in interrogation at a police station may lead to the subject being victimised or abused, even unintentionally; he may be so daunted by the implications of the event that he is terrified into confessing to acts which he has not in fact committed, or may be confused and thus lead into telling falsehoods of another kind.[131] In creating such rules the principle has been recognised that the effects of becoming involved in the criminal justice process may be severe, and thus, that appropriate safeguards should be built into the system.

In his Second Reading Speech on the original *Criminal Investigation Bill* the then Attorney-General in supporting such principle, stated:

> This Bill is a major measure of reform. Its basic purpose is to codify and clarify the rights and duties of citizens and the Commonwealth Police, when involved in the process of criminal investigation. . . . [T]his Government [is concerned] with the individual, the ordinary man and woman in our community. This concern is nowhere more vital than in the area of criminal investigation and police procedures . . . .[132]

Unfortunately, all rights and duties of citizens involved in the criminal process were not contained in the Bill; all police procedures were not covered.

128 See Devlin, *The Criminal Prosecution in England* (1960); Muir, 'The Rules of the Game' (1973) *Crim. L. R.* 341; Neasey, 'The Rights of the Accused and the Interests of the Community' (1996) 43 *A.L.J.* 482; Teh, 'An Examination of the Judges' Rules in Australia' (1972) 46 *A.L.J.* 489.

129 See Teh, supra n. 128; Neasy, supra n. 128.

130 See generally A.L.R.C. 2; Neasy, supra n. 128.

131 Parliamentary debates during the introduction of the Criminal Law (Amendment) Act 1898, discussed in Scutt, 'From Mystification to Rationality: The Right to Silence Revised' (1974) (unpublished paper, University of Michigan); Harding, 'Balancing Tyrannies in the Administration of Criminal Justice: The Right to Remain Silent' (1978) 52 *A.L.J.* 145.

132 The then Attorney-General The Hon. R. J. Ellicott, 2nd Reading Speech on the Criminal Investigation Bill 1977 (Cwth), Australia, H of R, *Debates*, vol. 104 at 562-7.

Certainly, the fact that police procedures *qua* suspects and accused were proposed to be embodied in an Act, rather than in Judges' Rules not having the force of law and being guidelines only;[133] or in Police Commissioner's Instructions or Standing Orders—which are kept secret from the public,[134] would have been a major advance in terms of the Australian criminal justice system. It would have been an advance for both public and for police: for the proper operation of the criminal justice process, for the good of all engaged in it, it is imperative that all should be apprised of the standards and procedures required.

However, just as it is necessary that standards and procedures required for the orderly investigation of crime in terms of suspects and accused persons be generally known or capable of ascertainment, it would also seem mandatory that witnesses and victims be apprised of their rights, and that police officers in questioning such individuals should know, clearly, what procedures should be adopted. It is not sufficient to state that current operations are enough; the evidence shows categorically that in some instances procedures are not operating effectively.[135] It is also wrong to contend that the introduction of legislation outlining rights for witnesses and victims of crime would upset the confidence the public possesses in relation to the police force. Wherever the public—including the general populace and members of the police force—is not made aware of its rights, and where ignorance rather than knowledge is at the base of any system, society must be the worse for it. Perhaps this is the reason for the lack of respect for the system which is sometimes revealed in public opinion surveys.[136]

The introduction of legislation laying down procedures to be undertaken by police officers in pursuit of investigations when those being questioned are accused persons, suspects, victims or witnesses of crime is essential. It would seem that in regard to the rights of victims and witnesses there would have been nowhere more appropriate for such procedures to be laid down, than in the now lapsed *Criminal Investigation Bill*, to serve as a model for other jurisdictions, not only in Australia. Should the Bill be re-admitted to the legislature, it would seem to be encumbent upon those responsible for the drafting to reconsider its terms in light of the rights of victims and witnesses, and the rights of police in

133 See R. v. Ragen [1964] N.S.W.R. 1515.

134 Id., and n. 49 supra.

135 See sources cited at nn. 6, 36-38, 43-47, 51-59, 69-72 and accompanying text supra.

136 See e.g. Chappell and Wilson, 'Police in Australia' in Chappell and Wilson (1972), supra n. 2, at 345; Jackson, 'Law Enforcement—of Police' in Chappell and Wilson (1971) 277.

interrogating them. Appropriate amendments to such legislation should be made.[137]

137 It is interesting to note that in the United States, where rights of accused persons and suspects are seen as emanating from the Constitution, today an extension of Constitutional rights in relation to police activities is taking place to cover the rights of others questioned by police. See e.g. Berger, 'Man's Trial, Woman's Tribulation': Rape Cases in the Courtroom' (1977) 77 *Colum. L. Rev.* 1, discussing the right to privacy and equal protection of laws as extending to the victim in police and courtroom investigation.