PRESENTATION OF PAPER

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I do not propose to address specifically the elements of my paper dealing with the recent proposals of the British government to modify the right to silence in Northern Ireland and the rest of the United Kingdom. What I will do is discuss more general questions which will indirectly lead back to that issue.

I would like to begin by asking what the primary goals of our criminal justice system are. It seems to me that at least one of those goals, a primary goal, must be an attempt to accurately find the truth about events that occurred in the past. Another goal is that our system of criminal justice should be civilised. Now what that means is rather controversial, and for that reason I propose to focus initially on the truth concern.

The problem with a system which is trying to find the truth, to accurately determine facts, is that we can never be sure that we have found the truth. There is no objectively verifiable means of finding out a fact whether it is an historical fact or even a fact in the physical world. Twentieth century scepticism in the natural sciences has reached the point now where many question the objective verifiability of facts. For that reason it seems to me that the best one can do is try to develop procedures which can reasonably be classified as truth seeking procedures. That is one primary goal of any system whether it is a system of criminal justice, a system of law in general or a system investigating the physical world.

The model that we predominantly adopt is an adversarial model of trial procedure. By that we set up a system in which there are two or more parties who are represented by what one might call champions, lawyers, who are there to provide roughly equal procedural benefits and protections to the people involved in the trial. I am talking about the trial here for the moment. These champions help the parties to produce information at the trial and they scrutinise and criticise the information produced by the other side. The role of the judge in such a system is essentially passive, neutral, a referee - independently involved but not getting down into the battle. That adversarial system is to be contrasted of course with the European model which has a high degree of the inquisitorial element in which the role of the judge is much more active and the role of lawyers correspondingly less significant. The judge is there to go out and actively seek information.

Interestingly enough, in the natural sciences it seems that the adversarial paradigm is seen by many scientists as increasingly the best way to find the truth, or at least attempt to find the truth, because of the idea that you have a procedure whereby all assertions are tested by criticism from independent people. Thus you do not accept a proposition of physical science until it has been tested by other experts in the area who are independent and are not involved in the process of investigation and experiment.

An additional complication in our system, this fundamentally adversarial system, is that in a criminal trial there is an accusatorial element. Certain procedural

safeguards are introduced exclusively for the benefit of the accused. For example, the standard of proof is not balance of probabilities but proof beyond reasonable doubt - the idea being that we should minimise the risk of convicting innocent people. We modify the adversarial system to provide greater protection for the accused because of the perception that it is better that ten guilty people go free than that one innocent person goes to gaol. Another advantage that we give in our system of trial to the accused is the idea that an accused should not be compelled to assist in his or her own conviction. Whether or not this is seen as an aspect of a civilized procedure, I think that that is really the rationale. It is somehow seen as uncivilized, unbefitting the recognition of the dignity of the individual, to force a person to virtually convict themselves out of their own mouth. The difficulty with that concept, and I will be talking about this later, is that the scope of it is rather unclear and its primary rationale is rather unclear, and that has implications at the pre-trial level as well, which is where I want to now go.

While our trials may be adversarial/accusatorial, that is not the situation pre-trial. In our system the process of criminal investigation is is primarily, effectively, inquisitorial. There is no champion to assist the suspect, there is no impartial referee to ensure that the rules are complied with. The reason why that is the case is that in the nineteenth century, when the police developed as an institution of criminal investigation, the role of the police was essentially to quickly move the suspect to the judiciary, to the Justice of the Peace, who would then in turn carry out investigations. The role of the police was limited but of course, that is no longer the case in our society. The role of the police has expanded enormously. They investigate much more than they used to and the significance of that is that, while we have an adversarial trial, to a large extent the process of criminal investigation dominates what happens at trial. The police produce a great mass of information, because of their resources, which I would suggest is sometimes one-sided, which, when it comes to the trial, notwithstanding the wonderful theory of equal sides with an impartial referee, tends to dominate that trial. I think an American professor summed up the problem that that causes by titling an article he wrote "Equal Justice in the Gate-houses and Mansions of American Criminal Procedure". The point being that it is all very well to have a wonderful mansion where we have beautiful rules which are designed to provide an effective method of finding the truth and a civilized form of procedure, but are not a great deal of help when you have to go through the gatehouse, a considerably less beautiful institution, to get to the mansion.

Don't get me wrong - I am not suggesting here that the process of police criminal investigation is intrinsically unacceptable. What I am really doing is raising the following question. If we believe that the adversarial system with its inquisitorial elements is an effective and an appropriate way of both finding the truth and providing a civilized form of criminal procedure we are kidding ourselves to an extent if we think that that is in fact the reality because what happens pre-trial is enormously important for what happens at trial. So what is the solution to that?

The solution that the existing law provides is two-fold. It does two things. Firstly, it attempts to weed out poor quality information that is produced pre-trial. It

excludes evidence which is of perceived poor quality. For example a confession that was obtained involuntarily is inadmissible. More recently, rules have developed to ensure that the evidence of certain events is of higher quality. So, for example, oral police evidence of what was said during an interrogation is now being subjected to increasing scrutiny, and rules are being developed to weed out such evidence.

The other basic mechanism which our system adopts to overcome the problem I have referred to is that it emphasises, on the one hand, the duties of the police during criminal investigation and, on the other hand, the rights of the accused or the suspect during criminal investigation. The duties of the police are essentially to obey certain procedural rules to avoid impropriety and to act fairly. The rights of the accused, similarly to those at trial, are not to be required to help the police to obtain information which can be used to convict them. My view is that that system is not satisfactory. I believe that the things that I have talked about are really band-aids. Theoretically, they are all very well, but the reality is different. The fact that a confession must be voluntary does not prevent the police from using all sorts of pressures to speak and to confess on criminal suspects. The right to silence is all very well but in the vast majority of cases the suspect does not take advantage of it because of these pressures. I am not suggesting such pressures are necessarily unacceptable, the mere pressure from being in a police station, isolated, subject to accusations of serious crimes without access to independent help. It is inevitable that there is enormous pressure on a suspect. But my point is that all the theoretical protections in the world don't change the reality of what happens in pre-trial criminal investigation. The theory is fine but in practice the reality is rather different - the right, for example, to silence is only used by a small minority of people who are being interrogated, and usually the people who do take advantage of it are people who have prior criminal experience of the system itself or members of middle class advised by lawyers. The question must therefore be asked: what is the alternative?

There are two alternatives. One is we simply go back to the old system whereby the police essentially are prohibited from engaging in much criminal investigation so that they are forced to shunt the suspect quickly over to the judicial branch. This would be in fact like the European model where you have investigating magistrates who have judicial responsibilities but also go out and obtain information. I do not see that as a practical option in New South Wales in the 1980s or 1990s. I am not even sure that it is totally satisfactory. If you believe in the adversarial concept, if you believe that there should be a competition, a continual criticism of what happens then the danger with the European model is that even an investigating magistrate tends to see his/her job as finding information to prove guilt and there is not a sufficient testing of that information.

The other option is that you really do support an adversarial system. You bring the adversarial system back to the important phase which is pre-trial investigation. What I mean by that is that you ensure that suspects have legal advice and the support of a knowledgeable lawyer. That lawyer would ensure that there was no abuse of any kind of the suspect. That lawyer would ensure that information obtained by the police, and by interrogation, or various techniques of identification,

was relatively reliable. This is where I come back to my paper. The conclusion I reached in my paper was that you should have a system where you (a) ensure electronic recording and (b) ensure the presence of a lawyer (and I notice that that is what is happening in the United Kingdom now that they are moving rapidly towards electronic recording, either tape or video, of interrogations and have set aside 20,000,000 pounds in the last year to bring about free legal advice for suspects). If you do that, the problem is that you will no longer have many admissions. The reality is suspects will say very little because as Justice Jackson, of the United States Supreme Court, said "Any lawyer worth his salt will advise his client that under no circumstances should he say anything at all to the police." Some of you will say fine, no problem with that, that is okay. I don't think that such a result is in the public interest. I don't think we should have a system in which criminal suspects are encouraged to say nothing. Admissions are a necessary part of our legal system as long as there is no abuse by the police, and as long as any statements made by the suspects are reliable. I see the right to silence as essentially something which has been developed historically to serve those goals, to ensure that there is no police abuse and to ensure that if the suspect does choose to speak that it is likely that the confession is reliable. If those goals are met by proper recording and the presence of a lawyer then I don't think you need the right to silence any more. I am not for a moment suggesting that a suspect should be compelled to speak. All I am talking about, of course, is the possibility of inferences being drawn from silence if the suspect remains silent.

My conclusion is that I think that our system should introduce adversarial elements not only at trial but at pre-trial. If that is done then the quid pro quo is that we should modify the right to silence.