

Can the principle in *O'Reilly v Mackman*, even carried to its logical conclusion, cause difficulties in practice? . . . Order 53 has built within it a power to direct that an action started by way of judicial review should be able to be continued as though begun by writ. Although there is no reverse escape route this is to prevent by-passing the safeguards provided for in the order by commencing an action by writ when it should have been commenced by judicial review. In cases of doubt the applicant should proceed initially by judicial review just in case leave is necessary.

* * *

odds and ends

□ *queensland inquiry.* The Fitzgerald inquiry in Queensland, being conducted by former ALRC Commissioner, Mr Tony Fitzgerald QC, into allegations of corruption in the Queensland Police Force has run into difficulties with interstate witnesses. The *Sydney Morning Herald* (6 October 1987) reported that the Queensland Attorney-General Mr Clauson announced amendments to the Commissions of Inquiry Act to enable the inquiry to compel interstate witnesses to appear before it.

The announcement follows approaches by Mr Fitzgerald to the government for assistance in requiring prospective witnesses overseas and interstate to appear.

Mr Clauson had admitted that without fresh legislation the Queensland government appeared to be powerless to force witnesses return from overseas or from interstate for the inquiry.

The ALRC report on service and execution of process is presently with the printer and is expected to be

tabled within the next few weeks. The question of interstate extradition was specifically dealt with in the ALRC's terms of reference and it can be anticipated that the ALRC will be recommending amendments to the Commonwealth Service and Execution of Process Act which would meet Mr Clauson's and Mr Fitzgerald's needs.

□ *Australian Bicentennial International Congress on Corrective Services.* A major international Congress on Corrective Services is to be held in Australia in Sydney, from January 24-28, 1988. The Congress will cover topics ranging from the traditional custodial issues, prison based programs and criminological research, to community based corrections and the wider aspects of the criminal justice system incorporating the role of the media, the legal profession and community organisations in corrections. It will also debate home detention and intensive supervision, AIDS, drug abuse in prison, prisoner rights and grievance procedures, victims, the future of parole, prison architecture, standards and accreditations and professional development in corrections. Further information can be obtained by writing to the Bicentennial Congress Secretariat, PO Box K390, Haymarket, Sydney, NSW 2001 Australia.

□ *police powers of arrest and detention.* The New South Wales Law Reform Commission has proposed a wide range of reforms to the law governing police powers of arrest and detention. The suggested changes, contained in a Discussion Paper released by the Commission recently, reflect the need to bring ancient rules of criminal procedure into line with the needs of contemporary society.

The major features of the proposals set out in the Commission's paper are:

- There should be a single code of procedure, expressed in understandable terms, governing powers of arrest and detention.
- A police officer should have the power to stop and search, where reasonable grounds exist, a person or vehicle in a public place.
- A police officer should have the power, where reasonable grounds exist, to require a person to disclose his or her name and address.
- Involuntary detention without arrest should generally be prohibited.
- The power of arrest should only be used where the use of a summons or court attendance notice procedure is not practicable.
- The power of private citizens to make an arrest should be restricted to offences which carry a maximum penalty of 12 months imprisonment or more.
- An arrested person must be brought as soon as possible after arrest before custody review officer at the nearest police station.
- All relevant communication at a police station between a police officer, including the custody review officer, and an arrested person should be recorded by means of electronic equipment.
- An arrested person should be informed of the right and be entitled to have access to a lawyer at a police station.
- An arrested person may be detained at a police station for so long as is reasonable but for no more than four hours before either being released or brought before a court.
- The period during which an arrested person may be detained can be extended on the order of a court for such time as the court considers reasonable.
- Wherever the procedure relating to arrest and detention requires the involvement of a court, the court should be constituted by a judge, magistrate or a justice employed by the Attorney General's Department.
- To ensure that applications for authorisation of prescribed procedures may be heard at any time, a "court" should be available for contact by telephone outside normal court sitting times.
- Investigative procedures authorised by statute may be conducted at a police station after arrest.
- A police officer may take the fingerprints or photograph of an arrested person where there are reasonable grounds to do so.
- A police officer or, where appropriate, a qualified medical practitioner, should be entitled to obtain forensic evidence from an arrested person without his or her consent.
- An arrested person may be released unconditionally, or on condition that he or she attends either at a police station or at a court.
- Evidence obtained in breach of procedural rules should generally

be inadmissible unless the party seeking to have it admitted can show its admission would not be unfair or contrary to the interests of justice.

In developing the tentative proposals set out in the Discussion Paper, the NSWLRC has tried to ensure that respect for the personal liberty of the individual and the opportunity for effective law enforcement are both features of the administration of criminal justice in New South Wales. The suggested procedure outlined in the paper is designed to enable the police to perform their function effectively but to make the exercise of investigative powers subject to constraints and independent review procedures which ensure that those powers are not used unnecessarily or unreasonably. Comments on the DP are welcome and can be sent to the NSWLRC at Goodsell Building, Chifley Square, Sydney.

□ *new human rights centre.* A centre for the study of human rights issues has been established at the University of New South Wales. Based within the Faculty of Law, the centre will provide a focus for the collection and dissemination of information about human rights issues. In collaboration with UNESCO, the centre organised a seminar on Human Rights Teaching, Information and Dissemination in the Asian-Pacific Region in May this year. The inaugural human rights lecture 'The Concept of Economic and Social Rights and its relevance in Australia' was delivered on the 13 August 1987 by Professor Philip Alston. A video recording was made of that lecture for the benefit of the Human Rights and Equal Opportunity Commission's congress in September. The Human Rights Centre organised a sem-

inar on 'Data Protection and Privacy after the Australia Card' in October. Consideration is being given to various research projects including freedom of the press in the South Pacific and a refugee data base project. The centre invites anyone interested in these issues or any other aspect of human rights to get in touch. The director of the centre is Associate Professor Pat Hyndman who can be contacted at the Faculty of Law, University of New South Wales, PO Box 1, Kensington NSW 2033.

□ *review of commonwealth criminal law.* The Review of Commonwealth Criminal Law (being conducted by Sir Harry Gibbs, former Chief Justice of the High Court, Mr Justice Watson and Mr Andrew Menzies) has released two discussion papers: *Onus of Proof in Criminal Proceedings and Averment Provisions* (DP 1) and *Common Law Offences and the Commonwealth* (DP 2). The first is principally concerned with two issues, namely onus of proof and the proper use in Commonwealth legislation of averment provisions and the second is directed towards the future role of common law offences in Commonwealth Criminal Law.

In November 1982 the Senate Standing Committee on Constitutional and Legal Affairs presented a report to the Senate recommending that the accused no longer bear the persuasive burden of proof in respect of common law defences such as insanity and in respect of statutory defences. The Senate Committee appears to have been substantially influenced by the Eleventh Report of the English Criminal Law Revision Committee which recommended a statutory provision along these lines. The Attorney-General's Department has, on the other hand, expressed the view that, where a matter is peculiarly

within the knowledge of the defendant or, alternatively, the Crown would have great expense or difficulty in establishing the issue which could readily or cheaply be proved by the defendant, the persuasive burden should pass to the defendant. The Review Committee has reached no concluded view as to the desirability or wisdom of enacting a general provision on the lines of the provision recommended by the Senate Committee and invites submissions.

Perhaps surprisingly, it is not clear whether there is a separate common law of the Commonwealth. The Review Committee is considering whether any common law offences should form part of any future Commonwealth Act consolidating Commonwealth criminal laws and is interested in receiving submissions on the following issues:

- Should any future Commonwealth Act consolidating Commonwealth criminal laws abolish common law offences in relation to matters dealt with in that Act and in other Commonwealth laws and make provision accordingly for all offences that may be appropriately taken for Commonwealth purposes from the common law?
- Should an offence of breach of statutory command be included in the future Act?
- Should particular offences once thought to be encompassed in the common law offence of effecting a public mischief, such as making false statements to the police likely to cause the police to investigate such matters, be included in the future Act?
- Should an offence equivalent to the common law offence of misprision

of felony be included in the future Act and, if so, in relation to what Commonwealth offences should it apply?

- Should the equivalent of section 47 of the Crimes Act 1914 (to be included in the future Act) be extended to escape from lawful custody before conviction and escape from custody at the Governor-General's Pleasure? Should these offences distinguish as regards penalty between escape before or after conviction?
 - Should an equivalent of the common law offence of personating a juror apply to all federal courts and courts exercising federal jurisdiction?
 - Should the future Act include
 - an extended version of sections 73 and 73A of the Crimes Act 1914 (Cth) covering circumstances where the bribe proposal related to an exercise of duty, authority or influence that the recipient of the payment or benefit either possessed or induced the payer to believe he or she possessed; and in addition
 - a modified version of the common law offence of extortion, namely, wrongful taking of money by an officer under colour of his or her office, knowing that the money was not due
- or either one of such possible offences?
- Should a new specific offence be included in the Act of fraud by holder of a public office which

would take into account the position of trust relating to that office?

- Should a new offence be included in the future Act equivalent in part to the common law offence of non-feasance or neglect of duty, for example, wilful failure by an office holder to carry out a duty of his or her office knowing or having reason to believe that his or her failure may cause loss of life, personal injury or serious property damage?
- Should the future Act include a provision making it an offence for the holder of a public office to exercise a power or discretion vested in him or her for an improper or dishonest motive?
- Is there any other common law offence which should be included in the future Act?

Comments may be sent to the Secretary, Review of Commonwealth Criminal Law, PO Box 237, Civic Square, ACT, 2608.

* * *

publications

Australia ALRC

- Report on Matrimonial Property, 1987, No 39
- Discussion Paper on Sentencing: Procedure, 1987, DP 29
- Discussion Paper on Sentencing: Prisons, 1987, DP 31.
- Discussion Paper on General Insolvency Inquiry, 1987, DP 32.

NSW LRC

- Discussion Paper on Police Powers of Arrest and Detention, 1987, DP 16.

Tas LRC

- Report on Minors' Contracts, 1987, No 48.
- Report on Burden of Proof in Criminal Proceedings and Statutory Offices, 1987, No 49. (to be tabled)
- Report on Suretyship and Guarantee, 1987, No 50. (to be tabled)
- Report on Variation of Private Trusts, 1987, No 51. (to be tabled)
- Annual Report 1986.

VLCC

- Third Report on the Operation of Section 32 of the Interpretation of Legislation Act 1984, 1987.
- Ninth Report on Subordinate Legislation, 1987.

VLRC

- Report on Rape and Allied Offences: Substantive Aspects, 1987, No 7.
- Report on Mortgagee Sales and Judgment Debts, 1987, No 8.
- Estate Agents and Auctioneers, DP 1, 1987 (Joint VLRC and Regulation Review Unit DP).
- Report on Plain English and the Law, 1987, No 9 includes 8 appendixes published separately in 3 volumes: Drafting Manual, Takeovers Code, Magistrates Act Summons & other documents.