

## DISCUSSION PAPER 1

*Prisoners Action Group*

### WILL VIDEO STOP VERBALS?

Now that general agreement has emerged on the need to clean up police interrogations, let's recognise how the issue arose.

The current move to introduce video recording came after many years of protest at the systematic fabrications of 'confessions' by police at every level. This fact is now acknowledged by numerous commissions of inquiry, High Court judgments and senior police themselves. Ex-cop Jack Herbert told the Fitzgerald Inquiry that there were more fabricated 'confessions' in Queensland than real ones; the situation in NSW is no better.

The issue of police verbal is before us today because of the exposure of gross criminality and dishonesty in Australian police forces, and because of the exposure of multiple instances of police perjury, which led in many cases to the gaoling of totally innocent persons. It is also before us because every NSW Attorney General for at least the past ninety years, in full knowledge of the extent of the crimes being committed, has acquiesced by inaction. NSW judges have also generally done nothing, preferring to condone or ignore mass police perjury to expose verbal to the public.

In apparent ignorance of this background, suggestions are now made that "video may end accusations of 'verballing'" (*Sydney Morning Herald* 4 March 1989); but accusations have never been the problem: the perjury and its acceptance is the problem. It is bizarre that a proposal, originally designed to end the years of agony for the victims of police fabrications, should now be portrayed as basically a device for protecting the image of the fabricators. The point must surely be to establish a process that puts an end to the fabrication of 'confessions', and protects the rights of accused persons.

#### **Important Principles**

- that every person's right to silence without adverse inferences being drawn, right to legal counsel and freedom from any sort of forced self-incrimination, in the face of criminal accusations, is maintained and defended.
- that the onus of proving a criminal charge remains with the prosecution.
- that any evidence before a court of alleged confessions be substantiated by an electronic recording conducted in fair and verifiable conditions.
- that any such confessions be demonstrably voluntary and free of any oppressive conditions, threats or inducements.

### **The Dangers of Video**

In current circumstances, video recording of interrogations may appear to be the best course; but it would be naive to ignore the dangers of this new regime. The overseas and interstate experience has shown that video can mean replacement of trial by jury with trial by police video: that the case and the accused's plea will be decided by the extent to which a contrived piece of theatre is produced by those with all the new technology in their hands.

The same police that have systematically abused the public trust placed in them now say they intend video as a powerful tool against accused persons, who may appear suspicious to a jury when filmed in a police station "being questioned in a heavy situation" (NSW Police spokesperson, *Telegraph* 17 February 1989). This "heavy situation" remark reminds us that video in itself provides no guarantee of the fairness or conditions of the interview.

These are some of the dangers of the uncontrolled use of video:

- 1) that police, in their dismay at losing the 'open go' that was previously open to them with unsigned confession, may even attempt to demand an abolition of the centuries-old right to silence "in exchange" for the use of video; previously the accused was unnecessary to the process of fabricating a confession, but now he or she may well become a compelled actor in the contrived theatre of his or her own condemnation.
- 2) that, in the absence of a legal representative of the accused being able to give counsel *before* the proposed interview, threats or inducements will continue to operate as before, destroying the voluntariness of any taped confessions;
- 3) that police investigation will now centre far more on the production of a confession than on genuine investigation before arrest;
- 4) that the system will be avoided, if video-taping is not mandatory and other evidence of 'confessions' is allowed.
- 5) that partial recording will omit important questions, answers and context, and that partial application will make such recording applicable only to certain cries and not others;
- 6) that video tapes may be used in court before juries, by police, in an attempt to portray distressed, nervous or injured persons as being shifty or guilty.

### **Putting an End to Fraudulent Confessions**

With the above considerations in mind, video-recorded police interviews seem certain to further violate the rights of accused persons UNLESS:

1) voluntariness in the making of a video-taped confession is established by the *prior presence* of the lawyer of the accused, so that the practice of threats and inducements is halted; a legal aid scheme can easily be funded by the savings from shorter trials obtained through uncontested interviews;

2) the accused person's right to silence is played on tape before the accused in a pre-recorded warning, and that no adverse inferences may be drawn from the accused asserting his or her right to silence.

3) in the case of the accused person refusing to answer questions three times in a row, further interrogation is considered oppressive and illegal; and that no illegally obtained confessions are admissible as evidence in court;

4) no evidence of alleged 'confessions' be admissible as evidence unless it is video-recorded;

5) the totality of the interview be video-recorded, without omissions or tampering, and that such rules apply to *all* prosecutions in which 'confessional' material is to be presented;

6) the video tape not be admissible as evidence in court for the purpose of attempting to stereotype or denigrate the person in police custody, before the jury. Facts can be ascertained from the tape, which need only be shown in open court in the event of a material dispute.

Video *could* put an end to police verbal - fabricated 'confessions' - *if and only if* the above essential safeguards are implemented. A failure to adequately control the use of video will allow the current criminal practices and human rights abuses to continue unchecked.