PRESENTATION OF PAPER

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It is an honour and a privilege for me to be here this afternoon to speak to the paper that I was invited to prepare. I was pleased to accept the invitation because it gives me an opportunity to say some of the things relevant to the issues raised in the *Williams* and *Carr* cases which could not be said in argument in relation to either of the two cases.

You might wonder why a Tasmanian would travel to these far parts and I suppose no better example or reason could be found than what Peter Conrad said in a recent book of his: "Tasmania has bred more audaciously inventive criminals of its own than any other place in Australia". Of the Risden Prison in Hobart he said:

> Among the current internees is a man who fed his wife to the mincer after perfecting his technique on a side of lamb. A doctor who asphyxiated his mistress whilst she fellated him, positioning his thumbs on her carotid arteries, and a student recently graduated from the University with a degree in information science who became upset by his girl friend's liaison with someone else and depilating his face first, dressed himself up as a woman, adopted the name of 'Linda', called on his rival, vamped seductively about the room and then when the rival responded defended his own feminine virtue by stabbing the attacker full of holes only to tell police that when he was arrested that "Linda did it".

Williams v. The Queen arose in Tasmania because of the need to seek, what I have described as legal solutions, to the factual difficulties and injustices caused by alleged police verbals. Sir Anthony Mason prepared a paper in 1977 which he delivered at the Tasmanian Bar Association in which he said of the decisions of the High Court in *Driscoll* and *Wright*:

> The recent decisions will of course have an immediate direct effect on the conduct of criminal trials. They will also have an ultimate and indirect effect in encouraging a closer and more thorough investigation of criminal offences with a view to the presentation of cogent evidence of a non-confessional nature.

That paper was delivered in 1977 and the members of the current audience will be aware as to whether the sentiments therein expressed have any relevance whatsoever in New South Wales in the succeeding ten years. Certainly they seem to have little relevance in Tasmania. What happened as a result of the High Court cases in *Driscoll* and *Wright* was that in general little regard was had to them and in my paper I quote a couple of examples of rulings of the Supreme Court on voir dires where *Driscoll* and *Wright* were held to be inapplicable.

Also in Tasmania it seemed that the High Court case of *McPherson* and the House of Lords case of *Adjodha* were not followed insofar as the question of whether

or not a trial judge when adjudicating upon the admissibility of a disputed confession ought to embark upon a finding of fact as to whether or not that disputed confession was in fact made. That issue it seems is still a live issue and there are references to be found in recent cases as to whether or not *McPherson v. The Queen* is still authority for the proposition that a trial judge in those circumstances has a responsibility to make a finding of fact that the confession was in fact made.

In my paper I refer to a quotation from the judgment of Brennan and Dawson JJ. in the recently decided case of *Hoch* and I quote from a very informative paper written by Robert Mulholland, QC, entitled "Judicial Discretion in a Criminal Trial Protection or Pretence", which paper was delivered in Queensland.

It seems to me that for us to be debating in 1989 the question of whether or not confessions were in fact made is in itself a disgrace and exemplifies the failure of authorities to come to grips with the very significant issues that arise in this area of the law.

Thus in Tasmania the situation was, and I understand it not to be vastly different in other jurisdictions, that the problem created by verbals went ambulating along and that there was little attention to the real injustices which flowed from that situation. It is therefore entirely predictable and it was predictable that there would be legal attempts to do what could be done to limit the capacity and opportunity of the authorities to produce confessional evidence in circumstances where allegations of verbals could be made and it was in that environment that *Williams v. The Queen* occurred.

It is interesting to note that in the discussion paper prepared by Paul Byrne in this matter, and in the Law Reform Commission paper quoted, *Williams v. The Queen* is described as not stating any new principles of law but as merely setting out the law as we all knew it to be. I suspect those of us who spent a long time in the criminal court were grateful to the High Court in *Williams v The Queen* because they set out what we believed the law to be very clearly and made the task of arguing that that was the law much easier.

A Tasmanian case which preceded *Williams* and which is referred to on a number of occasions in the judgments of the High Court was a case of *Clarke*. *Clarke* was a case which was singularly inappropriate to take to the High Court because of the factual circumstances of the case. Mr Clarke was charged with murdering a person in a country town called Georgetown at about 2.30 a.m. by pointing a shotgun at him from six feet away and blowing his head off. He had then walked some 30 metres to the police station, knocked on the door, and stood with his arms up with a gun in his hand and said that he wished to speak to the police. The police sat Mr Clarke down from that time until the early morning and commenced a record of interview with him at about 7.30 or 8.00 a.m., continuing to question him until about 11.00 a.m. Attempts were made at Mr Clarke's trial to have excluded all evidence of conversations between Clarke and the police from about 5.00 a.m. onwards. Those

attempts failed and given that the evidence was given that the only evidence as to the availability of a court was that a court would be available some time after 10.00 a.m. it was thought by those who were advising Mr Clarke that there was little opportunity to successfully take *Clarke v. The Queen* to the High Court.

What happened was that during Clarke's trial the case of *Iorlano* was being decided in Victoria. Judge Mulhally excluded some evidence of a confessional nature in that trial and the Federal prosecuting authorities attempted to have the High Court overrule Judge Mulhally's ruling. The High Court in a unanimous one-page decision in *Iorlano* set out some significant matters of principle relevant to the question of unlawful detention.

When *Williams v The Queen* came before the Court of Criminal Appeal in Tasmania the court either neglected or was not influenced by the full High Court decision in *Iorlano* and the rest is history. Why, you ask, in this forum does one talk about *Williams*? The reason, in my respectful submission, is that *Williams* shows that there was a need for counsel and for those who had the interests of the criminal justice system at heart to take every possible step they could to limit the opportunities during which disputed confessional evidence could come into existence, to use a neutral phrase. Where do you go and that is why I commenced my paper by stating the proposition that *Williams'*case is all about verbals it is not about the detaining of a person in custody for one, two, three, or four hours.

The facts found by the trial judge in *Williams* were such that they provided an appropriate vehicle for the matter to be resolved. Having considered the principle to be extracted from *Williams* the next place to go is, in my opinion, to *Cleland* and to ascertain the true nature and extent of the unfairness discretion. Since writing the paper that has been circulated the High Court have given their decision in a case of *Duke* and I will refer to that in just a moment. Certainly there has been considerable debate in Australia since *Cleland's* case as to the nature and the extent of the unfairness discretion and in particular whether unfairness not resulting in a lack of reliability of confessional evidence is an unfairness which could ground an activation of that discretion. In my paper I refer to what is, in my opinion, the critical sentence in Dawson J.'s judgment and I point out that the post-*Williams* debate has failed to recognize that there will be many occasions when a finding that evidence has been unlawfully obtained and or obtained in circumstances where an accused is unlawfully detained will have significant factual ramifications insofar as the unfairness discretion is concerned.

The absolute vulnerability of an accused person in the custody of police is well described by Deane J. in his judgment in *Cleland's* case (at pages 24, 25, and 26). It is my opinion that it is these passages that significantly influenced the trial judge in *Williams* case to exercise his discretion to exclude the confessions. The trial judge's ruling in *Williams* in fact excluded the confessions on the basis of the unfairness discretion and on the basis that the confessions had been obtained while the accused was in unlawful custody. That reasoning is somewhat similar to that which one now finds expressed in *Dukes* nearly five years later.

I quote from Deane J. in *Carr* where His Honour sets out with great clarity and tremendous insight the great difficulties faced by a suspect and the peculiar vulnerability of a suspect when at a police station. I observed that it is my opinion that a significant responsibility rests upon counsel involved in criminal matters which involved the question of the disputed admissibility of alleged confessional evidence. To very carefully analyse the factual ramifications of each lawful or unlawful detention of a person in custody. It is clear that the isolation of a suspect in circumstances where that person may need the assistance of friends, family, and/or legal advice is but one of the factors which could and will operate to induce the court to accept that the accused has been unfairly treated and/or that it would be unfair to use the confessional material thus obtained. It can also be said that the obtaining of alleged confessional material from an accused in such circumstances where there is no independent corroboration of the fact of the confession in itself operates unfairly *inter alia* as a consequence of the High Court in *Carr*.

In practical terms one benefit to be obtained by an accused in consequence of a strict compliance with *Williams* by the law enforcement agencies in Tasmania is that someone who has been taken into custody has to be taken before a magistrate, who has the statutory requirement to ask that person if they wish to have legal advice. It is not solely the fact of the availability of the opportunity to get legal advice that is significant it is the fact of the removal of the suspect from the confines of the police station to a place from which that person can seek assistance from all types of other people that becomes of significance. The invitation to obtain legal advice is likely to bring home to an accused person that there exists an opportunity to seek advice as to their predicament, and there and then they have the opportunity to come into contact with somebody independent of the investigation.

Having considered the nature and extent of the *Cleland* discretion I argued in my paper that the next place to go is the judgment of King C.J. in the case of *Waye v. The Queen* in South Australia, where His Honour sets out the circumstances in which, in his opinion, the discretion relating to evidence unlawfully obtained should be exercised. I observe in my paper that that discretion in my opinion has not been fully explored and that the observations of King C.J. in that case are of particular significance and will become of greater significance the more the question of unfairness arises as well as unlawful activity.

Van Der Meer is a further case recently decided relating to this area. However, I observe that the facts may be regarded as unusual in that there was no dispute as to the accuracy of the narration of the confessional evidence in that case. The scope for successfully invoking the court's discretion to exclude evidence unlawfully obtained in circumstances where there is no dispute as to its accuracy is thus much narrower.

Robert Mulholland in the paper previously referred to observed:

> We are probably all in agreement that it is highly desirable that the guilty are apprehended, convicted and punished. The point of disagreement occurs when the price to be paid is considered. This is not sentiment but a recognition of the importance attaching to the fact that those sworn to uphold the law are required to obey it. The argument against the latter approach is that the police are largely are unaffected by judicial criticism and that realism requires that the police in some cases use illegal means in order to apprehend and convict the criminals.

It is the nature and the extent of that discretion and the circumstances in which it will be exercised that in my opinion will become of particular relevance in due course.

Having given consideration to the circumstances surrounding the obtaining of confessional evidence which is likely to be disputed and recognizing that it is not a perfect world and that we are not going to be in a position where all disputed confessional evidence will be excluded, the next question that arises is: what is to be done with the evidence once admitted? Of course it is in that circumstance that the case of *Carr v. The Queen* and the subsequent case of *Duke* become important.

The facts of *Carr* are of very small compass and appear in the judgment. Basically the allegation was that he conducted an armed robbery in one of the main streets in Launceston and the only evidence against him was an alleged unsigned record of interview coupled with an allegation by a senior police officer connected with the investigation that he had seen the fellow somewhere near the place of the robbery within 10 minutes of the robbery. However Mr Carr was dressed differently.

One of the facts that does not become clear when you read the two reports is that Mr Carr, had he called alibi witnesses, would have been calling one Mr Williams - the same Mr Williams previously mentioned - to give evidence on his behalf. It will be of interest to those who have read *Carr* to know that he was re-tried, he gave sworn evidence on the second occasion and did not give an unsworn statement, was acquitted and the Crown appealed, filing a Notice of Appeal which read in part "the learned trial judge was wrong in law in that he followed the High Court in *Carr v. The Queen*". Not surprisingly the Crown did not continue with that.

Duke's case is an important case relating to the use to which this disputed evidence may be put. In my opinion, Brennan and Toohey JJ. in *Duke's* case, a judgment given on the 7 February 1989, both argue strongly that the unfairness discretion does not relate solely to evidence which can be said to be unreliable i.e. that the question of whether evidence should be excluded does not relate solely to its reliability. Mason C.J. in *Van der Meer* seems to take the same approach and Dean J. in *Duke* makes similar observations. It can thus be seen, in my opinion, that the nature and the extent of the unfairness discretion has been considerably extended by *Duke* and it is at least strongly arguable that the seeking to have admitted confessional evidence in circumstances where there is no corroboration and when it can be argued that the reception of such evidence would be unfair to an accused is

going to give rise to many battles in the courts. I suspect that many will be resolved in favour of the accused. *Duke's* case requires considerable attention for that reason.

I observe that those with significant experience in the criminal law cannot doubt that Deane J.'s judgment in *Carr* is one of the most significant judgments in the development of the criminal law. That the remaining members of the High Court did not concur in His Honour's conclusions and or his reasoning does not detract from the force of the reasoning in that judgment or the implications that it has for the development of the criminal law in the future. It is of interest to note that His Honour in *Duke's* case made the following observation when speaking of his own judgment in *Carr*:

> There is nothing in the judgments of the other members of the court in that case which requires or causes me to resile from or qualify the conclusions that I there expressed - that the necessary recognition of the perceptible risk of such fabrication i.e. of confessions in this country entails acceptance of the fact that there is ordinarily a perceptible risk of unfair trial and even a miscarriage of justice in a case where the prosecution leads and relies upon disputed and uncorroborated police evidence that the accused whilst in custody made an oral confession.

I observe that in my opinion governments have shirked their responsibility to articulate rules relating to this area of the law. They have behaved very much just like the proverbial ostrich and sought to leave it to the courts in the hope that the courts "will sort it out", and I observe with more refinement that that is just not good enough. The fine balance required to be created can in some circumstances be created by the courts but the fundamental responsibility rests with the legislature to articulate rules, and if those rules are found to be wanting, then to amend them so that that deficiency no longer exists.

I observe that the ultimate responsibility which rests upon counsel is to seek to ascertain factual and legal remedies to situations which are likely and have inevitably caused significant injustice. In my opinion the bottom line must be fairness. The trial process must be fair. The obligation I observe is upon the Bench to be strident in the protection of the accused in his position and to recognize that the authorities have within their own resources capacity to ensure that persons are *never* unlawfully detained and that alleged admissions can be corroborated satisfactorily in one way or another. The failure by the authorities to take the appropriate steps will in my opinion make it unfair to an accused to use such evidence at his trial.

I then quote from a very experienced judge of the Tasmanian Supreme Court, Neasey J., who, in relation to an occasion where he awarded costs against the State in a case which was largely based on an unsigned confession, said:

> In summing up to the jury I have left them in no doubt that my view on the evidence was that there was a grave danger of an injustice being done to the

applicant if she should be found guilty on the evidence before them, unless they felt sufficiently confident of their ability to make a subjective judgment about the truth or otherwise of the evidence of oral admissions given by police officers, so as to rely upon this as the principal basis of being satisfied of the applicant's guilt beyond reasonable doubt.

I observe that the fact that the law should be slow to keep up with technology in the pace of society in this century is not only a matter for regret but also justifies severe criticism of those who have had the opportunity to bring this aspect of our legal system up to date. I sometimes suspect that the issues raised in this paper are too difficult for legislatures and that governments of all political persuasions would prefer to have the very delicate balance required maintained by the courts. I argue that that is not enough. In my opinion it is an abrogation of the responsibility of the legislatures to leave such areas without relevant practical amendments. As indicated earlier I argue that the bottom line must be fairness. I am conscious that it is often not useful to seek an analogy but it seems to me that, as the issues under discussion are often seen as a contest, a boxing analogy is perhaps appropriate. If you have a prize fight in the ring where everyone sees what is going on then everyone can make a judgment as to what is fair or not and whether the result is a fair result. If you have a street fight down the alley then all you see are the results that ensue therefrom, and you are ill-informed and not in a position to make a proper judgment as to whether the results are in fact fair, or unfair, and as to what flows from them.

I conclude my paper by referring to Deane J.'s judgment in *Van der Meer* where His Honour articulates his views as to the requirement of a sound criminal justice system and I conclude by saying - as indicated earlier in the paper - it is my belief that the real question to be answered by those in authority is: what is a fair manner in which to treat an accused person? A system that ensures that there can be absolute knowledge on the part of the courts and therefore the public of everything that takes place between and accused and the authorities is a system which will ensure that the judgment as to what is or is not fair will be made only by those persons fully informed of the facts. One of the areas, in my opinion, that is going to again be of significance is the understanding of accused persons of the warning given. I think that we are going to see developing a less parrot-like rabbiting of the warning and a greater vigilance by courts to ensure that it is not merely the words that are said to somebody but that the courts are satisfied that they have an understanding of those words. It will only be when the courts can decide what is or not is fair that the question of whether or not the vulnerability earlier referred to has resulted in or might result in injustice can be properly tested. It will only be then that the potential for an innocent person to be convicted can be remedied. To me it is of far greater importance that there be absolute knowledge of what takes place between a suspect and the authorities and fair rules applied as to that time than it is to arbitrarily delineate the time during which the authorities may have access to a suspect with his or her consent.