Contemporary Comment

THE REPORT OF THE INQUIRY INTO THE DEATH OF DAVID JOHN GUNDY, ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY.

The report by Commissioner Hal Wootten into the killing of David Gundy by SWOS members was the result of the last inquiry from the NSW jurisdiction of the Royal Commission into Aboriginal Deaths in Custody. It provides a chilling glimpse into the methods and psychology of police paramilitary groups in Australia. The report also provides a detailed account of how systemic problems in investigatory procedures, processes of accountability and the culture of police serve to cover-up appalling attitudes to the public and the law.

It would appear from the Commissioner's report that the lessons from the fatal raid and death of an innocent man have yet to be learnt.

> Regrettably to this day, police have refused to recognise the shortcomings in the training and methods of SWOS, the unlawfulness of their raid, or the patent untruth on which it was based. (Wootten, p4).

Commissioner Wootten found that Sergeant Dawson had no intention to injure David Gundy, who "was accidentally shot by the gun of a trespassing policeman" (Wootten, p4). Dawson was no more to blame than the other police who were involved in the planning and execution of the raid. Yet of the raid itself, the Report is damming: Gundy was killed during "an unlawful police raid on his home... Police had no legal right to be in his home at all, much less to point a loaded and cocked shotgun at him" (p1).

Wootten acknowledges that police were concerned to recapture John Porter after he had shot at police, seriously injuring a number of officers (one of whom later died). However this led police "to make serious misjudgements and to treat SWOS guidelines, the Police Instructions, and the law and its processes disdainfully" (p2). In particular SWOS officers both prior to and after the raid "lacked the humility to seriously consider the lawfulness of their methods, or to acknowledge the terrifying effect of what they did on innocent citizens, or the risk involved in their operations". The report drives home the essential danger of paramilitary police units with inadequate accountability and an *esprit de corps* which rationalise their actions with a philosophy of 'the ends justify the means'. The death of David Gundy showed clearly that SWOS not only believed that the ends justified the means in relation to law enforcement, but that they were able to *operationalise* that belief. There was thus a conjunction of contempt for legal processes both by the group itself at an operational level, and by those who were charged with the role of investigation.

Wootten argues that the warrants which were used for the raid were invalid. "A senior sergeant obtained invalid search warrants by the making of patently untrue

statements" (p3). Police Instruction 90.98 correctly states the law that police may apply for a search warrant if the officer has reasonable grounds for *believing* that a thing connected with certain offences *is* in or on any premises. Wootten notes that the information given as grounds for the warrants showed no basis for such a belief (pp3, 7, 44-46). The warrants were used "simply as a subtefuge". Presumably the practice of gaining search warrants for "things" was the result of a belief that there were inadequate rights in relation to entering premises. However, as Wootten demonstrates in some detail (pp39-44) had there been a belief based on reasonable and probable grounds that Porter (the person for whom police were searching) was on the premises then the raid would have been legitimate. "What stood in the way of the police making legal raids... was simply that they did not have sufficient information." (p42) It was thus insufficient intelligence rather than insufficient powers which was at the heart of the problem.

Even if the warrant had been legally obtained, the actions of the police deprived them of protection because they disregarded the requirements of the warrant. According to Wootten "police demonstrated their lack of respect for the law in other ways" (pp4 and 91-92) which included:

- ignoring the statutory restrictions on the hours at which the warrant might be executed by raiding the premises prior to 6.00 am;
- failure to announce the presence of police and to demand entry prior to making a forced entry;
- assault and false imprisonment of the occupants by pointing guns at them and requiring them to lie on the floor;
- failure to serve the Occupier's Notice as required in the *Search Warrants Act* (NSW) 1985;
- seizure and removal of objects from the premises for which "there was not the slightest justification", including nine year old Bradley Eatts' story book; and
- failure to report the result of the raid to the Justice of the Peace who had issued the warrants as required under the *Search Warrants Act* (NSW) 1985.

In relation to the warrants, Wootten argues that the requirements for obtaining and executing the warrants were treated "disdainfully" (p45). Safeguards embodied in the legislation were "treated with contemptuous disregard", while the conditions of the warrant were "also treated contemptuously" (p46).

Commissioner Wootten was highly critical of the intelligence and surveillance which led to the raid on David Gundy's house and simultaneous raids on five other premises. The selection of Gundy's house was on the basis of information which was received from an informant. There was inadequate questioning of the informant and a "nonsensical statement was treated by the police as confirmation" of Porter's possible presence (p6). Surveillance on the house had produced nothing. There was "not the slightest reason to suppose any criminal connection between Porter and anyone at the premises and no inquiry was made about them. Police did not even know that David Gundy was the occupier" (p7). Indeed Wootten argues that it was an "unjustifiable decision to make simultaneous forced entries on six premises, in none of which there was any real evidence that he [Porter] would be present" (p10). On only two premises

had there been any significant surveillance and it had produced no indication of Porter's presence. On three premises which were raided there had been no surveillance at all.

Wootten argues that the police decision to conduct the raid was "unbalanced". The risks of physical or psychological injury to innocent persons, the invasion of citizen's homes and questions of the legality of the raids were lightly dismissed. It is Wootten's view that judicial officers of higher standing and greater independence than Justices of the Peace should be required to consider applications for warrants where forced entry may be used. He notes that there was a serious conflict of evidence between the Justice of the Peace who issued the warrants and the two officers who sought the warrants. The Justice who issued the warrants was a clerk of the local court and appears to have been "snowed" by police into failing to consider properly the grounds for the application (p50).

In relation to the training of SWOS, Wootten argues that there were serious deficiencies (pp9, 12, 36-38). Dawson had never been trained to deal with such situations other than that he must retain his weapon at all costs. He had only been taught to pull the weapon back. Other techniques for weapon retention were taught to members of the Special Operations Group in Victoria and are now available to SWOS officers (pp9, 161-166). Yet during the Royal Commission's hearing SWOS officers refused to acknowledge deficiencies in their training. Wootten describes as a "silly platitude" the SWOS view that officers could not train for all situations because every situation is different. As Wootten states:

> Of course every situation is different but that does not mean that you do not train for any situation... The clue to all this stupidity and short sightedness was given in evidence by Watson: 'If we were asked the question do we have anything to learn from a particular incident, that may infer that we handled that particular incident incorrectly'. (pp162-163)

Ironically one reason which explained the inadequate training in relation to weapon retention was the assumption that the techniques of forced entries were relatively safe. With sufficient suddenness and surprise, and the occupants of a house likely to be asleep, it was assumed that occupants would be terrified and "freeze" long enough for police to establish dominance over them with a firearm. Clearly such tactics in a forced entry were consciously designed to terrify people. As a senior superintendent from the Western Australian Tactical Response Group explained at the coronial hearing into David Gundy's death, "normally when a raid takes place in these circumstances there was a huge amount of terror or fear created" (p36). If occupants did not freeze in terror they were to be dismissed, in the words of the Commander of SWOS about Mr Gundy, as "utterly irrational" (p12). Yet Wootten makes the point that "it is simply ridiculous to suggest that the behaviour of terrified people is entirely predictable, much less rational... many people may freeze from terror, but others may panic or act to defend themselves" (p36).

In addition to spurious assumptions about individual's behaviour while in a state of terror, there is the additional question of psychological harm to citizens and individuals likely to be at particular risk such as the elderly. Such risks are obviously compounded when raids are based on inadequate intelligence.

Wootten is critical of the police investigation after the death of David Gundy. The person placed in charge of the investigation was Supt Harding who had been a part-time member of SWOS and who "clearly identified strongly with members of the SWOS team" (p13). Within a few hours of his appointment and on the same day of the shooting, Supt Harding announced to a journalist that a preliminary investigation had revealed that all police had acted properly. The same afternoon he prepared a departmental telex relayed to all police stations stating the above plus Dawson's view of the shooting and the fact that Mr Gundy had a criminal record. The information then found its way to 2UE Radio and the Johns Laws program. Harding never prepared a report as he was required to do under Police Instructions and the *Police Regulations (Allegations of Misconduct) Act.* Harding passed the material he had collected onto (then) Assistant Commissioner for Professional Responsibility Tony Lauer, who reached the same view that there was no police fault in the shooting. Lauer is now the Commissioner of the NSW police. Wootten was highly critical of the absence of a written report. "[There] is nothing in writing to demonstrate they [Harding and Lauer] did consider the issues or how they reached their conclusions exonerating all police" (p15). In relation to accountability, Wootten found that:

> in the absence of a written report those who are supposed to have held other police accountable can retreat behind a wall of waffle, inability to remember and unspecified reference to thousands of pages of coronial transcript, when they themselves are called to account. (p274)

Wootten is equally critical of Assistant Commissioner Lauer and the State Coroner in their attempt to prevent the Ombudsman from inquiring into the death. According to Wootten, Lauer "endeavoured to divert the official Ombudsman's inquiry by a nit-picking approach to the interpretation of a complaint" (p15, see also pp253-258). In this he was later joined by the State Coroner, Mr Waller, "who displayed not only a misunderstanding of the law but an excessive concern for the importance of his own office, which he seemed to regard as displacing the functions of all other persons" (p15, see also pp258-262).

In relation to David Gundy's nine-year-old son, Bradley Eatts, who was present in the house at the time of the raid and shooting, Wootten found that "police officers made no attempt to comfort him or even to explain to him what had happened" (p16). Bradley heard of his father's death on the police radio. Wootten was critical also of the treatment of David Gundy's wife Dolly Eatts who was notified of the death while in Mt Isa and immediately questioned as to her knowledge of Porter. Wootten concludes that "the indifference to the welfare of innocent citizens which the police showed in planning the raid continued to be displayed in the aftermath of David Gundy's death" (p17).

Police attitudes to the law are held up to scrutiny in the Report. Wootten summarises this attitude as being that:

> inconvenient legal rules can be safely ignored... This attitude permeated not only the execution of the raid by SWOS, but its planning by senior detectives and the obtaining of warrants. The attitude was supported by the senior officers who investigated the matter and swept all legal issues under the carpet.(pp17-18)

There was the added factor of what Wootten regards as SWOS culture which included tunnel vision and self-satisfaction. Wootten argues that it is natural for para-military groups to develop a particular culture and "it is in the nature of things that in a democratic country there will be real problems in ensuring that the body fully accepts the rule of law and the paramountcy of civil authority" (p282).

The events surrounding the death of David Gundy brought together a number of issues including problems with police intelligence, the readiness to use a paramilitary assault on citizen's homes even with insufficient information, the readiness to ignore the law, a police culture which readily rationalised such activities and a process of accountability which sought exoneration.

Commissioner Wootten recommended that compensation be paid to Doreen and Bradley Eatts, and to Marc Valentine and Richard McDonald who were on the premises when the unlawful police raid occurred. The Commissioner also recommended that consideration be given to whether criminal or disciplinary proceedings should be taken against any person arising out of matters dealt with in the Report.

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