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Phillips' Brief

Mark Finnane*

THE THIRD DEGREE

On 12 June 1930, the Labor Federal Cabinet approved the recommendation of Attorney-General Frank Brennan that Sgt James Richmond Shepherd of the Commonwealth Police be dismissed from his position.¹

A month earlier, the Attorney-General had appointed Sir John Quick, former arbitration court judge, Victorian and Commonwealth parliamentarian, Federationist and author (with Sir Robert Garran) of the foundational constitutional law text published in 1901, to enquire into the actions of Sgt Shepherd and to make recommendations about the administration of the fledgling Federal Capital Police.² Two decades earlier Brennan had failed to unseat Quick, the Deakinite federal member for Bendigo.³

The Quick Inquiry, as we shall call it, was no hasty affair behind closed doors, but a well publicised hearing at the Canberra Courthouse into allegations that Shepherd had assaulted a 20-year-old youth a year earlier with the intention of obtaining from him a confession on a charge of stealing money from a letter he was expected to post. The conduct of the inquiry, held just three years after the establishment by ordinance of the Federal Capital Police,⁴ was a striking example of the expectation that domestic policing would be conducted according to law and to a high standard of conduct in dealing with suspects and prisoners. Rather than leave to an aggrieved person the responsibility of bringing a private action against the police, here the Attorney-General took the initiative of disciplining an officer found guilty of improper conduct in his official capacity.

Over four days in late May 1930, Sir John Quick presided over the hearing of disciplinary charges brought by the Attorney-General against Sgt Shepherd, first, that he had unlawfully assaulted Francis Gifford, and second, that he had “behaved in a violent and threatening manner towards Gifford for the purpose of obtaining from him an admission or confession that he was guilty of an offence”.⁵ Instructed by the Commonwealth Crown Solicitor, Melbourne barrister Harry Shelton exposed within the police ranks a culture of bullying and cover-up that jeopardised the position of any who challenged police misconduct. Defending Sgt Shepherd, leading Victorian Kings Counsel, GA Maxwell, was forced in the end to rely only on a spurious legalistic defence that Gifford at the time of his brutal questioning had not been under arrest and so was not a prisoner according to law. Maxwell was no stranger to the criminal courts; indeed he was regarded by Sir Robert Menzies as the greatest criminal advocate he ever heard.⁶ His eloquence could not save Sgt Shepherd from some damning evidence given by police witnesses.

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¹ National Archives of Australia (NAA) *Scullin ministry. Folders of Typed Copies of Cabinet Minutes* (A3624/1, 235007, 12 June 1930).

² Michele Maslunka, “Quick, Sir John (1852–1932)”, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University, Canberra, 1988) <<http://adb.anu.edu.au/biography/quick-sir-john-8140>>; “Police Inquiry”, *Canberra Times*, 26 May 1930, 2.

³ Kevin Ryan, “Brennan, Francis (Frank) (1873–1950)”, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University, Canberra, 1979) <<http://adb.anu.edu.au/biography/brennan-francis-frank-5347>>.

⁴ “An Ordinance to Provide for the Establishment of a Police Force in the Territory for the Seat of Government”, no 19 of 1927 <http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/act/num_ord/po1927128/>.

⁵ n 2, 28 May 1930, 1. Although this article’s references are limited to reports of the proceedings in the *Canberra Times*, the inquiry and its outcome was widely reported throughout Australia, in all capital cities and many regional towns; all newspaper references consulted in the Trove library of digitised Australian newspapers <<http://trove.nla.gov.au/>>.

⁶ Norma Marshall, “Maxwell, George Arnot (1859–1935)”, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University, Canberra, 1986) <<http://adb.anu.edu.au/biography/maxwell-george-arnot-7533>>.

Chief among these was Constable William Fellowes, who had served at Canberra for less than three years after an earlier period with the Victoria police. Maxwell tried to smear Fellowes as a participant in the 1923 Police Strike; this was vigorously rebutted by Fellowes who had been on the Council of the Police Association which had opposed the strike. Fellowes told the inquiry that he had witnessed Shepherd hit Gifford in the pit of the stomach with a deliberate blow, in the course of a prolonged verbal assault. Fellowes reported having told another officer to hurry back to the station as Shepherd was “going a fellow a treat”. This crucial witness statement corroborated Gifford’s own account of having been punched violently twice during Shepherd’s interrogation of him at the police station.⁷ Other evidence suggested that Shepherd had his own “good cop bad cop” routine – something that Sir John Quick recognised when he concluded that Shepherd’s behaviour during an interrogation was more than evidence of bad temper or an excess of zeal. Rather:

the unlawful pressure at the police station used to induce the boy to confess was prolonged and violent, extending over three quarters of an hour. After he exacted the verbal confession and began to reduce it to writing he became a changed man, and his previous violence and uproar was followed by calm business behaviour and good and fair treatment such as providing an evening tea for the accused⁸.

Shepherd’s defence relied on his long experience in policing during which, he claimed, he had put away more than 800 NSW criminals. This did little to exculpate him, especially after it was revealed that he had attempted to pervert the course of justice by putting pressure on Gifford to retract his allegations. Accompanied by his wife, Shepherd had gone to Gifford’s home at Holbrook. Mrs Shepherd had attempted to get Gifford to retract his allegation of mistreatment, citing her concern over the fate of their five children if the case went against her husband.⁹ There had been further attempts to persuade Gifford not to appear at an inquiry; this was a fatal step especially when Shepherd pointed out “a way in which he [Gifford] might disobey a subpoena to attend without liability to a penalty for disobedience”. How can such a man, asked Quick, “be trusted with further continuance in office as a police sergeant?”¹⁰

More than half a century before a spate of major inquiries into police conduct and police culture in Australia, the Quick Inquiry into the assault on James Gifford is a striking reminder of the long history of police misconduct and the difficulty of addressing it. Its context and severe outcome for this particular police officer demand attention.

First, it seems likely that the inquiry owed much to a new Labor government in Canberra, sensitive to police behaviour in relation to striking unionists and dissenting protesters throughout the 1920s. Attorney-General Brennan was a pacifist, who “abhorred physical violence”.¹¹ A few months before this, in December 1929, the Scullin government had instructed the National Rifle Association that it was not to make available rifles or ammunition to the NSW state government for use in the coal strike at Rothbury in the Hunter Valley.¹² But it was not only labour activists who were concerned about police at that time. Indeed the Attorney-General had been prompted to establish an inquiry by a deputation led by the local president of the RSL, Roy Rowe, a Gallipoli veteran and now a public servant with the Federal Capital Commission, responsible for overseeing the furnishing of the new Parliament House.¹³ Rowe’s deputation prompted an editorial in *Canberra Times* calling attention to the problems of police administration in the capital.¹⁴ And indeed earlier in the year Sgt Shepherd had been involved

⁷ “The Third Degree”, *Canberra Times*, 29 May 1930, 1.

⁸ n 2, 13 June 1930, 5.

⁹ n 5, 3.

¹⁰ n 8.

¹¹ Ryan, n 3.

¹² National Archives of Australia (NAA), *Scullin ministry. Folders of typed copies of cabinet minutes* (A3624/1, 235007, 13 December 1929).

¹³ “Service for Former PS Secretary, Businessman”, *Canberra Times*, 20 November 1973, 8.

¹⁴ “A Clear Duty for the Attorney-General”, *Canberra Times*, 19 March 1930, 4.

in well-publicised controversy over his behaviour in relation to another public order matter in which he had abused a citizen.¹⁵ The readiness with which a number of other public servants became witnesses in the Quick Inquiry suggests that concern over high-handed police actions and misconduct was more widespread.

Second, the inquiry disclosed a police culture that encouraged conduct known at the time as “the third degree”, intensive interrogation to break down a suspect’s defences, even to the point of physical abuse. In particular, the hearings made clear that whistleblowing was met with a degree of hostility that made it beyond contemplation for most police, perhaps especially in a force of only 13 officers! And Shepherd’s conduct in attempting to intimidate Gifford was another example of the kind of behaviour that made it difficult to combat police misconduct. In making his adverse finding against the sergeant, Sir John Quick insisted that subordinate police required to give evidence about the misbehaviour of their superiors “were entitled to protection”.¹⁶

Third, the inquiry drew attention to the different state of the law between jurisdictions with respect to police conduct of investigations and especially with respect to the admissibility of confessional evidence, an issue that continued to fester long after this.¹⁷ Much of the inquiry turned on Maxwell’s contention that Victorian law should be preferred to that of New South Wales. Under the former, statutory reform provided that confessions induced by threat or promise would only be inadmissible if “the judge was satisfied that it was an untrue statement”; New South Wales retained the stricter common law rule that required the prosecution to prove that a statement was voluntary.¹⁸ Maxwell’s approach was a desperate advocate’s move to save a hopeless client, since not only was Territory policing conducted under NSW law and regulations, but Sgt Shepherd had himself been a longstanding officer in the NSW police, not that of Victoria.

Finally, we may consider that Shepherd’s clumsy resort to pressuring a witness was a signal of his well-founded concern about the possible outcome of the disciplinary charges against him. That he contemplated such a step was also a symptom of his initial confidence in the likely success of such pressure. Indeed, evidence at the hearing suggested that both Gifford and his father were very ready to leave the matter behind them. What made a difference was the escalation of a complaint about police behaviour and maladministration into a political issue involving the capital’s newspaper and the nation’s Attorney-General. And Shepherd may have been unlucky in the selection of Sir John Quick, unaccustomed to the hurly-burly of the criminal courts and police stations, and perhaps a little more insistent than a criminal court judge on the new federal police meeting the high standards of discipline expected of them.

¹⁵ “Judge Rebukes Police”, *Canberra Times*, 18 March 1930, 1.

¹⁶ n 8.

¹⁷ David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Studies in Criminology) (Clarendon Press, Oxford, 1997); Gareth Evans, “Reforming the Law of Criminal Investigation” (1984) 17 *Australian and New Zealand Journal of Criminology* 195; Australian Law Reform Commission, *Criminal Investigation: An Interim Report*, Report No 2 (Australian Government Publishing Service, Canberra, 1975).

¹⁸ n 5, 3; For a valuable contemporary assessment of the different trajectories of state jurisdictions on the admissibility of statements see T P Fry, “Admissibility of Statements Made by Accused Persons” (1938) 11 ALJ 425.