AUSTRALIAN INSTITUTE OF CRIMINOLOGY

PUBLIC SEMINAR, SYDNEY 7 MAY 1977

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Hon Justice M D Kirby

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Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

THE TASK BEFORE US

An occasion for Calm and Specific Debate. The task before us today is to debate in a calm and rational manner a Bill which has been laid on the table of the Commonwealth Parliament by the Attorney-General, Mr. Ellicott. It has been introduced and laid on the table precisely to permit public comment, discussion and criticism of the kind we should promote in this Seminar.

Let it be said at the outset that this is not the traditional way of formulating laws in this country, particularly upon controversial subjects; such as those contained in the Bill. For reasons that are bound in history, the nature of responsible government and the attitudes of politicians and public servants in days gone by, opportunities such as the one we have today have been relatively few and far between. To avoid embarrassment to a government and the rancour of public debate, the old way of doing things has been to prepare legislation in relative secrecy and to secure its passage with a minimum of delay and a minimum of fuss.

Consistent with the principles of open government, of access to information and the increasing literacy and education levels in the Australian community, a new method is now being tried. It is the method of public participation in lawmaking. However, we must prove that we are worthy of this experiment. It is an experiment which lies at the heart of the technique of

the Law Reform Commission. It is therefore one to which the Commission and I attach much importance. Nothing is surer than that, if we abuse the opportunity and turn public debate into an unseemly brawl, governments and public servants will plainly be tempted to retreat to the security which the secret preparation of legislation affords.

Associated with this point, which is simply a call for rational debate, is an appeal for specificity and an avoidance by protagonists and antagonists alike of vague generalities which have all too frequently marred the debate on human rights in Australia.

The Attorney-General acknowledged, as do I, that crime is too rife in our community to impair the basic efficiency of our police. Neither the Attorney-General, nor the Law Reform Commission of which I am Chairman, would lend their names to a measure which set out to assist criminals and frustrate the police. The aim of the Bill is to strike a fair balance between the needs of the law enforcement agencies of our society to uphold the criminal law, on the one hand and the rights of an accused person, under suspicion, on the other. The Bill is not written on a blank page. It has as its background a number of fundamental principles of our criminal justice system and worldwide movements which have gained momentum in recent years to translate vague, general expressions about the human rights to be expected in a civilised community into specific and clear laws, which are available to the persons subject to them.

The Value of a single Act, available to all. At the moment, no equivalent legislation, collecting in the one Act rights and duties of police and citizen is available in Australia. On the contrary, the rules are to be found in a jumble of statutes, decisions of the courts, Rules which English judges laid down 50 years ago for the conduct of police and Police Commissioners' Orders and instructions, some of which are not even available on the request of citizens. There are, I suggest, unarguable advantages for police and citizens in the administration of

justice, that favour collecting the basic rules to be observed in the criminal investigation procedure, in the one legislative measure. I doubt that anyone will dispute this. The question is therefore whether the Bill before the Commonwealth Parliament is in appropriate terms. Does it, as it sets out to do, strike a fair balance "between the community's needs for effective law enforcement and the need to preserve and respect basic human rights? That is the question before us today.

The Undisturbed Basic Rules of Our Criminal Justice. I said that the page upon which the Bill is written is not blank. On the contrary, some fairly fundamental rules are long established and are, substantially, preserved or relfected in the Bill. Our system of criminal justice, based upon settling disputes in an open trial, normally requires the accused to prove nothing. The burden of proof is normally exclusively upon the Crown. The Accused is entitled to be acquitted, if a reasonable doubt exists concerning his innocence. He is entitled to remain silent and to require the strictest proof of his guilt by the prosecuting authorities.

These rules do not, of course, make the lot of the police or prosecuting authorities easy. Inevitably, they result in the occasional failure to prosecute guilty men or the discharge or acquittal of such men. Let there be no doubt that the rules are extremely burdensome upon busy police and prosecuting authorities, who are faced with an increase in crime and growing sophistication on the part of criminals. The rules no doubt lead to frustration, disappointment and even bitterness. However, they are rules which have secured the special balance which exists between authority and the individual in English-speaking, common law countries. Although an English Committee proposed the abolition of the right of accused persons to silence when accused by the police, the outcry that followed this proposal showed clearly the support which exists for keeping the rules of criminal investigation and the criminal trial heavily weighted in favour of the innocence of the accused. When the Australian Law Reform Commission conducted its inquiry into a new code of criminal investigation, we were frankly

surprised that serious arguments for abolishing the right to silence were rarely pressed upon us. Even police authorities seemed content to live by these fundamental rules. We were not in these circumstances prepared to suggest the alteration of this basic right. Neither does the Bill. So long as guilt or innocence is tried before a jury in an adversary setting it will be difficult, so it seems to me, to interfere in this fundamental of our criminal jurisprudence.

Inescapability of Some Controversy. But even given agreement on fundamental rules, it is inevitable (and we must recognise it) that a Bill such as the *Criminal Investigation Bill 1977* which seeks to spell out and modernise various aspects of the criminal investigation process is bound to be controversial. Change of any kind, but particularly change in the sensitive relationship that is here in question, is inevitably uncomfortable. It is therefore not to be expected that legislation of this kind will command instant, universal approbation. Because it is necessarily detailed and introduces *some* new concepts and methods, it is entirely understandable that it should be greeted with suspicion. The task of the reformer is not supposed to be easy. Rare indeed will be an important reform that enlists universal praise. Though disappointed, I was therefore not surprised to see a report that the Police Commissioners of the south Pacific region, meeting recently, called on the government not to proceed with the Bill.

But just as "change for change's sake" must be resisted by reformers, so "opposition for opposition's sake" must equally be resisted. Proposals for reform must be weighed on their merits. Because they are complicated, difficult, technical and different, proposing new ways of doing settled tasks, does not of itself justify oppositon, given the background of this Bill and its terms. Reasons, indeed specific reasons, must be advanced.

Police Commissioners' Criticisms. Neither the Police Commissioners nor, I would suggest, former Commissioner Whitrod

in his *Monday Conference* have ever spelt out the specific proposals to which they object in the *Criminal Investigation Bill*. The Commissioners contented themselves with general statements alluding to the fact that the Bill was based upon a report of the Law Reform Commission. The Commission was described as a body with a "preponderance of academic lawyers". Can I suggest that this Seminar should pitch its arguments at a much higher level. The contention happened to be false. But even if it were true, it is an insult to the Australian community and to the need, if nothing else, to *modernise* the law, to resort to arguments of this kind. If faults there are in the Bill, the Attorney-General has invited criticism. But the criticism should be specific and not vague generalities. It should relate to the proposals contained in the Bill and avoid personalities. I suggest that we should try, today, to come to grips with the actual provisions of the Bill. Although it is based upon the report of the Law Reform Commission, there have been significant and detailed amendments. The most important of these has been the adoption by the government of the view of one Commissioner, Mr. Justice Brennan, concerning police powers on interrogation. The majority of the Commission, subject to very strict protections, was inclined to permit police a *right* of interrogation for a strictly limited period. The view adopted by the government and reflected in the Bill does not follow this recommendation. Instead, it adopts nothing more nor less than the approach of the Judges' Rules which are currently observed throughout Australia and have been observed in most British Commonwealth countries since at least the 1920s. The failure of the Bill to provide for a right of police interrogation is the major specific criticism which has been voiced by Mr. Whitrod, former Commissioner of the Queensland Police. Reference has been made by Mr. Whitrod to the Mitchell Committee's proposal that police should have a right of interrogation for two hours. The majority of the Australian Law Reform Commission proposed a basic right, subject to the guarantees and protections I have mentioned for four hours. The Thomson Report in Scotland proposes, with like protections, a six hour period for police interrogation. This Bill provides no novel right of detention such as this. Instead it would enact the well-established

current approach spelt out in the Judges' Rules.

Although the government has not adopted the view, it is important to put police criticism in perspective. By opting for the minority point of view and the Judges' Rules the Bill simply opts for the present constraints which are imposed by law upon the police. It may be a fair criticism that an opportunity has been lost to *facilitate* the work of police. However it is not a fair criticism that, by adopting the approach of the Judges' Rules, the Bill has positively *hindered* police. For more than half a century, the police have shown in this country as in Britain that they can perform their daily tasks within the constraints imposed by the Judges' Rules. Those Rules were designed to recognise the civic duty of all citizens to assist police but also the special disadvantage which an accused person suffers when under the compulsion of police. There are no doubt many in Australian society who sympathise with the predicament of the police having to "muddle along" with "voluntary co-operation" or securing "assistance with their inquiries" or even using holding charges. But an equal number are no doubt concerned to avoid a police power to "detain for questioning" which may be or become oppressive and could alter the delicate balance between the rights of the citizen and the exercise of executive power in our community. The Bill reflects this last concern. In this respect, I repeat the fundamental provisions of the Bill governing the relations of the police and a suspect do not alter the present law or the procedures that are observed by police throughout Australia.

Summing Up : Getting This Debate into Context. Can I sum up the points made so far which should, I suggest, govern our approach to the debate today?

1. We should endeavour to debate this Bill in a rational and practical way, showing that Australians can respond to the novel opportunity which the Commonwealth Parliament and the Attorney-General, Mr. Ellicott, have given us to assist in reforming this area of the law.
2. We should avoid, I suggest, personalities, vagaries and generalities and address

ourselves to the specifics of the Bill. Anything else will be of little help to our legislators who have, after all, to pass upon the measure which is before them, one way or another.

3. Of course, in a measure such as this, it is inevitable and healthy that there should be differences of opinion. In a democracy, anything else would be surprising indeed. Our task today should be to ascertain the differences and test them against the Attorney-General's stated objective. This is to strike a fair balance between the community's need for effective law enforcement and the need to preserve and respect basic human rights in our country.

4. The Bill should not be seen in isolation. It is part of a series of measures by which the Commonwealth Parliament is endeavouring to provide modern laws which recognise and uphold the citizens' rights in Australia. This is an international movement and is reflected in the creation of Ombudsmen, the Administrative Appeals Tribunal, the provision of laws to protect privacy, allow for freedom of information and so on.

5. Most of us will agree, I would suggest, that it is better that laws on such an important matter should be found in a readily available statutory code passed by an Australian Parliament rather than that scattered throughout a variety of generally inaccessible documents. Rules will undoubtedly exist to govern the criminal investigation process. These rules are critical for the rights of citizens. Consistent with the international and national movement to spell out human rights in specific terms, the step to collect

them in the one Bill is surely a step in the right direction. The question is therefore whether this Bill is the *right* Bill, and if not, how it can be improved.

6. To shelve this Bill and to do nothing about the process of criminal investigation leaving things as they are, will be to make a specific decision. Inventions of science and technology have been developed : the tape recorder, videotape and cameras, telephones and so on, which are presently not used in our criminal investigation process, as they might be. If we are to reject incorporating these into our laws, it is desirable that this rejection should be a positive decision and not simply the result of indolence, apathy or a fear to face up to hard questions.

7. This Bill does involve facing up to hard questions. Any reform is uncomfortable, but if we do nothing, our laws will simply slip behind. The law and reality will grow further apart. Parliaments are unlikely to allow this to happen.

8. The Bill's terms are what are vital in the debate. In terms the Bill leaves basically undisturbed the Judges' Rules that have governed police contact with suspects for half a century at least. A more radical proposal for a right of interrogation was not accepted. The alterations and reform proposed (though very important) do not alter the critical rule governing police relations with the accused. I do not believe that this point can be made too often. The changes proposed must be kept in this perspective.

HISTORY OF THE BILL

The Reference to the Commission. Having proposed the spirit in which we should examine the Bill, it is worth pausing for a moment to outline briefly the way the Bill originated. I say this because the only other criticism voiced by the Commissioners of Police was to the effect that the Commission failed "to give sufficient weight to the views of police, magistrates, judges and other concerned persons". This is not a fair statement.

In 1975 the Commonwealth Government decided to amalgamate the Commonwealth's law enforcement agencies into a single police force, to be known as "the Australia Police". A Bill for that purpose was introduced into the Commonwealth Parliament in November 1975. It lapsed with the dissolution of the Parliament and the new government decided not to proceed with the proposed amalgamation.

The Attorney-General, in May 1975, considered that an attempt should be made, contemporaneous with the amalgamation, to establish a new, modern code to govern criminal investigation by the new police force. Terms of Reference were drawn for the Commission and these included reference to the commitment of the government to "bring Australian law and practice into conformity with the standards laid down in the *International Covenant on Civil and Political Rights*. This Covenant, which Australia has signed but not yet subscribed to, contains a number of articles relevant to the criminal investigation process. Many of them are outlined by Mr. Ellicott in his Second Reading Speech. I will not repeat them here.

Expert Consultants to Assist the Commission. The Commission, unlike so many other government committees and inquiries was given a strict timetable. Accordingly, because it was then in its infancy and unable to look exclusively to its own staff, it sought out acknowledged experts from all parts of Australia with special knowledge in particular areas of the law and practice relevant to the reference. The Attorney-General appointed fourteen Consultants. One of them was a judge;

another, an eminent Queen's Counsel. Others were barristers, solicitors, police and academic lawyers. One police consultant was a Chief Superintendent of the South Australia Police (Chief Superintendent J.B. Giles, G.M., B.E.M., Q.P.M.) Another police consultant, now Chief Superintendent R. Farmer, Q.P.M., is now the Principal of the Australian Police College. In addition to these consultants, officers were appointed by the Attorney-General's Department and the then Department of Police and Customs. At all critical meetings when the Commissioners were considering the hard decisions that had to be made, officers were present both of Police and Customs, who were able specifically to put before the Commission the police point of view. Of course, this view was not always accepted. Nor were the opinions of the consultants always accepted. But the police and other viewpoints were carefully scrutinised and weighed. I have not heard one criticism from police quarters about the Commission's report on *Alcohol, Drugs and Driving* which proposed new breathalyzer laws for the Australian Capital Territory. The Bill based upon that report passed into law this very week. It will assist police to tackle in a new way the problem of drinking driving. The Commissioners who wrote *that* report were, with one exception, precisely the same Commissioners who signed the *Criminal Investigation* report. I say these things because the only significant criticism voiced by the Police Commissioners' meeting related to the composition and methods of the Commission. These are therefore the only criticisms which I can answer, as I believe I should.

Public Sittings in all Parts of Australia. The Commission sat in all parts of Australia to receive public submissions on its terms of reference. In a number of centres it had the benefit of comments by civil liberties associations, senior officers of State Police Forces, police associations, ordinary policemen and members of the public.

Favourable Reaction to the Report. Detailed consultations took place with the Office of Parliamentary Counsel in the preparation of draft legislation to implement the Commission's report. The report was delivered to the Attorney-General, as

required, on 5 September 1975. It was printed and tabled in Parliament in November 1975. It was styled an "Interim Report" precisely to permit still further comment and criticism of its proposals. In Australia, the response of the media was favourable at the time of the presentation of the report. The response of the *Australian Law Journal* was also favourable. Special attention was drawn to the Commission's efforts by public sittings and otherwise to "discern and determine the needs and interest of the community and of community minorities". The *Law Journal* pointed out that :

> "Quite a number of these reforms would be of value to the extent that, if adopted, they would save time and money, enable police officers to concentrate on coping with more serious crimes and increase respect for the law and for the members of the police force. A number of the proposed reforms have already worked well in overseas jurisdictions, and have stood the test of practical experience".

In the United Kingdom, the editor of the *Criminal Law Review*, Professor A.J. Ashworth, commended the Commission's attempt "to restore the law to its proper functions in this field by constructing a workable legal framework for criminal investigation". Professor Ashworth concluded his review in these terms :

> "Over the details of the proposals ... people will inevitably dispute. About the need to take duties and liberties seriously, however, there can be no dispute. This is the meaning of the principle that written rules and actual practice should correspond. A legal system which proclaims rules which it is not prepared to uphold is indulging in a dangerous form of hypocrisy. Thus, once an accepted framework for criminal investigation is settled, it must be reinforced by safeguards and sanctions. In the front line should be the safeguards designed to ensure that individuals are

> notified of their liberties, are given the facilities to exercise them, and are not disadvantaged by any departure from the procedure. In reserve should be the sanctions, designed to ensure that when breaches do occur, they are properly and effectively dealt with. Few people can be expected to welcome increased formalities and procedures with enthusiasm, especially those who have to operate them. *Yet if this is the price for the reintroduction of the rule of law into criminal investigation, then it ought to be paid*".

I am informed that the Law Reform Commission's report is now used in a number of law schools throughout the country as the basic text for teaching the law relating to criminal investigation in Australia. Indeed, I am told that in some parts of Australia, such has been the demand for the report that the Australian Government Publishing Service has sold out.

To say the least, it is unusual for supplies of reports of this kind to be exhausted. It indicates the very considerable interest which the scholarly analysis and reformist proposals of the Commission have engendered.

Preparation of the Bill. Before preparing the legislation itself the government had the benefit of suggestions and ideas from a number of sources, including the Department of State and comments by police and other authorities about the Commission's proposals. I am informed that all of the views and suggestions made, including those made by police, were carefully considered. Consultations took place between officers of the department, Mr. Justice Brennan and myself, in order to achieve those modifications which were necessary to accommodate His Honour's minority view. At the same time, the occasion was taken to improve and clarify the legislation.

The *Criminal Investigation Bill 1977* has therefore gone through successive stages of public consultation already.

It has been carefully scrutinised by departmental officers and re-examined by Parliamentary Counsel's Office. It now comes before the Parliament, the public and this Seminar for further critical scrutiny. I suggest that few legislative measures in recent years have been so carefully, thoroughly and intensively prepared.

THE TERMS OF THE BILL

Some Cautionary General Observations. There are real dangers in trying to summarise legislation, especially legislation which affects the rights of people and the duties of others. Every word in legislation of this kind is vital. There is, I am afraid, no substitute for going back to the terms of the Bill. I admit that this is frightening to many. Necessarily Acts of Parliament, and the Bills which precede them, are technical and sometimes complicated. The present Bill has complicated provisions. However, its broad approach is fairly clear. I can do no more in the time allotted, than to outline the Bill in general terms. As well as there being advantages in spelling out these vital rights and duties, and doing so in an Australian statute, available to all, there is one other advantage which the Bill enjoys. It is that it represents a collection in the *one* measure of relevant rules governing various stages in the process of criminal investigatior This allows a "total" approach to criminal investigation : governing the process from the first contact between the police and a member of the community, to the final handing over of an accused who has been charged with an offence, from the committed arm of the Executive (represented by the police) to the independent arm of government (represented by the judiciary).

Necessarily, then, this introduction must be brief, general, somewhat superficial and selective. There simply is no substitute for a close scrutiny of the Bill. Nevertheless, the community is entitled to have put in general terms the way in which it would operate. That is what I will endeavour to do.

The Arrest Situation. One of the first efforts of the Bill is to take the emphasis off proceeding by way of arrest in criminal charges and to encourage proceeding by way of summons. The differences in Australian figures are startling. Whereas about 18% of A.C.T. charges proceed by way of arrest (the balance by way of summons) 31% of Commonwealth Police charges proceed by way of arrest and 84% of Northern Territory Police charges proceed in this way. An average State figure is 25%.

Of course, there are explanations for some at least of the differences. But, in today's world, it seemed to the Commission that an effort should be made to encourage police to proceed by way of summons. Normally, with a married man and a family, a mortgage and other commitments, it is safe to proceed by way of summons. This the Bill seeks to encourage but not arbitrarily to require this.

It provides that arrest may be made after a magistrate has issued a warrant upon which he certifies the reasonable grounds that satisfy him that an arrest is justified. (Cl.8(3)) For a police officer, without a warrant, to arrest a person for an offence, the Bill requires that he should believe on reasonable grounds :

(a) that the person has committed or is committing the offence;

(b) that arrest is necessary to ensure the attendance of the person before a court, to prevent continuation or repetition of the offence or to prevent loss or destruction of evidence; and

(c) that he should believe on reasonable grounds that proceeding by way of summons will not effectively do the job (Cl.9).

The Bill requires that once a person has been arrested he is to be brought forthwith before a Magistrate. With some variation of language, this is the present duty of every police officer. It is at the heart of the transfer of the accused which I have mentioned : from the executive arm of government to the judicial.

The Bill also deals with so-called "citizen arrest". It lays down what is surely now a sensible requirement, in the age of organised police forces, that where a citizen arrests another he should be obliged to take the other forthwith to a Magistrate or deliver him to the custody of a police officer. (Cl.10(3)).

To protect policemen who had a reasonable belief at the time of arrest that the person arrested was committing or had committed the offence and so on, it is provided that the arrest "shall not be taken to be unlawful" if it subsequently appears or is found by the court that the other person did not commit the offence. In other words, the criterion is, as at present, whether the policeman did believe on reasonable grounds at the time he performed the arrest.

There is a provision (Cl.13) to limit the use of force in arrest. There are many in our society who believe that the escalation of violence is linked to the use of violence. It is therefore provided that in arresting a person for an offence, a policeman shall not do an act likely to cause the death of that person, or to inflict grievous bodily harm on him unless he believes on reasonable grounds that this is the only way to protect life or prevent serious injury to the policeman himself, the accused or some other person. Limits are also put upon the archaic rule that a fleeing felon can be killed. That rule had its origin in a society which hanged felons. It is not appropriate in a society that has abolished capital punishment. Of course, force and even lethal force will sometimes be necessary. But the Bill reserves its use to cases where life or serious bodily injury are at risk as the alternative to the use of such force.

The Bill requires policemen at time of arrest to inform the accused of the offence for which he is arrested. But to prevent foolish, technical arguments arising, it is specifically provided that it is enough for the policeman to tell the accused the substance of the offence (Cl.14(2)). Even this he does not have to do if the person ought because of the circumstances to know the substance of the offence or makes it impracticable for the police officer to do so. Again, this is nothing more nor less than the present general obligation of a policeman. If anything, it protects the policeman against meritless, technical arguments.

Investigating Offences. The first contact between a policeman and a person who may be able to assist him in his inquiries

about an offence, will normally require some form of identification. Clause 16 provides for a reciprocal exchange of information about identity. It imposes a duty upon certain persons to supply their name and address. Likewise the police have to supply their name and address to such persons. The N.S.W. Council for Civil Liberties opposes this obligation. It seemed to the Commission to be a fairly commonsense one. The right of silence can surely not go so far as to prevent mere identification. Furthermore, the obligation only arises where a police officer believes on reasonable grounds that a person who is unknown to him may be able to assist him in his inquiries in connection with an offence. There are many prerequisities and the fine for failure to supply identity or for giving a false identity is not very great ($200). I stress that the invasion of privacy seems minimal. Most citizens supply this information anyway. Foolish refusal to supply it, particularly with the preconditions mentioned, seems a trifle unreal. If the provision were abused, it could be reviewed. A police officer who had no reasonable grounds for seeking the name would not be entitled to get it. (Cl.16).

The Bill then proceeds with the duties which arise when a police officer is interviewing suspects. The Bill specifically envisages that the police officer may ask questions relevant to his investigation. But the Act spells out in terms that the person asked questions "is not bound to answer the question" (Cl.17(2)). This is nothing more nor less than the traditional right to silence.

Where, either before or after questions have been asked, a person becomes "under restraint" (that means that the police officer would not let him leave if he wished to do so) a duty arises upon the policeman not to ask him any further questions until he has told him his name and rank and given him the standard warning that he, the suspect, is not obliged to answer any questions asked of him. To this warning is added the obligation to inform the suspect, who at this stage is in a position that he cannot go free, that he may at any

time consult a lawyer or communicate with an appropriate relative or friend (Cl.18).

Furthermore a duty is imposed upon a police officer who decides to charge a person not to go on with an interview or to ask any questions unless he has cautioned the person involved by handing him a document which sets out in simple language that person's rights. These include that he is not obliged to answer any questions, that he may communicate with a lawyer or with a friend.

The purpose of this document (Cl.19) is to convey to the accused the rights which he enjoys as a member of the Australian community. The hardened criminal knows these rights. The rich can soon find them out. It is for the ordinary citizen who is literate, that notices of this kind must be devised and supplied. Is it reasonable that the important rights which our society cherishes should be restricted to the criminal classes and the wealthy or highly educated? In a society of general education, is it not appropriate to have a simple form which tells a person in a predicament just what he is entitled to do under the law of the land?

Access to Lawyers. The Bill then provides that where a suspect who is under restraint asks to see a lawyer, he is to be given reasonable facilities and a reasonable opportunity to do so. The police are required to wait until the lawyer has arrived. But the bill is not unrealistic. There is no obligation to wait for more than two hours for the arrival of a lawyer. If it is not reasonably possible to secure a lawyer or to secure one in that time, the police can proceed (Cl.20).

The Bill recognises that many people do not have a "lawyer of their choice". It therefore requires the Minister to keep a list of lawyers who are willing to assist people in the vicinity of the particular police station. If a person is unable to get his own lawyer or does not know of a lawyer, the police duty is to supply the list. The fact that it is for the Minister to keep the list and to consult professional

associations about it, will ensure that this provision is not abused (Cl.21).

Communication with Friends and Relatives. Some people will prefer to communicate with a relative or friend. In these circumstances the police are required to allow such communication unless they believe that it will lead to the escape of an accomplice or the loss, destruction or fabrication of evidence (Cl.22). To avoid the situation of people in custody being entirely incommunicado, the Bill also provides that a system will be introduced to maintain lists of persons who are "under restraint". This will mean that, subject to protections like those I have already mentioned, it will be possible to check whether a person is in police custody. This should avoid the complete disappearance of suspects during interrogation : a matter that we were told leads to much needless anxiety on the part of innocent people.

Treatment of Prisoners. The Bill obliges certain specific minimum treatment of persons under restraint. In this respect, it does nothing more than to reflect the *International Covenant on Civil and Political Rights*. For example, if they need medical treatment it is to be supplied, although at their cost. They are to be provided with reasonable refreshments and access to toilet facilities. They are to be given facilities to wash or shower, to shave and to change clothes, particularly before they come before a court. The sorry appearance of persons kept overnight, brought before a court on the next day, surely puts them at an unfair disavantage. If it costs the community a little more to unhold human dignity, even where a person is accused as a criminal, it is a price worth paying to uphold the *reality* of our fundamental rule that a man is presumed innocent until judged guilty.

Special Protection for Some People. Following the Law Reform Commission's Report special protections are provided for classes of people who are at a particular disadvantage in the criminal investigation process. The first is an Aboriginal Australian. If he is suspected of a serious offence, or an

offence against the person or property, he is not to be interviewed unless a "prisoner's friend" is present or unless he has expressly and voluntarily waived his right to that protection. Anyone who knows the slightest thing about Aboriginals, knows their tendency to agree with persons in authority. The judges of the Northern Territory, men skilled in dealing with Aboriginal accused, underline this point in many judgments. There are now Aboriginal Legal Services and informal arrangements for the presence of representatives of such services are often made in practice even now. This Bill would regularise that procedure. The presence of a relative, of a lawyer, or of a citizen authorised to attend is envisaged. It is quite unreal to answer the special needs of the Aboriginal community by reference to the very small number of Aboriginals who have reached prominence in our society. There is at the moment a need for special provisions for Aboriginals. Subject to waiver, the Bill provides them.

Likewise the Bill requires that where a person is not able to communicate with reasonable fluency in English, the police are not to ask questions unless a competent interpreter is present. (Cl.27). Anyone who has been in a strange country, with a strange criminal system, will know how fair this provision is. It is especially an obligation of our community, where we have brought in many migrants from criminal justice systems which are entirely different to our own.

Likewise the Bill provides special protection for children under interrogation. The primary obligation is to only conduct the investigation if a parent, relative or friend of the child or lawyer or welfare officer acceptable to the child is present.

Confessional Evidence. The Bill then turns to deal with the vexed question of confessional evidence. It is no good saying this is not a problem and that police should be trusted and that corroboration of police should not be required. More and more cases in our system are now being fought out not upon

the basis of primary investigative evidence but upon what the accused said or did not say at a police station. These bitter battles poison the administration of criminal justice. We must do something to help the judges and the juries to determine them correctly. The Bill does not make tape recording of confessions compulsory. However, it certainly seeks to encourage the use of tape recording. I ask again : is there any real doubt that in the 21st century one means for setting at rest disputes about confessional evidence will be tape recording of evidence? We are drawing a Bill here which speaks to the 21st century. We should always bear that in mind.

Of course tape recordings are not without problems. Of course tapes can be interfered with and sounds can be distorted or misrepresented. But I know from experience as Counsel how utterly devastating a good tape can be. How conclusive it can be to the issue for trial. How the inflection of the voice and the drama of real and not second-hand evidence can damn an accused much more severely than typewritten confessions. The police were weaned to typewritten confession in the 50s and 60s. We must now bring them the next step to the tape recorder. It will be difficult at first but if it ultimately restores entire community faith in the integrity of confessional evidence, or even makes a step in that direction, it will be a major step forward for police-community relationships.

Use of tape recorders is encouraged by providing that other requirements may be avoided if the interview is recorded. Alternative procedures are available. They include the presence of an independent witness (a magistrate, lawyer, relative or friend or suitable citizen) (Cl.31(7)). They also include verification of a statement, volunteered, before such a witness. However, the primary means of security is recording by sound recording apparatus (Cl.34). Once recorded, the police must hand the tape to a specially appointed custodian. This person will,it is envisaged, be a court officer. Provision is made for the supply of tapes and of

transcripts and for the security of tapes. Provision is also made for the destruction of tapes if a person is not proceeded against. The Thomson Committee in Scotland has proposed the use of tape recording. The Home Office Committee in England has proposed such use. The Victorian Police currently use tape recording in some homicide cases. I have seen them at work and have heard how powerful their evidence is. If even a few disputed cases can be set at rest in this way, the Bill will make a significant advance.

Fingerprints, Identification Parades, Searches etc. The Bill contains fairly specific provisions for other investigations. I will not go into all of these provisions. One is worth noting. Instances are quoted in our report of real injustice done by convictions based on identity evidence. The human mind is fickle and tends to see what it wants to see or expects to see. For this reason the Bill proposes many protections for the accused to ensure a fair conduct of identification procedures. One provision is that where a parade is conducted, at least one photograph, if practicable in colour, is to be taken while the parade is being conducted, unless a videotape recording is taken (Cl.40(6)). If disputes arise concerning the fairness of an identification parade (as often happens) there will be positive evidence to put before the jury and evidence which the accused can produce if he chooses to do so. The fear has been expressed that citizens may not be willing to take part in parades on such terms. I reject that fear. But even if it proved well grounded, the answer is not to suppress a fair means of resolving disputes at the trial but to introduce a duty, akin to jury service, so that the police are properly armed with the means of conducting fair identification procedures.

Specific provisions are made for fingerprinting (Cl.38), searching of arrested persons (Cl.41) and medical examinations of arrested persons (Cl.42).

The Charge Stage. The Bill spells out what is to happen when a person is charged. Particulars are to be entered in a consecutive charge book (Cl.43). The charge is to be made

"as soon as practicable" after the person is arrested (Cl.42). A person who has been arrested may be released without being charged, if, for example, the police recognise that they have "got the wrong man" (Cl.45). Nothing is more foolish than to require the police who become convinced of a mistake, to proceed with the full machinery of a trial simply to justify the mistake.

Immediately after a person is charged the police must caution him again and may ask him no further questions except to clear up ambiguities or to deal with an emergency. This, again, is nothing more nor less than the present limits imposed upon police by the Judges' Rules.

The Police Bail Decision. Once a person is arrested and charged, he is deprived of his liberty. The Bill again underlines the obligation of the police to hand him over to the judiciary. He must, if it is possible, be brought "forthwith after charge before a magistrate to be dealt with according to law. If he cannot be brought before a magistrate, so that he can make any necessary application for bail to him, the duty is imposed upon the police forthwith to make a decision whether to grant him bail or not.

The reform of Bail procedures could take up a whole seminar. Indeed there is a seminar arranged by the N.S.W. Institute of Criminology on 18 May in Sydney on this subject alone. The Bill stops talking about bail reform and does something. It sets out in clear terms the criteria that are to be applied by the police officer deciding whether to grant bail or not. I will not repeat the criteria. They are found in clause 51. They require consideration of the probability that the person will appear at court, matters related to the interests of the accused and matters relating to the protection of the community. In the last class is one matter which was not within the Law Reform Commission's recommendations. This obliges the police to have regard, in making the bail decision, to the likelihood that the person will commit other offences whilst on bail. (Cl.51).

The Bill then lays down the various conditions that can be imposed by police as a term of granting bail until the next court sitting (Cl.52). Provision is made, at last, for the payment of bail by cheque, but only if the police officer in his discretion allows it (Cl.56). There are many perfectly respectable citizens who do not carry large sums of cash around but who are nevertheless entirely credit-worthy.

The Bill allows for judicial supervision of police bail decisions. It requires police to inform person refused bail of the reasons for the refusal and of the right to appeal to a judge or magistrate, including by telephone. Why should we not use the telephone to superintend police bail decisions? In some parts of the country, the delay until the next court sitting is a long one. But even if it is short, why should the machinery of the 20th century (indeed of the 19th century for the telephone is 100 years old) not now be brought into the criminal justice system?

Search and Seizure and Police Records. Time does not allow me to deal with Part V of the Bill which provides for methods of conducting search and seizure and the prerequisities for search warrants and other searches. Again the Bill envisages the use of the telephone (Cl.62) to allow judicial supervision of urgent searches. The Bill does not prevent search without warrant in emergencies but it does specifically abolish the general search warrant i.e. an unrestricted warrant requiring no judicial approval for use in a particular case.

Likewise the Bill forbids entrapment (Cl.66). This is defined as the act of a policeman inducing a person to commit, either alone or with the policeman or some other person, any offence which he would not have committed on that occasion, if he had not been induced to do so. English law has always looked with disfavour upon *agents provocateurs* but the Bill actually does something about it. The Bill also gives persons access to their criminal history records and this is in keeping with the important moves on the horizon for freedom of access to government information.

Enforcement of the Bill. I now come, finally, to the critical provisions relating to enforcement of the Bill's rules. Some of the provisions of the Bill may already be enforcible by civil action brought in the courts for the recovery of damages. Such actions as those for assault, malicious prosecution, wrongful arrest and so on provide citizens with a means of redress. But the means has proved fairly inadequate in the past. The Commission is presently working on a revised procedure for the handling of complaints against police. I am happy to say that much progress has been made in this direction, largely because of the co-operation of police commissioners and the recognition of a need to overhaul the present system. This report will envisage a revised police disciplinary code as one means of enforcing the Bill's requiremen

But the Bill itself contains a provision designed to secure compliance with its terms. At present, courts are empowered to exclude evidence where such evidence is wrongfully obtained by police. Generally speaking, and in comparison to overseas jurisdictions (especially Scotland) our courts have tended to exercise this discretion most cautiously. In the United States, an approach has been taken to exclude evidence wrongfully or illegally obtained, no matter how cogent it may be. The Commission rejected this approach. But it felt that our courts should be given a more active role to ensure that the administration of justice is not poisoned by the wrongful obtaining of evidence. This is a case where the end does not justify the means, otherwise the whole fabric of the common law criminal justice system would come tumbling down.

The Bill therefore proposes that where in subsequent court proceedings, an objection is taken that evidence is obtained as a result of the failure by the police to comply with its terms, or contravention of its terms, the court's duty is not to admit the evidence unless it is satisfied that to do so "would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person".

Some guidance is given to the courts in applying this "reverse onus discretionary rule". The court is to have regard to such matters as the seriousness of the offence, the urgency and difficulty of detecting the offender, the need to preserve evidence of the facts, the nature and seriousness of the contravention of the rules and the extent to which the evidence could have been obtained lawfully (Cl.73(2)).

Therefore, where the requirements of the Bill are not complied with, this does not mean that the evidence obtained will automatically be excluded. On the contrary, the courts can be trusted to ensure that the discretion reposed in them is properly and fairly exercised. It will be exercised with a view to upholding the public interest. But the purpose of the Bill is to ensure that henceforth a discretion will, in truth, be exercised. The court will have to look to specific questions. It will not arbitrarily use the rules of evidence to discipline the police. It will, however, ensure that the whole conduct of criminal investigation is under the active scrutiny of the courts who are our ultimate guardians in preserving our liberties.

This Bill is a major measure of reform. It is especially a major measure of modernisation. It represents in many respects the present law. But it collects that law, updates it somewhat, gives it new machinery for operation and puts it into an Australian statute which will be available to every resident in the land. I suggest that a calm consideration of its terms will warrant the approval of the Australian community and of its Parliament.