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THE COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT

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MELBOURNE, SATURDAY 6 FEBRUARY 1982

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The Hon. Mr. Justice M.D. Kirby
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BEYOND PROPOSALS : INTO THE WORLD OF ACTION

This is a busy and practical seminar. It is not appropriate for me to make either a lengthy address nor a philosophical dissertation about law reform in general or criminal investigation reform in particular; but I shall probably do both.

Lord Hailsham said in a recent address on 'Obstacles for Law Reform' that 'truly straight is the gate and narrow the path which, so far as law reform is concerned, leads to the statute book'.[1] He also ventured, from his uniquely relevant English perspective, what he described as the two fundamental 'truths' of law reform. These may also apply in Australia. They were:

> That law reform is by consent or not at all, and that it takes at least three successive Lord Chancellors' normal span of office to carry through even those which are ultimately carried by consent.[2]

We may declaim against the inequity of such limitations on the modernisation, review and simplification of our legal system. However, practical law reformers, those concerned to achieve the righting of wrongs, cannot ignore the real world in which law reform is to be achieved.

It is exactly seven years since I, somewhat reluctantly, accepted the post of Chairman of the Australian Law Reform Commission. I am an older, and I hope wiser, man than I was when I embarked upon this venture. Naturally I am more clearly aware of the difficulties of securing law reform through the political and administrative processes of the Commonwealth. I am especially aware of the difficulty of doing so where, as has been the case of the five successive Attorneys-General with whom I have worked, the references to the Commission have been uniformly controversial, sensitive and matters upon which the keenest differences of view can be held in the legal profession, in the expert community and in society generally.

Such a case is the subject matter of our seminar today. Criminal investigation law reform is a matter upon which strong passions are engendered. They are inherent, in one sense, in what the justices of the High Court have described as the 'competing requirements of public policy' that are at stake. This competition is between the need to support our law enforcement officers, not to frustrate them with foolish or unnecessary rules and procedures, and to uphold them when they are honest and encourage them in the effort to bring to justice those who offend against society's rules. On the other hand, there is the desire to ensure that law enforcement officers themselves obey the law, act fairly and within the system of accusatorial justice we have inherited from Britain, are conscious of the rights and liberties of people, including suspects, and do not themselves damage respect for the law by disobedience to its letter or indifference to its spirit.

Because of the limitations of time available to me, I propose to confine my remarks, set against this background, to four themes:

. First, I propose to say something briefly about the approbation which I believe the Attorney-General and his officers deserve both for pressing forward with the effort of criminal investigation law reform and for adopting the course of public consultation in the process, of which this seminar is an example.

. Secondly, I will say something about the issue of tape recording of confessional evidence, dealt with in clause 31 of the Bill.

. Thirdly, I propose to say something about the subject of interrogation of persons not fluent in English, dealt with especially in clause 28 of the Bill.

. Finally, I propose to make a few comments about the critical clause upon which the enforcement of the Bill depends so heavily, namely that dealing with the exclusion of evidence illegally obtained, clause 69.

A PROPER COURSE FOR APPROBATION

Taking Lord Hailsham's test and accepting it for the moment as applicable to the Federal Australian scene, it is too much to hope that it will be possible to secure 'consent' of all involved about the precise terms of every provision of the Criminal Investigation Bill 1981. Indeed, if law reform is in truth 'by consent or not at all', we will exclude large areas of the law from the benefit of reform, precisely because people of different background (and even the same background) will, with entire sincerity and conviction, approach the resolution of the balance of conflicting interests of public policy in different ways. They will strike the equilibrium at different points, according to the values they place upon the competing social policies at work.

Proof of this could not be more easily established. Reform of criminal investigation law, I have previously called a 'graveyard' of law reform reports. Certainly, over the past decade or so, a great deal of intellectual energy and a lot of very busy people have been devoted to the attempt to improve the unsatisfactory features of criminal investigation. Few indeed of the many reforms proposed (a large number of them being recurring themes) have been implemented by the lawmakers. The list of the reports should be read, so that we will understand the significance of the general Bill which is now before us. None of the list, save the report of the Australian Law Reform Commission, has produced any significant legislation at all:

- The Murray Report on Procedures of Interrogation (Victoria), 1965.
- The 11th Report of the Criminal Law Revision Committee (England), 1972.
- The Mitchell Committee Report on Criminal Investigation (South Australia), 1974.
- The Report of the Australian Law Reform Commission on Criminal Investigation, 1975.
- The Home Office Report on Feasibility of Tape Recording (England), 1976.
- The Beach Report on Allegations Against Members of the Victoria Police, 1976.
- Sir Henry Fisher's Report on the Confait Case (England), 1977.
- The Lucas Report on the Enforcement of Criminal Law in Queensland, 1977.
- The Norris Report on the Beach Report (Victoria), 1978.
- The Report of the English Royal Commission on Criminal Procedure, 1981.

Such a proliferation of lawyerly activity leading nowhere invited the rebuke of the Prime Minister, Mr. Fraser, at the opening of the 1977 Australian Legal Convention in Sydney:

> This is an area in which there has been much dissatisfaction, considerable writing, many proposals for reform. But not much legislative action.[4]

There is a natural institutional pressure upon the Chairman of a reporting body, in a country where detailed controversial reports are frequently ignored, overlooked or put into the 'too hard' tray, to welcome any action designed to implement proposals for reform. Especially is the temptation great in an area of deep controversy and where novel ground is being covered. Where the venture is so unique as the first effort of an English speaking country to collect and state the basic rules of police and suspects and to retrieve these from the inaccessible pages of the English judicial reports (and the often more inaccessible files of Police Commissioners' Instructions), perhaps the pressure to applaud legislative action, any action, is almost irresistable.

In some senses, I ought perhaps to disqualify myself from evaluating the Criminal Investigation Bill 1981 at all because of these institutional pressures. Doubtless you will all make due allowance for them. The fact remains that I believe it is appropriate to say at the outset of my remarks that the Attorney-General (Senator Durack) and those who have been advising him — especially Mr. Andrew Menzies — deserve praise for the persistence with which they have pursued Lord Hailsham's straight gate and narrow path towards statutory law reform in this difficult area. How much easier it would have been simply to put the task to one side.

This is not to say that we ought not to use this occasion of public commentary for the purpose of offering constructive criticism towards the improvement of the Bill. I believe the Rubicon has now been crossed. Attorney-General Ellicott introduced his Bill. Attorney-General Durack has now presented his Bill and invited comments. The Police Commissioner (Sir Colin Woods), whose own contribution to better policing in Australia deserves public acknowledgement, has said that his Force can operate with this Bill. So important is it that we should secure the public statement of rights and duties in this area and set them out in an Australian statute, enacted by the Australian Parliament, thereby giving encouragement to modernisation of police procedures, that I believe critics should be prepared, at least to some extent, to accept the inevitability of differences of view, of room for compromise on non essentials and the need for ongoing reform, once the Bill is enacted into law.

There are clauses of the Criminal Investigation Bill 1981 which represent a retreat from the approach taken in the Bill attached to the Law Reform Commission's 1975 report. There are aspects of the Bill where I remain convinced that the Law Reform Commission struck a preferable balance to that which is now offered. There are ways in which the language of the present Bill could be improved and I will make some suggestions. The manner in which the Law Reform Commission's published report and the 1977 Bill were run through the gaunlet of a confidential interdepartmental committee, with representation of some, but not all, of the interests to be balanced, was perhaps administratively necessary but is not an assured means of arriving at an appropriate balance between 'the competing requirements of public policy' to which the High Court has referred. Having said all this, I repeat my view that we should approach the opportunity of criticism of the Bill in a constructive spirit, mindful of the approbation which the Attorney-General and his officers deserve for pressing forward with this vital and novel project. We may not secure the consent of all. We have still to complete the straight and narrow path before we reach the statute books. But we are certainly now in the Australian equivalent of the third Lord Chancellor's normal span of office after the proposals were first offered (Attorneys-General Enderby, Greenwood and Ellicott having departed). So I am hopeful that in an area where there has been much talk but not much action, we can anticipate action at last. The achievement of an Australian statute, of relative brevity, collecting the basic rights and duties of police and suspects, is an endeavour worthy of the attention of the best minds in government service, the legal profession, the judiciary and the police force, as well as deserving of the attention of good citizens, keen to play a part in the improvement of the law.

SOUND RECORDING

I turn to the three subjects of the Bill upon which I propose to make observations. Each is an important reforming feature of the Bill. First, sound recording of admissions to police. The proposal for sound recording has been made not only in most of the law reform reports that I have listed, but also in a number of judicial pronouncements including in the High Court of Australia. The allegation of oral admissions and confessions to police, subsequently denied by the accused, presents serious and difficult problems to the criminal justice system. The need for sound recording to lay at rest, so far as possible, disputes about allegedly fabricated confessional statements or otherwise damaging remarks, has been repeated over and over again. To some extent recording is already a feature of Australian police practice : in homicide in some States and in police corruption cases, in all jurisdictions. Use of tape recorders is proliferating — and I am told that 450 are already in use in the Victoria Police as an adjunct to police investigation. The English Royal Commission on Criminal Procedure acknowledged that virtually all

discussion on how to achieve reliable ways of ensuring that statements made to police are accurately recorded, centres around the introduction of tape recording of police interrogation:

> That would provide not only an accurate record of all that was said, but would be a monitor on the way the police conducted the interview.[5]

In the result, the Royal Commission, for reasons of feared cost, suggested that, whilst tape recording of all interviews should be 'if necessary gradually develop[ed]'[6], it would be sufficient to start with a summary or written statement in the more serious cases, recorded on tape, with the consent and knowledge of the suspect, to which he would be invited to offer, on tape, comments about how he had been treated and any remarks he might have about the summary. This approach, which is reflected in part in the approach taken in sub-clause 32(4) of the 1981 Australian Bill, attracted much controversy and some criticism in Britain. Lord Salmon, in a spirited address, felt moved to put his objections to this compromise in these terms:

> It is absolutely essential that the conversations between the police and the accused should be tape recorded <u>now</u>. I doubt, however, whether the police are particularly enthusiastic about tape recording : and the [Royal Commission] thinks, in my view wrongly, that tape recording should be postponed because it would incur large expense. ... In my view, trials within a trial would virtually disappear and very large sums of money and much court time would accordingly be saved; and justice would be done in regard to confessions real or invented. Moreover, the accused, on discovering that his confession was unassailable owing to its tape recording, would probably change his plea to 'guilty'. ... Surely no further time should be wasted. Tape recording of conversations between the police and the accused will cut down a large part of the time now wasted in many trials and this will accordingly enable persons who have been committed for trial and who are awaiting it, to be spared much of the shocking delay which they are suffering at the moment. Justice is calling loudly for tape recording to be used now; and there is no real excuse for this to be refused.[7]

On the one hand, it must be said that the Criminal Investigation Bill 1981 at last takes the plunge. It is there in the Bill, in black and white. Provision is made for sound recording. As a security against the alleged risk of interference (dismissed as insubstantial by the researchers looking at the problem for the Royal Commission) provision is made for copies to be automatically and simultaneously recorded and offered to the accused. The use

of sound recording is specifically provided for. It is one of only three ways by which, in certain cases, confessions may be admitted. Even where full sound recording is not provided, one of the other three ways is sound recording of the 'readback' of the summary.[8]

However, there is a very important difference that has been introduced in clause 32 of the 1981 Bill. It is that the requirement of complying with sound recording, readback or written acknowledgement of the confession or admission is limited to indictable offences only:

> 32(1) Subject to sub-section (10) in proceedings against a person (in this section referred to as the 'accused') in a court in respect of an indictable offence, evidence by a police officer of a confession made by the accused in his presence, after the commencement of this Act, is not admissible on behalf of the prosecution unless the requirements of sub-sections (2), (3) or (4) are complied with in respect of the interview in the course of which the confession is alleged to have been made.

In the 1977 Bill, introduced by Attorney-General Ellicott, a distinction was drawn between the consequences which followed in the case of a trial of a person before a jury, where a confession that was not sound recorded or otherwise verified was tendered and proceedings 'for the summary conviction of a person'. In the latter case, the court was instructed, in deciding whether the confession was made to the police or was made in the terms in which it was alleged to have been made, to 'have regard, among other matters' to the existence of written acknowledgement, sound recording or other specified verification. Reference to non-indictable summary offences has simply slipped out of the 1981 Bill. The precondition of sound recording, readback or written verification is limited to the very special and relatively limited class of 'indictable offences'.

True it is, clause 31 repeats the principle that evidence of a confession is not admissible unless it was made voluntarily. However, in the vital business of deciding voluntariness and in calling in aid the machinery of technology to lay at rest the disputes that surround that question, the use of sound recording has been reserved to a small, special though admittedly serious class of case : the indictable offence. The bulk of the work of Federal Police will simply slip through these provisions and as to them, the sound recording securities offered by clause 32 (because its terms are confined to indictable offences) will be irrelevant. Although sound recording is to be introduced, it is to be introduced, so it seems, gradually and only in one class of case. Perhaps it can be argued

that this is appropriate. Police, seeing the value of sound recording, may be encouraged to overcome their resistance to this new procedure. It is more important, so it might be said, in the most serious, indictable, offences, that special securities should be offered, because of the consequences that will be faced by the accused, generally of long periods of imprisonment, if he is convicted. The English Royal Commission, in its approach, contemplated gradualism in the introduction of the new procedure. Even sound recording may be seen as a staging post on the way to video taping of confessional evidence, which may be expected in the next century, if not before. So is gradualism the justification for the retreat in this beneficial development, marked by the language used in the 1981 Bill?

There is another serious objection to applying the requirements of clause 32 of the Bill on the basis of a distinction between indictable and other offences. In relation to the Commonwealth Crimes Act and in the Australian Capital Territory a number of offences can be dealt with either summarily or on indictment. According to a recent decision of the Supreme Court of Queensland R v. Waddington[9], where an offence can be dealt with either summarily or on indictment, it is, unless a contrary intention appears in the legislation, not an indictable offence if it is in fact dealt with summarily. It would seem inappropriate for the admissibility of oral confessions taken at the preliminary stage of criminal investigation to depend on whether or not the offence will later come to be dealt with summarily or on indictment.

The 1981 Bill does represent, in this respect at least, an important departure from the approach taken by the 1977 Bill, which gave encouragement to the use of sound recording and other securities in summary offences as well as those offences tried before a jury. The Law Reform Commission's 1975 report went even further still, simply providing, in clause 35 of the Bill attached to the report that:

> A police officer who interviews a person for the purposes of ascertaining whether the person has committed an offence shall, unless it is in all the circumstances impracticable to do so:
>
> (a) cause the interview to be recorded by means of sound recording apparatus; or
> (b) interview the person in the presence of a witness who is ... an appropriate witness.

In essence, the choice between the 1975, 1977 and 1981 approaches depends upon the emphasis one wishes to place upon the speed with which sound recording of confessions to police is to be introduced. One by one the points of opposition to sound recording crumble before serious examination:

. Costs. First, it was suggested that the costs of equipment would be prohibitive, running into thousands of dollars. Then it was discovered that a device for automatically producing two tapes was readily available and inexpensive. More recently even more modern equipment has been developed — pioneered in Australia — to provide an inexpensive, secure system for sound recording by police. Experiments are being conducted, with the knowledge of the Federal Police, to develop a portable sound recorder which will indelibly mark time lapse upon the tape. Arguments of cost are no longer significant. Indeed, they do not seem to me to be as significant as the Royal Commission in England thought. Costs of training police in the use of the new device would also be negligible, especially when compared to the public costs of disputed trials to which Lord Salmon referred.

. People Confess. The suggestion that people would refuse to make a statement at the sight of sound recording overlooks the fact that many people do make statements, including to the disconcerting cacophony of police typewriters. Evidence gathered by researchers for the Royal Commission on Criminal Procedure in Britain indicates that only about a quarter of all defendants in the representative sample examined reached the courts without either a full written confession or damaging statements of some kind having been recorded against them. In other words, about 75% of defendants reaching court, on this estimate, had made statements which facilitated prosecution proof of the case against them.[10] Moreover of these, 90% of the defendants who made written statements to police in Birmingham and 76% of the sample in London pleaded guilty at their trial. Thus, something of the order of 70% of cases in Britain are despatched by procedures of admission or confession. The figures in Australia are probably roughly the same. We are therefore dealing with a very significant proportion of the criminal justice docket. Pre-trial police procedure is of critical importance to the outcome of these cases. It is therefore the legitimate concern of the criminal justice system that these procedures should be acceptable and should be readily capable of being proved so.

. Interference. The suggestion of interference in the tape, which is often mentioned as an objection to the procedure, can be met by the provision of a copy tape. Furthermore, the modern technology I have referred to makes it much easier to ascertain breaks in the tape or interference with a recording. This objection too disappears.

. Privacy. So far as retention of the tape and the potential damage to privacy and reputation is concerned, this can be met, as it is in the Bill, by provisions for erasure or disposal after time, if no action is brought.

. Time Taken. So far as the objection about the time that would be taken up and the number of tapes necessary, this too can be met if English investigations are any guide. In the investigations for the English Royal Commission, it was found that most police investigations last two hours or less. Only 2% lasted more than four hours. The Law Reform Commission's inquiries revealed that similar patterns exist in this country. We are therefore talking of average interviews which can generally be covered in a single cassette tape : probably less, because the impediment of the speed of the typewriter will be removed. The verisimilitude of sound recording, with its greater conviction and authenticity, will be substituted.

. Place of Confession. So far as the objection that many confessions are made out of police stations and could be lost by a formal police station procedure, this too can be met. The English investigations disclose that 87% of statements to police were in fact made at the police station. Less than 1% were made in the police car. Of the 10% made at the scene of first apprehension, many of these were considered unimportant. In any case most of them could be covered by appropriate, portable sound recording equipment.

We ought not to be afraid of technology. We ought constantly to be conscious of the importance of pre-trial procedure, the need to assure its integrity and the tremendous cost to the community when disputes arise about what was said. These costs, funded increasingly by public funds, as legal counsel for the Crown and Public Defenders fight it out, do great damage to the good name of decent honest police. Many of these disputes could be laid at rest by warmly embracing the sound recording of statements to police. My regret about the approach of the 1981 Bill is that in this respect the requirement of sound recording in the Bill is confined to the small class of indictable offences and then only some of them. The opportunity has been lost to extend the cover further or even, by legislative prescription, to encourage as the 1977 Bill did, the use of sound recording across the whole range and variety of police work. Most Federal Police operations will fall outside the legal requirement of sound recording or equivalent security.

NON ENGLISH SPEAKING SUSPECTS

I now turn to the second subject of my commentary, namely the changes in the Bill dealing with accused who are not fluent in the English language. The provisions of the 1977 Bill were much simpler. Where a police officer had reasonable grounds for believing that a person under restraint was unable to communicate orally, with reasonable fluency in the English language, he was obliged not to ask the person any questions in connection with the investigation:

'unless a person competent to act as an interpreter is present and acts as interpreter during the questioning'.[11]

Now, a series of qualifications are introduced:

. Police Interpreters. First, the notion of the police officer having reasonable fluency is introduced as the first possible alternative to a trained interpreter. Whilst it is true that police forces have attracted some members from the ethnic communities and whilst this is thoroughly desirable, it would be quite undesirable if 'kitchen Greek' were to be substituted for the facilities of a proper translator and skilled interpreter, aware of the nuances of meaning that can exist in legal procedures and legal rules which are often quite different to those that exist in the home country.

. Using Other Means. The notion of communicating 'by any other means' which is incorporated in sub-clause 28(a) of the 1981 Bill, imports, to my mind, procedures that may be unsatisfactory and unfair to persons who are not fluent in the English language. I refer, for example, to the use of children or other members of the family of the accused person, members of the district or of a community group nearby, use of a tourist phrase book or even mechanical translators which are still in their infancy and are quite unsuitable for the sophistication of the vital work of criminal investigation.

. Interpreters. The provision of a person competent to act as an interpreter is given as the second and not the first of the obligations. Symbolically, it would have been preferable, as it seems to me, to suggest that the provision of a competent independent interpreter was the primary obligation. Other improvisions should be seen as 'second best' solutions, particularly bearing in mind that the sanction available for non compliance with the provisions is not automatic disallowance of the evidence but simply the activation of the judicial discretion to balance individual and community interests.

Ours is a country which now boasts its multicultural nature. People in the 'Anglo Celtic' realm of the law do not always appreciate the extent of the change that has overtaken Australia. It has welcomed people from more than 130 countries since the Second World War. More than 80 languages are spoken at home. We should be specially careful to uphold fair standards of justice in criminal procedure for those persons, citizens and otherwise, who are not able to understand with reasonable fluency the English tongue. They are at a great disadvantage because our criminal procedures are so different from those of most non English speaking countries.

Their disadvantage is compounded by inadequate translation of what they are saying and what is said to them. The International Covenant on Civil and Political Rights which Australia signed last year stresses many times the need for the use in criminal process of a language which the accused understands[12] and the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court. Falling down on this entitlement in the pretrial procedure, will put a significant and growing proportion of our population at a serious disadvantage. The commitment of the government, signalled by the Prime Minister's statement at the opening of the Australian Institute of Multicultural Affairs, to the notions of multiculturalism and the protection of the rights of persons not fluent in English should, as it seems to me, attract special attention to clause 28.

Here again, the limitation of the tape recording requirement option to indictable offences is relevant. It would not be so serious if it were possible usually to go back to the sound recording and to ascertain the fairness of the interrogation (and the accuracy of the translations being offered). But if sound recording is to be limited to indictable offences only, and then only to some such indictable offences where readback or written acknowledgement is not used, the opportunities to check objectively and conclusively the fairness of the translation, the reasonable fluency in the English language of the accused, the need for an interpreter, the satisfactory nature of any other means of communication opted for by the police, will all be lost. This is, as it seems to me, is yet another reason for extending more widely the operation of the sound recording principles which the Bill adopts but then applies only half heartedly and to a limited class.

EXCLUSION OF ILLEGAL EVIDENCE

Finally, I come to the sanctions which are provided to ensure that the procedures laid down in the new legislation will be obeyed by police.

It is not necessarily to rely solely on the exclusionary rule in clause 69 of the Bill for the support of the principles in the Criminal Investigation Bill. Commendably, the government has already secured the enactment of Commonwealth legislation which, in substance, implements recommendations in the Law Reform Commission's first and ninth reports concerning complaints against police.[13] This has been done in the Complaints (Australian Federal Police) Act 1981 and the Australian Federal Police Amendment Act 1981. Amongst other things, those Acts:

. Complaints Against Police. Introduce a new system for handling complaints against Federal police, in a way that will bring about a greater measure of apparent and real independence. Breaches of Criminal Investigation Bill by police will provide a basis for complaints to the Commonwealth Ombudsman or to the Commissioner of the Australian Federal Police. The assurance of greater independence and external scrutiny may make it more likely that complaints will be made: it being seen to be useful to complain.

. Liability for Police Wrongs. Secondly, the recommendation of the Law Reform Commission that the old principle that the Commonwealth and the police service were not responsible for the acts and defaults of individual police officers has been repealed. The principle that the police service will be responsible has been adopted. This may, in turn, make it worthwhile to pursue, in the civil law, enforcement of civil claims against police, where, until now, this may not have been worthwhile because of the uncertainties of effective recovery and the likelihood of specially vigorous resistance because of the personal liability of the police officers involved.

I do not believe for a minute that the prospect of exclusion of evidence unlawfully obtained will amount to universal safety valve, preventing police conduct in breach of the standards set out in the Criminal Investigation Bill. In the rush of events, frequently stressful and dramatic and in the heat of the chase, it may be too much to expect that such a lawyerly approach will be taken by investigating policemen. An enthusiastic policeman may consider it worth the risk of a breach, when weighed against the possibility that in the result, the admission will be excluded and the case fail.

That there will be debate is sure. That it is necessary to strike a balance between the competing, and sometimes conflicting principles of public policy is equally sure. There is discontent with the exact balance struck both in Britain and in the United States. In Britain, a Home Office memorandum on the Royal Commission Report asked these questions:[14]

> Was the Royal Commission right in taking the view that exclusion of evidence was not in general an appropriate or effective means of enforcing the rules or safeguarding the rights of suspects? Would the Commission's approach have the effect of reducing trials within trials? If so, to what extent? If the Commission's approach to exclusion is thought too restrictive, would the Australian 'reverse onus' rule, relating the discretion to exclude to the nature of the breach, the demands of the investigation and the seriousness of the offence, be a suitable alternative?

In the United States, too, the exclusionary rule is controversial. Proposals have been made to modify the exclusionary rule operating with vigour in that country because of earlier constitutional rulings of the Supreme Court of the United States. The proposals have been made by Senator De Concini of Arizona who has introduced a vaguely worded Bill which would allow courts to accept illegally obtained evidence, so long as it could be demonstrated that the officers involved did not 'intentionally or substantially' violate the law. Senators Hatch of Utah and Thurmond of South Carolina (the latter, the Chairman of the Judiciary Committee) have, on the other hand, sponsored another Bill that would eliminate the exclusionary rule altogether. Abolitionists of the rule favour civil suits and disciplinary measures within the police force as defences against illegal searches. Supporters of the rule argue that such law suits are time consuming, costly and unavailable to many of those subject to improper police conduct. Supporters also assert that it is not possible to amend the constitutional rule by mere congressional action.[15]

Accordingly, we in Australia can approach clause 69 of the 1981 Criminal Investigation Bill in the knowledge that this is an international debate and one difficult of resolution. It is impossible to hope for Lord Hailsham's 'consent' of all. Different observers will take different views of the value that should be given by the law to the competing public policies — in essence, resolute policing and respect for individual liberty by police, themselves acting lawfully.

It seems plain that clause 69 has been influenced by the decision of the High Court of Australia in Bunning v. Cross[16], a decision handed down since the Law Reform Commission's report. Paragraph 69(2)(c), for example, is clearly derived from the language used in that case. But there is one problem in clause 69, which should be frankly acknowledged by me and which is common to the 1981 Bill, the 1977 Bill and the Bill attached to the Law Reform Commission's report. It is a problem that has been called to the attention of the Attorney-General's Department because it is, above all, important that we should get clause 69 right. Much depends upon the success of its operation.

The difficulty is this. As drafted, sub-clause 69(1) requires, in essence, that where it is objected the evidence was obtained in breach of the legislation, the court is enjoined not to admit the evidence:

> unless, in the opinion of the court, admission of the evidence would substantially benefit the public interest in the administration of criminal justice without unduly prejudicing the rights and freedoms of any person.

The court, under this instruction, which is essentially the same (with verbal differences) to that set out in the Law Reform Commission's formula, must reach a positive conclusion. It is a conclusion that requires the court to be in possession of the conviction that admission of the evidence, apart from substantially benefiting the public interest, as explained, will do so 'without unduly prejudicing the rights and freedoms of any person'. It is in these last words that the problem lies. It is difficult to see how probative evidence, damaging to the accused person but beneficial to the public interest in the administration of criminal justice, could easily be admitted 'without unduly prejudicing the rights and freedoms of any person' namely, in this case, the accused. His rights and freedoms will, for example, certainly be prejudiced by breach of the standards laid down in the Criminal Investigation Bill. It requires a great deal of work to be done by the adverb 'unduly' to require that this word should import some notion of balancing the public's interest in the admission of the evidence as against the accused's interest in having his rights and freedoms respected and therefore the evidence excluded. It is at least open to argument that sub-clause 69(1) requires that evidence, to be admissible, should both substantially benefit the public interest in the administration of criminal justice and not unduly prejudice the rights and freedoms of any person, whatever that expression may mean.

I believe the Law Reform Commission was seeking to say that judicial officers, in exercising the discretion provided for in sub-clause 69(1) should weigh and balance the competing requirements of public policy for and against admission of the evidence and should not admit the evidence unless the public interest in doing so in the particular case outweighs the public interest in defending the rights and freedoms of the individual, including those set out in the Bill concerning fair police procedures. Certain indicia are offered in sub-clause 69(2) by which the discretion is to be exercised. Unless we are content that the adverb 'unduly' will import the obligation to weigh the competing public policies at stake, it would be preferable, as it now seems to me, to rephrase this important clause to make it plain that assessing the competition between the competing public policies is the judicial task here and only if the public benefit in the administration of criminal justice by the access to probative evidence outweighs, in the particular case, the public interest in the rights and freedoms of any person, including the accused in not admitting the evidence, is it to be admitted. This is quite possibly how sub-clause 69(1) as presently drawn would be interpreted by the courts. But if there is any doubt, it would be better to put it at rest. The following questions must also be answered in respect of sub-clause 69(1):

. What 'Rights and Freedoms'? To what 'rights and freedoms' does the sub-clause refer? Does it refer to the generality of the rights and freedoms, for example, stated in the International Covenant on Civil and Political Rights or does it refer more specifically, or at least incorporate, the rights and freedoms collected in the present context, in the Criminal Investigation Bill?

. Testing the 'Prejudice'? In determining the prejudice to rights and freedoms, is it the admission of the evidence which must provide the test or is it the underlying unlawful conduct involved in obtaining the evidence? In other words, is the admission of the evidence required to prejudice those rights and freedoms or is it enough that the rights and freedoms have been prejudiced in obtaining the evidence in the first place? Or is it a compound test : whether admission of the evidence would sufficiently compound the injury of the unlawful conduct involved in obtaining the evidence?

. The Issue of Balance. If a court concludes that admission of the evidence would unduly prejudice the rights and freedoms of any person, can the evidence nevertheless be admitted if it would substantially benefit the public interest in the administration of justice? That is to say, is it necessary to establish that rights and freedoms of any person would not be unduly prejudiced before the public interest in the administration of criminal justice is evaluated or is it a balance which is to be struck, which weighs individual freedoms against general public interest in the circumstances?

. 'Of Any Person'. Does the reference in sub-clause 69(1) to the rights and freedoms 'of any person' require the court to be satisfied that a particular person will be unduly prejudiced or does the very generality of the language point beyond evaluation of the particular case (a matter susceptible to judicial resolution within a small compass) to philosophical questions or general questions of police practice and human rights standards (matters not so readily susceptible to easy resolution in a courtroom)?

I regret raising these points. But they are important. The Law Reform Commission report is, I would remind you, an interim report. I am not anxious to delay the legislation. Indeed, I am keen to help it on its way. But clearly it is vital that we should put the microscope of our attention on this vital clause.

CONCLUSIONS : SUMMING UP

The Criminal Investigation Bill 1981 is an important, courageous and innovative piece of Federal legislation. It contains much that is very good. It provides a simpler draft than the earlier Bills, either attached to the Law Reform Commission's report or presented to Parliament in 1977. The Attorney-General and the government are, I respectfully believe, to be congratulated for pressing on with this pioneering reform. There can be no doubt that it is high time that the basic rights and duties of Australians in dealing with the police should be collected and stated in a law enacted by the Australian Parliament. The Bill contains few requirements on the police which a good policeman does not already abide by. I must resist the natural temptation of a person in my position to applaud any legislative action. In an area so important to our freedoms and to effective policing, there are reasons for compromise and arguments for gradualism. When the legislation is enacted, I believe it will be vital to monitor its operation. This should be the responsibility specifically assigned to somebody. The success of the enterprise in the Federal Police will dictate the spread of this example to other areas of Australian policing. It is therefore important that provision should be made for realistic, and if necessary urgent, revision of the operation of the legislation : with deference to the needs of effective policing and the due administration of criminal justice, and the obligation to uphold the rights and freedoms of citizens, including suspects.

I have mentioned three areas of concern:

. The first relates to what I see as a significant retreat in the implementation of the fine policy of sound recording. This may be deliberate retreat. I would hope it could be reconsidered.

. Secondly, I have mentioned the problems I see in the protections for suspects not fluent in English. The commitment of the government and the Parliament to multiculturalism and the need to translate this commitment and recognition of the special obligations of a country with so many languages and cultures, into practical, effective and fair procedures of criminal investigation, deserves further consideration.

. Thirdly, I have mentioned some of the problems of the reverse onus discretionary rule for the exclusion of evidence unlawfully obtained. There is a need to clarify the discretion that is reposed in the judiciary and the meaning of the words of generality appearing in the present draft Bill.

I applaud the decision to hold this public seminar. Legislation on controversial topics can only be improved, and the hopes of law reform in our country fulfilled, if the community is brought into the process and favoured with the opportunity to have its say.

FOOTNOTES

1. Lord Hailsham, Obstacles to Law Reform, in Current Legal Problems 1981, Vol. 34, 1981, 279, 283.

2. ibid, 282.

3. Stephen & Aickin JJ in Bunning v. Cross (1978) 141 CLR 54, 74.

4. (1977) 51 ALJ 343.

5. Royal Commission on Criminal Procedure, The Balance of Criminal Justice, Summary of the Report, 1981, 8.

6. ibid.

7. As reported in the Listener, 4 June 1981, 7.29. See [1982] Reform 16-17.

8. Criminal Investigation Bill 1981 (Cwlth), para.32(4)(a).

9. [1979] Qd.R. 533

10. The Royal Commission on Criminal Procedure, Research Study No. 5, Confessions in Crown Court Trials (J. Baldwin and M. McConville), 1979, 34.

11. Criminal Investigation Bill 1977 (Cwlth), cl.27.

12. International Covenant on Civil and Political Rights, Article 14(a) and 14(f).

13. Australian Law Reform Commission, Complaints Against Police (ALRC 1), 1975; ibid, Complaints Against Police : Supplementary Report (ALRC 9), 1978.

14. England, Home Office, Consultative Memorandum on the Royal Commission on Criminal Procedure, 1980. See [1982] Reform 17.

15. See 'Exclusionary Justice' in The New Republic, 14 October 1981, 7. See also the Report of the Address by the Attorney-General of the United States, W.F. Smith, to the ABA, 29 Cr.L. 2461 (1981) (8—26—81). For a statement by President Reagan see 30 Cr.L. 2017 (10—7—81) ('President Reagan Urges Statutory Changes to Combat Crime').

16. Bunning v. Cross, above, n.3.