FIRST SESSION OF THE THIRTY-SIXTH PARLIAMENT

MINORITY REPORT OF HON GIZ WATSON MLC OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CRIMINAL INVESTIGATION (EXCEPTIONAL POWERS) AND FORTIFICATION REMOVAL BILL 2001

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1 INTRODUCTION

1.1 Despite my support for certain amendments that will, if adopted, moderate the excesses of this Bill, I remain opposed to the policy of the Bill and argue that it is unnecessary; has inadequate checks and balances; is unlikely to achieve what it sets out to do; and removes some of the key features of the current criminal justice system.

1.2 I dissent from Recommendation 23: "The Committee by a majority (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) recommends that the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be passed subject to Recommendations 1 to 22."

1.3 I make the following comments in support of my position.

2 COMMENTS ON THE POLICY OF THE BILL

The exceptional powers created in the Bill are not needed

Additional powers are not necessary

2.1 Hon Nick Griffiths said in the second reading speech on this Bill:

> *These additional powers are vital to win the war against these highly organised criminals who have access to massive resources.*[1]

He further asserts that:

> *It has been recognised … that highly organised crime cannot be investigated and prosecuted by relying on ordinary police powers of investigation.*[2]

2.2 The State also has substantial powers and resources.

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1 Second Reading Speech, December 5 2001, p6437.

2 Ibid, p6438.

2.3 In their letter to the Committee the Western Australian Bar Association said:

> *However, the State also has "massive" resources to apply to the investigation and prosecution of crime and should, in the public interest, use those resources and existing police powers without resort to the far reaching extraordinary powers contained in this Bill.*[3]

2.4 It is my view that the Western Australia Police Service already has substantial powers of investigation including: powers to enter and search premises; powers to stop, detain and search individuals; powers to confiscate property; powers of surveillance and shortly they will have powers to compulsorily obtain DNA samples.[4]

2.5 The Law Society of Western Australia made the following comment:

> *If investigating authorities such as the Police believe that recent crimes are not capable of being solved or the perpetrators brought to justice using existing considerable powers which they already hold, then the public should be told this openly and reasons given. In other words, an empirical basis in fact needs to be made out justifying why it is contending that the level of existing powers are not adequate to do the job properly. Here, such a justification process has not even been attempted to date.*[5]

2.6 I note that as the Police Service elected to give their evidence to the Committee in private they did not take the opportunity so provided to present a public justification or any empirical evidence of the need for additional powers.

2.7 The particular and abhorrent crime that led to the deaths of former Detective Don Hancock and Lou Lewis has been clearly stated as the impetus for this Bill.[6] Two people have now been charged in relation to that crime, without the use of exceptional police powers.

2.8 Clearly the Bill is not needed.

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3 R I Viner, AO QC, President, Western Australian Bar Association (Inc), Letter to the Committee, April 22 2002.

4 See Committee Report paragraphs 6.32 to 6.36, *Surveillance Devices Act 1998*, and the Criminal Investigation (Identifying People) Bill 2001.

5 Submission No 8.

6 Second Reading Speech, December 5 2001, p6437.

2.9 A 1996 Legislative Council Select Committee on the Western Australia Police Service inquiry found endemic police corruption.[7] The Select Committee reported evidence of police taking bribes to protect prostitutes and drug traffickers, selling drugs confiscated from raids, tampering with evidence, colluding with concealed evidence, interfering in criminal investigations, selectively leaking confidential information to the media and warning people under investigation for gambling or drug offences. The inquiry, as reported in *The West Australian*, also 'identified problems in dealing between detectives and criminals, where the relationship between the two became blurred'. In the same article Hon Derrick Tomlinson, Chairman of the Legislative Council Select Committee, was quoted as saying: "*I think you will find more infiltration by organised crime into the police service.*"[8]

2.10 On December 12 2001 a long awaited Royal Commission was appointed to inquire into and report on whether, since January 1 1985, there has been corrupt or criminal conduct by any Western Australian police officer. The Commission is expected to start taking evidence shortly.

2.11 Given the nature, extent and persistence of allegations of the nature raised above, it is totally inappropriate to even consider granting the Police Service new, exceptional and coercive powers until the Royal Commission's inquiry is completed.

The removal of elements of the criminal justice system is not justified and the checks and balances provided are inadequate

2.12 An evaluation of the necessity of providing the special commissioner and police with exceptional powers to facilitate investigations of organised criminal activities, must involve an evaluation of the relative strengths of different public interests. On the one hand there is the public interest in protecting individual rights, such as the right to protection against self-incrimination. Against this interest must be balanced the need for effective law enforcement through access to essential investigative tools and a community's right to be protected by the state from crime.

2.13 This Bill has the potential to set the trend for the criminal justice system to begin to consistently favour the interest of the state over the individual.[9]

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7 Interim Report of the Select Committee on the Western Australian Police Service, *Term of Reference 3*, Legislative Council of Western Australia, June 1996.

8 Mendez, Torrance, 'Police face corruption test', *The West Australian*, March 28 2002, pp1-2.

9 See Committee Report paragraph 3.23.

2.14 The Bill provides substantial coercive powers without providing immunities that would provide protection from abuse of these powers.[10] This has the potential to interfere with certain civil rights.

2.15 The Law Society of Western Australia said in its submission to the Committee:

> *…the Society remains vitally concerned to ensure that any new legislation passed in the aftermath of abhorrent crimes does not constitute an over reaction which would trespass long term against fundamental freedoms which Australians treasure as part of a free and democratic society.*[11]

2.16 The Criminal Lawyers Association of Western Australia said in their submission:

> *Police powers are increased and yet the legislation does not provide for any safeguards against the misuse of powers…*[12]

2.17 Key features of the current criminal justice system include:

(1) Police cannot arrest a person simply for the purpose of questioning them.

(2) Generally, there are strict limits on the powers of police to detain a suspect in custody during an investigation.

(3) The defendant has a pre-trial right to silence in criminal matters.

(4) The defendant may engage a legal practitioner to represent them.

(5) The defendant is not required to call any evidence or give any evidence.

(6) The prosecution bears the burden of proving a case beyond reasonable doubt.

(7) Confessions that result from threats, inducements or improper pressure of any kind are rejected and cannot be acted on by the courts.

2.18 All these features are, to a greater or lesser extent, removed or challenged by the Bill. Further, the fact that some of these features have already been eroded by previous legislation is regrettable and does not lessen their importance.

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10 For example, clauses 26, 27, 37 and Part 4 of the Bill.

11 Submission No 8.

12 Submission No 16.

Arrest and detention of persons of interest to an inquiry

2.19 The Bill provides for the arrest and unlimited detention without charge of a person or persons of interest to an inquiry into two or more Schedule 1 offences.[13]

Right to refuse to answer questions and the onus of proof

2.20 John McKechnie QC, former Director of Public Prosecutions has said:

> *It is fair that a person who has the resources of the State marshalled against them should not have to contribute to their own conviction by being forced to speak. The State has, in the main, all the resources necessary to investigate a matter. There is little need to interfere with the right to silence of the accused. The interest of the State is in convicting the guilty and acquitting the innocent.*[14]

2.21 That same article goes on to say:

> *In legal theory the right to silence is connected to the fundamental presumption of innocence in criminal matters and the adversarial nature of the common law system itself.*
>
> …
>
> *Because the burden of proof, in legal theory, lies with the prosecution, the justification for the right to silence and the privilege against self-incrimination is not the protection of the guilty but the notion that the prosecution must prove its case beyond reasonable doubt.*

And further

> *The basic position in Western Australia is that no inference can be drawn against a defendant for remaining silent when questioned by police. There are two aspects to this rule. First, the fact-finders cannot use silence by the defendant as a basis to infer a consciousness of guilt. Second, if a defence is raised for the first time at trial no inference can be drawn that it is a new invention or suspect.* [15]

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13 Clause 20 of the Bill.

14 The Law Reform Commission of Western Australia, *Review of the Criminal & Civil Justice System in Western Australia*, Final Report, Project 92, September 1999, p201.

15 Ibid, pp201, 202.

2.22 This Bill removes the right to silence of witnesses being examined, cross-examined or re-examined by a person representing the Commissioner of Police (such as a police officer or a police lawyer) on any matter that the special commissioner considers relevant to the investigation.[16]

2.23 While noting that clause 39 provides a check on the abrogation of the privilege against self-incrimination by providing a form of indemnity against the use of statements obtained from a person, it must be pointed out that clause 39 does not apply to documents or other information provided by a person under clause 26 (refer to Committee Report paragraphs 5.182 to 5.186 and 5.224).

2.24 It is my view that this Bill sets a dangerous trend in removing this fundamental element of the criminal justice system.

Legal representation

2.25 In the case of the extraordinary powers granted under this Bill which take away existing rights, the right to legal representation becomes even more important.

2.26 While acknowledging that the proposed removal of the right to legal representation will be subject to the public interest test and that the Committee has recommended that the Bill have regulation making powers in order to prescribe that public interest provision (refer to Committee Report Recommendation 20 and paragraph 8.2(a)), it remains my view that no one should be compelled to appear before a special commissioner without legal representation. I note other jurisdictions require the state to provide a lawyer in such circumstances.

Judicial supervision

2.27 In the Bill, as noted at paragraph 3.15 of the Committee report:

> *An extraordinary amount of trust is placed in the special commissioner to make decisions based upon the public interest as the main form of 'check and balance' on the exercise of the exceptional powers that are provided for in the Bill. This is because in many aspects the special commissioner is the final arbiter.*

I would suggest that it is not only an extraordinary amount of trust but also an extraordinary amount of power that is handed to the special commissioner!

2.28 The Bill excludes judicial supervision of the performance of the functions of a special commissioner by removing any remedy by way, for example, of prerogative writ to the Supreme Court (refer to Committee Report paragraphs 5.198 to 5.206). I consider

[16] Clauses 17 and 27 of the Bill.

that this is a fundamental and unprecedented abrogation of the rule of law and I cannot support this aspect of the Bill.

Search powers enhanced (Part 4 of the Bill)

2.29 There has been no plausible evidence presented to the Committee that there are problems for the police in obtaining search warrants. While acknowledging that the Committee's Recommendation 9 (which will provide a 'paper trail' in relation to the granting and use of search powers provided for) is a welcome increase in accountability, it is my view that enhanced powers of search and seizure are not warranted.

Surveillance powers extended (Part 5 of the Bill)

2.30 The need to lower the test for use of surveillance devices is unwarranted and unexplained. The standard of 'reasonable suspicion' is a very low one and easily abused. Further, the existing *Surveillance Devices Act 1998* already has far reaching application. I do not support the extension of these powers.

The Bill is unlikely to achieve what it sets out to do

2.31 It is my view that the Bill will be ineffective in its stated objective of breaking the 'code of silence' of certain people.[17] Witnesses brought before the special commissioner are likely to decide to maintain their 'code of silence', taking a prison sentence rather than the likely severe reprisals from any organised criminal gang.

2.32 There may be good reasons to refuse to answer police questions; for example, silence may reflect fear or a desire to protect friends or family, and not necessarily guilt. A witness may have a very valid fear for their safety if they were to provide evidence, especially as this Bill does not include the power to order the protection of a witness or prohibit the subpoena of documents and evidence. (I note Committee Recommendations 11 and 15 in relation to these matters). A prison sentence may well be viewed as a preferable option. I note the failure of the witness protection scheme to prevent the death of protected witness Andrew Petrelis, and the lack of any adequate changes to the witness protection scheme following that failure.

2.33 Professor Art Veno, from Monash University, is Australia's leading expert on outlaw motor cycle gangs. He said in an interview on the Law Report on Radio National:

> *In America for example,* [with] *the* [R]*acketeer* [I]*nfluence and Corrupt Organisation Act, which is specifically aimed at organised crime, there have been 27 attempts at applying the Act on outlaw motor cycle clubs. Only one has been successful and that was police*

[17] Refer to Committee Report, paragraph 2.2 and Second Reading Speech, December 5 2001.

> *infiltration with the police infiltrator actually being treasurer of the club and had clear evidence that the outlaws were using some club money for the distribution and manufacture of illegal substances, I believe amphetamines. The rest of them have all fallen on their face because that's not their charter, they're not there about crime, they're there about turf, honour, loyalty and brotherhood.*[18]

2.34 The majority report notes that the National Crime Authority (NCA) has stated that illicit drugs are currently the most lucrative commodities for Australian organised crime.[19] Attempts to get tough on drug dealers and a 'zero tolerance' approach to illicit drug use continue to fail. Nicholas Cowdery QC, former DPP for NSW, in *Getting Justice Wrong - myths, media and crime,* said: "*Prohibition of a marketable commodity for which there is a demand inevitably produces a black (or illicit) market.*" [20] He goes on to argue for heroin to be available free to addicted users on prescription by licensed medical practitioners. Substantial drug law reform is needed to remove the enormous profits that are being made in trading in illegal substances. A prohibitionist approach has failed to prevent the increased involvement of criminal gangs in the supply of drugs, in fact it has done quite the opposite.

2.35 Despite the establishment and operation of the NCA in 1984, there has been no discernible drop in the rate of crime, or increase in the effectiveness of investigations or prosecutions. There is no evidence that introducing similar state-based powers to those available to the NCA, especially without a substantial financial commitment, will produce any better results.

It is questionable that the Bill will be limited in its effect to those participating in organised criminal activities

2.36 Hon Nick Griffiths in his second reading speech said: "*The proposed powers will not apply to citizens who are not engaged in organised criminal activities*."[21]

2.37 However, the Committee found that the Bill could be used in investigations of murder or wilful murder, where such an offence was not an activity of organised crime (refer to Committee Report, paragraphs 4.34 to 4.37). Schedule 1 also includes offences such as 'Intentionally endangering safety of persons travelling by railway' (*The Criminal Code* s295), 'Intentionally endangering safety of person travelling by aircraft' (*The Criminal Code* s296A) and 'Obstructing and injuring railways' (*The Criminal Code* s451). Whilst acknowledging these are serious offences, they are not

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18 September 11 2001.

19 Committee Report, paragraph 1.17.

20 Cowdery QC, Nicholas, *Getting Justice Wrong - myths, media and crime,* Sydney, Allen & Unwin, 2001, p32.

21 Second Reading Speech, December 5 2001, p6438.

offences associated with organised crime. They are offences associated with so-called terrorist activities (refer to Committee Report paragraph 4.17.1). As this Bill has been clearly identified as "… *not applying to citizens who are not engaged in organised criminal activities*", then these offences should be removed from the Schedule. (I note Committee Recommendation 2 on this matter).

3 OTHER MATTERS

The introduction of an inquisitorial procedure

3.1 The Bill will introduce a compulsory examination procedure. The inquisitorial proceedings, carried out by a representative of the Police Commissioner before a special commissioner, are similar to the procedures adopted in continental code jurisdictions[22] (also see for example, Committee Report paragraphs 1.22 and 3.24 to 3.29). It represents a departure from traditional common law investigative procedures. Despite the fact that it has been argued that Royal Commissions have similar inquisitorial powers, the inquiries of a Royal Commission are limited by the terms of its inquiry and it is not a standing body able to inquire into certain types of crimes generally and with no time limits.

Limited privilege for journalists

3.2 I dissent from the majority finding at paragraph 5.181 of the Report: "… *that the LRCWA review is the appropriate place to give consideration to the adoption of a limited form of privilege for journalists to ensure consistency with the court process.*"

3.3 In their submission to the Committee the WAJA stated:

> *Because the Bill elevates a special commissioner to the status of the Supreme Court in relation to contempts, any refusal to assist the special commissioner risks penalties as applied in the Supreme Court. The Supreme Court has sentencing powers at common law which are unlimited as to the fine or term of imprisonment. This sentencing power is seen by the WALRC to have no place in modern law.*[23]

3.4 Public disclosure of corruption, other criminal activity and misconduct by public officials or others often stems from information given to journalists on the basis of confidentiality.

3.5 Also in a written submission to the Committee, Mr Joseph M Fernandez, Lecturer (Media Law), Curtin University of Technology stated:

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22 Independent Commission Against Corruption, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, November 1994.

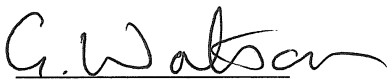
23 Submission No 19.

> *The overall effect of the (above) provisions on journalism is that it will pose yet another obstacle to free speech by unduly extending the scope of contempt actions from its present concern with ensuring the proper administration of justice to yet another investigatory process.*[24]

3.6 He also quotes from a submission to the 1994 Senate Standing Committee on Legal and Constitutional Affairs Report, *Off the Record - Shield Laws for Journalists' Confidential Sources*, where Journalism Associate Professor Wendy Bacon noted:

> *without … sources, a lot of information would not have been published, including stories on police, union and political corruption, improper business practices and shady property deals.*[25]

3.7 I believe that the right of journalists to protect confidential information and sources of that information is a cornerstone of the proper functioning of a free press. Without it, people with important information that is in the public interest to disclose, would not do so in circumstances in which the disclosure would result in retribution or dangers for that person. Therefore, I recommend that the Bill should contain a limited form of privilege which would grant them immunity from revealing confidential sources. The proposed amendment to the Bill is attached at Appendix 1.



Hon Giz Watson MLC

Date: May 7 2002

[24] Written submission tabled during Committee hearing, by Joseph M Fernandez, Lecturer (Media Law), Curtin University of Technology, Bentley, WA, March 6 2002.

[25] Ibid.

APPENDIX 1

PROPOSED AMENDMENT

Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001

Clause 26

Hon Giz Watson to move —

Page 12 — to insert after line 26 the following —

“

(1a) It is a complete defence to a charge of contempt arising from failure to comply with a requirement under subsection (1)(b) for the person to prove that the document or other thing was obtained in the course of that person’s occupation or employment as a journalist.

”

Clause 27

Hon Giz Watson to move —

Page 13 — to insert after line 30 the following —

“

(1a) It is a complete defence to a charge of contempt arising from failure to answer any question under subsection (1)(b) for the person to prove that the information to which the question relates was obtained in the course of that person’s occupation or employment as a journalist.

”