STANDING COMMITTEE ON LEGISLATION

CRIMINAL INVESTIGATION (EXCEPTIONAL POWERS) AND FORTIFICATION REMOVAL BILL 2001

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON WEDNESDAY, 6 MARCH 2002

SEVENTH SESSION

Hon Jon Ford (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Kate Doust (Substituted by Hon Ken Travers)
Hon Paddy Embry
Hon Adele Farina (Substituted by Hon E.R.J. Dermer)
Hon Peter Foss
Hon Bill Stretch

McKERLIE, MR COLIN ROBERT,
Convenor, The Freedom Forum,
examined:

Mr McKerlie: I understand that I have been invited to appear before the committee as the convenor of the Freedom Forum. However, since the Freedom Forum membership consists of only me, I suggest that it would be more appropriate to regard me as a private citizen.

The CHAIRMAN: Have you read and understood the document entitled "Information for Witnesses?

Mr McKerlie: I have.

The CHAIRMAN: These proceedings are being reported by Hansard. The transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing, for the record. Please be aware of the microphones, and try to talk into them. Be sure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If, for some reason, you wish to make a confidential statement during today's proceedings you should request that the evidence be taken in closed session. If the committee grants your request, any members of the public or the media in attendance will be excluded from the hearing. Until such time as a transcript of your public evidence is finalised, it should not be made public, and I advise that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Mr McKerlie: As would have been immediately apparent to anyone who read my submission, it was not presented in the manner that I would ideally have preferred. The computer it was prepared on was damaged in a way that prevented me from printing it or downloading it, on the day before it was due, so I had to take a pre-printed draft and scrawl all over it manually. I have now managed to recover the document, and I have prepared a more legible copy. It is 99 per cent the same as the original, except that I have changed a bit of the text, and have added a bit of text to round it off. Most of the additional text is italicised to identify it. For posterity, I ask the committee to accept that as my submission, although I can work from the original submission when answering any questions. The submission is lengthy although incomplete in my opinion. I will not speak to the submission in my opening statement.

I have four points to make by way of an opening statement. The first is that my principal concern in appearing before the committee today - and I take this opportunity to thank the committee for allowing me to appear today - is to attempt to persuade the committee that the constitutionality of this Bill should be tested in some manner prior to it becoming law. I suggest that the legislation, if it is to be enacted, be referred to the Supreme Court in the same way as the Electoral Amendment Bill 2001. I also am not a constitutional lawyer, so I might simply be wrong about this, but my concern is that the Bill contains provisions which exclude the prerogative writs, which I understand would normally be the basis for a challenge to legislation. Mr Bayly suggested that a constitutional challenge could be mounted to the Bill if it is enacted. I do not see - and some members of the committee may know better than I - what the actual process would be for testing the constitutionality of this Bill if it were passed in its present form. Normally, a Bill is tested by a prerogative writ being taken. There is the sole avenue of an appeal against an arrest, pursuant to clause 20 of the Bill, but that, in my view, would not enable a proper test of the constitutionality of the Bill to be mounted. The other point is that if the Bill is passed as it is now, I submit that, from the coverage it has had in the Press, it is clear that it will be challenged at the first available

opportunity. I suggest that this is a general flaw in our legal system. When test cases are mounted, because of the way our legal system works, someone must be the "bunny" - for want of a better word - who must mount the case. I have said in my submission that I foresee that someone will have to sit in jail, if they regard the Bill as unconstitutional, waiting for the constitutionality of the Bill to be tested. Given that the Bill could not be described in any other terms than as making fundamental changes in our legal system, I submit that it is inappropriate to call upon some citizen, who in good faith regards the legislation unconstitutional and refuses to comply with it, to have to take the responsibility of testing such fundamental and drastic legislation. Without wishing to pre-empt in any way the deliberations of the committee, if the Bill is to be passed I urge the committee to consider that it be done on the same basis as the Electoral Amendment Act, whereby the Supreme Court is given the chance, immediately the Bill is enacted, to test its constitutionality before its provisions come into play.

The converse submission I wish to make in relation to the Bill is that if the Bill is not tested in the Western Australian Supreme Court, there are other forums in which the Bill might be tested. I refer the committee to the provisions of the International Covenant on Civil and Political Rights, to which Australia is a signatory. The document I am handing up is not a complete copy of the International Covenant on Civil and Political Rights. It is a print-out that I have prepared containing a note, at least, of the first 27 articles of the covenant. The provisions I suggest are the most relevant are left in full, whereas the irrelevant provisions have been reduced to simply a note of their general content. I have not appeared before a committee before, so I am not exactly certain of the procedure. I propose to take the committee through this document and make the relevant points. The ratification of this covenant by Australia means that this Bill may well be tested in the International Court of Justice on the basis of the points contained in this extract, if it is not tested in separate proceedings in the Supreme Court. I have italicised and underlined what I consider to be the relevant provisions. The first one is article 2, paragraph 3(a), which reads -

> To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

In my submission, the abrogation of the prerogative writs contained within this Bill is contrary to that article. On the next page, article 9, paragraph 4 reads -

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful

In my submission, clearly, the removal of the prerogative writ is in breach of that article. On the next page, article 14 paragraph 2 reads -

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

In my written submission I have gone into this in more depth. The contents of the Bill as it is now, and the inherent operation of the Bill, are an attack on the presumption of innocence, because it allows action to be taken against a person which presupposes his guilt. I have gone into that in more detail in my submission, and I will not go into it in any further detail now. Article 14, paragraph 3 reads, in part -

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .
>
> > (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

[3.30 pm]

Mr McKerlie: I have to admit that the immediate relevance of that escapes me, so I will not pursue it. I think I included that one in error. Subparagraph G has the same leading sentence and states that a person shall -

> Not be compelled to testify against himself or to confess guilt.

The provisions of the Bill that require a person to incriminate himself are contrary to that article. Article 26 states -

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or -

And this is the telling part -

> other status.

Mr Bayly did not go into the issue of status in any great detail. However, the Bill will create a class of persons who are deemed, pursuant to the provisions of the Bill, to be engaged in a section 4 offence. It is not acceptable to create or discriminate between suspects on the basis of the offences for which they are suspect. We cannot create a specific means of investigation that applies only to certain criminals. I know Hon Peter Foss had an exchange with Mr Bayly about this, and I would be happy to go into that further at a later stage. This is a covenant to which I only recently had the opportunity to apply my mind. It is clear that this Bill will create a separate category or status of suspect, and, as such, it is in conflict with that covenant. I am not an international lawyer, but, according to my understanding, having ratified this covenant Australia is under an obligation to take the required action to ensure that all Australian citizens are given the protection of the covenant. In my view, this covenant recently acquired additional status to that which it had before. Since it was not reported in the Press, members of the committee may not be aware that when the Australian Human Rights and Equal Opportunity Commissioner Dr Sev Ozdowski recently appeared at the Australian Press Club, his speech was a call for an enactment by the federal legislature to give domestic effect to the International Covenant on Civil and Political Rights, such that it would act as a charter of citizens' rights in Australia; in other words, a bill of rights. The absence of a bill of rights in Australia singles us out in the English-speaking world. A Bill such as this, which is regarded by everyone as a fundamental or drastic attack on the human, civil and political rights of Western Australians, should not be passed into law until a bill of rights has been introduced into Australia or Western Australia. There is no reason that the Western Australian Parliament cannot effectively introduce a bill of rights for Western Australians. This Bill raises the whole issue and concept of sovereign government in an Australian State Parliament. State Parliaments should not regard themselves as having absolute power. In a federation such as Australia, there must be some limit on the powers exercised by all Parliaments, particularly State Parliaments.

I will not go through the document that I am about to hand out. I apologise to the committee because I omitted to print the first page of this document, which I took from the Internet. This is an extract from the third Australian report to the United Nations regarding Australia's implementation of the International Covenant of Civil and Political Rights. Pursuant to the covenant, each state party to the covenant is required from time to time to report on the conduct of that state in terms of guaranteeing its citizens the protection afforded in the covenant. Members will see that the small section that I have printed is taken from the third report prepared in 1995. A fourth report has now been prepared and is available on the Internet at the Commonwealth Attorney-General's web site. The extract that I have handed out contains reports with regard to police questioning and self-incrimination. Members will see that in its report to the United Nations the Australian Government

stated that a person has the right to remain silent in response to police questioning in respect of an offence. Obviously, if this Bill is enacted it will bring the Western Australian Parliament into conflict with the Australian Parliament, even though, as I am sure all committee members are aware, the Australian Parliament has been making repeated noises in the past few weeks about its intention to introduce legislation along the same lines as this Bill. However, the Australian Parliament has not suggested making the same fundamental attacks on the civil and political rights of Australians as are contained in this Bill. Paragraph 819 of the report states -

> Some legislation exists in Australia to compel the giving of evidence but this is made subject to certain safeguards. For example, a certification procedure exists under the Federal and New South Wales Evidence Acts.

It then goes on to describe the system contained in Section 11 of the Western Australian Evidence Act. I hope I made it clear in my written submission that in passing this Bill, Western Australia will become the focus of the worldwide civil rights debate. This Bill will make Western Australia stand out, glaringly, as being the most repressive jurisdiction in the English-speaking world. It is not in the interests of Western Australia to acquire that questionable distinction. Western Australia should be trying to adopt and conform to the internationally accepted standards of civil and political rights, rather than take the opportunity it currently has through the absence of an Australian or Western Australian bill of rights to launch this attack on what is historically regarded as the fundamental rights of the citizens of this State.

I turn now to the concept of sovereignty, the limits on the power of a democratic Government, and the concept of inalienable rights. Through my own lesser powers, I have tried to incorporate the philosophy of Ayn Rand and the way she has described inalienable rights. Obviously, I listened to the proceedings of the committee. I respectfully suggest that in Western Australia, as is evidenced by this Bill, there is a failure to understand the concept of inalienable rights. If we accept that inalienable rights exist, and that the United Nations Universal Declaration of Human Rights is framed in terms of inalienable rights, then no democratic Government - or no Government of any kind - can attack those rights; there is nothing in the political or democratic process to allow that to happen. It does not matter if everyone in the State wants to attack those inalienable rights. We can attack them, but we cannot remove them. Australia and Western Australia now exist within an international community that will aggressively defend those rights. As was recently made clear in the Press, lawyers from all over Australia will flock to attack this Bill and defend Western Australians from its application. Whatever members may think about Western Australia's status as a State, I urge the committee not to make Western Australia the pariah jurisdiction of the civilised world. That is what will happen if this Bill is passed into law. Every other modern, western, industrial and English-speaking nation has a bill of rights; therefore, they could not do this even if they wanted to, especially because those bills of rights are entrenched. Western Australia will stand out because this Bill will be passed in a jurisdiction that is, in the wider Australian jurisdiction, unique, because it has allowed a situation to arise in which such a Bill could be passed.

Finally, with regard to my opening statement, there has been discussion about the fundamental causes of organised crime. Organised crime can be defined much better and more rationally than is contained in the Bill. I am happy to answer questions about that. The fundamental submission I make is that the only way to attack organised crime is to attack its motivation. Organised crime is not defined just as two people who are involved in a serious offence, or however one may wish to measure the offences set out in schedule 1. It is about people who are organised in an ongoing way to make a living by being a criminal. People do not organise their lives around situations in which they are motivated by money, unless they think they are going to make money on an ongoing basis. We are not talking about someone who has a rush of blood and commits an armed robbery on just one occasion. I am aware that there is all sorts of organised crime. People who decide that they are going to make a lifestyle out of crime do it for the money. Also, they do it because of the

excitement of being an outlaw. These are the issues that must be attacked. The repressive approach taken in this Bill adds to the likelihood of organised crime becoming more organised.

[3.45 pm]

It is widely reported in the Press, and in some ways argued as justification for this Bill, that people believe they can make lots of money from being criminals. If people have sufficient resources to allow them to actively and intelligently confront the resources of the State, corrupt the police and resort to technology without limit in order to defeat the attempts made to defeat them, they will simply continue. The only way to stop it is to take the money out of the equation. Difficult and unacceptable as this might be, based on what are purported to be moral principles to many people in our community, the only way to stop organised crime is to regulate the behaviour that leads to the money being available through prohibition.

Prohibition does not work. Prohibition is a recipe for organised crime. As has been identified, the whole basis of prohibition is that the market exists. The market is created and is fed by organised crime. I fully understand the difficulties, but if the Government is serious about stopping organised crime, it must be serious about regulating the conduct that currently constitutes the basis of organised crime. The monetary incentive must be taken out of involvement in that conduct.

Repressive legislation, especially in the area of prohibition, provokes ordinary people to say that they do not agree that the Government has the right to tell them to do something, so they defy it. This legislation is the extreme version because it will lead to principled solicitors and lawyers, who genuinely believe this legislation is unconstitutional and an unacceptable attack on the civil liberties of themselves and clients, saying that they will not obey it. They will defy it. Otherwise law-abiding people will become criminals because they will not respect the legislation, and they will defy it.

With reference to drugs, rather than this Bill, the most obvious example of that kind of response is the law criminalising the consumption of cannabis. The Government used to tell us every few weeks in newspaper articles that one in three people have tried and will go on trying cannabis. The basis of criminality must be that the behaviour is deviant. It is adopted by a sufficiently small class of person that we can say it is so different from the way law-abiding people should behave that it is deviant and criminal. More than one in three people in Western Australia support the West Coast Eagles. If we were to outlaw wearing blue and gold, people would defy it because it would not be deviant. If 33 per cent of the population do something, it defies rational analysis to describe that behaviour as deviant and, therefore, criminal.

My concern is that legislation which provokes defiance, intentionally or otherwise, is not legislation made in good faith. The Government must act in good faith by representing all the people all the time. It is wrong to target groups, however small or large, and introduce legislation that simply uses that group as a focal point for the Government's energy. If government in good faith is government for all the people all the time, and if it genuinely believes, for example, that the use of drugs is harmful, legislation must be conceived that will assist people to minimise and avoid that harm. It is not a legitimate use of the power of government to simply demonise a target group and attack the people painted as demons on the basis that everyone will think the Government is doing the right thing. Government must govern for all the people all the time. This Bill is an extreme example of, unhappily, bad faith in government. This Bill is calculated to provoke defiance.

Hon PADDY EMBRY: You stated that you were not a specialist in constitutional law. Did you specialise in any part of law?

Mr McKerlie: To my cost, no. Specialisation is the only way to profitably succeed in the practice of law these days. Although I have my own practice, I try, without much success, to be a generalist. If to any degree I have specialised, it is in criminal law, but not in Western Australia.

Hon PADDY EMBRY: I may have misunderstood you, but it appears you are recommending the decriminalisation of marijuana. If that is what you meant? What suggestions do you have to overcome the problems that the people of this State generally want sorted out and the criminals brought to justice? With all due respect, it is very easy to be negative but you have not been particularly positive about what you believe the Government should do.

Mr McKerlie: The most edifying experience in my recent life was my attendance at the Drug Summit and hearing the remarkably intelligent and candid discussions of the problems surrounding the use of illicit drugs in our community, which were able to be heard by everyone. The Government must accept that the solution to these problems must be approached in the long term. I agree with the solution suggested by Dr Fiona Stanley of early intervention and educating young people so that they will not use drugs to their harm. I do not believe it is possible - it would be a wasted effort to even try - to completely rid the community of recreational drug use. I do not believe philosophically that we should try.

It is popularly believed that the illicit drug trade is where outlawed motorcycle gangs, for example, make their money. Other areas such as prostitution and the sex industry in general, which the committee has already heard about, are obvious targets for organised crime. My suggestion is that it be regulated; albeit, I acknowledge the difficulties involved in that. I have all sorts of theories about how that could be done. However, the regulation of any conduct brings it out into the open where it can be honestly confronted and controlled. Conduct that is the result of organised crime is profitable because people want it enough to pay exorbitant amounts of money for it. If conduct is regulated, the inflated profit margins involved in the conduct are removed and the community is open to intelligent education campaigns.

Cannabis is, or was, probably less popular than tobacco. However, cannabis is astronomically more expensive. We now have the "chop, chop" business whereby the regulation of tobacco is apparently creating an illicit market in tobacco. However, I submit that the really effective process in the community is education. People are ceasing to smoke cigarettes, especially young people. Everyone is talking about it openly and honestly rather than trying to hide from it; therefore, young people are saying it is a dirty habit and they do not want to acquire it. Community education is an effective process in confronting the real problem and dealing with it.

Hon PETER FOSS: Unfortunately I do not think that is correct. I was Minister for Health and I know that the number of people smoking remains fairly constant. Forty-year-old people are giving it up and teenagers are taking it up. The people who are continuing to smoke are young people. It is a nice theory, but statistics show that young people are smoking consistently.

Mr McKerlie: The honourable member is probably right, I do not take an active interest in that.

Hon PETER FOSS: I was Minister for Health and one of the unfortunate truths was that, although we were getting through to 40-year-olds, who are conscious of their not being immortal, we were not getting through to young people. The main worry was that young women were taking it up at a much greater rate than young men. Previously, the number of men who took up smoking was greater than the number of young women. No doubt we will eventually notice the resultant change in the mortality rates of females.

Mr McKerlie: My submission still is that because smoking is being regulated and can be openly and intelligently discussed, there is more prospect of those campaigns having an impact.

Hon PETER FOSS: Tobacco and alcohol cause more harm to the community than illicit drugs.

The CHAIRMAN: We are moving away from the current Bill.

Hon E.R.J. DERMER: Do I understand that you are recommending the decriminalisation of cannabis or all illicit drugs?

Mr McKerlie: I am recommending the decriminalisation of the use of all illicit drugs, but the regulation of their supply. I cannot understand why anyone would want to inject a drug - it is obviously such self-destructive behaviour; nonetheless, people want to do it. If someone wants to do that, it is their right. I have tried to promulgate the idea before that from the time we, as a community, accepted that there was no basis for criminalising suicide, we cannot say that they are not allowed to do something that is less harmful, such as using an illicit drug. This is just a personal opinion: I suggest that almost everyone involved in the illicit drug trade believes that the drug trade could not operate in the way it does now without the active or inactive collusion of some members of the Police Service.

The illicit drug trade is wide open to attack. I was in the middle of writing a long letter to Assistant Commissioner Atherton as a result of meeting him at the Drug Summit about how to actively and intelligently attack dealers of the drug trade. Essentially, that goes back to reading John Stuart Mills' book on liberty, which I think very few people have done. Mills says that there are two effective means of influencing behaviour in a community - legal and moral opprobrium. Part of the problem with drugs and this Bill -

The CHAIRMAN: I think we have moved away from the question.

Hon E.R.J. DERMER: I think I have the answer to the question.

The CHAIRMAN: We have moved away from the Bill and we have other witnesses. Thank you very much for your submission.