

STANDING COMMITTEE ON LEGISLATION

CRIMINAL INVESTIGATION (EXCEPTIONAL POWERS) AND FORTIFICATION REMOVAL BILL 2001

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

SIXTH 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**

BAYLY, MR RICHARD,
President, Criminal Lawyers Association,
examined:

The CHAIRMAN: You have signed a document entitled “Information for Witnesses”. Have you read and understood that document?

Mr Bayly: I have.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and the Hansard reporters, 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. Ensure that you do not cover them with papers or make noises near them. I remind you that your transcript will become a matter of 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 public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your evidence is finalised, it should not be made public. The premature publication or disclosure of public evidence may constitute contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Mr Bayly: The Criminal Lawyers Association has made a written submission. The concern of the association about this legislation is great but the main cause of concern is the use of judges in an investigative role. Using judges in an investigative role is a fundamental change in the way we run criminal law in Western Australia because it involves them in the investigative process and aligns them with the police. If it is one’s view that public confidence in the judiciary is in part based on the independence of the judiciary, one would have to be concerned about this legislation and the way that it sets up the investigative role of the judges. In a practical sense it is not only an issue of judges being involved in one particular matter. I presume that the legislation will use judges and therefore use the court system, the recording system and the people involved in the courts, including the court staff. These proceedings are supposed to be secret; however, it would be very difficult to retain secrecy if court judges and the court system were used. Everybody knows what goes on in the court system. Other court systems, including that of the National Crime Authority, are completely separate. It has completely separate staff and it is funded separately so there is no cross-referencing. The use of judges would pervade the whole of the criminal justice system. By listening to the evidence that came before him, and deciding on questions and answers, a judge who sat and heard information about a particular reference would get information about other people within the criminal justice system who came before the courts.

[2.30pm]

The proceedings are held in secret. Although the judge would probably exclude himself from hearing a case that involves the particular term of reference about which he has given permission for the subpoenas to be issued, he may not exclude himself from hearing cases that involve other accused persons who have come before him or who have been referred to by other people in their evidence. This causes a contamination of the system. One of the drawbacks of having this type of secrecy is that the person on trial for another matter may never know that the judge involved in his trial has heard things about him in secret proceedings that he disagrees with. If judges are involved in this investigative process, one does not know if a judge, when trying another matter, is bringing an independent mind before the court on that day. While judges can have that investigative role, there will always be the suspicion that on other matters, they do not have an independent mind and

are contaminated by what they have heard in secret proceedings from evidence that nobody can access.

The Bill will fundamentally change the way in which criminal justice is administered in Western Australia, and the Criminal Lawyers Association is very concerned about that. One wonders whether, in placing this legislation before the Parliament, the Chief Judge of the District Court, or the Chief Justice, have been approached about their views on the use of judges in the process envisaged under this Bill. The Criminal Lawyers Association is of the view that this may have a deleterious effect on the confidence that the public has in the criminal justice system. One does not know in advance how that confidence will be affected by judges becoming involved in the investigative process. The Criminal Lawyers Association has referred to that aspect of the matter in paragraph 1 of its submission.

There are a number of other matters in the Bill that are of considerable concern; for example, the definition of “gang”. The legislation is aimed at gangs. A “gang” is defined as “two or more persons”. Under the legislation as it stands, children may be investigated and be the subject of interrogation by a judge, because there is no distinction between adults and children. The legislation may also have wider implications than first thought of. My copy of the Bill includes section 451 of the Criminal Code under schedule 1.

Hon KEN TRAVERS: Is that the railway provision?

Mr Bayly: Yes. Has that been deleted from the Bill?

Hon KEN TRAVERS: Not yet but I expect it will be.

Mr Bayly: Section 451 may involve unionists who are protesting against wages or in some way involved in stopping the running of trains. One only has to read section 451 to see that those people would be caught under this legislation. The implications of the legislation may be far wider than first anticipated by those proposing it. The legislation would capture people who are in domestic disputes. For example, a person might break into his wife’s house and be involved in a serious offence such as murder. Under clause 4, that person could be investigated by the judge.

Hon PETER FOSS: Could you explain that?

Mr Bayly: Under clause 4(b), if a person were to break into his wife’s house and kill her -

Hon PETER FOSS: Clause 4(b) is not related to gangs or organised crime but is virtually aggravated wilful murder or murder.

Mr Bayly: That is correct.

Hon PETER FOSS: The provision does not even pretend to be organised crime.

Mr Bayly: No, that is right, and that is what concerns the Criminal Lawyers Association.

Hon PETER FOSS: But it does not have to be a domestic dispute. It could just be a burglar breaking into a house and committing a murder.

Mr Bayly: I accept that, but it is an example of how one might be caught under that clause.

Hon PETER FOSS: Anybody could break into a house and be caught by the legislation.

Mr Bayly: That is right. It is a matter of considerable concern -

Hon PETER FOSS: We would all be concerned if someone were to break into his wife’s house and kill her; but it would be no less a crime. It is more aggravated than otherwise.

Mr Bayly: What is the point of the legislation? Is it that everybody who commits a serious offence is caught by this legislation?

Hon PETER FOSS: I just wondered why you mentioned domestic disputes. Whether we should have clause 4(b) at all is the question. I would not have thought that an offence related to a domestic dispute would make it any less arguable.

Mr Bayly: Perhaps not, but it is an example of how this legislation would work, and perhaps how it was not intended to work, when the Bill, which is principally aimed at gangs, was introduced. One of the difficulties with this legislation is that it provides different laws for different people. If a particular offence is committed, it comes under certain legislation; if that particular offence is not committed, it does not come under that legislation. One of the principles of our criminal justice system is that the same justice applies to everybody within our society, irrespective of whether they commit one type of offence or another.

Hon PETER FOSS: There are numerous examples where that does not apply.

Mr Bayly: In relation to the way the offenders are treated?

Hon PETER FOSS: Yes. For instance, with offences involving rape, certain kinds of evidence cannot be raised against the complainant, and they are not allowed to be named in the newspaper. In extortion cases a similar sort of thing happens. There are numerous examples in which the criminal law treats offences differently.

Mr Bayly: I disagree. The examples that you have given do not alter the trial process of the evidence, which is admissible or inadmissible. It relates to the publication of evidence by the newspaper -

Hon PETER FOSS: Or the questions that can be asked. One used to be able to ask a complainant for relevant evidence about their sexual behaviour. It has been decided that that cannot be done anymore, and very fairly; however, it is a different treatment.

Mr Bayly: Is not the evidence provisions relating to sexual matters related to the question of relevance? The legislature has perceived that asking someone if they had sex with someone 20 years ago is not relevant to the issue before the court. That is just an extension of the evidentiary law relating to inadmissibility. The questions asked in court have to be admissible, and, in order for them to be admissible, they must be relevant. Therefore, it is simply an extension of that law. Under the present system everybody who comes before the courts is treated in the same way. This legislation treats certain classes of people in a different way, and the Criminal Lawyers Association says that is wrong. Everybody should be treated equally before the law. This legislation distinguishes between people.

Returning to the question of employing judges, it seems that the legislation is trying to set up a system that would be advantageous to the police and would be on the cheap, rather than having an independent system and having to spend money. That is the purpose of this legislation.

Hon PETER FOSS: Would you still object to it if we had an independent system?

Mr Bayly: I would still object to the legislation if we had an independent system. However, if there was an independent system then at least there would be a better chance of the investigation being kept secret and avoiding the contamination of the criminal law system, as would happen under this legislation.

Hon PETER FOSS: You are putting an emphasis on secrecy, and I agree with you. However, we have had some people say that if proceedings are held in secret it is a bad thing. That provision was put in to protect people from having their evidence sprayed around the community and in the newspapers, as well as to protect advanced knowledge from going to criminals. Do you see evidence being taken in private as a plus or a minus?

Mr Bayly: With this sort of system it must be done in secret. An investigative body cannot investigate one person to see whether another person has committed an offence and for the public and the press to be able to report on what was said. I would have thought that was obvious.

Hon PETER FOSS: I agree with you. However, the Law Society of WA has criticised the fact that this process is happening in private. I would have thought that was a protection, rather than the opposite. However, it depends on how one looks at it.

Mr Bayly: The Criminal Lawyers Association opposes the legislation and what it sets out to do. In the case of an investigation, it is not logical to make it a public event. When there are no rules of evidence, people can stand up and say awful things about other people that can then be reported. Those things may have no basis of fact at all, which is one of the problems with the investigative procedures as set out in this legislation. One ends up with a witch-hunt in which people say the most awful things about others, and if that was published -

Hon PETER FOSS: I am not disagreeing with you.

Mr Bayly: We see the legislation contaminating the criminal justice system. We are not saying that there should not be legislation to set up a National Crime Authority-type body, but the Criminal Lawyers Association is saying that at least if it was in that form it would not contaminate the rest of the criminal justice system. By doing it in the proposed manner, it may be cheap because you do not have to employ anybody, but you run the risk of ruining the criminal justice system and the public's confidence in it. That is the main problem that the association has with the legislation. There are other problems, such as the difficulties in not having a judicial review, a matter that has probably been addressed by the Law Society.

Hon PETER FOSS: Do you think that clause would be effective or would it still mean that certain cases need to be dealt with by the courts?

Mr Bayly: I am sure that people will try to get around it, but when considering the legislation the question is why should we have to try to find a way around it?

Hon PETER FOSS: I understand that. However, what do you think the net result will be?

Mr Bayly: If the legislation passes as it is?

Hon PETER FOSS: Yes.

Mr Bayly: There will still be applications for review to the courts, particularly based on constitutional grounds. This legislation could not stop a constitutional challenge to the whole of the legislation, if that was thought appropriate on the basis that judges should not be placed in the position of investigators - a distinct possibility. Although I am not a constitutional lawyer, there would be some basis for making a constitutional challenge if judges were used for the process that the Bill sets out.

Hon PETER FOSS: It is in there to stop those provisions from being used as delay tactics. We have seen instances in which the legal process has been abused and the courts do not seem to be very effective in stopping it. This provision would certainly stop that abuse. However, the question is whether it is overkill.

Mr Bayly: There are few people who take the appeals process in any proceeding; it is usually only one or two.

Hon PETER FOSS: They often tend to be people associated with drugs.

Mr Bayly: Not necessarily. Often it is people who can afford to take -

Hon KEN TRAVERS: This is about an investigative process, not a court process.

The CHAIRMAN: Perhaps we should let Mr Bayly finish his opening statement and then ask him some questions.

Mr Bayly: We are concerned about what appears to be an ability under the Bill to, for example, issue a summons. Someone may be sitting at home and having a cup of tea when they receive a summons at 10.00 pm to appear before a judge in the Supreme Court in two hours. The person goes

to the court to face a cranky old retired judge at that hour of the night and, in some circumstances, he is not entitled to have legal representation. The legislation needs to be tidied up in respect to when one can be summonsed before the commissioner to give evidence. The police could go to a judge and say that a murder will be happening in half an hour and they want to summons a person to give evidence.

[2.45 pm]

The judge might decide that the police are entitled to tell that person that he must be present in half an hour and is not entitled to have a lawyer, and if he does not answer the questions, he will go to jail. That sort of thing cannot be allowed to happen. The legislation must set out what can happen and be cautious about allowing that type of behaviour.

The provision that a search warrant not be required is just ridiculous. In practical terms, a justice of the peace sits in an office at central police headquarters and all a police officer must do is waft an application for a search warrant under his nose for the JP to stamp it. That is how hard it is to get a search warrant. The important point about the process is that it leaves a paper trail, which means that somebody in authority has given his okay for a search warrant. A requirement to get a search warrant is no impediment to any investigation. I do not think it has ever been an impediment to an investigation. If a JP, who will stamp anything on the way through, is located in the building, it is hardly an impediment to require some paperwork before the police can go into somebody's property. Under the proposed Bill, police officers could go into someone's property, take things and leave and not be obliged to tell the occupants that they have been there. There would be no paper trail and the occupant might never know that the police had been there. The Criminal Lawyers Association believes it is ridiculous that there is no requirement for a police officer to have a search warrant in order to search a property. There is no downside to that requirement. To suggest that a search warrant is an impediment to the investigative process is to perhaps not understand how police officers and search warrants currently operate in the State.

The question of professional privilege in relation to documents is a matter of concern. What will happen is that lawyers will not take proofs of evidence because these will presumably come under the definition of documents that can be subpoenaed. It is not healthy to take away legal professional privilege in the way proposed in this Bill.

Hon PETER FOSS: Can you see a problem with documents other than proofs of evidence?

Mr Bayly: I can see a problem with all documents that are prepared for the purpose of assisting or giving advice to a person. The Bill is presumably aimed at documents that evidence agreements and arrangements between parties, but that is not how the Bill was drafted. If the purpose of the legislation is to evidence agreements and arrangements between parties, and it is not aimed at finding out what somebody has told a solicitor, the legislation should say that, rather than to leave it open-ended in the way that it does.

The association is concerned about the abrogation of the right to silence. Under this legislation a person can be asked whether he has committed a particular offence. Historically, it is pretty rare for people to incriminate themselves under any circumstances, even if they are compelled to give evidence. The problem with compelling people to give evidence in circumstances in which they might incriminate themselves is that they will be encouraged to lie. That is of little benefit. I notice that a provision under the National Crime Authority legislation allows a person to object to a question if the answer would incriminate him. Even under the NCA legislation a person is not obliged to incriminate himself, whereas under this legislation he is.

A number of other parts of the Bill are of concern to the Criminal Lawyers Association. I have outlined the main ones.

Hon PETER FOSS: You talked about the NCA legislation. Have you had any experience of the operation of that legislation?

Mr Bayly: Yes, I have been to the NCA a couple of times.

Hon PETER FOSS: How different is the NCA legislation from this legislation?

Mr Bayly: A person is not required to incriminate himself. I found that one of the daunting prospects for a person who went to the NCA was that he would be in a witness box and there might be a line up of six police officers plus counsel who were entitled to ask him questions. I thought that was intimidating and wrong. If there is to be some form of investigative process, that sort of process should not be allowed to occur.

Hon PETER FOSS: This legislation does not allow that. A lawyer must be instructed on behalf of the commissioner. It only allows a lawyer instructed by the commissioner to do that.

Mr Bayly: Was that an amendment?

Hon PETER FOSS: Yes. He is allowed a lot of people under his supervision.

Mr Bayly: I do not know what the statistics were from the NCA, but the fact that the NCA is likely to close demonstrates that it has not been a success. That demonstrates that the sort of investigative process to be set up under this Bill is unlikely to be successful. What tends to happen is that the police become too reliant upon this type of investigation. Instead of using traditional policing methods - they currently have vast powers for surveillance or observation and by talking to people - they will rely on this process of hauling people in to answer questions. That can never be a substitute for proper investigative processes. For example, it can never be a substitute for getting intercepts on telephones, which are much more likely to reveal the truth of a matter than by taking away people's civil rights and bringing them before an investigative board.

Hon PETER FOSS: Asking questions of people is part of police investigations, is it not?

Mr Bayly: It certainly is, but if you bring people into a formal process, they are far less likely to answer the questions in a proper and appropriate way.

Hon PETER FOSS: One of the suggestions about the NCA is that the penalties are insufficient. Therefore, it is a bit of a paper tiger.

Mr Bayly: If people do not answer the questions? I do not know what the penalties are. Most people do not like going to jail under any circumstances, whether it is for one year or 10 years. Basically, the Criminal Lawyers Association says that the police should try to encourage people to volunteer information, rather than force them to give evidence, which history has shown is notoriously unreliable.

Hon PETER FOSS: What about the situation involving the supposed gang rape of a woman in Northcliffe, which was followed by her suicide, and a coronial inquest at which people refused to give evidence? How would you tackle that sort of crime, supposing it did occur, in which multiple people were involved and there was a code of silence about what happened?

Mr Bayly: That is a difficult question. Let me put it this way: would putting those people before an investigative body, such as the one envisaged by the Bill, give you the answers?

Hon PETER FOSS: It might put them in jail for a sufficient period for it not to make much difference.

Mr Bayly: Is the point of the legislation to put people inside because they do not want to answer questions?

Hon PETER FOSS: It might be one of the points of the legislation. People are obdurate. It is not just a question of failing to give evidence, forgetting to turn up and not remembering things, but of people who plainly know about the situation and who refuse to give any evidence simply because it is an easy way out. It might be a good idea to send them to jail.

Mr Bayly: Do you not think that they might devise ways around it, such as saying they cannot remember because they were too drunk?

Hon PETER FOSS: I am sure they will. That is where the interest will come. I am sure that “I cannot remember” will become a fairly frequent answer. We have seen it in other instances in which it is easier for a person to say “I cannot remember” than to say anything else. That is certainly one of the matters engaging Parliament. If these people can avoid going to jail by using a code of silence, should they be sent to jail for another reason? That is how Al Capone went to jail. He did not go to jail on charges for murder or gang warfare; he went to jail for tax evasion.

Mr Bayly: For example, under this legislation a mother who refused to do in her son might be sent to jail. That is a fine process. It should hardly be applauded.

Hon PETER FOSS: It all depends on how long they are sent to jail for. It is up to you to make horses for courses. Take the situation I gave - an apparent gang rape by violent thugs who refused to give evidence. I do not think that too many people would cry about them going to jail for a substantial period for refusing to give evidence.

Mr Bayly: Does it concern you that perhaps the person was not raped in a legal sense and that people did not want to talk about it? You would be sending them to jail because they would not talk about an incident that never occurred.

Hon PETER FOSS: Precisely. That is one of the reasons there would be a strong incentive for them to start talking about it.

Mr Bayly: Maybe, but that might not be the case. They will no doubt find ways around it, such as saying they do not remember or were not there. I do not have any statistics about the NCA legislation, I presume because the proceedings are secret. The question is: was the NCA a success? Given that it is being closed down, the answer is probably that it was not a success.

Hon PETER FOSS: That could be judged on prosecutions and you would probably still come to the conclusion that it was not a success.

Mr Bayly: That is right. There were also some troubles within the organisation itself. One of the difficulties with an investigative team that is not subject to scrutiny is that it runs into difficulties, such as those that some police officers ran into in the NCA. That is why scrutiny is needed of those involved in the investigative process to ensure that they act fairly. There also needs to be some scrutiny of the process set up by a Bill such as this. That is one of the difficulties of not having an appeal process. The whole thing can run off the rails quite easily. Questioning witnesses can go down a track which people have not previously envisaged.

Hon PETER FOSS: On the question of the search warrant, I have proposed an amendment that would require an order from the special commissioner before those powers could be used and for an endorsed return on the use of the powers. In other words, the person involved would have to say what he had done with those powers if they were used. Would that improve matters?

Mr Bayly: It would so far as the search warrants go. In some circumstances, police can enter property without a search warrant. What is really required is a paper trail, so that somebody can look at it later and say what happened and why the police went in, and access a list of what they took. We cannot have a system that does not at least have those minimal safeguards. I agree that any system that required reporting and a search warrant would be an improvement on clause 45 of the Bill as it currently stands.

Hon KEN TRAVERS: I take it that you are not talking about search warrants as they are defined under the Criminal Code or the Police Act, but that you are seeking an amendment to the legislation to provide a paper trail.

Mr Bayly: That is right. As a matter of commonsense, what **Hon PETER FOSS** said was right. It does not really matter if the commissioner or some other person is giving the search warrant, provided that a record is kept of the search warrant process.

Hon KEN TRAVERS: I take it from the comments you made earlier that you feel that the legislation will fail to achieve its aims. Is that correct?

Mr Bayly: I believe it will.

Hon KEN TRAVERS: Do you believe that there is the capacity to set up a legislative or an investigative framework that will get rid of organised crime?

Mr Bayly: I doubt very much that there is. The police currently have wide powers, as can be seen from recent arrests. Those powers can be used to great effect to arrest people involved in organised crime. That can be done without the sort legislation envisaged here. The question is: will this legislation bring about any improvement? I do not think that it will. However, it tramples on people's civil liberties. Importantly, in using judges in the investigative process, it runs into the difficulty of bringing the whole criminal justice system into disrepute. Judges will be involved in the investigative process and people will not know what they have been investigating. They will then go into other trials. The whole court system would become contaminated, and that should not be allowed to happen.

[3.00 pm]

Hon KEN TRAVERS: Other witnesses gave reasons that the legislation will fail or is no good. There is clearly a desire by the community for members of Parliament to control organised crime. I have asked those who have told us that the legislation will not control organised crime, and I ask you also: is there a solution to the problem or an alternative way of resolving it?

Mr Bayly: The way to tackle it is to give greater resources to the police so that they can carry out their duties and functions.

Hon KEN TRAVERS: Without greater powers?

Mr Bayly: I do not know any powers that they need that are greater than the ones they presently have.

Hon KEN TRAVERS: Can I take it from an earlier comment you made that you do not have a problem with the concept of interceptions?

Mr Bayly: Yes, provided they are obtained properly and the power is not misused. Interception is an investigative tool about which one cannot argue these days. It is used often by the Australian Federal Police and the state Police Service to good effect.

Hon KEN TRAVERS: Can an incriminating matter said by someone on an intercept be used against that person in a court of law?

Mr Bayly: Yes. There are some restrictions under the commonwealth legislation, which I have not looked at recently. However, I recall that when an interception warrant is granted for one purpose, it is difficult to use the information obtained pursuant to the interception warrant for a purpose other than that for which the interception warrant was obtained.

Hon KEN TRAVERS: Is it correct that you are happy to accept that there is a role for interceptions, yet if you hear people in an interception admitting to having committed a crime, the admission cannot be used against them before an investigator in a court of law, or there is a valid objection to their being asked about it? I mean, you are happy for the admission to be made to someone else and for it to be secretly recorded?

Mr Bayly: There is a distinction to be made between the investigative process once the crime is completed and attempts to prevent crime or find out what crimes are going on.

Hon KEN TRAVERS: But this legislation deals with the investigative process, just as interceptions should.

Mr Bayly: It does in one aspect. However, the legislation provides for bringing people before an investigator to force them to answer questions. That would not be done on a telephone intercept in which they would have spoken voluntarily to people who were perhaps involved in offences.

Hon KEN TRAVERS: I still cannot follow why it is acceptable in one case and not in another. Obviously, we will agree to disagree.

Hon E.R.J. DERMER: I refer to questions asked earlier by Hon Peter Foss. The general community reaction to the report on the Northcliffe case concerned me deeply. Your response was that it was a difficult question. Then, as I listened intently to the exchange of questions between you and Hon Peter Foss, I did not hear an answer to that difficult question. I want that answer to be clear. Is there any occasion in which a person's right to remain silent should be abrogated, if that is the way it is to be applied to investigate a matter to conclusion?

Mr Bayly: No.

Hon PADDY EMBRY: I may have misunderstood your statement and I ask you to clarify it. You indicated concern that the police could seize notes made by lawyers in their offices, which might lead to lawyers not making notes or keeping such documents. First, why would defence lawyers keep records that might incriminate their clients? Second, if that were to happen, would justice not be done if that led to guilty persons being brought to trial?

Mr Bayly: One difficulty is that people would be discouraged from consulting lawyers. It may surprise the committee to know that a number of people consult lawyers and then confess to the police or give them information. If there was a possibility that what people said to lawyers could become the subject of an inquiry, it would discourage people from consulting lawyers and, after having received legal advice, might well discourage people from going to the police. Many people consult lawyers and then confess to police or give them information. They might give such information on the basis that they will not be charged, or because a lawyer has advised them that it is in their best interests to do so to get a lesser penalty. Whatever the reason, it happens a lot. If that flow of information between people and lawyers was subject to questions, the source of information would dry up.

Hon PETER FOSS: Lawyers might also advise people that they have or have not committed a crime; that is often why people consult them. They know that they have done something but not necessarily whether it constitutes an offence or whether they have a defence to it. Unless there is that full disclosure, they will not get much advice.

Mr Bayly: That is right. A person is entitled to know his rights in a proper legal system before he goes to the police so that he can make a reasoned decision about whether he wishes to speak to the police.

Hon PADDY EMBRY: If your advice to a prospective client was that he or she should speak to the police, but it was clear that the client did not want to, either then or later, would you as a lawyer not be able to destroy the notes that you had taken as you were listening to the client?

Mr Bayly: I could destroy records but it would be far better if those records were not subject to the possibility of a subpoena and, therefore, would not have to be destroyed. What is the point of lawyers burning their records so that they cannot be the subject of a subpoena? It might surprise the committee to know that many people are scared to go to the police, particularly people who have not been involved previously with the police. They might be frightened to go directly to the police but might be happy to give a statement to a lawyer and for the lawyer to pass the statement on to the police. The police often use statements prepared by lawyers, but that process will cease if professional privilege is destroyed or its concept weakened in the way anticipated by the Bill.

Hon PETER FOSS: Other people have spoken on this area but not quite as effectively as you have. They have defended legal professional privilege generally, including the way in which it applies to documents, which I believe does not fall within this area. Are you able to give the committee - not now, but later - a short description of the type of documents to which you have referred?

Mr Bayly: Yes, I could think about that.

Hon KEN TRAVERS: Could I clarify that? Are you talking about people consulting a lawyer about a schedule 1 offence? This legislation would not apply to them. This legislation applies only to offences that are fairly serious.

Mr Bayly: Yes.

Hon KEN TRAVERS: Is it correct that when people consult you and admit to having committed a crime, you cannot then defend them if they want to plead not guilty?

Mr Bayly: No, that is not right. A lawyer cannot be a party to perjury. If someone said to me, "I stabbed Bloggs but I will go into the witness box to say I did not", I could not act for him or put him in the witness box knowing that he would lie. If he said, "I stabbed Bloggs but I did so because he tried to kill me", I could continue to defend him and the defence would be self-defence. The only thing that I could not do is put him into the witness box where I know he will perjure himself, because I would be a party to that offence.

Hon E.R.J. DERMER: What if you were not aware of his intention to lie but you became aware of it when he started answering questions in the witness box?

Mr Bayly: There is nothing I could do; I would have to keep going.

Hon E.R.J. DERMER: You would just ignore it?

Mr Bayly: Yes.

Hon KEN TRAVERS: What was that?

Mr Bayly: If I became aware that an accused was lying when he started answering questions in the witness box, but I did not know that he intended to lie when he got into the witness box, I could not suddenly stop representing him or stop asking him questions. I would have to continue.

Hon KEN TRAVERS: Even though you knew he was lying?

Mr Bayly: Yes.

Hon KEN TRAVERS: What would you then do as a lawyer?

Mr Bayly: I would have to keep going.

Hon KEN TRAVERS: At the end of the court case, if you knew that the defendant had perjured himself, is there an obligation on you to do anything at that point?

Mr Bayly: No, because I would not know whether he had lied to me when he was in my office.

Hon KEN TRAVERS: That is the point I am making. If someone eventually went to court for a criminal offence about which you had notes indicating that he had admitted to having committed the offence, you would not be able to defend him?

Mr Bayly: If he said that he did not do it, I could not represent him. However, if professional privilege is not allowed, people will stop consulting lawyers. As I indicated, that is a source of people giving themselves up or of their giving assistance to the police. The investigative process should be all about trying to encourage people to go to the police and to give information voluntarily about crimes that have been committed; not trying to put them off from undertaking that process.

Hon PETER FOSS: Did you know that in American, proofs of evidence are not subject to legal professional privilege?

Mr Bayly: I did not know that.

Hon PETER FOSS: It leads to very different legal practice in America, where it is a whole different world. We in Australia live in our own little world believing that it is the way in which it is done everywhere. However, in America those documents are not privileged.

Mr Bayly: It appears to me that the matters sought to be attacked under the Bill in fact probably would not attract legal professional privilege. It would not attach, for example, to transactions relating to property and other matters that are part of criminal activity.

Hon GIZ WATSON: I have a question about part 2 of your written submission, in which you state -

It may be that the legislation which imposes upon Judges an investigative role is in contravention of the constitution, this would be particularly so in relation to State Courts invested with federal jurisdiction namely the Supreme Court . . .

Could you elaborate on whether you believe the Bill, if passed, would be subject to court challenge in the future?

Mr Bayly: I am not a constitutional lawyer. However, there is a possibility that courts invested with federal jurisdiction, such as the Supreme Court, are subject to the restrictions placed on judges under the Constitution. If that is correct and judges are obliged to undertake an investigative role, that role and what judges can or cannot do may be contrary to the Constitution. That relates to the question of the judiciary being seen to be independent and the public having confidence in its independence, as required under the Constitution. The difficulty is that if judges are placed in an investigative role, they will lose that independence.

The CHAIRMAN: Point 4 of your submission states -

The legislation also appears to be retrospective in the sense that documents prepared by solicitors prior to the introduction of the legislation would appear to be caught by the legislation.

Does that mean that a summons can capture documents of any date? Can you explain to the committee those concerns about the Bill?

Mr Bayly: It is retrospective in the sense that, for example, advice that I gave to somebody five years ago and that I kept in note form appears to be caught by the legislation.

[3.15 pm]

Hon PETER FOSS: You cannot change your behaviour retrospectively, but the law has been changed retrospectively.

Mr Bayly: That is right.

Hon E.R.J. DERMER: I would like to return to the matter we were discussing earlier about lawyers' obligations to the law, the court, and their clients. If I understand correctly, you were saying that, if your client tells you that he will perjure himself before the court, that you are no longer at liberty to represent him. Is that correct?

Mr Bayly: That is correct.

Hon E.R.J. DERMER: Does that, by logical extension, mean that you can only advise your client to give honest testimony in the court?

Mr Bayly: Absolutely. The lawyer would be party to the perjury by advising a client to give evidence that is not the truth.

Hon E.R.J. DERMER: What about withholding evidence from the court?

Mr Bayly: The defendant does not have to answer questions that are not asked. The lawyer can tell the client that if a question is asked, he must tell the truth, but if nobody asks the question, he does not have to volunteer the information. That comes up in any practice. For example, a person's criminal record cannot be used against him unless he conducts his defence in a particular way. One of the ways in which a criminal record becomes available to the prosecution, is if the prosecution witnesses are attacked. In the old days, particularly before video interviews, an accused person might say that he had been beaten up by the police. The lawyers knows he has a very bad record, and must advise the client that, if he raises the issue of being beaten up by the police, he runs the risk of the record going into the court, and the likelihood is that the jury will not believe the defendant, and he will be convicted. Therefore, the lawyer will tell the client that unless he is specifically asked a question about being beaten up by the police, he should not mention it. Otherwise the defendant runs foul of the Evidence Act and is likely to be convicted based upon his previous convictions.