check' powers by the police as a means to regulate their activities and behaviour. The use of such powers in everyday interaction with young people is common in a number of States and has led to deep tensions and conflicts at the street level.[1]

Moreover, in practice, police will be able to detail a person who cannot prove the name and address they give is correct. Although there is no express requirement that citizens be able to verify their name and address, arrest could follow a police suspicion that the information given was false or not full and correct. Again this has a number of civil rights implications, not to mention the difficulties faced by the homeless and destitute in responding to such requests.[2]

Fingerprinting

Under the current provisions of the *Crimes Act* 1958, fingerprinting is a procedure for demonstrated investigative purposes. Suspects aged 17 and over can give informed consent to a procedure or have the matter determined before a Magistrates' Court. Suspects aged between 10 and 17 years must be brought before a Children's Court for an order. They have no capacity to consent. A child aged 10 years or less must not be fingerprinted. The reliance on courts reflects concerns about the voluntariness of 'consent' in the investigative context.

Even though current law provides apparent safeguards in the fingerprinting of young people, the reality does not reflect this. For example, a recent study of youth-police relations showed that, in Victoria, fully 54% of those young people aged 16 or under who were taken to police stations reported being fingerprinted. In a similar vein, despite legislation in Victoria, only 38% of young people aged 16 or under reported having a third person present while at the police station, and 50% reported being held in police cells.[3]

The proposed laws render fingerprinting a matter of routine and severely erode the supervisory role of the courts. For young people aged 10 to 14 years, a court will only be able to decide whether the prints should be taken if both the parent and child do not give consent to the procedure. Should the matter get to court, the young suspect is not a party to the proceedings, may not call or cross-examine witnesses and has a highly restricted capacity to address the court.

Young people over 14 years will be treated as though they were adults for the purposes of fingerprinting. They will be unable to refuse and the Bill eliminates access to the courts for a determination. More disturbing still is that senior police will have the authority to decide that 'reasonable force' may be used. The citizen may not even have been charged.

When prints are forcibly taken by police from a citizen under 17, parents will be expected to stand by and helplessly watch. It will be recorded on video if practicable. Otherwise it will be audio-taped. There will be no video souvenir of the forcible taking of prints from those 17 years and over.

The Bill purports to require the automatic destruction of the fingerprint records taken from juveniles found guilty of an offence who reach the age of 26 with a 'clean slate'. Only prints taken under the regimen introduced by the Bill are automatically destroyed. Prints taken under current law will only be destroyed on application. Those whose prints were taken before the current law came into force are completely ineligible for expungement. The Bill is also unclear whether a further offence as a child, even if followed by an unblemished adult record, will attract the requirement for destruction of prints.

Forensic procedures

At present, the law only covers blood samples. The Bill would expand the range of samples which may be obtained (blood, anal swab, sample of pubic hair, mouth scrapings) and dental impressions. The Bill claims to make a distinction between intimate and non-intimate procedures, with the former requiring a doctor of the same sex, but only if practicable. So called 'non-intimate' procedures may be carried out by anyone authorised by the police of either sex even though the suspect may be required to remove all or most clothes.

A Children's Court order remains necessary for all young suspects and a Magistrates Court order must still be obtained for suspects aged 17 or over who do not give informed consent. As with court proceedings with respect to fingerprinting, police will be the sole party to an application for court orders to extract body samples. In the case of urgent applications, these highly intrusive invasions of bodily integrity can be authorised without sworn evidence.

These particular provisions have been criticised by the President of the Australian Medical Association who has said that 'Medical practitioners will not accept any law which condones medical assault on persons who have not freely and informedly given their prior consent'.[4]

More generally, the proposed legislation has been condemned by Human Rights Commissioner, Brian Burdekin, by Brind Wolnarski, chair of the Criminal Bar Association, the Bar Council of Victoria and by a wide range of academics, welfare organisations, and community and youth workers. The Federal Government has also indicated that it may intervene to override the legislation if it is found to breach Australia's obligations under the International Covenant on Civil and Political Rights, and the International Covenant on the Rights of the Child.

References

1. See, for example, White, R. and Alder, C., (eds), *The Police and Young People in Australia*, Cambridge University Press, 1993.
2. For further discussion see Lane, D., 'Name and Address Power in Victoria: The "No" Case', unpublished paper available from Isaacs Chambers, Melbourne.
3. White, R. and Alder, C., 'Police Research and "Methodological Issues"', (1993) 9 *Socio-Legal Bulletin*, 13.
4. *Age*, 16.11.93, p.2.

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The walls have ears

Police bugs in remand cells. BARBARA ANN HOCKING reports on a recent English decision

This Brief deals with the recent English decision in *R v Bailey and another* (1993) 3 All ER 513. The English Court of Appeal (Criminal Division) dealt with the evidentiary impli-

cations of covertly obtained police tapes. The appellants had been charged with conspiracy to commit robberies in the Nottingham area, with varying degrees of evidence, such as fingerprints and identification, against them. However, the Detective Chief Inspector in charge of the case admitted that more evidence was needed and that he had therefore sought permission from the deputy chief constable to install listening device equipment in one of the remand cells.

The damning taped conversations between the appellants were therefore obtained by police through the secret bugging of the remand cell in which the appellants were held subsequent to being arrested and charged. The police arranged for the accused to be placed in the same remand cell by means of a police charade (which was presented as such by the trial judge) that gave the appellants the impression that the decision about their sharing the cell was one forced on the police by an unco-operative custody officer.

The appellants made indiscriminate and damaging admissions during the course of the taped cell conversations. The comments they made during the course of this police bugging were in fact recognised in the judgment as 'highly incriminating remarks, tantamount to admissions of guilt' (*Bailey* at 514). The sole issue for the court concerned the judge's decision to admit the evidence of the admissions in the tape recording despite the means by which they were obtained. The appellants argued at their trial that the judge should exclude the taped cell conversations in accordance with the exercise of his discretion in that regard.

Under English law, the particular issues raised by this case involved consideration of s.78(1) of the United Kingdom *Police and Criminal Evidence Act* 1984 and the detailed formulation of Police Codes of Practice set out under that legislation. The section of the *Police and Criminal Evidence Act* 'rests on the idea that the admission of certain evidence is capable of adversely affecting the fairness of proceedings'.

The court in *Bailey* considered itself bound by the principles enunciated in *R v Ali (Shaukat)* (*Times*, 19.2.91) to the effect that the code of police conduct enunciated in the 1984 Act contains no indication that the police ought to warn an accused of the possibility of their eavesdropping in such a situation. It was therefore held that the police were under no duty to protect the appellants from having the opportunity to speak indiscriminately to each other if they should choose to do so. While the common law recognised a discretion to exclude evidence on the grounds of fairness of the proceedings, it would appear that the British law on this matter has been underpinned by a different notion of fair play from the Australian law, at least up until the enactment of the *Police and Criminal Evidence Act*.

The court in *Bailey* spoke in terms that appear to distinguish positive duties of the police in relation to protection of the accused and which seem to refer to criminal behaviour as at times an implicit justification for particular police stratagems to obtain evidence. Thus, it would appear from the discussion of the authorities that the police method will be more likely to be considered heinous where it has involved deception of both the accused and, more importantly, of the accused's solicitor. However, while appearing to underwrite police efficiency in law enforcement, the decision rests clearly on consideration of the existing English case law authorities.

The court thus expressed the view that it saw no reason to decry the conduct of police in the present case nor to doubt the essential fairness of this evidence having been held admissible. Furthermore, the court held that there was nothing in the *Police and Criminal Evidence Act* or in the Police Code of Practice to prohibit the police from bugging a cell, even after an accused person had been charged and exercised the right to silence. The notion that the police had effectively thwarted or distorted the exercise of the right to silence did not figure prominently in the analysis. It was held that the trial judge had been entitled to admit the taped conversations as evidence in the exercise of his discretion under s.78(1) of the Act.

Clearly, the case is a particularly interesting one, for it involves the explicit recognition of police 'subterfuge' in procuring evidence and sets that stratagem against the detailed regimen formulated in the *Police and Criminal Evidence Act* 1984. In striking the balance between police and accused at the point taken, that of a necessary subterfuge as a means of acquiring vitally needed evidence, the case adds further case authority to support this type of police method. It also exemplifies an unusual aspect to the ever problematic balance that must be struck in law enforcement, and in evidentiary matters, in particular, between the rights of the accused and the powers of the police.

It is interesting to note by way of conclusion that the extremely severe law and order package that was recently unveiled by the British Conservative party, included at its centre the limit on the right to silence. This ' . . . includes allowing judges to instruct juries that they should infer that a defendant who fails to offer the police an explanation is guilty' (*Guardian Weekly*, 17.10.93, p.11). A newspaper report on the Conservative conference notes that the British House of Commons has traditionally rejected attempts to limit the right to silence, but that the argument now advanced is that this right is 'regularly abused by terrorists and videotaping of interviews provides suspects with safeguards' (*Guardian Weekly*, 17.10.93, p.11).

It would appear, therefore, that the court in *Bailey* has underwritten potential political approval of changes to police powers and a shift in the balance between accused and police. The right to silence has already been removed from the law in Northern Ireland. It would appear therefore that the 'law and order' situation in the United Kingdom bears witness to the process of 'normalisation' referred to by writers on terrorism. This refers to the increasing absorption of what are initially considered extreme measures into the processes of criminal justice administration (see, for example, Hocking, J., *Beyond Terrorism*, Allen & Unwin, 1993).

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