

### third time lucky

We are free in the sense that the police only arrest no-hopers and ratbags and book traffic offenders. But we are not free in the sense that every man tends to be his own policeman . . . we do not want our neighbours, or the people at work, or at the club to think that we are a Communist or a critic or a no-hoper. You never know what might happen if they did.

JF Cairns, 'The Eagle and the Lotus', 1969, p 88

**criminal investigation revisited.** The perennial issue of police powers in the investigation of crime will again be thrust into the public arena. The former Attorney-General, Senator Gareth Evans, recently announced that a new Criminal Investigation Bill will be introduced into the Australian Parliament in 1985. Delivering the John Barry Memorial Lecture in October 1984, Senator Evans said:

certainly no area of the law has aroused more intense reform interest over a longer period than the law of criminal investigation . . . the rules governing the exercise of powers by the police when investigating the familiar mainstream offences against the person and property. Some other police powers issues from time to time assume a little more glamour . . . but the old, time-honoured questions about powers of arrest and detention and custody; about questioning, confessions and the right to silence — continue to generate debate year in and year out.

It is almost 10 years since the Commission presented its report *Criminal Investigation*. The draft Bill included in that report has, said Senator Evans, tended to be the focal point for debate in recent years on the law governing this area. That Bill has also spawned two past attempts to introduce a single, comprehensive statement of the investigative powers of Federal Police (the Criminal Investigation Bills of 1977 and 1981) both of which have failed to reach the statute books.

In his address, Senator Evans identified certain key topics on which differences of opinion have continued to be expressed regarding the course of reform:

- custodial investigation; the extent to which police should be able to keep a suspect in custody — legal or de facto — for the purpose of questioning or carry-

- ing out other investigative procedures;
- regulation of police questioning of suspects, particularly the right to silence and measures to be taken as to recording of confessional evidence;
- rules as to exclusion of evidence obtained in contravention of laws governing the conduct of investigations.

Indeed, on the first of these matters there had been differences of opinion within the Commission at the time *Criminal Investigation* report was written. Debate will no doubt continue on these and other issues and Senator Evans expressed the hope that, following circulation of a draft Bill presently being prepared by the Attorney-General's Department, a public seminar could be convened at which all relevant issues could be fully canvassed. He added:

I think it will be reasonable to hope that from such a seminar a board consensus might be reached to provide a sure basis for future legislative action throughout the nation.

The climate for reform today is certainly no different from that which obtained at the time the Commission's report was presented. The sources of investigative powers of the Australian Federal Police are widespread and their effect imprecise and uncertain. This imprecision and uncertainty is, said Senator Evans, unsatisfactory both to police and the citizen: 'it may inhibit the speedy progress and handling of an investigation; and it certainly produces in many citizens distrust and suspicion of police officers.' The remedy: 'to proceed with the utmost determination to produce a clear, comprehensive and readily ascertainable statement of the law governing this whole subject'. It is to be hoped that this latest attempt at reform shall prove more successful than the past two attempts.

**victorian action.** In the *Criminal Investigation* report, the Commission recommended that the powers of the police to hold persons in custody for questioning before the laying of a formal charges be set out in statute. Recent amendments to the Crimes Act 1958 (Vic) have taken

up this recommendation. Victorian police may hold a suspect for an initial period of up to six hours (the Commission recommended a maximum of four hours), which period may be further extended for a maximum of six hours at a time by a magistrate.

**canadian proposals.** The Canadian Law Reform Commission has published a paper dealing with the questioning of suspects (Working Paper 32, *Questioning Suspects*). This was another area considered by the Commission in its *Criminal Investigation* Report. The proposals made by the Canadian LRC are in substantial agreement with the recommendations of the Commission. These include:

- the giving of a warning to a suspect of his or her right to silence and right to obtain the advice of a lawyer;
- that the questioning should be recorded at the time of its occurrence, preferably by sound or video recording equipment or, if that is not practicable, then in writing; and
- that a statement taken from a person in contravention of the rules not be admissible in evidence at a trial or preliminary proceeding.

It also understood that at the time of his death, NSW Attorney-General Paul Landa was putting the finishing touches to a Cabinet submission for legislation requiring the electronic recording of police questioning in that State. See below at p 39.

### righting wrongs or wrong rights?

We pay for being human and alive,  
The price to be entangled and compelled.

Robert John Clark, 'Meditations on the Flesh'

**new commission.** On 12 September 1984 the former Attorney-General, Senator Gareth Evans, QC, introduced into the Senate a Bill to restructure and expand the functions of the Human Rights Commission. The name of the Commission would also be changed to the Human Rights and Equal Opportunity Commission. With the election of 1 December the

Bill lapsed but it is expected to be revived in the early part of this year.

Established by the previous Liberal Government in 1981, the Human Rights Commission was to have a limited life of five years. At that time the then Attorney-General, Senator PD Durack, QC, stated that:

the essential purpose . . . of the Commission is to promote discussion and understanding of human rights in the community generally and to recommend to the Government and to Parliament changes in law or practice required to bring that law or practice into line with human rights as defined by the International Covenant [on Civil and Political Rights] or other human rights instruments . . . In an era of social change in which governments exercise wide powers and corporations and large institutions greatly influence the lives of individuals, it is important to have an agency that is active in the protection and promotion of the rights of individuals. (*Senate Hansard*, 10 March 1981).

With the change of government, the Human Rights Commission has assumed a more permanent and activist role in securing human rights. The Human Rights Commission, as well as performing the functions conferred on it by its enabling Act (see [1982] *Reform 21*), has assumed control over administration of the Racial Discrimination Act 1975 and, more recently, the Sex Discrimination Act 1984 (see [1984] *Reform 147*). The new Human Rights and Equal Opportunity Commission would continue these roles and will also be the basic machinery through which the proposed Australian Bill of Rights and any future legislation in the human rights area would be administered. The new Commission will also be the vehicle for implementation of the Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention 111). It is also to be given additional powers in the following areas:

- the formulation and publication of guidelines for the avoidance of acts or practices which may be inconsistent with human rights; and
- the ability to act as *amicus curiae* in legal proceedings that involve human rights issues.