Fourth, the accused shall have the opportunity to contact counsel or advise the local legal aid officials. Fifth, no interrogation shall take place after the person has requested counsel until the person has reasonable time to confer with counsel. Six, every person has the right to the presence of counsel during the interrogation. And seven, no statement made without the presence of counsel is admissible unless the person knowingly and voluntarily waives his right to counsel.

Such a clause does not exist in the Bill which is now before the Senate to amend the Canada Evidence Act, Bill S-33. Some protection for the person accused or questioned about a crime might be available in the Charter of Rights, Section 24(2), which deals with the exclusion of evidence bringing the administration of justice into disrepute. The problem with this is that the Section has not yet been tested. There is some indication that the Charter is being interpreted in a relatively conservative manner, particularly in the Province of Ontario. It will be some time before test cases indicate the strength with which the Charter will be interpreted.

To put the measure I propose into a statute makes it more all-encompassing and offers more positive protection—a more readily accessible protection—and puts the onus on the state to inform the person of his rights. It is a direct and positive action.

I said earlier that I am not suggesting something that is new and untried. In Scotland there is a total ban on custodial interrogation by the police and the restriction is backed by an exclusionary rule for any statements obtained in violation of it. Despite that, in 1971 Scotland had a crime clearance rate of 38.2 per cent, which compares very favourably with Canada which had a crime clearance rate of 35.5 per cent in the same year.

Similarly in the United States, where the procedures are much as I have indicated in the Bill, as a result of decisions brought down by the United States Supreme Court in the Miranda case among others, in-depth studies have shown no significant reduction in conviction or clearance rates since that major decision.

I think the principles I have enunciated in the Bill would widen the protection given to people and would further implement the fundamental principle that people shall be considered to be innocent until proven guilty. I know that what I propose is extremely controversial, not only among the general public but among lawyers and judges. I doubt very much that Members of the House would agree to pass the Bill today, but I would urge them to at least permit it to go to the Standing Committee on Justice and Legal Affairs where it may get the kind of study in depth which I think it merits.

Mr. David Weatherhead (Scarborough West): Mr. Speaker, I am very pleased to speak on Bill C-446 and to follow the Hon. Member for Winnipeg North (Mr. Orlikow) who has been in this House since 1962. During this period of more than 20 years he has been in the forefront of social policy matters, legal, labour and employment matters, including issues such as the one we are discussing this afternoon.

Bill C-446 proposes to amend the Canada Evidence Act with respect to incriminating statements. Although the Bill's intent may be judged laudable in that it says it seeks to clarify the law, Members should be aware that, in fact, it fails to do so. In order to appreciate how this Bill fails to do so, one must begin with an appreciation of the existing state of the law. The subject of incriminating statements or, more colloquially, "confessions" has received and continues to receive a great deal of attention in our law.

I need not remind Members that the rule that a confession must be voluntary to be admissible is of long-standing. The rule can be traced back to two oft-quoted passages on the subject of confessions. The first, contained in Lord Sumner's speech in Ibrahim v. The King, (1914) A.C. 599 at pp. 609-10, is as follows:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in Reg. v. Thompson—

● (1730)

The second is found in the case to which Lord Summer refers: Mr. Justice Cave's judgment in Regina versus Thompson, 1893, 2 Queen's Bench 12 at page 16, wherein Mr. Justice Cave said:

> The material question consequently is whether the confession has been obtained by the influence of hope or fear, and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to shew affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubts subsisting on this head, will reject the confession.

This Bill seeks to define the term "voluntary statement" and in doing so adopts the rule in the Ibrahim case. What the Bill fails to do, Mr. Speaker, is to resolve the considerable debate which has raged over the proper definition of the term "voluntary".

I would refer Members to the leading Canadian authority in this area, Mr. Justice Fred Kaufman, of the Quebec Court of Appeal, who in the third edition of his classic work," Admissibility of Confessions", published in Toronto by Carswell in 1979, sets out the debate in the chapter dealing with the definition of "free and voluntary".

Mr. Justice Kaufman, on page 106, refers to an article by Professor Vincent Del Buono entitled "Voluntariness and Confessions: A Question of Fact or Question of Law", 1976-77, 19 Criminal Law Cases 100, which speaks of the two definitions of the term "voluntary" which have been adopted in Canada. This article was, by the way, cited with the approval by Mr. Justice Lamer of the Supreme Court of Canada in his judgment in the recent Supreme Court of Canada decision in Rothman versus The Queen, 1981, 59 Canadian Criminal Cases at page 31, and I quote:

> The first of the two definitions of "voluntary" comes from what may be termed a "narrow" reading of Lord Sumner's speech. In this reading, "voluntary" simply means that neither "fear of prejudice" nor "hope of