

# NSW Law Reform Commission

## REPORT 66 (1990) - CRIMINAL PROCEDURE: POLICE POWERS OF DETENTION AND INVESTIGATION AFTER ARREST

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## **Terms of Reference and Participants**

To the Honourable J R A Dowd LLB, MP,  
Attorney General for New South Wales

### **CRIMINAL PROCEDURE**

### **POLICE POWERS OF DETENTION AND INVESTIGATION AFTER ARREST**

Dear Attorney General,

We make this Interim Report pursuant to the reference to this Commission dated 17 January 1982.

Hon R M Hope QC

(Chairman)

Assoc Professor David Weisbrot

(Commissioner)

Professor Brent Fisse

(Commissioner)

Mr Ronald Sackville

(Commissioner)

December 1990

### **Terms of Reference**

On 17 January 1982, the then Attorney-General of New South Wales, the Hon F J Walker QC, MP, made the following reference to the Commission:

To inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto; and in particular, without affecting the generality of the foregoing, to consider -

- (a) the means of instituting criminal proceedings;
- (b) the role and conduct of committal proceedings;

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- (c) pre-trial procedures in criminal proceedings;
- (d) trial procedures in matters dealt with summarily or on indictment;
- (e) practices and procedures relating to juries in criminal proceedings;
- (f) procedures followed in the sentencing of convicted persons;
- (g) appeals in criminal proceedings;
- (h) the classification of criminal offences;
- (i) the desirability and feasibility of codifying the law relating to criminal procedure.

The Criminal Procedure reference has generated a major research program at the Commission, and has already resulted in the following publications:

General Introduction and Proceedings in Courts of Petty Sessions (1982) (Issues Paper 3 and Outline);

Long Criminal Trials (January 1985) (Background Paper);

The Jury in a Criminal Trial (September 1985) (Discussion Paper 12);

Unsworn Statements of Accused Persons (October 1985) (Report 45);

The Jury in a Criminal Trial (March 1986) (Report 48);

The Jury in a Criminal Trial: Empirical Studies (June 1986) (Research Report 1);

Procedure from Charge to Trial: A General Proposal for Reform (December 1986) (Discussion Paper 13);

Procedure from Charge to Trial: Specific Problems and Proposals, Volumes 1 and 2 (February 1987) (Discussion Papers 14/1 and 14/2); and

Police Powers of Arrest and Detention (August 1987) (Discussion Paper 16).

The Commission has been asked to examine and report on the subject of police powers of arrest and detention as a matter of priority within the terms of its general reference on Criminal Procedure. That request followed directly upon concern being expressed, by the New South Wales Commissioner of Police and officials from various other law enforcement agencies, about the practical implications of the decision of the High Court of Australia in *Williams v The Queen* (1986) 161 CLR 278. In *Williams* the High Court re-affirmed the Australian common law position that, where it is practicable for the police to bring an arrested person before a justice, this must be done without unreasonable delay. Police are not entitled to delay this process for the purpose of questioning the arrested person or for conducting any other form of investigation into the suspected criminal activity of the arrested person.

In a letter to the Commission of 21 January 1987, the then Attorney-General of New South Wales, the Hon T W Sheahan, requested the Commission to consider this matter, but the Attorney-General asked that our inquiry should not be limited to the relatively narrow issue dealt with by the High Court in *Williams*. Rather, the Commission was expressly asked to "review the whole question of the rights and powers of police following arrest".

After preliminary research into this subject, the Commission prepared a consultative document which was distributed to all judges, magistrates, crown prosecutors, public solicitors, public defenders, a large number of lawyers in private practice, academic lawyers, and other interested individuals and organisations. The response to this document was of considerable value to the Commission in its work in this difficult and sensitive area. No

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other topic with which the Commission has dealt under its reference on Criminal Procedure has attracted such keen interest and generated such spirited debate.

The Commission originally intended to produce an early report on this topic. After receiving submissions in response to the consultation paper, however, it was considered that because of the complexity and importance of the issues involved and the largely conflicting approaches taken in the submissions, it was preferable for the Commission to deal with this subject by publishing a discussion paper: *Police Powers of Arrest and Detention (DP 16)*. This paper was completed in August 1987 and was again widely distributed for the purpose of consultation. Discussion Paper 16 contained some 67 tentative proposals for reform covering the following topics:

- a code of arrest and detention
- power to stop and search
- power to demand name and address
- power to set up road checks
- questioning before arrest
- police power to arrest
- power of private citizens to arrest
- power of search on arrest
- procedure following arrest
- services available to an arrested person
- questioning following arrest
- the use of electronic recording equipment
- fingerprinting of arrested persons
- photographing of arrested persons
- obtaining forensic evidence
- the conduct of identification parades
- the role of the court of first appearance
- court attendance notices
- the consequences of breach of procedural rules
- special rules for Aboriginal persons.

The Commission received a large number of submissions in March 1988 in response to the Discussion Paper, including lengthy and carefully considered submissions from the New South Wales Commissioner of Police, the Law Society of New South Wales, the Legal Aid Commission of New South Wales and the Commonwealth Director of Public Prosecutions. This consultation process appeared to be drawing to a close in the middle of 1988, and an interim report was expected in late 1988 or early 1989. Unfortunately, however, this period coincided with a major run-down in the Commission's financial and staff resources: the budget allocation for 1988-89 was down 31 per cent on the previous year, and the two remaining full-time Commissioners (including

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the Chairman) left the Commission and were not replaced. (The Commission's "difficult year" is fully detailed in the *Annual Report 1989*).

Substantial work in this area recommenced in August 1990 following the appointments of the Hon Justice R M Hope AC CMG QC as Chairman and Associate Professor David Weisbrot as a full-time Commissioner. At the behest of the current Attorney-General of New South Wales, the Hon J R A Dowd QC, the Commission has given special priority to the completion of its work on this aspect of the Criminal Procedure reference, recognising the widely held view that the need for reform is relatively urgent. Because of the two year hiatus in the Commission's work in this area, a further round of informal consultations were held in August and September 1990, to allow for an updating and "refreshing" of previous submissions. This involved discussions with many senior members of the New South Wales Police Service, the judiciary, the legal profession, officers in the Attorney-General's Department, academic lawyers, and other members of the community.

### **Participants\***

#### ***Division Members***

For the purpose of the reference a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

The Hon R M Hope QC

Associate Professor David Weisbrot

Professor Brent Fisse

Mr Ronald Sackville

#### ***Executive Director***

Mr Peter Hennessy

#### ***Research Assistance***

Ms Marianne Christmann

Ms Alexandra Shehadie

#### ***Honorary Consultant***

Dr David Dixon

#### ***Librarian***

Ms Beverley Caska

#### ***Desktop Publishing***

Mrs Nozveen Khan

#### ***Administrative Assistance***

Ms Zoya Howes

\* During the long life of this Reference there have been a great many Commission staff, consultants and others involved as participants. It is only possible to list here those responsible for the production of this Report.

## **Executive Summary**

In *Police Powers of Detention and Investigation After Arrest* (LRC 66, 1990), the New South Wales Law Reform Commission proposes a package of legislative and procedural reforms to bring the conduct of criminal investigation under the rule of law.

The Commission believes that the broad common law principles and discretions affecting criminal investigation, as applied in practice, do not meet the needs of modern society. The common law fails to provide police with a realistic opportunity to complete their investigations in some circumstances, while failing to set acceptable limits on police powers and practices in other cases. Despite the law's stated concern with the liberty of the individual, the common law fails in practice to secure meaningful rights and safeguards for persons in police custody.

In re-affirming the common law position in *Williams v The Queen* (1986) 161 CLR 278, the High Court of Australia recognised these limitations, and essentially invited legislative reform. Many English-speaking jurisdictions have already replaced the common law with comprehensive statutory regimes.

The Commission's recommendations aim to provide police with clear, detailed and comprehensive rules of procedure under which to operate. These rules will give police sufficient powers to do their jobs effectively while at the same time protecting the fraught position of persons in police custody. This new regime will serve to increase public confidence in the integrity of police practices and evidence, and have the further benefit of reducing delays and costs in the criminal justice system.

Emphasis is placed on proper management practices and accountability with respect to criminal investigations, encouraging a "new professionalism" on the part of the Police Service. The general approach will encourage a shift from the traditional "arrest and then investigate" style of policing to one of "investigate and then arrest".

In particular, the Commission's recommendations provide that:

Police will have the right to detain suspects for an initial period of up to four hours after arrest for the purposes of questioning or conducting other authorised investigative procedures.

The four hour period is reserved for actual investigation time and excludes periods (dead-time or "time-outs") when the police are obliged to suspend or delay the investigation. For example, there is "time-out" while travelling from the point of arrest to the police station, while waiting for the arrival at the police station of a lawyer or interpreter, and while waiting for the person to receive medical attention or refreshments.

Police may apply to a court or to a justice (after hours) for an extension of up to eight more hours of investigative detention in difficult cases. The application for extension is an *ex parte* proceeding and may be made after hours by telephone.

Police are to be made responsible for persons in their custody, who are to be treated with respect for human dignity. Police will be required to maintain detailed and complete custody records. The creation of a specialist "Custody Officer" designation in the Police Service should be considered.

Specific rights and safeguards for persons in police custody must be enshrined in legislation, including the right to silence, the right to communicate with a friend or family member, the right to legal assistance, and the right to an interpreter.

Special rules should be developed to regulate the treatment of children, Aboriginal persons and other vulnerable persons in police custody. (Detailed recommendations in this area will follow in the Commission's next report.)

Detailed Codes of Practice regulating criminal investigations should be developed by the Police Service after public consultation, to replace the Police Commissioner's Instructions in this area.

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All police interviews with suspects shall be electronically recorded. Evidence of a confession will not be admissible in court unless it is electronically recorded or there is some other independent verification.

Evidence obtained illegally or improperly (in breach of the new rules of criminal investigation) will be presumed to be inadmissible, although courts will retain the discretion to admit the evidence in the interests of justice.

There should be a follow-up study by the Commission of the operation of the new system after one year, to assess its effectiveness and recommend any needed modifications.

## 1. Background to the Report

### Brief Historical Background

1.1 In order to understand fully the basis and purpose of the existing law of arrest and detention, it is necessary to consider briefly the historical background of the requirement under English law that an arrested person be brought before a justice. Before the emergence of justices of the peace, responsibility for the questioning and investigation of persons suspected of having committed criminal offences lay in the hands of the Star Chamber which, along with the ecclesiastical courts

claimed the power to summon a defendant with no warning of the charge to be made against him, and to examine him on oath.<sup>1</sup>

1.2 The purpose of such interrogations was to obtain confessions from the accused persons, and torture was sometimes used to this end.<sup>2</sup> Where a matter was of public importance, this procedure of preliminary inquiry was also conducted by the Privy Council. According to Stephen

The justice of the peace was at first little more than a constable on a large scale whose power even to issue a warrant for the apprehension of suspected persons was acquired by practice, and was not derived from express parliamentary authority.<sup>3</sup>

1.3 With the enactment of two statutes in the mid-sixteenth century,<sup>4</sup> it became the practice for persons arrested for murder, manslaughter or felony to be brought before two justices who were to examine such persons and to record in writing matters material to the charge before considering bail.<sup>5</sup> Glanville Williams writes

the justice of the peace was half magistrate, half police officer, and in the latter capacity acted very much like a police detective at the present time except that he was not so scrupulous, whose purpose during interrogation was to obtain a confession from the defendant.<sup>6</sup>

1.4 Justices, then, played an important role in the initial investigation of an arrested person: they collected statements from witnesses and interrogated the suspect. The nature of the examination of the suspect conducted by the justices was inquisitorial, resembling the role of magistrates in the civil systems on the Continent. The suspect was not permitted to be present while other witnesses were examined, and had no right to examine or cross-examine any evidence.

1.5 Justices originally received no remuneration for their work, as voluntarism was thought to preserve their independence<sup>7</sup> (and the public perception of their independence) from the Crown and the government. In 1792, new legislation occasioned the practice of appointing Stipendiary Magistrates attached to Police Offices (the incipient police forces). These magistrates (who received a stipend from the Crown) had all of the normal judicial duties of the Justices of the Peace (who continue to exist), but also served as directors of the police (and were commonly referred to as "police magistrates").<sup>8</sup>

1.6 The development of the modern police force in the common law world is traced to the establishment in 1829 of the London metropolitan police by Sir Robert Peel (and the emergence of the English county constabularies just over a decade later). Prior to this the policing function was carried out principally by the yeomanry, civil militia and the army, with great reliance placed on the ancient institution of Hue and Cry until well into the eighteenth century.<sup>9</sup> The standing police forces took over the formal prosecutorial functions of arrest and presentment for charges, and subsequently were in a position to take over from the justices and magistrates the functions of interrogation and investigation.

1.7 In 1826, the statutes governing examination of arrested persons by justices were repealed and re-enacted to include misdemeanours as well as felonies. In 1848, they were again repealed by the Indictable Offences Act (the "Sir John Jervis Act"), which effectively established a kind of committal hearing. This procedure saw a shift towards the idea of the presumption of innocence<sup>10</sup> of the accused person. Evidence was

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given by witnesses in the presence of the accused, and he or she could cross-examine. A justice would then administer a caution to the accused person about the right to remain silent. The accused person also was given the opportunity to call his or her own witnesses, who were subject to cross-examination by the prosecution. After hearing and weighing all of the evidence presented, the justice would then determine whether to discharge the accused or commit the accused to trial upon indictment. These new procedures transformed the institution of justice (and magistrate) from that of public prosecutor to one of preliminary judge.<sup>11</sup>

1.8 Questioning and investigation of a suspect became a police responsibility in practice, although there was no express legal authority for the newly-created police forces to carry out these tasks. Police officers had only the same rights as ordinary citizens to arrest persons suspected of committing crimes. The police did routinely detain arrested persons for questioning prior to handing them over to a justice, but they did so *de facto* and not *de jure*.

1.9 The clear determination of when a person should be brought before a justice following arrest was made in the case of *Wright v Court & Ors*<sup>12</sup>

It is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can, and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time until he may be examined.

In this case the accused person had been arrested by a constable and detained for three days, in order that the party whose goods allegedly had been stolen might have an opportunity to collect his witnesses and bring them to prove the felony. A plea seeking to justify the detention was held bad on demurrer and the charges dismissed.

1.10 *Wright v Court* was decided 23 years prior to the enactment of the Sir John Jervis Act, at a time when the role of the justice was still prosecutorial. Nevertheless, the principle that an arrested person must be brought before a justice as soon as practicable and may not be detained by police for the purpose of investigation became entrenched in the common law and has survived long after both the role of the justice and the organisation of policing were fundamentally transformed.

1.11 This irregular situation was inherited in Australia through the colonial reception of the English common law and legal institutions, and has persisted in most States, including New South Wales. As a consequence, the courts have consistently made strong statements that the police have no power to detain arrested persons for investigation, notwithstanding any detrimental effects this may have on the proper investigation of allegations of criminal conduct.

### The Current Law of Arrest and Detention

1.12 The primary purpose of an arrest is the apprehension of a person suspected of the commission of a criminal offence. However, an arrest should also be seen in context as a preliminary step in the process of the prosecution of a suspected offender. The ultimate purpose of an arrest is to ensure the subsequent attendance of the arrested person before a court in the event that a prosecution is commenced. Arrest is not the only means available to achieve this purpose, of course. Attendance can also be required by a summons (issued by a justice), which states the matter of the information and requires the alleged offender to appear before a justice at a specified time and place,<sup>13</sup> or by the more modern procedure of the issue of a court "attendance notice" by a senior police officer.<sup>14</sup> The courts in New South Wales have recognised that the appropriateness of the exercise of the discretion to arrest must be measured against the circumstances. In *Lake v Dobson*, *Gault v Dobson*, Samuels JA queried the necessity to arrest the defendants for nude sunbathing

[S]ince [nude sunbathing] can scarcely be regarded as ranking high in the criminal calendar, it is to be hoped that police will employ a summons in these cases whenever possible. *Arrest, for the great majority of people, is equivalent to an additional penalty.* It is a means of setting the criminal process in train which should be reserved for situations where it is clearly necessary, *and should not be employed where the issue of a summons would suffice.*<sup>15</sup> (Emphasis supplied)

1.13 Despite its critical importance in the criminal process, the law of arrest remains an amalgam of common law decisions, scattered statutory provisions, and *de facto* practice. The usual distinction made in relation to

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powers of arrest is between those powers which may be exercised without the need for a warrant (issued by a justice), and those which may only be exercised on the basis of a warrant.<sup>16</sup>

1.14 At common law, a police officer may arrest without warrant a person whom the officer reasonably suspects has committed a felony; a private citizen may arrest without warrant only where a felony has actually been committed.<sup>17</sup> Both police officers and private citizens may arrest without warrant a person who commits a breach of the peace<sup>18</sup> in their presence, provided that they act promptly. An arrest without warrant is also justifiable if it is reasonably believed that the person is about to commit a breach of the peace. Neither police officers nor private citizens have any power at common law to arrest a person without warrant for the commission of a misdemeanour, other than where the offence also amounts to an actual or apprehended breach of the peace.<sup>19</sup>

1.15 In New South Wales, various statutory provisions supplement the common law of arrest. The most important of these provisions is s352 of the Crimes Act 1900

(1) Any constable or other person may without warrant apprehend,

(a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,

(b) any person who has committed a felony for which he has not been tried,

and take him, and any property found upon him, before a Justice to be dealt with according to law.

(2) Any constable may without warrant apprehend,

(a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime,

(b) any person lying, or loitering, in any highway, yard, or other place during the night, whom he, with reasonable cause, suspects of being about to commit any felony,

and take him, and any property found upon him, before a Justice to be dealt with according to law.

(Sub-sections (3) and (4) of s352 deal with aspects of arrest pursuant to a warrant.)

1.16 There are certain features of this section which should be noted. Section 352(1) confers certain powers of arrest without warrant on both police officers and private citizens, while section 352(2) confers powers only on police officers. The power under s352(2) may be exercised upon the reasonable suspicion of the police officer, and it is not necessary to show that an offence was actually committed by the arrested person. The powers of arrest conferred on a police officer by s352(1)(a) and (2)(a) are broader than those available under common law, since the arrest may be made not only for felonies but also for misdemeanours and other offences created by statute. The authorisation of warrantless arrests by police officers in the circumstances specified in s352(2)(b) (persons lying or loitering on a highway, etc.) also goes beyond the common law. The arrest powers of private citizens are also somewhat broader than under the common law, since s352(1) extends to all statutory offences and not merely to felonies; however, private citizens still are not empowered to arrest on the basis of reasonable suspicion alone.

1.17 There are other provisions in the Crimes Act which confer powers of arrest without warrant. For example, s352A concerns police powers of arrest in cases of certain offences committed outside the State (but within Australia, and also amounting to an offence against the law of New South Wales); s352AA permits a police officer to arrest on the reasonable suspicion that the person is a prisoner unlawfully at large; s353 provides that a person to whom any property is offered, and who has a reasonable suspicion that an offence has been committed in respect of the property, may (and in some circumstances, *must*) arrest the person offering the property;<sup>20</sup> and s353C gives special powers of arrest to the person in command of an aircraft.<sup>21</sup>

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1.18 Arrests under warrant are usually less problematic, although there may be disputes over such matters as: whether the information which led to the issue of the warrant was accurate or sufficient to constitute a prima facie case; whether the judicial officer involved had jurisdiction to issue the warrant; whether the warrant adequately describes the alleged offender and offences; and whether the warrant was properly enforced.<sup>22</sup>

1.19 At common law a police officer did not have any power to stop or detain a person unless the officer was exercising the power of arrest. Section 357E of the Crimes Act now provides that a police officer may “stop, search and detain” any person (or vehicle) reasonably suspected of having or conveying stolen property or items used or intended to be used in the commission of an offence.

1.20 It is essential to note, however, that neither the common law nor statute law has ever conferred upon police officers a general power<sup>23</sup> to arrest or detain a person merely for the purpose of questioning the person or conducting other investigative procedures.<sup>24</sup>

1.21 The Australian courts traditionally have taken a fairly strict view of the purpose of arrest. In 1933, in *Clarke v Bailey*,<sup>25</sup> Davidson J of the New South Wales Supreme Court held that s352 of the Crimes Act merely reinforced the common law rule that the duty of an arresting officer is to take the arrested person before a justice

without delay, and by the most direct route ... unless some circumstances reasonably justify a departure from these requirements.

Two years later this decision was followed by the New South Wales Court of Appeal in *Bales v Parmeter*,<sup>26</sup> in which Jordan CJ commented

Any detention which is reasonably necessary until a magistrate can be obtained is, of course, lawful, but detention which extends beyond this cannot be justified under the common law or statutory power. Thus it has been held that if in the course of an arrest which is otherwise for a lawful purpose, the arresting constable takes the arrested person to some place to which it would not be reasonable and proper to take him in the course of bringing him before a magistrate, for the purpose of searching him there, the detention in that place and the search are unauthorised and therefore actionable...<sup>27</sup>

Jordan CJ added

If a person has been arrested, and is in the process of being brought before a magistrate, questioning within limits is regarded as proper in New South Wales ... but a police officer has no more authority to restrain the liberty of a suspected person for the purpose, not of taking him before a magistrate, but of interrogating him, than he has of restraining the liberty of a person who may be supposed to be capable of supplying information as a witness.<sup>28</sup>

1.22 Another passage from a judgment delivered by Jordan CJ nearly a decade later emphasises the strength of the New South Wales judiciary's traditional approach to arrest and detention, and the sense of frustration in failing to secure police compliance with the common law requirements.

It appears, from recent cases that have come before this and other Courts of this State, that this rule of law with respect to arrests is being disregarded, and that arrested persons are being taken, not to a magistrate to be charged, but to a police station, where they are questioned by the police, sometimes for many hours, in the hope of extracting from them something that can be used in evidence against them ... Indeed, there seems to be a growing impression in police circles that so long as a constable, after making an arrest, gives the usual caution, there are no limits to the extent to which he may go, short of violence, threats, promises, or lies, in endeavouring to extract admissions from his prisoner. If these methods are tolerated, it is a short step to the moral, if not physical, tactics of the Gestapo and the Ogpu.<sup>29</sup>

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1.23 Half a century later, in the case of *R v Iorlano*,<sup>30</sup> the High Court of Australia adopted the strict interpretation of the purpose of arrest established by the Supreme Courts in New South Wales,<sup>31</sup> Victoria<sup>32</sup> and South Australia.<sup>33</sup>

1.24 The English common law prior to 1965 was in accord<sup>34</sup> with the Australian approach. However, in that year the English Court of Appeal handed down its judgment in *Dallison v Caffery*.<sup>35</sup> In that case Lord Denning MR held (and Danckwerts LJ agreed) that

When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and the valuable evidence lost. He can take the suspect to the place where he says he was working, for there he may find persons to confirm or refute the alibi. The constable can put him up on an identification parade to see if he is picked out by the witness. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. By which I mean, of course, justice not only to the man himself but also for the community at large.<sup>36</sup>

1.25 *Dallison v Caffery* was a case in which the appellant, Dallison, sued a police officer for damages for false imprisonment and malicious prosecution. Dallison had been arrested for allegedly stealing from a solicitor's office. Dallison immediately offered an alibi defence, which was subsequently vindicated at trial. In the civil action which followed, Dallison's argument was that he was unlawfully detained when he was taken to his place of work to check his alibi and to his home to search for the stolen property prior to being taken before a justice. The Court of Appeal found (confirming the judgment of the trial court) that, as Dallison was protesting his innocence, these procedures were in his own interest and, at least in part, at his own request. Further, he suffered no harm as a result and he would not have been taken before a justice or bailed "one moment earlier" in any event.

1.26 Thus there was no actual delay here in bringing an arrested person before a justice, and there was a strong element of consent and self-interest in the procedures taken by the police. Nevertheless this decision was cited regularly to support the much broader proposition that it is lawful for a police officer to delay taking an arrested person before a justice, for the purpose of conducting further investigations, so long as the delay is reasonable in the circumstances. Subsequent English decisions extended these circumstances. In *R v Holmes*,<sup>37</sup> Donaldson LJ described the requirement that an arrested person be brought before a justice as soon as practicable as a "slightly elastic concept", considering that "'as soon as practicable' ... means 'within about forty-eight hours at most'." In the 1984 House of Lords decision of *Holgate-Mohammed v Duke*,<sup>38</sup> Lord Diplock expressed the view that it was a proper purpose of arrest to use the time of detention to confirm or dispel the reasonable suspicion upon which the arrest was made. (The English common law in this area was abrogated in any event by the enactment of the Police and Criminal Evidence Act 1984 ("PACE"), which took effect from 1986. PACE expressly authorises detention after arrest for the purpose of investigation. See Chapter 4, below.)

1.27 In the United States, where the courts have tended to be relatively rigorous on questions of police powers and criminal procedure because of the Constitutional Bill of Rights dimension to American criminal law, the courts have nevertheless authorised a reasonable period of "investigatory detention" in certain circumstances, particularly where there is a "reasonable and articulable suspicion" that the person is involved in criminal activity relating to drugs.<sup>39</sup> This is an area where the American pre-occupation with drug crime has led the courts and the legislatures to move away from erstwhile fundamental concerns about individual liberty and restraints on the exercise of State power.<sup>40</sup>

1.28 The decision in *Dallison v Caffery* had echoes in the Australian courts. For example, in the New South Wales case of *R v Kushkarian*,<sup>41</sup> Street CJ held that it was reasonable and appropriate for the arrested person to have been detained in police custody for twelve hours while the arresting officers followed up the reasonable suspicions which led to the arrest in order to confirm or refute these suspicions. In *Clark v The Queen*,<sup>42</sup> Neasey J of the Tasmanian Court of Appeal wrote

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reasonable practicability must permit [police officers] to place themselves in a position to decide whether a charge shall be laid, and if so what charge. In order to do so they must investigate and assess the then presently available evidence, in as thorough a manner as the circumstances permit.

1.29 The issue of detention after arrest for the purpose of investigation was raised squarely in the 1986 High Court case of *Williams v The Queen*, discussed immediately below.

### The Williams Case and its Successors

1.30 In the early hours of 17 May 1984, police in the northern Tasmanian town of Scottsdale received information alleging that Williams was seen in a hotel, apparently in the act of burglary. After a car chase, Williams was arrested at about 6 am and taken to Scottsdale police station. Two officers came up from Launceston, arriving at 8:45 am, to question him about a number of other burglaries. The officers took Williams back with them to Launceston, arriving at the station at about 11 am. After some initial discussion, Williams allegedly indicated his involvement in the other offences. At 1:10 pm the police began to conduct formal interviews, with the last one concluding at 8:30 pm. The records of interview were all unsigned, but at 9:03 pm Williams was brought before a police inspector and allegedly confirmed the correctness of the records. Williams was finally taken to court in Launceston at 10 am the next day (although problems with court administration meant that his case was not actually dealt with by a justice until 2:15 pm).

1.31 At the subsequent trial, on voir dire, the trial judge held that the confessions were all voluntarily made, and admitted the records of interview relating to counts 27-29 of the indictment, which dealt with the Scottsdale burglary. However, the trial judge exercised his discretion to exclude the records of interview relating to the Launceston burglaries (counts 1-26) on the basis that these interviews were conducted while Williams was unlawfully detained. Section 34A(1) of the Justices Act 1959 (Tas) requires the police to take an arrested person "before a justice as soon as is practicable after he has been taken into custody." Section 303(1) of the Tasmanian *Criminal Code* also imposes a duty on the person who effects an arrest to take the arrested person "before a justice without delay, to be dealt with according to law." The trial judge considered that the police could have reasonably completed the investigation and the necessary documentation and brought Williams before the court on the Scottsdale charges at about 2:15 pm on the 17th. Instead, they continued to interrogate him about the other matters for some hours, delaying his appearance in court by about 20 hours. In rejecting the evidence, the trial judge commented that "public policy considerations should induce me to discourage what occurred here".<sup>43</sup>

1.32 The Crown then led no evidence on counts 1-26 at the trial and the jury was directed to acquit on those counts. Williams was convicted of two counts of burglary and one of theft (counts 27-29). The Crown appealed successfully against the acquittals to the Tasmanian Court of Appeal, which ordered a re-trial on counts 1-26. Williams then sought leave to appeal to the High Court of Australia.

1.33 In the High Court, four of the five judges expressly declined to follow the lead of Denning MR in *Dallison v Caffery* and the succeeding English cases, and instead re-affirmed the more strict Australian common law approach of prohibiting detention after arrest for the purpose of further investigation. The joint judgment of Mason J (now CJ) and Brennan J reviewed the Australian authorities<sup>44</sup> and agreed with the remarks of Hampel J in *R v Larson & Lee*<sup>45</sup> that the requirement that an arrested person be brought before a justice as soon as is practicable, and without any delay occasioned by police investigations, amounted to a basic safeguard for persons in police custody.

That view is surely right. If a person cannot be taken into custody for the purpose of interrogation, he cannot be kept in custody for that purpose, and the time limited by the words "as soon as practicable" cannot be extended to provide time for interrogation. It is therefore unlawful for a police officer having the custody of an arrested person to delay taking him before a justice in order to provide an opportunity to investigate that person's complicity in a criminal offence, whether the offence under investigation is the offence for which the person has been arrested or another offence.<sup>46</sup>

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1.34 Mason and Brennan JJ took pains to emphasise the importance of a common law rule which safeguarded personal liberty, even where this impinged upon the effectiveness of police investigations.

The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences<sup>47</sup> ...

The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.<sup>48</sup>

1.35 The joint judgment states that if the balance between personal liberty and the exigencies of criminal investigation has been wrongly struck by the common law, then it is a matter for the legislature and not the courts to strike a new balance.

If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.<sup>49</sup>

1.36 The joint judgment of Wilson and Dawson JJ is in similar terms.

[A]rrest is the beginning of imprisonment and, whilst it is recognized that imprisonment before trial may be necessary in the administration of criminal justice, it must be justified in accordance with the law. ... The point at which an arrested person is brought before a justice upon a charge is the point at which the machinery of the law leading to trial is put into operation. It is the point from which the judicial process commences and purely ministerial functions cease. This being the purpose of arrest, any delay in bringing a person under arrest before a justice, even if it is to effectuate some other purpose such as the questioning of the person in order to dispel or confirm the suspicion which was the basis of the arrest, is to defeat, however temporarily, the true purpose.<sup>50</sup>

1.37 Wilson and Dawson JJ also noted that the common law requirement could make things difficult for the police.

It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime and the institution of proceedings for the prosecution. And these are functions which are carried out by the police, not for some private end, but in the interests of the whole community. Instances of legislative modification of the common law in recent times may be seen as reflecting a need which the common law no longer meets.<sup>51</sup>

Wilson and Dawson JJ agreed with the joint judgment of Mason and Brennan JJ that the legislature was better placed to modify the common law, to ensure that other safeguards are put in place to replace those that are removed.<sup>52</sup>

1.38 Gibbs CJ, while joining in the unanimous verdict to allow the appeal,<sup>53</sup> took a different approach to the question of custodial interrogation. He agreed with the many Australian cases which have established that there is no power to detain a citizen merely for the purpose of questioning and that the desire to question an arrested person does not in itself justify a delay in bringing the person before a justice.<sup>54</sup> However, Gibbs CJ was prepared to give police more latitude, considering that "what is reasonably practicable in a particular case is a

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question of fact" which depends upon "the conditions under which the arrest was made."<sup>55</sup> Contrary to the views of the rest of the Court, Gibbs CJ considered that

A police officer who has arrested a person reasonably suspected of having committed a crime must be allowed time to make such inquiries as are reasonably necessary either to confirm or dispel the suspicion upon which the arrest was based. It will not be improper to question the arrested person ... and it may be only fair to do so, although it will be improper to persist in questioning such a person after he has indicated that he does not wish to answer any more questions.<sup>56</sup>

1.39 Gibbs CJ then cited Lord Denning's remarks in *Dallison v Caffery* for the proposition that other investigative procedures which may be reasonably necessary before an arrested person can be brought before a justice would include searching the person's house, taking the person somewhere to support or disprove an alibi, and conducting an identification parade.<sup>57</sup>

Although a justice may be found to be available, it may not be practicable to bring the arrested person before him until the necessary inquiries have been completed; on the other hand, the discretion which the police must exercise is not unfettered and does not allow them to hold an arrested person in detention until they decide to charge him if the period of detention exceeds what is reasonably necessary to make inquiries to enable charges to be laid, to prepare the necessary papers and to bring the arrested person before the justice. ... The critical question is whether the arrested person was detained any longer than was reasonably necessary ... the fact that he is questioned ... will not necessarily mean that there has been a failure to bring him before a justice as quickly as was reasonably practicable. On the other hand, if he is detained, not for that purpose, but solely for the purpose of questioning him, the detention will be unlawful. The line may be a fine one, as it often is when a discretion has to be exercised in sensitive matters.<sup>58</sup>

1.40 It must be noted that the Australian common law cases, including *Williams*, do not prohibit questioning or investigation of the arrested person by the police. Rather, they prohibit *delaying* the processing (taking the person before a justice or granting police bail) of the arrested person in police custody for these purposes. In their joint judgment in *Williams*, Mason and Brennan JJ stated

There is nothing to prevent a police officer from asking a suspect questions designed to elicit information about the commission of an offence and the suspect's involvement in it, whether or not the suspect is in custody. But if the suspect has been arrested and the inquiries are not complete at the time when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed. ... The making of inquiries is not a ground for extending the period of custody and denying the subject an opportunity of securing his release either absolutely or on bail by a justice's order.<sup>59</sup>

1.41 Strictly speaking, it could be argued that the High Court's decision in *Williams* is not binding in New South Wales, since the court was asked to consider the effect of particular words in the Tasmanian statutes.<sup>60</sup> However, the two joint judgments clearly set out to establish (or more precisely, to re-affirm) an Australian common law position. This position is not altered by any legislation in force in New South Wales at this time, and both joint judgments rely on the earlier New South Wales decisions, notably *Clarke v Bailey*, *Bales v Parmeter and Ex parte Evers*; *Re Leary*. Further, the New South Wales Police Commissioner's Instructions were revised with the (unsuccessful) intention of complying with the High Court's decision.<sup>61</sup> In several recent decisions the New South Wales Court of Criminal Appeal has used *Williams* as the basis for discussion of the issue of custodial interrogation.

1.42 The first major post-*Williams* case in New South Wales was *R v Burns*.<sup>62</sup> Burns was arrested at 6:15 pm on 11 November 1985 regarding the alleged possession of amphetamines. He was taken to Newcastle police station, arriving at 6:30 pm. Between 6:30 pm and midnight, Burns was in police custody at the station, but was not questioned as the police officers were making inquiries about the involvement of another person. At about 2:00 am, the police began to interview Burns, and at 3:45 am he allegedly admitted to possession of a quantity of heroin ("I bought it as speed but it is heroin") which was later found at his home and was sufficient for

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him to be charged with “deemed supply”. Burns was taken before a magistrate at 10:00 am that morning (the 12th) and released on bail.

1.43 Burns was convicted at trial on the deemed supply of heroin charge, and appealed. At trial, the defence made an unsuccessful submission that the detention of Burns in police custody after about 7:00 pm was illegal, and that the confession was therefore unlawfully obtained and should be excluded in the exercise of the court’s discretion. The key issue on appeal was whether it was practicable to have taken Burns before a justice on the night of his arrest. In the opinion of Street CJ (with whom Allen and Mathews JJ agreed)

the question is not so much the purpose for which the police used that period of detention - that is to say, for the purpose of pursuing further inquiries, and conducting an interrogation. The question rather is, whether it was practicable to bring him before a justice in order to charge him formally, and enable the question of bail to be considered, at a time prior to his making the admission in question.<sup>63</sup>

1.44 The Court of Criminal Appeal concluded that Burns had *not* been subjected to an unreasonable delay.

The suggestion that a Justice could have been brought back to the police station in order to open his court, and exercise his judicial function, appears to me to involve some excess of the expectation of the common law that the bringing of the person before a Justice should be as soon as practicable.

The requirement is not absolute. It is a requirement tinged, as are most common law principles, with an element of reasonableness and I see nothing unreasonable in the proposition that the requirement is not offended merely by reason of the failure of the police to go and find a Justice somewhere and bring him back to the police station in order to exercise his function.<sup>64</sup>

1.45 In passing, the Court also considered the argument that the requirement in s352(1) of the Crimes Act, to bring the arrested person “before a Justice to be dealt with according to law”, could be satisfied by taking the arrested person before a senior officer at the police station who has limited statutory rights (under the Bail Act 1978) to grant bail. The Court rejected this approach, stating that the reference to a “Justice” must be given its ordinary meaning, which is “magistrate”.<sup>65</sup>

1.46 In *R v Zorad*,<sup>66</sup> the accused was arrested in a motor vehicle at Gosford at about 10:00 pm. He was taken to Gosford police station, and questioned at about 11:30 pm. Admissions allegedly were made. At 3:20 am he was “charged” by police with supplying cannabis and robbery with striking. Zorad was brought before a magistrate later that morning; the matter was adjourned and bail refused. Zorad, still in custody, was questioned by police again the next day. At trial, the accused gave evidence that he was left in police cells for what “seemed like hours” before being interviewed. Zorad was unrepresented at trial, and the *Williams* point was not expressly raised nor picked up by the trial judge. Zorad appealed from his convictions.

1.47 As in *Burns*, the Court of Criminal Appeal rejected the arguments that:

(1) the requirement of bringing the arrested person before a justice could be by having a senior police officer make a bail determination; and (2) the common law requires that special efforts be made to find a magistrate outside of normal court hours. The Court also found that even if there was a “delay in compliance of a little over an hour at the time when the first interrogation took place [this] could hardly be regarded as serious”.<sup>67</sup> The Court pointed out that the admissions were found to be voluntary by the trial judge, so that a breach of the law did not automatically result in exclusion of the evidence,<sup>68</sup> and that “this was not a case for the exercise of a discretion to reject such admissions.”<sup>69</sup>

### The Problem with the Common Law

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1.48 The decision of the High Court of Australia in *Williams* represents a strong restatement of the common law's traditional concern about the liberty of the individual, even in the face of the practical exigencies of policing in modern, urbanised society. As a matter of practice, however, the decision does little else, since the grand rhetoric of the common law has never been matched by detailed and *enforceable* rules and procedures which would give real meaning to the "rights" and safeguards. At the same time, it imposes artificial constraints on the police, who are obliged, in their own view, to regularly skirt or breach the law in order to investigate properly allegations of criminal activity.

1.49 Taken at its broadest, the common law guarantee re-affirmed by the joint judgments in *Williams* is that an arrested person in police custody must be taken before a justice as soon as is practicable, and the person may not be detained beyond this time merely to facilitate police investigations. However, at least as seen through the eyes of the New South Wales Court of Criminal Appeal, "the jealous protection of personal liberty accorded by the common law of Australia"<sup>70</sup> is limited to non-holiday weekdays between 10:00 am and 4:00 pm, when the Local Court is sitting. The decisions in *Burns* and *Zorad* make clear that the courts will not require the police to seek out the services of a judicial officer "after-hours", nor has there been judicial pressure on the government to provide 24-hour courts or other institutions or procedures to deal with the large number of cases where magistrates inevitably will not be conveniently available.<sup>71</sup> In one recent unreported case, however, the New South Wales Court of Appeal did comment on this issue in passing, although the point was not litigated before the Court.

The Court emphasises the importance of the legal obligation where a person has been arrested and charged that he or she should be taken as soon as practicable before a justice. ... It is highly desirable, for the preservation of the proper relationship between the police and the judiciary, that arrangements should be made for this to be done, where necessary, during weekends and after hours. The obligation is one of abiding importance. It is to be observed at all times and not simply during usual working hours of weekdays. This requirement recognises the right to liberty of the citizen by ensuring that an accused person is transferred as soon as practicable after being charged by the executive branch of government to the judicial branch of government where the question of bail can be independently considered.<sup>72</sup>

1.50 The decisions also highlight the fact that the common law does not match up with modern criminal procedure, which has dispensed with the necessity for judicial intervention in many cases where matters may be handled administratively with greater speed and efficiency for the benefit of both the police and suspects. For example, in most cases (other than the most serious ones), bail is now granted at the discretion of senior police officers.<sup>73</sup> Only where the police refuse bail is there the need to approach a court. Similarly, in the great majority of cases where bail is granted or is not an issue, it is the norm for police to "charge" the person rather than to bring the person before a court for that purpose. Given the limited availability of judicial officers, and the alternative of continued detention in police custody, few would argue that shifting primary responsibility for bail and charging from justices to police has detracted from civil liberties.

1.51 The failure of the common law to match concern with practical application has at least three quite unfortunate results. First, the treatment that an arrested person receives will vary dramatically - and arbitrarily - depending upon the time of arrest. A person arrested at 10:00 am on a Tuesday could expect to be taken before a justice as soon as police complete the necessary paperwork, which should take no more than an hour in most cases. This may well significantly hamper police investigations if they comply with the law, particularly since there is a significant difference between the level of evidence needed to justify an arrest and that (greater) level needed to lay a criminal charge.<sup>74</sup> However, a person arrested at 4:00 pm on a weekday need not be taken before a justice until 10:00 am the following morning, and could be subject to many hours of interrogation and other investigative procedures (such as identification parades). A person arrested at the weekend, particularly a long (holiday) weekend, could spend some days in police custody, all the while subject to questioning and investigation.

1.52 The second problem follows from the first: it is in the interests of police, especially in complex cases, to purposely effect an after-hours arrest in order to gain substantially more time to complete their investigations. There is nothing actually *unlawful* in this gimmickry, but it is not a sound or ethical basis on which to operate a

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system of criminal investigation. In the course of the recent Royal Commission of Inquiry into the circumstances surrounding the arrest and charging of Insp. Harry Blackburn, it emerged that the arresting officers had received and followed the advice of a senior Crown Prosecutor to stage the arrest at "4:00 pm or so", rather than the planned 6:00 am, in order to give themselves more time for questioning and to avoid the *Williams* issue.<sup>75</sup>

1.53 Finally, there is the problem that police may simply ignore the common law requirement to bring the arrested person before a justice when they see this as substantially interfering with the proper investigation of a case. In the course of its consultations, the Commission learned from numerous senior police officers that police would be willing to "risk it", particularly in serious cases, rather than lose potentially valuable evidence.<sup>76</sup>

1.54 There is, in fact, not much risk for police in ignoring the common law requirements. An unlawfully detained person may be able to secure release by applying for a writ of *habeas corpus*. Such a person may also be able to bring actions for assault, false imprisonment or malicious prosecution.<sup>77</sup> For a plaintiff, however, there are grave problems of delay, costs, proof, and quantifying damages. Although abrogated by statute in New South Wales in 1983,<sup>78</sup> at common law there was also a rule that the Crown and the Commissioner of Police were not, as employers generally are, vicariously liable for the wrongful act of a police officer exercising an "independent discretion".<sup>79</sup> Consequently, these civil remedies are not commonly used and are even more rarely successful, inviting only "the most intrepid complainant."<sup>80</sup> More commonly, persons who believe that they have been unlawfully detained by police will complain to the Ombudsman or to the Police Board. The Police Regulation (Allegation of Misconduct) Act 1978 requires that where a complaint is investigated the investigation shall be conducted by the Police Internal Affairs Branch (s19). The Ombudsman is given a supervisory role under this regime (ss 24-25), but basically the investigation of complaints against the police is under police control. In 1989 there were 71 formal complaints against police for unnecessary detention or arrest, but only one was sustained.<sup>81</sup> The Police Regulation Act 1899 (ss 14-15) also sets out various offences of police misconduct. There are reasonably substantial maximum penalties available for some offences, such as soliciting or taking bribes (\$2000 fine or two years imprisonment) or aiding and abetting the escape of a prisoner (\$100 or six months). However, breach of a procedural rule or the poor exercise of discretion would come under the "neglect of duty" heading, which attracts a maximum penalty upon conviction of a \$10 fine for a first offence and \$40 for subsequent offences.

1.55 In practice, the most likely forum for testing the lawfulness of police treatment of an arrested person is at the subsequent trial of that person and, more particularly, on voir dire, when the accused person challenges the admission of any evidence that is a product of the period in police custody, such as a record of interview.

1.56 In the United States, the need to impose discipline on the large number of police forces in that country<sup>82</sup> led the Supreme Court to impose a blanket exclusionary rule in respect of unlawfully obtained evidence.<sup>83</sup> In *Mapp v Ohio*, the U.S. Supreme Court reviewed all the other mechanisms suggested for ensuring police compliance with criminal procedures and civil liberties - prerogative writs, ombudsman investigations, internal police disciplinary procedures, and civil suits - and expressly rejected all of them as historically unsuccessful and not likely to succeed in the future. The Court concluded that the only realistic and effective disincentive to police misconduct was to automatically exclude all unlawfully obtained evidence.<sup>84</sup>

1.57 The Australian common law courts have not developed an exclusionary rule, relying instead on an approach which gives the trial judge in each case a discretion to exclude evidence if its admission would operate unfairly against the accused,<sup>85</sup> or if its probative value is outweighed by its prejudicial effect on the accused's case,<sup>86</sup> or (in exceptional circumstances) if admission would not be in the public interest because of the illegal or improper manner in which the evidence was obtained.<sup>87</sup> Questions of production and admissibility of evidence are dealt with in Recommendations 7 and 8, which are discussed in more detail in Chapter 6.

1.58 Many of the submissions received by the Commission made the point that it was uncommon for confessional evidence which the trial judge had determined to be "voluntary" to be excluded in the exercise of discretion on the basis of unfairness or prejudice to the accused,<sup>88</sup> and that it was even more rare for voluntary evidence to be excluded on the basis of the public interest test.

1.59 Even if this were not so, there are strong arguments against relying upon retrospective judicial consideration as the primary means of monitoring the exercise of police powers and ensuring the proper

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treatment of suspects in police custody. Dixon and others, in their studies of the legal regulation of policing in England,<sup>89</sup> note that the courts: (1) generally view the detailed laying-down of rules of procedure for the police as a legislative function; (2) are reluctant to interfere with "operational" discretion, particularly in emergent circumstances; and (3) tend to approve of the *results* of police interrogation and investigation, which overshadow the *methods*. It is the principal concern of the trial judge in a criminal case to ensure that all of the cogent evidence which goes to the guilt or innocence of the defendant is presented to the jury. Any role that trial judges - or indeed judges of appeal - have in maintaining effective police discipline and propriety is clearly seen as secondary. The Commission received many submissions from members of the judiciary which emphasised that there is a compelling community interest in ensuring that accused persons who are factually guilty are found guilty by a court. Thus, there is a real reticence about excluding probative evidence at trial in order to "punish" the police for some wrongdoing.

1.60 Further, the significant informality and uncertainty surrounding most aspects of the law of criminal investigation have meant that the judiciary traditionally has been somewhat tolerant of breaches by police, on the basis that it is difficult for police to ascertain the correct procedures in order to comply with them. Feldman has recently noted that the attitude of the courts in England on this matter has changed markedly since the introduction of legislation (*PACE*) and detailed Codes of Practice which clearly set out the proper procedures for police to follow in dealing with suspects.

The judges in the Crown Courts and the Court of Appeal seem to have moved away from the traditional notion that it is not the judiciary's job to discipline the police. They treat the regulation of police practices as being at least as important an objective as procedural fairness in the criminal process. ...the judges now see themselves as having a disciplinary and regulatory role in maintaining the balance between the powers of the police and the protection of suspects.<sup>90</sup>

1.61 However, even with "a renewed judicial commitment to rule of law principles and the ideal of legal accountability for the exercise of police powers,"<sup>91</sup> the courts are not well-placed to be the principal regulators of police conduct.<sup>92</sup> The guilty plea is the central empirical fact in our criminal justice system, with over 80 per cent of people charged with indictable offences in New South Wales pleading guilty to the charge(s).<sup>93</sup> The guilty plea serves to sanitise police impropriety,<sup>94</sup> since the only issue left for the courts is sentencing. In the other cases, there is no guarantee that questions of police conduct will be ventilated at trial. Counsel may believe, for example, that raising such questions would be futile, tactically unwise,<sup>95</sup> or might unnecessarily divert attention from the key issue of culpability.

### The Need for Reform

1.62 The Commission finds it remarkable that an area of law of such fundamental importance to personal liberty has been left in a state which is so informal, so uncertain and so inconsistent for so long. This is true not only of the law surrounding detention after arrest (*Williams*), but also of the whole area of criminal investigation, including the safeguards which are meant to be available to suspects and the consequences for breach of procedural rules or for the poor exercise of discretion. It is highly unlikely that an area of law which dealt with the ownership of property would have been allowed to remain in this state without urgent legislative attention. At present we still give police officers

badges of authority, clubs and guns and then leave them without rules to guide and limit them.<sup>96</sup>

1.63 The unsatisfactory state of the current law is not for the want of major reports, inquiries and recommendations, but rather because of the failure to implement any of these proposals. Justice Michael Kirby, now President of the New South Wales Court of Appeal, has described the reform of criminal investigation as a "graveyard of reports".<sup>97</sup>

1.64 The failure to take action may be explained in part by the absence of public clamour for reform of the criminal process, which is itself explained in part by public misconceptions about the true state of the law. The

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ideology of the rule of law and the associated language of “rights” are strong in Australian society.<sup>98</sup> Most Australians probably believe that, if arrested, they have a “right” to make a telephone call to a family member or friend; a “right” to receive a caution about the right to remain silent; a “right” to receive legal advice about their position, and so on. This view is strongly reinforced in popular culture by countless American police drama programs on television, in which suspects are apprised of their panoply of rights and criminals get off on “technicalities” when the police err in some respect.

1.65 Unfortunately, it may well be that most Australians know more about their rights under the American Constitution than under their own system of law. In New South Wales, the Police Commissioner’s Instructions do advise police that suspects should be cautioned, permitted phone calls, and allowed access to legal advice,<sup>99</sup> but the Instructions do not have the full force of law and cannot be seen as the source of any legally enforceable “rights”. The gap between the hortatory of the common law in this area and enforceable rights was highlighted by the 1979 case of *McInnis v The Queen*,<sup>100</sup> in which the majority of the High Court of Australia held that it was a bad thing that the accused was put to trial on serious charges without the benefit of a lawyer, but there was no right to legal assistance provided by the common law in the absence of some specific statutory guarantee. There is no New South Wales equivalent of the American Bill of Rights, and there is no legislation which brings into force domestically the International Covenant on Civil and Political Rights, which Australia has signed.<sup>101</sup>

1.66 The Commission is convinced that there is a pressing need for the development of a comprehensive set of rules governing the conduct of criminal investigations, with a basic legislative framework supplemented by detailed Codes of Practice. The rules must be of practical utility, recognising the operational context in which they are to be used. This means that the rules must be expressed in language and concepts which enable both ease of understanding and certainty in their application. These rules would make it possible for the first time for ordinary citizens to have a clear idea of their position when they become involved in a police investigation, and for police to have clear guidelines on the treatment of suspects in custody. It should not be overlooked that police officers vary greatly according to their age, background, attitude, training and experience. The point was made to the Commission by several senior police officers that the average age of the officers under their command was in the early 20s, and that such officers, although highly capable and increasingly well-trained, need clear guidelines under which to operate. As Lord Devlin has written

It is quite extraordinary that, in a country which prides itself on individual liberty [the definition of police powers] should be so obscure and ill-defined. It is useless to complain of police overstepping the mark if it takes a day’s research to find out where the mark is.<sup>102</sup>

1.67 The present incoherence in the laws governing criminal investigation also occasions many long arguments over evidence in court. The expense and the delay caused by long voir dire proceedings at trial - and then subsequent appeals from the rulings of the trial judge on points of evidence - are costs borne ultimately, if not directly, by the community as a whole. When the operation of the rules becomes clear, one desirable consequence will be to limit the scope for disputes over the admission of evidence. This will free up valuable resources, reducing court delay, legal costs, and time spent in court by police.

1.68 Related benefits arising from the clarification of police powers will be the improvement in the quality of the evidence which is presented at trial, and the reduction of complaints about police abuses. The reliability of the evidence produced in a criminal trial, and the fairness and propriety of the methods used to gather that evidence, naturally have a crucial impact on the standard of justice achieved in that trial, and on public confidence in the integrity of the criminal justice system as a whole.

1.69 The former Chief Justice of Australia, Sir Harry Gibbs, has identified the importance of the issues which are dealt with in this Report.

I venture to think that no reform of the criminal law would be more important in practice than that which would satisfactorily define the powers of the police to question and search, the rights of the suspect during police questioning and the consequence of a failure to answer questions. The reason why the law on those matters is so important is because confessional evidence plays a dominant part in the majority of trials. In those cases in which it has been suggested that miscarriages of justice

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have occurred in Australia in recent times it will almost invariably, if not invariably, be found that the trial was conducted with exemplary care and propriety and that all the rules designed to safeguard the accused were faithfully observed. In those circumstances a miscarriage of justice, if it occurred, will usually have resulted from one of two causes. The first is an alleged deficiency in the scientific evidence... The second is that evidence of confessions or other statements made by the accused was fabricated.<sup>103</sup>

1.70 The judgments in *Williams' Case* expressly invite legislative reform. The joint judgment of Mason and Brennan JJ, after remarking that the common law requirement, at its strictest, "does nothing to assist the police in the investigation of criminal offences", suggests

If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.<sup>104</sup>

The joint judgment of Wilson and Dawson JJ agreed on this point, adding

it is better that legislative change should take place against the background of the common law as it has been understood in this country, which has consistently viewed detention for the purpose of investigation as an unwarranted encroachment upon the liberty of the person.<sup>105</sup>

1.71 Many other jurisdictions have moved in recent years to introduce more comprehensive legislation to replace the uncertain and incomplete common law, as well as the informal Judges Rules, Police Instructions and other sources of guidance on the exercise of police powers. England and Wales now have the Police and Criminal Evidence Act 1984 (PACE); Scotland the Criminal Justice (Scotland) Act 1980; Victoria the Crimes (Custody and Investigation) Act 1988 (which amends the Crimes Act 1958); the Northern Territory the Police Administration (Amendment) Act 1988 (which amends the Police Administration Act 1979); and South Australia the Police Offences Act Amendment Act 1985 (which amends the Summary Offences Act 1953). The Committee for Review of Commonwealth Criminal Law (the "Gibbs Committee") has recently recommended sweeping changes to the law in this area,<sup>106</sup> as has the Law Reform Commissioner of Tasmania.<sup>107</sup>

1.72 The Commission now also recommends replacement of the common law (and informal) regulation of this critical area with a comprehensive legislative regime, addressing the needs of the police for adequate power to conduct criminal investigations while offering proper and realisable safeguards for persons in police custody. It is time to shift the focus away from the jury trial, which is used in only a tiny proportion of criminal matters,<sup>108</sup> to the pre-trial process, the site which actually determines the fate of most accused persons. As Sallmann and Willis have written

The perception of the jury trial as the stage where the only really important decisions are made is often accompanied by a view of criminal investigation as exploratory, procedural, mechanical, introductory - relatively unimportant, in other words. Nothing could be further from the truth, and in fact a great many persons' convictions are signed, sealed and delivered in the police station during the criminal investigation process.<sup>109</sup>

1.73 Our Recommendations follow in Chapter 2. Chapters 3 to 7 isolate particular aspects of the reform package and provide further commentary.

### FOOTNOTES

1. G Williams, *The Proof of Guilt* (3rd ed, Stevens, London, 1963) 39.
2. See E Peters, *Torture* (Basil Blackwell Ltd, London, 1985), which argues, inter alia, that torture was much less a feature of English criminal procedure than it was on the Continent (at 85).

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3. J R Stephen, *A History of the Criminal Law in England* (Vol 1, Macmillan, London, 1883) 217.
4. In the reign of Mary I and Philip (of Spain).
5. Stephen, *op cit*, at 217-219.
6. Williams, *op cit*, at 44.
7. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Vol 2, Stevens and Sons, London, 1956) 406-408.
8. *Ibid*, at 189-192.
9. *Ibid*, at 27.
10. Although the presumption only really gained judicial force with the decision of House of Lords in *Woolmington v DPP* [1935] AC 462.
11. Stephen, *op cit*, at 216.
12. (1825) 4 B & C 596; 107 ER 1182.
13. See the Justices Act 1902 (NSW), ss 24, 27, 28, 31, 52, 60, 62, 63 and 66.
14. *Ibid*, at ss 101AA-101AC.
15. New South Wales Court of Criminal Appeal, Unreported Judgment, 19 December 1980. See also D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on the Criminal Law and Process of New South Wales* (Federation Press, Sydney, 1990) 964-965; and R Gemmill and RF Morgan-Giles, *Arrest, Charge and Summons: Current Practice and Resource Implications* (U.K. Royal Commission on Criminal Procedure, Research Study No. 9, 1980).
16. See M Aronson, J Hunter and M Weinberg, *Litigation: Evidence and Procedure* (4th ed, Butterworths, Sydney, 1988) .
17. See W Hawkins, *Pleas of the Crown* (Vol 2, Professional Books, London, 1973) ch12; Sir M Hale, *The History of the Pleas of the Crown* (Vol 2, T Payne and others, London, 1978) 78; and the leading case of *Christie v Leachinsky* [1947] 1 All ER 567, at 572-578.
18. A breach of the peace usually amounts to an actual assault, the creation of public alarm through wrongful conduct, or obstruction of a police officer in the execution of his or her duty. Merely annoying, disturbing or abusive conduct is insufficient to ground a warrantless arrest, absent some element of actual or threatened personal violence. See, e.g., *R v Smith* (1876) 14 SCR (NSW) 419; *Webster v Watts* (1847) 11 QB 311; *Spilsbury v Micklethwaite* (1808) 1 Taunton 146; *Baynes v Brewster* (1841) 2 QB 375.
19. See *R v Howell* [1981] 3 All ER 383.
20. This provision appears to be used rarely in New South Wales and has not been the subject of any judicial attention. Cf *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229, at 241 per Salmon LJ.
21. Section 353C(2)(b) authorises the removal of a person from an aircraft if necessary, but sagely provides that this should not be done "in the course of a flight".
22. See P Gillies, *The Law of Criminal Investigation* (Law Book Co, Sydney, 1982) 153 et seq.; Justices Act 1902 (NSW), ss 23, 29, 30, 54, 56, 57, and 65; and Police Regulation Act (NSW) 1899, s26.

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23. The Motor Traffic Act 1909 contains a number of provisions which permit police officers to detain a person in charge of a motor vehicle for investigation in particular circumstances, such as the administration of a "breath test". See ss 4E, 5 and 5C.
24. See *Nolan v Clifford* (1904) 1 CLR 429; *Bales v Parmeter* (1935) 35 SR (NSW) 182; *Ex parte Evers*; *Re Leary* (1945) 62 WN (NSW) 146; *John Lewis & Co v Tims* [1952] AC 676; *R v Banner* [1970] VR 240; and *Christie v Leachinsky* [1947] AC 573. See also New South Wales Police Commissioner's Instructions 31.10, para 1: "Police should be aware that they do not have any general power to detain a citizen merely for the purpose of questioning him or her."
25. (1933) 33 SR (NSW) 303.
26. (1935) 35 SR (NSW) 182.
27. *Ibid*, at 189.
28. *Ibid*, at 190.
29. *R v Jeffries* (1946) 47 SR (NSW) 284, at 288. See also *R v Bathgate* (1946) 46 SR (NSW) 281.
30. (1983) 151 CLR 678, at 680.
31. See also *Ex parte Evers*; *Re Leary* (1945) 62 WN (NSW) 146, at 147.
32. *R v Banner* [1970] VR 240; *R v Clune* [1982] VR 1; *R v Larson and Lee* [1984] VR 559.
33. *Drymalik v Feldman* [1966] SASR 227, at 234; *R v Stafford* (1976) 13 SASR 392, at 400-401.
34. See, eg, *Dumbell v Roberts* [1944] 1 All ER 326 at 329; *John Lewis & Co v Tims* [1952] AC 676.
35. [1965] 1 QB 348.
36. *Ibid*, at 367.
37. [1981] 2 All ER 612, at 616.
38. [1984] AC 437, at 445.
39. See *United States v Knox* (1988) 839 F2d 285; L Maxwell, "US v Knox: The Sixth Circuit Expands the Scope of Investigatory Detention" (1989) 21 *Toledo Law Review* 241.
40. See *Florida v Rodriguez* (1984) 469 US 1, at 5.
41. (1984) 16 A Crim R 416.
42. (1984) 17 A Crim R 335.
43. Quoted in the judgment of Gibbs CJ in *Williams v The Queen* (1986) 161 CLR 278, at 282.
44. See fns 24-31 above, and the accompanying text.
45. [1984] VR 559, at 568.
46. (1986) 161 CLR 278, at 295.
47. *Ibid*, at 296.
48. *Ibid*, at 299.

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49. *Ibid*, at 296.
50. *Ibid*, at 306.
51. *Ibid*, at 312.
52. *Ibid*, at 313.
53. Gibbs CJ considered that the appeal to the Tasmanian Court of Criminal Appeal was not against the adverse ruling on the *voir dire*, but against the acquittals. As the prosecution had offered no proof at trial, an acquittal was inevitable and in the circumstances the Court of Criminal Appeal had no power to grant leave to appeal: *ibid*, at 286-287.
54. *Ibid*, at 283.
55. *Ibid*, at 283-284.
56. *Ibid*, at 284.
57. *Id*.
58. *Ibid*, at 284-285.
59. *Ibid*, at 300-301, citing King CJ in *R v Miller* (1980) 25 SASR 170.
60. See the canvassing of this argument in S J Odgers, "Police Interrogation: A Decade of Legal Development" (1990) 14 *Crim L J* 220, at 225.
61. Instruction 31.10 was revised on 1 July 1989, pursuant to the Police Commissioner's Circular 88/098. Unfortunately, the revised Instruction is based upon the judgment of Chief Justice Gibbs in *Williams*, which is at odds with the majority of the High Court on this point. Thus the Instruction tells police officers that it is not an unreasonable delay "to question the arrested person or conduct inquiries to confirm or dispel the suspicion on which the arrest was based." The Law Reform Commission was informed that the Police Service is seeking to have this Instruction redrafted by the Crown Solicitor's Office to comply with the majority view in *Williams*.
62. Unreported, New South Wales Court of Criminal Appeal, No 256 of 1987, 19 August 1988.
63. *Ibid*, at 10.
64. *Ibid*, at 11.
65. *Ibid*, at 7. Cf the remarks of Samuels JA in *R v Walsh* (Unreported, NSW Court of Criminal Appeal, Judgment No 60257/89, 18 October 1990), at 11-13, in which it is stated that the meaning of "a justice", according to s4 of the Crimes Act 1900, s13 of the Justices Act 1902, Div 2 of the Bail Act 1978, and s8 of the Local Courts Act 1982, includes a "justice of the peace" and is therefore not limited to a magistrate. This point is not picked up by the other members of the Court, however.
66. (1990) 19 NSWLR 91 (NSW CCA).
67. *Ibid*, at 99.
68. Citing *R v Salihos* (1987) 78 ALR 509, at 513-515 and 519-520; and *R v Mansted*, unreported, New South Wales Court of Criminal Appeal, 20 October 1989.
69. (1990) 19 NSWLR 91 at 99.
70. *Williams v The Queen* (1986) 161 CLR 278, at 299, per Mason and Brennan JJ.

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71. See *R v Walsh*, op cit, per Samuels JA.
72. *Attorney General for NSW v Dean* (NSW Court of Appeal, Judgment No 40142/90, 11 October 1990) 3, per Gleeson CJ, Kirby P and Priestley JA.
73. See s18 of the Bail Act 1978, and s153 of the Justices Act 1902.
74. See *Commonwealth Life Assurance Society v Brain* (1935) 53 CLR 343, at 382; *Mitchell v John Heine & Son* (1938) 38 SR (NSW) 466, at 469; *Glinski v Mclver* [1962] AC 726, at 766-767; and *Williams v The Queen* (1986) 161 CLR 278, at 300, per Mason and Brennan JJ. Basically, the arresting officer need only have a "reasonable suspicion" of the commission of an offence, while it is necessary to have "reasonable and probable cause" in order to lay a charge.
75. Justice J A Lee, *Report of the Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therewith* (June 1990) 218-220, and App. at 88.
76. See also the remarks of Samuels JA in *R v Walsh*, op cit, at 9-10, on police arguments about the difficulties of complying with the law "out there" in "the real world".
77. See J G Fleming, *The Law of Torts* (7th ed, Law Book Co, Sydney, 1987) ch 2; F A Trindade and P Cane, *The Law of Torts in Australia* (Oxford University Press, Melbourne, 1985) Part II.
78. Law Reform (Vicarious Liability) Act 1983, ss 6 and 8.
79. See *Enever v The King* (1905) 3 CLR 969; *Fisher v Oldham Corp* [1930] 2 KB 364; *Attorney-General for New South Wales v Perpetual Trustee Co* (1955) 92 CLR 113; and *Griffiths v Haines* [1984] 3 NSWLR 653. See also M Aronson and H Whitmore, *Public Torts and Contracts* (Law Book Co, Sydney, 1982) 24-25.
80. See M D Kirby, "Controls Over Investigation of Offences and Pre-trial Treatment of Suspects" (1979) 53 ALJ 626, at 641.
81. New South Wales Police Department, *Annual Report of the Police Internal Affairs Branch for 1989*, Appendix B.2.
82. There are approximately 40,000 different law enforcement agencies in the United States, including 14,000 police forces: see *A Report by Insp CS Ireland, New South Wales Police Service, to the Law Foundation of New South Wales On the Findings of a Travelling Fellowship to Canada, America and the United Kingdom* (1988) 41-42.
83. *Mapp v Ohio* (1961) 367 US 643.
84. There is some doubt, however, whether the exclusionary rule has actually been very effective in this regard. See K C Davis, "An Approach to Legal Control of the Police" (1974) 52 *Texas L R* 703, at 704.
85. See *Kuruma v R* [1955] AC 197; *King v R* [1969] 1 AC 304; *Wendo v R* (1963) 109 CLR 559; *R v Ireland* (1970) 126 CLR 321.
86. See *R v Stephens* (1985) 59 ALJR 477.
87. See *Bunning v Cross* (1978) 141 CLR 54; *Cleland v R* (1982) 151 CLR 1.
88. See, eg, *R v Zorad* and *R v Walsh*, op cit, as cases in point.
89. D Dixon, K Bottomley, C Coleman, M Gill and D Wall, "Safeguarding the Rights of Suspects in Police Custody" (1990) 1 *Policing and Society* 115; see also D Dixon, C Coleman and K Bottomley, "Consent and the Legal Regulation of Policing" (1990) 17 *J of Law & Society* 1.

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90. D Feldman, "Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984" [1990] *Crim L R* 452, at 468-469. (See also *Samuel* [1988] QB 615, at 629 per Hodgson J.)
91. *Ibid*, at 468.
92. See *R v Mason* [1987] 3 All ER 481.
93. New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals* (Discussion Paper 14, Vol 2, 1987) 466.
94. D McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan, London, 1981) 70-73.
95. See J Baldwin and M McConville, *Negotiated Justice* (Robertson, London, 1977) ch 4. Baldwin and McConville suggest that defence counsel sometimes fear that making allegations of misconduct against the police could turn the judge against the defendant.
96. Davis, *op cit*, at 705.
97. Kirby, *op cit*, at 628.
98. See D Weisbrot, *Australian Lawyers* (Longman Cheshire, Melbourne, 1990) 44.
99. See Instruction 31.
100. (1979) 143 CLR 575; Cf the dissenting judgment of Murphy J. See also Article 14(3) of the International Covenant on Civil and Political Rights.
101. See generally Review Committee of Commonwealth Criminal Law, *Human Rights in Relation to the Commonwealth Criminal Law* (Discussion Paper 15, 1988).
102. Lord Devlin, "Police Powers and Responsibilities: Common Law, Statutory and Discretionary" (1967) 2:2 *Australian Police Journal* 122, quoted in Kirby, *ibid*, at 631.
103. Opening address, Second International Criminal Law Congress, Surfers Paradise, June 1988; reprinted in (1988) 20 *Australian J of Forensic Sciences* 252, at 258.
104. (1986) 161 CLR 278, at 296.
105. *Ibid*, at 313.
106. Committee for Review of Commonwealth Criminal Law, *Interim Report: Detention Before Charge* (February 1989).
107. Law Reform Commissioner of Tasmania, *Police Powers of Interrogation and Detention* (Report No. 64, 1990).
108. See Brown, Farrier, Neal and Weisbrot, *op cit*, at 168.
109. P Sallmann and J Willis, *Criminal Justice in Australia* (Oxford University Press, Melbourne, 1984) 16.

## 2. Summary of Recommendations

### 1. An Integrated Package of Reforms is Required

The replacement of the existing common law regime on the detention of persons by the police for the purposes of investigation with a statutory scheme is aimed at:

- (1) providing clear and comprehensive rules of procedure for police to follow in dealing with suspects;
- (2) allowing police a realistic opportunity for proper investigation in the period between arrest and charging a person before a court (or release on police bail), within a regulated structure;
- (3) enunciating and enhancing the safeguards available to persons in the custody of police, so that such "rights" become meaningful, realisable, and enforceable;
- (4) regularising the treatment of persons in police custody, so that this is no longer contingent on the time or day of arrest, the sophistication of the person involved, the location of the custody, or notions of "voluntariness" or "consent" on the part of the person in custody;
- (5) increasing confidence in the integrity of police investigative methods and the evidence subsequently produced in court; and
- (6) significantly reducing delays and costs in the criminal justice system by reducing the great amount of time currently spent in criminal trials considering challenges (on voir dire) to the admissibility of Crown evidence.

The recommendations which follow have been designed both to meet the needs of proper law enforcement in a democratic society and to safeguard the position of individuals held in police custody, and are presented as an integrated set. The Commission believes that any partial implementation of the package which dispenses with the notional protections afforded by the common law, while increasing police powers to detain persons in custody, would run contrary to the spirit of this Report.

### 2. Issues Concerning Arrest and Police Custody

#### 2.1 Relationship with existing law of arrest

The general law of police powers of arrest is outside the scope of this Report. However, there are some related issues which require consideration here in order to give effect to the proposed new regime for detention for the purpose of investigation.

#### 2.2 No general power to arrest merely to question

2.2.1 Nothing in these recommendations is intended to confer any power to detain against his or her will a person who is not under arrest. The Commission recommends that arrest still be predicated on a reasonable suspicion that a person has committed or attempted to commit a criminal offence. In the view of the Commission, extension of police powers of arrest merely to facilitate questioning or other forms of investigation would amount to an unwarranted intrusion upon personal liberty.

2.2.2 It shall be the responsibility of the police officer exercising the function of a custody officer to determine in the first instance whether an arrest without warrant was proper (see Recommendations 3.2 and 3.4).

2.2.3 The use of an artificial "holding charge" as a device to outflank the law of arrest should be strongly discouraged (without limiting other avenues of redress for a person who believes that he or

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she has been unlawfully arrested) in the Police Commissioner's Instructions or any new Codes of Practice. Again, it shall be the responsibility of the police officer exercising the function of a custody officer to take responsibility for charging a person.

### **2.3 The scheme commences when the suspect is arrested or held in police custody**

2.3.1 A provision should be adopted which states that, in respect of detention for the purpose of investigation, a person is in custody if he or she is -

(a) under lawful arrest by warrant; or

(b) under lawful arrest under section 352 of the Crimes Act or a provision of any other Act; or

(c) in a police station, police vehicle or police establishment in the company of a police officer, or is otherwise under police control, and is - (i) being questioned; or (ii) to be questioned; or (iii) otherwise being investigated - to determine his or her involvement (if any) in the commission of an offence.

2.3.2 Where a person voluntarily attends at a police station or any other place for the purpose of assisting with an investigation, that person shall be informed at the beginning that he or she is entitled to leave at will unless placed under arrest. If a decision is taken at any time by a police officer to prevent that person from leaving at will, the person shall be informed at once that he or she is under arrest.

### **2.4 Consent or voluntariness no longer an issue**

Following upon the previous recommendation, the Commission wishes to emphasise that "consent" to police detention for the purposes of investigation, and the "voluntariness" of that detention and participation, will no longer be the principal determining factors on the question of the lawfulness of the detention. Rather, the test should be based on the notions of fairness and propriety discussed in Recommendation 8, below, and all persons in the custody of the police must be dealt with according to the same regime.

### **2.5 Cautioning of persons in police custody**

2.5.1 An arresting officer must, at the time of making the arrest, and after informing the arrested person of the fact of the arrest and the grounds for it, caution the arrested person in the following or effectively similar terms:

You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer questions, anything you say will be recorded and may be introduced as evidence in court.

2.5.2 The police officer administering the caution shall inquire whether the services of an interpreter are needed. Where there is a need for an interpreter, the caution must be given to the person in custody in a language which he or she understands before any statement is taken or questioning is commenced. (This applies in respect of deaf and hearing impaired persons and others with profound communications difficulties, as well as those with limited comprehension of English. See Recommendations 2.5.6 and 5.4)

2.5.3 After the caution, the arrested person shall be informed of the rights to communicate with, or attempt to communicate with, a friend or relative, and to get legal advice about his or her position. If the police officer knows or is informed that the person is a foreign national, the person shall also be advised of the right to communicate with a consular officer. (See Recommendation 5, regarding safeguards.)

2.5.4 If the person is to be detained for the purpose of investigation, the caution shall then also include an explanation of the basic rules of custodial investigation, particularly that : the person may be held by the police for a reasonable period of up to four hours, excluding relevant "time-out" periods; certain investigatory procedures are permitted during this period; an extension of the period of custodial

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investigation for a reasonable period of up to a further eight hours may be possible in special circumstances; and that at the conclusion of the authorised period, the person must be released or taken before a justice as soon as is practicable.

2.5.5 The caution should be produced in a convenient form for police to carry, but in each case must be administered orally by the arresting officer. Immediately afterwards, the officer shall ask the arrested person whether he or she fully understands the warning. If there is any stated or perceived failure to do so, the caution must be repeated.

2.5.6 The caution and the other information about safeguards available for persons in police custody (see Recommendation 2.5.3) shall also be produced in a written form (in English, and also in a wide range of community languages), to be handed to all persons in the custody of the police. This sheet or brochure should be produced by, or in conjunction with, the Language Services Division of the Ethnic Affairs Commission of New South Wales.

2.5.7 Where a person has not been formally arrested, but is in the custody of the police (within the meaning of Recommendation 2.3) for the purpose of investigation or interrogation, the police must also administer the above caution, as well as making clear that the person is not under arrest and is free to leave police custody at any time.

2.5.8 Where more than one hour has elapsed between the caution and the commencement of questioning, the caution must be repeated before the questioning commences. Similarly, if there is a break of one hour or more during an interview, the person must be cautioned again at the re-commencement of questioning.

2.5.9 Where the initial caution has been given outside the police station at the time of the arrest or of the request for presence at the station, the caution must be repeated at the police station by the custody officer (see Recommendation 3.4, below). This caution at the police station must be adequately recorded, preferably by videotape.

### **2.6 Transmission of an arrested person to a police station**

2.6.1 Where it has been determined by a police officer that an arrested person should be detained for investigative purposes on any of the grounds specified in Recommendation 3.2, the person shall normally be taken as soon as is reasonably practicable after arrest to a police station or police establishment. This will usually be the nearest police station, but circumstances may exist where the location of the alleged offence, the nature of the offence, or the need for specialised personnel or facilities require transmission of the person in custody to a different police station or a police establishment.

2.6.2 This requirement does not apply in circumstances where the police officer who has custody of the person decides in the meantime that the person should be released, or where the police officer believes on reasonable grounds that it is necessary for the arrested person to be taken to a medical practitioner or hospital for immediate treatment.

2.6.3 This requirement does not apply in circumstances where the police officer who has custody of the person believes on reasonable grounds that it is necessary for the arrested person to be taken to the scene of the alleged offence or to another place in order to obtain or preserve evidence, or to recover any property or person.

2.6.4 Upon arrival at the police station or establishment, the arrested person must be brought immediately before a police officer who is for the time being exercising the function of the custody officer, as described in Recommendation 3.4.

### **2.7 Police expressly held responsible for persons in custody**

The Commission endorses the recommendation of the Royal Commission of Inquiry into Aboriginal Deaths in Custody that police officers be made expressly responsible for the safety and well-being of all persons in their custody. Specifically, it shall be the duty of the custody officer to ensure that all persons

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in police custody are treated in accordance with the legislation implementing these Recommendations and any Codes of Practice which are issued under that legislation. Any breach of this duty shall amount to a disciplinary offence.

### **2.8 Treatment of persons in police custody**

A person shall, while in the custody of police, be treated with humanity and with respect for human dignity. No person shall, while in the custody of police, be subjected to torture or to any cruel, inhuman or degrading treatment. (See also Recommendation 5.6.)

### **2.9 Police required to maintain complete and comprehensive custody records**

2.9.1 The Commission recommends that police be required to maintain complete and comprehensive custody records in respect of all arrested persons and all persons otherwise in police custody. It is already the case that the police prepare and maintain computerised charge sheets and property records in respect of each arrested person, so this requirement would involve only an addition to (and preferably a consolidation of) the existing processes. Any form designed for this purpose should, of course, be clear and easy for police officers to fill in. (Consideration should be given to adapting the model form developed by the British Home Office and the Association of Police Officers to New South Wales conditions.)

2.9.2 Responsibility for maintaining the Custody Record should fall upon the police officer who is for the time being exercising the function of the custody officer described in Recommendation 3.4.

2.9.3 The Custody Record shall require the recording of, among other things, the following information in full detail:

the name, address and other particulars of the person in custody;

the name, rank and badge number of the arresting officer and any accompanying officers;

the name and other details of the officer responsible for reviewing the custody and maintaining the Custody Record;

the time of the arrest (or of the person coming into police "custody" within the meaning of Recommendation 2.3.1) and the time of arrival at the police station or police establishment;

the reasons for arrest or taking into custody;

the grounds for detention for the purpose of investigation (see Recommendation 3.2);

any property taken from the person;

the giving of the caution(s) to the person in custody;

communications (or attempted communications) by the person in custody with friends, relatives, legal practitioners, interpreters, consular officials and others, per Recommendation 5, below;

the arrival at the police station or otherwise of those contacted, and other visitors;

the nature and time of all investigative procedures involving the detained person, including interrogation, fingerprinting, photographing, obtaining body specimens and other samples, identification parades and so on (see Recommendation 3.5 regarding the range of permitted procedures);

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the precise times of detention, including any “time-out” factors (see Recommendation 3.6);

any factors which indicate that a high level of observation of the person in custody is required in order to ensure the safety of the person (see Recommendation 2.9.4); and

any applications for extension of the period of detention beyond four hours (see Recommendation 4);

2.9.4 The Custody Record should also incorporate the current “arrest check-list” (see Police Commissioner’s Instruction 32.04) for use in respect of all persons in detention. The check-list directs police officers to assess whether a person arrested shows any signs of pain, injury, illness, despondency, guilt, or scars which might suggest previous attempts at self-injury, or severe agitation or aggression, in order to determine whether a high level of observation in custody is required.

2.9.5 The Custody Record shall call for the signature of the person in custody to confirm, among other things, that: a caution was given and the person was provided with a copy; an opportunity was given to communicate with family, friends, legal practitioners, etc.; the property seized (and returned) is accurately recorded; and the other material particulars about the detention, such as the time of detention and the investigative procedures used, are accurately recorded.

2.9.6 A copy of the Custody Record shall be made available to the person at the end of the period of detention, or as soon as practicable thereafter.

### **3. A Fixed Period of Detention Following Arrest To Be Permitted**

#### **3.1 Detention for a reasonable period up to four hours**

3.1.1 The general rule shall be that a person who has been arrested or is otherwise in the custody of a police officer may, if the conditions laid out in Recommendation 3.2 are satisfied, be detained in the custody of police for the purposes of further investigation for such time as is reasonable in all the circumstances, but for no more than four hours of actual investigation from the time of initial custody.

3.1.2 All persons in custody must be dealt with expeditiously, and released as soon as the need for detention has ceased to apply.

3.1.3 Before the expiry of the four-hour period, application may be made to a judicial officer for an extension of the time within which to continue custodial investigation, up to a maximum of eight additional hours, in accordance with the provisions of Recommendation 4.

3.1.4 Absent such an extension, no person taken into custody for an offence (or group of offences) shall be questioned or subjected to any other investigative procedure for a period longer than four hours from the commencement of the custody. The “consent” of the person to a further period of questioning shall not, of itself, permit an extension beyond four hours, but such “consent” may be considered by the judicial officer in determining whether (and for how long) to grant an extension (see Recommendation 4.3).

#### **3.2 Grounds for detention following arrest**

3.2.1 A person who has been arrested or is otherwise in the custody of a police officer may only be detained for the purpose of investigation if it is necessary:

(1) to follow up reasonable suspicions in order to confirm or dispel these suspicions;

(2) to enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and the nature of the charge(s);

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(3) to complete any necessary documentation which requires the presence of the detained person;

(4) to establish the identity of the person; or

(5) to conduct other authorised investigative procedures, as detailed in Recommendation 3.5.

3.2.2 The decision whether a person is to be detained for the purpose of investigation, the determination of a “reasonable period” of detention within the maximum of four hours, and the decision whether to apply to a judicial officer for authorisation of a further period of detention, should all be made by the police officer exercising the function of a custody officer (see Recommendation 3.4, below).

### 3.3 The determination of a reasonable time for detention

3.3.1 What is a “reasonable period” for detention for the purpose of investigation must be determined by reference to all of the relevant circumstances, including:

(a) whether the presence of the arrested person is necessary for the conduct of any investigation which is intended to be conducted after arrest;

(b) the number and complexity of the matters under investigation;

(c) whether the person has indicated a willingness to make a statement or to answer any questions;

(d) whether a police officer reasonably requires time to prepare for any interview of the person in custody;

(e) whether appropriate facilities are available to conduct an interview or other investigations;

(f) the number and availability of other persons (including alleged co-offenders, the alleged victim, and other material witnesses) who need to be interviewed or from whom statements need to be obtained in respect of the offence for which the person is in custody;

(g) any need to visit the place where the alleged offence is believed to have been committed or any other place reasonably connected with the investigation of the offence;

(h) the total period of time during which the person has been in the company of an investigating official before and after the commencement of custody;

(i) the time taken for police connected with the investigation to attend at the place where the arrested person is being held;

(j) the time taken to complete any forensic examinations which are reasonably necessary to the investigation; and

(k) any other matters which are reasonably necessary to the proper conduct of the investigation.

3.3.2 These factors are to be considered in the first instance by the police officer exercising the function of a custody officer in determining a “reasonable period” of detention within the four hour maximum. These matters must also be considered by the judicial officer to whom an application is made for an extension of the period of detention, to determine whether any such extension is justified, and if so, what further period (up to eight hours) should be authorised. (See Recommendation 4.)

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3.3.3 In both cases, the determination of a “reasonable period” shall be subject to an overriding concept of proportionality, balancing the period of custodial investigation necessary against the circumstances and seriousness of the alleged offence and the requirement that the investigation be conducted diligently and expeditiously.

### **3.4 The function of a custody officer**

3.4.1 The NSW Police Service should consider the practicability of the introduction of a formal system of “Custody Officers” in New South Wales to operate the proposed custodial detention scheme.

3.4.2 Until such time as a formal system of Custody Officers is introduced, the Commission recommends that someone in each police station at any given time (hereafter referred to as the “custody officer”) must be given specific responsibility for

- (1) determining whether detention for the purpose of investigation is warranted (Recommendation 3.2);
- (2) determining what a “reasonable period” of detention is in the circumstances of each case (Recommendation 3.3);
- (3) ensuring that the required safeguards, such as the giving of a caution and permitting communication with family and legal advisers, are effectively afforded to the detained person (Recommendations 2.5, 2.9, and 5);
- (4) ensuring the safety and well-being of all persons in custody (Recommendations 2.7 and 2.9);
- (5) determining whether to apply to a judicial officer for an extension of the period of detention, and preparing or assisting in the preparation of such an application (Recommendation 4);
- (6) maintaining the Custody Record for each person in police custody (Recommendation 2.9); and
- (7) ensuring that the Codes of Practice for police investigations are complied with (Recommendation 7.1).

3.4.3 Where an officer of higher rank than the custody officer gives directions relating to a person in police detention, and the directions are at variance with any decision made or action taken by the custody officer in the performance of a duty imposed on him or her by these recommendations (or with any decision or action which would have been made or taken in the performance of such a duty, but for the directions), the custody officer shall refer the matter at once to a commissioned officer who is responsible for the police station.

3.4.4 The designated custody officer should preferably be of or above the rank of senior constable or be in charge of the police station for the time being. Unless it is unavoidable, the arresting officer should not act as the custody officer. In such cases, the arresting officer must contact a commissioned officer for authorisation, and note this in the custody record.

### **3.5 Authorised investigative procedures during detention**

3.5.1 During the period of detention for the purpose of investigation, it shall be proper for the police to conduct the following investigative procedures (to the extent that these procedures are already authorised by law):

- (1) questioning or obtaining a statement from the detained person;

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- (2) questioning or obtaining statements from witnesses or other persons who may have relevant information for the police;
- (3) searching of the arrested person;
- (4) searching of premises, a vehicle or other conveyance;
- (5) fingerprinting;
- (6) photographing;
- (7) conducting medical examinations;
- (8) obtaining forensic samples;
- (9) subjecting physical evidence to scientific analysis; and
- (10) holding identification parades.

3.5.2 Where a person in police custody states or otherwise indicates that he or she does not wish to be questioned, police must not persist. If after the questioning has commenced, the person states or otherwise indicates a desire not to answer any further questions, no further questions should be asked. (See Police Commissioner's Instruction 31.10).

3.5.3 Codes of Practice should be developed to govern the conduct of these investigative procedures (see Recommendation 7.1).

### 3.6 "Time-outs" during the period of detention

3.6.1 The following periods of time, *during which the questioning or investigation of the person is suspended or delayed*, shall not be included in calculating the amount of time a person has spent in custody for the purpose of investigation

- (1) the direct travel time from the place of apprehension to the police station or police establishment;
- (2) any time spent arranging communication with a relative, friend, consular official or lawyer;
- (3) any time spent arranging for the services of a qualified interpreter;
- (4) any time spent waiting for the arrival at the police station of a relative, friend, lawyer, consular official or interpreter; and later attend a police station for the purpose of conducting an investigative procedure.
- (5) any time spent by the detained person receiving medical attention, or resting, or receiving refreshment;
- (6) any period in which authorised investigative procedures (per Recommendation 3.5.1) may not be conducted by reason of the person's state of intoxication (caused by alcohol or drugs); and
- (7) any period during which an application for a detention warrant (per Recommendation 4) is in progress.

3.6.2 Any "time-out periods" to be applied to the four hour time limit for detention (or any greater period which is judicially authorised) must be recorded on the Custody Record (see

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Recommendation 2.9). Responsibility for recording and calculating the time-out periods shall be placed on the custody officer.

### **3.7 After the detention period has run**

3.7.1 At the end of the authorised period of detention the police must either

- (1) release the person without any information being laid; or
- (2) release the person on the basis that a summons has issued or will issue against the person; or
- (3) charge the person with a criminal offence.

3.7.2 If the decision is made to charge the person, then a further decision shall be made with respect to the granting of "police bail" pursuant to the provisions of the Bail Act. If police bail is denied, or granted on conditions which are unacceptable to the accused, then the person must be brought before a justice or magistrate as soon as is reasonably practicable, and in any event no later than the next sitting of the most appropriate court, following arrival at such court after travel thereto by the most direct route. (In determining the most appropriate court, regard should be had to the need for the case to be dealt with expeditiously, so that the timing of the next sitting of the court is more important than the convenience of the location.)

3.7.3 No further period of detention for the purpose of investigation may be authorised. For example, it should not be possible for bail to be granted conditional on the person's undertaking that he or she will

3.7.4 The term "charge" is used in this Recommendation to refer to the power of the police in practice to "charge" a person with a criminal offence for the purpose of that person attending court. Section 18 of the Bail Act, 1978, specifically refers to the charging of a person by a police officer, and s353A of the Crimes Act does this by implication. It is common practice for the police to "charge" a person upon a determination of bail. However, a strict reading of the common law, and s352 of the Crimes Act, suggests that the power to formally charge a person with a criminal offence lies only with the courts. It is for this reason that the common law requires that an arrested person be brought before a justice as soon as is practicable.

### **3.8 Provision against expedient re-arrest**

Provision shall be made to guard against the expedient re-arrest of a suspect following the expiry of the authorised investigation period, in order to avoid the limitations on detention imposed by this new regime. It is thus recommended that a person who has already been detained for the purpose of investigation, and released pursuant to Recommendation 3.7, shall not be re-arrested without a warrant and subjected to any further period of investigative detention for the offence or offences for which he or she was previously arrested, unless new material evidence justifying a further arrest has come to light since the release.

## **4. Extension of the Detention Period in Exceptional Cases**

The Commission recommends that there be a presumption that a period of not more than four hours of custodial investigation will ordinarily be sufficient for police to complete their inquiries, and to make the decisions called for in Recommendation 3.7. However, the Commission recognises that in a small percentage of cases, owing perhaps to some special logistical problems or the complexity or number of the charges, the police may need more than four hours of custodial investigation to carry out their duties properly. In such cases, the police may apply, within the four hour initial period, for a warrant to extend the period of detention.

### **4.1 Application to a judicial officer**

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Before the expiry of the initial four hour period of custodial investigation (taking into account the "time-out" periods), a police officer (preferably the custody officer) may apply to a court for a "detention warrant" authorising an extension of the period of detention. Such an application may only be heard by a Judge of the District or Supreme Court, a Local Court Magistrate or, if none of these judicial officers is available, a justice employed in the administration of the Local Courts who has been specifically empowered to issue detention warrants. (The role previously played by a justice of the peace in the process of criminal investigation should formally cease.)

### **4.2 Applications by telephone**

During all times when the courts are not in session, some judges, magistrates and designated justices should be available by telephone to hear applications for detention warrants. In such circumstances, an application by telephone is acceptable. Police all over the State should be given a central telephone number to ring, with calls diverted to the judicial officer or justice on duty at any given time. ("Telephone" shall be read to include radio, telex, facsimile and any other communication device.)

### **4.3 The nature of the application and proceedings**

The application for a detention warrant is not restricted to the offence for which the initial arrest was made. Where a police officer in the course of the custodial investigation forms a belief on reasonable grounds that the person has committed another offence, the application for authorisation of an additional period of detention may be based on that offence, or on both the offences.

4.3.1 The detained person and his or her legal representative have no affirmative right to be heard on the application; however, it is open to the judicial officer hearing the application to request to speak to the detained person or the person's lawyer before making any order.

4.3.2 Given the presumption against any further period of custodial investigation, the onus is on the police officer to satisfy the judicial officer that

- (1) the investigation is being conducted diligently and expeditiously; and
- (2) a further period of detention without charge is reasonably necessary to preserve or obtain evidence, or to complete the investigation; and
- (3) there is no reasonable alternative means of obtaining the evidence other than by the continued detention of the person in custody; and
- (4) (a) circumstances exist (having specific regard to the matters listed in Recommendation 3.3) in this particular matter which made it impracticable for the investigation to be completed within four hours (excluding "time-outs"); or  
(b) other circumstances of emergency reasonably prevented the particular police officers from utilising a significant portion of the four hour period for the purpose of investigating this matter, which made it impracticable for the investigation to be completed within four hours (excluding "time-outs").

4.3.3 The application for a detention warrant shall be made on oath and supported by an information. Such information shall state

- (1) whether any earlier applications have been made in respect of the same, or substantially the same, matter;
- (2) the nature of the offence for which the person to whom the application relates has been detained;

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- (3) the general nature of the evidence on which that person was arrested or detained;
- (4) what investigation has taken place and what further investigation is proposed;
- (5) the reasons for believing that the continued detention of the person without charge is reasonably necessary for the purposes of further investigation; and
- (6) the extent to which the person in custody is cooperating in the investigation.

4.3.4 The Oaths Act 1900, s11A, should be amended to provide specifically for the administration of, and the taking of, an oath by telephone (or other communication device).

4.3.5 Forms shall be developed for applications for detention warrants and supporting informations, and for orders authorising detention warrants, to facilitate convenient preparation.

### **4.4 Authorisation of further detention**

4.4.1 Where a judicial officer hearing an application is satisfied as to the matters set out in Recommendation 4.3.2, he or she may order a further period of detention for the purpose of investigation. This further period shall be that determined by the judicial officer to be the minimum period reasonably necessary for the police to complete their investigations, but in any event for no longer than eight hours.

4.4.2 The order issuing a detention warrant must be reduced to writing (although the order may be conveyed by telephone, radio, telex, facsimile or other communication device, if necessary), and the judicial officer must state the reasons for approving the period of further detention, with specific reference to the matters listed in Recommendation 3.3. The warrant and any other documentation (such as the information on oath) used in the process shall become part of the official record of the court (including the court to which the justice is normally attached, in the case of a telephone application).

4.4.3 The detention warrant must be tendered in court as a condition of the admission of any evidence obtained by the police during the period of further detention. (See Recommendation 8.6) The warrant shall be prima facie evidence of the lawfulness of this detention.

### **4.5 Refusal to authorise further detention**

If the judicial officer refuses the application, the person shall be dealt with according to the procedures in Recommendation 3.7. Where an application is refused, no further application shall be made in respect of the person to whom the refusal relates, unless supported by evidence which has come to light since the refusal.

### **4.6 Monitoring device for detention warrants**

The Commission recommends the establishment of an independent monitoring device to periodically review all detention warrants which have been issued. This function could be carried out by a special Commissioner for Warrants, or another suitable person or agency.

## **5. Safeguards for the Detained Person**

### **5.1 Right to remain silent not affected**

Nothing in this recommended scheme affects the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations (except where already required to do so under State or Commonwealth legislation), and no adverse inference may be drawn from such a refusal.

### **5.2 Right to contact a friend or relative**

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5.2.1 Before any questioning or investigation commences, the person in custody must be informed that he or she has the right to communicate or attempt to communicate with a friend or relative to inform that person of his or her whereabouts, and the person must be given the opportunity to meaningfully exercise that right.

5.2.2 Where an arrested person is moved from one police establishment to another, he or she is entitled to contact a friend or relative to inform that person of the new place of detention.

5.2.3 The right to contact a friend or relative may be delayed (only for so long as is reasonably necessary) only where the custody officer believes on reasonable grounds that any such communication will probably result in: the escape of an accomplice; the disappearance, fabrication or destruction of evidence; or hindering the recovery of any person or property relevant to the alleged offence.

5.2.4 Where a friend or relative has agreed to attend the police station, the police must delay any questioning of, or obtaining a statement from, the person for a reasonable period until the friend or relative has arrived. However, the police shall not be obliged to wait for more than two hours from the time that the agreement to attend was made.

### **5.3 Right to communicate with a lawyer**

5.3.1 Before any questioning or investigation commences, the person in custody must be informed that he or she has the right to communicate or attempt to communicate with a lawyer, and the person must be given the opportunity to meaningfully exercise that right.

5.3.2 If the person in custody wishes to contact a lawyer, the person must be allowed to communicate with the lawyer or the lawyer's office over the telephone in such circumstances which enable the conversation to remain private and confidential. When the lawyer arrives at the police station, the police shall permit a private conference for a reasonable period between the person and his or her lawyer.

5.3.3 An arrested person's lawyer should be entitled to be present during police questioning or other investigations, and should be entitled to give legal advice. Anything which the lawyer says during the questioning should be a formal part of the record of the questioning. The role of the lawyer in the interrogation process and the police power to exclude a lawyer for misbehaviour in limited circumstances should be spelled out in the code of practice relating to police interrogation.

5.3.4 Where a lawyer has agreed to attend the police station, the police must delay any questioning of, or obtaining a statement from, the person for a reasonable period until the lawyer has arrived. However, the police shall not be obliged to wait for more than two hours from the time that the agreement to attend was made.

5.3.5 A duty solicitor scheme should be established by the Legal Aid Commission so that all persons in police custody for the purpose of investigation may have access to a lawyer, at their request. This service would need to have some lawyers available on a 24-hour basis. In more remote areas, it may be necessary for legal advice to be provided by telephone or radio when it is not practicable for lawyers to appear at the police station within a reasonable period. Funding should be made available by the State Government to make effective this fundamental safeguard.

5.3.6 If the person in police custody is not in a position to obtain advice from a lawyer of his or her choice, then the custody officer shall inform the person of the availability of legal advice free of charge through the duty solicitor service and how that service may be contacted. (As discussed in Recommendation 2.5.6, literature to this effect should also be available in English and a wide variety of community languages.)

### **5.4 Right to an interpreter**

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If a person in custody requests the assistance of an interpreter, or it is apparent to the police officer that the person does not have a knowledge of the English language that is sufficient to enable that person to understand the questioning, or to answer questions or to make a statement, the police must, before any questioning or investigation commences, make arrangements for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present. (This applies equally in respect of deaf and hearing impaired persons, and other persons with profound communications difficulties.)

### **5.5 Right of foreign national to communicate with consular officer**

5.5.1 If a person in custody is not a citizen or permanent resident of Australia, the custody officer must, before any questioning or investigation commences, inform the person in custody that he or she may communicate or attempt to communicate with the consular office of the country of which the person is a citizen. Police must defer the questioning or investigation for a reasonable time in the circumstances to enable the person to make, or attempt to make, the communication.

5.5.2 As per paragraph 5.2.3, the right of a person to contact a consular official may be delayed (only for so long as is reasonably necessary) only where the custody officer believes on reasonable grounds that any such communication will probably result in: the escape of an accomplice; the disappearance, fabrication or destruction of evidence; or hindering the recovery of any person or property relevant to the alleged offence.

### **5.6 Rights to medical assistance, rest, refreshment**

5.6.1 Where a person in police custody requests medical treatment in respect of illness or an injury, or it appears to the police that medical treatment is required, the custody officer shall immediately take such reasonable action as is necessary to ensure that the person is provided with appropriate medical treatment.

5.6.2 A person in the custody of the police shall be provided with reasonable refreshments and reasonable access to toilet facilities.

5.6.3 Where a person has been in the custody of police for the purpose of investigation for four hours or more (including any "time-out" periods), that person shall, if it is practicable to do so, be provided with facilities to wash or shower, and to shave and change clothes, before being brought before a justice.

## **6. Special Rules Regarding Children, Aborigines and Other Vulnerable Persons**

The Commission recognises that there are certain groups in the community which are especially vulnerable and may be at particular risk when involved in the process of police investigation. The Commission identifies the following as groups which require special protection in police custody: (a) children; (b) Aborigines and Torres Strait Islanders; (c) mentally ill or mentally disordered persons, and persons with developmental disabilities; (d) persons from non-English speaking backgrounds; and (e) other persons, who by reason of some disability, are unable to communicate properly with the police (such as the seriously visually or aurally impaired, persons who cannot speak, and so on). As a general matter, the Commission recommends that special rules be developed to regulate the custodial investigation of persons in these categories, and that no questioning or investigation take place in respect of such persons unless an appropriate independent person is present. However, detailed consideration of this issue will be the subject of a further Report by the Commission.

## **7. The Conduct of Custodial Investigation**

### **7.1 The development of codes of practice**

7.1.1 Codes of Police Practice should be developed in the manner of those in use in the United Kingdom to replace the Police Commissioner's Instructions in relation to the detention, treatment

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and questioning of suspects, as well as other aspects of criminal investigation. The Codes of Practice will serve to provide operational instructions to members of the Police Service at a level of detail unsuitable for legislation.

7.1.2 These Codes of Practice should be statutory instruments, promulgated only after the public exposure of, and debate over, draft codes, and should be subject to parliamentary disallowance.

7.1.3 A Working Group should be established forthwith to manage the development of the Codes of Practice. The Group should consist of the members of the Police Board, as well as representatives of interested groups and the general community appointed by the Attorney General.

7.1.4 The Codes of Practice should be readily available at all police stations for consultation by police officers, detained persons and members of the public.

### **7.2 Electronic recording of interviews**

7.2.1 All police stations should be equipped, as soon as possible, with facilities to electronically record all interviews with persons in police custody for the purpose of investigation.

7.2.2 A caution administered under Recommendation 2.5 shall be electronically recorded at the beginning of any interview. Prior to any questioning for the purpose of investigation, there should be a series of standard questions which establish whether the person in custody understands his or her rights.

7.2.3 The interview of the person by the police should be recorded from beginning to end and, to the extent practicable, any contact between the person and the custody officer should also be recorded.

7.2.4 If an admission was allegedly made prior to the commencement of the electronically recorded interview, the statement shall be put to the person at the interview and the person asked whether he or she agrees that the statement was made. (See also Recommendation 8.5.2.)

7.2.5 A police officer shall have the power to suspend the recording of the interview where this has been requested by the person being interviewed, or where it is necessary for the comfort of the participants, or in order to ensure that the questions asked cover all matters relevant to the investigation. The reason for the suspension shall be recorded just prior to the suspension of the interview and again at the re-commencement of the interview.

7.2.6 Where the person in custody states or otherwise indicates that no questions will be answered or that no statements will be made, or that no further questions will be answered, the fact of these events must be recorded. In these circumstances, police will not persist in questioning. (See also Recommendation 3.5.2) .

7.2.7 The equipment used to record the interview or the procedure adopted shall include a means of continuous verification of the time at which the interview was conducted. There should be safeguards designed to ensure that recordings are safely kept and are neither tampered with nor destroyed.

7.2.8 A copy of the audiotape of a police interview shall be given to the person interviewed or to the person's lawyer as soon as is reasonably practicable.

7.2.9 A detailed Code of Practice shall be developed to regulate all aspects of, and to ensure the fair and proper conduct of, all electronically-recorded police interviews.

7.2.10 The recording facilities in police stations should not be confined to use for the recording of interviews with suspects. They may also be used for the purpose of taking statements from witnesses or for photographing matters relevant to an investigation.

## 8. Admissibility of Evidence Obtained in Breach of These Rules

### 8.1 Admissions influenced by violence, oppression etc

Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether toward the person who made the admission or toward some other person, or by a threat of conduct of that kind.

### 8.2 Discretion to exclude admissions on basis of unfairness

In a criminal proceeding, where evidence of an admission is adduced by the prosecution, the court may refuse to admit the evidence, or may refuse to admit the evidence to prove a particular fact, if the court believes that it would be unfair to a defendant to use the evidence, having regard to the circumstances in which the admission was made.

### 8.3 Discretion to exclude prejudicial evidence

In a criminal proceeding, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, the court may refuse to admit the evidence.

### 8.4 Illegally or improperly obtained evidence

8.4.1 Where evidence is obtained improperly or in contravention of a law or code of practice, or in consequence of an impropriety or of a contravention of a law or code of practice, the evidence shall be presumed to be inadmissible.

8.4.2 Such evidence may be admitted only where the desirability of admitting the evidence substantially outweighs the undesirability of admitting the evidence having regard to the manner in which the evidence was obtained. For the purposes of making this balance, the court shall take into account such matters as: the probative value of the evidence; the importance of the evidence in the proceeding; the nature of the relevant offence or defence; the gravity of the contravention or impropriety; whether the conduct concerned was deliberate or reckless; whether the conduct concerned was contrary to, or inconsistent with, the human rights of a person as enunciated in the safeguards proposed above (Recommendation 5), codes of practice regulating police treatment of persons in custody, or any other applicable human rights legislation; whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the conduct concerned; and whether the evidence could have been obtained in some other, proper way.

### 8.5 Electronic recording or independent verification of any admissions by defendant

This provision applies in relation to an admission made by a person who is under arrest or in police custody for the purpose of investigation (see Recommendation 2.3).

8.5.1 Evidence of the admission is not admissible unless there is available to the court a video or sound recording of the questioning and of the admission.

8.5.2 If it was not reasonably practicable to have made such a recording, evidence of the admission may be admitted only if there is available to the court a video or sound recording in which the defendant freely and expressly adopts the admission which is read back to him or her, or the questioning was conducted and the admission was made in the presence of an independent person of the person's choosing (such as a lawyer, friend or relative - see Recommendation 5).

8.5.3 Evidence of the admission is not admissible unless, before the admission being tendered was made, the person was given a caution, in accordance with Recommendation 2.5.

### 8.6 Detention warrant to be tendered in court

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A detention warrant issued by a judicial officer under Recommendation 4.4 must be tendered in court as a condition of the admission of any evidence obtained by the police during the period of further detention. The warrant shall be prima facie evidence of the lawfulness of the detention.

### **9. Detention in Police Custody to Count Towards Sentence**

In determining an appropriate sentence, a court shall take into account any period(s) during which the offender was detained in police custody for the purpose of investigation (including any "time-out" periods) of the relevant offence.

### **10. Need for Follow-up Empirical Study of Custody Records**

One year after the coming into force of any legislation which replaces the common law in respect of police detention for the purpose of investigation (whether or not based on the recommendations contained in this Report), the Law Reform Commission shall conduct an empirical study, including but not limited to a survey of police custody records, to consider the fairness and operational effectiveness of the new system and to report its findings, which may include recommendations for changes to the system. Specific regard shall be had to the length of custodial detention for investigation, any mechanisms for extending the initial period of detention, and the effective provision of safeguards for persons in police custody. Sufficient funding should be made available to the Commission to complete the study in a timely fashion.

### 3. Arrest and Custody

#### RECOMMENDATION 1:

##### An Integrated Package of Reforms is Required

The replacement of the existing common law regime on the detention of persons by the police for the purposes of investigation with a statutory scheme is aimed at:

- (1) providing clear and comprehensive rules of procedure for police to follow in dealing with suspects;
- (2) allowing police a realistic opportunity for proper investigation in the period between arrest and charging a person before a court (or release on police bail), within a regulated structure;
- (3) enunciating and enhancing the safeguards available to persons in the custody of police, so that such "rights" become meaningful, realisable, and enforceable;
- (4) regularising the treatment of persons in police custody, so that this is no longer contingent on the time or day of arrest, the sophistication of the person involved, the location of the custody, or notions of "voluntariness" or "consent" on the part of the person in custody;
- (5) increasing confidence in the integrity of police investigative methods and the evidence subsequently produced in court; and
- (6) significantly reducing delays and costs in the criminal justice system by reducing the great amount of time currently spent in criminal trials considering challenges (on voir dire) to the admissibility of Crown evidence.

The recommendations which follow have been designed both to meet the needs of proper law enforcement in a democratic society and to safeguard the position of individuals held in police custody, and are presented as an integrated set. The Commission believes that any partial implementation of the package which dispenses with the notional protections afforded by the common law, while increasing police powers to detain persons in custody, would run contrary to the spirit of this Report.

#### COMMENTARY ON RECOMMENDATION 1

3.1 In Chapter 1, it was argued that the common law position on police powers of detention for investigation as enunciated again by the High Court of Australia in *R v Williams*,<sup>1</sup> and as explicated by the New South Wales Court of Criminal Appeal in *R v Burns*<sup>2</sup> and *R v Zorad*,<sup>3</sup> is incomplete and unsatisfactory, and in need of urgent reform by legislation. Such reform must be comprehensive, dealing not only with the narrow issue before the High Court in *Williams*, but more generally with the whole process of criminal investigation, including the status of evidence obtained in the course of an investigation.

3.2 It is the view of the Commission that the concern shown by the High Court for the fundamental liberty of the citizen is not matched by a regime of sufficiently detailed and enforceable rules and procedures which gives real meaning to the rights and safeguards that citizens are meant to possess when caught up in a criminal investigation. At the same time, the common law position imposes arbitrary constraints on the police in some cases, and causes them to ignore the requirements of the law or to resort to artifice to get around the requirements. The existing remedies for breach of proper procedures by the police are insufficient to ensure compliance or punish wrongful conduct.

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3.3 The common law rule - that an arrested person in police custody must be taken before a justice as soon as practicable, and may not have his or her custody extended merely for the purpose of police investigation - is neither consistently applied nor compatible with modern criminal procedures. For one thing, as discussed in Chapter 1, the application of the rule by the New South Wales courts means that police are under no obligation to find a justice outside the normal working hours of the courts. Consequently, the time of arrest becomes a crucial determinant in the length of detention to which a person will be lawfully subject and, in tandem, the amount of time that police will have to interrogate that person and to conduct other investigative procedures, such as forensic tests, identification parades and interviews of witnesses. This leads to: (1) substantially differential treatment of arrested persons, based not on considerations of need or principle but rather on chance; (2) arrests which are contrived in order to gain extra time for investigation; and (3) frequent breaches of the common law requirements, as acknowledged by most of the submissions to the Commission. The submission of the New South Wales Bar Association, for example, stated that it was "the experience of the Bar that suspects are often detained illegally by police officers".<sup>4</sup>

3.4 The common law rule also fails to appreciate that in the vast majority of cases (other than the most serious ones), the arrested person is now released from police custody after a bail decision by a senior police officer.<sup>5</sup> In these situations the person is never *taken* before a justice in the pre-trial process, nor would he or she have any wish to appear before a justice. Similarly, there is now an increasing use of summons and other non-arrest mechanisms (such as attendance and infringement notices) for commencing criminal proceedings.

3.5 The common law prohibition on the further detention in custody of an arrested suspect for the purpose of investigation also fails to recognise that the basis for arrest is not the same as the basis for charge. As discussed in Chapter 1, an arrest may be justified if there was a "reasonable suspicion" that the person had been involved in the commission of a crime. This suspicion may be based on hearsay evidence and other material which would not be admissible in any subsequent criminal proceeding. The laying of a charge, however, requires that there be a belief that there is "reasonable and probable cause" that the person committed an offence.

3.6 In *Williams, Mason and Brennan JJ* briefly discussed the meaning of the term "reasonable and probable cause" and the distinction between that concept and the notion of "reasonable suspicion" which justifies arrest.

In the ordinary case of an arrest on suspicion, the arresting officer must have satisfied himself at the time of the arrest that there are reasonable grounds for suspecting the guilt of the person arrested ..., although the grounds of suspicion need not consist of admissible evidence ... . If the arresting officer believes the information in his possession to be true, if the information reasonably points to the guilt of the arrested person and if the arresting officer thus believes that the arrested person is so likely to be guilty of the offence for which he has been arrested that on general grounds of justice a charge is warranted, he has reasonable and probable cause for commencing a prosecution ... .<sup>6</sup>

3.7 The problem in practice is raised by the example of police receiving information that an offence was committed by a person, who is roughly described (or perhaps a description is given of a vehicle). The police then arrest a person who is found near the scene of the alleged crime and who matches the description given. In these circumstances, there was probably a "reasonable suspicion" on which to make the arrest, but in the absence of the opportunity to question the person, or to check out an alibi offered by the person, to take a statement from a witness, to conduct an investigation parade, to search the scene for evidence, or to conduct other inquiries or investigative procedures, there may not be "reasonable and probable cause" to charge the person with the offence.

3.8 Providing the police with a realistic post-arrest regime which affords them the opportunity to discharge effectively their legitimate responsibilities, whilst also standardising the treatment accorded to all suspects, represents only part of the concerns of this Report. Of at least as great importance is the need to bring the whole area of criminal investigation under the rule of law, by providing for the first time in this State a framework for the development of clear and comprehensive statutory rules of conduct. As Kirby J has remarked

What is surprising is that we have struggled on for more than a century with a complex body of law made up of a little legislation, much case law (in most jurisdictions), the Judges' Rules and

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administrative directions of varying authority issued by Police Chiefs. The argument for collecting, rationalising, simplifying and clarifying the rules seems incontestable.<sup>7</sup>

3.9 The Canadian Law Reform Commission has also noted that the existing law is inadequate to “define the limits of permissible intrusion by agents of the State upon private interests for the purpose of investigating and prosecuting crime”.<sup>8</sup> That Commission blamed the effective absence of any procedural *law* in this area, commenting that the only form of regulation is provided by “the rules of evidence, encrusted by ancillary rules, which determine the permissible uses of a statement in court.”<sup>9</sup>

3.10 There are potentially great cost savings in clarifying police powers and procedures and increasing confidence in the integrity of evidence produced at trial by police. Experience elsewhere suggests that guilty pleas are likely to increase, saving the whole cost of trials (as well as the inconvenience to witnesses and the trauma to victims); there is also likely to be a significant decrease in voir dire challenges to the admission of evidence of alleged confessions. A two day voir dire in the District Court - a not uncommon event in trials for serious offences - was estimated to cost about \$11,000 in 1986.<sup>10</sup> The Victorian Shorter Trials Committee also concluded that the costs involved in setting up and operating an electronic taping system as a regular part of the criminal investigation process would be greatly outweighed by the savings in trial costs.<sup>11</sup>

3.11 Clarifying police powers and formally regulating the conduct of criminal investigation would be invaluable contributions to civil liberties. However, there is also the need to enunciate specifically, and in statutory form, the safeguards that are available to persons in police custody, so that these “rights” become more widely known<sup>12</sup> and available.

3.12 The “invitations” to legislatively reform the common law of arrest and detention contained in *Williams* cautioned that any reform must be careful to ensure that there are satisfactory safeguards for persons in police custody. Mason and Brennan JJ wrote

If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.<sup>13</sup>

3.13 While the language of “balance” is common and convenient in this area, the Commission rejects the notion that its task is to properly position a fulcrum between, as one of several submissions put it, “the rights and interests of the general community on the one hand and the rights and interests of the individual offender on the other”,<sup>14</sup> as if there is an inevitable and irreconcilable conflict between concern for individual liberty and protection of the common good. It has been pointed out by the legal philosopher Roscoe Pound that “we must be careful to compare [competing demands] on the same plane. If we put one as an individual interest and the other as a social interest, we decide the question in advance in our way of putting it.”<sup>15</sup>

3.14 The better characterisation in this case is to seek to ensure that both of the *separate* requirements of the public interest in proper law enforcement are met: on the one hand the need to safeguard the fraught position of an individual in police custody who is suspected of a criminal offence; on the other hand the need to preserve the community’s peace and good order by bringing to justice those who are guilty of criminal offences. There is as obvious a general or community interest in the former as in the latter.

3.15 The Commission also cannot accept as proper a characterisation of the issue which suggests that “it is the interests of the community, in having offenders brought to justice, which should prevail over the interests of the individual offender.”<sup>16</sup> In the course of a criminal investigation the police are *not* dealing with “offenders”. The persons involved are *suspected* of being offenders. One of the fundamental principles upon which our system of criminal justice is based is that a person is presumed to be innocent unless and until he or she is convicted by a court of law after a fair trial. From a practical point of view it must be remembered that persons who are innocent of any wrongdoing are not infrequently caught up in the process of police investigation.

3.16 In the course of the Commission’s work we have been conscious of those provisions of the International Covenant on Civil and Political Rights which are of significance to the law of criminal investigation. Australia ratified the Covenant on 13 August 1980, and Australian governments should therefore apply, and where

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necessary supplement, the standards established there for the protection of civil rights.<sup>17</sup> Virtually all of the countries in the Pacific Islands region have already done so,<sup>18</sup> but Australian governments have been slow to follow suit.

3.17 The Commission is confident that the package of recommendations contained in this Report not only addresses the important issues of principle that arise in this sensitive area of the law, but is capable of implementation in practice.

### **RECOMMENDATION 2:**

#### **Issues Concerning Arrest and Police Custody**

##### **2.1 Relationship with existing law of arrest**

The general law of police powers of arrest is outside the scope of this Report. However, there are some related issues which require consideration here in order to give effect to the proposed new regime for detention for the purpose of investigation.

##### **2.2 No power to arrest merely to question**

2.2.1 Nothing in these recommendations is intended to confer any power to detain against his or her will a person who is not under arrest. The Commission recommends that arrest still be predicated on a reasonable suspicion that a person has committed or attempted to commit a criminal offence. In the view of the Commission, extension of police powers of arrest merely to facilitate questioning or other forms of investigation would amount to an unwarranted intrusion upon personal liberty.

2.2.2 It shall be the responsibility of the police officer exercising the function of a custody officer to determine in the first instance whether an arrest without warrant was proper (see Recommendations 3.2 and 3.4).

2.2.3 The use of an artificial "holding charge" as a device to outflank the law of arrest should be strongly discouraged (without limiting other avenues of redress for a person who believes that he or she has been unlawfully arrested) in the Police Commissioner's Instructions or any new Codes of Practice. Again, it shall be the responsibility of the police officer exercising the function of a custody officer to take responsibility for charging a person.

##### **2.3 The scheme commences when the suspect is arrested or is held in police custody**

2.3.1 A provision should be adopted which states that, in respect of detention for the purpose of investigation, a person is in custody if he or she is -

- (a) under lawful arrest by warrant; or
- (b) under lawful arrest under section 352 of the Crimes Act or a provision of any other Act; or
- (c) in a police station, police vehicle or police establishment in the company of a police officer, or is otherwise under police control, and is - (i) being questioned; or (ii) to be questioned; or (iii) otherwise being investigated - to determine his or her involvement (if any) in the commission of an offence.

2.3.2 Where a person voluntarily attends at a police station or any other place for the purpose of assisting with an investigation, that person shall be informed at the beginning that he or she is entitled to leave at will unless placed under arrest. If a decision is taken at any time by a police officer to prevent that person from leaving at will, the person shall be informed at once that he or she is under arrest.

#### **2.4 Consent or voluntariness no longer an issue**

Following upon the previous recommendation, the Commission wishes to emphasise that “consent” to police detention for the purposes of investigation, and the “voluntariness” of that detention and participation, will no longer be the principal determining factors on the question of the lawfulness of the detention. Rather, the test should be based on the notions of fairness and propriety discussed in Recommendation 8, below, and all persons in the custody of the police must be dealt with according to the same regime.

#### **2.5 Cautioning of persons in police custody**

2.5.1 An arresting officer must, at the time of making the arrest, and after informing the arrested person of the fact of the arrest and the grounds for it, caution the arrested person in the following or effectively similar terms:

You have the right to remain silent and you are free to exercise that right at any time. In other words, you do not have to make any statement or answer any questions. If you wish to make a statement or answer questions, anything you say will be recorded and may be introduced as evidence in court.

2.5.2 The police officer administering the caution shall inquire whether the services of an interpreter are needed. Where there is a need for an interpreter, the caution must be given to the person in custody in a language which he or she understands before any statement is taken or questioning is commenced. (This applies in respect of deaf and hearing impaired persons as well as those with limited comprehension of English.)

2.5.3 After the caution, the arrested person shall be informed of the rights to communicate with, or attempt to communicate with, a friend or relative, and to get legal advice about his or her position. If the police officer knows or is informed that the person is a foreign national, the person shall also be advised of the right to communicate with a consular officer. (See Recommendation 5, regarding safeguards.)

2.5.4 If the person is to be detained for the purpose of investigation, the caution shall then also include an explanation of the basic rules of custodial investigation, particularly that : the person may be held by the police for a reasonable period of up to four hours, excluding relevant “time-out” periods; certain investigatory procedures are permitted during this period; an extension of the period of custodial investigation for a reasonable period up to a further eight hours may be possible in special circumstances; and that at the conclusion of the authorised period, the person must be released or taken before a justice as soon as is practicable.

2.5.5 The caution should be produced in a convenient form for police to carry, but in each case must be administered orally by the arresting officer. Immediately afterwards, the officer should ask the arrested person whether he or she fully understands the warning. If there is any stated or perceived failure to do so, the caution must be repeated.

2.5.6 The caution and the other information about safeguards available for persons in police custody (see Recommendation 2.5.3) shall also be produced in a written form (in English, and also in a wide range of community languages), to be handed to all persons in the custody of the police. This sheet or brochure should be produced by, or in conjunction with, the Language Services Division of the Ethnic Affairs Commission of New South Wales.

2.5.7 Where a person has not been formally arrested, but is in the custody of the police (within the meaning of Recommendation 2.3) for the purpose of investigation or interrogation, the police must also administer the above caution, as well as making clear that the person is not under arrest and is free to leave police custody at any time.

2.5.8 Where more than one hour has elapsed between the caution and the commencement of questioning, the caution must be repeated before the questioning commences. Similarly, if there is a

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break of one hour or more during an interview, the person must be cautioned again at the re-commencement of questioning.

2.5.9 Where the initial caution has been given outside the police station, at the time of the arrest or the request for presence at the station, the caution must be repeated at the police station by the custody officer (see Recommendation 3.4 below). This caution at the police station should be adequately recorded, preferably by videotape.

### **2.6 Transmission of the arrested person to a police station**

2.6.1 Where it has been determined by a police officer that an arrested person should be detained for investigative purposes on any of the grounds specified in Recommendation 3.2, the person shall normally be taken as soon as is reasonably practicable after arrest to a police station or police establishment. This will usually be the nearest police station, but circumstances may exist where the location of the alleged offence, the nature of the offence, or the need for specialised personnel or facilities require transmission of the person in custody to a different police station or a police establishment.

2.6.2 This requirement does not apply in circumstances where the police officer who has custody of the person decides in the meantime that the person should be released, or where the police officer believes on reasonable grounds that it is necessary for the arrested person to be taken to a medical practitioner or hospital for immediate treatment.

2.6.3 This requirement does not apply in circumstances where the police officer who has custody of the person believes on reasonable grounds that it is necessary for the arrested person to be taken to the scene of the alleged offence or to another place in order to obtain or preserve evidence, or to recover any property or person.

2.6.4 Upon arrival at the police station or establishment, the arrested person must be brought immediately before a police officer who is for the time being exercising the function of the custody officer, as described in Recommendation 3.4.

### **2.7 Police expressly held responsible for persons in custody**

The Commission endorses the recommendation of the Royal Commission of Inquiry into Aboriginal Deaths in Custody that police officers be made expressly responsible for the safety and well-being of all persons in their custody. Specifically, it shall be the duty of the custody officer to ensure that all persons in police custody are treated in accordance with the legislation implementing these Recommendations and any Codes of Practice which are issued under that legislation. Any breach of this duty shall amount to a disciplinary offence.

### **2.8 Treatment of persons in police custody**

A person shall, while in the custody of police, be treated with humanity and with respect for human dignity. No person shall, while in the custody of police, be subjected to torture or to any cruel, inhuman or degrading treatment. (See also Recommendation 5.6.)

### **2.9 Police required to maintain complete and comprehensive custody records**

2.9.1 The Commission recommends that police be required to maintain complete and comprehensive custody records in respect of all arrested persons and all persons otherwise in police custody. It is already the case that the police prepare and maintain computerised charge sheets and property records in respect of each arrested person, so this requirement would involve only an addition to (and preferably a consolidation of) the existing processes. Any form designed for this purpose should, of course, be clear and easy for police officers to fill in. (Consideration should be given to adapting the model form developed by the British Home Office and the Association of Police Officers to New South Wales conditions.)

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2.9.2 Responsibility for maintaining the Custody Record should fall upon the police officer who is for the time being exercising the function of the custody officer described in Recommendation 3.4.

2.9.3 The Custody Record shall require the recording of, among other things, the following information in full detail:

the name, address and other particulars of the person in custody;

the name, rank and badge number of the arresting officer and any accompanying officers;

the name and other details of the officer responsible for reviewing the custody and maintaining the Custody Record;

the time of the arrest (or of the person coming into police "custody" within the meaning of Recommendation 2.3.1) and the time of arrival at the police station or police establishment;

the reasons for arrest or taking into custody;

the grounds for detention for the purpose of investigation (see Recommendation 3.2);

any property taken from the person;

the giving of the caution(s) to the person in custody;

communications (or attempted communications) by the person in custody with friends, relatives, legal practitioners, interpreters, consular officials and others, per Recommendation 5, below;

the arrival at the police station or otherwise of those contacted, and other visitors;

the nature and time of all investigative procedures involving the detained person, including interrogation, fingerprinting, photographing, obtaining body specimens and other samples, identification parades and so on (see Recommendation 3.5 regarding the range of permitted procedures);

the precise times of detention, including any "time-out" factors (see Recommendation 3.6);

any factors which indicate that a high level of observation of the person in custody is required in order to ensure the safety of the person (see Recommendation 2.9.4); and

any applications for extension of the period of detention beyond four hours (see Recommendation 4);

2.9.4 The Custody Record should also incorporate the current "arrest check-list" (see Police Commissioner's Instruction 32.04) for use in respect of all persons in detention. The check-list directs police officers to assess whether a person arrested shows any signs of pain, injury, illness, despondency, guilt, scars which might suggest previous attempts at self-injury, or severe agitation or aggression, in order to determine whether a high level of observation in custody is required.

2.9.5 The Custody Record shall call for the signature of the person in custody to confirm, among other things, that: a caution was given and the person provided with a copy; an

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opportunity was given to communicate with family, friends, legal practitioners, etc.; the property seized (and returned) is accurately recorded; and the other material particulars about the detention, such as the time of detention and the investigative procedures used, are accurately recorded.

2.9.6 A copy of the Custody Record shall be made available to the person at the end of the period of detention, or as soon as practicable thereafter.

### COMMENTARY ON RECOMMENDATION 2

#### Relationship with the existing law of arrest (2.1)

3.18 In Chapter 1, the general law of arrest (common law and statutory) in New South Wales was outlined briefly, mainly to set the stage for a discussion of the common law requirements *after* arrest. The detailed reconsideration of the law of arrest is outside the scope of this Report, although it is a matter that the Commission could pursue in future if the Attorney General believes this is appropriate. There are some aspects of arrest law and practice which do require consideration here, however, in order to support our recommendations on custodial investigations.

#### No general power to arrest merely to question (2.2)

3.19 In our Discussion Paper No. 16, one of our “tentative proposals” was that, as a general matter, “a police officer should not have the power to detain any person against his or her will for any purpose unless that person is either arrested by a police officer or has been taken into custody by a police officer following his or her lawful arrest by a private citizen.”<sup>19</sup> This is, of course, the existing general law, although there are some statutory exceptions.

3.20 There was overwhelming support for this proposition in the submissions received. Only the Police Commissioner’s submission recommended that police be given the power to detain a person found in “suspicious circumstances” for a “short period” in order to decide whether a formal arrest was necessary, as well as the power to detain for a short period any potential witnesses or suspects found at the scene of the crime.<sup>20</sup> The remainder of the submissions emphasised the traditional view that the people of New South Wales should be free to conduct their lawful affairs without the threat of being interfered with by the police or anyone else. This freedom is suspended upon arrest, which should be resorted to only where it is justified *and* necessary. The Review Committee of Commonwealth Criminal Law, chaired by the former Chief Justice of Australia, Sir Harry Gibbs, also agreed with this proposition, concluding that “it is essential to protect a citizen from arbitrary detention”.<sup>21</sup>

3.21 There are some circumstances in which the legislature has authorised, by express statutory provision, a departure from the general rule. The use of the random breath testing procedure is perhaps the best known example.<sup>22</sup> In general, people who are driving motor vehicles within the law should not be stopped without reasonable cause. However, there appears to be widespread community acceptance for the rule that drivers may be stopped at random and detained (or at least delayed) briefly while they are subjected to a test for alcohol consumption. The departure from ordinary principles and the inconvenience of the procedure are seen to be overridden by the benefits to public safety, particularly since the intrusion is relatively minor, confined to the one procedure, and is susceptible to immediate “scientific” verification. The arguments which are used to support random breath testing cannot, however, be easily translated to other forms of unlawful conduct.

3.22 Similarly, the Intoxicated Persons Act 1979, s5, permits a police officer to detain (in a proclaimed place) a person found in a public place, who is seriously affected by alcoholic liquor and is behaving in a disorderly or injurious manner or is in need of physical protection. The detention period is a maximum of eight hours, and the person must be released into the care of a responsible person rather than detained if this is possible. This detention power originates not in an attempt to *increase* police powers in this area, but rather in an attempt to decriminalise the area of public drunkenness and therefore to *restrict* police powers of arrest.<sup>23</sup>

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3.23 The Commission agrees that the general prohibition against detention without arrest, which has always been part of the common law, should be maintained.<sup>24</sup> Any specific departure from this principle must not only be justifiable, in public policy terms, but absolutely compelling.

3.24 A number of submissions<sup>25</sup> were critical of the occasional police practice of using a “holding charge” to arrest a person for one (usually more minor) offence when the real intent was to question the person and conduct investigations about another offence. The Criminal Law and Penal Methods Committee of South Australia has stated that “this practice is to be deprecated” and has recommended that it should be discontinued.<sup>26</sup> The Australian Law Reform Commission has also condemned this practice.

The Commission makes it clear that it does not in any way countenance ... the arrest of persons on trivial ‘holding’ charges in order to pursue investigations in respect of more serious offences in respect of which there is no evidence such as would justify arrest.<sup>27</sup>

Aronson, Hunter and Weinberg have commented

The practice is grossly undesirable as it allows the police to flaunt the spirit of the law (that is, no arrest for the purpose of questioning) while remaining within its doctrinal boundaries.<sup>28</sup>

3.25 As the preceding quotation notes, the practice of using artificial holding charges may be undesirable but it is not strictly illegal at present. In *R v Kushkarian*,<sup>29</sup> for example, the New South Wales Court of Criminal Appeal failed to condemn the use of a holding charge of possession of a firearm, which was employed by police to justify a 12 hour period of detention (during the day, when a justice would have been readily available) during which time an investigation for armed robbery was conducted.

3.26 The Commission agrees with the Australian Law Reform Commission and other commentators that the practice of using artificial holding charges should not be countenanced in a fair system of criminal investigation. The Commission’s recommendation (2.2.3) is that this practice should be strongly discouraged in the Police Commissioner’s Instructions or a successor Code of Practice, and that the determination of the legitimacy of the arrest and charge be a responsibility for a police officer exercising the powers of a Custody Officer (see Recommendation 3.4).

### **Arrest and de facto custody (“voluntary attendance”) considered equivalent for purpose of fixed time limits (2.3-2.4)**

3.27 There is often a difficult factual question whether a person has been formally “arrested” or is merely at the police station “assisting the police with their inquiries”. In the latter case, the law has regarded such attendance as “voluntary”, even though the person may feel strongly constrained to attend. For example, the courts have said that attendance is “voluntary”, and thus does not amount to a deprivation of liberty, even where the police officer would have arrested the person if he or she had not complied, and the person understood this to be the position.<sup>30</sup> Further, the person’s volunteer status may change during the course of the interview with police, when incriminating evidence comes to light.

3.28 The existing law actually places the volunteer at the police station at a considerable disadvantage compared with an arrested person. A person who is arrested should be informed of the charges against him or her; should receive a caution about the right to remain silent; should be permitted to arrange for legal assistance, and so on. However, the case law suggests that a person who consents to attend the police station need not receive these safeguards.<sup>31</sup>

3.29 This situation is quite unsatisfactory, as it provides a judicially authorised loophole by which police may avoid the law of arrest and related procedural requirements. It also fails to take account of the reality of the “consent” and the “voluntary” assistance, which occur against a typical backdrop of uncertainty and implied coercion. The Australian Law Reform Commission, after noting that the “concept of ‘voluntary co-operation’ would appear to be very much stretched in Australian police practice”,<sup>32</sup> concluded

The fact that no shoulders may have been touched, or incantations mouthed, does not mean for a minute that a very large number of people indeed who were in the past ‘voluntarily co-operating with

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the police' or engaged in 'assisting the police with their inquiries' were just as surely arrested as if they had been bound in chains.<sup>33</sup>

3.30 The Australian Law Reform Commission also made the point, quite relevant to our report, that a statutory regime which mandates a fixed time for investigation after arrest and before charge could be totally undermined by a police strategy based upon avoiding arrest wherever possible and relying instead on the "consent" of suspects.<sup>34</sup> The Scottish experience is instructive.<sup>35</sup> The Criminal Justice (Scotland) Act 1980 brought in a regime which permitted police to interrogate or investigate an arrested person for up to six hours before having to bring the person before a justice. There are no "time-out" provisions and no procedures for extending the detention if a further period of investigation is required. What has resulted is a system in which more than half of the suspects questioned at some police stations are regarded as "voluntarily" assisting the police, and thus avoiding the statutory time constraints. This is a case of police creativity in manipulating legal rules (or more precisely the interstices in the rules), although not a gross example, for the police were led to believe, in the parliamentary debates which surrounded the new legislation, that the new detention procedure was a *supplement* to the old system which was heavily reliant on consent, rather than a replacement. The lesson for New South Wales is that there is a need to address the issue of voluntary attendance directly and fully in any new legislation.<sup>36</sup>

3.31 The Commission recommends the adoption of a legislative provision which defines "custody" in such a fashion as to remove the problems described above. The specific form of words we suggest in our recommendation (2.3.1) is adapted from s464(1)(c) of the Victorian Crimes Act 1958, as amended in 1988.<sup>37</sup>

3.32 One of our two modifications to the Victorian provision deletes the last phrase of s464(1)(c), which states that a person is "in custody" if the person is in the company of a police officer and is being questioned or otherwise investigated to determine possible involvement in the commission of a criminal offence "*if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.*" The Commission believes that this qualification in the Victorian provision creates more problems than it resolves and is unnecessary. It requires a court, if there is a subsequent challenge to the lawfulness of the custody, to look into the mind of the police officer at various stages of the questioning of a person to determine if and when the officer may have had sufficient grounds to effect an arrest (but did not, or else the issue of custody would be governed by the law of arrest).

3.33 The Victorian definition of "custody" exists in the context of a system in which the police are granted a "reasonable time" to carry out all of their investigations while the person is held in custody. However, the Commission is recommending for New South Wales a system in which the police are given specified time limits for investigation, in order to confine the deprivation of liberty suffered by the person in police custody. In operating a system with fixed time periods, it is obviously critical to ascertain easily and precisely when the clock commences to run. Under our proposal, this is from the moment the person is arrested (with or without warrant) or is "*in a police station, police vehicle or police establishment in the company of a police officer, or is otherwise under police control*" and is the subject of a criminal investigation. The italicised words in the preceding phrase represent the second modification to the Victorian provision.

3.34 With this change, the Commission wishes to include all of those cases in which the police are, in reality, in control, and have effective custody of the person, regardless of whether the person has been formally arrested. Usually the venue will be a police car or police station (or other police establishment), but the Commission intends that the provision should also cover, for example, a security room in a department store in which a person is detained on the suspicion of larceny, or a hospital room, provided that the other conditions are met. It is also intended to cover the situation in which a police officer seeks to run around the requirements by asking the suspect to "step outside" the police car or station, since we refer to the person being "otherwise in police control".

3.35 It is the concept of "control" that is crucial, since it is this which amounts to a deprivation of liberty and renders the notions of "consent" and "voluntariness" meaningless in the circumstances. The Federal Court of Australia understood this when it wrote in the recent "Gundy Case"

Elements in the lexical meanings of "custody" include the notion of dominance and control of the liberty of the person, and the state of being guarded and watched to prevent escape. To confine the meaning of "custody" to "that state which follows arrest or similar official act", as [the police] would

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have it, is in our opinion, to pay too close a regard to legal forms rather than the substantive character or quality of police activity.<sup>38</sup>

3.36 By the same logic, the Commission wishes to *exclude* from the fixed time regime, for example, the situation where police wish to question a person and arrangements are made to meet at the office of the person's solicitor. Whilst it may not be a pleasant experience for the person concerned, this does not amount to a substantial deprivation of liberty, and as the person's interests are being looked after by a lawyer and they are free to leave at any time there is no reason to impose an artificial limitation on the time for investigation. Indeed, it is precisely this sort of non-custodial police investigation which the Commission wishes to strongly encourage whenever the circumstances permit.

3.37 Consequently, for reasons of fairness, consistency and precision, the Commission recommends that all persons in the custody of the police - whether or not they have been formally arrested - be dealt with according to the same procedures. This approach has also been recommended by the Australian Law Reform Commission<sup>39</sup> and the Review Committee of Commonwealth Criminal Law (the Gibbs Committee),<sup>40</sup> and is found in cl 23B(2) of the *Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990* which is currently before the Commonwealth Parliament.

### Cautioning of persons in police custody (2.5)

3.38 One of the "tentative proposals for reform" contained in our Discussion Paper 16 on Police Powers of Arrest and Detention was that the system of issuing a "caution" to suspects about the right to silence and related matters be formalised and standardised.<sup>41</sup> There was much support for, and very little opposition to, this proposition and what concern was expressed related to the right to silence itself rather than to the administration of a caution. (The Commission does recommend the retention of the right to silence and its procedural and evidentiary consequences, and this is discussed below in Recommendation 5.1, Chapter 5.)

3.39 The basis of the caution is simple: to alert a suspect in a criminal investigation to his or her legal position. The Australian Law Reform Commission has put this justification in eloquent terms, with which we agree:

It should not be necessary to argue that if a person has rights he should be made aware of them. Whether, once informed, he has the will, the wit or the wisdom to take advantage of them is probably something no criminal justice system can completely ensure. Perhaps it should not try. But no criminal justice system deserves respect if its wheels are turned by ignorance. Any system which pays lip-service to the existence of rights yet does nothing to ensure that they are known and understood - and indeed which may depend on their not being understood - is a system that discriminates against the weak, the unintelligent and the uncomprehending in favour of the strong-willed, the smart and the linguistically competent.<sup>42</sup>

3.40 The New South Wales Police Commissioner's Instructions currently direct police officers to caution a person whom they intend to charge before they begin questioning that person.<sup>43</sup> This is in keeping with what is now fairly standard police practice in common law countries. Perhaps the best known caution is the American one arising from the US Supreme Court cases of *Miranda v Arizona*<sup>44</sup> and *Escobedo v Illinois*.<sup>45</sup> The Codes of Practice on criminal investigation brought in to complement the *PACE* legislation in England and Wales also require police to administer a brief caution before questioning.<sup>46</sup>

3.41 Years of experience and numerous empirical studies in the United States and elsewhere indicate that there has been no significant impairment of police functions because of the requirement of a caution.<sup>47</sup> As one commentator has suggested

suspects, whether for reasons of resignation, shock, embarrassment or relief, continue typically to confess and notification of rights has only a marginal effect upon the propensity to assert rights.<sup>48</sup>

Nevertheless, the Commission strongly believes that it is fundamental to a fair and open system of criminal justice that a person in police custody be formally cautioned about his or her rights.

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3.42 In New South Wales and much of the rest of Australia, the caution requirement is usually imposed by Police Instructions, Standing Orders and other non-statutory (and largely unenforceable) directions to the police. However, Victoria now has a statutory requirement in its Crimes Act,<sup>49</sup> and the Gibbs Committee has recommended legislative recognition of the need to caution suspects.<sup>50</sup>

3.43 The Commission recommends that New South Wales should also formalise the requirement of a caution in legislation, to emphasise the importance of informing suspects of their position and to ensure to a greater degree that this happens in practice. At least one change from the current police guidelines in New South Wales is also necessary in our view. This proposed change derives from the fact that the time at which the caution is given under the current practice is not capable of being readily determined. A police officer is asked to administer the caution before questioning a person “whom he/she has made up his/her mind to charge”. We consider that the obligation to caution arises at the time of arrest, or at the time of taking a suspect into police custody (2.5.7),<sup>51</sup> according to Recommendation 2.3.

3.44 The actual terms of the caution have been simplified as much as possible to increase the likelihood that the person who receives it will actually understand it, whilst still conveying the essence of the person’s right to silence and the consequence of waiver. Without formalising the wording or the precise nature of the process, which is better left to a Code of Practice, and without wishing to make the caution too complicated for police to administer, the Commission also recommends that other aspects of the person’s position be clearly explained by the arresting officer or the custody officer, or both. This should include information about the person’s rights to communicate with a friend or relative, a lawyer and a consular official (if the person is a foreign national) (2.5.3), as well as information about the nature of custodial investigation if the person is to be detained (2.5.4). A person detained in police custody should certainly be given a clear idea of how long he or she is likely to be detained, and what procedures may be conducted.

3.45 The caution must be administered orally in each case, but it should be produced in a convenient (perhaps “credit card” style) form to assist the police (2.5.5). Naturally, where an interpreter is required, this must be arranged and there may be no questioning without the administration of the caution in a language the person understands (2.5.2) (and the presence of the interpreter at the interview). The caution and the other information about safeguards should also be produced in written (brochure) form in English and a wide range of community languages to be handed to all suspects in police custody (2.5.6). The Language Services Division of the Ethnic Affairs Commission of New South Wales was consulted, and saw no problem with producing this material, based on its experience with producing other important social service notices. Overseas experience, especially in the United States and the United Kingdom, also suggests that this is both feasible and advisable, assisting both the police and the person in custody.

3.46 The requirement that the caution be repeated by the Custody Officer at the police station (2.5.9) is primarily intended to ensure that there is an opportunity to adequately record the fact that the caution has been given. The requirement that the caution be repeated where there is a break of more than one hour between the initial caution and the start (or re-start) of interrogation (2.5.8) is intended to serve the same purpose, as well as to ensure that the person in custody is clear on his or her position at every stage of the investigation.

3.47 At present, the failure by police to administer a caution, or an effective caution, would be unlikely in practice to result in a subsequent confession being ruled inadmissible. The trial judge would have the power to exclude the evidence, however, on the basis of the “fairness” and “public interest” discretions,<sup>52</sup> even if the evidence was found to be “voluntary”. Under our proposed regime, the failure to administer a proper caution, as with other significant breaches of procedure by the police, would lead to the presumed inadmissibility of the evidence obtained as a consequence, although this presumption would be rebuttable (see Recommendation 8.4, discussed in Chapter 6).

### **Transmission of an arrested person to a police station (2.6)**

3.48 The normal practice is that an arrested person should be taken as soon as practicable to the nearest police station so that the necessary paperwork may be completed and, if permitted by law, some investigation may take place. There is no express legislative instruction in New South Wales, however, about what to do with an arrested person, other than to take the person “before a Justice” (s352). By contrast, the *Police Ordinance* 1927 (ACT) s24(1) and the Summary Offences Act 1953 (SA) s78(1) require that a person who is apprehended

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without warrant must be delivered forthwith into the custody of the officer in charge of the nearest police station.<sup>53</sup> The New South Wales Police Commissioner's Instruction 31.49 *does* direct police officers to take an arrested person without delay "to the nearest Police Station by the shortest practicable route" with "no deviation from that route for any purpose". The Instruction does not have the full force of the law, however.

3.49 If a period of detention following arrest is to be permitted (Recommendation 3), subject to compliance with certain procedures, it is desirable if not essential for the law to require that the arrested person be taken to a place where those procedures can be properly observed and where a more reliable record of their observance may be made, preferably by an officer specially charged with this responsibility.<sup>54</sup> Our recommendations require that certain things be done (such as videotaping of interviews) which can only realistically be carried out in a police station or other police establishment with the equipment and the facilities to perform those functions.

3.50 The Police Commissioner's submission supported this idea in principle, but raised several situations in which more flexibility would be desirable.<sup>55</sup> For example, it may be necessary, in order to obtain or preserve evidence or to recover stolen property or to rescue a person in danger, to take the arrested person to the alleged scene of the crime or some other place. The Commission accepts that the police should be able to so respond in circumstances of emergency, and has recommended accordingly (2.6.3).

3.51 The Commission also believes that there are a few other situations which call for flexibility. For example, police should be able to take an arrested person to a doctor or a hospital, if necessary, before going to the station (2.6.2). There are other circumstances in which the *nearest* police station is not necessarily the most *appropriate* police station. A slightly more distant police station may have specialised investigative facilities or specialist staff which are needed in a particular case (for example, in the case of a child sexual assault). In country areas a geographically more distant police station may have temporal and other advantages for the arrested person, by providing better opportunities for getting legal advice or offering quicker access to a Justice.

3.52 Thus the Commission sees value in allowing for some flexibility in practice while laying down a rule of general application. Such flexibility is sometimes susceptible to abuse, unfortunately, and the Commission suggests that these procedures be closely monitored. In the first instance it is the responsibility of custody officers and senior police to ensure that suspects are dealt with fairly. As a general matter, this is an issue that should be looked at as part of the overall review of the system after one year of operation (see Recommendation 10, discussed in Chapter 7).

### Responsibility for, and treatment of, persons held in police custody (2.7-2.8)

3.53 The Universal Declaration of Human Rights<sup>56</sup> and The International Covenant on Civil and Political Rights,<sup>57</sup> ratified by Australia in 1980,<sup>58</sup> provide that persons in custody shall be treated with humanity and respect for human dignity, and that no person shall be subject to cruel, inhuman or degrading treatment. The Australian Law Reform Commission<sup>59</sup> and the Gibbs Committee<sup>60</sup> have both recommended that it is appropriate that these basic human rights provisions be incorporated into any Australian legislation dealing with the position of persons in custody.

3.54 We agree that it is important to state these fundamental propositions in legislative form, to demonstrate a clear institutional commitment to human rights and to provide a backdrop for the interpretation of other rules of criminal procedure. More specific provisions regarding the treatment of persons in custody are included in Recommendation 5 (see especially 5.6), and could be expected from the detailed Codes of Practice which we recommend should be developed in the near future (Recommendation 7.1).

3.55 Consequentially, the Commission also endorses the recommendation of the Royal Commission of Inquiry into Aboriginal Deaths in Custody<sup>61</sup> that the police be made expressly responsible for the safety and well-being of all persons in their custody. This should not be a matter for controversy. The New South Wales Police Commissioner's Instructions already provide that

Patrol Commanders have overall accountability for prisoners and shall ensure that police under their command carry out the correct custody policies and procedures. Individual police officers will be held accountable for disobeying instructions or failing to properly discharge their duty of care towards prisoners.<sup>62</sup>

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3.56 The Instructions also provide, in considerable detail, rules for the “care, control and safety of persons in police custody.”<sup>63</sup> For example, police officers are required to assess the physical, mental and emotional state of a person who is arrested,<sup>64</sup> and a custody officer is obliged to do the same when the person is taken into custody at the police station.<sup>65</sup> There are also special rules for the treatment of Aborigines in custody.<sup>66</sup> In the U.K., s39 of the Police and Criminal Evidence Act 1984 (*PACE*) imposes considerable responsibility on custody officers to ensure that all persons detained in police custody are treated in accordance with the law and the Codes of Practice, and that special care is taken with respect to juveniles.

3.57 It is worth mentioning in passing that the old common law bar to the vicarious liability of the Crown and the Commissioner of Police for the wrongful acts of police officers who are exercising “independent discretion”, was abrogated by statute in New South Wales in 1983.<sup>67</sup>

### Maintenance by police of comprehensive custody records (2.9)

3.58 An essential part of a properly regulated system of custody and custodial interrogation is the maintenance of accurate and complete records. This serves several critical functions: (1) providing in each case the information about time (time of arrest, “dead time”, and so on) which is necessary to operate a fixed-period regime; (2) helping to ensure that suspects are provided with all of the relevant information and procedural safeguards to which they are entitled; (3) standardising and formalising the somewhat haphazard police custody record-keeping system which exists at present; (4) providing an official record for the purposes of subsequent (judicial or administrative) review in each case; and (5) offering a convenient and reliable means for generally monitoring the effectiveness of, and compliance with, the new system of custodial investigation.

3.59 A sound system of record-keeping would benefit the police as much as it would persons in custody, by protecting police from controversies over the lawfulness and length of custody and the treatment of suspects. In England and Wales, police initially were somewhat resistant to the requirement for detailed record-keeping under *PACE* and the Codes of Practice, but this soon came to be seen as a necessary and proper part of the “new professionalism” of the police force, which “includes acceptance of the need to work within legal procedures rather than reliance on traditional, informal practices.”<sup>68</sup>

3.60 Significant work has been done by the Home Office and the Association of Chief Police Officers in Britain, in connection with the introduction of *PACE* and the equivalent legislation in Scotland and Northern Ireland, to develop model forms and systems to facilitate record-keeping by the police. These should be considered for adaptation to local needs and conditions. In New South Wales, there are already computerised systems for the preparation of charge sheets and property records in respect of all arrested persons. The new requirements would involve only an addition to (or preferably a consolidation of) existing processes.

3.61 The responsibility for the maintenance of custody records would be placed upon the Custody Officer, or the police officer exercising that function. The custody record should contain full details of all the required information (see Recommendation 2.9.3), and should include the “arrest checklist” currently in use to determine whether a high level of observation of the person in custody is advisable. The person in custody should be asked to sign the record to acknowledge the details of the arrest, the administration of a caution, and the provision of other safeguards. A copy of the custody record should be made available to the person at the end of the detention, or as soon as practicable thereafter.

### FOOTNOTES

1. (1986) 161 CLR 278.
2. Unreported, New South Wales Court of Criminal Appeal, No 256 of 1987, 19 August 1988.
3. (1990) 19 NSWLR 91 (NSW CCA).
4. R Gyles, QC, Submission of the NSW Bar Association (1987) 1.
5. See the Bail Act 1978, s18, and the Justices Act 1902, s153.

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6. (1986) 161 CLR 278, at 300, citing *Mitchell v John Heine & Son* (1938) 38 SR (NSW) 466, at 469; *Commonwealth Life Assurance Society v Brain* (1935) 53 CLR 343, at 382; and *Glinski v Mclver* [1962] AC 726, at 766-767.
7. M D Kirby, "Controls Over Investigation of Offences and Pre-trial Treatment of Suspects" (1979) 53 ALJ 626, at 632.
8. Law Reform Commission of Canada, *Report No. 23: Questioning Suspects* (1984) 3.
9. *Ibid*, at 4.
10. Criminal Law Review Division, Attorney General's Department of New South Wales, *A Proposed System of Electronically Recording Police Interviews with Suspected Persons* (1986) 2. See also N Stevenson, "Criminal Cases in the NSW District: a pilot study," in J Basten, M Richardson, C Ronalds and G Zdenkowski (eds), *The Criminal Injustice System* (Australian Legal Workers Group (NSW) and Legal Service Bulletin, Sydney, 1982).
11. Shorter Trials Committee, *Report on Criminal Trials* (1985) (the "Sallmann Report") 30.
12. See Kirby, *op cit*, at 631-632, on the importance of "educative legislation".
13. (1986) 161 CLR 278, at 296. See also the joint judgment of Wilson and Dawson JJ at 313.
14. Letter to the Commission from the Chairman of the New South Wales Police Board, Sir Maurice Byers QC, 8 March 1988.
15. See (1943) 57 *Harvard Law Journal* 2, cited by Samuels JA in *Barron v Attorney General for New South Wales* (1987) 10 NSWLR 215, at 218.
16. J K Avery (with KJ Drew, CS Ireland and WJ Haran), *Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document "Police Powers of Arrest and Detention"* (February 1988) 1.
17. See generally Review Committee of Commonwealth Criminal Law, *Human Rights in Relation to the Commonwealth Criminal Law* (Discussion Paper No 15, July 1988).
18. See D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, Sydney, 1990) 1030.
19. New South Wales Law Reform Commission Discussion Paper No 16, *Police Powers of Arrest and Detention* (1987) 93.
20. *Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document "Police Powers of Arrest and Detention"* (May 1987) 21.
21. *Interim Report: Detention Before Charge* (March 1989) 31.
22. Traffic Act 1909, s4E (formerly the "Motor Traffic Act"). See also the stop and search provision in s357E of the Crimes Act.
23. See Brown, Farrier, Neal and Weisbrot, *op cit*, at 973-985. At the outset most of the detentions were in police cells, but by 1987 about 80% of the detentions were in other proclaimed places, such as hospitals and hostels, as the legislation originally envisaged.
24. Of the Criminal Law and Penal Methods Reform Committee of South Australia, *Second Report: Criminal Investigation* (1974) 74-76, and s 78(1) of the Summary Offences Act 1953 (SA).
25. See, eg, the Submission of J R Marsden (1987) 3.

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26. Criminal Law and Penal Methods Reform Committee of South Australia, *op cit*, at 82-83.
27. Australian Law Reform Commission, *Criminal Investigation* (Report No 2, 1975) 19, para 42 (hereafter "ALRC 2").
28. M Aronson, J Hunter and M Weinberg, *Litigation: Evidence and Procedure* (4th ed, Butterworths, Sydney, 1988) 358.
29. (1984) 16 A Crim R 416.
30. *R v S and J* (1983) 32 SASR 174.
31. See *R v Leecroft* (unreported South Australia Supreme Court judgment no 9675, 1987), cited in D Dixon, C Coleman and K Bottomley, "Consent and the Legal Regulation of Policing" (1990) 17 *J of Law & Society* 1.
32. ALRC 2, at para 65.
33. *Ibid*, at 32, para 71. There was a dissenting view on this point from Mr (now High Court Justice) Brennan.
34. *Ibid*, at 28, para 65.
35. See J H Curran and J K Carnie, *Detention or Voluntary Attendance? Police Use of Detention Under s2, Criminal Justice (Scotland) Act 1980* (Scottish Office, Social Research Study, 1986). See also Dixon, Coleman and Bottomley, *op cit*.
36. Cf s29 of the UK Police and Criminal Evidence Act 1984, which still allows for voluntary attendance, but requires the police officer to spell out clearly the legal position to the person, and to effect an arrest when the evidence compels it. The question of the treatment of volunteers is also dealt with in UK Code of Practice "C", ss 3.15-3.16.
37. By the Crimes (Custody and Investigation) Act 1988.
38. *Eatts v Dawson* (unreported, Federal Court judgment no G208 of 1990), at 30-31, per Morling, Beaumont and Gummow JJ.
39. ALRC 2, at paras 9 and 64-71.
40. Review Committee of Commonwealth Criminal Law, *Interim Report: Detention Before Charge* (1989) 31, para 4.6.
41. Recommendation 29, at 108-109.
42. ALRC 2, at para 99.
43. Instruction 31.09. The recommended caution is "I am going to ask you certain questions. You are not obliged to answer unless you wish to do so, but whatever you say may be used in evidence. Do you understand that?"
44. (1966) 384 US 436.
45. (1964) 378 US 478.
46. Code of Practice C, para 10. See also B Irving and I McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (Police Foundation, London, 1989) 15-16.
47. See the studies cited by the Australian Law Reform Commission in ALRC 2, at 66-68.

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48. Kirby, *op cit*, at 639.
49. Section 464A(3), inserted in 1988.
50. Review Committee, *Detention Before Charge*, *op cit*, 44-45.
51. The High Court, in *Van der Meer v The Queen* (1988) 35 A Crim R 232, also seemed to indicate that a caution should be given in this situation. See S J Odgers, "Police Interrogation: A Decade of Legal Development" (1990) 14 *Crim L J* 220.
52. *Ibid*, at 247-248.
53. See *Miller* (1980) 25 SASR 170; *Barker* (1978) 19 SASR 448.v
54. That is, a custody officer - see Recommendations 2.6.4 and 3.4.
55. Avery, *op cit*, (Feb 1988) 62.
56. United Nations General Assembly Resolution 217(III) of 10 December 1948, Article 5.
57. United Nations General Assembly Resolution 2200A(XXI) of 16 December 1966, Articles 7 and 10(1).
58. Review Committee of Commonwealth Criminal Law, Human Rights, *op cit*.
59. ALRC 2, at para 135.
60. Review Committee of Commonwealth Criminal Law, Human Rights, *op cit*; and *Detention Before Charge*, *op cit*, cl 85P(1) of the proposed *Crimes (Investigation of Commonwealth Offences) Amendment Bill 1989*.
61. Muirhead J, Royal Commission into Aboriginal Deaths in Custody (Interim Report, December 1988) para 6.4, and 34-38, 45-46 and 55.
62. Instruction 32, para 2. See also Instruction 60 and the Police Custody Manual.
63. See generally Instruction 32.
64. Instruction 32.04.
65. Instruction 32.14.
66. Instructions 32.38 and 38.25.
67. Law Reform (Vicarious Liability) Act 1983. Cf *Enever v The King* (1905) 3 CLR 969.
68. D Dixon, K Bottomley, C Coleman, M Gill and D Wall, "Safeguarding the Rights of Suspects in Police Custody" (1990) 1 *Policing and Society* 115, at 138. See also K Bottomley, C Coleman, D Dixon, M Gill and D Wall, *The Impact of Aspects of the Police and Criminal Evidence Act 1984 on Policing in a Force in the North of England: Final Report* (Centre for Criminology and Criminal Justice, University of Hull, July 1989) 145; and Irving and McKenzie, *op cit*, at 4 and 246.

## 4. The Fixed Time Model of Detention

### RECOMMENDATION 3:

#### A Fixed Period of Detention Following Arrest To Be Permitted

##### 3.1 Detention for a reasonable period up to four hours

3.1.1 The general rule shall be that a person who has been arrested or is otherwise in the custody of a police officer may, if the conditions laid out in Recommendation 3.2 are satisfied, be detained in the custody of police for the purposes of further investigation for such time as is reasonable in all the circumstances, but for no more than four hours of actual investigation from the time of initial custody.

3.1.2 All persons in custody must be dealt with expeditiously, and released as soon as the need for detention has ceased to apply.

3.1.3 Before the expiry of the four-hour period, application may be made to a judicial officer for an extension of the time within which to continue custodial investigation, up to a maximum of eight additional hours, in accordance with the provisions of Recommendation 4.

3.1.4 Absent such an extension, no person taken into custody for an offence (or group of offences) shall be questioned or subjected to any other investigative procedure for a period longer than four hours from the commencement of the custody. The "consent" of the person to a further period of questioning shall not, of itself, permit an extension beyond four hours, but such "consent" may be considered by the judicial officer in determining whether (and for how long) to grant an extension (see Recommendation 4.3).

##### 3.2 Grounds for detention following arrest

3.2.1 A person who has been arrested or is otherwise in the custody of a police officer may only be detained for the purpose of investigation if it is necessary

- (1) to follow up reasonable suspicions in order to confirm or dispel these suspicions;
- (2) to enable such further investigation and inquiries as are reasonably necessary to determine whether a prosecution will be launched and the nature of the charge(s);
- (3) to complete any necessary documentation which requires the presence of the detained person;
- (4) to establish the identity of the person; or
- (5) to conduct other authorised investigative procedures, as detailed in Recommendation 3.5.

3.2.2 The decision whether a person is to be detained for the purpose of investigation, the determination of a "reasonable period" of detention within the maximum of four hours, and the decision whether to apply to a judicial officer for authorisation of a further period of detention, should all be made by the police officer exercising the function of a custody officer (see Recommendation 3.4 below).

##### 3.3 The determination of a reasonable time for detention

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3.3.1 What is a “reasonable period” for detention for the purpose of investigation must be determined by reference to all of the relevant circumstances, including

- (a) whether the presence of the arrested person is necessary for the conduct of any investigation which is intended to be conducted after arrest;
- (b) the number and complexity of the matters under investigation;
- (c) whether the person has indicated a willingness to make a statement or to answer any questions;
- (d) whether a police officer reasonably requires time to prepare for any interview of the person in custody;
- (e) whether appropriate facilities are available to conduct an interview or other investigations;
- (f) the number and availability of other persons (including alleged co-offenders, the alleged victim, and other material witnesses) who need to be interviewed or from whom statements need to be obtained in respect of the offence for which the person is in custody;
- (g) any need to visit the place where the alleged offence is believed to have been committed or any other place reasonably connected with the investigation of the offence;
- (h) the total period of time during which the person has been in the company of an investigating official before and after the commencement of custody;
- (i) the time taken for police connected with the investigation to attend at the place where the arrested person is being held;
- (j) the time taken to complete any forensic examinations which are reasonably necessary to the investigation; and
- (k) any other matters which are reasonably necessary to the proper conduct of the investigation.

3.3.2 These factors are to be considered in the first instance by the police officer exercising the function of a custody officer in determining a “reasonable period” of detention within the four hour maximum. These matters must also be considered by the judicial officer to whom an application is made for an extension of the period of detention, to determine whether any such extension is justified, and if so, what further period (up to eight hours) should be authorised. (See Recommendation 4.)

3.3.3 In both cases, the determination of a “reasonable period” shall be subject to an overriding concept of proportionality, balancing the period of custodial investigation necessary against the circumstances and seriousness of the alleged offence and the requirement that the investigation be conducted diligently and expeditiously.

### **3.4 The function of a custody officer**

3.4.1 The NSW Police Service should consider the practicability of the introduction of a formal system of “Custody Officers” in New South Wales to operate the proposed custodial detention scheme.

3.4.2 Until such time as a formal system of Custody Officers is introduced, the Commission recommends that someone in each police station at any given time (hereafter referred to as the “custody officer”) must be given specific responsibility for

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- (1) determining whether detention for the purpose of investigation is warranted (Recommendation 3.2);
- (2) determining what a "reasonable period" of detention is in the circumstances of each case (Recommendation 3.3);
- (3) ensuring that the required safeguards, such as the giving of a caution and permitting communication with family and legal advisers, are effectively afforded to the detained person (Recommendations 2.5, 2.9, and 5);
- (4) ensuring the safety and well-being of all persons in custody (Recommendations 2.7 and 2.9);
- (5) determining whether to apply to a judicial officer for an extension of the period of detention, and preparing or assisting in the preparation of such an application (Recommendation 4);
- (6) maintaining the Custody Record for each person in police custody (Recommendation 2.9); and
- (7) ensuring that the Codes of Practice for police investigations are complied with (Recommendation 7.1).

3.4.3 Where an officer of higher rank than the custody officer gives directions relating to a person in police detention, and the directions are at variance with any decision made or action taken by the custody officer in the performance of a duty imposed on him or her by these recommendations (or with any decision or action which would have been made or taken in the performance of such a duty, but for the directions), the custody officer shall refer the matter at once to a commissioned officer who is responsible for the police station.

3.4.4 The designated custody officer should preferably be of or above the rank of senior constable or be in charge of the police station for the time being. Unless it is unavoidable, the arresting officer should not act as the custody officer. In such cases, the arresting officer must contact a commissioned officer for authorisation, and note this in the custody record.

### **3.5 Authorised investigative procedures during detention**

3.5.1 During the period of detention for the purpose of investigation, it shall be proper for the police to conduct the following investigative procedures (to the extent that these procedures are already authorised by law)

- (1) questioning or obtaining a statement from the detained person;
- (2) questioning or obtaining statements from witnesses or other persons who may have relevant information for the police;
- (3) searching of the arrested person;
- (4) searching of premises, a vehicle or other conveyance;
- (5) fingerprinting;
- (6) photographing;
- (7) conducting medical examinations;
- (8) obtaining forensic samples;
- (9) subjecting physical evidence to scientific analysis; and

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(10) holding identification parades.

3.5.2 Where a person in police custody states or otherwise indicates that he or she does not wish to be questioned, police must not persist. If after the questioning has commenced, the person states or otherwise indicates a desire not to answer any further questions, no further questions should be asked (see Police Commissioner's Instruction 31.10).

3.5.3 Codes of Practice should be developed to govern the conduct of these investigative procedures (see Recommendation 7.1).

### **3.6 "Time-outs" during the period of detention**

3.6.1 The following periods of time, during which the questioning or investigation of the person is suspended or delayed, shall not be included in calculating the amount of time a person has spent in custody for the purpose of investigation

(1) the direct travel time from the place of apprehension to the police station or police establishment;

(2) any time spent arranging communication with a relative, friend, consular official or lawyer;

(3) any time spent arranging for the services of a qualified interpreter;

(4) any time spent waiting for the arrival at the police station of a relative, friend, lawyer, consular official or interpreter;

(5) any time spent by the detained person receiving medical attention, or resting, or receiving refreshment;

(6) any period in which authorised investigative procedures (per Recommendation 3.5.1) may not be conducted by reason of the person's state of intoxication (caused by alcohol or drugs); and

(7) any period during which an application for a detention warrant (per Recommendation 4) is in progress.

3.6.2 Any "time-out periods" to be applied to the four hour time limit for detention (or any greater period which is judicially authorised) must be recorded on the Custody Record (see Recommendation 2.9). Responsibility for recording and calculating the time-out periods shall be placed on the custody officer.

### **3.7 After the detention period has run**

3.7.1 At the end of the authorised period of detention the police must either

(1) release the person without any information being laid; or

(2) release the person on the basis that a summons has issued or will issue against the person; or

(3) charge the person with a criminal offence.

3.7.2 If the decision is made to charge the person, then a further decision shall be made with respect to the granting of "police bail" pursuant to the provisions of the Bail Act. If police bail is denied, or granted on conditions which are unacceptable to the accused, then the person must be brought before a justice or magistrate as soon as is reasonably practicable, and in any event no later than the next sitting of the most appropriate court, following arrival at such court after travel thereto by the most direct route. (In determining the most appropriate court, regard should be had to

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the need for the case to be dealt with expeditiously, so that the timing of the next sitting of the court is more important than the convenience of the location).

3.7.3 No further period of detention for the purpose of investigation may be authorised. For example, it should not be possible for bail to be granted conditional on the person's undertaking that he or she will later attend a police station for the purpose of conducting an investigative procedure.

3.7.4 The term "charge" is used in this Recommendation to refer to the power of the police in practice to "charge" a person with a criminal offence for the purpose of that person attending court. Section 18 of the Bail Act 1978, specifically refers to the charging of a person by a police officer, and s353A of the Crimes Act does this by implication. It is common practice for the police to "charge" a person upon a determination of bail. However, a strict reading of the common law, and s352 of the Crimes Act, suggests that the power to formally charge a person with a criminal offence lies only with the courts. It is for this reason that the common law requires that an arrested person be brought before a justice as soon as is practicable.

### 3.8 Provision against expedient re-arrest

Provision shall be made to guard against the expedient re-arrest of a suspect following the expiry of the authorised investigation period, in order to avoid the limitations on detention imposed by this new regime. It is thus recommended that a person who has already been detained for the purpose of investigation, and released pursuant to Recommendation 3.7, shall not be re-arrested without a warrant and subjected to any further period of investigative detention for the offence or offences for which he or she was previously arrested, unless new material evidence justifying a further arrest has come to light since the release.

## COMMENTARY ON RECOMMENDATION 3

### Introduction - a fixed period system of custodial investigation (3.1)

4.1 In this Recommendation we propose, and define the temporal limits of, a system of custodial investigation for New South Wales.

4.2 The Commission had four basic options in responding to the issues raised by the High Court in the case of *Williams v R*.<sup>1</sup>

4.3 First, we could have recommended that the law in New South Wales remain as stated in *Williams*. There was considerable support for this in the submissions and communications we received, including the submissions of the major legal professional associations: the Law Council of Australia, the Law Society of New South Wales, the New South Wales Bar Association, the New South Wales Council for Civil Liberties, the Legal Aid Commission of New South Wales, and the Society of Labor Lawyers. There were also submissions in this vein from a number of judges, Queen's Counsel and other prominent lawyers. These submissions emphasised the concern of the common law with the fundamental liberty of the individual, and selected stirring passages from the judgments in support. However, they did not deal with any of the problems which substantially erode and degrade the common law protections in this area in practice.

4.4 In Chapter 1, we discussed "the problem with the common law" and the consequent need for reform. The common law rule, as affirmed in a succession of New South Wales cases and recently re-affirmed by the High Court in *Williams*, requires that an arrested person be brought before a justice as soon as practicable, and that this process may not be delayed merely to question the person or to investigate the matter further. However, the "practicability" test, as interpreted by the courts in this State, makes the common law rule meaningless outside normal court hours. This results in considerably differential treatment of suspects depending upon the day and time of their arrest; contrived after-hours arrests by the police in order to take full advantage of the loophole; and police regularly ignoring the common law requirements, which they regard as illogical and impractical. There is little adverse consequence for the police in breaching common law rules aimed at protecting fundamental rights: few are subjected to administrative discipline for this, and it is rare that probative evidence is excluded by the courts because the police obtained it illegally or improperly. The Commission cannot recommend that this situation continue.

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4.5 The second option would be to maintain the tenor of the common law rule, as enunciated in *Williams*, but to provide the necessary support to make the rule meaningful in practice. Most of the submissions referred to above would probably prefer this option, but offered little advice about how to achieve it. In order to adequately ensure that every arrested person is brought before a justice promptly, regardless of the time of arrest, a system of State-wide, 24-hour, 7-day a week courts would have to be established. It may be that a system of roving justices, who visited police stations after-hours or were on-call (since this procedure could not be applied over the telephone) all over the State could also accomplish this.<sup>2</sup> The Commission did look into these possibilities and was assured by court administrators that the prospects for such developments were nil.

4.6 Even if the common law rule could be made effective, as seems unlikely, the police would have a good argument that their legitimate functions in investigating criminal activity were being severely impaired. As discussed in Chapter 1, the common rule developed in England at a time when there were no standing police forces and the investigative function was carried out by the justices to whom arrested persons were brought. That function has now passed to the police, but without the legal authority having passed. Even groups noted for their concern over police powers and practices now recognise that it is "beyond question that the police should have the statutory authority to detain for questioning... the common law is anachronistic when the police (rather than magistrates) investigate crime and when they rely on custodial interrogation as a primary tool. There is nothing improper about them doing so ...".<sup>3</sup> To ask police to investigate crime without the lawful opportunity to question the suspect is to invite widespread bending or breaking of the rules, without likely redress.

4.7 The solution, in the opinion of the Commission, lies instead in designing a system which authorises some custodial investigation as part of a more clearly and closely regulated system of criminal investigation, while at the same time enhancing the safeguards available to persons in custody to ensure that they are not treated unfairly or oppressively.

4.8 The third option would be to legislate to give police a "reasonable time" from the point of arrest to pursue their investigations while the person is detained in custody. The legislation would specify the factors to be taken into account in determining what a "reasonable time" is in the circumstances of each case. This has been the position in Victoria since the law was changed in 1988;<sup>4</sup> it has been the position in the Northern Territory since 1988;<sup>5</sup> and it recently has been recommended by the Law Reform Commissioner of Tasmania.<sup>6</sup> This approach had the support of the submissions of the State's Police Commissioner, the Police Board, the Police Association, the Commonwealth and NSW Directors of Public Prosecutions, and a few judges.

4.9 It is not surprising that this is the favoured approach of the police and prosecuting authorities, since it places all of the operational discretion (and therefore power) in the hands of those agencies, with only loose statutory guidance and little in the way of accountability or review mechanisms. Essentially, the only consequence for police of acting "unreasonably" would be to activate a discretion on the part of the trial judge to exclude the evidence gained, on the basis that it would be unfair to the accused to admit it, or contrary to the public interest. (The same submissions also argued against a mandatory exclusionary rule in respect of illegally or improperly obtained evidence.) In Chapter 6, we discuss at greater length questions of admissibility of evidence. In Chapter 1, we offered reasons why the courts are not well-placed to be the principal regulators of police conduct: the courts do not see this as their role; guilty pleas take most cases out of the system before police practices are scrutinised; the issue of police practices may not be raised in defended cases because of tactical or other considerations; and trial judges are placed in a difficult position when asked to exclude probative, incriminating evidence against a particular accused in order to retrospectively uphold the more abstract value of the public interest in police compliance with procedural rules (which may involve very broad operational discretions).

4.10 The "reasonable time" formula without any fixed limits or presumptions is much too uncertain to regulate an area which touches on the fundamental liberty of the individual. A person in custody would have no idea when he or she is likely to be released, or whether the detention is even lawful. The uncertainty is probably as detrimental to the person's state of mind as the length of detention in many cases. The list of factors used in Victoria and the Northern Territory to determine "reasonable time" reflects the wide range of contingencies but fails to provide effective guidance. In an able but very young police force, such as we have in New South Wales, this is unsatisfactory.

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4.11 As well as providing the least measure of guidance and accountability, the indeterminate “reasonable time” system violates the spirit of the common law. Although the judgments in *Williams* seem to invite legislative reform, the joint judgment of Wilson and Dawson JJ sounds a cautionary note against replacement of the common law with too open-ended a system of detention.

To countenance a period of detention in police custody after arrest, without specific limits, for such time as might be reasonably necessary to enable the police to obtain the evidence upon which to charge the suspect, *is unacceptably open-ended and quite contrary to what was (and in Australia, in our view, still is) the law.*<sup>7</sup> (Emphasis supplied.)

... If the law requires modification, then it is better done...by legislation. For there must be safeguards, *if necessary in the form of time limits*, and they must be set with a particularity which cannot be achieved by judicial decision. Moreover, *it is better that legislative change should take place against the background of the common law as it has been understood in this country, which has consistently viewed detention for the purpose of investigation as an unwarranted encroachment upon the liberty of the person.* The experience of the common law is something which, in our opinion, should be borne steadily in mind if and when the changing needs of society appear to require statutory adaptation of the existing rules.<sup>8</sup> (Emphasis supplied).

4.12 The Commission recommends a fourth option, that of a fixed-time system for custodial investigation. Under our proposals, the police would be able to detain a person for up to four hours for the purpose of investigation if it is reasonably necessary to do so. The four hours is actual investigation time - travelling and waiting time is excluded from the calculation in most circumstances (see 3.6). In more complex cases, police may apply to a court or to a justice (after hours) for a detention warrant authorising an additional period of up to eight hours of custodial investigation. The fixed-time regime is easily coupled with an array of procedural and evidentiary safeguards.

4.13 There was also considerable support in the submissions for the adoption of a fixed-time approach from some senior judges and tribunal members, Crown prosecutors, public solicitors and defenders. There was also support for this approach from some law enforcement agencies, including the National Crimes Authority.

4.14 The Commission has come to the conclusion that the fixed-time system has the most to offer. It provides a high degree of certainty, and brings the area of criminal investigation under effective legal regulation for the first time. It operates on the basis that police will be given clear standards and rules of procedure to operate under, which will afford them a realistic opportunity to perform their duties; that persons in custody will be kept fully informed at all stages about their position and their rights; and that there will be proper record-keeping to enable contemporaneous and subsequent review. This “new professionalism” on the part of the police promotes the values of openness, fairness, accountability and efficiency which are meant to be the main criteria for successful management in a democracy.<sup>9</sup> NSW Police already operate a two hour fixed-time regime in respect of breath testing for PCA offences, without undue difficulties.<sup>10</sup>

4.15 It must be stressed again that our recommendations relate only to the narrow time band between the point when the person is arrested (or held “in custody”) and when the person is charged or discharged. There is no limit to the amount of time police may devote to the pre-arrest investigation, nor to the post-charge investigation. Indeed, part of the “new professionalism” of police work involves changing police culture and practices from “arrest and investigate” to “investigate and arrest”.

4.16 It should also be stressed that, in the end, even a “fixed” system of rules operates largely on good faith and an understanding of the consequences of breach. The Commission considered recommending the creation of specific offences for breach of the rules of criminal investigation by police, but decided against this course. The consequences of breach will remain internal discipline, the rare tort action, and the triggering of judicial discretion to exclude evidence illegally or improperly obtained. The statutory time limits are firm guides to lawful conduct, but the Commission does not envisage that a court will readily entertain an unlawful detention argument based on a dispute over the length of a telephone call or a 10 minute discrepancy in the custody record. The police authorities and the courts have thus far shown no inclination to punish police or to scrap evidence for trivial

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or technical breaches, and there is nothing in our Recommendations to alter this. A substantial or wilful illegality or impropriety *should* attract censure, however, and the rules should now be sufficiently clear so that there will be little profit in operating at the margins of legality.

4.17 The selection of four hours for the initial period of custodial detention is based on the best empirical evidence available, which the Commission concedes still leaves something to be desired. South Australia has been operating a fixed-time system with a four hour initial period (and considerably fewer time-out exclusions than we are recommending) for five years now. Our discussions with senior South Australian police officials and lawyers indicate that “the legislation has proven to be effective”, “is a vast improvement” from an operational viewpoint, and “there have not been any major problems encountered in the application of this legislation”.<sup>11</sup> The Australian Law Reform Commission has also recommended a four hour initial period (with limited time-out exclusions), based on an empirical study which it commissioned, and research studies from America show that as many as 97 per cent of cases could be cleared in this time.<sup>12</sup> In Scotland, where there is a six hour fixed period with no second stage, the average length of detention is just over two hours.<sup>13</sup> The Review Committee of Commonwealth Criminal Law (the Gibbs Committee) also recommended an initial period of between four-to-six hours,<sup>14</sup> and the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990 currently before the Commonwealth Parliament provides for a four hour initial period.<sup>15</sup>

4.18 The Coldrey Committee reviewed the records of over 40,000 interviews with suspects at police stations in Victoria in the last seven months of 1984, and found that all but 187 (less than half of one per cent of) cases were disposed of within the six hour initial period (with no time-outs) that existed at that time.<sup>16</sup> Police sought extensions in 154 of these cases, but in 97 cases did not use the extra time granted anyway.<sup>17</sup> In only 33 cases did the suspect refuse to consent to continued custody.<sup>18</sup> The Coldrey Committee concluded that even in the few cases pointed to by police as evidence of the “rigidity” of the system,<sup>19</sup> “in all of those cases it is arguable that the real issue was the right to silence.”<sup>20</sup> The Coldrey Committee proclaimed the fixed period regime “a success as an interim measure”, but surprisingly recommended its abandonment on the basis that it had “the potential to cause problems in the future.”<sup>21</sup> The Committee made little apparent effort to examine possible solutions for the particular problems it identified with the fixed period system, and recommended instead the “reasonable time” regime that the police had sought.<sup>22</sup>

4.19 The New South Wales police carried out a pilot survey for three months in 1987, and found that in 91 per cent of cases surveyed it took less than four hours to process suspects between arrest and charge.<sup>23</sup> No time-out exclusions were taken into account, nor were the police operating in a system in which time was of the essence, so it may be anticipated that the “success” figure will be higher if our Recommendations are adopted.

4.20 In the small percentage of cases where the initial period is not sufficient, we recommend that the police may apply for an extension of custody for a further eight hours (see Recommendation 4). The Commission seriously considered whether a further extension (or “trapdoor” procedure) should be possible for the extraordinary case which requires a longer period of custodial investigation. In such cases, police could apply to a court for a further detention warrant of up to 12 more hours (making the total detention period 24 hours, excluding time-outs). A heavy onus would be placed on the police to satisfy a District or Supreme Court judge that the circumstances were indeed exceptional and compelled the granting of extra time. This hearing would involve both parties, with the suspect given the opportunity to present a contrary case and to challenge police evidence. Legal aid would need to be available for suspects in this position. The Commission has decided not to recommend such a procedure at this time, however, preferring to wait until there is sufficient experience with the fixed-period system in New South Wales to determine whether a trapdoor mechanism is absolutely necessary. (See also the discussion of alternative custody review systems in this Chapter, below.)

4.21 The Commission’s recommendation is for the initial four hour period of custodial investigation be codified in legislation, subject to review. If after one year of experience it is evident that the time limits (both the initial period and the extension) need adjustment, then this should be done. The Commission has recommended that there be a mandatory review of the scheme after one year. By then, the system will for the first time be capable of producing reliable empirical information, drawn from the custody records, to facilitate informed debate and the design of a fair and effective process of criminal investigation.

### Grounds for detention (3.2)

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4.22 The Commission has specified the circumstances in which a person who is under arrest or is in police custody (per 2.3) may be detained by police for the purpose of investigation. Custodial investigation is proper only where it is *necessary* to: follow up the reasonable suspicions which grounded the arrest, in order to confirm or dispel these suspicions; make further inquiries to determine the precise nature of the charges (if any); complete the necessary paperwork; establish the identity of the person; or conduct any of the other investigative procedures detailed in Recommendation 3.5.

4.23 It is the responsibility of the custody officer to determine whether adequate grounds for detention exist, and whether to detain any person under these rules.

### “Reasonable period” factors (3.3)

4.24 The Commission has nominated a series of factors to be taken into account in calculating what is a “reasonable period” of detention in the circumstances of each case. The reasonableness determination must be made in the first instance by the custody officer, to decide whether (and how much of) an initial period of custodial investigation is justified (3.3.2). These matters become relevant again when a court or justice is asked to authorise a further period of custodial investigation (4.4.2).

4.25 The factors are largely the same as those used in systems which authorise detention for an indefinite “reasonable period”,<sup>24</sup> and include such matters as the number and complexity of the offences, the number of alleged co-offenders, logistical problems, and so on (see 3.3.1).

4.26 Apart from the weighing of the specific factors, the determination of a reasonable period of detention must be tested against an overriding concept of proportionality (3.3.3). It may be the case that completing the necessary basic paperwork will take as long for petty offences as for the more serious, but beyond that there must be the idea that detention in custody is a deprivation of liberty which is warranted only in respect of serious offences. Some custodial investigation schemes specify different time limits in respect of summary offences and indictable offences, “arrestable” or “non-arrestable” offences,<sup>25</sup> or summary offences and “serious offences”. For example, the Gibbs Committee recommended an initial investigatory period of four hours in respect of summary offences, but six hours in respect of “serious offences”.<sup>26</sup> This recommendation was abandoned in the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990, which is currently before federal Parliament. The Bill provides for a four hour period in respect of all offences (although the detention period is limited to two hours for children, Aboriginal persons and Torres Strait Islanders).<sup>27</sup>

4.27 The Commission considered such an approach, but rejected the idea as misconceived. There are many “hybrid” offences which may be heard summarily or tried on indictment.<sup>28</sup> The basic larceny and assault offences fit into this category in New South Wales, among many others. Secondly, a single incident could give rise to a number of possible charges, given the overlapping nature of offences and the broad discretion given to police and prosecutors. For example, the same episode of threatening behaviour could be charged as offensive behaviour (a summary offence carrying a maximum penalty of three months imprisonment),<sup>29</sup> or assault (which carries a maximum penalty of two years gaol if dealt with on indictment or one year if dealt with summarily),<sup>30</sup> or an aggravated assault (which carries five or more years).<sup>31</sup> It would be counter-productive to design a system in which the police felt obliged to prefer the more serious charge in order to give themselves the option of more investigation time, or to provide post facto justification for a long detention that has already happened. Instead, the Commission recommends that a more flexible concept of proportionality be employed.<sup>32</sup>

### Custody officers (3.4)

4.28 The Commission recommends that the New South Wales Police Service consider the introduction of a formal system of “Custody Officers” to supervise the proposed custodial investigation scheme. The NSW Police Commissioner’s Instructions already use the term, defined as follows

The term custody officer, or person performing custody duties, when referred to in this instruction, includes any police officer having responsibility for the detention and care of persons in custody at a police station.

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The custody officer will be responsible for the safe custody and care of all prisoners and their property from the time they are charged or detained at a police station until they are either released or transferred to other custody.<sup>33</sup>

4.29 In England and Wales, under *PACE*, the position of custody officer is recognised by statute<sup>34</sup> and carries statutory duties, breach of which amounts to a disciplinary offence. Custody officers in the British system must be at or above the rank of sergeant,<sup>35</sup> and usually take on the job full-time for a set period of at least two years. They are assigned to designated police stations where suspects may be detained for investigation. When a person is brought to the police station, the custody officer must review the lawfulness and propriety of the arrest, and review the sufficiency of the available evidence to determine if the person should be discharged. The custody officer then determines whether or not a period of custodial investigation is necessary. The custody officer is responsible for the suspect's treatment and well-being for the period of detention, including ensuring that the person receives all of the appropriate safeguards provided by law and the Codes of Practice, and that the custody records are diligently maintained.<sup>36</sup> If disputes arise between the custody officer and investigating officers, as does happen, they are referred upwards to more senior officers for resolution.<sup>37</sup>

4.30 The establishment of the custody officer system has been widely regarded as a major success of the *PACE* legislation.<sup>38</sup> (This should not be confused with the custody *review* officer system, which has been less well-received. See the discussion of the alternative custody review systems later in this Chapter, under Recommendation 4.) For this reason, we recommend the consideration of the system locally. However, the Commission does recognise that the circumstances are significantly different in New South Wales. First, in England and Wales, the distances are much smaller and the population is less spread out, so it is possible to designate regional police stations as custody stations, provide each with at least one custody officer per shift, and expect all arrested persons who might be subject to custodial investigation to be brought to those stations. In New South Wales there are many small country stations, often staffed by only one or two officers. Secondly, the British police forces are also older and more experienced, on average, with many senior sergeants who can be expected to handle the role of custody officer.<sup>39</sup>

4.31 If there are advantages in a custody officer system, adoption of the system should not be forestalled simply because of the problems caused by isolated country police stations, which in any event would account for only a very small proportion of arrests. It is easy enough to build in common sense exceptions to the requirements (as *PACE* does, in fact) to cater for the impracticality of providing a full-time custody officer in some areas, and for the temporary absence of the custody officer in other police stations.

4.32 The system of custodial investigation that we propose is by no means contingent upon the introduction of specialist custody officers, but would be enhanced by it. The most important thing, however, is that some police officer, preferably a relatively senior one, exercises the *functions* of a custody officer in respect of each and every arrested person. Unless unavoidable, the ad hoc custody officer should not be the arresting officer, so that the arrest may be independently reviewed. In those circumstances where no other police officer is available and the arresting officer does serve as the custody officer, approval for this arrangement should be secured from a commissioned officer by telephone, and written in the custody record.

### **Authorised investigation procedures (3.5)**

4.33 The Commission considers that it would be useful to spell out the range of investigative procedures which are authorised while the suspect is detained in custody (to the extent that these procedures are already permitted by statute or common law). The authorised investigative procedures include: interviewing suspects, alleged victims and witnesses, and obtaining statements from these persons; searching persons, premises and vehicles; fingerprinting; photographing; conducting medical examinations and obtaining forensic samples; subjecting physical evidence to scientific evidence; and holding identification parades.

4.34 The Commission also recommends that Codes of Practice be developed to govern the conduct of these investigative procedures (see Recommendation 7.1).

### **"Time-out" calculations (3.6)**

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4.35 One of the major objections to the former fixed-period system in Victoria was that there were inevitable “reasonable delays” which significantly decreased the time for interrogation and investigation.<sup>40</sup> (The Victorian police were nevertheless able to complete over 99.5 per cent of all investigations within the initial six hour period.)<sup>41</sup> The Police submissions to the Commission argued, and we accept, that the time limits imposed on detention of suspects should relate to the time actually available for investigation. The Australian Law Reform Commission<sup>42</sup> and the Gibbs Committee<sup>43</sup> have also made recommendations to this effect.<sup>44</sup> The police interest is obvious, but inclusion of a time-out provision serves the interests of detained persons as well. It will lengthen detention, but also make it more likely that police will be prepared to cooperate in ensuring that the safeguards promised are actually available. If time spent in the effort to secure an interpreter or lawyer or to contact family, for example, was permitted to cut significantly into the time police are allowed to pursue their investigations, it is easy to foresee that such efforts on behalf of suspects would become perfunctory at best.

4.36 The “time-out” or “dead time” exclusions refer only to time that is actually *lost*, that is, periods in which the interrogation or investigation is suspended or delayed. If police persist in questioning a person in the absence of a requested legal adviser, or while the person is receiving medical attention, for example, in contravention of the rules, they should not receive a time “bonus” for this impropriety.

4.37 We suggest that there be exclusions for time lost to investigation in the following circumstances

(1) Travel time from the point of arrest to the police station. This would *not* include time spent visiting the crime scene or other places with the suspect in order to gain evidence or confirm or dispel suspicions, which is a part of the investigative process.

(2) Any time spent arranging communications with friends, family, lawyers, consular officials or interpreters, and any dead time spent waiting for the arrival of such persons at the police station.

(3) Any time spent by the detained person receiving medical attention or refreshments, or resting.

(4) The Gibbs Committee recommended that there also be an exclusion where the investigation could not proceed because the person’s state of intoxication, caused by alcohol or drugs.<sup>45</sup> We agree that police investigation time should not be lost because of the suspect’s intoxication, nor should police be encouraged to proceed with interrogation in these circumstances in the fear that investigation time will be lost. (Note that this provision relates to suspects who *are arrested* in respect of an alleged offence. Persons detained by police for being found intoxicated in a public place are dealt with under separate legislation<sup>46</sup> and conditions).

(5) Any time lost waiting for the processing by a judicial officer or justice of an application for a detention warrant to extend the period of custodial investigation (see Recommendation 4).

4.38 The exclusions must be carefully noted on the suspect’s custody record, with responsibility for this placed on the custody officer (see Recommendations 2.9 and 3.4.2(6)). The Commission acknowledges that allowing exclusions detracts somewhat from the certainty benefit of the fixed time system,<sup>47</sup> but nevertheless regards this as fair and workable. We agree with the statement of the Australian Law Reform Commission

we trust that common sense will prevail in the application of these provisions in the courts, and that justices, magistrates and judges will not require police officers to go about like rally drivers armed with stop-watches ...<sup>48</sup>

4.39 The Commission paid special attention to the police submission<sup>49</sup> that an exclusion should also be included to cover periods of time during which the alleged victim of a sexual assault is unavailable to be interviewed by police owing to the need for medical examination, medical attention or counselling. The police supplied information to the Commission from the coordinator of a Sexual Assault Centre at a Sydney hospital<sup>50</sup> that the “average time for a crisis presentation is three and a half hours.” If the exclusion under this head was always limited to less than four hours, the Commission possibly would be prepared to recommend that it be included in the proposed legislation. Unfortunately, the period of unavailability “can be considerably lengthened” if the alleged victim requires more extensive medical treatment, and there are occasionally postponements of the interview with police due to injury or trauma. A victim of sexual assault may take up to 48 hours to decide

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whether or not to proceed with the police complaint following a medical examination.<sup>51</sup> Consequently, the Commission felt unable to recommend an exclusion in these cases as a general rule. The unavailability of witnesses is, however, a basis for gaining an extension of the period of custodial investigation. (see Recommendations 3.3.1(f) and 4.3.2).

### Post-detention procedures (3.7)

4.40 Once the authorised period or periods of detention have expired, *custodial* investigation must cease, although the police are free, of course, to continue their investigations in other respects. At this point, the police must either: discharge the person absolutely; discharge the person on the basis that a summons will issue; or charge the person with a criminal offence. While the common law procedure for charging a person with an offence requires that the person be brought before a justice, modern statutory criminal procedure envisages that police will usually “charge” the person in the first instance<sup>52</sup> in order to facilitate an early bail determination, in the interests of the arrested person.

4.41 Under the NSW Bail Act 1978, police bail cannot be granted until a suspect has been “charged”,<sup>53</sup> although there is no *express duty* on the police under the Bail Act or the Crimes Act to charge. The tenor of the Bail Act is to encourage early release by authorising senior officers to make the charge and bail decisions without the need to proceed to a court, in straight-forward cases.<sup>54</sup> If police bail is denied, or granted on conditions which the person cannot or will not meet, then the person must be brought before a justice at the first practicable opportunity. The Commission believes that it is inappropriate for bail to be granted on the condition that the person will subject himself or herself to further police interrogation or investigation. “Acceptance” of the bail conditions and “consent” to further investigation, in such circumstances, is the product of coercion, not a genuine desire to cooperate. Bail is meant to secure the person’s attendance at subsequent proceedings and not to facilitate police investigations.<sup>55</sup>

### Expedient re-arrest prohibited (3.8)

4.42 The aim of this recommendation is to prevent cynical manipulation of the rules limiting detention times by releasing a suspect and then immediately re-arresting the person, ostensibly entitling police to detain the person for another four hours or more. The problem is to distinguish between this type of cynical or bad faith action, and a genuine need for a subsequent arrest of a person who has been released, or for further detention of a person who is still in custody, based on new information or circumstances. For example, where police question a suspect about one matter and the person admits involvement in an unrelated criminal matter, this would be a proper basis for arresting the person again (assuming the evidence is strong enough to amount to a reasonable suspicion) and commencing a new period of custodial investigation in respect of the second matter.

4.43 The Australian Law Reform Commission has made a similar recommendation,<sup>56</sup> in these terms

A Police Officer shall not take under restraint in respect of any offence a person who has previously been under restraint in respect of the offence - (a) unless he does so in consequence of matters that have come to the knowledge of the Police Officer in charge of investigating the offence only after the person last ceased to be under restraint; or (b) unless a reasonable period has elapsed since the person last ceased to be under restraint.<sup>57</sup>

Without adopting the precise language of this clause, the Commission believes that it encapsulates the concept and concern involved. In contrast, the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990, cl 23C(5), which is currently before the federal Parliament, provides a less flexible restriction on multiple arrests and detentions within a 48-hour period.

If the person has been arrested more than once within any period of 48 hours, the investigation period for each arrest other than the first is reduced by so much of any earlier investigation period or periods that occurred within that 48 hours.

The Commission appreciates the concern underlying the more restrictive approach in the Bill, but we prefer that police be given a new period of custodial investigation in genuine cases.

**RECOMMENDATION 4:**

**Extension of the Detention Period in Exceptional Cases**

The Commission recommends that there be a presumption that a period of not more than four hours of custodial investigation will ordinarily be sufficient for police to complete their inquiries, and to make the decisions called for in Recommendation 3.7. However, the Commission recognises that in a small percentage of cases, owing perhaps to some special logistical problems or the complexity or number of the charges, the police may need more than four hours of custodial investigation to carry out their duties properly. In such cases, the police may apply, within the four hour initial period, for a warrant to extend the period of detention.

**4.1 Application to a judicial officer**

Before the expiry of the initial four hour period of custodial investigation (taking into account the "time-out" periods), a police officer (preferably the custody officer) may apply to a court for a "detention warrant" authorising an extension of the period of detention. Such an application may only be heard by a Judge of the District or Supreme Court, a Local Court Magistrate or, if none of these judicial officers is available, a justice employed in the administration of the Local Courts who has been specifically empowered to issue detention warrants. (The role previously played by a justice of the peace in the process of criminal investigation should formally cease.)

**4.2 Applications by telephone**

During all times when the courts are not in session, some judges, magistrates and designated justices should be available by telephone to hear applications for detention warrants. In such circumstances, an application by telephone is acceptable. Police all over the State should be given a central telephone number to ring, with calls diverted to the judicial officer or justice on duty at any given time. ("Telephone" shall be read to include radio, telex, facsimile and any other communication device.)

**4.3 The nature of the application and proceedings**

The application for a detention warrant is not restricted to the offence for which the initial arrest was made. Where a police officer in the course of the custodial investigation forms a belief on reasonable grounds that the person has committed another offence, the application for authorisation of an additional period of detention may be based on that offence, or on both the offences.

4.3.1 The detained person and his or her legal representative have no affirmative right to be heard on the application; however, it is open to the judicial officer hearing the application to request to speak to the detained person or the person's lawyer before making any order.

4.3.2 Given the presumption against any further period of custodial investigation, the onus is on the police officer to satisfy the judicial officer that:

- (1) the investigation is being conducted diligently and expeditiously; and
- (2) a further period of detention without charge is reasonably necessary to preserve or obtain evidence, or to complete the investigation; and
- (3) there is no reasonable alternative means of obtaining the evidence other than by the continued detention of the person in custody; and
- (4) (a) circumstances exist (having specific regard to the matters listed in Recommendation 3.3) in this particular matter which made it impracticable for the investigation to be completed within four hours (excluding "time-outs"); or

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(b) other circumstances of emergency reasonably prevented the particular police officers from utilising a significant portion of the four hour period for the purpose of investigating this matter, which made it impracticable for the investigation to be completed within four hours (excluding "time-outs").

4.3.3 The application for a detention warrant shall be made on oath and supported by an information. Such information shall state

(1) whether any earlier applications have been made in respect of the same, or substantially the same, matter.

(2) the nature of the offence for which the person to whom the application relates has been detained;

(3) the general nature of the evidence on which that person was arrested or detained;

(4) what investigation has taken place and what further investigation is proposed;

(5) the reasons for believing that the continued detention of the person without charge is reasonably necessary for the purposes of further investigation; and

(6) the extent to which the person in custody is cooperating in the investigation.

4.3.4 The Oaths Act 1900, s11A, should be amended to provide specifically for the administration of, and the taking of, an oath by telephone (or other communication device).

4.3.5 Forms shall be developed for applications for detention warrants and supporting informations, and for orders authorising detention warrants, to facilitate convenient preparation.

### **4.4 Authorisation of further detention**

4.4.1 Where a judicial officer hearing an application is satisfied as to the matters set out in Recommendation 4.3.2, he or she may order a further period of detention for the purpose of investigation. This further period shall be that determined by the judicial officer to be the minimum period reasonably necessary for the police to complete their investigations, but in any event for no longer than eight hours.

4.4.2 The order issuing a detention warrant must be reduced to writing (although the order may be conveyed by telephone, radio, telex, facsimile or other communication device, if necessary), and the judicial officer must state the reasons for approving the period of further detention, with specific reference to the matters listed in Recommendation 3.3. The warrant and any other documentation used in the process (such as the information on oath) shall become part of the official record of the court (including the court to which the justice is normally attached, in the case of a telephone application).

4.4.3 The detention warrant must be tendered in court as a condition of the admission of any evidence obtained by the police during the period of further detention. (See Recommendation 8.6) The warrant shall be prima facie evidence of the lawfulness of this detention.

### **4.5 Refusal to authorise further detention**

If the judicial officer refuses the application, the person shall be dealt with according to the procedures in Recommendation 3.7. Where an application is refused, no further application shall be made in respect of the person to whom the refusal relates, unless supported by evidence which has come to light since the refusal.

### **4.6 Monitoring device for detention warrants**

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The Commission recommends the establishment of an independent monitoring device to periodically review all detention warrants which have been issued. This function could be carried out by a special Commissioner for Warrants, or another suitable person or agency.

### COMMENTARY ON RECOMMENDATION 4

#### Introduction

4.44 The adequacy of procedures governing extension of the period of custodial investigation is crucial to the operation and success of the fixed time model. These procedures must be: logistically sound, catering for after-hours applications; smooth enough to ensure that appropriate cases gain ready approval, so as not to hamper police investigations; and substantial enough to amount to more than merely a rubber stamp for police requests.

4.45 As discussed in the preceding commentary, it is common ground that over 90 per cent of all criminal matters which require attendance at the police station will be disposed of by police within the initial four hour period. Nevertheless, this leaves a considerable number of more serious or complicated matters which will require additional time for investigation. Again, it must be stressed that the proposed scheme does *not* in any way limit the amount of time police may spend investigating a matter, or even interrogating a suspect. All that is limited under our proposals is the amount of time that the person may be detained in police custody before he or she is charged, discharged or brought before a magistrate.

4.46 The extension procedures in South Australia,<sup>58</sup> which are similar to those we are recommending, appear to be working well and there is no move to have them altered.<sup>59</sup> The extension procedures in England and Wales under *PACE* are quite different from our proposals, and do not offer much assistance. As discussed above, the English system operates on an entirely different set of premises. Much has been made in some of the submissions of the "failure" of the extension procedures in Victoria under the original fixed time system, which was altered as a result of the Coldrey Report.<sup>60</sup> However, the problems that were identified in the Coldrey Report have all been specifically addressed in our recommendations.

4.47 Under the earlier Victorian legislation, the police had a six hour initial period for custodial investigation, but *without* any "time-out" provisions. Extensions were available only by going before a court for a full hearing, and the extension could be granted only if the arrested person consented to the further period. Police complained that the interruption caused by the need for everyone to go before a court hampered investigations, and caused people who were being successfully interrogated to "go off the boil".<sup>61</sup> However, our recommendations call for detention warrants (extensions) to be granted on the basis of *ex parte* proceedings, which may be conducted by telephone and need not, in any event, interrupt or interfere with the on-going investigation. There were also some complaints from Victorian police in the early days of the system of problems caused by the requirement that only certain senior "authorised officers" were entitled to make the applications for extensions, as it was sometimes difficult to find one of these officers in time. According to the Coldrey Report, formulation of a roster and the use of electronic pagers soon resolved the problem.<sup>62</sup> Our proposals are not so limiting, although we would prefer applications to come from custody officers if possible (see 4.1).

4.48 Police also complained in Victoria that the consent requirement was too restrictive and thwarted too many extension applications. The Coldrey Committee was not sympathetic to the latter claim, finding that the requirement was a concomitant of the right to silence, which it was committed to maintaining.<sup>63</sup> Our recommendations do not expressly require consent for an extension to be granted, but consent is a factor to be taken into account (see 3.1.4 and 4.3.6). The right to silence is re-affirmed (5.1), and safeguards in support of the right (such as the formal cautioning of suspects, and the right to legal assistance) are to be substantially strengthened.<sup>64</sup>

#### Applications for detention warrants (4.1-4.2)

4.49 Before the end of the initial period of custody, a police officer may apply for a "detention warrant" in order to extend the period of custodial interrogation for up to another eight hours (excluding time-out periods). During normal working hours the application should go to a (Local, District or Supreme) Court (4.1). After hours,

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applications may be made by telephone or other communications device, in much the same manner as it is already possible for police officers to apply for and receive search warrants,<sup>65</sup> domestic violence entry warrants<sup>66</sup> and listening devices warrants<sup>67</sup> by telephone.

4.50 The experience with the out-of-court issuing of these other warrants in recent years provides valuable lessons for how, and how not, to organise the detention warrants scheme. The recent inquiries in New South Wales into the death of David Gundy<sup>68</sup> and the shooting of Darren Brennan,<sup>69</sup> at the hands of the police, after the execution of search warrants issued by justices after hours, point to such major problems as: determining precisely what information was given to the justice by the police; determining precisely what the justice authorised (over the telephone) the police to do in the warrant; regulating what happens to such contemporaneous or subsequent records of the conversation and warrant as are made; remedying the fact that the information given by the police is not made under oath; determining why significant facts which could influence the issue of the warrant were not discussed at all; controlling how police choose which justice to approach for a warrant in any given case, and so on.

4.51 In order to prevent the procedure from becoming a rubber stamp, the decision-maker must have the intelligence, judgment, experience and strength of personality to be able to say "no" to police where that is the appropriate response. Applications for detention warrants during court hours will go to judicial officers (magistrates, judges) who are accustomed to making difficult decisions. (This does not necessarily screen out many cases, however. In England, under *PACE*, the approval of a magistrates' court (comprised of two or more magistrates) is required for continued detention past 36 hours.<sup>70</sup> In 1987-1988, only one application out of 89 was refused in London.)<sup>71</sup> In the course of consulting with judicial officers in New South Wales, there was widespread agreement expressed in favour of an after-hours service; however, there was equal insistence that the service could not be staffed on a roster basis by the 200 or so sitting judges and magistrates. The concerns most often advanced related to workload, cost and the possibility that judicial officers could find themselves subpoenaed to testify in subsequent proceedings where the issue of the warrant was challenged.

4.52 If judicial officers are not available, the question then becomes the choice of non-judicial officers to handle sensitive issues of deprivation of liberty. Clearly these matters should *not* be within the province of ordinary justices of the peace, who have no legal training and ordinarily no decision-making function. While justices of the peace have traditionally been authorised to issue warrants, and even to hear and determine cases in certain circumstances,<sup>72</sup> the modern approach has been to remove these powers to a smaller number of "justices of the peace employed in Local Courts Administration in the Attorney General's Department". These justices are usually employed in the Local Courts as senior clerks of court and chamber magistrates, are all experienced and legally qualified, and are likely to receive appointment as magistrates in the future. They already have a relief role in bail determinations and other matters relating to the liberty of persons.

4.53 There is an existing panel of about 20 such justices who have volunteered (and have been selected) to handle after-hours telephone applications for search, listening devices, and domestic violence entry warrants. The Attorney General's Department is in the process of reviewing the panel, and reducing the number to about twelve, with the aim of increased "quality control" and consistency. The preference is to continue with volunteers if possible, in recognition of the disruption to the lives of persons providing after-hours services, but thought will be given to conscription if this is necessary to ensure high quality. This may require additional compensation to overcome resistance to such extra duties (see below).

4.54 At present, police are given the entire roster of justices available after-hours and may choose which justice to contact. The Commission recommends (4.2) that in future, police be given a single, central telephone number for all after-hours warrant applications. The call would then be diverted to the judicial officer or justice who is on duty at that particular time. This procedure would have several important advantages. First, it avoids the practice of, and the suggestion of, police "shopping" for a compliant justice. Second, it will ensure that the workload is spread relatively evenly across the pool. Third, it would minimise any geographical or logistical problems, particularly in country areas, since a justice would always be only a telephone call away (and a 008 number could be used to avoid STD charges for country stations).

4.55 Diverter and paging technology is now very sophisticated, and well-suited for such a system. For example, an electronic diverter attached to the central telephone number could send the call to the home telephone of the person on duty that night, or to a mobile telephone, or to a paging device, anywhere in the State

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within 30 seconds. Secondary and further numbers can be programmed into the diverter, in the event that the primary number is engaged, unattended, or out of service. The programmed numbers in the diverter can be altered easily, and over the telephone, so that if the rostered person is ill or becomes unavailable for other reasons, the necessary adjustments can be made. The fact that mobile phones can be used means that rostered persons are not "chained to the telephone" at home. The NSW Guardianship Board, a quasi-judicial body which receives after-hours requests from doctors, hospitals and nursing homes for permission to provide medication or medical treatment to patients unable to offer informed consent,<sup>73</sup> reports that the use of a central number (the Board's daytime number) plus a diverter has been a considerable success. The Board uses a roster of ten people, each of whom serves as the duty officer for one week, in rotation.<sup>74</sup>

4.56 While the use of a small panel assists in ensuring quality control, there is a natural concern that it could become overwhelmed if the number of applications increases substantially. At present the panel of justices receives about 1500 telephone applications per year for search warrants (compared with about 10,000 applications which are handled during the day). This number is expected to decrease somewhat, with the planned tightening up of search warrant procedures which is currently in train. The numbers of domestic violence entry and listening devices warrant applications sought over the telephone is relatively smaller and less problematic in this regard. If the Commission is correct in its belief that only a tiny proportion of cases will require additional periods of investigative detention, and that police will pursue all investigations expeditiously and with due diligence, then a panel of the existing size should not become over-burdened. If the number of after-hours applications for detention warrants is greater than we anticipate, then the size of the panel may have to be increased. The Commission does not seek to minimise this issue, but sees it as soluble with proper monitoring and adjustment of the system, and as less compelling than the issue of deprivation of liberty.

4.57 There are costs involved in operating an after-hours system, but these are not enormous. At present, a rostered justice who receives a warrant application by telephone is compensated by a minimum of one hour's overtime payment. If the justice is obliged to convene or attend a court, a minimum of three hours of overtime is paid. The total annual overtime payment at the moment is only about \$50,000-\$60,000. If there is a need to increase the level of reward, in order to attract and maintain good people, thought should be given to creatively broadening the non-salary benefits to include extra leave entitlements and other allowances which are cost and tax effective. A number of judicial officers and court administrators consulted by the Commission suggested that the Police Service pay for the costs of the after-hours warrant application process, on a user-pays basis.

4.58 Additional, but not substantial, costs should be incurred in upgrading the equipment used in the telephone warrant process for *all* warrants, not only detention warrants. As mentioned above, there is often considerable uncertainty about the precise information put before the justice in support of the application, and then considerable uncertainty about the precise wording of the warrant which is dictated to police over the telephone. In the age of inexpensive and simple to use communications technology, this is an easily remediable problem. All applications for detention warrants would come from police stations, and virtually all police stations of any size in New South Wales are already equipped with facsimile (FAX) machines. (Most search warrant telephone applications come from police stations, although occasionally one originates from a police car and is patched through the station.) It should not be beyond the reach of the State budget to provide the ten or so justices on the after-hours panel with FAX machines at home, so that they can receive the documentation supporting warrant applications and dispatch copies of the warrant.

### **The nature of the proceedings for detention warrants (4.3-4.5)**

4.59 A presumption operates in this system that the police will ordinarily be able to complete their investigation within the initial period, so the onus lies on the police to satisfy the court (or justice) of the need for an extension of custody (that is, a delay in charging the person and making a bail determination or bringing the person before a justice to be charged). In particular, the police must satisfy the magistrate that (4.3): the investigation is being conducted diligently and expeditiously; the further period of custody is reasonably necessary to complete the investigation; there is no reasonable alternative means of obtaining the evidence<sup>75</sup> or completing the investigation short of the continued detention of the person in police custody; and the circumstances of the particular investigation make it impracticable to complete within the initial period (such as the number and complexity of the alleged offences, the number of alleged co-offenders, and the availability of witnesses, among other things - see Recommendation 3.3, which is incorporated by reference); or other emergent circumstances prevented the police from completing their inquiries in this matter (such as where all of

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the police at a small station are called away to attend another matter, leaving no one to pursue the investigation of the particular accused).

4.60 Above all, the police must satisfy the court that it is *necessary* for the suspect to remain in custody without being taken before a judicial officer. No doubt there will be occasions when it is more convenient for the police that the person remain in custody, but unless it is demonstrably necessary - that is, the investigation cannot otherwise successfully proceed - the liberty of the person should be given a higher priority.

4.61 In several cases the High Court of Australia has ruled that "in general the sufficiency or character of materials which are required for the purpose of exercising a discretion [to issue a warrant] is not a matter upon which the validity of the discretionary act is made to depend".<sup>76</sup> The fact that the presumption of validity of a warrant is *not* open to collateral attack on the basis of the nature or insufficiency of the material presented to the judicial officer means that it is even more imperative to ensure that the judicial officer receives all of the necessary information in the first instance.

4.62 The application for a detention warrant must therefore be supported by information which *fully* informs the justice of all of the relevant aspects of the matter, including: the nature of the offence; the general nature of the evidence; what investigation has already taken place and what further investigation is proposed; the reason continued custody of the person is necessary, and the extent to which a person in custody is cooperating in the investigation. The Commission has no wish to interfere with investigations in which the person is genuinely happy to be interviewed for longer than four hours. (See also Recommendation 3.1.4.) However, where a person is asserting the right to silence, it would not be proper to extend custody in the hope that the person might "break down" over time.

4.63 It is presently the case that information given by police over the telephone in support of applications for search and other warrants is *not* made on oath. The Commission believes this is unsatisfactory, and recommends (4.3.4) that the Oaths Act 1900<sup>77</sup> should be amended to provide specifically for the administration of, and the taking of, an oath by telephone (or other communications device).

4.64 Perhaps the most difficult issue faced by the Commission in this area was whether the person in custody or that person's legal representative should be given an opportunity to be heard on the question of whether a period of further detention in police custody should be ordered. The Australian Law Reform Commission<sup>78</sup> and the Gibbs Committee<sup>79</sup> both recommend that the person should be given an opportunity to be heard. The UK *PACE* legislation also provides that a suspect in police custody ("unless he is asleep"), or the suspect's lawyer, has the right to make representations to the Custody Review Officer on the issue of continued detention.<sup>80</sup> The *PACE* procedure involves only a ministerial decision by the police officer, however, and is not a judicial or administrative proceeding.

4.65 There is a strong presumption that the rules of natural justice will attach to any legal proceeding, particularly where fundamental rights are at issue. However, the Commission decided on balance that the person should *not* have an affirmative right to be heard on these proceedings (4.3.1), and that this should be made clear in the legislation. This decision was made on the basis that it would not be practicable to have a full, contested hearing at this stage. Such a hearing would seriously disrupt the investigation, put a strain on the resources of the police (and legal aid), and not be susceptible to proper handling over the telephone when the courts are not in session. The Commission envisages that a requirement for a full hearing would present such obstacles that the whole system would be placed in question, as happened in Victoria (see above).

4.66 Our Recommendations already do include significant safeguards and presumptions in favour of the person in custody, including the right to receive legal assistance at the police station. We believe, therefore, that it is not *necessary* for the person to be heard on the application, although we have recommended that it should be *open* for the court (or justice) hearing the application, at its discretion, to ask to speak with the person or the person's lawyer. The Commission likens this *ex parte* warrant procedure to other warrant procedures, rather than to judicial or administrative hearings. At present, the subject of an arrest warrant, search warrant or listening devices warrant is not given an opportunity to be heard; indeed, it would be rare for the person even to be aware of the matter. The stakes involved in the detention warrant process are considerable, but not necessarily any greater than those in respect of the other warrants. Here, the person is already under arrest, and the only issue is whether the detention should be extended for up to eight more hours. Search warrants and domestic violence

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entry warrants render a person open to a highly intrusive police procedure, which involves some element of danger in enforcement. Listening devices warrants open a person to sustained interference with privacy. Further, the law in the area of detention warrants should be clear and in legislative form, in contrast to the law surrounding search warrants, which is highly complex, uncertain and unsatisfactory in many respects.<sup>81</sup>

4.67 Where a court (or justice) is satisfied that the application should be granted, a detention warrant should be issued for a specified period of up to eight hours. It is certainly open for the warrant to be made valid for less than the full eight hours, if it is believed that the necessity for custody ends short of that period. The order issuing the warrant must be reduced to writing, of course, including specific reasons for approval. The warrant and any other documents (such as the information on oath) used in the process shall become part of the official record of the court (the court to which the justice is normally attached, in the case of a telephone application). Upon the trial of a person who was subject to a further period of custodial detention, the detention warrant must be tendered in court as a condition of the admission of any evidence obtained by the police during this period. The warrant is *prima facie* (but rebuttable) evidence of the lawfulness of the detention (see Recommendation 8.6).<sup>82</sup> If a court refuses the application for a detention warrant, the person must be dealt with according to the procedures in Recommendation 3.7; that is, released unconditionally, released on the basis that a summons will issue, or charged. If charged, a bail determination must be made.

4.68 Where an application is refused, no further applications in respect of the same matter shall be entertained unless supported by new evidence, so that police may not keep applying until they find a compliant judicial officer or justice (4.5). Every application must disclose whether there have been any prior applications made in respect of the same, or substantially the same, matter (4.3.3(1)).

4.69 In order to facilitate the process of making and deciding on applications for detention warrants (whether in court or over the telephone), we recommend (4.3.5) that suitable forms should be developed for use by the police and the courts (and justices).

### **The need to monitor the issuing of detention warrants (4.6)**

4.70 All warrants are meant to be subject to review at some time after their issue. In practice, however, there is little or no follow-up or scrutiny of issued warrants, despite statutory requirements that there be a report back on the warrant.<sup>83</sup> For example, judicial officers often are unaware of what actually happened after the issue of the warrant. Was it ever enforced? If it was a search warrant, did the police actually find the items they were looking for? It may be that judicial officers would exercise their discretion differently if they were familiar with the results of earlier applications.

4.71 In any event, there is a need for a much greater degree of accountability by both police and judicial officers in this area. Accordingly, the Commission recommends that an independent monitoring device be put in place to oversee and periodically review all detention warrants. Special attention should be paid to warrants which follow telephone applications, and those issued by justices (as opposed to courts). An annual report should be made to Parliament on the operation of the system. See Recommendation 10, discussed in Chapter 7.

### **Alternative custody review systems considered**

4.72 The Commission seriously considered, at the request of some senior police officers, an alternative system of approving extensions based on the United Kingdom's *PACE* procedures. Under *PACE*, the initial detention must be approved by a Custody Officer, who is of at least the rank of sergeant.<sup>84</sup> The custody must be reviewed no later than at the six hour mark by a police officer who is of at least the rank of inspector, and then again at no later than the 15 hour mark.<sup>85</sup> At 24 hours, the review must be conducted by a superintendent, who can authorise a further 12 hours of detention.<sup>86</sup> Judicial approval only becomes necessary at the 36 hour mark, when an application for further detention may be made to a magistrates' court, which has the authority to issue a detention warrant for up to another 36 hours.<sup>87</sup> The warrant may be extended for another 24 hours by a further application to a magistrate, with a 96 hour limit to the total period of detention,<sup>88</sup> unless separate anti-terrorism legislation is relied upon.<sup>89</sup> The *PACE* legislation intended for there to be "continual review" of the need for detention, with the 6/15/24/36/72 hour markers meant to serve as outer limits rather than as targets. However, in practice the release times tend to bunch around the six and fifteen hour marks, with little evidence of continual

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review.<sup>90</sup> Less than one per cent of suspects are actually detained for more than 24 hours without charge, and about three-quarters are released before six hours (the first review).<sup>91</sup>

4.73 Adapting the *PACE* system of custody review to our general proposals, it was suggested that before the expiry of the initial four hour period of custodial investigation, an application for an extension of up to eight hours could be made to a commissioned police officer (Inspector or above). This senior officer would then have personal responsibility for the police handling of the matter from that time on. The custody review officer would be obliged to listen to representations from the person in custody and his or her legal adviser, and the decision whether or not to grant the application would be based on the same criteria discussed above. There would then be a “trapdoor” procedure for the very small number of extraordinarily difficult cases. In these cases, a further extension of up to, say, twelve additional hours could be granted, after a full hearing before a District or Supreme Court judge.<sup>92</sup> (See also the commentary on Recommendation 3.1, above.)

4.74 There are some significant advantages in a review and extension system operated by senior police officers. First, the logistical and cost problems involved in presenting applications for detention warrants to judicial officers, especially outside of normal court hours, are largely obviated. Senior police would have to make themselves available instead, but there are currently 482 commissioned officers between the ranks of Inspector and Chief Superintendent,<sup>93</sup> as compared with a panel of between 10 and 20 justices. Such officers already carry pagers and are accustomed to after-hours work (which is a factor in their award wage). Secondly, it would bring a commissioned officer into every major investigation at an early stage, with a clear and specific *statutory* responsibility for supervising the conduct of the investigation to ensure that it is carried out properly, expeditiously, and with due regard for the rights of the person in police custody.<sup>94</sup> At the same time, it could be argued that commissioned police officers would not be any more likely to “rubber stamp” requests for further custody than judicial officers or justices, given the relative rarity of judicial refusal of police applications for other forms of warrants in Australia (or of detention warrants in the United Kingdom).

4.75 After careful consideration, however, the Commission was unable to accept the use of a ministerial procedure completely in the hands of the police as a substitute for judicial scrutiny of the necessity for further custody. The Commission believes that it is basic to our system of justice and legality that procedures which touch on the fundamental liberty of individuals be determined by an independent judicial officer. This allows for an impartial assessment of the circumstances of each case, by a court officer trained to make these types of decisions, free from any suggestion that police interests are given greater weight than those of the person in custody. A major study of the English *PACE* system has concluded that the custody review procedure

tends to be routinized and insubstantial, at least in the early stages ... Solicitors comment that their representations rarely influence review officers, who treat extension of detention as routine. ... In general, our research suggests that the review system is conducted in a way which produces records apparently complying with the letter of *PACE*, but that its spirit is largely dissipated in the routinization of procedures. Particularly in the case of earlier reviews, the quasi-judicial, independent role of the review officer which *PACE* seems to demand has been implemented as merely administrative routine.<sup>95</sup>

4.76 At present, our community insists that matters of deprivation of fundamental liberties require independent judicial oversight. This is the case with the issue of arrest warrants, search warrants, listening devices warrants, and so on. While some problems with judicial supervision of warrants have been identified, there is no suggestion that the solution is to place the warrant-granting power in the hands of the police themselves. Rather, the challenge is to ensure that independent scrutiny of applications for warrants is enhanced. The Commission is confident that our recommendations will achieve this in respect of detention warrants, and that some of our recommendations are adaptable to other forms of warrants.

### FOOTNOTES

1. (1986) 161 CLR 278.

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2. See *Attorney General for NSW v Dean* (NSW Court of Appeal, Unreported Judgment No 40142/90, 11 October 1990), discussed in Chapter 1, above.
3. "Police Powers and Suspects' Rights: Detention for Questioning", (1990) *Campaign for Criminal Justice Bulletin No 6*, at 1.
4. See the Crimes Act 1958 (Vic), s464A, inserted by the Crimes (Custody and Investigation) Act 1988 (Vic).
5. Police Administration Act 1979 (NT), as amended by the Police Administration (Amendment) Act 1988 (NT).
6. Law Reform Commissioner of Tasmania, *Police Powers of Interrogation and Detention* (Report No 64, 1990) 14.
7. (1986) 161 CLR 278, at 311.
8. *Ibid*, at 313.
9. See the *Report of the Royal Commission on Criminal Procedure* (UK Home Office, London, 1981) (the "Philips Report") 127-128.
10. See s4E(5)(c) and (11) of the Traffic Act 1909.
11. Letter to the Commission from the South Australia Commissioner of Police, Mr D A Hunt, 8 August 1990.
12. Australian Law Reform Commission, *Criminal Investigation* (Report No 2, 1975) (hereafter, "ALRC 2") para 92.
13. Consultative Committee on Police Powers of Investigation, Custody and Investigation: Report on Section 460 of the Crimes Act 1958 Victoria (1986) (hereafter, the "Coldrey Report") at 68-69. See also J H Curran and J Carnie, *Detention or Voluntary Attendance* (Scottish Office Research Study, 1986). This figure may not be entirely reliable as a guide, given the fact that a large proportion of persons attending police stations in Scotland are deemed to be the "voluntarily".
14. Review Committee of Commonwealth Criminal Law, *Detention Before Charge* (Interim Report, March 1989) para 5.6 (hereafter, the "Gibbs Report").
15. Clause 23C(4)(b). The limit is two hours in respect of children, Aboriginals and Torres Strait Islanders under cl 23C(4)(a).
16. Coldrey Report, *ibid*, at 31.
17. *Ibid*, at 33.
18. *Ibid*, at 31.
19. *Ibid*, at vii.
20. *Ibid*, at 37.
21. *Ibid*, at 94.
22. *Ibid*, at 97.

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23. J K Avery (with K Drew, C S Ireland and W J Haran), *Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document "Police Powers of Arrest and Detention"* (February 1988) 58.
24. See s464A(4) of the Crimes Act 1958 (Vic).
25. The UK *PACE* legislation, Part III, draws a distinction between "non-arrestable", "arrestable" and "serious arrestable" offences, but poses difficult problems of interpretation and enforcement.
26. Gibbs Report, App D, cl 85F and 85G of the Draft Bill. Serious offence is defined as any offence that is punishable by imprisonment for a period exceeding 12 months.
27. Clause 23C(4).
28. See ss 476 and 501 of the Crimes Act 1900 (NSW).
29. Summary Offences Act 1988 (NSW) s4.
30. Crimes Act 1900 (NSW), ss 61 and 495.
31. See, eg, assault with intent to commit a felony, s58, or assault occasioning actual bodily harm, s59.
32. The Commission is aware that "proportionality" is waning in importance as a distinct element of criminal defences such as provocation and self-defence. See, eg, the High Court case of *Zecevic v DPP* (Victoria) (1987) 71 ALR 641. However, the concept is still appropriate and useful in sentencing and, by analogy, with respect to the deprivation of liberty that occurs with detention for investigation.
33. Instruction 32.02.
34. U K Police and Criminal Evidence Act 1984, s36.
35. Although a more junior officer may perform the functions for a time if a custody officer is not available: s36(4).
36. Sections 37-39.
37. Section 39(6).
38. K Bottomley, C Coleman, D Dixon, M Gill, and D Wall, *The Impact of Aspects of the Police and Criminal Evidence Act 1984 on Policing in a Force in the North of England: Final Report* (Centre for Criminology and Criminal Justice, University of Hull, 1989) 139-140; B L Irving and I K McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (Police Foundation, London, 1989) 117.
39. Bottomley et al, *ibid*, at 139-140.
40. Coldrey Report, at 41.
41. *Ibid*, at 31 and 37.
42. ALRC 2, at para 97, and cl 19(2) of the Draft Bill.
43. Gibbs Report, at paras 5.7-5.8.
44. See also the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990, cl 23C(6).
45. *Ibid*, at para 5.7(e). Cf s138(p)(ii) of the Northern Territory's Police Administration Act 1979.

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46. Intoxicated Persons Act 1979 (NSW).
47. See also the Gibbs Report, at para 5.8.
48. ALRC 2, at para 97.
49. Avery, *op cit*, at 59.
50. Letter from Ms Claire Vernon to Det Phil Meehan, 21 October 1987.
51. *Id.*
52. See, eg, the Crimes Act 1900 (NSW), s353A, and the Bail Act 1978 (NSW), s18.
53. Section 18.
54. Part III.
55. See S Lee, "Bail Conditions" (1987) 103 *Law Quarterly Review* 327; K Warner, "Bail Conditions and Civil Liberties" (1983) 8 *Legal Services Bulletin* 124; and *R v Hilton* (1986) 7 NSWLR 745.
56. ALRC 2, at para 89(g).
57. Clause 18 of the draft *Criminal Investigation Bill* 1975 (Cth), ALRC 2, at 171.
58. Summary Offences Act 1953 (SA), s78(6).
59. See note 9, above.
60. Coldrey Report, *op cit*.
61. *Ibid*, at 42.
62. *Ibid*, at 46-47.
63. *Ibid*, at 45.
64. See Recommendation 5, discussed in Chapter 5.
65. Search Warrants Act 1985 (NSW), s12.
66. Crimes Act 1900 (NSW), s357G.
67. Listening Devices Act 1984 (NSW), s18.
68. See the *Fifteenth Annual Report of the Ombudsman of New South Wales* (1990) 165-167.
69. *Ibid*, at 167-169.
70. Section 43 of the Police and Criminal Evidence Act 1984.
71. *Metropolitan Police Commissioner's Annual Report* 1988, 26-27.
72. See generally the Justices Act 1902 (NSW).
73. Under the Disability Services and Guardianship Act 1987 (NSW) and the Protected Estates Act 1983 (NSW).

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74. Communication from the Chairman, Mr Roger West.
75. See s16(2)(c) of the Listening Devices Act 1984 (NSW) which imposes the same requirement in respect of the grant of a warrant to use a listening device.
76. *McArthur v Williams* (1936) 55 CLR 324, at 366, per Dixon, Evatt and McTiernan JJ. See also *Murphy v R* (1989) 86 ALR 35, at 42-43.
77. Section 11A.
78. ALRC 2, at paras 89(f) and 95.
79. Gibbs Report, at paras 5.9-5.12.
80. UK Police and Criminal Evidence Act 1984, s40(12).
81. See C Cunneen, *Aboriginal Police Relations in Redfern: With Special Reference to the Police Raid of 8 February 1990* (Report to the Human Rights and Equal Opportunity Commission, May 1990) 16.
82. See *Murphy v R* (1989) 86 ALR 35, at 42-43.
83. See, eg, the Search Warrants Act 1985, s21(1).
84. UK Police and Criminal Evidence Act 1984, ss 34 and 36.
85. Section 40.
86. Section 42.
87. Section 43.
88. Section 44.
89. Prevention of Terrorism (Temporary Provisions) Act 1984.
90. Bottomley et al, op cit, at 131.
91. D Dixon, C Coleman and K Bottomley, "Consent and the Legal Regulation of Policing" (1990) 17 *J of Law & Society* 1.
92. The Australian Law Reform Commission also "envisaged" that a third period of custodial investigation would be available in extremely rare cases, upon authorisation from a Supreme Court judge, but it did not elaborate on this point. See ALRC 2, at paras 89 and 95.
93. There are 290 Inspectors, 122 Chief Inspectors, 45 Superintendents and 25 Chief Superintendents. Information supplied courtesy of Insp Steve Ireland.
94. Mr Justice J A Lee was critical of current police practice in this regard in the *Report of the Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therein* (June 1990).
95. D Dixon, K Bottomley, C Coleman, M Gill and D Wall, "Safeguarding the Rights of Suspects in Police Custody" (1990) 1 *Policing and Society* 115, at 131-132.

## 5. Safeguards for Persons in Custody

### RECOMMENDATION 5:

#### Safeguards for the Detained Person

##### 5.1 Right to remain silent not affected

Nothing in this recommended scheme affects the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations (except where already required to do so under State or Commonwealth legislation), and no adverse inference may be drawn from such a refusal.

##### 5.2 Right to contact a friend or relative

5.2.1 Before any questioning or investigation commences, the person in custody must be informed that he or she has the right to communicate or attempt to communicate with a friend or relative to inform that person of his or her whereabouts, and the person must be given the opportunity to meaningfully exercise that right.

5.2.2 Where an arrested person is moved from one police establishment to another, he or she is entitled to contact a friend or relative to inform that person of the new place of detention.

5.2.3 The right to contact a friend or relative may be delayed (only for so long as is reasonably necessary) only where the custody officer believes on reasonable grounds that any such communication will probably result in: the escape of an accomplice; the disappearance, fabrication or destruction of evidence; or hindering the recovery of any person or property relevant to the alleged offence.

5.2.4 Where a friend or relative has agreed to attend the police station, the police must delay any questioning of, or obtaining a statement from, the person for a reasonable period until the friend or relative has arrived. However, the police shall not be obliged to wait for more than two hours from the time that the agreement to attend was made.

##### 5.3 Right to communicate with a lawyer

5.3.1 Before any questioning or investigation commences, the person in custody must be informed that he or she has the right to communicate or attempt to communicate with a lawyer, and the person must be given the opportunity to meaningfully exercise that right.

5.3.2 If the person in custody wishes to contact a lawyer, the person must be allowed to communicate with the lawyer or the lawyer's office over the telephone in such circumstances which enable the conversation to remain private and confidential. When the lawyer arrives at the police station, the police shall permit a private conference for a reasonable period between the person and his or her lawyer.

5.3.3 An arrested person's lawyer should be entitled to be present during police questioning or other investigations, and should be entitled to give legal advice. Anything which the lawyer says during the questioning should be a formal part of the record of the questioning. The role of the lawyer in the interrogation process and the police power to exclude a lawyer for misbehaviour in limited circumstances should be spelled out in the code of practice relating to police interrogation.

5.3.4 Where a lawyer has agreed to attend the police station, the police must delay any questioning of, or obtaining a statement from, the person for a reasonable period until the lawyer

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has arrived. However, the police shall not be obliged to wait for more than two hours from the time that the agreement to attend was made.

5.3.5 A duty solicitor scheme should be established by the Legal Aid Commission so that all persons in police custody for the purpose of investigation may have access to a lawyer, at their request. This service would need to have some lawyers available on a 24-hour basis. In more remote areas, it may be necessary for legal advice to be provided by telephone or radio when it is not practicable for lawyers to appear at the police station within a reasonable period. Funding should be made available by the State Government to make effective this fundamental safeguard.

5.3.6 If the person in police custody is not in a position to obtain advice from a lawyer of his or her choice, then the custody officer shall inform the person of the availability of legal advice free of charge through the duty solicitor service and how that service may be contacted. (As discussed in Recommendation 2.5.6, literature to this effect should also be available in English and a wide variety of community languages.)

### **5.4 Right to an interpreter**

If a person in custody requests the assistance of an interpreter, or it is apparent to the police officer that the person does not have a knowledge of the English language that is sufficient to enable that person to understand the questioning, or to answer questions or to make a statement, the police must, before any questioning or investigation commences, make arrangements for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present. (This applies equally in respect of deaf and hearing impaired persons, and other persons with profound communications difficulties.)

### **5.5 Right of foreign national to communicate with consular officer**

5.5.1 If a person in custody is not a citizen or permanent resident of Australia, the custody officer must, before any questioning or investigation commences, inform the person in custody that he or she may communicate or attempt to communicate with the consular office of the country of which the person is a citizen. Police must defer the questioning or investigation for a reasonable time in the circumstances to enable the person to make, or attempt to make, the communication.

5.5.2 As per paragraph 5.2.3, the right of a person to contact a consular official may be delayed (only for so long as is reasonably necessary) only where the custody officer believes on reasonable grounds that any such communication will probably result in: the escape of an accomplice; the disappearance, fabrication or destruction of evidence; or hindering the recovery of any person or property relevant to the alleged offence.

### **5.6 Rights to medical assistance, rest, refreshment**

5.6.1 Where a person in police custody requests medical treatment in respect of illness or an injury, or it appears to the police that medical treatment is required, the custody officer shall immediately take such reasonable action as is necessary to ensure that the person is provided with appropriate medical treatment.

5.6.2 A person in the custody of the police shall be provided with reasonable refreshments and reasonable access to toilet facilities.

5.6.3 Where a person has been in the custody of police for the purpose of investigation for four hours or more (including any "time-out" periods), that person shall, if it is practicable to do so, be provided with facilities to wash or shower, and to shave and change clothes, before being brought before a justice.

## **COMMENTARY ON RECOMMENDATION 5**

### **Taking Rights Seriously**

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5.1 In Chapter 1, we referred to the gap between the traditional *concern* of the common law with the fundamental rights and liberties of individuals and practical *reality* of the lack of readily enforceable rights and safeguards. In this part, we recommend the affirmation of those safeguards in legislation, and the provision of sufficient resources to give meaning to the language of rights and to make the safeguards readily available to those in need.

5.2 Preoccupation with the criminal trial, and its attendant safeguards, has resulted in inadequate attention and resources devoted to the criminal investigation process, which affects vastly more people and shapes the outcome of every criminal matter. As Sallmann and Willis have written

a great many persons' convictions have been signed, sealed and delivered in the police station during the criminal investigation process. ... Criminal investigation is a stage of the criminal process which is almost completely dominated by the police. With the full resources of a powerful State behind them, the police pursue the suspect as the adversary. They are usually in positions of enormous physical, psychological, emotional and legal superiority ... .<sup>1</sup>

Similarly, McBarnet has noted

the accused is alone with the police and the formal structure creates an informal situation of unilateral power. The police are in the position to define what may be an ambiguous situation for the accused with no contradictory expertise to challenge it. Arrest, search, fingerprinting, questioning, being charged are all part of a degradation ritual which constructs an atmosphere of guilt. Alone with the police the accused is exposed to only one version of how the law defines his behaviour, how the evidence looks against him, be he innocent or guilty, and what his chances are in court. Given their own involvement, interests, and indeed beliefs in the case the police are likely to create, with the best will in the world, a sense of pending conviction which makes co-operation, not silence, the only sensible reaction.<sup>2</sup>

5.3 In the past few decades there has been an explosion in the area of administrative law and administrative remedies, with a concomitant flow of public resources, predicated on the recognition of the value of openness, fairness and accountability in the exercise of government powers. Despite the rhetoric about the concern for fundamental liberty, and the higher stakes involved in the criminal sanction, the criminal process has fallen far behind in terms of fairness and accountability - most particularly in the funding, infrastructure, and review procedures necessary to ensure effective police accountability.

5.4 The procedures designed to ensure that any interference with the liberty of the subject accords with rules of procedural fairness must not be avoided merely because such procedures have financial or administrative implications for the agencies of enforcement. It would be perverse if the executive government could control not only compliance with basic legal rights but also their very existence simply by declining to provide adequate facilities to ensure that those rights are enjoyed in practice.<sup>3</sup>

5.5 The safeguards recommended here are already available in a large number of jurisdictions, in Australia and overseas. Full implementation would not unduly strain the public purse, nor amount to more than a tiny fraction of the resources already devoted to law and order. As a group of English commentators have remarked

the cost of arresting and detaining any one suspect - not to mention interrogation and prosecution when this occurs - must be substantial. If it is considered worth the expenditure of state resources to detain particular suspects there is no reason in principle why it should not be worth the further expenditure of state resources to assist them ... .<sup>4</sup>

5.6 It should not go unmentioned that the massive costs of the royal commissions and other inquiries which are periodically required to investigate the tragic breakdowns in the criminal justice system could be better spent assuring the routine, proper functioning of that system in the first instance.

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5.7 The recommended rights and safeguards are qualified by practical exigencies, as are virtually all rights. For example, a person in custody should normally be entitled to communicate with a friend or relative, or a consular officer (in the case of a foreign national) as soon as practicable, but these communications may be delayed if this is necessary to prevent the escape of an accomplice, tampering with evidence, or the recovery of a missing person or property relevant to the alleged offence.<sup>5</sup> Similarly, a person in custody should normally have the right to have the friend or relative, lawyer or consular official present at the police station, but the necessity for police to wait for the arrival of such persons is limited to a reasonable period of up to two hours.<sup>6</sup> (There is no such time qualification on the arrival of an interpreter, however, whose presence is necessary before any police interview of a suspect may take place.)<sup>7</sup>

5.8 The assertion of rights will inevitably come with some costs to persons held in police custody - possibly financial, if they are asked to pay for part or all of the services provided, but more likely in terms of time. All of the studies of the take-up of rights by suspects in England after the *PACE* reforms indicate that only a small proportion of people in custody actually ask to see a lawyer, even when informed that there is a free-of-charge duty solicitor service available. As a study sponsored by the Lord Chancellor's Department found, to the surprise of the researchers

suspects really do not want advice much of the time and... are far more concerned about getting out of the station quickly than about getting help in order to start their case on strong ground.<sup>8</sup>

Thus the priorities of the suspects themselves are likely to be the biggest factor in keeping costs down.

### The right to silence (5.1)

5.9 The traditional "right to silence" is a concept which embodies a number of procedural aspects: a person is not obliged to answer police questions, in general (although there are increasing numbers of statutory exceptions<sup>9</sup>); police must inform (caution) suspects of this before questioning them; no negative inference (of guilt) should be drawn by a jury from the exercise of the right to silence; and the defendant is a competent but not compellable witness at trial<sup>10</sup> - that is, he or she is not obliged to give evidence. The High Court has stated that this right derives from the

cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover the existence of such a power tends to lead to abuse and to "the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice".<sup>11</sup>

5.10 Despite the *right* to remain silent and the reminder of this right by police, the fact is that a very large proportion of suspects in custody do make admissions. Stevenson's study of District Court trials in New South Wales found that confessional evidence was tendered by police in over 96 per cent of cases,<sup>12</sup> and other empirical studies confirm this phenomenon.<sup>13</sup> There is a considerable body of literature on the psychological and other pressures which compel confessions,<sup>14</sup> and there has been much controversy in recent years over allegations of fabricated confessions (see Chapter 6, below).

5.11 The rationale for the right to silence and the pros and cons regarding retention have been canvassed at great length by the Australian Law Reform Commission<sup>15</sup> and others,<sup>16</sup> and we do not intend to do so again here.

5.12 The work of the Commission on this reference did not involve a major reconsideration of the traditional "right to silence", particularly since the Australian Law Reform Commission did undertake this project in its work on the laws of criminal investigation and evidence. The ALRC has consistently recommended retention of the traditional position,<sup>17</sup> and we have earlier adopted that Commission's reports in this respect.<sup>18</sup> Our Recommendation in this Report (5.1) is in the nature of a savings clause; that is, nothing in our recommendations is intended to affect the existing right (which is somewhat uncertain in application).<sup>19</sup> This is the same approach taken in the recent Victorian legislation<sup>20</sup> based on the Coldrey Report,<sup>21</sup> the Report of the Review Committee

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of Commonwealth Criminal Law (the Gibbs Committee),<sup>22</sup> and the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990, cl 23S, which is currently before the federal Parliament.

5.13 Retention of the right to silence was foreshadowed in our earlier discussion paper,<sup>23</sup> and was strongly supported by most of the submissions. The main proponents of abolition were the New South Wales Police Commissioner and the Commonwealth Director of Public Prosecutions, who both argued in their submissions, in essence, that if the safeguards for suspects in custody are going to be strengthened (such as access to legal advice) there should be a “trade-off” with the right to silence.<sup>24</sup> The Commission does not accept, however, that giving practical effect to the rights and safeguards which suspects are already meant to possess at common law is sufficient justification to abandon other protections. All of the empirical evidence available suggests the marginal effect of the right to silence;<sup>25</sup> there is no empirical evidence linking the right with increased acquittal rates or any other problem with the administration of criminal justice.

5.14 Apart from the operational significance of the right to silence in the legal system, there is also an important underlying democratic value that there should be some distance allowed between the citizen and the State, with its massive power and resources. The proponents of the abolition of an ancient common law right, based on democratic values and continually reaffirmed by the High Court of Australia, bear a heavy persuasive burden which has not yet been met.

### **The right to contact a friend or relative (5.2)**

5.15 This recommendation reflects what should be the current practice in New South Wales<sup>26</sup> (and the rest of Australia<sup>27</sup>) of allowing a friend or relative to be notified of the circumstances and whereabouts of the person in police custody, provided that this does not endanger the police investigation. The period immediately following an arrest is recognised as being an emotionally demanding time, during which time the person may well be vulnerable and exercise poor judgment because of feelings of shame, despair and hopelessness. The comfort provided by contact with friends and family can do much to alleviate the difficulty.

5.16 As the Australian Law Reform Commission has noted

Some psychological advantage is doubtless obtained by a police investigator keeping the suspect isolated from any contact with the outside world. This justification is clearly insufficient ... to deny a person in custody - who is still, let it not be forgotten, presumed by our law to be innocent until proven guilty - the opportunity to communicate with at least one friend or relative in order to explain his position and make any necessary arrangements.<sup>28</sup>

5.17 The right to notification assists not only the person in custody, but that person's family, who may be concerned over the person's absence, particularly if the detention is extended (overnight or on the weekend).

5.18 Unfortunately there is no empirical study available of police practices and suspect take-up rates in this area in Australia. In England and Wales, the Police and Criminal Evidence Act 1984,<sup>29</sup> (*PACE*) and the subordinate Code of Practice,<sup>30</sup> also provide a right to have someone informed when arrested (known there as “intimation”). Several studies of police records after the introduction of *PACE* indicate that only one in four or five suspects in police custody actually avail themselves of this right, with a higher take-up rate in the city than in rural areas.<sup>31</sup>

5.19 We recommend that the right to notify friends and family be qualified (5.2.3), so that police may delay the communication if necessary to prevent the escape of an accomplice, tampering with evidence, or interference with the recovery of a missing person or property relevant to the alleged offence. Police discretion in exercising this delaying power should be closely monitored to ensure that it is used sparingly. Notwithstanding anti-terrorist legislation and other problems in England, the notification of family and friends was delayed in less than one per cent of cases there in 1989.<sup>32</sup>

### **The right to legal assistance (5.3)**

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5.20 The Australian Law Reform Commission has noted

The right to consult with a lawyer during the course of pre-trial police investigations is one of those traditionally claimed civil rights to which an almost universal obeisance is paid in principle, but which is greeted with very great circumspection in practice by law enforcement authorities.<sup>33</sup>

5.21 The common law authorities have consistently referred to the “right” to legal advice as “one of the most important and fundamental rights of a citizen”.<sup>34</sup> However, this is another one of those common law “rights” that lacks meaning in practice, translating into something like “if you have your own private lawyer, the police should not unreasonably deny you access to him or her”. In Chapter 1 we referred to the fact that the High Court of Australia, in *McInnis v The Queen*,<sup>35</sup> has ruled that there is no enforceable common law or “constitutional” right to legal assistance, even at trial, in the absence of any specific statutory guarantees.

5.22 Legal assistance in court is normally available in New South Wales under State law.<sup>36</sup> The Commission believes that there is also an urgent need for legal advice at the police station *before* trial, when it could make some difference. There is a trend towards statutory recognition of - and funding for - the provision of legal assistance in the criminal investigation phase in those jurisdictions which authorise detention in police custody for the purpose of investigation. For example, statutory provisions to this effect were included in Victoria in 1988,<sup>37</sup> and in England and Wales by the Police and Criminal Evidence Act 1984 (*PACE*),<sup>38</sup> and are recommended at the federal level by the Review Committee of Commonwealth Criminal Law.<sup>39</sup>

5.23 The New South Wales Police Commissioner’s Instructions provide that persons in custody should be given the opportunity to seek access to legal assistance,<sup>40</sup> but there is no routine mechanism for seeing that legal advice is actually delivered. Few suspects would “have a solicitor” a phone call away, and there is no duty solicitor scheme for police stations in New South Wales as there is for the local courts. In keeping with the lack of empirical knowledge about the rest of the criminal investigation process in New South Wales (and Australia), there is simply no empirical evidence available about the extent to which suspects in police custody actually ask for, and receive, legal assistance. There is much anecdotal evidence (including that contained in submissions to the Commission), however, that few suspects in custody have lawyers present at the interview and that police do not encourage the presence of lawyers, to put the proposition mildly.

5.24 The purpose of the right to legal advice whilst in custody is to ensure that the arrested person is treated fairly by the criminal process. The recognition of such a right not only helps to ensure that the right to silence and the privilege against self-incrimination receive due attention, but also means that if a statement is made by the arrested person it cannot later be objected to on the ground that it was involuntarily made or unfairly obtained.

5.25 A lawyer attending a police station could be expected to perform several valuable services for a client: informing a client who is not under arrest that he or she is under no obligation to remain at the police station; informing a client who has been arrested of his or her legal rights and assisting the client to exercise those rights; ensuring that the client is not unfairly treated; and assisting the client to secure release on bail.<sup>41</sup> Lawyers also can aid communication between police and suspects, by explaining the suspect’s legal situation, including the obligation to answer questions in some circumstances and the benefits of cooperation in others. Our Recommendations (5.3.3) suggest that the role of the lawyer in the criminal investigation process be clearly spelled out in detail in a Code of Practice, as is the case in England,<sup>42</sup> for the benefit of both lawyers and police officers.

5.26 The lack of enthusiasm by police for the presence of lawyers is no doubt based on a general conviction that lawyers interfere with the smooth operation of the investigation process and, most particularly, discourage their clients’ cooperation with the police. This was certainly the view of English police forces before the introduction of the *PACE* legislation in 1984, but there is evidence that the police have now come to live with the routine presence of lawyers at police stations.<sup>43</sup> A survey of police officers in the North of England after *PACE* found that 72 per cent now believe that the presence of a lawyer affects the interview “not at all” (40%) or “not much” (32%).<sup>44</sup> Similarly, 78 per cent of police reported that the presence of a lawyer did not affect the suspect’s exercise of the right to silence.<sup>45</sup> Given the growing number of statutory exceptions to the right to silence, lawyers often may be placed in the position of advising clients who are asserting their right to silence that they actually do have to answer certain questions (or face the adverse consequences of a refusal to do so).

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5.27 One recent study which is critical of the quality of legal assistance offered at police stations in England after *PACE* suggests that the presence of lawyers may benefit the police more than suspects, by “giving the false impression of complete police compliance with the law”.<sup>46</sup> Another recent English study has found that

all too often, ...legal advisers are largely passive and non-interventionist in police interrogations. The self-perceived role of many is to act purely as witness to the proceedings (often making a full contemporaneous note) and consequently as a check on how interrogations are conducted.<sup>47</sup>

5.28 Because of this passivity on the part of English legal advisers, very few police officers reported the need to ever challenge a legal adviser's interventions in interrogations.<sup>48</sup> It seems less likely that New South Wales lawyers would show the same degree of deference or passivity. The same study notes that it is often clerks or “runners” who actually attend at the police station (rather than solicitors) - many of them ex-police officers, who are retained because of their experience with criminal procedure and useful contacts.<sup>49</sup>

5.29 Earlier in this Chapter we referred to the low take-up rates of legal assistance by suspects in England, even though there is a free duty solicitor scheme. A national study done for the British Home Office in 1988 found that the median request rate for legal assistance was about 25 per cent, although there was considerable variation between police stations.<sup>50</sup> Other studies confirm this, showing a substantial rise from the pre-*PACE* position, but rarely exceeding one suspect in four.<sup>51</sup> The take-up rate by children is even lower.<sup>52</sup> At least it is now the case that almost all of the suspects in England who request legal advice actually receive it.<sup>53</sup> Most suspects in custody prefer to get through the criminal investigation process as quickly as possible,<sup>54</sup> and those suspects who received legal assistance in England in 1987 were detained over four hours longer than those who did not.<sup>55</sup> Apart from delay there are other real and imagined disincentives to requesting legal assistance

Intimidated by the situation, distrusting or unused to dealing with lawyers, assuming that legal services are costly, fearing that asking for legal advice implies guilt, and in some cases being discouraged by the way the offer is made, most suspects feel that the appropriate response in the situation is to decline.<sup>56</sup>

5.30 Our Recommendations provide that all persons in police custody be informed of the right to contact a lawyer and be given a realistic opportunity to exercise that right (5.3.1). Further details could be provided in a Code of Practice. Since the communication between lawyer and client is confidential and privileged, it is essential that this be conducted in private (5.3.2). Most police stations have adequate facilities to enable lawyer-client communications to take place out of the hearing of both police officers and any other persons who may be present at the police station.

5.31 It has been suggested to us in submissions that there should be a restriction on communications with lawyers similar to that placed on communications with friends and family (Recommendation 5.2.3), whereby a police officer could delay the exercise of the right to contact a lawyer if the officer believed on reasonable grounds that the investigation will be endangered. Although some lawyers have been suspected of, or even convicted of, involvement in criminal activity, any person who is admitted to practise as a lawyer in New South Wales has been accepted by the Supreme Court to be a person of “good fame and character”<sup>57</sup> and as such is entitled to be entrusted to provide legal representation and advice without first having to satisfy an additional test determined by a police officer on an occasional basis. To authorise police to delay or forbid communications with lawyers would permit police to effectively “black ban” certain lawyers and disadvantage their clients.

5.32 The proceedings to remove a lawyer from the Roll for character reasons involve a lower standard of proof than in criminal proceedings;<sup>58</sup> if police have evidence that a lawyer is involved in criminal or unethical conduct then it is imperative that they should launch a criminal or disciplinary action. The only possible exception which we can envisage as a valid ground for denying the right of access to a lawyer is where there is in existence a warrant for arrest or other criminal process issued by a court or justice in relation to the lawyer sought to be contacted by the arrested person.

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5.33 As mentioned, few persons in police custody have a regular solicitor, so we recommend the establishment of a 24-hour duty solicitor scheme (5.3.5) to ensure that those persons who wish to receive legal assistance, despite all the disincentives, will actually do so. This will necessitate a significant amount of public funding, although the amount will pale in comparison to the vast sums already spent on police, courts and prisons.

5.34 Partly in response to our Discussion Paper 16, the Legal Aid Commission of New South Wales conducted a comprehensive study as to the feasibility of providing advice and assistance for suspects at police stations.<sup>59</sup> The Legal Aid Commission (LAC) determined that a 24-hour legal assistance scheme which was based on a salaried model within the LAC would cost about \$1.6 million (in 1988 dollars) per year, assuming a generous take-up rate of 30 per cent of all adults and children in police custody.<sup>60</sup> The cost of a 24-hour hour scheme based entirely in the private profession was estimated at \$3.76 million, also assuming that assistance is provided to 30 per cent of all adults and children presenting at police stations.<sup>61</sup> These costs appear to accord roughly with those in England under the scheme currently in operation there.<sup>62</sup> Even purely "voluntary" schemes come at some cost, with the need for considerable administrative support to arrange rosters and keep the service functioning and for communications equipment (telephones, pagers etc.). The LAC estimates the cost of voluntary schemes to be about \$19,000 per area covered.<sup>63</sup> (By way of contrast, the "Milperra Bikie Massacre Case" was estimated to cost over \$5 million for the first year alone, including \$2.5 million in Police Department expenditures and \$1.2 million in legal aid.)<sup>64</sup>

5.35 We make no recommendation at this time about the preferred mode of delivery of 24-hour legal assistance at police stations. As the LAC feasibility study<sup>65</sup> and reviews of the English scheme<sup>66</sup> make clear, there are advantages and disadvantages in each approach. The implementation of the scheme in New South Wales will require careful consideration and flexibility in order to match the different needs and conditions in different parts of the State.

5.36 In England, where there are far fewer geographical and logistical problems than Australia, much of the legal assistance to persons in police custody is provided over the telephone.<sup>67</sup> This is much less satisfactory than assistance in person, for obvious reasons, but it is better than no assistance and has the advantages of much lower costs to the State and much less delay for the person in custody and the police. It may be that a portion of legal assistance in New South Wales should be offered in this way, particularly in country areas where the caseload would not justify the regular presence of a duty solicitor. There are a number of 24-hour telephone "hotline" legal assistance schemes already in operation in Australia, such as the Alphaline service from Fitzroy Legal Centre in Victoria (for children); schemes run by the Aboriginal Legal Services in Victoria and Western Australia; the Flemington-Kensington Youth Line in Victoria; the Queensland Youth Advocacy Centre scheme; and the "Arrest Express" scheme in Western Australia. Most of these operate on very limited budgets, using a combination of (a few) salaried lawyers and (many) volunteers.

### **The right to an interpreter (5.4)**

5.37 The criminal investigation process is probably the "most stressful of all legal situations"<sup>68</sup> with this stress increased further by cultural and linguistic difficulties. Proper communication is essential, and barriers to effective communication disadvantage both suspects and the police. According to the 1986 census, there is now a large number of persons from non-English speaking backgrounds resident in New South Wales,<sup>69</sup> and it is necessary to ensure that their needs are being met in the criminal justice system. (It should be noted that the Attorney General of New South Wales has established a Working Party in conjunction with the Ethnic Affairs Commission to review and evaluate the role and use of interpreters within the state's legal system.)

5.38 At common law there is no particular rule of law or practice which compels the use of interpreters by police whilst interrogating persons with no command (or limited command) of the English language, but a trial judge would have the discretion to exclude evidence obtained by police in those circumstances if the judge was satisfied that admission of the evidence would be unfair to the accused, or would be prejudicial (measured against the probative value), or would not be in the public interest.<sup>70</sup> (See chapter 6 regarding the admissibility of evidence obtained unfairly, improperly or illegally.)

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5.39 The Commonwealth and most State police forces have standing orders or legislation dictating the requirements for the use of interpreters in the criminal investigation process,<sup>71</sup> but there is currently no specific rule in New South Wales.<sup>72</sup> A survey of police stations carried out by the New South Wales Ethnic Affairs Commission in 1984 indicated that as a matter of practice, police make the effort to obtain interpreters in “serious” cases, but “such concerns seem not to be as strong when the interrogation of non-English speaking peoples centres on less ‘glamorous’ offences”.<sup>73</sup>

5.40 In New South Wales the interpreters used by police are usually supplied by the Ethnic Affairs Commission, but occasionally they may be a friend of the suspect, an interpreter from a private service, or another police officer “used as a matter of convenience and in cases where it is not possible to obtain interpreters from the Commission”.<sup>74</sup> In our Recommendation we urge the use of a “competent interpreter”, the term of art used by the legislation in Victoria,<sup>75</sup> the Australian Law Reform Commission,<sup>76</sup> the Review Committee of Commonwealth Criminal Law,<sup>77</sup> and the Commonwealth Attorney General’s Department<sup>78</sup> to mean qualified, certified and independent interpreters. The general undesirability of having police officers act as interpreters, and of police forces retaining their own “in-house” interpreters, has been commented upon in a number of reports.<sup>79</sup>

5.41 An arresting officer and the custody officer should inform an arrested person of the right to an interpreter (see Recommendation 2.5.2), and if necessary then make arrangements to ensure that a competent interpreter will be present at the interview. Questioning must be deferred until the interpreter has arrived and has translated the caution and the other material that the custody officer is obliged to provide to the suspect prior to the interview (see Recommendation 2.5 generally). This is also the approach of the *Crimes (Investigation of Commonwealth Offences) Amendment Bill* 1990, cl 23N, which is presently before the Federal Parliament.

5.42 As the wording of the Recommendation makes clear, the right to an interpreter is not limited to non-English speakers, but also operates in favour of those with other profound communications difficulties, such as the deaf and hearing impaired.

### **The right of foreign nationals to consular assistance (5.5)**

5.43 In the 1988 codification of procedural safeguards in Victoria, a right of an arrested foreign national to communicate with a consular official was included.<sup>80</sup> The Review Committee of Commonwealth Criminal Law has recommended adoption of this provision at the federal level.<sup>81</sup> This right derives from Article 36 of the Vienna Convention on Consular Relations, brought into force in Australia by the Consular Privileges and Immunities Act 1972 (Cth).

5.44 The New South Wales Police Commissioner’s Instructions currently provide for visits to non-citizens in police custody by consular officers “for the purpose of conversing, corresponding, arranging for legal representation”.<sup>82</sup> We recommend codifying this right, together with the other safeguards for persons in police custody. Communication with a consular official may be delayed on the same basis as other communications (see above), where reasonably necessary to prevent the escape of an accomplice, tampering with evidence or recovery of a missing person or stolen property.

### **The right to humane treatment (5.6)**

5.45 In Recommendation 2.7, police are made expressly responsible for the safety and well-being of persons in their custody; in Recommendation 2.8, persons in custody are guaranteed treatment that accords with respect for human dignity. Apart from the general principles of law of civilised societies, these rights derive from the International Covenant on Civil and Political Rights,<sup>83</sup> to which Australia is a party.<sup>84</sup>

5.46 The Recommendation in 5.6 calls for access to medical treatment for those in custody who require it; the provision of reasonable refreshments and toilet facilities; and facilities to enable the arrested person to shower, shave and to change clothes (in other words, to look presentable), if practicable, prior to going before a justice. Codification of these rights should not be controversial: the New South Wales Police Commissioner’s Instructions already so provide.<sup>85</sup>

## **RECOMMENDATION 6:**

### **Special Rules Regarding Children, Aborigines and Other Vulnerable Persons**

The Commission recognises that there are certain groups in the community which are especially vulnerable and may be at particular risk when involved in the process of police investigation. The Commission identifies the following as groups which require special protection in police custody: (a) children; (b) Aborigines and Torres Strait Islanders; (c) mentally ill or mentally disordered persons, and persons with developmental disabilities; (d) persons from non-English speaking backgrounds; and (e) other persons who, by reason of some disability, are unable to communicate properly with the police (such as the seriously visually or aurally impaired, persons who cannot speak, and so on). As a general matter, the Commission recommends that special rules be developed to regulate the custodial investigation of persons in these categories, and that no questioning or investigation take place in respect of such persons unless an appropriate independent person is present. However, detailed consideration of this issue will be the subject of a further Report by the Commission.

#### **COMMENTARY ON RECOMMENDATION 6**

5.47 It is already recognised by our criminal justice system that there are categories of persons who are particularly vulnerable in police custody and require special consideration and treatment in the criminal investigation process. For example, section 13 of the NSW Children's (Criminal Proceedings) Act 1987 provides that no statement, admission, confession or information made by a child is admissible in evidence unless an independent adult (who is not a police officer) was present at the interview of the child by the police.<sup>86</sup> If the child is above the age of 16, the independent person may be of the child's choosing. There is also some case law which is protective of the position of children<sup>87</sup> and Aborigines<sup>88</sup> who are being interrogated in police custody. The New South Wales Police Commissioner's Instructions contain specific protective provisions dealing with the questioning and treatment of juveniles,<sup>89</sup> non-citizens,<sup>90</sup> Aborigines and Torres Strait Islanders,<sup>91</sup> and mentally ill and handicapped persons.<sup>92</sup>

5.48 In keeping with the general thrust of our report, the Commission recommends that these guidelines and practices be formalised in legislation and subordinate regulations (codes of practice), with sufficient resources and accountability mechanisms to ensure that the protective features and safeguards are regularly available in practice. This has also been the recommendation of the UK Royal Commission on Criminal Procedure (the Philips Commission),<sup>93</sup> the Australian Law Reform Commission in two major reports,<sup>94</sup> the Review Committee of Commonwealth Criminal Law (the Gibbs Committee),<sup>95</sup> and the Youth Justice Coalition (with the general support of the NSW government and police).<sup>96</sup>

5.49 Our earlier Discussion Paper on *Police Powers of Arrest and Detention* contained proposals for the development of "special rules" in regard to children, Aboriginal Australians, and non-English speakers.<sup>97</sup> There was virtually unanimous support for this approach, including from the Commissioner of Police.<sup>98</sup>

5.50 In deferring its detailed recommendations in this area, the Commission is in no way intimating that the problem of police dealings with especially vulnerable persons is somehow marginal to our general concerns about the regulation of criminal investigations. It is notorious that Aborigines are very heavily over-represented in the criminal process, and the current Royal Commission into Aboriginal Deaths in Custody is a grim reminder of the consequences of this. The problems of children in the criminal justice system have been highlighted again recently by the release of the report of the Coalition for Youth Justice. The special difficulties of mentally and physically disabled persons involved in the investigation of crime are also apparent.<sup>99</sup>

5.51 It is the Commission's recognition of the *centrality* of this problem, both in principle and empirically, both for group members and for police, which compels the pragmatic decision to grant ourselves more time to carefully consider the issues and, most importantly, to consult with the appropriate persons and organisations in the community. While Discussion Paper No 16 did raise the question of special rules, the Commission did not receive (nor did it directly solicit) any submissions which concentrated on this or even dealt with it in detail.

5.52 The special problems of recent migrants and persons from non-English speaking backgrounds are addressed to a large extent in Recommendations 2.5.6 (production of literature about rights in community languages); 2.5.2 and 5.4 (provision of interpreters); and 5.5 (communication by foreign nationals with consular

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officials). However, the Commission does not rule out further attention to the problems of these groups in its next report.

### FOOTNOTES

1. P Sallmann and J Willis, *Criminal Justice in Australia* (Oxford University Press, Melbourne, 1984) 16.
2. D McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan, London, 1981) 61.
3. See *Johns v Release on Licence Board* (1987) 9 NSWLR 103, at 113-116.
4. A Sanders, L Bridges, A Mulvaney and G Crozier, *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (University of Birmingham Law School and the Lord Chancellor's Department, 1989) 174. (Hereafter "Sanders et al".)
5. See Recommendations 5.2.3 and 5.5.2.
6. See Recommendations 5.2.4, 5.3.4, 5.5.1.
7. Recommendation 5.4.
8. Sanders et al, op cit, at 190.
9. See, eg, ss 5(1) and 5(3) of the Traffic Act 1909 (NSW), and s233B(1)(e) of the Customs Act 1901 (Cth). Under s541 of the *Companies Code* a liquidator who has obtained the appropriate court order can compel a person to answer questions. See *Hamilton v Oades* (1989) 7 ACLC 376.
10. See Art 14(3)(g) of the International Covenant on Civil and Political Rights.
11. *Sorby v The Commonwealth* (1983) 57 ALJR 248, at 253 per Gibbs CJ. See also *Bruce v R* (1987) 74 ALR 219.
12. N Stevenson, "Criminal cases in the NSW District Court: a pilot study" in J Basten, M Richardson, C Ronalds and G Zdenkowski (eds), *The Criminal Injustice System* (Australian Legal Workers Group (NSW) and Legal Service Bulletin, Sydney, 1982) 107-108, and 140-141.
13. See S J Odgers, "Police Interrogation and the Right to Silence" (1985) 59 ALJ 78, at 86; C J Ayling, "Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions" [1984] *Wisconsin Law Review* 1121.
14. Australian Law Reform Commission, *Criminal Investigation* (Report No 2, 1975) (hereafter "ALRC 2") para 149, fn 242; B Irving, *Police Interrogations: a Case Study of Current Practice* (Royal Commission on Criminal Procedure Research Study No 2, 1980); D Dixon, C Coleman and K Bottomley, "Consent and the Legal Regulation of Policing" (1990) 17 *J of Law & Society* 1; M D Kirby, "Controls Over Investigation of Offences and Pre-trial Treatment of Suspects" (1979) 53 ALJ 626, at 638-639.
15. ALRC 2, at paras 146-150; Australian Law Reform Commission, *Evidence* (Interim Report No 26, 1985) paras 756-758 ("ALRC 26"); and Australian Law Reform Commission, *Evidence* (Report No 38, 1987) paras 160 and 165-169 ("ALRC 38").
16. For another summary of the contemporary debate, see S Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53 *Modern L R* 709.
17. ALRC 2, at paras 9, 137-150; ALRC 26, at paras 753-758; and ALRC 38, at paras 160, 165-169.
18. New South Wales Law Reform Commission, *Evidence* (Report No 56, 1988) para 2.38.

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19. Problem areas include where the suspect answers some questions and not others(selective answering); where there is a failure to disclose an alibi or defence; and where there is a countervailing presumption, such as the doctrine of recent possession. See S J Odgers, "Police Interrogation: A Decade of Legal Development" (1990) 14 *Crim L J* 220, at 237-238; ALRC 26, App C, paras 118-120; *Woon v The Queen* (1964) 109 CLR 529; *Beljajev* [1984] VR 657, at 662.
20. See s464J of the Crimes Act 1958 (Vic), as amended in 1988.
21. Consultative Committee on Police Powers of Investigation, Custody and Investigation: Report on Section 460 of the Crimes Act 1958 Victoria (1986) 10-14 (hereafter the "Coldrey Report").
22. Review Committee of Commonwealth Criminal Law, *Detention Before Charge* (Interim Report, March 1989) paras 6.4-6.5 (hereafter the "Gibbs Committee"). Cf Criminal and Penal Methods Reform Committee of South Australia, *Second Report: Criminal Investigation* (1974) ch 7, and the Criminal Law Revision Committee (England), *Eleventh Report: Evidence (General)* (1972) 19-28, which argued (unsuccessfully) for abolition of the right to silence. The recommendations of the Eleventh Report on this point were not followed by the 1981 Royal Commission on Criminal Procedure, chaired by Sir Cyril Philips, nor is the right to silence abrogated by the 1984 PACE legislation.
23. New South Wales Law Reform Commission, *Police Powers of Arrest and Detention* (Discussion Paper No 16, 1987) 108-109.
24. Submission of the New South Wales Commissioner of Police (1988), 65-67; submission of the Commonwealth Director of Public Prosecutions (1988), 7-8.
25. Kirby, *op cit*, at 638-639. See D Dixon, "Politics, Research and Symbolism in Criminal Justice" (1991) *Anglo-American Law Review* (forthcoming) for a review of the empirical evidence on silence, pre- and post-PACE.
26. New South Wales Police Commissioner's Instructions 32.35 and 32.54.
27. See s464C of the Crimes Act 1958 (Vic); and ALRC 2, at paras 103-104.
28. ALRC 2, at para 103.
29. Section 57.
30. Code of Practice "C", s5.
31. K Bottomley, C Coleman, D Dixon, M Gill and D Wall, The Impact of Aspects of the Police and Criminal Evidence Act 1984 on *Policing in a Force in the North of England: Final Report* (Centre for Criminology and Criminal Justice, University of Hull, 1989) 110-111 (hereafter "Bottomley et al"); D Brown, Detention at the Police Station under the Police and Criminal Evidence Act 1984 (Home Office Research Study No 104).
32. Brown, *ibid*, cited in Bottomley et al, *ibid*, at 111-112.
33. ALRC 2, at para 105.
34. *Samuel* [1988] 2 All ER 135, per Hodgson J.
35. (1979) 143 CLR 575, Murphy J dissenting; cf Article 14(3) of the International Covenant on Civil and Political Rights, and the position under the U S Constitution, as interpreted in *Gideon v Wainwright* (1963) 372 US 335 and *Argersinger v Hamlin* (1971) 407 US 25.
36. Legal Services Commission Act 1979. There are means and merit tests imposed on the grant of legal aid.

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37. Crimes Act 1958 (Vic), s464C(1)(b) and (2)(b), inserted by the Crimes (Custody and Investigation) Act 1988.
38. Sections 58-59; Code of Practice "C", s6. For a case in which confessional evidence was excluded by the Court of Appeal because of the absence of a solicitor at the interrogation, see *R v Moss*, reported in (1990) 140 *NLJ* 665.
39. Gibbs Committee, paras 6.7-6.8.
40. Instructions 32.35 and 32.45-32.51.
41. See N Rees, I McGill and A Woods, "*The Role of the Lawyer At the Police Station*" in *Lawyers Practice Manual* (NSW) (Law Book Co, Sydney, 1983), Ch 1.1.
42. See U K Code of Practice "C", Part 6, made under *PACE*.
43. See J Baldwin, "Police Interviews on Tape" (1990) 140 *NLJ* 662.
44. Bottomley et al, op cit, at 119, Table 6.14.
45. Ibid, at 121 and 142.
46. A Sanders and L Bridges, "Access to Legal Advice and Police Malpractice" [1990] *Criminal Law Review* 494, at 507.
47. D Dixon, K Bottomley, C Coleman, M Gill and D Wall, "Safeguarding the Rights of Suspects in Police Custody" (1990) 1 *Policing and Society* 115, at 124.
48. Id.
49. Ibid, at 123.
50. Brown, op cit.
51. Bottomley et al, at 114-115.
52. Ibid, at 115.
53. Ibid, and Sanders et al, op cit.
54. Sanders et al, op cit, at 190.
55. Bottomley et al, at 103. Other factors, such as offence seriousness, also contributed to the length of detention in these cases.
56. Dixon, Coleman and Bottomley, "Consent", op cit.
57. Legal Profession Act 1987 (NSW), ss 9 and 16. See D Weisbrot, *Australian Lawyers* (Longman Chesire, Melbourne, 1990) 199 and 208.
58. See *Weaver* [1977] 1 *NSWLR* 67; *Briginshaw v Briginshaw* (1938) 60 *CLR* 336; and *NSW Bar Association v Livesey* [1982] 2 *NSWLR* 231. See also Weisbrot, *ibid*, at 201-210.
59. Legal Services Division, Legal Aid Commission, *Feasibility Study into the Provision of Advice and Assistance for Suspects at Police Stations* (June 1988).
60. Ibid, at 9-12 and 20. The cost would be \$2.67 million with a take-up rate of 50%, and \$3.73 million with a 70% rate.

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61. Ibid, at 15-16 and 20. The cost would be \$6.24 million with a 50% take-up rate, and \$8.76 million with a 70% rate.
62. Sanders et al, op cit, Ch 9 (esp at 174).
63. Legal Aid Commission, op cit, at 16, 19 and 21.
64. Det Supt R H Stevenson, "Milperra Bikie Massacre" (July-Sept 1988) *Australian Police Journal* 84, at 96.
65. Ibid, at 4-9.
66. Sanders et al, op cit, at 181-182.
67. Ibid, at 177 and 182.
68. Commonwealth Attorney General's Department, *Access to Interpreters in the Australian Legal System* (Draft Report, August 1990) 60 (hereafter "Access to Interpreters").
69. There were nearly 700,000 persons from non-English speaking backgrounds living in New South Wales, of whom 140,000 assessed themselves as having little or no English: ibid, at 16.
70. *R v Czerwynski* [1954] VLR 483.
71. See Australian Federal Police General Instruction No 34; Queensland Police Standing Orders; South Australia Summary Offences Act ss 79a(b)(ii) and 83a; Tasmanian Police Standing Orders 408.11; and Victoria Crimes Act 1958, s 464D.
72. Cf New South Wales Police Commissioner's Instruction 85.
73. Access to Interpreters, at 67.
74. Ibid, 62.
75. Crimes Act 1958 (Vic), s464D.
76. ALRC 2, at para 264.
77. Gibbs Committee, at para 6.10.
78. Access to Interpreters, Ch 6.
79. A Jakuvowicz and B Buckley, *Migrants and the Legal System* (Report to the Law and Poverty Section of the Australian Commission of Inquiry into Poverty, 1975) Part 4; and ALRC 2, at para 264.
80. Section 464F of the Crimes Act 1958 (Vic), added by the Crimes (Custody and Investigation) Act 1988.
81. Gibbs Committee, at para 6.12.
82. Instruction 32.56. See also Instruction 57.37-57.46. "Non-citizen" is defined in 57.37 as a person who is not an Australian citizen or is a dual national. See also English Code of Practice "C" s7, made under PACE.
83. Articles 7 and 10(1).
84. See ALRC 2, at para 135.
85. See Instructions 32.60 (re medical assistance); 32.86 and 77.15 (re washing and toilet facilities); and 32.87 (re change of clothes). See also English Code of Practice "C" ss 8-9, made under PACE.

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86. A court has the discretion to admit evidence obtained in breach of this section, however, if it is satisfied that there was sufficient reason for the absence of an independent person, or the circumstances of the particular case so require. See also the Crimes Act 1958 (Vic), s464E.
87. See, eg, *Dixon v McCarthy* [1975] 1 NSWLR 617; *Collins v R* (1980) 31 ALR 257.
88. See, eg, *R v Anunga* (1976) 11 ALR 412; *R v Williams* (1976) 14 SASR 501; *Coulthard v Steer* (1981) 12 NTR 13; and *R v Jabarula* (1984) 11 A Crim R 131. See also N Rees, "Police Interrogation of Aborigines" in J Basten et al (eds), *The Criminal Injustice System* (Australian Legal Workers Group (NSW) and Legal Service Bulletin, Sydney, 1982) 36.
89. Instructions 31.18-31.21, 32.109, and 35 (especially 35.08-13, and 35.48). Instruction 31.18 is similar in terms to the provisions of s13 of the Children's (Criminal Proceedings) Act 1987. See also N Rees, "The Rules Governing Police Interrogation of Children" in Basten et al, *ibid*, at 68.
90. Instructions 31.58, 32.56 and 57.
91. Instructions 32.38, 32.49 and 38.
92. Instruction 32.74.
93. *Report of the Royal Commission on Criminal Procedure* (1981). The recommendations of this Report were codified in the PACE legislation and Codes of Practice in 1984. See, especially, Code of Practice "C" on Detention, Treatment and Questioning of Persons by Police Officers, ss 1.5 and 3.7-3.8 regarding juveniles; ss 1.4 and 3.9-3.10 regarding mentally disordered and mentally handicapped suspects; and ss 1.6 and 3.14 regarding suspects who are blind, visually handicapped, deaf, illiterate or unable to communicate.
94. ALRC 2, especially chapter 9; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, 1986) para 565.
95. Review Committee of Commonwealth Criminal Law, *Detention Before Charge* (1989) 48-49, and draft bill clauses 85H, 85J, 85L, 85M and 85N.
96. Coalition for Youth Justice, *Kids In Justice* (Youth Justice Coalition, Sydney, 1990) 245-256.
97. NSWLRC DP No 16 (1987) 137-138, proposals 62-64.
98. J K Avery, *Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document "Police Powers of Arrest and Detention"* (February 1988), 98-99. The Commissioner sounded one cautionary note, however, that the question of "who is an Aborigine?" should be clearly addressed, so as to "avoid exploitation of any special rules laid down for the benefit of those in genuine need" (at 98).
99. See, eg, SC and R Hayes, *Mental Retardation: Law, Policy and Administration* (Law Book Co, Sydney, 1982) 395-397; B L Irving and I K McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (Police Foundation, London, 1989) 234.

## 6. Regulating Custodial Interrogation: Evidence and Procedure

### RECOMMENDATION 7:

#### The Conduct of Custodial Investigation

##### 7.1 The development of codes of practice

7.1.1 Codes of Police Practice should be developed in the manner of those in use in the United Kingdom to replace the Police Commissioner's Instructions in relation to the detention, treatment and questioning of suspects, as well as other aspects of criminal investigation. The Codes of Practice will serve to provide operational instructions to members of the Police Service at a level of detail unsuitable for legislation.

7.1.2 These Codes of Practice should be statutory instruments, promulgated only after the public exposure of, and debate over, draft codes, and should be subject to parliamentary disallowance.

7.1.3 A Working Group should be established forthwith to manage the development of the Codes of Practice. The Group should consist of the members of the Police Board, as well as representatives of interested groups and the general community appointed by the Attorney General.

7.1.4 The Codes of Practice should be readily available at all police stations for consultation by police officers, detained persons and members of the public.

##### 7.2 Electronic recording of interviews

7.2.1 All police stations should be equipped, as soon as possible, with facilities to electronically record all interviews with persons in police custody for the purpose of investigation.

7.2.2 A caution administered under Recommendation 2.5 shall be electronically recorded at the beginning of any interview. Prior to any questioning for the purpose of investigation, there should be a series of standard questions which establish whether the person in custody understands his or her rights.

7.2.3 The interview of the person by the police should be recorded from beginning to end and, to the extent practicable, any contact between the person and the custody officer should also be recorded.

7.2.4 If an admission was allegedly made prior to the commencement of the electronically recorded interview, the statement shall be put to the person at the interview and the person asked whether he or she agrees that the statement was made. (See also Recommendation 8.5.2.)

7.2.5 A police officer shall have the power to suspend the recording of the interview where this has been requested by the person being interviewed, or where it is necessary for the comfort of the participants, or in order to ensure that the questions asked cover all matters relevant to the investigation. The reason for the suspension shall be recorded just prior to the suspension of the interview and again at the recommencement of the interview.

7.2.6 Where the person in custody states or otherwise indicates that no questions will be answered or that no statements will be made, or that no further questions will be answered, the fact of these events must be recorded. In these circumstances, police will not persist with questioning. (See also Recommendation 3.5.2.)

7.2.7 The equipment used to record the interview or the procedure adopted shall include a means of continuous verification of the time at which the interview was conducted. There should be

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safeguards designed to ensure that recordings are safely kept and are neither tampered with nor destroyed.

7.2.8 A copy of the audiotape of a police interview shall be given to the person interviewed or to the person's lawyer as soon as is reasonably practicable.

7.2.9 A detailed Code of Practice shall be developed to regulate all aspects of, and to ensure the fair and proper conduct of, all electronically-recorded police interviews.

7.2.10 The recording facilities in police stations should not be confined to use for the recording of interviews with suspects. They may also be used for the purpose of taking statements from witnesses or for photographing matters relevant to an investigation.

### COMMENTARY ON RECOMMENDATION 7

#### Codes of police practice (7.1)

6.1 The Commission recommends that police Codes of Practice should be developed along the lines of those currently in use in England and Wales pursuant to ss 60, 66 and 67 of the UK Police and Criminal Evidence Act 1984 (*PACE*). There are now five British Codes of Practice, regulating police practices in relation to the major areas of criminal investigation: Code "A" is on Stop and Search; Code "B" is on the Search of Premises and Seizure of Property; Code "C" (which is of most interest to this Report) is on Detention, Treatment and Questioning of Persons by Police Officers; Code "D" is on Identification; and Code "E" is on Tape Recording.

6.2 There are several reasons why the Codes of Practice approach is preferable to maintenance of the existing New South Wales Police Commissioner's Instructions<sup>1</sup> in respect of criminal investigations. First, the Codes of Practice would be promulgated as statutory instruments (regulations), subject to parliamentary disallowance.<sup>2</sup> This gives the Codes the force of law and provides for formal, open, legal regulation of the criminal investigation process for the first time. Codes would not be able to be changed unilaterally by the Police Commissioner, as the Instructions currently may be. The NSW Police Commissioner's instructions are rarely cited by the courts in New South Wales or seen as having significant legal effect. By way of contrast, the UK Codes of Practice are now regularly cited by the British courts,<sup>3</sup> and taken seriously.<sup>4</sup> In Recommendation 8.4, below, we provide that evidence obtained illegally or improperly by the police be presumed inadmissible. Such an approach is contingent on the police being able to determine, with speed and certainty, what the rules and standards of conduct actually are.

6.3 Secondly, the process of development of the Codes of Practice should involve persons outside the police force, and allow for community consultation and input. The United Kingdom experience with producing the recent Revised Codes of Practice provides a helpful precedent. The Home Office produced a first draft of the Revised Codes. This was then distributed to the various police forces for comment. A Home Office barrister produced a second draft in light of the police responses. This second draft was then released for public comment, and submissions were called for. A Working Group was established which contained Home Office representatives, police officers, lawyers, legal academics and heads of relevant government departments. The Working Group considered the submissions and produced a third draft, which was again released for public comment. The fourth and final draft followed. Because of the extensive public consultation there was widespread confidence in the fairness of the proposed Codes of Practice, and their promulgation did not become a party political issue. The process nevertheless does provide an opportunity for democratic (legislative) scrutiny of policing practices.

6.4 The form of the Codes of Practice allows for periodic review, a great benefit which is not usually available in practice in respect of legislation. Indeed, the UK Codes of Practice have already been revised.<sup>5</sup> Representative committees at the national and local levels are being maintained in order to keep the Codes under continuing review.<sup>6</sup>

6.5 The Commission recommends (7.1.3) that a Working Group be established in New South Wales to manage the development of Codes of Police Practice for this State. The Working Group should include: the members of the Police Board, and representatives of the Attorney General's Department, the New South Wales

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Law Reform Commission, the Police Association, the Law Society, the Bar Association, the Legal Aid Commission, academic lawyers, and the community (appointed by the Attorney General).

6.6 In a submission to the Law Reform Commission on this reference, the NSW Commissioner of Police expressed the view that the general public - as opposed to lawyers and other interest groups involved in the criminal justice system, who are likely to make formal submissions - should have a greater role in the law reform process.<sup>7</sup> We agree. Unfortunately, not only are the existing Police Commissioner's Instructions issued without any community consultation, they were, until very recently, actually *unavailable* to the general public. The Commission believes that the Codes of Practice should be produced in an open fashion, should be widely available for purchase by interested members of the public,<sup>8</sup> and should be readily available in every police station.<sup>9</sup>

6.7 The Police Commissioner's Instructions presently cover a wide range of topics, many of which relate to internal police matters. These matters should properly remain in the Instructions, with only those criminal procedures which directly affect the public (see also Recommendation 3.5.3) to be hived off to new Codes of Practice.

### **Electronic recording of interviews (7.2)**

6.8 The electronic recording of police interviews with suspects is an idea whose time has come. Indeed, it is an idea whose time came decades ago.<sup>10</sup> It is not surprising that there were no submissions in general opposition to the Commission's earlier proposal that interviews be recorded,<sup>11</sup> although there are some differences at the level of detail.

6.9 The controversy over "police verbals", or allegations of the unreliability or fabrication of confessional evidence produced by the police, has been the most vexed question in the criminal process in Australia in recent times.<sup>12</sup> Several major Royal Commissions of Inquiry have found widespread and seriously disturbing evidence of police verbals: the Lucas Inquiry in Queensland;<sup>13</sup> the Beach Inquiry in Victoria;<sup>14</sup> and the Fitzgerald Inquiry in Queensland,<sup>15</sup> all detail specific cases and general concerns. The Fitzgerald Inquiry found that the routine falsification of evidence was a feature of "police culture"

As part of that culture, many police are routinely involved in misconduct, in rejecting the applicability of the law to police, in improperly influencing the outcome of court proceedings, and in lying under oath as well as breaching their oath to enforce the law. ... Such verballing involves a rejection of fundamental standards.<sup>16</sup>

Just recently, at the New South Wales Independent Commission Against Corruption inquiry into allegations of police harassment of anti-corruption campaigner Mr Eddie Azzopardi, the counsel assisting the inquiry summed up the evidence given as disclosing a "police culture of lying".<sup>17</sup>

6.10 The High Court of Australia has also expressed its concern in a series of decisions which have limited somewhat the use of, and the weight to be given to, unsigned records of interview which are not otherwise independently verifiable or "adopted" by the accused.<sup>18</sup>

6.11 The perception of widespread investigatorial misconduct inevitably results in the tarnishing of *all* police evidence, irrespective of the integrity of the individual police officers and whether the rules have been scrupulously observed in a particular case. The lack of confidence in the integrity of police evidence not only strikes at the heart of the administration of the criminal justice system but also at the pocket-book, since routine challenges to police evidence of confessions are a major cause of delay in criminal trials and are very expensive to hear.<sup>19</sup>

6.12 The technology exists to permit the electronic recording of all transactions between the police and a suspect in a criminal matter, particularly the interview. This technology is now relatively inexpensive, simple to operate, portable, and reliable. Electronic recording will not totally eliminate allegations of police misconduct, but should reduce them dramatically. Apart from providing a high degree of certainty as to the contents of a record of interview, the recording provides evidence of the fairness and propriety of police practices. While most of the

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clamour for recording in Australia has come from defence-oriented groups, ironically the American experience with the video-recording of confessions is that it becomes a potent tool for prosecutors. The Commonwealth Director and Assistant Director of Public Prosecutions have also suggested that police may be the main beneficiaries of electronic recording.<sup>20</sup>

6.13 Pilot programs conducted in Victoria,<sup>21</sup> Tasmania<sup>22</sup>, Western Australia,<sup>23</sup> and England and Wales<sup>24</sup> all have been judged to have been very successful. The general consensus is that electronic taping of police interviews with suspects results in the significant advantages of: reduced interview times; increased numbers of guilty pleas; earlier indication of guilty pleas; fewer police officers required to attend court; shorter and more focussed trials; fewer appeals and retrials; and increased use by police of other investigative procedures besides interrogation.<sup>25</sup> The Tasmanian pilot study found that interview times were cut by two-thirds, to an average of 26 minutes each,<sup>26</sup> and the Victorian study found that interview times were greatly reduced to an average of only 12 minutes each.<sup>27</sup> There were very few suspects who refused to take part in the recording.<sup>28</sup> Despite an initial suspicion that the admission of tape recordings<sup>29</sup> and transcripts based on recordings would be subject to extensive challenges for fairness and voluntariness at trial, this proved not to be the case. In Tasmania, there was a "virtual absence of allegations of impropriety by police in the interviewing process";<sup>30</sup> in Victoria, the issues of admissibility which "once formed the core of a typical trial" have now "virtually disappeared" when electronic recording is used.<sup>31</sup>

6.14 The Commission's proposals for electronic recording have largely been overtaken by events. The Criminal Law Review Division of the New South Wales Attorney General's Department produced a report on electronic recording in 1986,<sup>32</sup> with detailed consideration of: the position in other jurisdictions; the behavioural, technological and logistical concerns; methods of operation; and costs. The New South Wales Police Service is about to commence the implementation of a system of electronic recording<sup>33</sup> based on the Criminal Law Review Division's Report.

6.15 The first electronic recording will commence in early 1991 in Sydney, with equipment to be provided on a district-by-district basis to all police stations in New South Wales over a period of about two years. The equipment to be used is a "purpose-built" machine costing about \$9000 each, which simultaneously records one videotape and three audiotapes. At the end of the two year implementation period, there will be 250 machines in use in 180 locations around the State. (There is also some consideration being given to the use of mobile videos in police cars.) The machines will record a continuous time code on all tapes (a signal on the audiotapes, a visual display on the videotapes) to protect against subsequent surreptitious editing, and there are other features built in which are aimed at making the system tamper-proof. It is anticipated that the audiotapes will normally be used to provide the evidence of what was said in the record of interview, with the videotape used only in the event of a dispute about the propriety of the interrogation. Once an interview is complete, the master videotapes will be sealed and stored securely, with access only by court order. A copy of the audiotape will be given to the suspect, with another for the investigators, and one for the files.

6.16 The Commission recommends that the caution of a suspect at the police station be electronically recorded for verification. The whole of the interview should be taped, otherwise the system is open to subsequent allegations about what happened when the tape was not running. Where an admission was allegedly made prior to the beginning of the taped interview, such as at the time of arrest or in the police car on the way to the station, the statement must be put to the suspect again at the interview and the suspect asked to confirm or deny the words. (NB See Recommendation 8.5.2 regarding the admissibility or otherwise of untaped confessional evidence.)

6.17 The Commission recommends that where a person in police custody indicates that no questions will be answered or no statements will be made, or no *further* questions will be answered or statements made, this must be recorded. In these circumstances, police must not persist with questioning. (See also Recommendation 3.5.2.). This principle already has been recognised as a common law rule of practice for the conduct of police officers by the former Chief Justice of the High Court of Australia, Sir Garfield Barwick, in *R v Ireland*,<sup>34</sup> and it is also to be found in the New South Wales Police Commissioner's Instructions.<sup>35</sup>

6.18 As discussed above, electronic recording of interviews with suspects can be a powerful tool for the prosecution, particularly after police, freed from the constraints of having to contemporaneously transcribe the

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record of interview, become familiar with the skills and techniques of “on-air” interrogation. There are important issues about the propriety of certain interrogation techniques and the acceptable limits of others. For example, it is not generally thought to be proper for the police to “cross-examine” a suspect, although this is made easier with electronic recording. There are also questions about the propriety and fairness of taping staged re-enactments of the crime,<sup>36</sup> visits to the scene of the crime and other presentational/non-discursive modes of investigation. For all of these reasons, the Commission recommends that a detailed Code of Practice be developed specifically to regulate tape recording.<sup>37</sup>

### **RECOMMENDATION 8:**

#### **Admissibility of Evidence Obtained in Breach of These Rules**

##### **8.1 Admissions influenced by violence, oppression etc.**

Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether toward the person who made the admission or toward some other person, or by a threat of conduct of that kind.

##### **8.2 Discretion to exclude admissions on basis of unfairness**

In a criminal proceeding, where evidence of an admission is adduced by the prosecution, the court may refuse to admit the evidence, or may refuse to admit the evidence to prove a particular fact, if the court believes that it would be unfair to a defendant to use the evidence, having regard to the circumstances in which the admission was made.

##### **8.3 Discretion to exclude prejudicial evidence**

In a criminal proceeding, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, the court may refuse to admit the evidence.

##### **8.4 Illegally or improperly obtained evidence**

8.4.1 Where evidence is obtained improperly or in contravention of a law or code of practice, or in consequence of an impropriety or of a contravention of a law or code of practice, the evidence shall be presumed to be inadmissible.

8.4.2 Such evidence may be admitted only where the desirability of admitting the evidence substantially outweighs the undesirability of admitting the evidence having regard to the manner in which the evidence was obtained. For the purposes of making this balance, the court shall take into account such matters as: the probative value of the evidence; the importance of the evidence in the proceeding; the nature of the relevant offence or defence; the gravity of the contravention or impropriety; whether the conduct concerned was deliberate or reckless; whether the conduct concerned was contrary to, or inconsistent with, the human rights of a person as enunciated in the safeguards proposed above (Recommendation 5), codes of practice regulating police treatment of persons in custody, or any other applicable human rights legislation; whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the conduct concerned; and whether the evidence could have been obtained in some other, proper way.

##### **8.5 Electronic recording or independent verification of any admissions by defendant**

This provision applies in relation to an admission made by a person who is under arrest or in police custody for the purpose of investigation (see Recommendation 2.3).

8.5.1 Evidence of the admission is not admissible unless there is available to the court a video or sound recording of the questioning and of the admission.

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8.5.2 If it was not reasonably practicable to have made such a recording, evidence of the admission may be admitted only if there is available to the court a video or sound recording in which the defendant freely and expressly adopts the admission which is read back to him or her, or the questioning was conducted and the admission was made in the presence of an independent person of the person's choosing (such as a lawyer, friend or relative - see Recommendation 5).

8.5.3 Evidence of the admission is not admissible unless, before the admission being tendered was made, the person was given a caution, in accordance with Recommendation 2.5.

### 8.6 Detention warrant to be tendered in court

A detention warrant issued by a judicial officer under Recommendation 4.4 must be tendered in court as a condition of the admission of any evidence obtained by the police during the period of further detention. The warrant shall be prima facie evidence of the lawfulness of the detention.

## COMMENTARY ON RECOMMENDATION 8

### Adoption of ALRC Report No 26

6.19 In the Commission's 1988 Report on Evidence,<sup>38</sup> we adopted in full (with some minor reservations and modifications which are not relevant here) Part 5 of the Australian Law Reform Commission's (ALRC) 1985 Interim Report on Evidence<sup>39</sup> regarding "Admission and Use of Evidence: Exclusionary Rules". The Commission now adapts and formally recommends again some of these provisions, which relate to evidence obtained in the course of criminal investigation. These recommendations are meant to replace the existing s410 of the Crimes Act 1900 and the consequential case law.

### Inadmissible Evidence

6.20 Section 410 of the Crimes Act prohibits the reception into evidence of any confession, admission or statement if it has been induced "by any untrue representation" or "by any threat or promise" made to the person by "the prosecutor or some person in authority". This statutory prohibition is equivalent to the common law prohibition on the reception of confessions which are not "voluntary",<sup>40</sup> and the New South Wales courts usually speak of s410 as imposing a "voluntariness" test, although this term is not expressly used in the section.

6.21 In our discussion in Chapter 3, we argued that the concept of "voluntariness" was inappropriate in the context of custodial investigation, because of the massive imbalance between the position and power (in terms of physical power, resources and information) of the police and that of a suspect in custody. (See Recommendation 2.4). In Chapter 5, we also considered the constraints against freely exercising the right to silence. (See Recommendation 5.1).

6.22 Interestingly, this situation was well understood in the nineteenth century, when the case law developed restricting custodial interrogation. As McBarnet has written

The absolute prohibition on questioning in custody expressed in late nineteenth-century English cases like *R v Gavin* (1885) 15 Cox CC 656 and *R v Male and Cooper* (1893) 17 Cox CC 689 put the emphasis very much on the danger implicit in the privacy of the police station with no-one present to see how the matter was conducted. This echoes very much the fear on which civil liberties ideology was originally based, with the common law growing up in the wake of interrogation by torture in the King's Court of Star Chamber, and a consequent emphasis on receiving only *voluntary* statements as evidence in court. Prohibiting questioning in custody at all, the idea that still comes through in the broad principles governing investigation, was clearly one extreme means of allaying those fears. Any statements made in response to questioning in custody were basically treated as involuntary. This definition of voluntary and involuntary statements however did not last long and *Ibrahim v R* [1914] AC 599 dismissed it as *not the law*.<sup>41</sup>

6.23 Irving's research study of confessions in England<sup>42</sup> for the Philips Royal Commission on Criminal Procedure concluded that "voluntariness" was an inappropriate criterion for the admission of the product of police

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interrogation, since there are enormous psychological pressures to speak and to confess. This led to the abandonment of the concept of voluntariness in the 1984 *PACE* legislation, replaced by the more satisfactory concepts of "oppression" and "fairness".<sup>43</sup>

6.24 The Australian Law Reform Commission (ALRC) canvassed at length the legal and behavioural literature on question of voluntariness,<sup>44</sup> and concluded that "Psychological studies seem to suggest that the legal concept of 'voluntariness' is a wholly inappropriate concept to apply to answers or statements provided by an accused person in custody."<sup>45</sup> In particular, the Commission found that the law ignored such important psychological factors as: social approval and disapproval; self-esteem; stress; and lack of control over key information.<sup>46</sup>

6.25 The ALRC also noted that it was unclear from the case law what the relevant considerations are in determining voluntariness: are the personal characteristics of the suspect relevant? if there is external pressure, must the pressure be regarded as improper before the admission is excluded? what sorts of untrue representations can render a confession involuntary? The ALRC also pointed to "a vast body of technical and unclear law dealing with the admissibility of a confession induced by threats or promises by a person in authority."<sup>47</sup>

6.26 The ALRC recommended that the deficiencies of the voluntariness test compelled replacement by one which prohibits the admission of confessional evidence which is "influenced by violent, oppressive, inhuman or degrading conduct".<sup>48</sup> We agree, and so recommend (Recommendation 8.1).

### Discretions to exclude unfair or prejudicial evidence (8.2-8.3)

6.27 Under the current common law, a court has the discretion to exclude a confession which is regarded as "voluntary", in certain circumstances, in order to assist the administration of justice. The circumstances giving rise to the discretions, and the rationales for these discretions, overlap, but it is convenient to refer to three different discretions, relating to fairness, prejudice, and illegally or improperly obtained evidence.

6.28 In *McDermott v R*, Chief Justice Latham stated that a trial judge has a "discretion to reject a [voluntary] confession ... if... in all the circumstances it would be unfair to use it in evidence" against the accused.<sup>49</sup> In *R v Lee*,<sup>50</sup> the full bench of the High Court held that a trial judge has a discretion to exclude confessional evidence when, "having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused."<sup>51</sup> The rationale of this discretion is not clear, with the judgments in *Lee* referring to a number of considerations. However, it may be taken that

the High Court's view seemed to be that it was not concerned *per se* with any public policy to discourage unfairness or impropriety among police officers. Rather, the basis was unfairness to the accused, the circumstances under which the confession was made indicating that it was "unfairly extracted" and "unreliable".<sup>52</sup>

6.29 The need for an "fairness" discretion is said to stem from the desire for judicial flexibility with respect to the admission of evidence, in view of the narrowness of the "voluntariness" test.<sup>53</sup>

6.30 The ALRC's 1985 Interim Report on Evidence recommended abolition of the fairness discretion, in the belief that the policy ground was covered in other discretions.<sup>54</sup> However, the 1987 Final Report recommended maintenance of this discretion, which may cover some factual circumstances not dealt with by the other discretions.<sup>55</sup>

6.31 Another discretion arises where a trial judge forms the view that the probative value of the evidence adduced by the prosecution is outweighed by the prejudice to the accused. The ALRC has summarised the basis of this discretion

It derives from a concern to protect the accused from unduly prejudicial evidence - prejudicial because it may be given too much weight or because it may lead to conviction on an improper basis.

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This concern in turn reflects both a desire to ensure accurate fact finding and a policy attempting to ensure that innocent persons are not convicted.<sup>56</sup>

The concept of “prejudice” is not precisely defined in the case law, but

clearly, it does not mean simply damage to the accused's case. It means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving evidence more weight than it should have.<sup>57</sup>

6.32 The categories of circumstances in which the “more prejudicial than probative” discretion has been found to apply include: statements made to or in the presence of the accused, but not acknowledged by him or her; the admission to police of facts already known to them (which reveal nothing new but convey an air of “confession”); statements by persons who may be especially vulnerable in police custody, such as children, Aborigines, and persons with mental disabilities; “confessions” which the trial judge believes are fabricated or unreliable; and the tendering of unsigned records of interview.<sup>58</sup> For example, in *Driscoll v R*,<sup>59</sup> the majority of the High Court of Australia considered that the tendering of an unsigned record of interview on top of the oral evidence of the police officers at trial as to the alleged admissions was prejudicial to the accused. The unsigned (and unadopted) record of interview would actually add little to the oral evidence (that is, it would have little probative weight), yet

the danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover, the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight.<sup>60</sup>

6.33 The Commission recommends (8.2 and 8.3) that these common law discretions, which will overlap on the facts of some cases,<sup>61</sup> be codified in their present form.

### Illegally or improperly obtained evidence (8.4)

6.34 One of the most difficult issues for the criminal courts has been the question of whether to receive evidence (confessional or otherwise) which has been obtained illegally or improperly, such as in the course of an illegal arrest, search or detention or as a result of an illegal wiretap. In these cases the courts must balance competing public interests: the conviction of guilty defendants on the one hand, and the censure of police misconduct and preservation of the basic integrity of the criminal justice system on the other.

6.35 In the United States, the frustration of the US Supreme Court over regular police improprieties led the Court in *Mapp v Ohio* to impose a blanket exclusionary rule in respect of unlawfully obtained evidence.<sup>62</sup> The Court based its judgment on the U S Constitution's Bill of Rights guarantee against “unreasonable searches and seizures”.<sup>63</sup> The exclusion also extends to “the fruit of the poisonous tree”; that is, to evidence which is later gained as a result of an initially unlawful act by police, such as a lead obtained from an illegal telephone wiretap. In *Mapp*, the U.S. Supreme Court reviewed all of the other mechanisms suggested for ensuring police compliance with criminal procedures and civil liberties - prerogative writs, ombudsman investigations, internal police disciplinary procedures, civil suits and so on - and expressly rejected all of them as historically unsuccessful and not susceptible to future success. The Court concluded that the only realistic and effective disincentive to police misconduct was to automatically exclude unlawfully obtained evidence. (Contrary to popular opinion, exclusion of evidence on this basis occurs in only a small percentage of cases).<sup>64</sup>

6.36 The Anglo-Australian common law courts have resisted the idea that the rules of criminal procedure should be used as a means of regulating police conduct and disciplining police for misconduct.<sup>65</sup> These courts have not seen fit to develop an exclusionary rule, relying instead on an approach which vests the trial judge in each case with discretion to exclude any evidence if its admission would operate unfairly against the accused<sup>66</sup> or, on balance, would not be in the public interest because of the tendency to undermine the administration of criminal justice.<sup>67</sup> As Barwick CJ said in *R v Ireland*

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Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. *Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.* Hence the judicial discretion.<sup>68</sup> [emphasis supplied]

6.37 This public interest discretion emerged most clearly in Australia in the High Court case of *Bunning v Cross*,<sup>69</sup> which described the remarks of Barwick CJ as “representing the law in Australia”.<sup>70</sup> The principle was applied to confessional evidence by the High Court in *Cleland v The Queen*.<sup>71</sup>

6.38 In *Cleland*, Gibbs CJ wrote that a voluntary and fairly obtained confession which was made during unlawful detention should only be excluded in the “most exceptional circumstances”.<sup>72</sup> Wilson<sup>73</sup> and Dawson<sup>74</sup> JJ were also of this view. Murphy J considered, however, that a confession obtained by unlawful or improper conduct should “generally” be excluded on the ground of public policy.<sup>75</sup> Deane J also took a stricter approach to this issue

It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.<sup>76</sup>

Consequently, according to Deane J

Where a confession has been procured while the accused was unlawfully imprisoned by the police, special circumstances, such as the illegality being slight, would commonly need to exist before the balancing of considerations of public policy would fail to favour the exclusion of evidence of the confession.<sup>77</sup>

6.39 In *Williams v The Queen*, the High Court did not dwell on the issue of the public policy exclusion of confessions obtained from persons in unlawful custody. Gibbs CJ reiterated that the majority of the Court in *Cleland* held “that it will only be in the most exceptional case that a voluntary [and fairly obtained] confession ... will be rejected on the ground that it was illegally obtained.”<sup>78</sup> Justices Wilson and Dawson suggested that trial judges who, in the exercise of their discretion, began to exclude confessions obtained from a suspects kept in police custody for longer than was allowed by law, had taken a “somewhat expansive view of the decision of this Court in *Cleland*”.<sup>79</sup> Only the joint judgment of Mason and Brennan JJ adopted<sup>80</sup> the warning of Deane J in *Cleland* that in the interests of ensuring personal liberty the restraints on police powers must be “scrupulously observed”.

6.40 The New South Wales Court of Criminal Appeal appears to lean heavily towards the approach espoused by Gibbs CJ. In *Kyriakou & Ors v DPP*,<sup>81</sup> the Court heard an appeal against the admission into evidence of a signed record of interview which was obtained after a lengthy detention in police custody. In rejecting the appeal, the Court seemed to say that the illegality or otherwise of the detention was not even a material question, as the trial judge considered that the person had not been treated unfairly. As Yeldham J (with whom the others agreed) stated

Whether or not his Honour was correct in concluding that the detention was not unlawful, he did pay regard in what he said to the fact that the appellant had been in police custody from the morning [3:50 am] of the day in question until late in the evening [10:00 pm], and had not been taken before a court... it should be observed that in *Cleland's* case the learned Chief Justice said that the rejection of confessional evidence because it has been unlawfully obtained is most exceptional... Here the trial judge... considered and took into account the time of detention, *whether that be lawful or unlawful*. His Honour found that no unfairness flowed to the appellant from the admission of the document, and that there was no unfairness in relation to his custody, or the obtaining of the confession. That having been held as a fact, his Honour was entitled to exercise his discretion in the manner in which he did, and this Court in my view should not interfere.<sup>82</sup> [Emphasis supplied.]

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6.41 The failure of the Court of Criminal Appeal to see any relevance in the question of the legality of the detention in police custody has prompted one commentator to write that

Unfortunately, the discretion to exclude unlawfully obtained confessions seems to have become a dead letter in New South Wales.<sup>83</sup>

6.42 This position is in contrast to the consistent recommendations of the Australian Law Reform Commission. The ALRC's 1975 Report on criminal investigation proposed a rule of evidence<sup>84</sup> that any material obtained in contravention of the law (common or statutory) would be *inadmissible* in criminal proceedings *unless* the proponent of the evidence convinced the court to exercise its discretion to admit the evidence. This discretion would be exercised on the basis that admission would substantially benefit the public interest without unduly derogating from the rights and liberties of any individual, having regard to such relevant factors as the gravity of the crime, the emergent circumstances of the investigation, the seriousness of the breach by police, and so on. This approach steers the same "middle ground" as the Canadian, Irish and Scottish legal systems, avoiding the extremes of the inflexibility of the American exclusionary rule and the English (pre-*PACE*) lack of concern with police illegality or impropriety.

6.43 The ALRC's 1985 *Interim Report on Evidence* next addressed the question of the exclusion of illegally and improperly obtained evidence. After considering at length the public interest arguments supporting admission (accurate fact determination, crime control) and the public interest arguments supporting exclusion (police discipline, deterrence of future illegality, protection of individual rights, fairness at trial, executive and judicial legitimacy, and encouragement of other methods of police investigation),<sup>85</sup> the Commission again recommended that a presumption of inadmissibility should attach to any illegally or improperly obtained evidence, with a judicial discretion to admit if the desirability of admission of the evidence "substantially outweighed" the undesirability of admitting evidence obtained in that manner.<sup>86</sup>

6.44 The ALRC's final *Report on Evidence* adhered to this approach, although it received a number of submissions arguing for a blanket exclusionary rule and a number which opposed placing the onus on the proponent of the evidence (usually the prosecution). The Commission concluded

once misconduct has been established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. ... those who infringe the law should be required to justify their actions and the admission of evidence and thus bear the onus of persuading the judge not to exclude the evidence so obtained. Practical considerations also support this approach. It is not often that evidence is excluded under the common law discretion that presently exists. Further, factors relevant to the exercise of the discretion include the mental state of the law enforcement officers involved and the urgency under which they acted. The prosecution will have access to the relevant information and witnesses. It would, therefore, seem more appropriate that the prosecution have the primary responsibility of showing that the officers acted in good faith, rather than the accused having to show the reverse.<sup>87</sup>

6.45 This Commission adopts the ALRC's recommendations in this respect (8.4), including the statement of the balancing test factors to be applied by the court (8.4.2). In the submissions we received, there was strong support for this course of action and also for an American-style mandatory exclusionary rule, and some support (mainly from law enforcement agencies) for maintenance of the existing common law rule. A number of submissions made the point that if the new regime for criminal investigation gave police clear rules to operate under and the opportunity for custodial investigation, then the courts should no longer be prepared to tolerate police illegality or impropriety. This appears to be the situation emerging in England and Wales after the introduction of the *PACE* legislation several years ago.<sup>88</sup>

### Electronic recording of confessional evidence (8.5)

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6.46 In Recommendation 7.2, the Commission calls for the electronic recording of all police interviews with suspects. In Recommendation 8.5 we consider the evidentiary rules relating to admission of taped confessions.

6.47 The 1975 Australian Law Reform Commission Report on Criminal Investigation called for the introduction of procedures designed to ensure the reliability of confessional evidence and to minimise disputes over the circumstances in which it was obtained. The ALRC proposed, among other things, that police interviews with suspects be recorded by mechanical means, or corroborated by an independent person.<sup>89</sup> The ALRC followed these recommendations in its work on the law of evidence a decade later.<sup>90</sup>

6.48 We adopt the recommendations of the ALRC that confessional evidence should not be admissible at trial unless it has been electronically recorded. In circumstances where it was not practicable to have recorded the confession, evidence of the confession may be admitted only if: (a) it was made in the presence of, and corroborated by, an independent person of the suspect's choosing; or (b) the suspect confirms on tape the substance and circumstances of the earlier confession, known as a "read back" procedure.<sup>91</sup> The presumption is that police interviews shall always be recorded, so the onus will be on the prosecution to establish the non-practicability of recording and the Commission hopes that the courts will carefully scrutinise such applications. There are ordinary circumstances in which electronic recording will not be practicable,<sup>92</sup> such as where the suspect makes admissions in the field or in the police car en route to the station, or where the recording equipment malfunctions,<sup>93</sup> but this loophole should not ordinarily be available in respect of interviews conducted at the police station. The Police Commissioner's submission to the Commission<sup>94</sup> stated that if detention for investigation was legislatively authorised, police would refrain from interrogating arrested persons until arrival at the police station, unless urgency required otherwise.

### Tendering of detention warrants (8.6)

6.49 Under Recommendation 4, the police need to obtain a detention warrant from a judicial officer in order to extend the period of custodial interrogation beyond the initial period of four hours (excluding time-outs). Where the prosecution seeks the admission of any evidence obtained in the second period of detention, it must first tender the detention warrant. The warrant shall serve as prima facie evidence of the lawfulness of the detention.<sup>95</sup> The Commission believes that this procedure will reduce disputation at trial as well as assisting to ensure compliance with the requirements of the new detention scheme, highlighting the need to seek judicial authorisation of lengthy detentions.

### FOOTNOTES

1. Which are made under the Police Regulation Act 1899 (NSW).
2. A regulation may be disallowed by a majority vote in either House of State Parliament.
3. Section 67(11) of *PACE* provides that: "In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining the question."
4. See D Feldman, "Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984" [1990] *Crim L R* 452, at 468-471.
5. The new Codes were supposed to come into force on 1 January 1991, but further changes have delayed the implementation until April 1991.
6. See S Sharpe, *Electronically Recorded Evidence* (Fourmat Pub London, 1989) 106-107.
7. J K Avery, *Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document "Police Powers of Arrest and Detention"* (February 1988) 12.
8. The UK Codes of Practice are published in a convenient form by H.M.S.O., and are available for purchase at government and public bookshops. The Codes "must be readily available at all police

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- stations for consultation by police officers, detained persons, and members of the public”: Code “C”, s1.2.
9. See section 1.2 of the U.K. Code of Practice “C” on Detention, Treatment and Questioning of Persons by Police Officers.
  10. The very first issue of the *Criminal Law Review* in 1952 contained a discussion of this idea.
  11. New South Wales Law Reform Commission, *Police Powers of Arrest and Detention* (Discussion Paper No 16, 1987) 113-114.
  12. See generally, D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, Sydney, 1990) 248-293.
  13. *Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland* (1977).
  14. *Report of the Board of Inquiry into Allegations Against Members of the Victorian Police Force* (1978). See also *Procedure on the Interrogation of Suspected Persons by the Police - A Report to the Victorian Attorney General* (1965) (the Murray Report).
  15. *Report of a Commission of Inquiry Pursuant to Orders in Council* (1989).
  16. *Ibid*, at 206-207.
  17. Sydney Morning Herald, 7 November 1990, at 7.
  18. See *Driscoll v The Queen* (1977) 15 ALR 47; *Stephens v R* (1985) 58 ALR 753; and *Duke v R* (1988) 83 ALR 650. See also *R v Carter* (1984) 3 NSWLR 635; P Byrne, “Judicial Discretion on Disputed Confessional Evidence” (1988) 62 ALJ 1046, and S J Odgers, “Police Interrogation: A Decade of Legal Development” (1990) 14 *Crim L J* 220.
  19. See, eg, Australian Law Reform Commission, *Criminal Investigation* (Report No 2, 1975) para 154; Victorian Shorter Trials Committee, *Report on Criminal Trials* (1985) (the Sallmann Report).
  20. M Weinberg QC and J McCarthy, “Commentary Paper on Electronic Recording of Police Interviews with Crime Suspects,” Australian Institute of Judicial Administration Ninth Conference (hereafter, the “AIJA Conference”), Melbourne, 18-19 August 1990, 8-9.
  21. See AIJA Conference papers of G Morrish QC, at 6, and S Brown (Deputy Chief Magistrate), at 2-3.
  22. See AIJA Conference papers of Det Insp Lupo Prins; and Tasmanian DPP Damian Bugg, at 13. See also L Prins, *Video Recording of Police Interviews* (Tasmanian Police, October 1989).
  23. See AIJA Conference paper of Justice Wallwork (WA Supreme Court), at 1-2.
  24. Sharpe, *op cit*, 85-86. See also J Baldwin, “Police Interviews on Tape” (1990) 140 *NLJ* 662.
  25. *Ibid*, and AIJA Conference papers, *passim*.
  26. Prins, *op cit*, at 12-13.
  27. Brown, *op cit*, at 7.
  28. *Ibid*, at 9; Prins, *op cit*, at 8, Table 2.
  29. In *Butera v DPP for Victoria* (1987) 164 CLR 180, the High Court of Australia held that tape recorded interviews may, in general, be tendered in evidence.

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30. Prins, op cit, at 22.
31. Morrish, op cit, at 8.
32. R Howie, P Berman, I McClintock and R Spence, *A Proposed System of Electronically Recording Police Interviews With Suspected Persons* (Criminal Law Review Division, Sydney, October 1986).
33. The Commission thanks Inspector Roger Kilburn for providing details of the new system.
34. (1970) 126 CLR 321, at 333.
35. Instruction No 31.10, para 4.
36. See *Li Shu-Ling v R* [1989] 1 AC 270. Here, an accused charged with homicide by strangulation substantially re-enacted the events on videotape, at the scene of the crime, based on his earlier confession, using a woman police officer in the role of the deceased. The Privy Council upheld the admission into evidence of the videotape, holding that provided the tape was made reasonably soon after the confession and the defendant was properly warned that he need not participate, it amounted to a voluntary confession. The Privy Council considered that if a particular re-enactment tape was inappropriate or misleading it could be excluded at the discretion of the trial judge because its prejudicial effect would outweigh its probative value.
37. See Code of Practice "E" on Tape Recording, made under the UK PACE legislation; and the Victorian Police Force's "Tape Recording in Indictable Matters (TRIM) Procedural Guidelines" (March 1989). See also Sharpe, op cit, 86-107.
38. New South Wales Law Reform Commission, *Evidence* (Report No 56, 1988).
39. Australian Law Reform Commission, *Interim Report: Evidence* (Report No 26, 1985), clauses 54-119 of the Draft Bill. (Hereafter "ALRC 26".)
40. *McDermott v R* (1948) 76 CLR 501.
41. D J McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan, London, 1981) 48.
42. B Irving, *Police Interrogation: A Case Study of Current Practice* (RCCP Research Study No 2, 1980).
43. UK Police and Criminal Evidence Act 1984, ss 76 and 78. See also D Dixon, C Coleman and K Bottomley, "Consent and the Legal Regulation of Policing" (1990) 17 *J of Law & Society* 1.
44. ALRC 26, op cit, at vol 1, paras 140-147, 371-379 and 761; at vol 2, paras 130-140.
45. *Ibid*, at para 375.
46. *Id*.
47. *Ibid*, vol 1, paras 371ff; vol 2, paras 129ff; and vol 2, App C, para 131. See also Australian Law Reform Commission, *Evidence* (Report No 38, 1987) para 156 (hereafter "ALRC 38").
48. ALRC 26 (1985), paras 753-754, 759-766, 965-966, and cl 71 of the proposed Bill; ALRC 38 (1987), paras 156-158, and cl 72 of the proposed Bill.
49. (1948) 76 CLR 501. See also the judgment of Dixon J at 506.
50. (1950) 82 CLR 133.
51. *Ibid*, at 154.

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52. ALRC 26, para 150 and vol 2, para 146; citing *Lee*, *ibid*, at 152, 154 and 159, and *Cornelius v R* (1936) 55 CLR 235, 251.
53. ALRC 26, para 761.
54. *Ibid*, at para 967.
55. ALRC 38, para 160(b).
56. ALRC 26, para 761.
57. *Ibid*, at 957.
58. *Ibid*, vol 2, para 143.
59. (1977) 137 CLR 517.
60. *Ibid*, at 541, per Gibbs J, with whom Mason and Jacobs JJ agreed. Murphy J expressed a similar view (at 544); Barwick CJ disagreed on this point (at 523).
61. ALRC 26, para 152.
62. (1961) 367 US 643.
63. Fourth Amendment, applied to the States through the Fourteenth Amendment. See also *Weeks v US* (1919) 232 US 383; *Wolf v Colorado* (1949) 338 US 25.
64. See P Nardulli, "The Societal Cost of the Exclusionary Rule: An Empirical Assessment" [1983] *American Bar Foundation Research Journal* 585, at 606. There were motions to suppress evidence in 7.6 per cent of the cases surveyed, resulting in the successful exclusion of confessional evidence in only 0.16 per cent of cases.
65. See, eg, *R v Mason* [1987] 3 All ER 481.
66. See *Kuruma v R* [1955] AC 197; *King v R* [1969] 1 AC 304; *Wendo v R* (1963) 109 CLR 559; *R v Ireland* (1970) 126 CLR 321.
67. See *Bunning v Cross* (1978) 141 CLR 54; *Cleland v R* (1982) 151 CLR 1.
68. (1970) 126 CLR 321, at 335.
69. (1978) 141 CLR 54.
70. *Ibid*, at 72, per Stephen and Jacobs JJ.
71. (1982) 151 CLR 1.
72. *Ibid*, at 9.
73. *Ibid*, at 17.
74. *Ibid*, at 34.
75. *Ibid*, at 16.
76. *Ibid*, at 26.
77. *Ibid*, at 27.

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78. (1986) 161 CLR 278, at 286. (See also *Collins v The Queen* (1980) 31 ALR 257, at 317, per Brennan J.)
79. *Ibid*, at 311.
80. *Ibid*, at 292.
81. (1987) 29 A Crim R 50.
82. *Ibid*, at 56-57. An application to the High Court for special leave to appeal was refused.
83. Odgers, *op cit*, at 227.
84. Australian Law Reform Commission, *Criminal Investigation* (Report No 2, 1975) para 298 (hereafter "ALRC 2").
85. ALRC 26, at paras 958-959.
86. *Ibid*, at paras 964-966.
87. ALRC 38, at para 164.
88. See Feldman, *op cit*, at 468-471.
89. ALRC 2, at paras 155-162 and 345.
90. ALRC 26, at paras 760 and 768; ALRC Report 38, paras 158 and 163.
91. See ALRC 38, at para 163.
92. Cf the "reasonable excuse" proposal of the Criminal Law Review Division: Howie, Berman, McClintock and Spence, *op cit*, 51-59.
93. The Police Service has technical officers who will be responsible for the repair and replacement of faulty equipment. A pool of spare equipment will be maintained for such purposes. Where equipment is found to be faulty the technical officers will issue a certificate to that effect.
94. Submission of the New South Wales Commissioner of Police, May 1987, at 24.
95. See *Murphy v R* (1989) 86 ALR 35, at 42-43. Generally, the validity of a warrant is not open to collateral attack on the basis of the nature or sufficiency of the material produced in support of the application for the warrant. See also the commentary in Chapter 4 in relation to Recommendation 4.4.3.

## 7. Other Considerations

### RECOMMENDATION 9:

#### Detention In Police Custody to Count Towards Sentence

In determining an appropriate sentence, a court shall take into account any period(s) during which the offender was detained in police custody for the purpose of investigation (including any "time-out" periods) of the relevant offence.

### COMMENTARY ON RECOMMENDATION 9

7.1 This was one of the "tentative proposals for reform" contained in the Commission's Discussion Paper 16 on Police Powers of Arrest and Detention,<sup>1</sup> and was perhaps the least controversial. Every submission which considered the matter at all supported the proposal, including those from the New South Wales Commissioner of Police and other law enforcement agencies. Time spent in police custody, even where there is lawful authority for the detention, amounts to a deprivation of liberty, and it makes perfect sense that this be taken into account by the court which pronounces sentence upon the conviction of an offender. In the UK, the Police and Criminal Evidence Act 1984 (*PACE*) contains a provision to the same effect.<sup>2</sup> As a matter of practice this is also the case with persons who were not freed on bail and were remanded into custody pending trial. The provision is not likely to have a major effect upon sentence, given that the authorised periods of detention are relatively short under the proposed regime; however, there is no reason why person involved should not have whatever benefit is available. It is not intended that time spent in detention should only be taken into account in determining the *length* of a sentence of imprisonment; it may be that a sentencing court, in an appropriate case, would prefer to hand down a non-custodial sentence on the basis that the offender has already served a period in custody.

### RECOMMENDATION 10:

#### Need for Follow-up Empirical Study of Custody Records

One year after the coming into force of any legislation which replaces the common law in respect of police detention for the purpose of investigation (whether or not based on the recommendations contained in this Report), the Law Reform Commission shall conduct an empirical study, including but not limited to a survey of police custody records, to consider the fairness and operational effectiveness of the new system and to report its findings, which may include recommendations for changes to the system. Specific regard shall be had to the length of custodial detention for investigation, any mechanisms for extending the initial period of detention, and the effective provision of safeguards for persons in police custody. Sufficient funding should be made available to the Commission to complete the study in a timely fashion.

### COMMENTARY ON RECOMMENDATION 10

7.2 The Commission was struck by the lack of empirical data available to us on police practices in New South Wales. The submissions contained much legal analysis of the common law cases, historical references, strongly-held opinion, discussions of the legal regimes in operation inter-state and overseas, and assertion about the wisdom of pursuing one approach or another. References to empirical fact were almost invariably vague or general, on the order of "in our experience..." or "we understand that..."

7.3 It is not the case that the relevant data exist somewhere but have not yet been properly collated or interpreted. The Commission was officially advised by senior police officers<sup>3</sup> that the basic information about arrest and detention in police custody is not routinely or centrally collected. There may be some useful information available in the computerised on-line charging systems at the larger police stations and the charge books maintained at smaller police stations, but much of it is unreliable, at least from the point of view of statistical significance, since the data were not entered with the intent of precision or subsequent analysis. More importantly, for the Commission's purposes, the recording in the charge books is not standardised or complete. It

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is often impossible to determine whether an initial entry relates to the time of arrest, or the time of arrival at the station, or the time when the person was first attended to. There are key gaps in entries, including the time of charge or release, and whether the person was able to meet bail conditions.

7.4 In other words, the basic data simply do not exist. As remarked in Chapter 1, we believe that no system which dealt with property or property rights would have been allowed to remain so informal and, literally, unaccountable, for so long.

7.5 The essence of the Commission's recommendations is that the informal practices and procedures regarding criminal investigation be replaced with a formal system regulated under law. Record-keeping is at the core, with custody records maintained which enable proper analysis of the new system. It will then be possible to know, for example, the numbers of persons who are detained after arrest; the average length of detention; the extent of utilisation of the various investigative procedures; the number of confessions produced; the compliance with safeguard requirements, such as the administration of cautions and the permitting of communications with friends, relatives and legal advisers; the take-up rates by detainees for such safeguards, and so on. It will also be possible to make useful correlations; for example: the presence of lawyers with the exercise of the right to silence; the length of detention with the seriousness or other circumstances of the offence; the practical availability of safeguards with the location of the police station; and the take-up of rights with plea and verdict.

7.6 The lack of existing data has meant that the Commission's recommendations are of necessity based on its *general* appraisal of the real nature of policing in New South Wales, drawn from the submissions received, the experience of the Commissioners and their consultants and staff, and extensive consultations with the main institutional actors - police, lawyers, judicial officers and court administrators. Monitoring of the new system is necessary to determine whether we have "got it right", and to see that it stays right. Even a well-designed system, as we believe this be, will disclose some bugs in operation, and require some adjustment. Any further debate on police powers and practices in New South Wales should now be based on facts and figures, rather than on opinion and conjecture.

7.7 Even if we could be more certain of the factual basis of the proposed system, we would still urge the need for careful, periodic review. As a general matter, the interest of the Commission should not end with its report to the Attorney General, but rather it should be involved in monitoring the effectiveness of the program which is eventually implemented as a result. In this particular case, the Commission recommends that it be empowered to review any new system of criminal investigation which is established. This review could be conducted by the Commission alone, or in conjunction with another body - perhaps another public agency, a university research institute, or private consultants.

7.8 It is unlikely that extensive funding would be necessary to conduct the review, which would probably consist of an empirical analysis of a significant sample of custody records, as well as interviews with persons involved in the operation of the new system (eg, police, lawyers, magistrates). However, the substantial decrease in the Commission's funding in recent years may make it impossible for the work to be done without some additional resources. These extra resources could be in the form of a special government allocation, the secondment of public service research staff, or a grant obtained from a foundation or research council.

### FOOTNOTES

1. New South Wales Law Reform Commission, *Police Powers of Arrest and Detention* (Discussion Paper 16, 1987) 139.
2. Section 49. See also the Criminal Justice Act 1967 (UK), s67, and the Prevention of Terrorism (Temporary Provisions) Act 1984 (UK), s12.
3. Letter to the Commission of 11 June 1987 from the NSW Police Policy and Planning Unit.

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