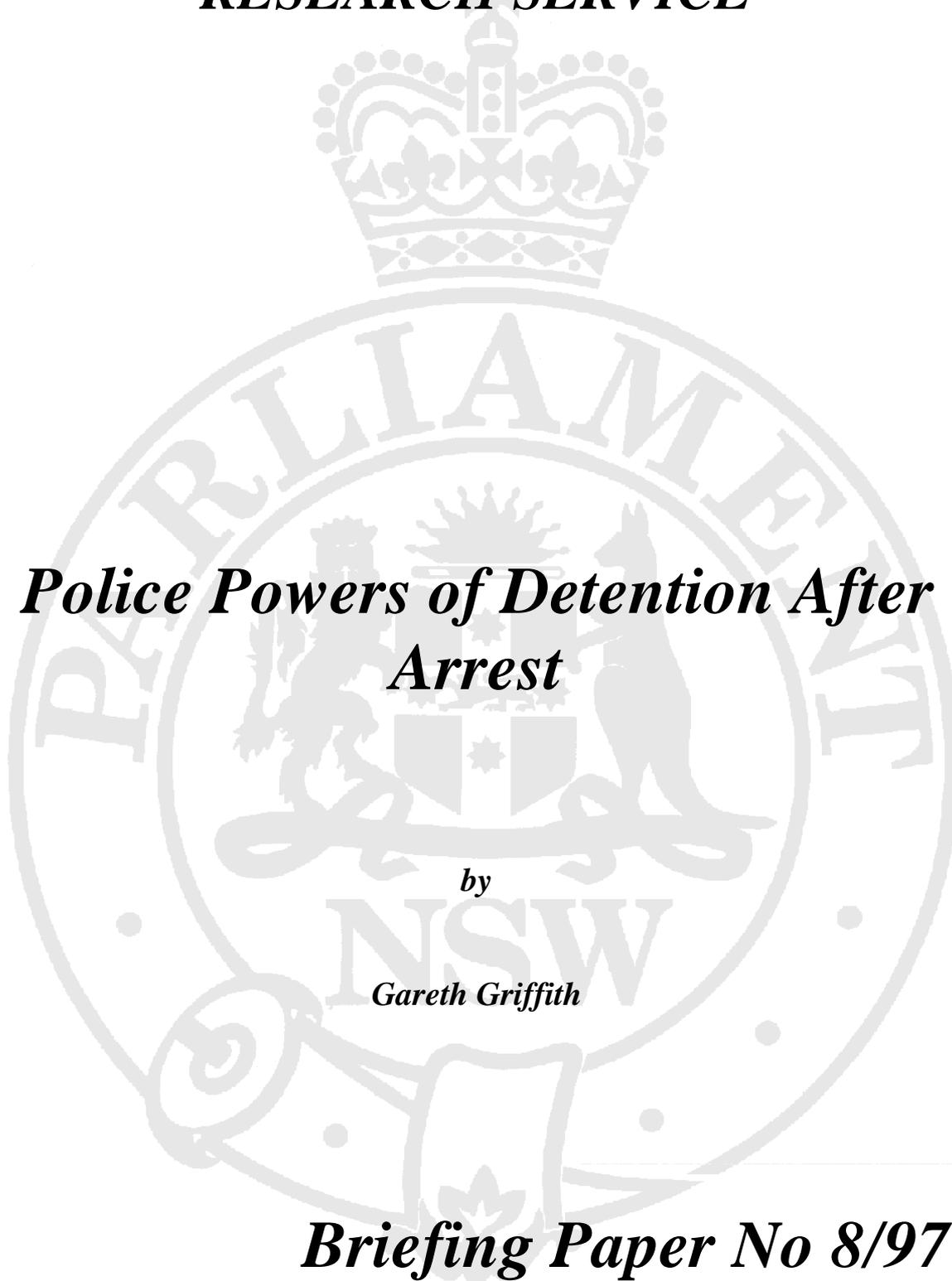


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***Police Powers of Detention After
Arrest***

by

Gareth Griffith

Briefing Paper No 8/97

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Arrest*

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CONTENTS

Executive Summary	3
1 Introduction	5
2 Detention after arrest in NSW	5
Section 352 and the common law	5
Questioning after arrest and the issue of practical uncertainty	7
Reasonable and unreasonable delay and the gap between principle and practice	9
The discretion to exclude evidence obtained under unlawful detention	11
The need for legislative reform	13
3 Length of detention period for arrested persons under a regulated scheme	14
Maximum time vs reasonable time:	14
The maximum time approach	14
Arguments for the maximum time approach	16
The reasonable time approach	17
Arguments for the reasonable time approach	17
Arguments against either form of regulated scheme	18
Length of detention and related issues under the Crimes Amendment (Detention after Arrest) Bill 1997 (Exposure draft)	20
Questions and Comments	23
4 Pre-charge investigative procedures	25
Investigative procedures under the Crimes Amendment (Detention after Arrest) Bill 1997(Exposure Draft)	25
The common law	26
The law regulating to forensic procedures in NSW	26
The law relating to forensic procedures in other jurisdictions	27
The law relating to forensic procedures in Victoria	28
The Model Criminal Code Bill	28
Questions and comments	29
5 The provision of rights and safeguards, including the custody officer ...	32
Balancing police powers and individual rights	32
The custody officer - England and Wales	33
The custody officer - NSW proposals	34
The custody officer - Tasmania	35
Rights and safeguards under the Crimes Amendment (Detention after Arrest) Bill 1997 (Exposure draft)	36
Questions and comments	37

6	<i>The NSW Police Royal Commission - Final Report</i>	40
	Regulation of police powers	40
	Custody officers	41
7	<i>Conclusions</i>	41

EXECUTIVE SUMMARY

This paper looks first at the current law relating to police powers of detention after arrest in NSW. It then considers the three key features of the regulated scheme proposed under the Crimes Amendment (Detention after Arrest) Bill 1997 (Exposure draft): (i) the criteria for determining the length of the detention period for arrested persons and related issues; (ii) the investigative procedures which can be conducted while the person is detained; and (iii) the rights and safeguards available under the Bill, including the establishment of the position of custody officer. The paper's findings include:

- Section 352 of the *Crimes Act 1900* (NSW) requires a police officer arresting a person without warrant to take that person before a justice to be dealt with according to law. That requirement has been interpreted in the light of the common law as meaning that the police officer must do so 'without unreasonable delay', or in as short a time as is 'reasonably practicable' (page 5);
- the leading case is *Williams* ((1986) 161 CLR 278) (page 6);
- at present the law does not permit the police to arrest a person solely for the purpose of questioning; nor does it allow any delay for the purpose of investigating an offence in bringing the detained person before a justice (pages 6-7);
- the scope for uncertainty in this area of law is notorious, with one commentator stating that five years after the *Williams* decision the NSW police still did not know that they had no power to arrest a person for questioning (page 7);
- The NSW Law Reform Commission (NSWLRC) has said that the judgments in *Williams* 'expressly invite legislative reform' and in 1990 it recommended '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' (page 13);
- in determining the length of time for which an arrested person can be detained under such a regulated scheme, the two issues to be addressed are: (i) whether a maximum period of detention should be specified; and (ii) if so, what that maximum period should be. Much of the debate revolves around the pros and cons of the 'maximum time' approach against the 'reasonable time' formulation favoured in some jurisdictions (page 14);
- the 'reasonable time' approach was proposed under the Crimes (Detention after Arrest) Amendment Bill 1994 (page 17);
- the present Bill proposes an investigation period for a reasonable time but up to a maximum of 4 hours. That can be extended by a further 8 hours in total under

a detention warrant (page 21)

- The Bill will apply to all persons but its operation *may* be modified by Regulation with respect to children and other vulnerable people (pages 21 and 23);
- the present Bill is based largely but not entirely on the recommendations of the NSWLRC. For the NSWLRC the introduction of its custodial investigation system was contingent on the establishment of a 24-hour duty solicitor scheme (page 23);
- a minority view in the debate (at least where governmental reports are concerned) is that all regulated schemes should be rejected in favour of minor modifications to the common law. That view is associated with the Queensland Parliamentary Justice Committee. Among other things, the Committee was of the view that ‘time out’ provisions under a regulated scheme would be open to abuse and that any such scheme would be inherently at odds with the right to silence (pages 18-20);
- at common law there is no power to conduct a medical examination without the consent of the person, either before or after arrest; under section 353A of the NSW *Crimes Act 1900* there is a power to search the person after arrest *and charge*. This now authorises the taking of blood samples from accused persons without their consent, using reasonable force where necessary (page 26);
- the present Bill would permit a certain investigative procedures to be carried out before the detained person is charged. However, it may be the case that the legal effect of the relevant provision would differ between some procedures and others. It is suggested that these can be separated into at least three distinct categories: those for which the legal position will be different if the Bill is passed; those where the position is unclear; and those procedures for which the Bill would appear to have no legal effect (page 30);
- the expansion of police powers envisaged under a regulated scheme must be accompanied by adequate, transparent and effective protective rights and procedures for the detained person (pages 38-40).
- as a counterweight to the extension of police powers, the Bill would enshrine a range of protective rights and safeguards, including the establishment of the position of ‘custody officer’. These proposals are based on the terminology used under the English *Police and Criminal Evidence Act 1984* (pages 32-40); and
- in its *Final Report* the NSW Police Royal Commission endorsed the reforms proposed under the present Bill (page 40).



1. INTRODUCTION

The subject of police powers of detention after arrest is of long standing concern in NSW, as it is in other comparable jurisdictions. It has been said many times that at the core of the issue is the need to strike a balance between two competing demands, namely, the concern that criminal investigation be effective, on the one side, and the right to personal liberty under the law, on the other. In *Ainsworth*¹ Hunt J expressed the dichotomy in these terms: 'What must be weighed up is the public interest in having those who commit criminal offences brought to justice and convicted, on the one hand, and, on the other, the public interest in protecting citizens against unlawful conduct by the police'.² That the issue is difficult and controversial is not in doubt.

Police powers of detention after arrest were considered in some detail in the Parliamentary Library's Bills Digest No 25/94, *Crimes (Detention After Arrest) Amendment Bill 1994*. The purpose of this paper is to summarise the key issues and, more particularly, to take account of recent developments in this State, notably the release by the Government on 10 April 1997 of an exposure draft of the Crimes Amendment (Detention After Arrest) Bill 1997. This follows the introduction of a Private Members Bill, the Crimes Amendment (Police Detention Powers After Arrest) Bill 1996, which was read a second time on 17 October 1996.³

A comprehensive regulated scheme in this area of law would have three key features. First, it would need to determine the length of the detention period for arrested persons, either by reference to a maximum time (and possibly in combination with a criteria of reasonableness), or solely in terms of a 'reasonable time' formulation. Secondly, the scheme would set out the investigative procedures which can be conducted while the person is detained. The third key feature of a comprehensive regulated scheme is that it would identify certain safeguards for the protection of the rights of the detained person. Moreover, such schemes tend to require the appointment of custody officers at police stations who have certain statutory functions and duties, including the keeping of a custody record. After analysing the present legal position in NSW, this paper considers each of these features in turn, noting the relevant aspects of the Crimes Amendment (Detention after Arrest) Bill 1997.

2. DETENTION AFTER ARREST IN NSW

Section 352 and the common law: Section 352 of the *Crimes Act 1900* (NSW) requires a police officer arresting a person without warrant to take that person before a justice to

¹ (1991) 57 A Crim R 174.

² *Ibid* at 185.

³ NSWPD, 17 October 1996, p 5023. The Bill was sponsored by Mr AA Tink MP.

be dealt with according to law.⁴ That requirement has been interpreted in the light of the common law as meaning that the police officer must do so ‘without unreasonable delay’,⁵ or in as short a time as is ‘reasonably practicable’.⁶

The common law position in Australia relating to police powers of detention after arrest was considered in the High Court case of *Williams*.⁷ In the opinion of the NSW Law Reform Commission, the judgments in that case did not change the law in ‘any significant way’.⁸ The High Court found that ‘it is unlawful for a police officer to delay taking an arrested person before a justice solely for the purpose of investigating his or her complicity in the offence for which the arrest has been made or any other offence’.⁹ The issue in the case was the proper construction of the words ‘as soon as practicable’ in section 34A (1) of the Tasmanian *Justices Act 1959*. Mason and Brennan JJ held that the words ‘as soon as practicable’ refer to the time required to bring the arrested person before a justice and that the time cannot lawfully be extended to provide time for interrogation. They went on to say:

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.¹⁰

In *Ainsworth*,¹¹ Hunt J posed the question, ‘What then does reasonable practicability require in bringing a person arrested without warrant before a justice?’. Based on the High Court’s decision in *Williams*, he answered:

It permits reasonable time to be taken to decide to charge the person arrested and to prefer that charge...It does not permit any delay for the purpose of interrogating or investigating the offence, although each is permitted - provided that the arrested person is still brought before a

⁴ Note that section 4E (3-4) of the *Traffic Act 1909* allows the police to take a suspect to a police station for the purposes of investigation in the form of a breath analysis test.

⁵ *Bales v Parmenter* (1935) 35 SR (NSW) 182.

⁶ *Williams v R* (1986) 161 CLR 278.

⁷ *Ibid.*

⁸ NSW Law Reform Commission, *Criminal Procedure: Police Powers of Arrest and Detention*, A Discussion Paper for Community Consultation, 1987, p 6.

⁹ *Ibid.*, p 1.

¹⁰ (1986) 161 CLR 278 at 299.

¹¹ (1991) 57 A Crim R 174.

justice when it becomes reasonably practicable to do so.¹²

An arrest is unlawful if carried out for the purpose of questioning the suspect. Investigation is permitted subsequent to arrest, but only if it seems where the police take advantage of some legitimate delay. Complicating matters further, the High Court held in *Michaels*¹³ that the legal status of detention can vary, so that a detention which is or has become unlawful may later become lawful if circumstances change which legitimate the further detention.

Questioning after arrest and the issue of practical uncertainty: The scope for uncertainty in this area of law is notorious. Commenting on this, the NSWLRC said that the informality and uncertainty surrounding most aspects of the law of criminal investigation has 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’.¹⁴ The conduct of the police officers in *Foster* (a case discussed in some detail below) was the subject of an Ombudsman report, published in October 1996, where it was said:

Each year my Office receives hundreds of complaints associated with arrest and detention. I am concerned that a significant number of these complaints reveal a lack of awareness by police of the appropriate standards which should apply when arresting and detaining suspects. In some cases even senior officers show a basic lack of understanding of the legal grounds of arrest.¹⁵

On this issue, Beverley Schurr has noted that in 1991, five years after the High Court judgment in *Williams*, the NSW police still did not know that they had no power to arrest a person for questioning.¹⁶ In 1990 the NSWLRC had taken issue with the NSW Police *Commissioner’s Instructions* which, based on the minority judgment of Gibbs CJ in *Williams*, still saw the period after arrest as a time in which to interrogate arrested persons.¹⁷

¹² Ibid at 181.

¹³ (1995) 184 CLR 117.

¹⁴ NSWLRC, *Report No 66 - Police Powers of Detention and Investigation after Arrest*, 1990, p 17. (Henceforth, NSWLRC Report)

¹⁵ NSW Ombudsman, *The Foster Report*, October 1996, p i.

¹⁶ B Schurr, *Criminal Procedure (NSW)*, LBC Information Services 1996, [4,220] - reference is made to *Livermore* (unreported, NSW CCA, 2 March 1995).

¹⁷ NSWLRC Report, p 24; B Schurr, op cit, [4.180] comments that the Instruction was valid as at 1 April 1995. A more detailed account of the police response to *Williams* in NSW is found in - D Dixon, *Law in Policing: Legal Regulation and Police Practices*, Clarendon Press, forthcoming 1997, pp 205-210.

The concern of the NSWLRC was that the Instruction told police officers that it is not unreasonable delay 'to question the arrested person or conduct inquiries to confirm or dispel the suspicion on which the arrest was based'. As at 1 April 1996 the Instruction had been amended, so that the above is now qualified by the words 'after you administer a caution'. Now the relevant part of Instruction 37 reads:

In determining what is an unreasonable delay allowance may be had for the making of a decision to prefer a charge or not. In making this decision it may only be fair to question the arrested person (after you administer a caution) and conduct inquiries to confirm or dispel the suspicion on which the arrest was based.

Presumably, the purpose of this alteration is to alert police officers to the concerns expressed by the courts in situations where there was no intention to charge the suspect as soon as he had been arrested. The point is that under the *Commissioner's Instructions* police officers are told to issue a caution 'Before questioning a person *you have decided to charge...*'. The difficulty is that if the decision to charge has already been made and a caution duly given, then it would seem somewhat confusing to allow subsequent questioning for the purpose of 'the making of a decision to prefer a charge or not'. What the Instructions seem to contemplate is that a person is arrested, a decision is made to charge the person, he/she is then cautioned and afterwards questioned 'to confirm or dispel the suspicion on which the arrest was based', following which the decision to charge may or may not be carried through. For the Instructions, it appears, that sequence of events would not constitute an *unreasonable* delay in bringing the person before a justice. However, that may still reflect the broader view of the common law adopted by Gibbs CJ in *Williams*,¹⁸ as against the narrower view of the other justices; with Mason and Brennan JJ stating that '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';¹⁹ and Wilson and Dawson JJ making it clear that the purpose of arrest is to charge a person and bring them before a justice:

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 that person in order to dispel or confirm the suspicion which was the basis of the arrest, is to defeat, however temporarily, the true purpose.²⁰

Questioning can occur after a person is arrested under the *Williams* ruling, but it cannot

¹⁸ Gibbs CJ followed the English case of *Dallison v Caffery* [1965] 1 QB 348. He would have allowed the police considerable discretion in the length of detention time required to 'confirm or dispel the suspicion upon which the arrest was based'.

¹⁹ (1986) 161 278 at 300.

²⁰ *Ibid* at 306.

be the cause of any delay in bringing the detained person as soon as practicable before a justice, even where the purpose of interrogation is to confirm or dispel the suspicion which was the basis of the arrest. That this narrow view can hinder the effective investigation of criminal offences has been recognised.²¹ As discussed later, the judgments in *Williams* recognised that legislative intervention may be needed in this area of law.

Reasonable and unreasonable delay and the gap between principle and practice :

Timing is all-important to the question of compliance by the police with their obligations under section 352 of the *Crimes Act 1900* (NSW). As the Court of Criminal Appeal noted in *Bell*,²² in this State this has been the subject of a considerable degree of judicial and other comment in recent years. The decisions in *Burns*²³ and *Zorad*²⁴ made it clear that the courts will not require the police to seek out the services of a judicial officer 'after hours'. In these cases it was found that where a person was arrested at 6.15 pm or 10 pm respectively, it was not unlawful for the police to question him through the night until the early morning and then take him before the court at 10 am later that day.²⁵ Nor, according to the NSW Law Reform Commission, 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'.²⁶ However the Commission did cite the following powerful statement of principle (albeit *obiter dicta*) in *Dean*:²⁷

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 ordinary 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

²¹ NSWLRC, *Criminal Procedure: Police Powers of Arrest and Detention*, Discussion Paper 1987, p 10.

²² (1994) 77 A Crim R 213 at 216 (per Gleeson CJ).

²³ (Unreported, NSW CCA, 19 August 1988)

²⁴ (1990) 19 NSWLR 91.

²⁵ B Schurr, *Criminal Procedure (NSW)*, LBC Information Services 1996, [4,200].

²⁶ NSWLRC Report, p 14.

²⁷ (1990) 20 NSWLR 653.

question of bail can be independently considered.²⁸

Later commentators have noted that this statement of principle was watered-down in the subsequent case of *Ainsworth*.²⁹ In that case Hunt J found that, in the absence of relevant administrative arrangements being made by the government of the day, magistrates or appropriate justices cannot be said to have a duty to be available at all hours. No arrangements had in fact been made to meet the obligation defined by the Court of Appeal in *Dean*. 'In consequence', Findlay, Odgers and Yeo comment, 'it will be very difficult for a person who was arrested outside of normal court hours to demonstrate that it was reasonably practicable for the police to take him or her before a "justice"'.³⁰

For its part the NSW Law Reform Commission stated that the failure of the common law to match principle with practical application has at least three unfortunate results:

- the treatment that an arrested person receives will vary dramatically - and arbitrarily - depending on the time of arrest. For example, 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;³¹
- following on from this, it is in the interests of police, especially in complex cases, to purposefully effect an after-hours arrest in order to gain more time to complete their investigations. For example, the Royal Commission into the arrest of Harry Blackburn found that the arresting officers were advised by a senior Crown Prosecutor to arrest Mr Blackburn at 4.00 pm or so rather than the earlier proposed 6.00 am, so as to give themselves more time for questioning and to avoid the *Williams* issue; and³²

²⁸ Ibid at 653.

²⁹ (1991) 57 A Crim R 174 at 183-184. Hunt J said that, in his view, the obiter statement in *Dean* was consistent with the decisions in *Burns* and *Zorad*: in both the latter cases the court found that 'it was not reasonably practicable' for the appellant to have been brought before a justice prior to making the confession and that the appellant was not, therefore, under unlawful detention when the confession was made.

³⁰ M Findlay, S Odgers and S Yeo, *Australian Criminal Justice*, Oxford University Press 1994, p 51. Gleeson CJ summed up the situation in *Bell* in these terms: 'This Court and the Court of Appeal in this State have made it clear that the question of reasonable practicability is not to be concluded solely by reference to ordinary weekday working hours. In terms of the way in which it deals with the liberty of the subject, the justice system is not closed for business on Sundays. At the same time the question of reasonable practicability needs to be related to the administrative arrangements that exist from time to time in connection with the persons who are made available to the police to deal with the important and difficult issues that can be involved in the matter of granting or declining bail': (1994) 77 A Crim R 213 at 217.

³¹ NSWLRC Report, p 15.

³² Ibid.

- according to the NSWLRC 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 the 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’.³³ The NSWLRC went on to say, ‘There is, in fact, not much risk for police in ignoring the common law requirements...In practice, the most likely forum for testing the lawfulness of police treatment of an arrested person is at the subsequent trial of the 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’.³⁴

The discretion to exclude evidence obtained under unlawful detention: Importantly, it was explained in the NSWLRC Report that, unlike the United States, the courts in Australia have not developed an exclusionary rule automatically excluding all unlawfully obtained evidence. Instead, in this country the trial judge is given a discretion to exclude evidence. The exercise of that discretion, as well as the factors relevant to it, have been considered on many occasions, often in relation to the admissibility of a supposedly voluntary confessional statement made during a period of unlawful detention.³⁵ On this issue, Samuels JA in *Walsh*³⁶ had said that ‘it is only in exceptional circumstances that an admission found to have been voluntarily made will be rejected’.³⁷

In *Foster v R* the High Court reviewed the operation of the discretion. There the leading judgment noted that Samuels JA had overstated the position and that, in any event, ‘it could scarcely be thought that unlawful arrest and detention in custody by police for the sole purpose of interrogation does not, in this country, constitute “exceptional circumstances”’.³⁸ The *Foster* case concerned an incident in 1987 involving a 21 year old Aborigine who was taken to Narooma Police Station at 12.30 pm for the purpose of

³³ Ibid.

³⁴ Ibid, p 16.

³⁵ Considerations relevant to the exercise of the discretion were listed by Stephen and Aicken JJ in *Bunning v Cross* (1978) 141 CLR 54 at 78-80. They can be listed as follows: (i) was the deliberate act the result of mistaken belief that the act was unlawful, or a deliberate disregard of the law?; (ii) does the nature of the illegality effect the cogency of the evidence so obtained?; (iii) was the illegal act the result of a process of deliberate cutting of corners to make the task of the police easier; (iv) how serious is the offence charged?; and (v) does an examination of the legislation indicate a deliberate intent on the part of the legislature to circumscribe the powers of the police in the interests of the public?

³⁶ (Unreported, NSW CCA, 18 October 1990).

³⁷ Samuels JA also pointed out that ‘the appellant bore the onus of proving facts which could justify the discretionary exclusion of the evidence’ (Ibid at 8).

³⁸ (1993) 113 ALR 1 at 6 (per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

being questioned about a fire at the local High School. The prosecution case relied on a confessional statement made soon after, the substance of which was denied by the accused both before and after the interrogation. Foster was charged on the same day at 2.30 pm. The question for the High Court was whether the NSW Court of Criminal Appeal was mistaken in upholding the decision of the trial judge to allow evidence of the confessional statement to be placed before the jury. For its part, the Court of Criminal Appeal found, contrary to the trial judge, that the arrest had been merely for the purpose of questioning and was, therefore, unlawful. However, it was held that the trial judge's error had no vitiating effect for the reason that he had expressly stated that, even if he was wrong in thinking the arrest was lawful, he would none the less have exercised his discretion to admit the evidence. On this basis, the Court of Criminal Appeal concluded that the discretion of the trial judge had not miscarried. A majority of the High Court disagreed for the reason that, having regard to the conduct of the police and all the circumstances of the case, reception of the evidence would be unfair to the accused; in addition, on public policy grounds, it was stated that 'the case manifests "the real evil" at which the discretion to exclude unlawfully obtained evidence on public policy grounds is directed, namely, "deliberate or reckless disregard of the law by those whose duty it is to enforce it"'.³⁹ The leading judgment confirmed in this context the view that the right to personal liberty under the law is the 'most elementary and important of all common law rights'.⁴⁰

Among other things, the *Foster* case suggests again the complexities and uncertainties in the way this area of the law has been applied by the courts in NSW. In that regard it serves as an interesting point of comparison to such cases as *Ainsworth*⁴¹ and *Bell*⁴² where the discretion to exclude evidence was not applied.⁴³

The NSWLRC recommend that evidence obtained illegally or improperly should be presumed to be inadmissible, although courts should at the same time retain the discretion to admit the evidence in the interests of justice.⁴⁴ In fact, legislative reform has

³⁹ Ibid at 10. Reference was made to *Bunning v Cross* (1978) 141 CLR 54 at 78. Generally, the High Court discussed the case law relating to the exercise of 'two independent discretions': the fairness discretion; and the public policy discretion. As noted, the conduct of the police officers in *Foster* is the subject of a 1996 Ombudsman Report.

⁴⁰ Ibid at 8.

⁴¹ (1991) 57 A Crim R 174.

⁴² (1994) 77 A Crim R 213. The admission into evidence of a confession was upheld where a person was arrested on a Sunday in relation to guns found in the car in which he was travelling, questioned about an armed robbery and taken before the court the next day, Monday. *Foster* was distinguished on the basis that in *Bell* the original arrest was lawful.

⁴³ For a highly critical account of the performance of the NSW courts in relation to the application of the discretion to exclude evidence see - D Dixon, *Law in Policing: Legal Regulation and Police Practices*, Clarendon Press, Forthcoming 1997, pp 192-201.

⁴⁴ NSWLRC Report, p xiii.

occurred in this area under the NSW and Commonwealth *Evidence Act 1995*, with section 138 codifying the discretion to exclude improperly or illegally obtained evidence. To a large extent this is based on the common law, although it is wider in applying to civil as well as criminal cases and in reversing the onus of proof. The evidence may still be admissible but the court has to engage in a balancing exercise before deciding whether to reject or admit it. The Crimes Amendment (Detention after Arrest) Bill 1997 would not affect the rights under section 138 and other relevant provisions of the *Evidence Act 1995*.⁴⁵

The need for legislative reform: The need for legislative reform of a more general kind in this area has been recognised on many occasions. In particular, it has been said that the decision in *Williams* underlined the practical difficulties which police might encounter in the first place in determining the law and secondly in adhering to its strict requirements in the investigation of criminal offences in a modern urbanised society. Indeed, Mason and Brennan JJ observed in *Williams* that the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck.⁴⁶ However, they added that the ‘the striking of a different balance is a function for the legislature, not the courts’, and commented in this regard that ‘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’.⁴⁷

The NSWLRC agreed, saying that the judgments in *Williams* ‘expressly invite legislative reform’.⁴⁸ Summing up its concerns, the NSWLRC stated in its 1990 report:

The Commission finds it remarkable that an area of the 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

⁴⁵ Proposed section 356B (2).

⁴⁶ The example offered was that of the Australian Law Reform Commission, *Interim Report on Criminal Investigation*, Report No 2, Ch 4.

⁴⁷ (1986) 161 CLR 278 at 296. Wilson and Dawson JJ concurred, stating that 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’ (at 313).

⁴⁸ NSWLRC Report, p 20.

legislative attention.⁴⁹

In response to these concerns, the NSWLRC recommended ‘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’.⁵⁰

However, it should be noted at this stage that, while the operation of the common law may have its confusions and complexities, the case for a comprehensive regulated regime has not gone unchallenged. In particular, the argument is put that statutory intervention would compromise the common law’s prohibition against a general police power to arrest for the purpose of questioning. Legislation may compensate by providing certain safeguards for the detained person but, it is argued, it may be the case that a regulated regime would generate its own confusions and complexities and would itself be subject to abuse by the police.⁵¹

3. ***LENGTH OF DETENTION PER IOD FOR ARRESTED PERSONS UNDER A REGULATED SCHEME***

Maximum time vs reasonable time: The Queensland Criminal Justice Commission has said that in determining the length of time for which an arrested person can be detained, the two issues to be addressed are: (i) whether a maximum period of detention should be specified; and (ii) if so, what that maximum period should be.⁵² These matters have been considered at considerable length in many jurisdictions, often as a preface to legislative change.

Much of the debate usually revolves around the pros and cons of the ‘maximum time’ approach, as against the ‘reasonable time’ formulation which is favoured in some jurisdictions.

The maximum time approach: Some regulated schemes allow for pre-charge detention for a ‘reasonable period’ up to a maximum time, with possible provision for extension and ‘time-outs’. A scheme of this kind is what is proposed under the Crimes Amendment

⁴⁹ Ibid, p 18.

⁵⁰ Ibid, p 21.

⁵¹ Legislative Assembly of Queensland, Parliamentary Criminal Justice Committee, *Report on the Review of the Criminal Justice Commission’s Report on a Review of Police Powers in Queensland - Volume IV: Suspects Rights, Police Questioning and Pre-Charge Detention*, 12 May 1995. (Henceforth, Queensland Parliamentary Criminal Justice Committee Report).

⁵² Criminal Justice Commission, *Report on a Review of Police Powers in Queensland - Volume IV: Suspects’ Rights, Police Questioning and Pre-Charge Detention*, May 1994, p 687. (Henceforth, Queensland Criminal Justice Commission Report).

(Detention after Arrest) Bill 1997, the details of which are discussed below.

An approach involving the introduction of a maximum time limit for custodial investigation was first recommended by the Australian Law Reform Commission in 1975⁵³ and subsequently by the Gibbs Committee in 1989,⁵⁴ the NSWLRC in 1990⁵⁵, the New Zealand Law Commission in 1992⁵⁶ and the Queensland Criminal Justice Commission in 1994.⁵⁷ In both the latter cases, the recommendation was contingent on the introduction of a free legal advice scheme, an issue which is discussed later in the paper.

In terms of legislative reform, the maximum time limit approach has been implemented in the Commonwealth⁵⁸ and South Australia⁵⁹. It was introduced in Victoria in 1984, when the *Crimes Act 1958* was amended to provide for a prescribed period of 6 hours before an arrested person had to be taken before a magistrate. However, after the effectiveness of the measure had been reviewed by the Coldrey Committee in 1986, the Act was again amended in 1988, this time to introduce a 'reasonable time' test for detention after arrest. Basically, it was found that the prescription of a fixed time period was too inflexible, a conclusion which has been disputed elsewhere. The Gibbs Committee commented (and the same point was made by the NSW Law Reform Commission) that the Coldrey Committee found that over 99.5% of all consensual

⁵³ ALRC, *Criminal Investigation: Report No 2 - An Interim Report*, AGPS 1975.

⁵⁴ Review of Commonwealth Criminal Law, *Interim Report: Detention Before Charge*, AGPS 1989.

⁵⁵ NSWLRC Report.

⁵⁶ New Zealand Law Commission, *Police Questioning*, Report No 31, 1994.

⁵⁷ Queensland Criminal Justice Commission Report.

⁵⁸ In 1991 the Federal *Crimes Act 1914* was amended by the insertion of Part 1C - Investigation of Commonwealth Offences. Section 23C (4) of the Act reads: For the purposes of this section, but subject to subsections (6) and (7), the investigation period begins when the person is arrested, and ends at a time thereafter that is *reasonable*, having regard to all the circumstances, but does not extend beyond: (a) if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander - 2 hours; or (b) in any other case - 4 hours; after the arrest, unless the period is extended under section 23D.

⁵⁹ Section 78 (2) of the *Summary Offences Act 1953* (SA) provides a 'prescribed period' for detention after arrest for a person arrested without warrant for a 'serious offence'. The prescribed period is expressed to mean 'a period (calculated from the time of apprehension) of four hours or such longer period (not exceeding eight hours) as may be authorized by a magistrate...'. A 'serious offence' is defined to mean an indictable offence or an offence punishable by imprisonment for two years or more. Section 78 (2) (a) provides that in relation to a serious offence an arrested person may be detained 'for as long as may be necessary to complete the investigation of the suspected offence, or for the prescribed period, whichever is the lesser'. The common law applies in relation to other offences.

interrogations or investigations since the 1984 amendments had taken effect had been completed within 6 hours of a suspect being arrested. Nonetheless, the Coldrey Committee concluded that the 6 hour time period might be inadequate where, for instance, a complex crime or multiple offences are under investigation, or delays occur due to travelling time or for other reasons.

A fixed minimum time limit is also provided under the English *Police and Criminal Evidence Act 1984* although, as the Queensland Criminal Justice Commission has said, ‘the permissible periods of detention far exceed what is generally considered acceptable in Australia’.⁶⁰

Arguments for the maximum time approach: The main arguments for a fixed maximum time limit were summarised by the New Zealand Law Commission as follows:

- The fixed maximum time approach offers a high degree of certainty. Persons being questioned by police are kept fully informed at all stages about their position and their rights, and are provided with clear protection against unduly prolonged detention.
- In those jurisdictions which have a fixed time regime, police have encountered few practical problems.
- A fixed maximum time gives guidance to police officers and promotes accountability. This regime operates with procedural and evidentiary safeguards which regulate police conduct and provide clear standards and rules of procedure. It ensures proper record keeping, which is essential for review. In contrast the reasonable time approach places all operational discretion in the hands of police and prosecuting authorities, with only loose statutory guidance and little in the way of accountability and review.
- Measures can be introduced to control any possible tendency for police to allow the maximum to become the norm. The investigation period is not intended to provide time during which a person may simply be held in custody. Even within the investigation period, the time for which the person is held must be reasonable in the circumstances of the case.
- The problem of delays caused by factors beyond police control, such as travelling time, the need to wait for the arrival of a lawyer, and so on, can be dealt with by making provision for time-outs. It is not necessary to abandon fixed maximum time limits in order to be able to accommodate these factors.

⁶⁰ Queensland Criminal Justice Commission Report, p 688. For a detailed discussion of *PACE* see: The Royal Commission on Criminal Justice, *Report*, July 1993, Cm 2263. A more recent analysis of *PACE* is found in Home Office Research Study No 155, *PACE ten years on: a review of the research*, by David Brown (Home Office Research and Statistics Directorate, 1997).

- It is preferable to set an initial limit which will be appropriate in the vast majority of cases rather than setting an ill-defined outside limit which is not relevant to most cases and is really designed for exceptional cases. A fixed maximum time approach, with provision for extension, makes allowance for exceptional cases.⁶¹

The reasonable time approach: The main alternative advanced by those in favour of some form of regulated scheme is one based on the reasonable time approach. This was proposed under the Crimes (Detention after Arrest) Amendment Bill 1994,⁶² section 356B (1) of which provided that ‘A police officer may, for a *reasonable time* after a person is arrested, detain the person for the purposes set out in subsection (2)’ Those purposes included where it is necessary ‘to establish the identity of the person’, or ‘to conduct any further inquiries that are reasonably necessary to determine whether a prosecution against any person will be commenced’. Proposed section 356C (1) provided, ‘In determining what is a reasonable time to detain a person after arrest under section 356B, all the relevant circumstances of the particular case must be taken into account’. These were defined to include

- the age, the physical capacity and condition, the mental capacity and condition and the intellectual capacity, of the person;
- the number, seriousness and complexity of the offences under investigation;
- whether a police officer reasonably requires time to prepare for any questioning of the person;
- the time during which the person is in the company of a police officer before and after the person's arrest.

This reasonable time approach found support in the 1990 report of the Tasmanian Law Reform Commissioner.

In terms of legislation, the approach finds expression in Victoria,⁶³ the Northern

⁶¹ Cited in Queensland Criminal Justice Commission Report, p 689.

⁶² The Bill was introduced in the Legislative Council on 21 April 1994. It did not pass beyond the Second Reading stage in the Legislative Assembly.

⁶³ Section 464A, *Crimes Act 1958* (Vic). The provision is part of a comprehensive regulated scheme which has operated as something of a model for legislation in other Australian jurisdictions.

Territory⁶⁴ and, since 1995, Tasmania.⁶⁵

Arguments for the reasonable time approach: Among others, the New Zealand Law Commission advanced the following arguments in support of the reasonable time approach with no upper limit:

- The setting of a fixed maximum period for the duration of police detention for questioning ‘achieve(s) certainty at the expense of flexibility and practical efficiency. To tie the police to a particular period of time to conduct post-arrest investigations unduly impedes the efficacious enforcement of the criminal law’.
- There may be a tendency for the maximum to become the norm. That is, the arrested person could be detained for the maximum period even though that time was not necessary, or reasonable, for the purpose of the investigation.
- A fixed maximum period may create a tendency to rush pre-interrogation investigations so as not to use up too much of the investigation period, particularly where a suspect has been arrested at the time or shortly after the commission of the offence.⁶⁶

Arguments against either form of regulate d scheme: Of particular interest is the report in 1995 by the Queensland Parliamentary Criminal Justice Committee (the Parliamentary Committee), in part because its findings are against the trend of most recent studies, including the very detailed analysis undertaken by the Criminal Justice Commission (the Commission) itself which found in favour of a regulated scheme based on the maximum time period approach. Thus, the Parliamentary Committee was not opposed to some legislative intervention in this area, but it did oppose the kind of comprehensive regulated scheme proposed by the Commission and others.

Briefly, in 1994 the Commission had recommended a scheme authorising detention of an arrested person for a reasonable period not exceeding 4 hours; time-outs would be disregarded when calculating the relevant time period for detention; and in certain circumstances provision would be made for the extension of the detention period beyond 4 hours (for a further period up to 8 hours). The recommendations contained legislative obligations on police officers to inform suspects of their rights and status and the provision of a Custody Officer to authorise the detention of the person for a specified period. Importantly, the Commission’s recommendations regarding pre-charge detention were contingent upon the introduction of a free legal advice service. The Commission saw this as essential to the proper balance between individual liberty and the public

⁶⁴ Section 137, *Police Administration Act* (NT).

⁶⁵ Section 4 (2), *Criminal Law (Detention and Interrogation) Act 1995* (Tas). For a brief overview of the Act see - ‘Detention for questioning - reasonable time: Tasmania’ (June 1996) 20 *Criminal Law Journal* 156.

⁶⁶ Cited in the Queensland Criminal Justice Commission Report, p 689.

interest. It was adamant that ‘The power to detain for questioning cannot be justified unless it is accompanied by adequate protections for suspects...If legal advice is considered too costly, much more radical alternatives must be considered, such as a shift in police investigative practice away from relying on interrogation, or confining questioning to the courtroom by a magistrate’.⁶⁷

Against the Commission’s recommendation the Parliamentary Committee presented a range of arguments, including:

- the introduction of a free legal advice scheme was neither economically nor practically viable. Moreover, the Parliamentary Committee had reservations as to the efficacy of any such scheme, noting ‘Experience in other jurisdictions which have operated free legal advice schemes indicates that the quality and value of legal advice provided under such schemes is often deficient. Therefore, often the real safeguard value of these schemes is illusory’;⁶⁸
- the proposal would increase the incidence of arrest, with the police being encouraged to arrest suspects in order to obtain evidence, namely, confessions;⁶⁹
- any scheme which revolves around detention for questioning is inherently at odds with the right to silence; it is also at odds with the concept of voluntariness which is the basis for admission of confessional evidence: ‘The fear is that the act of detention may itself *induce* a detained person to not exercise the right to silence, and perhaps, *induce* a confession that is false’;⁷⁰
- legislation cannot cure all evils and will be equally open to abuse. Further, it is not possible to cater in legislation for all possible scenarios;⁷¹
- while accepting that the common law has its problems in this area, the Parliamentary Committee was not convinced of the need for the kind of fundamental change recommended by the Commission. This is especially so when the Commission did not consider whether the present defects might be corrected by ‘minor adjustments’. The Parliamentary Committee stated, ‘Before proceeding to recommend substantive changes to the law which infringe longstanding common law liberties and rights, other alternatives must be

⁶⁷ Queensland Criminal Justice Commission Report, p 715.

⁶⁸ Queensland Parliamentary Committee Report, p 53. Criticisms of the provision of free legal advice under the English *Police and Criminal Evidence Act 1984* were discussed in - The Royal Commission on Criminal Justice, *Report*, July 1993, Cm 2263, pp 35-39.

⁶⁹ *Ibid*, p 57.

⁷⁰ *Ibid*.

⁷¹ *Ibid*, p 58.

considered. It is unwise to follow the precedents of others before considering the fundamental effect of those changes’;⁷²

- the Commission only acknowledged one objection to a regulated scheme, namely, that police should not be rewarded for ignoring the law by enshrining the practice of arresting for the purpose of questioning suspects in legislation. For the Parliamentary Committee, the better formulation of this objection is that police practices in detaining persons for questioning are inherently undesirable;⁷³
- some elements of the proposed scheme, notably the ‘time-out’ provisions, would be readily open to abuse; also, the safeguards associated with custody officers would be in reality inefficient and ineffective; and⁷⁴
- an over regulated scheme may result in an increase in the exclusion of confessional evidence as a result of ‘technical’ breaches of the regulations.⁷⁵

As noted, this is something of a minority view on the subject, with most studies and reports favouring some form of regulated scheme. However, opposition to such schemes has found support elsewhere. For example, in its response to the recommendations of the New Zealand Law Commission the Public Issues Committee of the Auckland District Law Society said that it ‘would be unfortunate to interrupt the development of the common law by the introduction of this cumbersome, flawed and unnecessary proposed legislation’.⁷⁶ On the issue of police abuses of the present law, Dr Rodney Harrison QC was quoted in these terms:

surely it is fallacious and indeed a travesty of reasoning to argue as the [New Zealand Law] Commission does that, because the police are regularly breaching the law and usurping powers of detention for questioning that they currently lack, the obvious solution is to provide them with such powers.⁷⁷

Length of detention and related issues under the Crimes Amendment (Detention after Arrest) Bill 1997 (Exposure draft): Contrary to the common law, among other things the Bill would alter the *Crimes Act 1900* to permit a police officer to detain ‘a person for the purpose of investigating whether the person committed the offence for which the

⁷² Ibid, p 63.

⁷³ Ibid, p viii.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Auckland District Law Society (Public Issues Committee), *Police Questioning: A Wrong Turn?*, December 1994, p 9.

⁷⁷ Ibid, p 2.

person is arrested'.⁷⁸ A new Part 10A would be inserted into the *Crimes Act 1900* which will apply to all persons, including children.⁷⁹ Proposed section 356B makes it clear that the Part does not confer any power to arrest a person, or to detain a person who has not been lawfully arrested. It would apply, however, to persons who have not been formally arrested but who are in the company of the police for the purpose of participating in an investigation if the police:

- (a) believe that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation,⁸⁰ or
- (b) would arrest the person if the person attempted to leave, or
- (c) have given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.⁸¹

Further to this provision a suspect would be 'deemed' to be under arrest and therefore would be protected by the rights and safeguards established under the Bill.

Regulations may be made modifying the effect of proposed Part 10A as it relates to: children; Aboriginal persons; Torres Strait Islanders; persons from non-English speaking backgrounds; and those with a physical or intellectual disability.⁸²

Proposed section 356D of the Bill then provides:

- (1) The investigation period is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.
- (2) The maximum investigation period is 4 hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

Examples of the circumstances which may be taken into account for the purpose of determining what is a reasonable time are set out in the Bill. These include the age and mental capacity of the detained person, the seriousness and complexity of the offences under investigation, the time required to complete any reasonably necessary searches, as well as the broadly worded criteria of 'the time required to carry out any other activity

⁷⁸ Proposed section 356C (2). A person's involvement in any other offence may also be investigated where the police officer forms a reasonable suspicion in that regard concerning the detained person (proposed section 356C (3)).

⁷⁹ Proposed section 356. However, proposed Part 10A would not apply to a person detained under the *Intoxicated Persons Act 1979*.

⁸⁰ Note the police officer is required to *believe* and not merely *suspect* that the person committed the offence. 'Belief' can be said to constitute a basis for arrest.

⁸¹ Proposed section 355 (2).

⁸² Proposed section 356A.

that is reasonably necessary for the proper conduct of the investigation’.⁸³

Proposed section 356F allows for certain times (time outs) to be disregarded in calculating the initial 4-hour period or any extension of time. These are defined to include: any time that is reasonably required to transport the person from the place of arrest to the nearest facility for conducting relevant investigative procedures; any time required to allow the person to communicate with a friend, relative, guardian, independent person, legal practitioner or (where relevant) consular official and any time required for such a person to arrive at the place of detention; any time required to arrange for medical attention or to arrange for the provision of an interpreter; and any time that is reasonably required to allow for an identification to be arranged and conducted. In any criminal proceedings it is for the prosecution to prove that the particular time was a time that was not to be taken into account, but it is to be proved on the civil standard of the balance of probabilities.⁸⁴

Provision is made for the extension of the detention period for up to an additional 8 hours in certain circumstances. This is where a police officer, before the end of the initial 4-hour period, applies for a warrant to an authorised justice who must be satisfied that:

- (a) the investigation is being conducted diligently and without delay; and
- (b) a further period of detention without charge of the person to whom the application relates is reasonably necessary to preserve or obtain evidence, or to complete the investigation, and
- (c) there is no reasonable alternative means of obtaining the evidence otherwise than by the continued detention of the person, and
- (d) circumstances exist in the matter that make it impracticable for the investigation to be completed within the 4-hour period.⁸⁵

The Bill then sets out the procedures for applying for and making a detention warrant,⁸⁶ plus the information required to be included in the application.⁸⁷ An application may be made in person or, when required urgently, by telephone⁸⁸ and must include the following information:

- (a) the nature of the offence under investigation,
- (b) the general nature of the evidence on which the person to whom the application relates was arrested,
- (c) what investigation has taken place and what further investigation is proposed,

⁸³ Proposed section 356E (2).

⁸⁴ Proposed section 356F (2).

⁸⁵ Proposed section 356G (4).

⁸⁶ Proposed section 356H.

⁸⁷ Proposed section 356I.

⁸⁸ Proposed section 356H (3). Also, it cannot be practicable for the application to be made in person. Application must be made by facsimile (and not by telephone) where this is readily available.

- (d) the reasons for believing that the continued detention of the person without charge is reasonably necessary to preserve or obtain evidence, or complete the investigation,
- (e) the extent to which the person is co-operating in the investigation,
- (f) if a previous application for the same, or substantially the same, warrant was refused, details of the refusal and any additional information required by section 356J,
- (g) any other information required by the regulations.

A maximum penalty of 100 penalty units or imprisonment for 2 years, or both can apply to a person knowingly giving false or misleading information in an application.⁸⁹

Questions and comments: Using in part the discussion in the Queensland Parliamentary Committee report as a guide, a number of questions can be raised and comments made in regard to certain aspects of the Crimes Amendment (Detention after Arrest) Bill 1997, including:

- as noted, for the Queensland Criminal Justice Commission and the New Zealand Law Commission the provision of free legal advice was essential to the proper balance between police powers and individual liberties under any regulated scheme. The NSWLRC had recommended 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’.⁹⁰ In addition, the establishment of a 24-hour duty solicitor scheme was recommended to ensure that ‘those persons who wish to receive legal assistance, despite all the disincentives, will actually do so’. The NSWLRC commented, ‘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’. A scheme of this kind is not in place in NSW at present;⁹¹
- following on from this, presumably the system of custodial investigation proposed under the Bill will have some funding implications, notably in the provision for detained persons to be taken before a justice after hours and on weekends;
- the present Bill would permit Regulations to be made modifying the effect of proposed Part 10A on certain vulnerable persons, including children and

⁸⁹ Proposed section 356K.

⁹⁰ Schurr comments that the NSW *Commissioner's Instructions* encourage police co-operation with a request by a detained person to consult a lawyer before questioning, but also remind police that a person does not have a legal right to a lawyer during questioning: B Schurr, *Criminal Procedure (NSW)*, LBC Information Services 1996, [4.310]. She quotes the NSWLRC as saying, ‘There is much anecdotal evidence...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’.

⁹¹ NSWLRC Report, p 127.

Aboriginal persons and Torres Strait Islanders. One question is whether this is an issue of such importance that it should be dealt with in the Act itself and not left to the Regulations. Associate Professor David Dixon of the University of NSW has argued in this regard: ‘Experience shows that it is simply not enough to legislate for the supposedly “normal” suspect, leaving other groups to be dealt with subsequently in regulations, if at all’;⁹²

- a further issue raised by Dixon is that the Bill ‘does nothing to effectively control how police treat suspects’. His general argument is for a more detailed legal scheme, along the lines of PACE. He continues: ‘For example, the Bill says nothing about what should happen if a period of authorised detention expires when no magistrate is available to accept a charge. There is nothing to prevent officers continuing, for example, to question a suspect overnight. Consequently, the current incentive to exploit loopholes by timing arrests appropriately will continue’;⁹³
- a concern of the Queensland Parliamentary Committee was that the proposed regulated scheme would compromise the suspect’s right to silence. The present Bill addresses the issue by stating that it would not affect certain rights, including the right to remain silent, but whether that addresses the concerns of the Queensland Parliamentary Committee is another matter;⁹⁴
- do the time out provisions in the Bill leave scope for abuse by the police, this being another issue of concern for the Queensland Parliamentary Committee? The Bill would seem to conform with the spirit of the NSWLRC’s recommendations in this regard, where it was added that any time outs must be ‘carefully noted on the suspect’s custody record, with responsibility for this placed on the custody officer’;⁹⁵
- likewise, are the Bill’s procedures in regard to the extension of detention, notably by telephone, sufficiently rigorous to guard against abuse? It can be said in this respect that the Bill does reflect substantially the recommendations of the NSWLRC on this issue, including the requirement that information given by police over the phone should be on oath (or affirmation or by affidavit). The NSWLRC had stated, ‘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: logically 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

⁹² D Dixon, ‘What’s wrong with the detention after arrest Bill?’, copy of forthcoming article supplied to the Parliamentary Library.

⁹³ Ibid.

⁹⁴ Proposed section 356B (2).

⁹⁵ NSWLRC Report, p 96.

amount to more than merely a rubber stamp for police requests;⁹⁶ and

- a criticism of the Crimes (Detention after Arrest) Amendment Bill 1994 was that it failed to deal with the practice of ‘voluntary attendance’. David Brown et al have commented that there was nothing in the Bill to dissuade or prevent police officers from relying on the supposed ‘consent’ of suspects who are said to be ‘assisting the police with their enquiries’. They added:

Inadequate as the rights of detained suspects are [under the provisions of the 1994 Bill] they may encourage officers to rely on voluntary attendance rather than formal arrest and custody. ‘Detention’ has to be defined (as the NSWLRC recommended) to include ‘voluntary attendance’, so removing the incentive for evasion of the detention regime.⁹⁷

In fact the NSWLRC had noted the view of the ALRC to the effect that a regulated scheme based on a fixed time approach ‘could be totally undermined by a police strategy based upon avoiding arrest wherever possible and relying instead on the “consent” of suspects’.⁹⁸

Further to proposed section 355 (2), the present Bill addresses this issue by deeming that a person is under arrest where certain conditions are met, including where ‘the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation’. In this way a detained person who is not formally under arrest is afforded protection of the rights and safeguards established under the Bill;

4. PRE-CHARGE INVESTIGATIVE PROCEDURES

Investigative procedures under the Crimes Amendment (Detention after Arrest) Bill 1997 (Exposure Draft): Proposed section 356M ‘Investigative procedures’ provides:

The following procedures may be conducted (*if otherwise authorised by law*) while a person is detained under this Part (emphasis added):

- (a) questioning the person,
- (b) obtaining a statement from the person,
- (c) questioning witnesses or other persons who may have relevant information relating to offence under investigation,
- (d) obtaining statements from witnesses or other persons who may have relevant information relating to the offence under investigation,
- (e) searching the person,

⁹⁶ Ibid, p 101.

⁹⁷ D Brown et al, *Criminal Laws*, Volume 1, The Federation Press 1996, p 202.

⁹⁸ NSWLRC Report, p 67.

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- (f) searching of premises, a vehicle or other conveyance,
 - (g) taking of finger-prints,
 - (h) taking of palm-prints,
 - (i) taking of photographs,
 - (j) filming,
 - (k) videotaping,
 - (l) examining the person's body,
 - (m) obtaining blood, urine or other bodily samples,
 - (n) subjecting things or matter to analysis,
 - (o) conducting identification parades,
 - (p) taking voice samples,
 - (q) taking handwriting samples,
 - (r) any other procedure authorised by law and generally conducted by a police office for the purposes of investigating a person's involvement in the commission of an offence,
 - (s) any procedure prescribed by the regulations for the purposes of this section.

Importantly, proposed section 356B (1) (c) states that Part 10A would not 'independently confer power to carry out an investigative procedure'. This is discussed later in this section of the paper under the heading 'Questions and comments'.

The common law: At common law a police officer could lawfully search the body, clothing and property in the immediate possession of a person arrested, but only if such a search was reasonably believed to be necessary (a) for the purpose of discovering a concealed weapon which might be used by the person to injure himself or others or to assist escape, or (b) to secure or preserve evidence with respect to the offence for which the person is in custody.⁹⁹ Thus, police have a common law power to search a person on arrest, based on the principle of safety in some cases and in others on the interests of justice, in order that evidence of the crime might not be destroyed or lost.

At common law there is no power to conduct a medical examination without the consent of the person, either before or after arrest.¹⁰⁰

That a person cannot be arrested under the common law solely for the purpose of questioning has been noted.

The law relating to forensic procedures in NSW:¹⁰¹ Under section 353A of the *Crimes Act 1900* there is a power to search the person *after arrest and charge*. In *Clarke v*

⁹⁹ ALRC, *Report No 2, Interim - Criminal Investigation*, AGPS 1975, p 25. For a detailed account see - K Tronc, C Crawford and D Smith, *Search and Seizure in Australia and New Zealand*, LBC Information Services 1996.

¹⁰⁰ B Schurr, *Criminal Procedure* (NSW), LBC Information Services 1996, [11.30]. Schurr cites *R v Boulton* (1871) 12 Cox CC 87 at 91.

¹⁰¹ For a detailed discussion of this issue see - M Swain, *Forensic Samples*, NSW Parliamentary Library Briefing Paper No 22/1995. The paper includes a comparative overview of comparable legislation.

*Bailey*¹⁰² it was held that, while the section extends police powers, it is only directed ‘to the time when an arrested person is in custody after a formal charge has been laid against him’.¹⁰³ In *R v Hass*¹⁰⁴ it was said that section 353A was ‘intended in certain respects to remove doubts as to powers at common law and in others to extend them’.

In particular, section 353A extends the common law by permitting the medical examination of a person without his or her consent. In this context the power of an investigating police officer consists of the power to seek authorisation for or to assist a medical practitioner to: conduct an ‘examination of the person’; and, since 1995, ‘take samples of the person’s blood, saliva and hair’. The latter was inserted by the *Criminal Legislation Amendment Act 1995* and followed the ruling in *Fernando*¹⁰⁵ where the NSW Court of Appeal held that section 353A did not (before it was amended) authorise the taking of blood samples from accused persons without their consent. In the Second Reading Speech it was said:

The amendment authorises a medical practitioner acting at the request of a police officer of or above the rank of sergeant to take forensic samples from a person in lawful custody and removes any requirement that consent be obtained. The place of ‘lawful custody’ is not limited to a police station.¹⁰⁶

Section 353A authorises a police officer to use such force as is reasonably necessary to enable a doctor to make the appropriate examination.¹⁰⁷

Section 353AA relates to the photographing, fingerprinting or palm-printing of children under 14 and provides that a police officer of or above the rank of sergeant may apply to the Children’s Court or a Justice for an order authorising such investigative procedures. A child under 14 cannot be held in custody solely for the purpose of making an application of this sort.

The law relating to forensic procedures in other jurisdictions: Likewise, in most other Australian jurisdictions forensic procedures are conducted on persons who have been arrested, with the scope of the provisions and the safeguards offered varying somewhat from place to place. Indeed the federal Attorney General has commented that ‘Some of

¹⁰² (1933) 33 SR (NSW) 303.

¹⁰³ *Ibid* at 310 (per Davidson J).

¹⁰⁴ (1972) 1 NSWLR 589 at 591-592.

¹⁰⁵ (1995) 36 NSWLR 567. It was held that the section only permitted an external examination involving an examination by eye and by touch.

¹⁰⁶ *NSWPD*, 1 June 1995, p 541.

¹⁰⁷ R Watson, AM Blackmore and GS Hosking, *Criminal Law (NSW)*, LBC Information Services 1996, [2.33730].

the current legislation contains virtually no safeguards at all...Even the requirement for a court order is not consistently provided where there is a lack of consent or where the use of force is required. For example, none is required in South Australia or Western Australia'.¹⁰⁸

Section 259 (3) of the Queensland *Criminal Code* contains broad powers to examine and obtain biological samples from the body surface and orifices of a person who 'is in lawful custody *upon a charge* of committing an offence' (emphasis added).¹⁰⁹

The law relating to forensic procedures in Victoria: A different scheme operates in Victoria. The Victorian *Crimes Act 1958* was amended in 1989 to include detailed provisions relating to investigative procedures, notably the taking of blood samples *before arrest and charge*. Police may request a sample from persons suspected of committing indictable offences where there are reasonable grounds to believe that the sample would tend to confirm or disprove the involvement of the suspect in the offence. In the absence of consent, the police may apply to the Magistrates Court for an order. If the Court grants the order, police may use reasonable force to assist a medical practitioner to take a sample. Samples from children aged 10-16 cannot be taken by consent but they may be taken by a court order. There is no power to take a sample from a child under 10.¹¹⁰ Indeed, under amendments introduced in 1993 the Act contains detailed provisions with respect to conducting forensic procedures on children, as well as the fingerprinting of children under 14.

The Model Criminal Code Bill: The 1995 amendments to section 353A of the NSW *Crimes Act 1900* were described at the time as an 'interim measure' pending the final release of the Model Criminal Code Committee's Bill on forensic procedures, which was intended to operate as the basis of uniform legislation in this area.¹¹¹ The history of that proposal and of the various reports which have contributed to the debate need not be outlined here.¹¹² It is enough to note that if the Federal Criminal Amendment (Forensic Procedures) Bill 1995 had been enacted the Commonwealth would have joined Victoria as the two jurisdictions where compulsory forensic testing could be imposed *before*

¹⁰⁸ *Commonwealth Hansard* (HR), 26 March 1997, p 3068.

¹⁰⁹ For a detailed commentary on the section see the Queensland Criminal Justice Commission, *Report on a Review of Police Powers in Queensland - Volume V: Electronic Surveillance and other Investigative Procedures*, October 1994, Chapter 26. (Henceforth, Queensland Criminal Justice Commission Report, Volume V)

¹¹⁰ Sections 464R-U, *Crimes Act 1958* (Vic); the account is based on DJ Neal, 'Model Forensic Procedures Legislation', *The College of Law Continuing Legal Education Seminar Papers*, 23 June 1996, p 136.

¹¹¹ *NSWPD*, 1 June 1995, p541.

¹¹² Senate Legal and Constitutional Legislation Committee, *Report on the Crimes Amendment (Forensic Procedures) Bill 1995*, October 1995. The Bill lapsed when the Federal Parliament was prorogued in 1996.

arrest.¹¹³ Responding to the proposal, the ALRC noted that currently Victoria, under the *Crimes (Blood Samples) Act 1989*, 'is the only Australian jurisdiction in which people who are not in lawful custody and who have not been charged can be compelled to undergo forensic procedures'.¹¹⁴ In its report on the 1995 Federal Forensic Procedures Bill, the Senate Legal and Constitutional Legislation Committee made 20 recommendations for amendment, most of which reflected a concern to strengthen the rights and safeguards for detained persons.¹¹⁵

On 26 March 1997 the Crimes Amendment (Forensic Procedures) Bill 1997 was introduced into Federal Parliament. To a significant extent this reflects its 1995 counterpart. In the Second Reading Speech, the Federal Attorney General said the 1997 Bill 'made minor but important changes' to its predecessor, 'most of which increase the safeguards on the rights of suspects who undergo a forensic procedure'.¹¹⁶ In the case of suspects who do not or cannot (children and otherwise 'incapable persons') provide 'informed consent' for the carrying out of forensic procedures, the Bill requires most procedures to be authorised by a magistrate. Non-intimate forensic procedures could be conducted on an adult who is in custody by order of a senior constable. Consistent with the recommendation of the Senate Committee Report, the 1997 Bill expressly exempts children below the age of 10 years from being compelled to undergo forensic procedures.¹¹⁷

Questions and comments: As noted, proposed section 356M of the Crimes Amendment (Detention after Arrest) Bill 1997 provides that a wide range of investigative procedures may be conducted but only 'if otherwise authorised by law'. Also, proposed section 356B (1) (c) states that Part 10A would not 'independently confer power to carry out an investigative procedure'.

It should be said at the outset that the Bill's section on investigative procedures may be open to several alternative interpretations and that the analysis presented in this paper is necessarily somewhat speculative in nature. An indication of the scope for uncertainty in this area is that the NSW *Commissioner's Instructions* seem to suggest that those procedures authorised under section 353A of the *Crimes Act 1900* can be undertaken before a person is charged, as part of the process of confirming or dispelling the suspicion on which the arrest was based.¹¹⁸ However, it has been suggested in this paper

¹¹³ Ibid, p 5.

¹¹⁴ Ibid.

¹¹⁵ Ibid, pp 58- 61.

¹¹⁶ *Commonwealth Hansard (HR)*, 26 March 1997, p 3069.

¹¹⁷ Note the recent amendment to the Federal *Crimes Act*, with section 4M providing that a child under 10 cannot be liable for an offence against a law of the Commonwealth. This is consistent with section 5 of the NSW *Children (Criminal Proceedings) Act 1987*.

¹¹⁸ *NSW Commissioner's Instructions*, Instruction 37.14, valid as at 1 April 1996.

that this Instruction is itself founded on a misinterpretation of the *Williams* decision. Another area of potential confusion is that different views may be held as to what is meant by the statutory term ‘upon a charge’ and the practical implications flowing from this.¹¹⁹ In any event, that alternative interpretations to the one presented here may well exist is acknowledged.

With this qualification in mind, the point to make is that a distinction may be drawn between some investigative procedures included under proposed section 356M of the Bill and others. In terms of the list of procedures included under the section, these can be separated into at least three distinct categories: those for which the legal position will be different if the Bill is passed; those where the position is unclear; and those procedures for which the Bill would appear to have no legal effect.

An example of the first category (where the legal position will be different if the Bill is passed) is the reference to ‘questioning the person’ in proposed section 356M. Under the *Williams* decision questioning is permitted before a person is charged. What is not permitted is the arrest of a person solely for the purpose of questioning, or where the taking of a person before a justice is delayed for the purpose of questioning. Thus, if this analysis is correct, where proposed section 356M refers to ‘questioning the person’ it does not independently confer power to carry out an investigative procedure. Rather, the Bill sets out the appropriate time frame and conditions under which the questioning of a detained person may occur. It is not the investigative procedure as such which is novel, therefore, but its *modus operandi* under the Bill.

Examples of the second category, where the legal effect is seemingly unclear, are ‘filming’ and ‘videotaping’ which at present do not appear to be regulated at all. These cannot therefore be said to be ‘otherwise authorised by law’ and would appear to inhabit some sort of legal limbo.

The third category, where the Bill would seemingly have no effect on the current law, refers to the taking of blood samples, for instance, and other forensic procedures permitted under section 353A of the NSW *Crimes Act 1900*. This is because that section only provides the police with the power to take forensic samples ‘Where a person is in lawful custody *upon a charge* of committing any crime and offence’. It has been said that at common law there is no power to conduct a medical examination without the consent of the person either before or after arrest. In relation to such procedures, section 353A extends police powers beyond the bounds of the common law but only in the situation where a formal charge has been laid against the person. The present Bill, it seems, would

¹¹⁹ The word ‘charge’ is not defined under the *Crimes Act 1900* and the point is made that the cases fail to discuss the practices of in-station charging and police bail in sufficient detail. Dixon comments that ‘the significant point of charge is not at the court, but in the police station’ - D Dixon, *Law in Policing: Legal Regulation and Political Practices*, Clarendon Press, Forthcoming 1997, p 185. The NSWLRC has said that the phrase ‘in custody upon a charge’ is ‘uncertain and ambiguous’: NSWLRC, *Police Powers of Arrest and Detention*, Discussion Paper No 16, August 1987, p 38 and p 40.

not confer an independent power to carry out forensic procedures before charge. In other words, such things as the taking of blood samples could still only occur *after arrest and charge*. These matters would not, therefore, be affected by proposed Part 10A.

Moreover, as the rights and safeguards proposed under the Bill relate to ‘investigative procedures in which a person who is detained *under this Part* is to participate’, it would seem to follow that these protections would not be available with respect to any of the investigative procedures dealt with under section 353A of the *Crimes Act* which are an extension of common law powers. On the other hand, presumably they would relate to other post-arrest search powers contemplated under section 353A which would otherwise be authorised at common law.¹²⁰ Also, those rights and safeguards would apply to pre-charge ‘questioning’, that being a police power authorised by law at present.

Again, if this analysis is correct, the obvious question is why does proposed section 356M include matters which do not appear to have any legal effect, or where the effect is unclear? Is it intended to point to a future direction in the law, perhaps under a revised scheme for uniform legislation? With that in mind, some comments of a more general nature can be made:

- the question can be put whether the powers set out under section 356M (if all these were to apply to pre-charge custodial investigation) should only be available to the police in respect of persons arrested for more serious offences. That consideration might apply with particular force to especially vulnerable persons, including Aboriginal and Torres Strait Islanders.¹²¹ However, its potential significance may not rest there. As noted, the relevant Victorian legislation is restricted to persons suspected of committing an indictable offence.¹²² Likewise, the Queensland Criminal Justice Commission recommended, among other things, that section 259 (3) of the *Criminal Code* be ‘available only in respect of a person in lawful custody upon a charge of committing an indictable offence’.¹²³
- another consideration (again with some form of model forensic procedures legislation in mind) may be whether a distinction should be made generally between intimate (the obtaining of blood samples for example) and non-intimate forensic procedures, as contemplated under the 1995 and 1997 Federal Forensic

¹²⁰ Note that the extent of the search authorised under section 353A (1) has not been determined: B Schurr, *Criminal Procedure (NSW)*, LBC Information Services 1996, [9.540].

¹²¹ Under proposed section 356A provision is made for the modification by Regulation of Part 10A with respect to such persons.

¹²² *Crimes Act 1958* (Vic), section 464R. An elaborate scheme is established under the Act which includes provision for forensic procedures to be conducted by informed consent, or by an order of the Magistrates’ Court.

¹²³ Queensland Criminal Justice Commission Report, Volume V, p 827.

Procedures Bills. Should some form of informed consent or else authorisation from a Justice be required at least for intimate forensic procedures to be undertaken? Note that the Crimes Legislation (Further Amendment) Bill 1990 (NSW)¹²⁴ distinguished between ‘intimate examinations’ and ‘non-intimate examinations’ and set out the circumstances in which these could occur. An ‘intimate examination’ would have required ‘appropriate consent in writing’ or in the absence of such consent, if authorised by a police officer of or above the rank of sergeant; and

- should it be stated expressly whether reasonable force may or may not be used in taking forensic samples during the period of custodial investigation. At present, reasonable force is permitted under section 353A of the NSW *Crimes Act 1900*, though it is not provided for explicitly. The contrast in this respect is with section 81 of the South Australian *Summary Offences Act 1953* which does explicitly provide for the use of reasonable force.

5. ***THE PROVISION OF RIGHTS AND SAFEGUARDS, INCLUDING THE CUSTODY OFFICER***

Balancing police powers and individual rights: What the present Bill seeks to achieve is a balance between the public interest in effective policing and the right of individuals to be free against the dangers of arbitrary arrest. It would achieve the first by expanding police powers and the latter by confirming certain rights and establishing certain safeguards for those persons detained by the police for questioning.

In this regard the Bill adopts certain features of systems introduced in other jurisdictions, including the English *Police and Criminal Evidence Act 1984* which, in this respect at least, has been something of a model for legislative reform elsewhere.¹²⁵ The Act includes a right to free legal advice,¹²⁶ the right of members of vulnerable groups to have an appropriate adult present, plus the right to communicate with people outside the

¹²⁴ NSWPD, 8 May 1990, p 2532.

¹²⁵ Note that the English legislation allows for periods of detention (up to 96 hours) after arrest far in excess of what is considered appropriate in Australia.

¹²⁶ The Royal Commission on Criminal Justice, *Report*, July 1993, Cm 2263, pp 35-39. The Commission discussed the provision of legal advice under section 58 of *PACE*. It noted a rising trend in people detained requesting and obtaining legal advice while adding that in a ‘substantial proportion of cases’ it is neither asked for nor received. It also addressed the issue of the quality of legal advice at police stations, noting that research showed that ‘many advisers lacked adequate legal knowledge and confidence and that sometimes they seemed to identify more with the police than with the suspect’. Various reforms were proposed, including a review of the training, education, supervision and monitoring of legal advisers who operate at police stations. Note that in 1994 the Law Society and Legal Aid Board initiated a major training and accreditation scheme aimed at the many non-solicitor advisers who provide advice to suspects held in police stations: L Bridges and J Hodgson, ‘Improving custodial legal advice’ [February 1995] *Criminal Law Review* 101.

police station. Importantly, *PACE* provides for Codes of Practice dealing with various areas of police activity. These Codes set out in subordinate legislation the sort of material one finds in the NSW *Commissioner's Instructions*; as a result of their statutory status, they have given rise to extensive judicial consideration of their requirements and implications.¹²⁷

With significant modifications, its provisions are reflected, for example, in the relevant part of the Victorian *Crimes Act 1958* which includes a right to an interpreter, as well as the right of the person in custody to be informed that he or she may communicate with a friend or relative, plus a legal practitioner.¹²⁸

The various reports have also highlighted the need for specific rights and safeguards for persons in police custody to be enshrined in legislation. For the NSWLRC, for example, these included 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. Such recommendations were reflected in the Crimes (Detention after Arrest) Amendment Bill 1994 and find expression again under the present Bill.

In relation to current practice as regards the availability of legal advice, Schurr comments that the NSW *Commissioner's Instructions* encourage police co-operation with a request by a detained person to consult a lawyer before questioning, but also remind police that a person does not have a legal right to a lawyer during questioning. She quotes the NSWLRC as saying, 'There is much anecdotal evidence...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'.¹²⁹

The custody officer - England and Wales: An important innovation of the English *Police and Criminal Evidence Act 1984 (PACE)* was the creation of a 'custody officer' (of at least the rank of Sergeant) with the role of ensuring that the protective safeguards under the Act operate effectively. The custody officer's function under *PACE* has been explained in these terms:

Elaborate reporting and recording provisions were established to make it as difficult as possible for the police to abuse their powers. The *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Code C) laid down standards to be met in the treatment of those in custody. The custody officer was made responsible for ensuring compliance with the Act and Codes, breach of which became a

¹²⁷ D Dixon, 'Reform of policing by legal regulation: international experience in criminal investigation' (March 1996) 7 *Current Issues in Criminal Justice* 287 at 292.

¹²⁸ Section 464C.

¹²⁹ B Schurr, *Criminal Procedure (NSW)*, LBC Information Services 1996, [4.310].

disciplinary offence.¹³⁰

Reporting in July 1993 the Royal Commission on Criminal Justice presented a critical overview of the operation of this and other features of *PACE*. It noted that under the Act the custody officer is not to be involved in the investigation of any offences for which he or she may be acting as custody officer. The Commission commented, 'This separation of roles is fundamental'. It added, however, that in a police station environment this can be difficult to achieve and accordingly recommended, among other things, the 'centralisation of custody functions wherever practicable and their provision as a separate specialist service'.¹³¹ Others have commented on this separation of roles in these terms:

Notable features of the PACE system are the allocation of specific personal responsibility for the treatment of detainees to custody officers, and the exploitation of the traditional antipathy between uniform and detective officers. Custody officers are usually unwilling to tolerate behaviour from investigating officers which could have serious consequences for them, including being called to court to account for a suspect's treatment or facing disciplinary action.¹³²

The custody officer - NSW proposals: In keeping with the *PACE* scheme, the NSWLRC recommended that the creation of a specialist 'Custody Officer' to operate the proposed custodial detention scheme should be considered. 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. The Commission set out the functions of the custody officer. These included maintenance of the Custody Record, ensuring the safety and well-being of persons in custody, determining what a 'reasonable period' of detention is in each case and generally safeguarding and ensuring the rights of arrested persons. In conjunction with this it was further recommended that the police should be required to maintain detailed and complete custody records.¹³³

¹³⁰ D Feldman, *Civil Liberties and Human Rights in England and Wales*, Clarendon Press 1993, p 222. *PACE* includes 5 Codes of Practice which regulate distinct aspects of policing, with Code C dealing with 'detention and questioning'.

¹³¹ The Royal Commission on Criminal Justice, *Report*, July 1993, Cm 2263, p 32. Another feature of the system discussed by the Commission was the requirement for anything relevant to the detention of a person under the Act to be clearly recorded in the custody record form, as part of the protection against unfair treatment and improper coercion. Shortcomings in the system led the Commission to recommend 'the continuous video recording (including sound-track) of all the activities in the custody office and in the passage and stairways leading from the custody office to the cells'. Video cameras in the cells themselves were not recommended.

¹³² D Dixon, 'Reform of policing by legal regulation: international experience in criminal investigation' (March 1996) 7 *Current Issues in Criminal Justice* 287 at 292.

¹³³ NSWLRC Report, p 93.

At the same time, however, the NSWLRC recognised that Australian circumstances are significantly different to those encountered in England. In NSW, for instance, there are many small country police stations, often staffed by only one or two officers, thus making it hard to designate regional police stations as custody stations and expect all arrested persons who might be subject to custodial investigation to be brought to those stations. On the other side, the NSWLRC was convinced that common sense exceptions could be built into any proposed system to accommodate such local differences.

Ultimately, it was said, the system of custodial investigation proposed by the NSWLRC was not contingent on the introduction of 'specialist custody officers' but would, in the Commission's view, be enhanced by it.¹³⁴

The NSW Crimes (Detention after Arrest) Amendment Bill 1994 made provision for the position of 'custody officer', a term it defined to mean 'the police officer having, or nominated by the officer in charge of a police station as having, the responsibility for the care, control and safety of persons detained at the police station or another place'. Specialist custody officers were not part of the proposed scheme and the custody officer's role was not spelt out in detail.

The custody officer - Tasmania: The Tasmanian *Criminal Law (Detention and Interrogation) Act 1995* also makes provision for the position of 'custody officer'. That regulated scheme has the following features:

- it requires the Commissioner of Police to designate those police stations with 'sufficient facilities' which may be used for detaining arrested persons;¹³⁵
- one or more police officers (usually at or above the rank of Sergeant) must be appointed as custody officers for each designated police station;¹³⁶
- subject to certain qualifications, a separation is to be maintained between the functions of a custody officer and the investigation of the offence at issue;¹³⁷
- a person detained under the Act must be brought before a custody officer without delay and placed in his or her custody;¹³⁸
- the custody officer must record, among other things, the time of the person's

¹³⁴ Ibid, p 94.

¹³⁵ Section 13.

¹³⁶ Section 14 (1) and (2). An officer of any rank may perform the functions of custody officer 'if a custody officer is not readily available to perform them' - Section 14 (3).

¹³⁷ Section 14 (4)-(6).

¹³⁸ Section 15 (1).

arrival at the police station and the grounds for detention, as well as inform the person in custody of those grounds;¹³⁹

- the police officer conducting the investigation must advise the custody officer when the detained person is questioned and the reason for the denial of any protective rights available under the Act; and
- a custody officer may transfer a detained person to the custody of either the police officer conducting the investigation, or to the officer in charge of the person outside the police station.

Rights and safeguards under the Crimes Amendment (Detention after Arrest) Bil 1 1997 (Exposure draft): The Bill provides that, before any investigative procedure in which the person is to participate starts, a *police officer* must advise the person of his or her right:

- to communicate with a friend, relative, guardian or independent person to inform that person of the detained person's whereabouts and to consult with that person at the place of detention;¹⁴⁰
- to communicate with a legal practitioner, to consult with that practitioner at the place of detention and to have legal representation at any investigative procedure¹⁴¹
- however, both the above requirements need not be complied with in certain circumstances, such as if the *police officer* believes on reasonable grounds that compliance is likely to result in an accomplice avoiding arrest;¹⁴²
- where the above requirements are complied with a *police officer* must defer any investigative procedures for a reasonable time. However, the police are not required to wait for more than 2 hours for the persons communicated with to arrive;¹⁴³ and
- if the detained person is not an Australian citizen or a permanent Australian resident, a police officer must also advise him or her of the right to communicate and consult with a consular official.¹⁴⁴

Subject to certain exceptions,¹⁴⁵ friends, relatives, guardians, legal practitioners and

¹³⁹ Section 15 (2).

¹⁴⁰ Proposed section 356N (1) (a).

¹⁴¹ Proposed section 356N (1) (b).

¹⁴² Proposed section 356P.

¹⁴³ Proposed section 356N (3)-(8).

¹⁴⁴ Proposed section 356O.

¹⁴⁵ Proposed section 356Q (2). These include where the detained person does not agree to the information being provided and where the police officer believes on reasonable grounds that supplying the information would, among other things, be likely to result 'hindering the recovery of any person or property concerned in the offence under investigation', or 'the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness'.

certain other persons are entitled to information from the police about the whereabouts of detained persons.¹⁴⁶ At the same time, again subject to certain exceptions,¹⁴⁷ a *police officer* must inform the detained person of any request for information made by a legal practitioner, a person concerned in a professional capacity with the welfare of the person or, where appropriate, a consular official.¹⁴⁸

All the above functions are to be carried out by a *police officer*. Certain other functions, however, are expressly designated to be performed by the *custody officer*. These are as follows:

- the provision of an interpreter for certain persons, with the custody officer ensuring that any investigative procedure is deferred until the interpreter arrives;¹⁴⁹
- the provision of medical assistance where this is appropriate;¹⁵⁰
- the provision of reasonable refreshments and access to toilet facilities;¹⁵¹
- the maintenance of custody records, as may be prescribed by the Regulations.¹⁵²

In all these particulars the present Bill replicates the provisions under the 1994 Bill. Consistent with this, its definition of ‘custody officer’ is substantially the same as its 1994 equivalent. The current definition reads:

the police officer having, or nominated by the officer in charge of a police station as having, from time to time the responsibility for the care, control and safety of persons detained at the police station or another place.

Note that the Regulations power includes the provision of ‘guidelines’ which are to be observed by police officers (including custody officers) in the performance of their functions etc under proposed Part 10A of the *Crimes Act*.

¹⁴⁶ Proposed section 356Q (1).

¹⁴⁷ Proposed section 356R (2). This is where the detained person does not agree to the information being provided, or where ‘the police officer believes on reasonable grounds that the person requesting the information is not the person whom he or she claims to be’.

¹⁴⁸ Proposed section 356R (1).

¹⁴⁹ Proposed section 356S. The custody officer need not make such arrangements where they are not ‘reasonably practicable’, or defer an investigative procedure in urgent cases where the custody officer considers that the ‘safety of other persons, makes such deferral unreasonable’.

¹⁵⁰ Proposed section 356T.

¹⁵¹ Proposed section 356U.

¹⁵² Proposed section 356V. Note that proposed section 356X (2) provides that the Regulations *may* make provision for the keeping of records, ‘including the formal record of the conduct of investigative procedures’ in which police officers participate.

Questions and comments: At the heart of any consideration of the rights and safeguards under the proposed Bill must be the question of their practical efficacy. How well will they work in practice? Concerning the right to legal advice under *PACE* in England and Wales, David Feldman, Barber Professor of Jurisprudence at the University of Birmingham, has commented that its efficacy:

depends crucially on the operation of an effective 24-hour duty solicitor scheme. This is a case, therefore, where civil liberties depend crucially on the expenditure of public money to make the detainee's freedom to obtain legal advice a real one.¹⁵³

Here Professor Feldman used this example to illustrate the point that many individual freedoms depend on social and governmental action to make them realisable. That the NSWLRC recommended the establishment of a 24-hour duty solicitor scheme as part of its proposed system of custodial investigation has been noted.

Views on *PACE* differ.¹⁵⁴ However, a recent review conducted by the UK Home Office concluded:

PACE has introduced a greater element of fairness into pre-charge procedures, in that suspects are now more aware of their rights and given the chance to exercise them, although there remain areas in which improvement is required. There are also benefits for the police in terms of clearer and more certain powers, particularly at the station.¹⁵⁵

That some caution is needed in applying English experience to Australian conditions is clear. Yet, the significance of *PACE* in this area needs to be acknowledged, as indeed it is in the *Final Report* of the Royal Commission into the NSW Police Service. It is also the case that the drive towards the legal regulation of custodial interrogation has been fuelled by similar concerns in both countries, notably the apparent toleration of police abuses in the courts, as well as concern about police culture generally.¹⁵⁶

¹⁵³ D Feldman, *Civil Liberties and Human Rights in England and Wales*, Clarendon Press 1993, p 267.

¹⁵⁴ For an overview of different responses to *PACE* see - D Dixon, 'Reform of policing by legal regulation: international experience in criminal investigation' (March 1996) 7 *Current Issues in Criminal Justice* 287.

¹⁵⁵ UK Home Office, *PACE ten years on: a review of the research*, Home Office 1997, p ix. This is quoted in Royal Commission into the NSW Police Service, *Final Report: Volume II - Reform*, May 1997, p 462.

¹⁵⁶ Dixon would extend his concerns to include the 'legal and political cultures and structures' - D Dixon, *Law in Policing: Legal Regulation and Police Practices*, Clarendon Press, Forthcoming 1997, p 227.

Concerning the detail of the Crimes Amendment (Detention after Arrest) Bill 1997, a number of further comments can be made:

- to what extent is the proposal supported by an adequate, publicly funded legal assistance scheme?;
- as with the 1994 Bill, it does not specify that a custody officer must be of or above a certain rank;
- statutory provision would not be made for separating the functions of custody officer from the investigation of the offence, a matter considered to be of fundamental importance under *PACE* and reflected in the Tasmanian system;
- unlike the Tasmanian legislation, the Bill would not provide for detention after arrest to occur in ‘designated police stations’, nor are the details of the record keeping requirements spelt out under the Bill; and
- having regard to the custody officer scheme operating under *PACE*, it can be asked whether the system proposed under the Bill is either sufficiently clear or comprehensive. Why, for example, are the express functions of the custody officer restricted to the provision of an interpreter, medical assistance and refreshments and facilities, plus the keeping of records? Is there a case for a specialist custody officer scheme, as suggested by the NSWLRC?

On this issue, Associate Professor David Dixon has commented that while the present Bill echoes *PACE* in referring to custody officers and custody records, ‘it ignores the central lesson of the English experience: *PACE*’s relative success has been based on giving dedicated custody officers detailed statutory power and responsibility’. He continues: ‘there is a need for detailed regulation (by Parliament, not just by the Police Service) of the custody officer’s role and responsibilities’. Of the present NSW system Dixon says that too much faith is put on electronic recording of interviews with suspected persons, adding that while the ERISP system has considerable merit, ‘it cannot act as an effective regulator in itself’.¹⁵⁷

Summing up his concerns about the balance of police powers and suspects’ rights under the Bill, Associate Professor David Dixon states:

The *PACE* experience shows clearly that a custody officer must have specific responsibility to inform suspects of their rights: here the duty is allocated to an unspecified officer (presumably in practice the investigator) who has no duty even to record having done so. Regulation

¹⁵⁷ D Dixon, ‘What’s wrong with the detention after arrest Bill?’, copy of forthcoming article supplied to Parliamentary Library.

is inadequate in not defining what a legal adviser can (and cannot) do in a station: permitting legal advisers to attend questioning is asking for trouble unless the law clearly defines what legal advisers can (eg advise on the right to silence?) And cannot (eg answer questions for suspects?) do. Even more significantly, the Bill provides a right to legal advice which will be meaningless for most suspects. Unless a duty solicitor scheme is provided and legal aid is available for legal advice at police stations, it is hypocritical to suggest that the police power to detain is 'balanced' by a right to legal advice.¹⁵⁸

6. *THE NSW POLICE ROYAL COMMISSION - FINAL REPORT*

Regulation of police powers: To a significant extent the Royal Commission approached the regulation of police powers in the light of the reforms introduced in England under *PACE* and bearing in mind the problems and confusions in the common law following the decision in *Williams*. The Commission noted that, in contrast to several other jurisdictions,¹⁵⁹ NSW has been slow to respond to the need for legislative change, the case for which it found compelling, stating:

If the rights of suspects and police are not properly spelled out there will inevitably be confusion and dispute. This leaves room for the abuse of common law rights either out of ignorance or deliberately. Alternatively, it can result in undue hindrance to police investigations which are, as the High Court pointed out, carried out for the benefit of the community at large. It is productive of delay and uncertainty in the trial process, and it features as an incident of process corruption so far as it encourages police to perjure themselves in relation to whether suspects being interviewed are under arrest or merely 'assisting inquiries'.¹⁶⁰

Responding to these matters, the Royal Commission said it 'strongly' recommended the passing of the present proposed legislation.¹⁶¹ Its reasons had been spelt out in more

¹⁵⁸ Ibid.

¹⁵⁹ It was suggested (at page 464) that the fixed detention period recommendation of the Queensland Criminal Justice Commission was reflected in the amended *Criminal Code* (Qld), Act 37 of 1995, which as yet has not been proclaimed to commence. However, section 311 of the revised Code uses the 'reasonably practicable' formulation without further reference to a fixed maximum detention period. The report of the Queensland Parliamentary Justice Committee is not considered by the Royal Commission.

¹⁶⁰ Royal Commission into the NSW Police Service, *Final Report, Volume II - Reform*, May 1997, pp 464-465.

¹⁶¹ Specific reference was made to the Crimes Amendment (Detention after Arrest) Bill 1996, but the Commission's *Interim Report* (p 17) makes it clear that it is dealing with the present Bill. The Commission said in the Interim Report that it supported the present Bill, which it had examined in a draft form and 'following extensive consultation with the Police Association' - Royal Commission Into the NSW Police Service, *Interim Report*, November

detail in its *Interim Report* of November 1996 where it spoke, among other things, of the need for the 'precise definition' of both police powers and the rights of suspects. The differences between the *PACE* model and the reforms recommended under the present Bill were not discussed.

In addition, the Royal Commission recommended 'careful consideration' of the current review by a NSW Police Service Working Party of the Codes of Conduct which operate under *PACE*, with a view to possibly implementing their equivalent in this jurisdiction.

Custody officers: In a brief discussion the Royal Commission expressed its support for the appointment of 'custody officers/managers', stating:

In particular, it considers that they are likely to act as a restraining influence so far as they might become personally accountable for anything untoward that may happen during the interview detention process, or for any failure to protect the rights of detained persons. Entrusted with specific responsibilities in relation to these matters they might better conduct the adoption procedures following interview, which has largely proved to be a solemn farce.¹⁶²

7. CONCLUSIONS

Proposed legislation which purports to affect the common law liberties of the individual will always require close scrutiny, both in terms of the changes it will make to the current law, as well as in relation to its likely practical effect. The widespread dissatisfaction with the existing law has been discussed and it has been said that most recent governmental and other inquiries have favoured the introduction of some kind of regulated scheme. Most commentators have advocated the introduction of a scheme based on a fixed maximum time model, as proposed under the present Bill. At the same time, it has been argued that the expansion of police powers envisaged under a regulated scheme must be accompanied by adequate, transparent and effective protective rights and procedures for the detained person, including children and other vulnerable people. If a regulated scheme is to be introduced the aim must be to get the balance and the detail right, or as right as possible bearing in mind the competing claims at issue. Associate Professor David Dixon has said that the issue 'is not whether police should have power to detain for investigative purposes, but how that power should be regulated'.¹⁶³

1996, pp 17-18.

¹⁶² Ibid, pp 465-466.

¹⁶³ D Dixon, 'What's wrong with the detention after arrest Bill?', copy of forthcoming article supplied to Parliamentary Library.

