

Preliminary Paper No 21

CRIMINAL EVIDENCE: POLICE QUESTIONING

A discussion paper

The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.

These should be forwarded to:  
The Director, Law Commission, PO Box 2590, Wellington  
by Monday, 30 November 1992

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The Commissioners are:

Sir Kenneth Keith KBE - President  
The Hon Mr Justice Wallace  
The Hon Mr Justice Blanchard  
Professor Richard Sutton

The Director of the Law Commission is Alison Quentin-Baxter. The offices of the Law Commission are at Fletcher Challenge House, 87-91 The Terrace, Wellington. Postal address: PO Box 2590, Wellington, New Zealand.  
Telephone: (04) 473 3453. Facsimile: (04) 471 0959

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## Preface

The Law Commission's reference on criminal procedure has the following purposes:

- (1) To ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi.
- (2) To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

With these purposes in mind the Law Commission is asked to examine the law, structures and practices governing the procedure in criminal cases from the time an offence is suspected to have been committed until the offender is convicted, including but not limited to

- powers of entry, search and arrest,
- diversion - principles and procedures,
- decisions to prosecute and by whom they should be made,
- the rights of suspects and police powers in relation to suspects,
- the division of offences into summary and indictable offences,
- preliminary hearings and criminal discovery,
- onus of proof,
- evidence in sexual and child abuse and other special cases,
- payment of costs to acquitted persons,

and to make recommendations accordingly.

The criminal procedure reference needs to be read together with the evidence reference which has the following purpose:

To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.

With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

Both references were given to the Law Commission by the Minister of Justice in August 1989.

To deal comprehensively with the criminal procedure reference in a single report would mean considerable delay. The Commission therefore decided to proceed with the reference by stages. A report on *Disclosure and Committal* was published in June 1990 and an issues paper on the prosecution of offences was published in November of that year. There is also discussion of police powers in the *Final Report on Emergencies* published in December 1991. The present discussion paper, which considers the right of silence, confessions, improperly obtained evidence and police questioning after arrest, represents the next major step in the reference.

Many aspects of this paper are also relevant to the evidence reference. The paper therefore needs to be considered in conjunction with the series of papers which are being published under that reference. Three papers published in April 1991 on principles for the reform of evidence law, codification of evidence law and hearsay evidence are particularly relevant and are frequently referred to in this paper.

The Law Commission's work has been greatly assisted by Mr R R Mahoney, Senior Lecturer in Law at the University of Otago, who prepared most valuable research papers on the right of silence, the law of confessions, police questioning after arrest, and improperly obtained evidence. This research has formed the foundation for the Commission's discussion paper. Mr Mahoney also acted as a consultant throughout the project and the writing of the paper.

Our work has also been assisted by an advisory committee, comprising the Hon Mr Justice R C Savage, Judge J D Rabone, Mr L H Atkins QC, Dr R S Chambers QC and Mr S B W Grieve. Mr G C Thornton QC, legislative counsel, drafted the rules proposed in the paper, and Mrs G Te Heu Heu and Mr J Te M Chadwick acted as consultants on issues relating to te ao Maori. In addition the Commission received assistance from individual members of the judiciary and the legal profession. The Commission also consulted with the New Zealand Police, the Law Reform Division of the Department of Justice and a special committee of the New Zealand Law Society.

The Law Commission hopes that this discussion paper will draw a wide response. The law of criminal procedure and the law of evidence are of major importance and we particularly wish to take account of the views of all those with an interest in the topics covered by the paper.

The paper does more than discuss the issues and pose questions for consideration. It



includes our provisional conclusions and draft rules relating to the various topics. The draft rules are also accompanied by a commentary. The intention is to enable detailed and practical consideration of our proposals. We emphasise that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Formal submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, Wellington, if at all possible, by 30 November 1992. Any initial inquiries or informal comments can be directed to Susan Potter (04 473 3345).



## Introduction

As the preface indicates, the Law Commission has references on two broad, related topics - the whole of the law of evidence and the law of criminal procedure. The latter runs from the beginning of the criminal investigation through prosecution to trial.

This discussion paper concerns a number of interrelated questions falling within those two topics:-

- Should individuals who are suspected of committing a crime be obliged to answer questions put to them by police officers and other public officials? If they refuse to answer or refuse to give evidence at their trial, what consequences (if any) should follow from their silence? The latter question arises even if they are not obliged to answer or to give evidence.
- What power should police officers have to ask suspects questions before and after arrest, and in particular what rules govern the admissibility of confessions resulting from that and other questioning? Should police officers have a power of detention to facilitate any power of questioning?
- What should be the consequences, for the admissibility of evidence, of the breach of any rules governing police questioning?

The law and practice bearing on those questions rest on three important public interests.

The first public interest is in upholding the particular part of the criminal law which is the subject of the investigation. This is achieved in substantial part by the prosecuting of alleged offenders, the bringing of relevant evidence before the court, and the convicting of those who have committed the crimes in question. For the pursuit of that public interest it is critical that all relevant, probative evidence be available to a court seeking to determine the truth. But there may of course be good reason to exclude evidence.

Such good reasons are to be found in the second public interest: that the police and other officials of the State are required to follow and do in fact follow a lawful process. We can trace back to the beginnings of our legal system (in the various versions of Magna Carta for instance) the proposition that nobody should be deprived of liberty except according to due process of law. That does not just mean simple technical legality, for there are certain basic standards which the criminal law must adhere to. At least two reasons underlie those standards - the reliability and safety of the prosecution process and of any

convictions that result from it, and a deeply held sense that there must be limits on State powers of enforcement of the criminal law. Like the expression *due process* in Magna Carta, the adjectives in the Bill of Rights of 1688 make that instinct clear: *excessive* bail is not to be required nor *excessive* fines imposed nor *cruel* or *unusual* punishments inflicted.

The third relevant public interest is in having clear, accessible, coherent and fair law which can be easily understood by the public and equitably applied by law enforcement officers and the courts.

In some cases those public interests may all point in the same direction. For example, the prohibition on torture in our law and on the admissibility of any confession obtained by torture can be related to the concern for reliable evidence (for it is clear that innocent people have in the past been convicted on the basis of coerced confessions), to basic standards of civilised behaviour, and to clear, easily applicable rules of law.

But the principles may also be in conflict. Just two instances illustrate that. A person might be wrongly abducted from one country and brought to trial in another. The abduction itself in no way affects the evidence, which is reliable and indeed untainted by the illegality. But when the trial takes place what is the relevant court to do when faced with such a gross international illegality and breach of the rights of the individual? Or consider the case in which, as a direct result of an illegally coerced confession, tangible physical evidence of the guilt of the offender is obtained and the reliability of the evidence is completely unaffected by the means of obtaining it. Is the trial court to ignore that compelling evidence or is it to ignore the illegal act of the official?

The law and practice in New Zealand, as elsewhere, shows that an even handed application of principle may provide different answers in different circumstances. In some circumstances, evidence will be held inadmissible to condemn the illegal actions and to deter repetition. In other cases it will be admissible, notwithstanding the illegality, since relevant evidence should be available to those determining the truth. In some situations one result or the other will be dictated by a clear rule of law, while in others the decision will be left to the trial judge to determine according to all the circumstances.

When deciding what the legal rules should be we also need to know the relevant facts - whether prosecutions are thwarted by the application of exclusion rules and if so the circumstances and numbers. But those facts have to be weighed against the fact of police illegality or impropriety. Other remedies available to call officials to account for their allegedly illegal or improper act may also affect the balance.

The need for an even handed application of principle is also required in any consideration of the law relating to the right of silence. Calls for the abolition of the right of silence or for its complete restoration are not helpful. The issues have to be more carefully stated and related to the existing state of the law.

In fact the law has long imposed obligations on citizens to answer questions and to provide information at the demand of the State. A few examples suggest that the obligation is imposed for good reason. The State would not be able to collect its revenue without the willingness - potentially under legal compulsion - of individual taxpayers to provide relevant information, including the making of appropriate returns. The safety of factories and the health of those working in them could be put at risk if factory inspectors were unable to gather relevant information which as well might incriminate the operators of the factory. The life and health of those who buy food might be jeopardised were health inspectors not able to examine the premises of those who prepare such items for consumption.

The information may have to be provided even if it incriminates the person providing it. The legislation may then, however, limit the use to which such incriminating information can be put. Both the particular circumstances and the general principle should contribute importantly to the striking of the correct balance and to the detail of the legislation. This is not a matter that can be resolved by simple slogans. The Law Commission will consider the privilege against self-incrimination in the next part of its work on evidence and criminal procedure.

The areas mentioned so far where there is statutory obligation to answer are regulatory ones. By contrast, in the area of the general criminal law such obligations to answer questions are rarely imposed. Rather the debate usually turns on the more restricted question whether any consequence, especially an adverse inference, is to be drawn, from the silence of the defendant before trial or at trial. If an adverse inference is to be drawn, who is to call attention to the possibility - only the judge or also the prosecutor? What should be the form of such a statement? These are important questions but it will be seen that they are much narrower than the question whether the right of silence should be completely abrogated or protected. There may also be another possible way of addressing the particular interest, as various statutes indicate. The onus of proof in respect of some particular matter might be placed on defendants. That may well indirectly require defendants to forsake silence if they are to successfully defend charges brought against them.

The powers of the police to ask questions are vital to the enforcement of the criminal law. When they are carrying out that function it is also vitally important that they comply with the relevant rules. If the rules are considered unsatisfactory by a major participant in their application (and accordingly are breached from time to time) then either the rules should be amended or action should be taken to ensure compliance in practice. Our society cannot accept the proposition, once put to the first Chief Ombudsman, that a little illegality by officials does not do any harm. As Sir Guy Powles said, such a proposition is not in accordance with the dignity and honour of a country which professes a system of constitutional government and adherence to the rule of law (Report by Chief Ombudsman, *Security Intelligence Service* 1976 AJHR A 3A, 59). The major agency of the State set up to enforce the law must not act outside the existing legal structure. Such action will have a generally corrosive and unacceptable effect.

The police in New Zealand have high standards. It is important that these standards be maintained in practice. Constant vigilance is needed, for the cases do indicate that the practice departs from the standards from time to time. We need sound rules which are observed in the first place as a matter of basic routine and which, secondly, provide a basis for sanction in the event of breach. The proper and fair operation of the law also requires excellence in recruiting, training and supervision. One critical element is not to assume guilt and seek assiduously for evidence to fit that initial assumption.

The paper consists of three parts considering in turn:

- aspects of the right of silence,
- confessions and improperly obtained evidence, and
- police powers of questioning.

Each part sets out provisional conclusions and proposals of the Law Commission. As indicated in the preface, the proposals are based on consultation and research. Following its usual practice, the Commission plans further extensive consultation on the issues raised in the paper and the proposals put forward there.

The proposals are based on a broad view of the issues and endeavour to take account of the many interrelationships in this area of law and practice. They are aimed at the preparation of principled, clear and accessible law. The process requires detailed consideration of the current law (which is developing in part because of the Bill of Rights) and careful identification of the principles on which our law and any reform of it should be based.

## PART I

### RIGHT OF SILENCE





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## The Policy Debate

### INTRODUCTION

1 The right of silence in its broadest sense reflects the principle that, in the absence of some contrary rule of common law or legislation, all citizens are free to remain silent and to decline to provide the authorities with information. The traditional debate regarding the right of silence concerns the extent to which this freedom should be limited in order to facilitate the investigation and prosecution of crime.

2 In that context the right of silence refers to a range of situations which differ in nature, origin, incidence and importance, as is shown by the extent to which some aspects of the right have been encroached upon by statute.<sup>1</sup> While throughout this paper we refer to the right of silence, the discussion will make it clear which of the various aspects of the right is under consideration. This is important because the strength and grounds of the justification for preserving one aspect (eg, protection against adverse comment when a defendant refrains from giving evidence) may differ markedly from another (eg, the general freedom of individuals not to answer questions asked by the police).

3 Although the right of silence has been the subject of heated debate and is of great symbolic importance, the actual issues in dispute so far as they arise in criminal trials are confined within a relatively narrow compass. Those issues concern:

- the consequences of not raising a defence relied on at trial at an earlier stage;
- whether inferences may be drawn from a defendant's silence before trial or

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1 *R v Director of Serious Fraud Office, Ex parte Smith* [1992] 3 WLR 66, 74. The speech of Lord Mustill contains a description of the various aspects included within the expression "right of silence". The New Zealand statute book contains many instances of the types of encroachments to which Lord Mustill refers. For instance safety, health, financial and taxation legislation require individuals to answer questions and provide information on the demand of officials. Some of those requirements expressly override or preserve the privilege against self-incrimination, while some are silent on this. The use to which incriminating information can be put is regulated by some statutes.

lack of testimony at trial, and whether those inferences may be the subject of comment to the jury.

Broader issues are raised by recent (and rather general) suggestions that a legal duty to co-operate with law enforcement officers should be imposed on all citizens.

4 The right of silence is at best a qualified right; there are undoubted adverse consequences which may flow from a defendant remaining silent before or during trial. The central question is whether those detrimental consequences should be added to or lessened. To discuss the right of silence in absolute terms of preservation or abolition is artificial.

5 Not only is the debate sometimes conducted in misleadingly broad terms but also the importance of the issues can be over-emphasised. The Law Commission believes that the current law is in need of clarification because there are uncertainties which reflect a less than coherent foundation for the existing rules. In practice, however, we are not convinced that the current law concerning the right of silence presents difficulties of the magnitude which arise in respect of other aspects of this paper concerning the questioning of suspects and the law of confessions. We would not wish to see attention being diverted from the reforms which we consider are required in these latter fields through undue emphasis being placed on right of silence issues.

## HISTORY

### Silence at trial

6 The right of silence has strong roots in ancient times, and its early emergence in disparate cultures illustrates that it did not arise in our law through some historical accident.<sup>2</sup>

7 Passing to more direct antecedents, others have exhaustively set forth<sup>3</sup> how the right of silence at trial grew out of an abhorrence of the ex officio oath of the English ecclesiastical courts - the inquisitorial style oath requiring a person to swear to answer truthfully to a wide ranging interrogation by the court, unsupported by an accusation more specific than "common report" (rumour). The objection to this style of oath crystallised

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2 Rosenberg & Rosenberg, "In the Beginning: The Talmudic Rule Against Self-Incrimination" (1988) 63 NYULR 955; Helmholtz, "Origins of the Privilege Against Self-Incrimination: The Role of the European *Ius Commune*" (1990) 65 NYULR 962.

3 For an accessible summary see *McCormick on Evidence* (3rd ed, West Publishing Co, St Paul Minnesota, 1984), 279 and following pages.

with its adoption by the courts of Star Chamber and High Commission, created in the 15th and 16th century respectively, which employed draconian methods such as torture in pursuit of their often politically repressive ends. Opposition to the ex officio oath was a rallying cry for the Puritans and culminated in 1641 with the Long Parliament abolishing the oath, as well as the two courts with which it had been associated.

8 The force of this opposition led the common law courts to rethink the procedure, which had long been employed, of pre-trial interrogation of a defendant by justices of the peace, as well as the spirited interrogation at trial of the defendant (though this was not under oath). The initial antipathy to the single issue of being forced to take the ex officio oath became transposed into a much wider opposition to being forced to respond to questions if there was a risk that the answers might be incriminating. The right to refuse to answer such questions was recognised quickly in actual trials, including civil proceedings, and was eventually extended in 1848 to protection of the defendant in criminal proceedings,<sup>4</sup> replacing the former practice of pre-trial judicial interrogation.

9 Once examination of the defendant in court disappeared in practice, the ironic effect was that there was little opportunity for testimony to be given of the defence version of events. This was because the common law permitted only a statement by the defendant from the dock and did not allow sworn evidence from the defendant or the defendant's spouse. It has only been since the defendant and his or her spouse have been competent to testify in criminal cases (1889 in New Zealand<sup>5</sup>), that most of the pertinent issues concerning the right of silence of a defendant at trial have had to be confronted. The current expression of the right of silence is found in s 25(d) of the New Zealand Bill of Rights Act 1990:

Everyone who is charged with an offence has, in relation to the determination of the charge, ...

(d) The right not to be compelled to be a witness or to confess guilt.<sup>6</sup>

### Silence before trial

10 Wigmore attempted to disassociate the law relating to confessions from the developments leading to the abolition in the 17th century of the inquisitorial style oath.<sup>7</sup>

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4 11 & 12 Vict c 42 s XVIII.

5 Criminal Evidence Act 1889 s 2; as to summary proceedings, see s 80 Justices of the Peace Act 1882.

6 This accords with Article 14(3)(g) of the International Covenant on Civil and Political Rights, which New Zealand has ratified.

7 *Wigmore on Evidence* (Chadbourn rev 1970), Vol III, para 832.

However, his historical arguments (which themselves have been questioned<sup>8</sup>) cannot gainsay the obvious link between these subjects. The New Zealand Court of Appeal,<sup>9</sup> together with the House of Lords,<sup>10</sup> the Privy Council<sup>11</sup> and the Supreme Courts of Canada<sup>12</sup> and the United States<sup>13</sup> have accepted that the same philosophy which led to the abolition of the Court of Star Chamber lent impetus to the subsequent rule excluding evidence of confessions made by a defendant when his or her right of silence (manifested here in the narrower and stronger privilege against self-incrimination) had been improperly disregarded. The most obvious link to the privilege against self-incrimination occurs when the confession has been obtained after violence or a threat - in keeping with the concept of a defendant's right not to be *forced* to incriminate himself or herself.<sup>14</sup> Since its beginnings, the law of confessions has experienced dramatic fluctuations of interpretation, as the rights of defendants have from time to time been afforded varying weight when balanced against the desire to obtain convictions. Our Bill of Rights can be seen as a culmination of 250 years of development of the law regarding a defendant's right of silence before trial. Section 23(4) declares that:

Everyone who is -

(a) Arrested, or

(b) Detained under any enactment -

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

11 The historical component of the right of silence should not be ignored. In days gone by people literally shed their blood and sacrificed their freedom in the name of the ideals embodied in the right of silence.<sup>15</sup> Obviously it can be said that our system of

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8 Kamisar, *Police Interrogation and Confessions: Essays in Law & Policy* (University of Michigan Press, 1980), 35-37.

9 *R v McCuin* [1982] 1 NZLR 13, 23, Somers J.

10 *R v Sang* [1980] AC 402, 436, Lord Diplock.

11 *Lam Chi-ming v R* [1991] 2 AC 212.

12 *R v Hebert* (1990) 57 CCC 3(d) 1, 33, McLauchlin J.

13 *Miranda v Arizona* (1966) 384 US 436

14 The link is less clear where the factor vitiating the confession is the holding out to the accused of the "hope of advantage", though this technique can likewise be argued to be a breach of the right of silence. See part II paras 19-22

15 Most notably the remarkable John Lilburn, whose history can be reviewed in Wigmore, see note 7.

criminal justice is not subject to the same sorts of abuses as were current at that time, but beyond the rhetoric remains the fact that the right of silence was a response to processes which were unjust. Reference to the historical context in which the right developed in support of an argument that it is an anachronism in modern conditions begs the question. Over time the basis for a particular principle may change, but the principle itself still be valid. It could be precisely because of the core of protections afforded to defendants, such as the right to consult a lawyer, the presumption of innocence and the right of silence itself, that we have been able to maintain the relative integrity of our system of criminal justice.

### THREE MAIN QUESTIONS

12 We do not propose to present a full recapitulation of the debate over the right of silence. Wigmore's valuable work on the subject<sup>16</sup> remains the most complete reference source, drawing for instance on Bentham, and many others who have considered the issue.<sup>17</sup> Essentially the debate focuses on three main questions (which correspond to the principal justification for the right of silence).

- Is the right of silence an essential corollary of the presumption of innocence ?
- Does the right of silence protect the guilty or the innocent ?
- Does the right of silence protect against unwarranted State intrusion into private lives ?

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16 See note 7. A recent argument against the right of silence can be found in Thomas, "The So-Called Right to Silence" (1991) 14 NZULR 299. See generally on the debate: Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53 Mod LR 709; Zuckerman, *The Principles of Criminal Evidence* (1989) ch 15; Menlow, "Bentham, Self-Incrimination and the Law of Evidence" (1988) 104 LQR 286; Coldrey, "The Right to Silence: Should it be Curtailed or Abolished?" (1991) 20 Anglo-American LR 51; Galligan, "The Right to Silence Re-Considered" [1988] CLP 69 and in reply see Robertson, "The right to silence ill-considered" (1991) 21 VUWLR 139. The following discussion attempts to cover the strongest points made by these and other commentators.

17 *Wigmore on Evidence* (McNaughton rev ed 1961) Vol VIII para 2251. Wigmore draws on Vol 7 of Bowring's 1843 edition of *The Works of Jeremy Bentham*. See also the 1827 edition referred to in note 26.



13 Each of these questions will be considered in turn, but it is first necessary to put what follows in context. Inevitably, some of the discussion will only have reference to one particular circumstance in which the right of silence arises as an issue, for instance the position of a defendant before, as opposed to during, trial. This summarised version of the debate over the right of silence cannot be a substitute for more detailed policy consideration in respect of individual topics. And again it must be stressed that a general discussion is open to the criticism that it is misleading to conduct the debate in absolute terms of uncompromising recognition or complete abolition of the right of silence (paras 4 and 5).

14 This point is sometimes overlooked by those who cite existing qualifications to the right of silence in support of a conclusion that the right should be "abolished". It is argued that to cling to vestiges of the right of silence adds confusion to our law and in fact can prejudice people who may act on the mistaken assumption that the right is "absolute". Those contentions mask the fact that what is being considered is the desirability of there being further (or indeed fewer) detrimental consequences from remaining silent than currently exist. Once the issue is presented in this way it is clear that the existence of limits on the absolute theoretical right does not logically lead to the conclusion that there should be further limits. There may be no sound policy basis for existing limits or, conversely, there may be a sound policy basis which has a wider application than is presently recognised. Accordingly, the concern is to identify the underlying principles and to ensure that they are applied consistently to rectify any anomalies in the law.

### **Is the right of silence an essential corollary of the presumption of innocence?**

15 The English Royal Commission on Criminal Procedure was of the view that the right of silence at trial is an essential feature of the accusatorial system of criminal justice, reflecting the principle that the onus of proof rests on the Crown:

In the accusatorial system of trial the prosecution sets out its case first. It is not enough to say merely "I accuse". The prosecution must prove that the defendant is guilty of a specific offence. If it appears that the prosecution has failed to prove an essential element of the offence, or if its evidence has been discredited in cross-examination, there is no case to answer and the defence does not respond. There is no need for it to do so. To require it to rebut unspecific and unsubstantiated allegations, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty. Accordingly, "it is the duty of the prosecution to prove the prisoner's guilt", which is, in Lord Sankey's words, the "golden thread" running through English criminal justice.<sup>18</sup>

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18 The Royal Commission on Criminal Procedure, *Report* (January 1981, Cmnd 8092), para 4.35 quoting *Woolmington v DPP* [1935] AC 462, 481.

16 The English Commission also stated that the same reasoning applies in respect of the use at trial of a suspect's refusal to answer police questions as evidence of guilt. (A minority thought that the inconsistency of principle in requiring the onus of proof at trial to be upon the prosecution and to be discharged without any assistance from the defendant, but yet using the defendant's silence in the face of police questioning under caution as part of the prosecution case at trial, was more apparent than real.) In the interests of simplicity the discussion that follows focuses more on silence at trial.

17 One view of the presumption of innocence is that it requires the defendant to remain free from the need to answer an allegation until guilt has been proven.<sup>19</sup> A mere suspicion or accusation is not enough.

18 This, however, does not entail that a defendant suffers no prejudice by remaining silent at trial in the face of evidence which, if not contradicted, establishes guilt. When evidence sufficient to establish guilt exists defendants remain silent at their peril - convictions should ultimately result, but it will be on the basis of the evidence, not the factor of silence.

19 Put simply, the effect of the presumption of innocence, as with most presumptions, can be weakened and eventually nullified by sufficient contrary evidence. Apparent proof of guilt beyond reasonable doubt (apparent in the sense that it may later be able to be explained away) may occur at different stages of a trial - whether in the direct examination of the first prosecution witness or through cross-examination of the last defence witness. Whenever such stage is reached the presumption of innocence may be said to have been displaced. There has been apparent proof of guilt beyond reasonable doubt and, if nothing is done to alter that position, the defendant should be convicted.

20 Though there are several ways in which the defence can seek to destroy the apparent proof of guilt - by cross-examination or the contrary testimony of defence witnesses - one obvious way is through testimony of the defendant. But it is contended that this particular step should not, any more than any other, be necessary until there has been apparent proof of guilt. Once, however, guilt has been apparently proven, it is accepted that the defendant stands in jeopardy of conviction unless something, which might be the defendant's own testimony, is offered to weaken the prosecution's case. The defendant in such a case who has any helpful testimony to give would be well advised not to remain silent. In short, when the benefit afforded the defendant by the presumption of innocence has been displaced by proof of guilt beyond reasonable doubt, a conviction will result from the defendant's exercise of the "right" of silence. However, it is argued that to attach any significance to a defendant's silence in effect means that the prosecution may establish

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19 See *Dubois v R* (1986) 23 DLR (4th) 503, 522; *Petty v R* (1991) 65 ALJR 625, 639.

something less than proof beyond reasonable doubt and yet still obtain a conviction. For those who accept this proposition the presumption of innocence and the right of silence stand and fall together.

21 In the view of some commentators<sup>20</sup> the preceding argument rests on a fallacy. They contend that the presumption of innocence does not discriminate among particular types of evidence. As long as guilt has been proven beyond reasonable doubt the presumption is adequately displaced. When a defendant refrains from testifying this is simply another piece of evidence to be considered in determining guilt, and it is capable of tipping the balance in favour of a conclusion that the level of proof beyond reasonable doubt has been reached. On this view, abolition of the right of silence at trial amounts to no more than a recognition of the evidential effect of the defendant's failure to testify, acknowledging that a jury is likely to take this fact into account in any event. This position is perhaps best stated by Glanville Williams:

It is said that any change in the law would substantially shift the burden of proof away from the prosecution. This is a misunderstanding. The jury or magistrates, before they can convict, must be satisfied of the defendant's guilt beyond reasonable doubt, on the evidence presented. The rule as to burden of proof has nothing to say on what evidence shall be taken into account. It is illogical to argue that reasonable changes in the law of evidence to help the prosecution to *discharge* their burden of proof *shift* the burden of proof.<sup>21</sup>

22 Those who favour one view or the other appear to remain irretrievably apart and an endeavour to resolve the debate is not likely to be fruitful. It is, however, vital to recognise that treating silence as an item of evidence - irrespective of whether so doing is considered to effect the presumption of innocence - significantly changes the position of a defendant. It becomes more difficult for the defendant to make a judgment about whether to give evidence on the basis of an assessment whether the prosecution case has been proved beyond reasonable doubt, because the defendant cannot readily determine what weight will be given to silence. The weight clearly will vary from case to case and jury to jury. There will, therefore, be greater reason for the defendant to testify.

23 Another school of thought is that silence can be taken into account without treating it as positive evidence of guilt. From this perspective, it is contended that having regard to silence does not affect the presumption of innocence. Thus, it is regarded as legitimate to consider pre-trial silence when assessing the credibility of a defence raised for the first time at trial. Additionally, while no inference of guilt can be drawn from silence at trial,

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20 Most notably Glanville Williams, "The Tactic of Silence" (1987) 137 NLJ 1107.

21 (1987) 137 NLJ 1107, 1108.

silence can be taken into account in assessing the credibility or weight to be given to prosecution evidence.

24 These distinctions are not without difficulty. The Court of Appeal has stated that the first distinction "is often too fine to be of practical value in a jury trial."<sup>22</sup> (However, as was recently pointed out in *R v Kattenberg*,<sup>23</sup> this comment implicitly accepts that there is a distinction.) The second distinction has been accepted in the comments made by Cooke P in *R v McCarthy*.<sup>24</sup>

25 We would not go so far as to say that taking silence into account in assessing the weight or credibility of other evidence does not accord evidential weight to silence,<sup>25</sup> but the crucial point is that silence is not being accorded evidential weight in its own right. Before silence can become relevant to the determination of the charge, there must be evidence in the particular case which may more readily be accepted by being uncontradicted or unexplained (in respect of prosecution evidence) or may less readily be accepted because it was not previously raised (in respect of defence evidence).

### **Does the right of silence protect the guilty or the innocent?**

26 The oft-cited dictum (erroneously ascribed to Bentham<sup>26</sup>) would have it that "innocence claims the right of speaking, as guilt invokes the privilege of silence". It may well be that the great majority of persons who claim the benefit of the right are simply seeking to avoid conviction for the crime they have committed. Common sense and daily experience confirm that a person who fails to respond to an allegation of criminality or questioning concerning an offence is often motivated by a desire to conceal the self-incriminating truth.

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22 *R v Coombs* [1983] NZLR 748, 752. See also *Petty v R* (1991) 65 ALJR 625.

23 Unreported, High Court, Wellington, 21 October 1991, AP 201/91, 7.

24 (1992) 8 CRNZ 58.

25 See Cross, "The Evidence Report: Sense or Nonsense - A very wicked animal defends the 11th Report of the Criminal Law Revision Committee" [1973] Crim LR 329, 333; Zuckerman, "Trial by Unfair Means - The Report of the Working Group on the Right of Silence" [1989] Crim LR 855, 863-864.

26 Lewis, "Bentham's View of the Right to Silence" [1990] CLP 135, 139 and following pages. Regardless of the fact that the words are not those of Bentham, their force is undiminished. A similar quotation, actually from Bentham, to the same effect is found in Bentham, *Rationale of Judicial Evidence*, Vol V (Hunt and Clarke, London 1827 reprinted, Garland, New York, 1978), 209:

between delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable.

27 Having said that, however, it must be recognised that silence does not always indicate guilt. What follows is a non-exhaustive summary (taken largely from a recent article on the subject<sup>27</sup>) of reasons why an innocent person may wish to remain silent or, perhaps more pertinently, may be well advised to remain silent either before trial or during the trial itself.

With respect to suspects undergoing police interrogation:

- They may not be fully aware of the circumstances which have led to their being questioned.
- They may be in an emotional and highly suggestible state of mind.
- They may be confused and liable to make mistakes which could be interpreted at trial as deliberate lies.
- They may forget important details which it would have been to their advantage to have remembered.
- They may use loose expressions, unaware of the possible adverse interpretations which could be placed upon them at trial.
- They may have misheard or misunderstood what the police interviewer said.
- They may feel guilty when in fact (or at least in law) they have not committed an offence.
- They may be ignorant of some vital fact which explains away otherwise suspicious circumstances.
- They may wish to protect others.
- They may be hesitant to admit to having done something discreditable but not illegal.
- They may feel forced to protect the true perpetrators of the crime because of the fear of the consequences of being labelled an informant.
- They may be reluctant to speak because they fear the truth will not be believed.

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27 Greer, see note 16.

- They may rely on the existence of the right of silence. Advised, or already aware, that there is a purported right of silence, an innocent person may deliberately claim the right as, in effect, a political act in response to what he or she may view as an unwarranted intrusion into his or her private (and guilt free) life.

28 Some of the above reasons will be equally applicable to the decision not to testify. But there are protections afforded to a defendant at trial which distinguish the position of a defendant in that situation from that of a suspect being questioned by the police. The defendant at trial knows the full prosecution case and may be represented by counsel. The evidence of prosecution witnesses may be tested through cross-examination. The prosecution must have established a *prima facie* case in order for the defendant to be faced with the decision whether to testify. There are rules to ensure that the conduct of the trial is fair and an impartial judge to see that the rules are observed.

29 Nevertheless some of the concerns listed in para 27 will remain and there are the following additional concerns:

- As with interrogation by an experienced police officer, cross-examination by prosecution counsel of an inarticulate and uneducated defendant is an unequal contest which may distort the truth.
- The defendant may wrongly come across to a jury in a bad light because of his or her mannerisms, speech idioms or general attitude, which would never be evident if he or she refrained from testifying.
- The defendant may have a criminal record which, despite the general protection against its disclosure through cross-examination of the defendant by the prosecution, may nonetheless be the subject of cross-examination in certain cases (eg, a defence which attacks a co-defendant or a prosecution witness<sup>28</sup>) to the severe prejudice of the defendant. The same defence can be mounted with no disclosure of the defendant's record if the defendant does not testify.
- Defence counsel may think that for the defendant to testify in support of a positive defence rather than simply putting the prosecution case to proof would shift the focus of the case from the credibility of the prosecution case to the credibility of the defence.

30 The validity of some of the points listed in paras 27 and 29 may be disputed.

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28 See generally *Cross on Evidence* (Mathieson, 4th NZ ed, Butterworths, Wellington, 1989) ch 14.

Further, it might be argued that if there is a legitimate reason why a suspected but innocent person stayed silent in response to police questioning, the reason for silence could be explained to the jury when the time comes to testify at trial, or defence counsel could remind the jury that guilt is not the only inference that flows from silence. In a similar fashion counsel could point out to the jury that a failure to testify is not necessarily an admission of guilt. Evidence could be called to explain the reason for a defendant's silence before or at trial.

31 The broad response to these suggestions is that the reason for remaining silent may also prevent the defendant from pursuing one of these courses of action. Also, comment to the jury by defence counsel may carry little weight and would need to be non-specific to avoid presenting evidence from the bar. To call evidence in respect of the reason for remaining silent would make the defendant's silence the central issue at trial and divert attention from the primary question of whether the prosecution has proven its case beyond reasonable doubt.

32 The Law Commission is of the view that, once it is accepted that there are reasons other than guilt why a defendant may remain silent, then an inference of guilt cannot inevitably be drawn from silence. Moreover, it will often be difficult to determine in a particular case whether guilt is the appropriate inference to draw from silence. A comparison can be made with the way in which the courts deal with evidence that a defendant lied when questioned by the police before trial.<sup>29</sup> Though such evidence has an obvious adverse effect on the defendant's credibility should he or she testify, the Court of Appeal has stressed that, except in rare cases (where the lie suggests that the defendant is unable to give an innocent explanation), such evidence cannot be taken to have added anything to the prosecution case. If some other reason besides guilt can be suggested to explain the lie then the jury cannot use evidence of the lie to supplement the other evidence in the case.<sup>30</sup> The cautious approach taken in dealing with lies (which has also been applied to a defendant's false testimony<sup>31</sup>) must likewise be appropriate to the seemingly less incriminating response of silence.

33 Some would argue that too much emphasis is being placed on the desire to avoid convicting innocent people. The right of silence also leads to guilty people escaping conviction, and it has been said that the fact that silence occasionally protects innocence should not hinder the ability of the jury to draw the most obvious (adverse) inference from a defendant's silence before or during trial:

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Innocent men do not normally keep out of the witness box, so the risk that one such

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29 See generally *R v Andrews* (1990) 6 CRNZ 680.

30 *R v Carey* (unreported, Court of Appeal, 19 December 1984, CA 124/84).

31 *R v Gye* [1990] 1 NZLR 528.

man will occasionally court conviction by doing so is one which may legitimately be taken; we can console ourselves with the reflection that such a man would to a large extent be the architect of his own misfortunes.<sup>32</sup>

34 The claim is that in practice, with few exceptions, the right of silence only affords protection to those who are undeserving of it. It is argued that it is the experienced criminal who is most likely to remain silent under interrogation. The young or inexperienced defendant, for whose protection from self-incrimination a better case can be made, will usually respond to questioning. A particular scenario which is often referred to involves numerous closely related suspects, as in the case of gang members, where it is clear that one or more of the suspects committed a particular offence, but their silence results in there being no way of determining who is the offender.<sup>33</sup> However, it must be recognised that the difficulty in this particular instance is a practical one. Even unfettered comment to the jury, by the judge and prosecutor alike, on the adverse inferences to be drawn from the defendant's silence will not help solve the problem of determining which particular members of the gang were the actual offenders.

35 The claim that the right of silence leads to an undue number of wrongful acquittals is not supported by the discussions we have to date had with police and Crown prosecutors. The impression that we have formed, based on our initial inquiries, is that the practical significance of the right of silence in the function of investigating and prosecuting crime is exaggerated by some commentators. It is important that reform proceeds on the basis of facts rather than perceptions and, in conjunction with the police, we are seeking to obtain further information (see also para 81).

### **Does the right of silence protect against unwarranted State intrusion into private lives?**

36 The right of silence debate extends beyond theoretical doctrines of the law of evidence. With regard to the continuing need to maintain an appropriate balance between the interests of the community and individual liberties, some would argue that the right of silence reflects an unreasonable concern for individual liberty at the expense of a compelling community interest in combating crime. Thus, there have been recent calls in this country for the imposition of a positive duty on all citizens to co-operate with law enforcement officers.<sup>34</sup>

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32 Cross, "The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguards of Liberty?" (1970) 11 *Journal of the Society of Public Teachers of Law* 66, 70.

33 See *R v Tapaea* (unreported, High Court, Christchurch, 1 February 1988, T 49/87).

34 Thomas, see note 16; Robertson, *Council Brief*, Issue 185, July 1991 (address to Wellington District Law



37 Beneath the surface of this aspect of the debate rests a fundamental political judgment as to the proper relationship between the individual and the State. On the one hand the right of silence may be seen as an essential component of "the right to be let alone":

the most comprehensive of rights and the right most valued by civilized men.<sup>35</sup>

On this view an individual's affairs are an individual's concern and, in the absence of compelling reasons to the contrary, should be free from State intervention. This notion of the primacy of the individual is also reflected in the basic common law principle, declared in *Entick v Carrington*,<sup>36</sup> that in the absence of positive legal authority the State has no power to act in a way which impinges on individual rights.

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Society Seminar June 1991).

35 *Olmstead v United States* 277 US 438, 478 (1928), Brandeis J (dissenting).

36 (1765) [1558 - 1774] All ER Rep 41.

38 On the other hand the right of silence may be characterised as "the right to be unco-operative":

Surely, then, the right to be uncooperative is an anachronism which has been overtaken by the concept of personal accountability? Civilised society, it is suggested, has matured to the point where that question can be answered affirmatively. One may therefore properly question whether a society founded on the right to silence, with its implicit denial of personal responsibility and duty to account, is the sort of society which we can properly cherish as our ideal.<sup>37</sup>

39 In support of a positive duty to co-operate reference may be made to the increasing crime rate. But what is involved is clearly a significant change:

though every citizen has a moral duty or ... a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority ...<sup>38</sup>

40 The aim of the proposal to impose a positive duty on all citizens to co-operate with law enforcement officers, together with the benefits and detriments, must therefore be clearly identified. What would be the extent of the duty to co-operate and how would it be defined? How would the penalty be determined, for instance in a case involving serious crime? To what extent would imposing that duty lead to an increase in the detection of crime and the conviction of offenders? What effect would such a change have on the actual crime rate?

41 Further, what long-term costs would flow from the effective reversal of the presumption that individual affairs should be free from State interference? An important point which may be overlooked is that the protection of individual liberties is itself in the interests of the community. In this context the right of silence protects against the arbitrary exercise of State power. This aspect of the right of silence is best seen as a particular application of the fundamental common law principle that an individual's liberty should not be constrained by the exercise of State power in the absence of good cause to suspect that the individual has committed an offence (see also part III para 27).

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37 Thomas, see note 16, 317-318.

38 *Rice v Connolly* [1966] 2 QB 414, 419.

## CONCLUDING COMMENTS

42 From the preceding discussion it is possible to state some propositions on which the Law Commission's consideration of particular aspects of the right of silence is based. First, the jury or judge as fact-finder will be aware that the defendant has not testified or has raised a defence for the first time at trial and it is unrealistic to expect that they will disregard that fact.

43 Second, silence does not equal guilt. There are many reasons other than guilt why a person accused of a criminal offence may remain silent either before or during trial. No-one suggests that silence should be regarded as conclusive evidence of guilt.

44 Third, it will be difficult to determine in any particular case what inferences can properly be drawn from silence. One reason for this is the problem of determining the defendant's reasons for remaining silent. Although the distinction between regarding silence as evidence of guilt in its own right and viewing silence as going to the weight or credibility of other evidence has been criticised, the distinction, at the least, illustrates the need to assess the significance of silence in light of the facts of the particular case.

45 There are good reasons for distinguishing silence before trial from silence at trial (see para 28). Some also argue that providing safeguards for a suspect being questioned by the police (such as video-taping and access to a lawyer) means that the protection afforded by the right of silence before trial is unnecessary. There is some valid basis for that line of argument, not because there is a "trade-off" between various procedural protections, but because in certain circumstances, for example at a pre-trial examination before a judicial officer, it may be safer to draw an adverse inference from a defendant's silence.

46 The Law Commission's intention in addressing the questions at the centre of the "right of silence debate" is to elucidate the issues. In our view the issues as they relate to a criminal trial essentially concern the evidential significance of silence. In what circumstances may inferences safely and properly be drawn from silence? In the context of the inferences which may be drawn from a defendant's silence, suggestions of "a fundamental right on which civilised society as we know it rests" or "a criminal's charter which severely hinders the police in pursuing their important social objective of investigating and prosecuting crime" are overstated. (These are our own characterisations of the polar extremes of the debate.) The right of silence, however, has been a central component of our system of criminal justice for some three centuries. Its practical and symbolic significance should not be underrated. It may indeed be one of the factors which has maintained the integrity of our system of criminal justice. It is, therefore, appropriate to tread with caution when considering reform of the law and to require any case for change to be clearly established.

47 Finally, we refer to the provisions of the New Zealand Bill of Rights Act 1990 which

are relevant to our consideration of the right of silence. The specific provisions are

- . s 23(4), the right of a person arrested or detained under any enactment for any offence or suspected offence to refrain from making any statement,
  - . s 25(d), the right of a person charged with an offence not to be compelled to be a witness or to confess guilt,
- and, arguably,
- . s 25(c), the right of a person charged with an offence to be presumed innocent until proved guilty according to law.

48 These provisions do not dictate a specific solution to the various issues concerning the right of silence. Logically, several possible solutions may be consistent with the requirements of the Bill of Rights. We, therefore, do not attempt to discuss generally what is permitted by the Bill. We will, however, discuss our preliminary proposals in terms of their compatibility with the provisions of the Bill. (See also the discussion on the Bill of Rights and the International Covenant on Civil and Political Rights, part III paras 33-58.)

## II

### Silence Before Trial

49 It is convenient to consider the issues relating to reform of the law under the two heads of silence *before* trial and silence *at* trial. With regard to silence before trial we first discuss when evidence of silence is admissible and when comment may be made. Thereafter, we examine possible reform options and set out our preliminary conclusions. At the outset of the discussion we record that the current law concerning silence before trial is in some respects unclear. Three aspects are relevant, namely silence in the face of an allegation or accusation, silence in response to questioning and silence by way of failure to disclose a defence before trial.

#### THE CURRENT LAW

##### Silence in the face of an allegation or accusation

50 The House of Lords in *R v Christie*<sup>39</sup> held that, as a matter of strict admissibility, an allegation made in the presence of the defendant could go into evidence along with the defendant's response, it then being for the jury to determine whether the defendant had in fact adopted the accusation made. However, the Court indicated that as a matter of practice when the defendant denies the truth of the statement, the judge should intimate to counsel for the prosecution that the evidence ought not to be admitted if it would have little value and might unfairly prejudice the jury against the defendant.

51 In the leading New Zealand decision of *R v Duffy*<sup>40</sup> the Court of Appeal pointed out that the decision in *Christie* did not, strictly speaking, involve the right of silence, since the defendant had actually responded to the allegation made ("I am innocent"). *Duffy* establishes that evidence of an allegation and the defendant's subsequent silence will generally be inadmissible on the ground that the probative value of the evidence is outweighed by its prejudicial effect. The rule of practice approved in *Christie* has thus achieved a status in New Zealand tantamount to a rule of law.<sup>41</sup> The basic issue is

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39 [1914] AC 545.

40 [1979] 2 NZLR 432.

41 In addition to *Duffy* see *R v Spring* [1958] NZLR 468. The High Court of Australia has decided similarly:

whether, in the totality of the circumstances, there is evidence to support the conclusion that the defendant accepted the truth of an allegation made against him or her. Generally, it will be difficult to draw this conclusion from the mere fact of silence. In the case, however, of a spontaneous allegation where the parties to the incident are on even terms, the defendant's silence may amount to an acceptance of the allegation made.<sup>42</sup> But where an allegation is made by or in the presence of a police officer (as occurred in *Duffy*) the defendant's silence cannot safely be regarded as an admission since it may well be an exercise of the right of silence (although there may be "very exceptional circumstances" where an adverse inference may be drawn).

52 *Duffy* also establishes that the absence of a "caution" (the shorthand term for the warning given by the police to a suspected or accused person that he or she need not say anything but that anything said may be used in evidence) does not alter the situation concerning silence in response to an allegation. A suspect who is cautioned is led to expect that no negative repercussions will flow from remaining silent. However, the court cited a Privy Council decision in which it was pointed out that "the caution merely serves to remind the accused of a right which he already possesses at common law".<sup>43</sup>

### Silence in response to questioning

53 *Duffy* and the other cases concerning silence in response to an allegation<sup>44</sup> illustrate a strong application of the right of silence in the sense that, in the usual case, there will be no adverse consequences from remaining silent - because the evidence will be excluded and the jury will never know of it. That approach has not, however, been applied consistently in respect of the two other instances of silence before trial, namely silence in response to questioning and silence in the form of a failure to disclose a defence.

54 Though a clear distinction is not always made between silence in face of an allegation and silence in response to questioning, it seems that in the latter case evidence of the defendant's silence is admissible (whether or not the questioner is a government official or a lay person).<sup>45</sup> Questioning can, however, include allegations which are not

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*Petty*, see note 19, 626.

42 As in *Parkes v The Queen* [1976] 3 All ER 380, referred to in *Duffy* in which the (stabbing) victim's mother (a lay person) accused the appellant of stabbing the victim and the defendant, though remaining silent, attacked the mother (although an inference would also be drawn from the fact of the attack).

43 *Hall v R* [1971] 1 All ER 322, 324. Also *Petty*, see note 19, 629, Brennan J.

44 *Cross* (Mathieson) see note 28, 533; *R v Samuels* [1985] 1 NZLR 350.

45 In *R v Coombs* (see note 22) the admissibility of the evidence appears to have been accepted. The court

substantiated by other evidence and in that event the Court of Appeal has made it clear that any allegations not admitted will be excluded from evidence.<sup>46</sup> That apart, it appears that evidence of silence in the face of general questioning is admissible. But it seems incongruous that the result should differ in the two cases of silence in response to an allegation and silence in response to questioning. In both cases the inference relied upon by the prosecution is the same - the defendant remained silent because of a consciousness of guilt.

55 The current law is illustrated by the decision of the Court of Appeal in *R v Coombs*.<sup>47</sup> During a raid on a house in which drugs were found, the defendant, both before and after being cautioned, refused to answer most of the questions asked of him by customs and police officers, stating that he first wished to speak to his solicitor. The refusal to answer continued after he had received legal advice. The Crown contended that his silence showed guilty knowledge. It was also further put to the defendant in cross-examination that if there was an innocent explanation there was no reason why he would not have given it at once. The trial judge discouraged the jury from placing weight on these submissions, but left it open to them to do so and did not explicitly tell them that the defendant had a right of silence. A new trial was ordered, not because of the admission of the evidence concerning the defendant's silence (this point does not appear to have been raised), but because the circumstances of the case called for an "express and emphatic" direction that the defendant had a right of silence. The situation had been aggravated, in the view of the court, by the "unfortunate ... attempt by the prosecution to make something out of [the defendant's] refusal to answer questions at the police station, after having been earlier arrested and cautioned at his house".<sup>48</sup>

56 Though the order for a new trial in *Coombs* can be seen as a reaffirmation of the right of silence, the position is not as clear as might be thought. Despite the importance placed on the right of silence, the decision implicitly accepts both the admissibility of evidence concerning silence in response to questioning and, probably, the judge's right to comment in exceptional circumstances.<sup>49</sup>

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concentrated on the limits on comment to the jury by the judge and prosecutor. For a contrary view in Australia see *R v Ireland* (1970) 126 CLR 321, 331 and *R v Armstrong* (1990) 54 SASR 207.

46 *R v Halligan* [1973] 2 NZLR 158.

47 See note 22.

48 See note 22, 752. In *R v McCarthy* (see note 24) it was said that the prosecution should not advance submissions based on a defendant's silence in response to police questioning.

49 Referring to *Duffy* (see note 40) in *R v Accused* (CA 227/91) (1991) 7 CRNZ 407 Cooke P referred to *Coombs* (see note 22) and said that it was only "exceptionally" that a defendant's silence under interrogation could be used against him or her. It is difficult to envisage what the exceptional circumstances might be. It seems clear that a judge should not comment on a defendant's silence after being advised by the police that





### Silence in the form of failure to disclose a defence before trial

57 As with silence in response to questioning, evidence that the defendant did not previously disclose a defence later relied upon at trial, is admissible in New Zealand.<sup>50</sup> Yet, except in the case of alibi (to be discussed shortly) and a few statutory defences,<sup>51</sup> there is no express obligation to give notice of a defence.

58 The issue is whether weight should be given to the fact that the defendant did not provide pre-trial notice of a defence. Once again the problem is aggravated when the defendant has been cautioned. In a case involving the failure to disclose a (bizarre) defence, Cory J of the Supreme Court of Canada recently stated:

since there is a right to silence, it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt.<sup>52</sup>

The court concluded that in the normal case the defendant's silence in the form of a failure to disclose a defence is not admissible in evidence.

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50 *Coombs*, see note 22. Also, *Kattenberg*, see note 23. It is not the law in Australia: *Petty*, see note 19.

51 See note 85.

52 *R v Chambers* [1990] 6 WWR 554, 573. The Canadian Charter of Rights contains no express recognition of the right of silence at the investigative stages of a criminal proceeding (see s 23(4) of New Zealand's Bill of Rights) but the Supreme Court of Canada determined that the right of silence was nonetheless guaranteed under s 7 as one of the "principles of fundamental justice". The existence of a *Miranda* warning has proved crucial in American deliberations over the Fifth Amendment: thus a defendant's failure to volunteer a defence (self defence) is able to be used in his or her cross-examination at trial if there has been no *Miranda* warning (*Jenkins v Anderson* 447 US 231 (1980)) but silence after a *Miranda* warning cannot be used to impeach the defendant's testimony *Doyle v Ohio* 426 US 610 (1976). The caution has a similar relevance in Australia: *R v Ireland*, see note 45.

59 New Zealand law does not, however, prevent adverse comment on the defendant's pre-trial failure to disclose a defence, even though the defendant may have been cautioned that he or she need not say anything.<sup>53</sup> The justification given is that the pre-trial silence is not being relied upon as evidence of guilt, but rather is "an answer to the defence - a test applied in order to determine its truth or falsity."<sup>54</sup> That distinction is not free from difficulty, as has been pointed out by the Court of Appeal,<sup>55</sup> and, more recently, by the High Court of Australia.<sup>56</sup> In essence, the choice is whether to change the words of the caution from a reminder of the right of silence to a warning of the adverse consequences of the exercise of that right, or to curtail the ability of the judge or prosecutor to comment on a defendant's late explanation.

## OPTIONS FOR REFORM OF THE LAW CONCERNING SILENCE BEFORE TRIAL

60 The previous discussion indicates that the current law concerning silence prior to trial is both unclear and potentially unfair to the defendant. We say "potentially" because it seems likely that in most instances judges are not commenting on the exercise of the right to silence before trial. But, even if comment is not being made, evidence of the exercise of the right is apparently being tendered. That evidence would be inadmissible in a number of other jurisdictions (if exercise of the right had followed the giving of a caution).

61 Both in New Zealand and overseas there have been numerous suggestions for reform of the law. Some of the proposals have only addressed the problem of surprise or ambush defences. We do not attempt to record all the possible reform options but mention those which appear to be the most significant.

### A blanket exclusion of confessions

62 The most radical proposal is that no (or alternatively very reduced) use should be made of confessions as evidence in court. While the police would remain able to interview suspects to obtain information - and it has also been suggested that all citizens

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53 *R v Ryan* [1973] 2 NZLR 611, 615 citing *R v Hill* [1953] NZLR 688; *R v Foster* [1955] NZLR 1194. In *Rapana v Police* (1984) 1 CRNZ 191 the defendant, in the course of an interrogation after a drug raid said, "You are wasting your time. I've been told when you are caught with dope, don't say anything." Citing *Coombs*, the court held that no adverse inference should be drawn from this response.

54 *Foster* see note 53, 1200. See, too, the more recent discussion in *Kattenberg* note 23.

55 *Coombs* see note 22, 751-752 and *McCarthy*, see note 24. See, however, the discussion at paras 25 and 44.

56 *Petty*, see note 19.

should be under a duty to answer police questions - any resulting statements could not be presented as evidence. This proposal has been coupled with the suggestion that the court should be entitled to draw adverse inferences if a defendant refrains from giving evidence at trial. We discuss the possibility of excluding all evidence of confessions in paras 108-110 of part II of this paper (when we consider reform of the law concerning confessions); and we discuss the suggestion that adverse inferences should be able to be drawn if a defendant refrains from giving evidence at paras 112-124 of this part (when we consider the right of silence at trial). We also mention that a considerably modified form of the above proposal is found in the Serious Fraud Office Act 1990, which draws on a British model. That Act gives the Director of the Serious Fraud Office defined questioning powers, with the person who is being questioned having the right to have a lawyer present. Failure to comply with the obligation to answer questions is an offence attracting substantial penalties. The right of silence is expressly abrogated. A limitation is, however, imposed on the use of information obtained as a result of questioning. Though the information may be used for any investigatory purpose, a self-incriminating statement made orally during questioning can only be used in evidence in a criminal prosecution when the person gives evidence inconsistent with the statement.

### **An effective end to the right of silence before trial**

63 A model for ending the right of silence before trial is found in the Criminal Evidence (Northern Ireland) Order 1988. The provisions contained in the Order stem in the main from the recommendations of the controversial 1972 Eleventh Report of the English Criminal Law Revision Committee. The Northern Ireland provisions enable the court and jury, when determining whether the defendant is guilty, to draw inferences from, and treat as corroboration, the failure of a suspected or accused person upon being questioned by a constable or similar investigator, or upon being charged with an offence, to "mention any fact relied upon in his defence".

64 The Order also provides that a defendant may be prejudiced by failing, when called upon to do so by a constable, to account for the presence of forensic evidence found on or about the defendant at the time of arrest or to account for his or her presence at the time of the occurrence of the offence at a particular place when this is believed by the constable to be attributable to the defendant's guilt.<sup>57</sup> Some protection for the suspect is given by virtue of the provision that no adverse inference can be drawn unless the suspect had been warned by the constable as to the effect of a failure to respond. No such protection is provided concerning adverse inferences taken from failure to mention a fact later relied

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57 It is to be noted that Carswell J in *R v Kane & Others* (Crown Court, March 30, 1990) suggested that no inference from silence in response to interrogation could be drawn when it was not a case of a surprise defence, but rather a case where the defendant offered no defence, merely putting the Crown to the proof of the offence beyond reasonable doubt.

upon at trial, but the Chief Justice for Northern Ireland has issued a practice note revoking the Judges' Rules, and setting out a new form of caution warning the suspect that a failure to mention any fact relied upon in defence "may be treated in court as supporting any relevant evidence against you."<sup>58</sup> The difficulty with this warning, however, is that a suspect does not necessarily know what facts will later be regarded as relevant to any particular defence raised at trial.<sup>59</sup>

65 The Order is now in force. We have not, however, as yet been able to obtain detailed information concerning its effect. Predictably, there has been strong criticism, with one commentator stating:

The psychological pressure that there has always been on a suspect in a police station to speak will be intensified. Little thought seems to have been given to the effect that this will have on principles such as the presumption of innocence, the privilege against self-incrimination and, perhaps most important of all, the right not to be falsely convicted.<sup>60</sup>

However, essentially similar reform proposals have recently been made in New Zealand, with the author of the proposals concluding that the various criticisms which might be levelled against them are not well-founded.<sup>61</sup>

### **Limited adverse inferences from silence**

66 In 1989 a proposal for England and Wales was made in a Home Office Working Group Report.<sup>62</sup> Though the Working Group's terms of reference restricted them to considering how, and not whether, the law on the right of silence should be changed, their Report did not support changes as far reaching as those contained in the Northern Ireland Order. In particular, the Working Group said:

We agree with the majority of the witnesses in not wishing silence to amount to

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58 See Jackson, "Recent Developments in Criminal Evidence" (1989) 40 NILQ 105, 112; "Curtailling the Right of Silence: lessons from Northern Ireland" [1991] Crim LR 404. The practice note has now been formalised: [1991] Crim LR 404, 407-414.

59 Dixon, "Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act" (1991) 20 Anglo-American LR 27, 36.

60 Jackson, "Recent Developments", see note 58, 118.

61 Thomas, see note 16.

62 *Report of the Working Group on the Right of Silence* (London: Home Office, July 1989).

positive evidence of guilt. We think that the primary adverse inference which can be drawn from the defendant's previous failure to answer questions or to mention a particular fact is that the defence he is now putting forward in court is untrue. Such an inference may of course be extremely damaging to his general credibility. We do not think we can go further and give silence evidential weight, or make it capable of amounting to corroboration as the law stands at present. Our reason for reaching this conclusion is that, once silence becomes positive evidence of guilt, the burden of proof is shifted; and we are completely opposed to that.<sup>63</sup>

67 As we said previously,<sup>64</sup> it is difficult to argue that taking silence into account in assessing the weight or credibility of other evidence does not accord evidential weight to silence. But there is substance in the point that silence does not, and should not, amount to positive evidence of guilt.

68 The Working Group recognised that once inferences can be drawn from a failure to respond to police interrogation, a new caution is required outlining the detrimental consequences of remaining silent. The Report, however, recommended no change to the existing (minimal) extent to which the police must disclose their case to a suspect being questioned, though a detailed structure for later pre-trial disclosure by both the prosecution and the defence was proposed.

69 The lack of a disclosure requirement at the stage of interrogation has prompted the criticism that a suspect is effectively forced to speak without knowing the precise nature of the allegations against him or her. Indeed, one reason why a lawyer may advise a client to remain silent during police questioning is that it is foolhardy to answer without knowing the evidence possessed by the police. As has been said by Zuckerman (who supports some inroads upon the right of silence before trial):

The proposals of the Working Group erect an inquisitorial process but without adequate limits on police powers. Like an inquisitorial procedure the present proposals demand the suspect submit to interrogation but unlike the inquisitorial model the present proposals do not offer the suspect the protection of an independent official. In fact the proposals go further and undermine the suspect's present access to legal assistance.<sup>65</sup>

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63 See note 62, para 83.

64 Para 25.

65 "Trial by Unfair Means - The Report of the Working Group on the Right of Silence" [1989] Crim LR 855, 862. See too Editorial [1989] Crim LR 1, 2:

It is one thing to permit the drawing of adverse inferences from D's failure to answer a case against him; it is quite another thing to permit the drawing of adverse inferences from a failure to answer

70 Since the time the Working Group reported a Royal Commission has been established to consider many aspects of the British criminal justice system, with a major emphasis on pre-trial investigation procedures. The appointment of the Royal Commission stems from recent developments involving the "Birmingham Six" and other persons convicted on manufactured evidence and coerced confessions. The concerns arising out of those developments may have prompted caution about making law changes which would decrease the rights of suspects.

### **An examination before an independent official**

71 The suggestion that questioning of a suspect should take place before an independent official like the continental magistrate has been advanced for consideration by the British Royal Commission by Lord Scarman<sup>66</sup> and others.<sup>67</sup> There is also support for such a proposal in the United States of America.<sup>68</sup> Cardinal Hume's "deputation" has submitted that there should be judicial supervision of the police in the pre-trial phase of arrest, interrogation and assembly of evidence. However, even given such supervision, the deputation expressed the view that the right of silence is a necessary protection in a system that permits conviction for serious crime on the strength of uncorroborated confession evidence. They went on to say, however, that if there were to be some relaxation of the adversarial nature of pre-trial proceedings, and defendants were given the opportunity to state their position to a judicial officer or judge, the court should be allowed to draw inferences from failure to speak if the circumstances of the case warrant it.

72 A similar change was made in Scotland in 1980 with the reintroduction of a power to require a formal examination before the sheriff. Briefly described,<sup>69</sup> a defendant can be brought before the sheriff and questioned by the procurator fiscal (the prosecutor) in a tape recorded proceeding. The defendant is represented by a lawyer and can consult with him or her before answering questions. The lawyer cannot ask questions other than to clarify ambiguities. The questioning of the defendant by the prosecutor is not conducted under

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police questioning when a full case has not been set out and a court has not satisfied itself that the case should be answered.

<sup>66</sup> See *The Independent*, London, 20 June 1990.

<sup>67</sup> Cardinal Hume, Lord Devlin, Lord Jenkins, Rt Hon Merlyn Rees MP.

<sup>68</sup> Kamisar, see note 8, 77-94 and 135 where he refers to a proposal by Roscoe Pound for the "legal examination" of suspects before a magistrate.

<sup>69</sup> Gow, "Scotland's Right of Silence" (1988) 138 NLJ 781; "The revival of examinations" (1991) 141 NLJ 680.

oath and is by no means a cross-examination. Leading questions and reiteration of a question which the defendant has failed to answer are forbidden. The questioning is directed to the charge in general and any confession alleged to have been made to the police. Parenthetically, it is of interest that in Scotland a confession cannot be the sole evidence upon which a conviction is based - there must be corroboration.

73 Though the sheriff advises the defendant that he or she may remain silent, the defendant is also warned that any "surprise" defence offered for the first time at trial may be adversely commented upon. Likewise, at trial the defendant can be cross-examined about his or her silence at the earlier examination before the sheriff if, at the trial, it is alleged that a confession was obtained by some impropriety. It should be pointed out that these examinations are by no means routine and are apparently most often conducted in serious cases where there is some suggestion that the defendant may renege on a confession.<sup>70</sup>

### **An affirmation of the right of silence before trial**

74 A clear affirmation of the right of silence in response to all questioning prior to trial is the solution adopted in the Australian Law Reform Commission Report on Evidence and the subsequent Evidence Bill 1991 of the Commonwealth of Australia. Clause 95 of the Bill deals with silence in response to questioning or a representation (the latter term being equivalent to an "allegation" in terms of this paper) and provides as follows:

#### **Evidence of silence**

95(1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused to answer a question, or respond to a representation, put or made to the party or other person in the course of official questioning.

(2) Evidence of that kind is not admissible if it can only be used to draw such inference.

(3) Subsection (1) does not prevent the use of the evidence to prove that the person failed or refused to answer the question or respond to the representation if

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70 A lesser change would involve the adoption of a system of pleadings in criminal cases; see for example, Robertson, Guest Memorial Lecture, to be published in 1992 Otago Law Review. Pleadings could on occasions create difficulties for a defendant who wished to be able to decide at the latest possible stage (eg, after the conclusion of the prosecution case) what defence to run. But a requirement for a defendant to plead specific defences would not appear to make major inroads on the right of silence or the burden of proof and could be particularly appropriate in complex fraud trials. See also the discussion on alibi evidence paras 92-95.

the failure or refusal is a fact in issue in the proceeding.

(4) In this section:

"inference" includes an inference of consciousness of guilt.

It should be noted that the above provisions apply to "official questioning". This reflects the viewpoint that the right of silence only has application in relation to questioning conducted by state officials.



## CONCLUSIONS CONCERNING SILENCE BEFORE TRIAL

### General conclusions

75 The Law Commission does not favour making changes along the lines of the Northern Ireland Order or the Home Office Working Group proposals. There are two principal reasons for this view.

76 In the first place, we consider that both the Northern Ireland Order and the Working Group proposal, whether or not they affect the presumption of innocence or change the burden of proof,<sup>71</sup> would constitute a fundamental shift in the balance of our system. In relation to official questioning they would overturn a protection for the individual citizen which was established in Britain after great conflict and which has remained a part of the common law for some three centuries. We consider that any change of that nature should only be contemplated if there is clear evidence that it is essential in order to enable the proper prosecution of crime.

77 In the second place, all past experience - including the recent problems in Britain - indicate that an innocent suspect is especially vulnerable at the police questioning stage.<sup>72</sup> Later in this paper we propose that the police should, with appropriate safeguards, be given more precise powers to question suspects. That proposal is intended to balance the competing principles at stake in the questioning process. Even, however, when there are safeguards (which include video-taping of questioning and advice to the suspect concerning the right of access to a lawyer) we are reluctant to see an adverse inference drawn if a suspect elects to remain silent in response to police questioning. This would, in our view, result in an unacceptable risk of an innocent person making a false admission or creating a false impression of guilt.

78 On the basis of the information at present available to us we favour enactment of a provision preventing all comment on the exercise of the right of silence before trial. We recognise that the present law, though arguably unclear, is not in practice creating major problems. But that is largely because judges appear very rarely to comment on pre-trial exercise of the right of silence, no doubt because the Court of Appeal has made it clear that comment is only justifiable in exceptional cases (it being plainly unfair to comment when, as required by law, the defendant has been advised of the right to remain silent). We think, however, that the need for consistency and clarity in the law justify following a similar approach to that taken in the Evidence Bill 1991 of the Commonwealth of Australia. It should be noted that this changes the law concerning comment on a belated

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71 See the discussion under the head "Three main questions", paras 15-25.

72 See the discussion under the head "Three main questions", paras 27 and 28.

explanation (see paras 57-59).<sup>73</sup>

79 We would like to receive responses concerning the desirability of excluding evidence of silence as well as comment on such evidence (as is the case in the Australian provision). If comment is not to be allowed it appears incongruous to admit evidence concerning the exercise of the right. Moreover, exclusion of the evidence avoids the difficulties arising from the effect of a caution. Those factors cause us to favour the view that evidence concerning silence in response to questioning should generally be excluded. We have, however, some concern about the artificiality which may on occasions be created by keeping aspects of the investigation from the jury. Exclusion of the evidence may result in the narrative of events becoming distorted (eg, in the case of a video-taped interview where the right of silence is exercised on several occasions but the other answers are admissible). Our present conclusion is that the exclusion of evidence of silence is best dealt with on a case by case basis in terms of relevance and the general power to exclude evidence which is unfairly prejudicial.

80 We would, in addition, like to receive views as to whether any rule of inadmissibility should refer to silence in response to all questioning or simply, as has been proposed in the Australian Bill, in response to "official questioning". We favour the latter and would leave unchanged our present law concerning silence in response to an allegation when the parties are on even terms. The Australian Bill also precludes comment on the silence of a person other than the defendant. We would be interested in views as to whether that is desirable.

81 The above conclusions are in part based on the information at present available concerning the exercise of the right of silence in relation to police questioning. We have no evidence that the exercise of the right is unduly hampering the police or resulting with any frequency in the acquittal (or failure to charge) guilty people. Similarly, our inquiries of both police and Crown prosecutors have not so far revealed information that the prosecution is encountering any substantial problems because of ambush or surprise defences. If, however, information to the contrary is available we would like to be advised. We are ourselves endeavouring, through a survey which we are conducting with assistance from the police, to ascertain whether more precise information can be obtained.

82 Should further information make it clear that there is a need to consider changing

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73 We should make it clear that we have not entered into an examination of the Serious Fraud Office Act 1990 and the issues concerning the right of silence in respect of complex fraud. Those issues are not addressed in this paper because the Serious Fraud Office Act was only recently enacted and it is too early to reach conclusions about the way it is operating. In due course it will be desirable to assess whether the provisions of the Act which affect the right of silence are necessary for that class of crime and if so whether they are operating satisfactorily.

our law in order to expose a suspect to the risk of comment concerning silence before trial, we are at present inclined to favour the creation of a process for examination before a judicial officer similar to that now in use in Scotland.<sup>74</sup> This would work a marked change in our present criminal procedure, though an even more searching interrogation by a magistrate was once a standard feature of our law.<sup>75</sup> However, there would then be a framework for the defendant to be properly informed of the prosecution case and to have appropriate access to legal assistance, thereby allowing more reflective responses to questioning than is presently the case. We incline to the view that it is only in those circumstances that it is proper to draw an adverse inference from silence in response to questioning.

83 Adoption of a system similar to the Scottish one would appear likely to add to the cost of criminal prosecutions if the right to require an examination is regularly invoked by the prosecution. We think it would be necessary for the prosecution to strike a reasonable balance (indeed the value of the Scottish system has been questioned on the ground that prosecutors do not exercise the right to examine with sufficient frequency). If the present law is unjustifiably hindering the prosecution, sensible use of such a system could prove cost effective by increasing the number of guilty pleas and shortening the length of trials. It would also seem possible to consider the use of competent and experienced lawyers on a part-time basis to preside over the questioning of the defendant. This would enable the scheme to commence with a limited number of examinations which could be increased if they proved desirable. We emphasise, however, that we do not think it justifiable to embark on the introduction of a system similar to the Scottish unless it is established that the present law concerning the right of silence before trial is unduly hindering the investigation and prosecution of crime.

84 In summary, our provisional conclusion concerning silence before trial is that it is desirable in the interests of certainty and clarity to adopt a provision similar to clause 95 of the Australian Evidence Bill.

## Two special cases

85 It remains for us to consider the situation concerning silence at trial. Before, however, we turn to that topic, we should refer to two special cases of failure to disclose a defence prior to trial, namely the doctrine of recent possession and the defence of alibi.

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74 It is said that the present system of judicial examination in Scotland has had a limited impact. Modifications to the system are suggested by Macphail, "Safeguards in the Scottish Criminal Justice System" [1992] Crim LR 144. As we previously noted (see note 70), another reform option is a system of pleadings in criminal cases.

75 Mirfield, *"Confessions"* (Sweet & Maxwell, London, 1985), 13.



*The doctrine of recent possession*

86 The doctrine of recent possession involves silence both before and during trial, but is dealt with here because it particularly highlights the present law relating to failure by a defendant to disclose a defence before trial. This so called "doctrine" really concerns the limits to judicial comment on the inference which arises from the defendant's possession of recently stolen property. The jury will be told that in the proper circumstances the defendant's silence (lack of explanation for the possession) can itself justify a verdict of guilty on a charge of theft or receiving the property in question.<sup>76</sup> It is enough to obtain an acquittal if the defendant gives an explanation either before or during the trial which might be true (thereby raising a reasonable doubt).

87 Some of the arguments offered in support of the continued operation of the doctrine are as follows. Most defendants will be unaware of the doctrine and thus will not be aware of the pressure it exerts to speak at the moment of apprehension. Any disclosure by the defendant at that point will probably be the result of the incriminating force of the circumstances of possession, which is the undeniable foundation of the doctrine. Comment on the defendant's silence simply serves to stress the obviously incriminating circumstances. It is well recognised that an adverse inference can be drawn from a defendant being found in unexplained incriminating circumstances<sup>77</sup> and the doctrine of recent possession is really just a crystallisation of this general proposition which has developed in the circumstances commonly encountered following a theft. Much of the prejudice otherwise suffered by the defendant who remains silent before trial when found in possession of stolen goods can be undone by offering an explanation through testimony at trial.

88 The above contentions explain the lack of success met by challenges to the doctrine in the United States<sup>78</sup> and Canada,<sup>79</sup> despite constitutional guarantees of the presumption of innocence and the right of silence. As was pointed out by the US Supreme Court, unexplained possession of stolen goods is a strong piece of circumstantial evidence and:

Introduction of any evidence, direct or circumstantial, tending to implicate the  
defendant in the  
alleged crime  
increases the

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76 *Cross* (Mathieson), see note 28, 54.

77 *Cross* (Mathieson), see note 28, 54-55.

78 *Barnes v US* 412 US 837 (1973).

79 *Russell v R* (1983) 32 CR (3d) 307.

pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination.<sup>80</sup>

89 It is, however, questionable whether on this basis there is any need for comment on the defendant's silence when found in possession of recently stolen goods. It will generally be sufficient to let the facts speak for themselves - the defendant was found in possession and there is no evidence of any innocent explanation for this.

90 The major problem with the existing law is that the doctrine of recent possession operates even though a caution has been given. The difficulties of reconciling the doctrine of recent possession with the terms of the caution have recently exercised the High Court of Australia where it was said that:

an inference will be drawn from the unexplained fact of possession of such property and not from any admission of guilt arising from the failure to proffer an explanation.<sup>81</sup>

A defendant who remains silent in response to police questioning may, however, offer at trial an explanation for possession of the property. The problem in terms of the existing law is that an adverse comment may then be made as to the credibility of an explanation given for the first time at trial.<sup>82</sup> Thus, a defendant who takes the caution at face value may be prejudiced as the following model direction, suggested in Canada, illustrates:

You may consider that an explanation given before arrest, or not too long after arrest, is more convincing than one given at some later time. But you must not take into account that the accused upon being arrested and warned said nothing. He had the right to say nothing and to consult a lawyer.<sup>83</sup>

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80 *Barnes*, see note 78, 388, Powell J. Three judges dissented on the basis that, as applied in *Barnes*, the doctrine contravened the presumption of innocence.

81 *Bruce v R* (1987) 61 ALJR 603. Also *Petty*, see note 19, 634-635.

82 See note 53 and accompanying text.

83 *R v Machado* (1989) 50 CCC (3d) 133, 142, Southin JA.

91 We have suggested, as a general principle, that no significance should be attached to the fact that an explanation is advanced for the first time at trial (see para 78). We would like to receive comments as to whether the doctrine of recent possession should provide an exception to the general principle. If so, a change to the terms of the caution would seem necessary. Such a change would create practical difficulties because an arresting officer is then required to determine when the circumstances require a special "recent possession" caution. If the special caution is given at a time when the doctrine is not properly applicable, for example when the goods have not been recently stolen, it results in improper pressure to speak being placed on the defendant. Our preliminary conclusion, reflecting the views expressed in para 89, is that it is an unnecessary complication to refer to the so-called "doctrine" of recent possession. There need be no comment on pre-trial failure to give an explanation. The facts can simply be left to speak for themselves. This would not preclude comment on silence *at trial* on the basis we subsequently discuss.

### *The defence of alibi*

92 Alibi is the only defence of general application<sup>84</sup> of which a defendant is required to give notice prior to trial.<sup>85</sup> Though the defence of alibi has the potential to cloak last minute perjured evidence, the same could be said of most other defences. Other jurisdictions have, therefore, enacted similar disclosure requirements for defences beyond alibi.<sup>86</sup> As, however, we have previously indicated, our preliminary discussions with Crown prosecutors and the police have not revealed a strong case for mandatory advance disclosure of all defences. The prosecution generally seems able to foresee and cope with the likely defences, though that may be at the cost of unnecessary preparation and

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84 The requirement that prior notice be given of a defence is not without precedent in the field of regulatory offences: see Food Act 1981 ss 30(3) and 31(4) for examples. It is suggested, however, that special considerations may apply to some regulatory offences, due to their object of promoting public health and safety.

85 Crimes Act 1961 s 367A; Summary Proceedings Act 1957 s 168B. Leave may be granted to permit the giving of alibi evidence without prior notice, in which event comment may on occasions be made concerning credibility; compare *R v Sullivan* [1971] 1 QB 253. Indulgence by the court cannot, however, be assumed: *R v Jacks* [1991] Crim L R 611. See further *Criminal Procedure: Part One Disclosure and Committal* (NZLC R14 1990) and *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18 1991) paras 103-109.

86 In Scotland "special defences" (alibi, insanity, self defence and incrimination of another) require notice before trial: Gow see note 69. Also Wigmore, see note 7, Vol VI, para 1855b. In New Zealand the Law Commission has recommended disclosure of expert evidence: see *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18 1991).

calling superfluous witnesses. And defence disclosure does now to some extent occur, for example in pre-trial conferences.

93 The issue of mandatory pre-trial disclosure of defences has been tested in the United States of America against the Fifth Amendment guarantee of protection against self-incrimination.<sup>87</sup> The result was Supreme Court approval of legislation requiring pre-trial disclosure of alibi evidence. Though it might be thought that disclosure of alibi evidence could hardly be incriminating (because it is disclosure of a defence) the court accepted that such was the case because of the fuel which early disclosure provided for the prosecution's eventual rebuttal of the defence. What saved the legislation, was the argument that for there to be a breach of the privilege against self-incrimination, there must be a coerced disclosure. This factor is lacking in notice of alibi because the defendant remains free to decide whether or not to offer the evidence, with the legislation simply requiring advance notice of any decision to do so. Even without any pre-trial notice, the prosecution would eventually learn of the defence. The requirement of a temporal acceleration of this process was, therefore, held not to violate the privilege against self-incrimination.

94 There is a contrary argument. While legislation which precludes (without leave of the court) reliance at trial on a particular defence may not coerce a defendant's testimony at trial, this is not the sole focus of the right of silence. The privilege against self-incrimination extends to proceedings before trial. It can be contended that the pressure which disclosure legislation places upon a defendant to forego the right of silence and reveal a defence is not dissimilar to that imposed by penalties for failing to answer official questions or improper inducements to confess. Using such pressure to force pre-trial disclosure of a defence can be said to impinge on the right of silence.

95 It is doubtful, however, whether the arguments against alibi disclosure carry enough force to warrant abolition of the requirement of notice. Once a defendant has the protection of legal advice and a full disclosure of the case for the prosecution, the concerns surrounding advance disclosure of an alibi are greatly minimised, and it becomes difficult to conceive of an innocent defendant not wishing to disclose the defence. In our view the law has reached a justifiable position in its treatment of alibi, but we at present see no strong argument in favour of extending similar treatment to additional defences. An alibi is usually a somewhat cut and dried matter whereas other defences

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87 *Williams v Florida* 399 US 78 (1970).



may depend on a much finer assessment of the actual testimony of prosecution witnesses as it emerges at trial - consider the closely related yet conflicting bases of self-defence and provocation. In the absence of evidence that non-disclosure of defences is causing unreasonable difficulty for the prosecution or unnecessarily extending trials,<sup>88</sup> our present conclusion is that legislative intervention is not warranted. We would, however, welcome comment.<sup>89</sup>

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88 See para 92.

89 As previously noted (see note 70) another possibility is the introduction of pleadings in criminal cases.

### III

## Silence at Trial

### INTRODUCTION

Silence in the face of unsupervised interrogation by officials may be inspired by considerations different from those inducing an election not to go into the witness box.<sup>90</sup>

96 In the controlled setting of the courtroom many of the concerns motivating recognition of the right of silence at the pre-trial stage disappear.<sup>91</sup> Yet, just as experience shows that not every defendant who testifies is innocent,<sup>92</sup> so also there are reasons apart from guilt which may motivate a defendant to remain silent at trial.<sup>93</sup>

97 Further, the values protected by the right of silence at trial go beyond the issue of guilt or innocence. Indeed, the privilege against self-incrimination developed in response to judicially supervised interrogation on oath, and was only later extended to pre-trial proceedings. Few would now quarrel with the proposition that there are some lengths to which the State should never go in order to extract sworn testimony from a defendant. To this extent there will always be a right of silence at trial. The real issue is whether the pressures currently brought to bear on a defendant to testify should be modified. The question remains one of degree.

### THE CURRENT LAW

98 The greatest pressure to testify experienced by a defendant is that which was an

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90 *R v Coombs*, see note 22, 752, Cooke J.

91 See para 28.

92 It was the perception of the probability of perjured testimony in such circumstances which motivated the common law rule of the defendant's incompetence to testify.

93 See paras 27 and 29.

inevitable part of the 1889 reform permitting the defendant to give sworn testimony.<sup>94</sup> The right of silence had previously been an obligation,<sup>95</sup> but the ability to testify effected a basic change. In the modern criminal trial, as the prosecution's case mounts, so will the pressure on the defendant to offer evidence, including his or her own testimony, in an attempt to displace the growing likelihood of conviction. Nothing can or should be done to alter this position. In such a case the failure of a defendant to testify may indeed be decisive, but simply because in the absence of any contrary evidence the prosecution case is established. Similarly, any positive defence should be supported by admissible evidence and there can be no quarrel with the Court of Appeal's view that the defendant "cannot point to his right to silence to explain his failure to tell the Court directly about the exculpatory facts."<sup>96</sup>

99 The previous discussion of the presumption of innocence indicates that the crucial issue is whether the defendant's silence at trial should itself be given evidential value and if so to what extent.<sup>97</sup> The leading case is *Trompert v Police*.<sup>98</sup> In specific terms, the judgment in *Trompert* is authority for the proposition that in a summary trial, where a prima facie case has been established, the judge may, when determining whether the charge has been proved beyond reasonable doubt, take into account the defendant's failure to testify.<sup>99</sup> Whether that enables the court to give evidential weight to silence in order to bolster an otherwise insufficient prosecution case or to remove a reasonable doubt depends on the meaning attributed to the expression "prima facie case".

100 Mathieson suggests that prima facie case can be used in two senses.<sup>100</sup> The first is where the evidence has sufficient weight to entitle a reasonable person to decide the issue in the prosecution's favour, although, as a matter of common sense, he or she is not obliged to do so. This appears to be the way in which prima facie case is regarded in *Dolling v Bird*<sup>101</sup> (and is the test which is applied in determining whether to commit a

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94 Criminal Evidence Act 1889 s 2.

95 The defendant could, however, make an unsworn statement from the dock, upon which no cross-examination was allowed.

96 *R v Smith* [1989] 3 NZLR 405, 406.

97 See paras 15-25.

98 [1985] 1 NZLR 357.

99 Citing *Purdie v Maxwell* [1960] NZLR 599 and *Haw Tua Tau v Public Prosecutor* [1982] AC 136.

100 *Cross on Evidence* (Mathieson) see note 28, 29-31.

101 [1924] NZLR 545.

defendant for trial for an indictable offence). The second sense is where the evidence is so weighty that in the absence of further evidence, no reasonable juror could help deciding the issue in the prosecution's favour. It is suggested in Mathieson that it is only when there is a *prima facie* case in the second sense (sometimes called presumptive evidence) that an adverse inference may be drawn from silence.<sup>102</sup> Mathieson treats *Trompert* as an example of the latter. This can be supported by reference to a number of passages in the judgment.<sup>103</sup> There is also support for this view in other cases.<sup>104</sup> Interpreted in that way, *Trompert* is also consistent with the prior decision of the Court of Appeal in *R v Mareo (No 3)*.<sup>105</sup>

101 It is, however, doubtful whether *Trompert* can be interpreted in that way. In the first place, it would seem unnecessary to make any reference to silence if the prosecution case is already proved beyond reasonable doubt. At best, reference to the defendant's silence is only made in order to indicate that, in the absence of an explanation, the evidence called by the prosecution has proved the case beyond reasonable doubt. The defendant's silence simply confirms what has already been established. In the second place, there are a number of subsequent decisions in which *Trompert* appears to have

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102 See note 28, 58.

103 Thus in the body of the judgment (358) and the various authorities quoted from there are passages such as:

such inferences as will naturally be drawn from his silence in the face of proved facts which call for explanation on his part . . . .

No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction . . . .

This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive ...

104 Thus in *R v Griffiths* (1985) 1 CRNZ 445, 448, a case of disputed identity, McMullin J stated: "The failure of an accused person to give evidence may sometimes be a factor of which the jury are entitled to take account but only when an assessment of the evidence led by the Crown is itself reliable; not when, as here, it is uncertain"; and more recently in *R v Accused* see note 49, Holland J posed the question "Is there then any reason why a Court should not be able to make an inference adverse to an accused if he remains silent *at trial* when the other evidence as a matter of logic points inevitably to guilt in the absence of a satisfactory explanation?"

105 [1946] NZLR 660, 676 where the court approved the following passage from the Canadian case of *R v Droux* [1936] 2 DLR 780, 786:

It seems to me that there has been no alteration in the law which requires that a criminal charge must be proved and that the presumption of innocence till guilt is proved still stands. Clearly the prosecution cannot at the trial add the silence of the accused as a make-weight to turn the scale of proof against an accused and thereby remove a possible reasonable doubt.

been regarded as enabling evidential weight to be given to silence when a prima facie case in only the first sense has been established.<sup>106</sup>

102 In view of the decision in *Trompert*, s 67(5) of the Summary Proceedings Act 1957, which forbids adverse comment by the informant in a summary trial on the failure of the defendant to testify, is arguably unnecessary and could be repealed.<sup>107</sup> On any interpretation, however, *Trompert* does not justify drawing unrestricted adverse inferences.

Accordingly, to avoid any impression of unfairness, any comment would need to be restricted. In that situation it may be safer to leave s 67(5) in place (though no doubt a judge would disregard any inappropriate comment).

103 Though *Trompert* related to a summary trial, similar issues concerning the evidential weight to be given to silence arise in the context of a jury trial.<sup>108</sup> The present law is partly contained in s 366(1) of the Crimes Act 1961 which provides that no one other than the person charged or his or her counsel or the judge shall comment on the fact that a defendant refrains from giving evidence as a witness.

104 It is clear that the prosecution cannot comment on the defendant's silence.<sup>109</sup> Nor can the co-defendant.<sup>110</sup> On the face of s 366(1) all potential allusions (good, bad or

106 Thus in *Martin v Police* (unreported, High Court, Gisborne, 22 May 1991, AP 16/91) *Trompert* was cited as supporting the proposition that "the failure of a defendant to give evidence is a matter going to weight in relation to such evidence as shall be found to establish a prima facie case" (although it was also held that a defendant's election not to give evidence could not translate a finding of equivocality in relation to guilt into proof beyond reasonable doubt). In *McBurney v MOT* (1989) 5 CRNZ 384 the defendant's failure to testify was treated as a sufficient catalyst to weaken the effects of the defendant's exculpatory pre trial statements and destroy a reasonable doubt when, otherwise, (387) "there could be respectable argument as to whether or not guilt was proved beyond reasonable doubt". See too *Durey v Police* (1985) 1 CRNZ 392 (where reference is made to a prima facie case in the *Dolling v Bird* sense) and *Brandley v MOT* (1990) 5 CRNZ 584. The decision in *Trompert* also specifically approved the views of Adams J in *Purdie v Maxwell*, see note 99. In Adams, *Criminal Law and Procedure in New Zealand* (2nd ed, 1971), para 2958, 756 the author makes clear his view that the failure to testify is probative: "it may nevertheless be the last grain that turns the scale."

107 The section also prohibits adverse comment on the failure of the defendant to call his or her spouse to testify.

108 Nothing, of course, can prevent members of a jury from drawing whatever inference they consider appropriate: *Nicolls v King* [1951] NZLR 91, 95; *R v Lindsay* [1970] NZLR 1002. For an early New Zealand attempt to legislate away any potential prejudice suffered by the silent defendant, see Criminal Evidence Act 1889 s 4.

109 *R v McCarthy*, see note 24.

110 In England the co-defendant can comment, since the Criminal Evidence Act 1898 s 1 proviso (b) prohibits comment only by the prosecution: *R v Wickham* (1971) 55 Cr App R 199.

indifferent) to the defendant's failure to testify should be barred, since there is a presumably intentional difference in the drafting of this subsection and s 366(2) which prohibits only adverse comment on the failure to call a spouse. The Court of Appeal in *R v McCarthy*<sup>111</sup> has recently pointed out that the prohibition is absolute. However, some oblique references to the defendant's silence do not amount to comment.<sup>112</sup>

105 One problem with the existing law concerns the unrepresented defendant who is, on arraignment, given the statutory written warning, pursuant to s 364 of the Crimes Act:

If you do not give evidence no person other than the Judge and yourself may comment on that fact.

It is probably not certain that the defendant will realise from this that what is in contemplation is, largely, adverse comment by the judge to the jury.

106 The important question in most jury cases is the extent to which the judge may go in advising the jury to have regard to the defendant's silence in court. The issue is again what evidential weight, if any, may be given to silence. In Britain the standard comment has been along the lines that "while the jury have been deprived of the opportunity of hearing [the defendant's] story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box."<sup>113</sup> In New Zealand some judges have added that silence has no evidential value, but the use of those words has recently been questioned by the Court of Appeal.<sup>114</sup>

107 In *R v Accused (CA 78/88)*<sup>115</sup> the court accepted the propriety of adverse comments made by the trial judge in the particular case but noted that:

Nevertheless, as long as the law recognises the so-called right to silence, judges

111 See note 24.

112 See Snelling, "Commentary Upon Comment" (1962) 35 ALJ 395. It is not comment to suggest that a purported defence could have been supported by evidence (*R v Dallard* [1957] NZLR 1092) or is not supported by factual evidence (*McCarthy* see note 24, where it was said that this is the furthest counsel should go and that even then any comment must be in restrained terms). Such comments may counter unsupported suggestions made by defence counsel.

113 *R v Bathurst* [1968] 2 QB 99, 107-108.

114 *R v Andrews* (unreported, Court of Appeal, 15 April 1992, CA 366/91).

115 [1988] 2 NZLR 385. See also *R v Wheatley & Gallagher* [1968] NZLR 1135 and more recently *R v Aramakutu* [1991] 3 NZLR 429 and *R v Green* (unreported, Court of Appeal, 18 February 1992, CA 119/91).

must keep their comments on the correct side of the line ...<sup>116</sup>

108 The court also expressed the view that the basic issue involved the burden of proof<sup>117</sup> and the judgment, therefore, emphasises that any comment by the judge must be reinforced by a direction to the jury that the prosecution bears the burden of proof throughout. In relation to the inferences which may be drawn from silence the court referred to English authority that:

an inference can be drawn from *uncontested or clearly established* facts which point so strongly to guilt as to call for an explanation ...<sup>118</sup>

and said:

So this was not a case where the accused's election not to give evidence was used to bolster an inadequate or marginal case. A strong *prima facie* case had been made out and, in the absence of the accused from the witness box to support a positive assertion on his behalf that Mr S, not himself, might have been responsible, it was not improper for the jury to *reinforce the already established case against him* from his decision not to give evidence.<sup>119</sup>

109 This decision can be regarded as supporting the view that inferences can only be taken from silence to confirm or reinforce an already established case, (see the discussion at paras 99-101). But the question must again be asked why it is necessary to comment on silence at all if the prosecution case is already proved. Is comment only made, as the courts have from time to time indicated, to legitimise a natural reasoning process? Or is it intended to give some weight to silence in order to remove a lingering or reasonable doubt? Or, as a third possibility, is weight to be given to silence, not as positive evidence of guilt, but only when assessing the weight (or credibility) of other evidence? It is probably fair to say that the decisions both in New Zealand and overseas demonstrate some hesitancy to clarify finally the evidential effect of a defendant's decision not to testify.<sup>120</sup>

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116 At 389, quoting from *R v Mutch* [1973] 1 All ER 178, 181.

117 See the discussion paras 15-25.

118 See note 115, 391 (emphasis added). The passage is again referring to *Mutch*, see note 116.

119 See note 115, 391 (emphasis again added).

120 England: *R v Hubbard* [1991] Crim LR 449; Canada: *R v Patrick* (1982) 66 CCC (2d) 575.

110 The Court of Appeal has returned to the question of silence at trial in two recent cases. In *R v Accused* (CA 227/91) Cooke P said:

The present law certainly allows an inference adverse to an accused to be drawn if he remains silent at trial in the face of evidence pointing to his guilt. Moreover, by virtue of s 366 Crimes Act 1961, the trial Judge may comment to that effect in his summing up to the jury. See on the whole matter *R v Coombs* [1983] NZLR 748; *Trompert v Police* (1984) 1 CRNZ 324; and *R v Accused* (1988) 4 CRNZ 208. The accused is not bound to give evidence, but he refrains at the foregoing risk, so the expression "right to silence" can be somewhat misleading.<sup>121</sup>

In the subsequent decision of *McCarthy* Cooke P said:

In the ordinary run of cases trial Judges are not to be discouraged from exercising their right of comment - see *R v Accused* (CA 227/91) 7 CRNZ 407, 419 - and we think that criticism of the one-sided effect of the so-called 'right to silence' will be less justified if Judges bear this in mind. Silence certainly does not give rise to an inference of guilt; but, depending always on the particular facts, the prosecution evidence and natural inferences from it may more easily be accepted if not contradicted by evidence from the accused or other evidence called for the accused. In general, and subject again to the particular facts, the Judge is well entitled to explain this to the jury. It may well be desirable to do so to prevent 'the right to silence' from being over-exploited.<sup>122</sup>

111 Those comments offer some encouragement to judges to exercise the right to comment, but they also appear to leave the law very much as expressed in *Trompert* and *R v Accused* (CA 78/88).<sup>123</sup> On the one hand, silence of itself is not to give rise to an inference of guilt. On the other hand, an adverse inference may be drawn if a defendant remains silent at trial in the face of evidence pointing to guilt; and natural inferences arising from the prosecution evidence may be more readily accepted if not contradicted by evidence from the defendant. The latter suggestion appears, however, to give some evidential significance to silence, though only as a factor relevant to the weight of other evidence. This, as we have mentioned, is a distinction which has been criticised, but which is consistently found in the decided cases.

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#### OPTIONS FOR REFORM CONCERNING SILENCE AT TRIAL

121 See note 49, 419.

122 See note 24, 63.

123 See note 115.



### No right to comment

112 It would seem that three directions could now be taken. The first would be to revert to the pre-1966 position<sup>124</sup> and deprive the judge of the right to make any adverse comment. The trial judge cannot comment adversely in North America and, indeed, the law goes even further.<sup>125</sup> So does the solution proposed for New South Wales where the Evidence Bill 1991 prohibits even the defendant from making a statement as to the reasons why he or she did not give evidence (clause 14(1)(b)). It is only if "the issue of why the defendant did not give evidence or sworn evidence is raised before or by the jury" that the judge may comment. The judge is then permitted only to do the following (clause 14(2)):

- a) state that the defendant had the choice of giving no evidence or of giving either sworn or unsworn evidence (but must not comment on the consequences attached to those choices); and
- b) warn the jury that it must not speculate as to the reasons the defendant chose not to give evidence ... .

### An increased right to comment

113 The second option is to enact legislation specifically authorising increased comment by the judge, and, perhaps, prosecuting counsel, on the basis that the defendant's lack of testimony is an item of evidence which can be considered by the jury in assessing guilt. This, as we previously recorded, is the option chosen recently in Northern Ireland where the 1988 Order<sup>126</sup> has substantially curtailed the right of silence both before and at trial. Briefly described,<sup>127</sup> in addition to permitting comment by the prosecution,<sup>128</sup>

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124 The present s 366(1) was enacted in 1966. Prior that time the judge was prohibited from commenting adversely on the defendant's failure to testify.

125 US: *Griffin v California* 380 US 609; *Carter v Kentucky* 450 US 288. Canada: s 4(6) of the Canada Evidence Act RSC 1985, Chapter C 5.

126 Para 63.

127 Jackson, see note 58.

128 The 1989 English Home Office Working Group also recommended that the prosecution be allowed the opportunity to comment on the fact that the defendant did not testify and that "judges should make more frequent and robust use of their existing right to comment." The law in England relating to the ability of the trial judge to comment is, in essence, the same as the present New Zealand law.

the Order provides that, except in limited circumstances, the court shall tell the defendant that he or she will be "called upon by the court to give evidence in his or her defence" and shall warn the defendant what the effect of not giving evidence will be - namely that the jury can take silence into account in deciding the defendant's guilt and also utilise the failure to testify as corroboration if such is necessary.

### **No change to right to comment**

114 The third option is to leave the law relatively unchanged and continue to allow the judge, but not the prosecution, the right to comment.<sup>129</sup> At present, we favour this option for the following reasons. The first option does not in our view address the reality of the situation. The jury will be aware that the defendant has not testified and, if not instructed on the subject, may draw their own unguided and unrestricted inferences. We also consider that to revert to the pre-1966 position, and allow only neutral comment by the judge (or comment to the effect that the jury is not to draw an adverse inference from silence), would be equally unsatisfactory. On the other hand, we consider that the second option goes too far. It would result, as we indicate in more detail at para 124, in a major change to the position of the defendant. We therefore prefer the third option which permits the trial judge, in particular circumstances, to tell a jury that, in assessing the weight or credibility of other evidence, they may have regard to the fact that the defendant has not testified. This direction allows the jury in appropriate circumstances to draw an adverse inference from the defendant's silence at trial.

115 The third option does not, as the law is at present being interpreted, appear to be creating any substantial unfairness to either the defence or the prosecution. In relation to the defence this is possibly because judges have exercised the right to comment with caution - no doubt due to the very real difficulty in knowing the actual reason why a defendant has not testified in a particular case. Moreover, when comment has been made it has, at least until recently, usually been limited to the standard formula referred to in para 106. In relation to the position of the prosecution, it is not apparent that significant numbers of guilty defendants are avoiding conviction by not testifying. Nor are we aware of evidence that many defendants are putting the Crown to the proof in circumstances where they would not do so if adverse inferences were more readily drawn from silence. If, however, that does appear to be happening we would wish to be advised.

### **CONCLUSIONS CONCERNING SILENCE AT TRIAL**

116 In the absence of evidence that the existing law is working injustice to either the defence or the prosecution we are, therefore, disinclined to recommend any substantial change concerning comment on silence at trial. The overall view which we at present take is that, as previously indicated, we favour exclusion of all evidence of, and comment upon, silence before trial (except when an accusation is made when the accused is on more or less even terms with the accuser). This, however, must be considered in conjunction, first, with the new provisions for police questioning which we suggest later in

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129 We have not at this juncture endeavoured to draft any provisions replacing the existing provisions (ss 364 and 366 of the Crimes Act 1961).

this paper<sup>130</sup> (which preserve the right of silence before trial) and, second, with the ability of the judge to comment on silence at trial. Taking into account the safeguards available for the defendant at trial, which include advice of the consequences of silence and full knowledge of the prosecution case, we think it appropriate to allow comment. We emphasise, however, that our conclusion is based on our understanding that the law requires the right to comment to be exercised with care and with a clear regard to fairness for the defendant.

117 We recognise that maintaining the present law involves an element of difficulty in relation to the terms of the standard jury direction, which can prove confusing. Zuckerman has suggested that a comment along the following lines may generally be appropriate:

All that is necessary is to inform the jury at the end of the trial that, in law, the accused had the opportunity of rebutting the charges levelled against him under oath but that he declined to do so. It is unlikely that this piece of information will come as a surprise to the majority of jurors and it will not, therefore, constitute a sharp departure from the present position. To avoid misunderstanding, the trial judge should make the jury understand that refusal to testify is not tantamount to an admission of guilt and that the accused's failure does not discharge them from weighing carefully the evidence presented by the prosecution and by the defence.<sup>131</sup>

118 While comment along the above lines may be somewhat more direct than the present standard comment, it may help to dispel misunderstanding among jurors. The Court of Appeal has also emphasised that it is important that judges should not be limited to a standard form of comment.<sup>132</sup> What is essential is that the comment should be fair in all the circumstances of the case. Thus it may on many occasions be necessary to expand on the comment. It may, for example, frequently be necessary to amplify the reference to silence not being tantamount to an admission of guilt by indicating that there are reasons why an innocent defendant may choose not to testify. Moreover, though the recent comments of Cooke P appear to encourage greater exercise of the right to comment, it would seem very important for comment not to be made automatically.

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130 See part III and Draft Rules for Questioning After Arrest.

131 Zuckerman, see note 16, 341.

132 *Andrews* see note 114.

119 The circumstances in which comment should be made were recently considered by the Court of Appeal in *R v Andrews*.<sup>133</sup> Though the judges differed on the facts, it seems clear that none considered comment should be automatic. It was suggested by Jefferies J (who dissented) that "there must be something in the trial itself that enables an unfavourable comment to be made" and that the current type of comment was "not to become a pattern direction to be used whenever an accused chooses to remain silent". These statements appear to reflect the proposition that silence is not evidence of guilt but is only to be taken into account in assessing the weight of other evidence. Examples of factors which might be relevant to a decision whether to comment after a defendant refrains from giving evidence are the making of an attack on prosecution witnesses,<sup>134</sup> a suggestion that another person was the culprit, or an endeavour to tender an explanation through a psychiatrist.<sup>135</sup> We inquire whether it is worth endeavouring to devise statutory but non-exhaustive guidelines as to when and how comment should be made.

120 Even with guidelines it may on occasions be difficult for a defendant to predict when comment is likely to be made. One way of enabling the defendant to know whether comment will be made is to permit counsel, before deciding whether or not to call the defendant, to inquire from the judge whether comment is likely. A similar indication could be sought before final addresses, though this could not be binding on the judge because the content of the defence final address might be a ground for making comment. We would welcome views as to whether it is undesirable or impracticable for counsel to make an inquiry concerning the likelihood of comment.

121 It should also be clearly recognised, probably by way of a specific rule contained in the Law Society's Code of Ethics, that counsel has the obligation to advise a defendant concerning the possible consequences of refraining from giving evidence. (We have already mentioned the possible inadequacy of the advice currently given to an unrepresented defendant.<sup>136</sup>) Further, it needs to be appreciated that a defendant is entitled to call other witnesses to indicate why he or she refrained from giving evidence. This not an issue free from difficulty.<sup>137</sup>

122 As emerges from the entire foregoing discussion, it is our view that on all the right of silence issues it is necessary to maintain a proper balance between the interests of

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133 See note 114.

134 *Green*, see note 115.

135 *R v Brader* (unreported, Court of Appeal, 9 April 1992, CA 191/91).

136 Para 105.

137 Coldrey, see note 16, 58 where it is suggested that the potential exists to considerably complicate and lengthen trials. This, however, would possibly be more likely when comment is made on silence before trial.

citizens in the effective prosecution of the guilty and the need to protect the innocent from conviction. Specifically in relation to silence at trial, our provisional conclusion is that the present law, properly applied in the light of the recent directions of the Court of Appeal and with the modifications we suggest concerning the form and circumstances of comment (which do not require any change to the terms of s 366(1) of the Crimes Act 1961), strikes a fair balance.

123 This conclusion appears to be compatible with the provisions of the Bill of Rights. We do not consider that the prospect of a carefully considered and balanced comment by the judge to the jury on the fact that a defendant did not testify would compel a defendant to testify in breach of s 25(d). The jury will be aware that a defendant did not testify and the choice, therefore, lies between giving measured guidance on this issue or leaving the jury to make of silence what they will. Any pressure to testify stems from the fact that the jury will know if the defendant does not give evidence. As was expressed by Justice Stewart (dissenting) in the US Supreme Court decision of *Griffin v California*:

whenever in a jury trial a defendant exercises this constitutional right [not to testify], the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad.<sup>138</sup>

With regard to the significance in this context of the guarantee of the presumption of innocence contained in s 25(c), we refer to the discussion in paras 15-25. In determining whether the prosecution has proved guilt beyond reasonable doubt, the jury will have regard to all of the evidence, whether adduced by the prosecution or by the defence. A recognition that in some instances the defendant's decision not to testify may be relevant to the assessment of the weight or credibility of a particular item of evidence does not affect the principle that the totality of the evidence adduced must establish guilt beyond reasonable doubt.

124 Before parting with the question of comment on silence at trial we think it important to emphasise that comment which goes beyond that which we envisage would significantly alter the balance of our system. We are concerned that comment should not go too far towards treating silence as positive evidence of guilt. Whether or not giving evidential weight to silence in its own right would affect the burden of proof and consequently the presumption of innocence,<sup>139</sup> it would result in a major change to the position of the defendant in a criminal trial. As we pointed out in our earlier discussion of the principles (para 22), it then becomes more difficult for the defendant to make a

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138 See note 125, 623.

139 See the discussion paras 15-25.

judgment about whether to give evidence on the basis of an assessment whether the prosecution case has been proven beyond reasonable doubt - because the defendant cannot readily determine what weight will be given to silence. If, for example, the prosecution case, once the witnesses have been cross-examined, appears to fall significantly short of proof beyond reasonable doubt, will the jury treat silence as sufficient to overcome that doubt? There will also certainly be greater reason for the defendant to give evidence.<sup>140</sup> The question then arises whether that amounts to compulsion to testify contrary to s 25(d) of the Bill of Rights, which provides that everyone charged with an offence has "the right not to be compelled to be a witness".<sup>141</sup> As we have previously indicated, we consider that a change of that significance should only be contemplated if the evidence shows that our present system is unjustifiably hindering the prosecution of offences.<sup>142</sup>

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140 Which in turn heightens the importance of ensuring that the rules concerning cross-examination on previous convictions are fair.

141 See para 9.

142 It needs also to be kept in mind that in many of the difficult cases inferences drawn from silence may not assist the prosecution. An example is when there are a number of people implicated in a crime but the prosecution cannot prove who was the actual perpetrator; see para 34.

## USE ON APPEAL OF A DEFENDANT'S SILENCE AT TRIAL

125 In *R v Mareo (No 3)*<sup>143</sup> the Court of Appeal held that when the issue on appeal against conviction for an offence tried by indictment is whether the verdict was "unreasonable or cannot be supported having regard to the evidence" (s 385(1)(a) of the Crimes Act 1961), it is permissible to take into consideration the fact that the defendant did not testify.<sup>144</sup> It is important to note that the issue on appeal is different from that which faces a trial court making a determination whether guilt has been proved beyond reasonable doubt. The court in *Mareo* stressed this difference and also appeared to affirm, in the passage quoted earlier in this paper,<sup>145</sup> that at trial the defendant's silence could not be used to remove a reasonable doubt otherwise existing. While the use by an appellate court of the defendant's silence is undoubtedly a detrimental consequence of the exercise of the right of silence, the particular issue involved on an appeal largely legitimises this. The court said:

If, however, the appeal against conviction resolves itself in substance into an application for a new trial on the ground merely that the verdict was against the weight of evidence, and there was a *prima facie* case made out against the prisoner, we think that the view expressed *obiter* by Chapman J., in *Weston v Cummings*(30) is correct and that this Court may take into consideration (unless there appears to be a satisfactory explanation of the failure) the fact that the prisoner did not give evidence.<sup>146</sup>

It is also hard to imagine that the potential for this use of silence by an appellate court significantly affects the decision of a defendant whether or not to testify at trial. We can see no reason to alter the law as set forth in *Mareo* as it relates to appeals in indictable proceedings.

126 The position may be slightly different in the case of a summary conviction appeal because there is no express reference in the grounds of appeal to the verdict being unreasonable or unable to be supported having regard to the evidence. Nevertheless the approach in *Mareo* has been applied to such appeals.<sup>147</sup> We agree that the defendant's

143 See note 105, 674-677.

144 One of the concerns was that at the time *Mareo* was decided even the trial judge was not permitted to comment on the defendant's failure to testify. Now that s 366(1) of the Crimes Act allows such comment the case would be even stronger for the appellate court to take into account the defendant's silence at trial (because there is a stronger indication from the legislature that the failure to testify has probative force).

145 See note 105.

146 See note 105.

147 *Dolling v Bird*, see note 101; *McBurney*, see note 106.



failure to testify at the original hearing should continue to be able to be taken into account when the issue before the court is whether the conviction was against the weight of evidence.



PART II

CONFESSIONS

AND

IMPROPERLY OBTAINED EVIDENCE



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## Introduction

1 Evidence can be obtained for use in criminal proceedings by many different methods which are often dependent on the form in which the evidence exists (such as spoken words or an object) and the type of crime that has been committed. For example, a person may be questioned in order to determine his or her whereabouts and actions during a riot, a phone may be tapped to gather evidence about a conspiracy to import controlled drugs, or a house may be searched in an endeavour to find a murder weapon.

2 The law prescribes certain standards to control the gathering of evidence, especially by the police and other government officials. If those standards are breached the evidence is said to have been obtained "illegally" or "improperly" or "unfairly".<sup>148</sup> Broadly speaking, this part of the discussion paper considers what standards control the gathering of evidence and the consequences for the admissibility of evidence when the standards are breached.

3 The basic rule is that evidence is admissible (ie, may be offered as evidence in a proceeding) if it is relevant.<sup>149</sup> Generally, all forms of relevant evidence, however obtained, are admissible, subject to the court's power to exclude the evidence on the ground that it is unfairly prejudicial.<sup>150</sup> In addition to the general exclusionary power there are also certain rules, established both by common law and statute, requiring or allowing the court to exclude relevant evidence. These include rules relating to confessions and all kinds of improperly obtained evidence.

4 Our consideration of the issues concerning confessions and improperly obtained

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148 At present we leave these terms undefined, but see para 0.

149 Relevant evidence is "that which is logically relevant, anything which according to logic and good sense has a bearing on the issues. ... [E]vidence is relevant if it has a tendency to prove or disprove any fact of consequence to the determination of the proceedings": see commentary to the Law Commission's draft Evidence Code in *Evidence Law: Codification* (NZLC PP14 1991) para C9.

150 See *Evidence Law: Codification*, note **Error! Bookmark not defined.**, which contains draft provisions for the early part of an Evidence Code. Section 3 of the draft Code contains a general exclusionary power for evidence which is unfairly prejudicial, confusing, misleading or unjustifiably time consuming or expensive.



evidence proceeds on the basis that the evidence in question is relevant. In fact this will usually be so in the case of a confession. In addition the probative value of a confession is high because it comes from the defendant - it is direct evidence of guilt. Other forms of evidence which may have been improperly obtained, such as real evidence (ie, tangible items like a murder weapon), are also relevant and are often highly probative when they can be linked to the defendant.

5 In terms of the purposes of the Law Commission's proposed Evidence Code,<sup>151</sup> rejection of relevant evidence is contrary to the objective of rational ascertainment of facts and can only be justified on the basis of the need for fair procedures and the protection of other public and social interests. There are in fact differing public interests at stake. On the one hand it is important that those who commit crimes are apprehended and convicted, and, therefore, that all relevant evidence is admissible in criminal proceedings. On the other hand it is important to ensure that people are free from unreasonable State intrusion in their lives and that the innocent are not convicted. It is when evidence is obtained in a manner which prejudices the latter interests that grounds exist for its exclusion.

6 In part I of this paper the right of silence is examined in some detail because it is relevant to several aspects of the law concerning the investigation and prosecution of crime. In this part of the paper the right of silence is relevant as one of the protections aimed at ensuring that people are free from unreasonable State intrusion in their lives and that the innocent are not convicted. It translates into an obligation on the State not to coerce people into incriminating themselves whether by forcing them to make a statement, give a body sample or attend an identification parade. In some instances the legislature has considered it appropriate to make inroads on the right of silence.<sup>152</sup>

7 The Law Commission considers that the law of evidence should continue to reflect a balance between the various public interests at stake (without requiring either the outright admission or the invariable exclusion of all improperly obtained evidence).<sup>153</sup> The issues for law reform are whether the present balance is appropriate and how the proper balance should be reflected in any codification of the legal rules.

## CONFESSIONS

8 Historically, confessions have been treated by the law as a special category of evidence governed by particular rules of admissibility, including a refined application of the

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151 See draft section 1 set out in *Evidence Law: Codification*, note **Error! Bookmark not defined.**, 19.

152 See eg, the Serious Fraud Office Act 1990 ss 9, 27, 28.

153 In relation to confessions see the later discussion at paras 0-0.

discretion to exclude unfairly or improperly obtained evidence. This approach is due to concerns about the reliability of confessions and the protection of people from coerced self-incrimination. The Law Commission considers that these factors continue to justify special rules dealing with the admissibility of confessions.

9 The confessions rules to a large extent relate to the way in which confessions are obtained. This includes the process of police or official questioning, and how that process should be controlled. Though police questioning is dealt with separately in part III, it is important to keep in mind that it is but one aspect of the law concerning the admissibility of confessions.

## IMPROPERLY OBTAINED EVIDENCE

10 The general rules controlling the admissibility of all forms of improperly obtained evidence are also considered in this part of the paper because to a significant extent the policies underlying these rules and the special rules relating to confessions are the same. Indeed, we later suggest that in some respects confessions and improperly obtained evidence can be subject to the same rule (see paras 0-0).

11 Although the general rules relating to all improperly obtained evidence are dealt with in this paper, we do not discuss particular rules about the admissibility of different kinds of improperly obtained evidence (eg, the admissibility of illegally intercepted private communications under the Misuse of Drugs Amendment Act 1978) or the rules controlling the gathering of such evidence (eg, how an identification parade must be conducted or how a search warrant must be obtained and executed). While that task is beyond the scope of this paper,<sup>154</sup> we have endeavoured to keep such rules in mind when considering the general rules.

## THE STRUCTURE OF THIS PART

12 First, the current law is outlined. The particular rules of admissibility which relate only to confessions are discussed and then the general rules which apply to all forms of improperly obtained evidence are examined. The policies underlying the various rules are then considered. Thereafter, proposals for reform are set out, including the reasons why the Law Commission believes reform is necessary. In most cases we have drafted new

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154 It will in due course be undertaken in other parts of the Law Commission's references on evidence and criminal procedure.

rules in order to provide a focus for consideration of our provisional conclusions. In some instances, however, we have only asked questions on which responses are sought for further study. And on other occasions we have indicated that we consider the present law is satisfactory and simply needs to be codified.

## II

### The Current Law

13 In this chapter we endeavour to set out the current law as briefly as possible, but without omitting any aspects relevant to our proposals for reform. Some important issues, however, receive less extensive treatment than others because they have already been well explored elsewhere<sup>155</sup> or have been considered in the valuable *Report on Confessions* by the Evidence Law Reform Committee.<sup>156</sup> In chapter IV the problems with the current law are explored and the Law Commission's proposals for reform are examined.

#### CONFESSIONS

14 Under the current law confessions are admitted in evidence as an exception to the hearsay rule. Generally, evidence is hearsay, and therefore inadmissible, if it is given by a witness who relates what another person said or wrote out of court. The rule applies only to statements offered as the truth of what the other person said or wrote. The law permits admissions (ie, statements adverse to the maker) to be given in evidence as an exception to the hearsay rule on the ground that if a person makes an admission it is likely to be true. Confessions are admissions made to a person in authority, most typically a police officer. In the case of confessions there are special rules about voluntariness (with an exception provided by the Evidence Act 1908 s 20), oppression, unfairness, and breaches of the New Zealand Bill of Rights Act 1990. Before those rules are discussed in more detail the meaning of the term "confession" is considered.

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155 *Cross on Evidence* (Mathieson, 4th NZ ed, Butterworths, Wellington, 1989), 545, referred to as *Cross* (Mathieson); *Garrow and McGechan's Principles of the Law of Evidence* (McGechan, 7th ed, Butterworths, Wellington, 1984), chapter 10; Adams, *Criminal Law and Procedure in New Zealand* (Robertson, 1992), part 2, chapter 2. For a summary of more recent cases see McBride, "Evidence" [1989] NZ Recent Law Review 45 and [1991] NZ Recent Law Review 38. For a detailed discussion of the Australian law, which includes consideration of many of the issues relevant in New Zealand, see Law Reform Commission (Australia), *Admissions* (Research Paper No 15, 1983).

156 Evidence Law Reform Committee, *Report on Confessions* (February 1987, Wellington).

## What is a confession?

15 The rules about admissibility of confessions only apply to evidence that is a "testimonial disclosure" ie, an assertion of a human being offered as the truth of that which is asserted.<sup>157</sup> A layperson's definition of a confession might further restrict that requirement to a statement which is an admission of guilt. However, confessions often comprise a variety of statements, of which some are incriminating, some are exculpatory (either a denial of an accusation or an innocent explanation) and some are seemingly neutral. In New Zealand the whole confession, including any exculpatory parts, must be admitted in evidence for the court or jury to consider.<sup>158</sup>

16 Confessions are usually tendered in evidence to show the truth of their contents. Nevertheless, on occasions the prosecution may wish to adduce entirely exculpatory or neutral statements in order to show that the defendant responded in a way suggesting that he or she committed the crime. For example, the prosecution may wish to produce an exculpatory statement to demonstrate that the defendant has lied. Similarly, a flippant response to questioning may be tendered to suggest that the defendant was conscious of guilt.<sup>159</sup> The argument can then be made that the statements are not hearsay (because they are not offered in evidence to prove the truth of their contents<sup>160</sup>) and can therefore be admitted in evidence without any regard to the confessions rules. In that event the statements will only be excluded from evidence if the court determines that their prejudicial effect outweighs their probative value. There is no clear authority whether the confessions rules apply to exculpatory or neutral statements, but it is probable that in New Zealand the prosecution must at least prove that such statements are voluntary.<sup>161</sup>

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157 *Cross* (Mathieson) see note **Error! Bookmark not defined.**, para 1.23. Thus evidence of incriminating hair or blood samples, or medical examinations, are not subject to the confessions rules, although they can be the subject of the fairness discretion discussed at paras 0-0.

158 *R v Smith* [1989] 3 NZLR 405.

159 See eg, *R v Howe* (1987) 2 CRNZ 568. Issues can arise whether what a defendant has said can actually be taken to be an incriminating statement. This will be a matter for the jury: *R v Innes* (unreported, Court of Appeal, 23 November 1988, CA47/87).

160 See *Mawaz Khan v R* [1967] 1 AC 454.

161 See *R v Coats* [1932] NZLR 401, 405, Myers CJ, 407, Ostler J. Smith J, 408, after concluding that s 20 (see paras 0-0) did not apply, stated that the defendant's statements are "subject simply to the rules of practice which are applied with regard to the putting in evidence of statements taken from accused persons by police officers." In Canada the prosecution cannot tender an involuntary exculpatory statement (see *Piche v R* (1970) 11 DLR (3d) 700) while in England exculpatory statements appear to fall outside the definition of confessions and therefore are not subject to the voluntariness rule (see *R v Pearce* (1979) 69 Cr App R 365, 370, Lord Widgery CJ) or its equivalent under the Police and Criminal Evidence Act 1984 (see *R v Sat*

17 The admissibility of exculpatory or neutral statements also raises the complex problem of "implied assertions". Implied assertions are statements or actions which imply a meaning not necessarily intended by the maker. Exculpatory or neutral statements tendered to show a consciousness of guilt fall within this category. However, the law is not clear whether implied assertions are to be regarded as hearsay and therefore whether they are subject to the confessions rules.<sup>162</sup>

18 We now turn to the special rules governing the admissibility of confessions: voluntariness and the exception in s 20 of the Evidence Act 1908, oppression, unfairness and the exclusionary rule in respect of evidence obtained in breach of the Bill of Rights.

### Voluntariness

19 Lack of voluntariness is the first ground upon which confessions may be excluded. The prosecution must prove voluntariness beyond reasonable doubt.<sup>163</sup> This requirement needs to be considered in conjunction with s 20 of the Evidence Act 1908 (see paras 0-0) allowing certain confessions to be admitted as evidence when at common law they would have been excluded because they were not made voluntarily.

20 There is little detailed guidance in the cases about how the voluntariness rule is to be applied, and attempts to define the concept tend to be vague. The court in *Naniseni v R* approached the rule by providing what is in part a broad definition:

"voluntary", where used to describe the essential characteristic of an admissible confession, must be taken to signify that the will of the person making the confession has not been overborne by that of *any other person*.<sup>164</sup>

On the basis of that definition, the court in *Naniseni* determined that no matter what the factor or inducement relied upon as rendering a confession involuntary, it must emanate from another person in order to be legally relevant. Thus, unless brought about by another person, matters such as fatigue, lack of sleep, emotional strain, the consumption of alcohol, or mental illness are irrelevant to a determination of voluntariness.<sup>165</sup> (Such

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*Bhambra* 88 Cr App R 55).

162 See *Evidence Law: Hearsay* (NZLC PP15 1991) para 6, and the later discussion in the text at para 0.

163 *R v McCuin* [1982] 1 NZLR 13.

164 [1971] NZLR 269, 274 (emphasis added).

165 See note **Error! Bookmark not defined.**, 274.

matters may, however, be taken into account when the court considers whether evidence should be excluded on the ground of unfairness, see para 0.) In addition there must be a causal link between the inducement and the making of the confession.<sup>166</sup>

21 The voluntariness rule can be considered in two parts. First, the classical formulation of the voluntariness rule is that inducements exciting a "fear of prejudice or hope of advantage" in the defendant (typically described as persuasions or promises), emanating from a *person in authority*, will deprive a confession of voluntariness.<sup>167</sup> Whether a person is a "person in authority" is determined subjectively. The question is did this defendant believe that the person to whom the statement was made was a person in authority?<sup>168</sup>

22 Second, more serious inducements such as threats, violence, force or other forms of compulsion or (put another way) duress, intimidation, persistent importunity or sustained or undue insistence or pressure, emanating from *any* person (not necessarily a person in authority), will also deprive a confession of voluntariness.<sup>169</sup>

## Oppression

23 Oppression was originally developed at common law as a separate but related ground for exclusion ie, in addition to the common law "fear of prejudice or hope of advantage" rule of voluntariness.<sup>170</sup> For oppression to exist the conduct complained of must possess a "physical character" though it need not necessarily be violent.<sup>171</sup> Factors relating to the nature of the questioning, the period of questioning, the environment in which questioning takes place, and the characteristics of the defendant, may be relevant to whether oppression exists.<sup>172</sup> Breaches of the Judges' Rules (guidelines for the police

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166 *DPP v Ping Lin* [1976] AC 574.

167 *R v Ibrahim* [1914] AC 599, 609, and *Naniseni v R*, see note **Error! Bookmark not defined.**, 271-273.

168 *Deokinanan v R* [1969] 1 AC 20. But see *R v Dally* [1990] 2 NZLR 184, 190-191 requiring a belief "on reasonable grounds".

169 *Naniseni v R*, see note **Error! Bookmark not defined.**, 271-273. See also *R v McDermott* (1948) 76 CLR 501, 511, Dixon J; *R v Ibrahim* see note **Error! Bookmark not defined.**, 613, Lord Sumner.

170 *R v Wilson* [1981] 1 NZLR 316. Courts in New Zealand have tended to regard oppression as part of the general rule about voluntariness.

171 *R v Dally*, see note **Error! Bookmark not defined.**, 204.

172 *Cross* (Mathieson), see note **Error! Bookmark not defined.**, para 18.45.

conduct of questioning) may also be relevant to whether questioning has been oppressive.<sup>173</sup>

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<sup>173</sup> See eg, *R v Wilson* (see note **Error! Bookmark not defined.**) where the finding that there had been oppressive questioning amounting to some "other form of compulsion" (see paras 0 and 0) was based on serious breaches of the Judges' Rules (see para 0).



## Section 20 Evidence Act 1908

24 The precursor of s 20 of the Evidence Act 1908 was enacted in 1895 as a reaction against what was seen as the over-protectiveness of the common law voluntariness rule in its exclusion of reliable confessions which had not been forced from the defendant by any serious police misconduct.<sup>174</sup> Section 20 provides a limited exception to the voluntariness rule:

A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

Various aspects of s 20 require discussion.

*... a promise or threat or any other inducement ...*

25 If a confession is held to have been obtained involuntarily it may nevertheless be admissible if the prosecution satisfies the test in s 20. However, only certain kinds of involuntary confessions fall within the scope of the section ie, those made as the result of a promise, threat or other inducement. There is some authority for the proposition that the confession must also have been obtained by a person in authority because at common law only inducements emanating from a person in authority render a confession involuntary (see para 0).<sup>175</sup>

26 The result is that sometimes the admissibility of a potentially unreliable confession will turn on who obtained it. For example, if a confession is induced by a promise made by an ordinary person (ie, not someone in authority) the confession may be admissible even though it may be unreliable. The same promise made by a police officer renders the

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174 Evidence Further Amendment Act 1895 s 17 (derived from a Victorian Statute of 1856). The history of s 20 up to 1949 is set out in *R v Phillips* [1949] NZLR 316, 339, O'Leary CJ. That case includes a history of the law of confessions in New Zealand to that time as well. Section 20 reached its present form in 1950 (Evidence Amendment Act s 3). See also Adams, "Confessions" (1963) 1 NZULR 5 and Mirfield, *Confessions* (Sweet & Maxwell, London, 1985) 50.

175 See *R v Phillips* [1949] NZLR 316, 344-345, 349-350, 355 and *Cornelius v R* (1936) 55 CLR 235, 246. See also *R v Wilson* note **Error! Bookmark not defined.**, 322. However, according to *R v Nanisani*, see note **Error! Bookmark not defined.**, 274, threats may render a confession involuntary no matter who makes them.

induced confession inadmissible under the voluntariness rule and it will not be saved by s 20 if the confession is likely to be unreliable.

*... (not being the exercise of violence or force or other form of compulsion) ...*

27 When "violence or force or other form of compulsion" emanating from *any* person causes a confession to be made, the confession will inevitably be held to have been obtained involuntarily and will therefore be inadmissible. (The phrase "or other form of compulsion" in s 20 corresponds broadly to the common law concept of "oppression".<sup>176</sup>) A confession obtained in these circumstances is expressly excluded from the operation of s 20. Thus, even if the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made, the confession cannot be admitted in evidence.

*... the judge or other presiding officer is satisfied ...*

28 Section 20 requires that the court be "satisfied" that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made. It is arguable that "satisfied" imports a standard different to and perhaps lower than proof beyond reasonable doubt, which applies to the voluntariness rule.<sup>177</sup> However in *R v Cullen and Waa*<sup>178</sup> it was accepted by the prosecution and the court that a combined interpretation of *R v McCuin* and *R v Fatu*<sup>179</sup> requires the court to be satisfied beyond reasonable doubt that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

*... not in fact likely to cause an untrue admission of guilt ...*

29 The interpretation of s 20 is discussed in *R v Fatu*:

the correct test ... is to ask ... whether or not an innocent person in the position of the accused and in the circumstances in which he was placed would be likely to confess to a crime which he had not committed. The words "in fact" in the section emphasise that regard is to be had to reality in the particular circumstances. As to the meaning of "likely" in the section ... this is to be interpreted as importing a real or substantial risk. The prosecution must negate such a risk ...<sup>180</sup>

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176 *R v Wilson*, see note **Error! Bookmark not defined.**, 322.

177 *R v Fatu* [1989] 3 NZLR 419, 430.

178 (1990) 6 CRNZ 28, 33.

179 See notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.** respectively.

180 See note **Error! Bookmark not defined.**, 430, adopting *R v Hammond* [1965] NZLR 257, 258.

The Court of Appeal in *Fatu* pointed out that the issue is not the truth or untruth of the actual confession (which is for the jury to decide if the confession is admitted) but rather the likelihood that the improprieties may have caused an untrue admission of guilt.

30 It is arguable that where s 20 applies it will always enable the prosecution to tender an exculpatory statement.<sup>181</sup> Such a statement, even if tendered as an implied assertion of guilt, may not constitute an "admission of guilt" in terms of s 20. In that event (assuming the voluntariness rule applies to such statements)<sup>182</sup> the prosecution will be able to satisfy s 20 and tender an involuntary exculpatory statement in evidence. At most the defendant will only have made an untrue "admission" of innocence. Yet the statement may well be unreliable if it was coerced in some way.<sup>183</sup>

31 There are older authorities<sup>184</sup> suggesting that s 20 does not apply to partial admissions of guilt. If they are correct this creates an inconsistency concerning s 20. The prosecution can rely on s 20 to obtain the entry into evidence of a "full" confession, yet be compelled to surmount the stricter common law hurdle of voluntariness (unaided by the "not in fact likely to cause an untrue admission" of guilt test in s 20) when dealing with a partial admission. The Court of Appeal in *R v Fatu* has, however, now indicated that partial confessions are subject to s 20.<sup>185</sup>

### Breach of the New Zealand Bill of Rights Act 1990 and unfairness

32 As a consequence of the enactment of the New Zealand Bill of Rights Act 1990 there is now a rule requiring the exclusion of confessions and other forms of evidence obtained in breach of the Bill of Rights unless there is good reason to admit them in evidence. This rule, which is still in the process of development, is discussed in more detail in the section on improperly obtained evidence (see paras 0-0).

33 Confessions may also be excluded from evidence on the ground of unfairness. The ability of the court to exclude a confession on this ground is simply a particular

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181 *Cross* (Mathieson), see note **Error! Bookmark not defined.**, para 18.37.

182 See para 0.

183 Contrary to the above view, it can be argued that s 20 does not apply to exculpatory statements on the basis that it only applies to "confessions": see *Bocock v Ministry of Transport* (unreported, High Court, Wellington, 17 June 1992, AP46/92), 5.

184 *Cross* (Mathieson), see note **Error! Bookmark not defined.**, para 18.35.

185 See note **Error! Bookmark not defined.**, 429.

application of the discretion which may be exercised in respect of all forms of unfairly or improperly obtained evidence. For that reason unfairness is discussed under the head of improperly obtained evidence (see paras 0-0). In that discussion confessions are, where necessary, considered separately.

### **Children, Young Persons, and Their Families Act 1989**

34 The Children, Young Persons, and Their Families Act 1989 contains special rules concerning the admissibility of statements made by children and young persons.<sup>186</sup> A Ministerial Review Team has recently reported to the Minister of Social Welfare concerning all aspects of the Act, including the admissibility rules.<sup>187</sup> The Department of Justice is at present considering the Review Team's recommendations, which are not confined to rules about the admissibility of statements made to the police. In these circumstances it is preferable for the Law Commission to restrict the focus of our inquiry to the general rules which apply to all persons (including children and young persons). Any special rules for children and young persons can later be included with the general rules if that is thought desirable.

### **The conduct of the trial**

#### *The voir dire*

35 The Judge decides all questions relating to the admissibility of evidence. In some instances this process requires a voir dire or "trial within a trial". There is also provision in the Crimes Act 1961 for the making of interlocutory orders relating to the admissibility of evidence (s 344A). Since the defendant will often give evidence on a voir dire, or on the hearing of an application for an interlocutory order, some rules are necessary.

36 The principles for the conduct of a voir dire set out in *Wong Kam-Ming v R*,<sup>188</sup> as supplemented by the decision in *R v Brophy*,<sup>189</sup> have been accepted by the New Zealand Court of Appeal.<sup>190</sup> The principles are:

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186 See in particular ss 221 and 224 of the Children, Young Persons, and Their Families Act 1989.

187 *Review of the Children, Young Persons, and Their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare The Hon Jenny Shipley* (February 1992).

188 [1980] AC 247.

189 [1982] AC 476.

190 *R v Uljee* [1982] 1 NZLR 561, 567, Cooke J, 572, Richardson J.

- On a voir dire the prosecution is not entitled to cross-examine the defendant about the truth of the statement, since the sole issue on the voir dire is whether the statement was made voluntarily. Whether it is true is not relevant to that issue.<sup>191</sup>
- Whether the defendant's statement is excluded or admitted on the voir dire, the Crown is not entitled as part of its case on the general issue to adduce evidence of testimony given by the defendant on the voir dire. (To do so would undermine the defendant's right of silence at trial.)
- Where a statement is admitted as voluntary on the voir dire and the defendant when subsequently testifying on the general issue gives evidence about the reliability of the admissions in the statement, and in so doing departs materially from his or her testimony on the voir dire, cross-examination on the discrepancies between the testimony on the voir dire and the evidence on the general issue is permissible.

#### *The voir dire in summary trials*

37 The voir dire rules are applicable both to jury and judge alone trials.<sup>192</sup> In judge alone trials there is, however, no need to duplicate testimony already given on the voir dire which is admissible in the trial proper.

#### *Disputed confessions*

38 A distinction can be made between objections to admissibility which raise questions of voluntariness and arguments about whether a confession was actually made. The Privy Council has noted this distinction, stating that an issue about the existence of a confession is simply a matter for the jury rather than a matter to be decided on a voir dire.<sup>193</sup> To date New Zealand courts have not developed formal rules about allegations of

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191 However, some cases indicate that the courts do not regard this as an absolute proposition. See eg, *R v Brophy* note **Error! Bookmark not defined.**, 481, where the defendant in his evidence on the voir dire, led by his defence counsel, admitted committing one of the crimes with which he was charged. See also *R v Dale* (unreported, Court of Appeal, 24 October 1991, CA186/91) 13, where the defendant volunteered in his evidence in chief on the voir dire that he had committed some but not all of the offences charged.

192 *Police v Grootjans* [1989] 3 NZLR 587; *Kidwell v Police* [1989] 3 NZLR 594.

193 See *Ajodha v State* [1982] AC 204. *Ajodha* was not referred to in *R v Hurst* (1987) 2 CRNZ 698 in relation to a voir dire on the issue of whether or not a confession had actually been made.

fabricated confessions. It has, however, been said that:

where the fact of the commission of any crime is supported only by something the accused himself has said, that something must be convincingly proved, and it must be cogent and satisfactory evidence, before it can be accepted by itself as a foundation of a conviction.<sup>194</sup>

39 In New Zealand there is no rule of law or practice requiring corroboration of a confession.<sup>195</sup> A rule of law that there must be corroboration requires evidence of another witness or evidence of some other type which confirms or supports the confessional evidence, before the defendant can be convicted or before a finding of fact can be made.<sup>196</sup> A rule of practice that there must be corroboration requires that, if there is no corroborative evidence, the jury must be warned that it is dangerous to convict on an uncorroborated confession.<sup>197</sup>

*Cross-examination at trial by a co-defendant on a defendant's inadmissible confession*

40 In multiple prosecutions a co-defendant may wish to cross-examine another defendant concerning a statement by the other defendant which has been ruled inadmissible as part of the prosecution case. The present law is that the co-defendant has the right to cross-examine, subject to the judge directing the jury not to use the statement in any way as evidence in support of the prosecution's case; the statement is only relevant to test the credibility of the evidence which the defendant has given against the co-defendant.<sup>198</sup> On some occasions this situation will be a ground for ordering a

194 *R v Lord and Doyle* [1970] NZLR 526, 529.

195 Rule 9 of the Judges' Rules (see para 0) only requires that any statement made by the defendant should, wherever possible, be taken down in writing and signed by the defendant. Corroboration is required in Scotland and most states in the United States [of America]: see Pattenden, "Should Confessions be Corroborated?" (1991) 107 LQR 317. In Australia there is a rule of practice requiring corroboration; this obliges the trial judge to give a warning to the jury about acting on uncorroborated evidence. For the most recent case see *McKinney v R* (1991) 98 ALR 577 which is also discussed at para 0. The Police and Criminal Evidence Act 1984 (UK) has no requirement of corroboration, or rules requiring warnings about corroboration.

196 Accordingly a conviction or finding of fact in the absence of corroboration will necessarily be set aside by an appellate tribunal. See *Cross* (Mathieson), note **Error! Bookmark not defined.**, para 8.1.

197 If a warning is given the conviction or finding of fact cannot be assailed simply because there was no corroboration. See *Cross* (Mathieson), note **Error! Bookmark not defined.**, para 8.1.

198 *Lui Mei-Lin v R* [1989] AC 288, 297-298.

separate trial in the interests of justice.

41 A related situation is where a co-defendant wishes to cross-examine a police officer on the fact that another defendant made incriminating statements to the officer. This issue is considered in *R v Rhodes and Nikara (No 2)*<sup>199</sup> where it was held that the co-defendant could not cross-examine a police officer concerning the other defendant's allegedly incriminating statements (because the statements were inadmissible hearsay). It appears debatable whether the statement should be excluded as hearsay.<sup>200</sup>

## IMPROPERLY OBTAINED EVIDENCE

42 In our consideration of improperly obtained evidence we first discuss several preliminary issues. We then consider two rules concerning admissibility of such evidence.

The first rule concerns the admissibility of evidence obtained in breach of the New Zealand Bill of Rights Act 1990. The second is a broad ranging discretion to exclude evidence on the ground of unfairness. The general nature of the discretion is canvassed and its particular application to confessions and other forms of evidence is also considered.

### Preliminary issues

#### *Unfairly, improperly or illegally?*

43 This paper generally employs the term "improperly" obtained evidence. The subject is, however, often discussed in terms of "illegally" obtained evidence or "unfairly" obtained evidence, phrases which similarly convey the nature of the basic problem. These expressions are not definitive. Although illegally obtained evidence usually relates to a breach of a statutory provision, and unfairly or improperly obtained evidence signals some other source of criticism of the way in which the evidence was gathered, numerous examples can be given where no clear distinction can be made.

44 The crucial issue will usually be the seriousness of the conduct in question. A breach of a statutory provision may be a minimal invasion of a person's rights, whereas an unfairness or impropriety which breaches no statute may be considered inexcusable. For example, a breach of s 198 of the Summary Proceedings Act 1957 (under which a constable may apply for a search warrant) may be far less serious than an oppressive cross-examination of a detained suspect. It needs also to be kept in mind that a finding

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199 Unreported, High Court, Auckland, 1 July 1991, T11/91.

200 It can be argued that the statement, being an admission, is not hearsay.



that evidence has been unfairly or improperly obtained does not always imply improper conduct on the part of the police or some other person. Evidence may be regarded as improperly obtained if a person from whom it was gathered was unable to exercise his or her rights effectively. Thus a person may, unknown to the police, be under the influence of an intoxicating or hallucinatory drug while giving a confession. Despite exemplary conduct by the police, the confession may be regarded as improperly obtained because the defendant was unable to exercise his or her rights in an informed manner.<sup>201</sup>

### *Criminal proceedings*

45 While issues concerning improperly obtained evidence may arise in any kind of proceeding, civil or criminal, to date in New Zealand the discretion to exclude unfairly or improperly obtained evidence has only been exercised in criminal proceedings.<sup>202</sup> Furthermore, the important issues concerning personal liberty and the control of government action in the Bill of Rights tend to arise more directly in criminal cases. For both these reasons our discussion is limited to the rules about the admissibility in criminal proceedings of improperly obtained evidence.<sup>203</sup>

### *Different forms of evidence*

46 A wide range of evidence may be obtained by improper means. Perhaps the most significant examples involve real evidence (eg, a murder weapon or drugs) obtained by an improper search and seizure. Other classes of improperly obtained evidence include body samples and evidence of identification, an example of the latter being evidence resulting from an improperly conducted identification parade. Apart from confessions, other evidence of spoken or written communications can be obtained by improper means, the most obvious instance being an unauthorised electronic interception of private telephone communications.

47 When considering improperly obtained evidence it is sometimes valid to focus on the form in which the evidence is obtained because this may indicate the different policies requiring protection. For example, concern to protect a person's bodily integrity is highlighted when the admissibility of an improperly obtained body sample is in question, but this will not be the case when the issue is the admissibility of a murder weapon found

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201 See eg, *R v Busby* (unreported, High Court, Auckland, 17 October 1985, T124/88) where the accused, unknown to the police, was "high" on lysergide.

202 *Cross* (Mathieson), see note **Error! Bookmark not defined.**, para 11.33.

203 The admissibility of improperly obtained evidence in civil proceedings will be considered in a later paper under the Law Commission's evidence reference.

after an illegal search of the defendant's premises. In the latter case the primary concern is a different aspect of privacy. When improperly obtained evidence is in the form of a confession special considerations may apply, but any specific rules for confessions are no more than a particular response to the general problem of unfairly or improperly obtained evidence.

*Means by which evidence was obtained*

48 It may also on occasions be valid to focus on the means by which the evidence was obtained. The issues raised when real evidence is discovered as a result of an inadmissible confession may be different from those raised when similar evidence is found as a result of an illegal search. For example, evidence that drugs were recovered as the result of information contained in a confession may be regarded as inadmissible if the police neglected to inform the defendant of the right to consult and instruct a lawyer, yet the same evidence resulting from an illegal search of the defendant's home may be regarded as admissible if the police acted in good faith and the illegality was a minor one relating to the form of the search warrant.

### **Breach of the New Zealand Bill of Rights Act 1990**

49 The admissibility of confessions and other evidence obtained in breach of a provision of the New Zealand Bill of Rights Act 1990 requires specific consideration. The majority of the Court of Appeal in *R v Butcher* held that:

Prima facie ... a violation of rights should result in the ruling out of evidence obtained thereby. The prosecution should bear the onus of satisfying the Court that there is good reason for admitting the evidence despite the violation.<sup>204</sup>

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204 [1992] 2 NZLR 257, 266, Cooke P. The majority judgments were delivered by Cooke P and Holland J. Gault J (273) considered the correct approach to be:

to exclude as a general rule evidence obtained by conduct clearly involving denial of the rights included in s 23 [of the New Zealand Bill of Rights Act 1990] which can be said to have induced provision of the evidence in question. Where there is no clear breach, a purely technical breach or a breach which has not induced the provision of the evidence, exclusion should be in the discretion of the Court exercised on the basis of fairness and the interests of justice.

The confessions obtained from the two defendants in breach of the Bill of Rights were held to be inadmissible. There were "no circumstances which could justify overriding or setting aside the rights or holding that the violations were immaterial". See also *R v Kirifi* [1992] 2 NZLR 8; *R v Narayan* (unreported, Court of Appeal, 15 April 1992, CA80/92); *MOT v Noort* (1992) 8 CRNZ 114.

50 Cooke P expressed the view that it is not appropriate to treat a breach of the Bill of Rights simply as a factor to be taken into account in the exercise of the fairness discretion (see paras 0-0), as is the case when there has been a breach of the Judges' Rules<sup>205</sup> or indeed an ordinary statutory provision.<sup>206</sup> The Bill of Rights is an important statutory statement of the fundamental rights of all people in New Zealand which must be given primacy, subject to other legislation. Its genesis is "not judicial discretion but the increasing international recognition of human rights".<sup>207</sup>

51 The admissibility of evidence obtained in breach of the Bill of Rights needs to be considered in two stages. First, evidence will be prima facie inadmissible if it is obtained in breach of a provision of the Bill of Rights. However, in order to decide whether the evidence was so obtained it is necessary to determine what causal or temporal link there must be between the breach of the Bill of Rights and the procurement of the evidence.

52 Although the Court of Appeal has preferred to leave the general issue of causation open, it seems that a minimal causal link is necessary before the evidence is prima facie inadmissible.<sup>208</sup> In some cases it seems that the courts have been prepared to readily assume the existence of a causal link.<sup>209</sup> *R v Butcher* also indicates that evidence obtained indirectly as the result of a breach of the Bill of Rights will be prima facie inadmissible eg, real evidence discovered as a consequence of information contained in an inadmissible confession.<sup>210</sup> Proof that there is no causal link between the breach of the Bill of Rights and the procurement of the evidence may establish that the evidence is admissible. If, for example, the prosecution proves that the defendant would not have retained a lawyer if informed of the right to do so, the confession may be admitted on the basis that the defendant would have made it even if informed of the right.<sup>211</sup> However, if

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205 *R v Butcher*, see note **Error! Bookmark not defined.**, 266-267. Holland J concurred in the view expressed by Cooke P (273-274). The Judges' Rules are discussed at para 0.

206 Compare eg, *R v Mann* [1991] 1 NZLR 458.

207 *R v Butcher*, see note **Error! Bookmark not defined.**, 267.

208 In *R v Kirifi* (see note **Error! Bookmark not defined.**) the court stated that "it is a proper course for the court to rule out an admission ... *obtained in consequence* [of a breach]" (emphasis added). In *R v Butcher* (see note **Error! Bookmark not defined.**) the phrase "*obtained thereby*" was used. See further Rishworth, "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Publication No 32, 1992).

209 See the comments by Rishworth, note **Error! Bookmark not defined.**, 30-32.

210 See note **Error! Bookmark not defined.**, 267.

211 In *R v Grant* (unreported, Court of Appeal, 19 March 1992, CA443/91) it was inferred from the facts that the defendant, even if he had been told of his right to consult a lawyer, would not have exercised that right and

the absence of a causal link cannot be safely assumed then the evidence will be prima facie inadmissible.<sup>212</sup>

53 The second stage requires a determination whether there is "good reason" to admit evidence which is prima facie inadmissible. "Good reason" includes circumstances falling within or analogous to the concept embodied in s 5 (the justified limitations section),<sup>213</sup> or a breach that is trivial or inconsequential.<sup>214</sup> Causation may also be a factor to be considered by the court at this stage.

54 Further, evidence obtained indirectly as a result of a breach of the Bill of Rights may be admitted if it would in any event have been discovered by the police.<sup>215</sup> The prosecution must prove that the police would have discovered the evidence, despite the breach, by conducting their investigations in the normal manner. In such cases the evidence will be admissible even though the breach of the Bill caused the discovery of the evidence. This exception may, however, apply only to real evidence which exists independently of the breach of the Bill of Rights.<sup>216</sup> In respect of other forms of evidence, for example a statement or sample of blood, it may be impossible to prove that the police would have discovered or obtained the evidence in any event.

55 In the context of criminal procedure and criminal investigations, the provisions of the Bill of Rights most likely to concern the courts are ss 21-23. Those provisions pertain to the right to be secure against unreasonable search and seizure (whether of the person, property, or correspondence or otherwise),<sup>217</sup> the right not to be arbitrarily arrested or

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would have made the same confession. The confession was therefore admitted.

212 See *MOT v Noort*, note **Error! Bookmark not defined.**, 143, Richardson J, 128-129, Cooke P. In this case the court was persuaded to this view because the evidence in question did not have an existence independent of the breach of the Bill of Rights.

213 Section 5 provides:

Subject to section 4 of the Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

214 *R v Butcher*, see note **Error! Bookmark not defined.**, 266.

215 *R v Butcher*, see note **Error! Bookmark not defined.**, 267, adopting the Canadian approach in *Black v R* (1989) 70 CR (3d) 97.

216 In Canada real evidence obtained in breach of the Charter will rarely affect the fairness of the trial because the evidence existed irrespective of the Charter violation, see Appendix B para B18 (see note 33).

217 The section has already been briefly considered by the Privy Council in *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1991] 2 AC 464. In *Scott v Police* (unreported, High Court, Christchurch,

detained, and rights of arrested persons such as the right to consult and instruct a lawyer,<sup>218</sup> the right to refrain from making a statement and the right to be brought before a court or competent tribunal as soon as possible.

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10 February 1992, AP272/91) the court found that there was no evidential foundation laid for a submission that the search was unreasonable under the Bill of Rights (7-8). (The court concluded that although the search in question was unlawful, the trial judge did not apply the fairness discretion on a wrong principle or reach a decision which was clearly wrong or fail to give consideration to material matters; evidence of drugs found in the illegal search was admitted.) Similar provisions concerning unreasonable search and seizures are found in s 8 of the Canadian Charter of Rights and the Fourth Amendment to the United States' constitution, see Appendix B.

218 Considered in the cases cited in notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.**.

## Unfairness

56 New Zealand courts have a discretionary power, based on the jurisdiction to prevent an abuse of process, to exclude evidence on the ground of "unfairness".<sup>219</sup> The ground on which evidence is excluded is sometimes expressed as evidence "unfairly obtained",<sup>220</sup> "unfairness to the accused",<sup>221</sup> a general sense of "fair play"<sup>222</sup> or simply that it would be "unfair" to use the evidence against the defendant.<sup>223</sup>

57 Historically the exercise of the discretion in relation to confessions preceded its exercise in relation to other kinds of improperly obtained evidence. The application of the discretion to confessions is therefore more developed and to some extent needs to be considered separately from its application to other forms of evidence (see paras 0-0). While this is convenient for the purposes of this discussion paper, it needs to be kept in mind that the discretion applies to all forms of improperly obtained evidence.<sup>224</sup>

58 The present application of the fairness discretion is in some respects uncertain and open to distortion because its aims or rationales are rarely articulated.<sup>225</sup> Because

219 See eg, *R v Loughlin* [1982] 1 NZLR 236, 238; *R v Coombs* [1985] 1 NZLR 318, 321; *R v Katipa* [1986] 2 NZLR 121, 125; *R v Grace* [1989] 1 NZLR 197, 202; *R v Alexander* [1989] 3 NZLR 395, 403; *R v Dally*, see note **Error! Bookmark not defined.**, 192. See also *R v Murphy* (1988) 3 CRNZ 342 where the court excluded the confession because it would be "unfair to use it" even though the court found no impropriety or unfairness in the way it was obtained. For a history of the fairness discretion see *R v Convery* [1968] NZLR 426, 437. For an outline of the law in some other jurisdictions see Appendix B.

220 *R v Horsfall* [1981] 1 NZLR 116, 121. In *Police v Gray* (1991) 6 CRNZ 701, 708 it was said that evidence is unfairly obtained if it results from or involves either:

- (a) an infringement of a recognised right, protection, or privilege; or
- (b) a breach of a recognised duty or obligation; or
- (c) something which so offends public conscience as to outweigh the wider public interest in securing the conviction of an offender.

221 In *R v Lee* [1978] 1 NZLR 481 the court specifically limited the discretion to this terminology. In *R v W* (1988) 4 CRNZ 21, 24-25, the judge, in dealing with the questioning of a young offender, stated, "I [do] not see the Court's role in the circumstances of this case as being a disciplinary review of the police. ... Rather the issue is simply, were there omissions which created unfairness to [the defendant]?"

222 *H v Police* (1989) 4 CRNZ 621, 623.

223 *R v Busby*, see note **Error! Bookmark not defined.**.

224 *R v Dally*, see note **Error! Bookmark not defined.**, 192.

225 See the policy discussion in chapter III and the unfairness cases noted at paras 0, 0, 85, 86, 0, and 0.

the principles guiding the exercise of the discretion so often remain unstated, the results in many cases do not appear to be based on any consistent or logical reasoning and it may on occasions be difficult to predict how a court will exercise the discretion. The cases indicate disapproval of any action on the part of the police which amounts to trickery or misrepresentation (even in good faith) and evidence so obtained is excluded on the ground of unfairness.<sup>226</sup> Evidence is also excluded on that ground when there is a breach of a statute (but no particular unfairness to the defendant),<sup>227</sup> and even when there is no serious police impropriety at all.<sup>228</sup> Conversely, the courts sometimes do not exercise the fairness discretion even though there has been a breach of the Judges' Rules (see para 0) or statutory regulations for police <sup>229</sup>unlawful detention of the defendant,<sup>230</sup> or a denial of access to a lawyer.<sup>231</sup>

### *Causation*

59 The voluntariness rule requires a causal link between the conduct said to induce the confession and the making of the confession (see para 0). And though the position is not yet resolved in relation to evidence obtained in breach of the Bill of Rights, it is clear

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226 See *Howden v Ministry of Transport* [1987] 2 NZLR 742 (a traffic officer misrepresented the scope of his powers, although in good faith, to conduct random breath alcohol testing on private property; the court regarded the officer's conduct as a considerable intrusion into privacy); *R v Beazley* [1987] 2 NZLR 760 (the defendant was arrested on a minor charge for the purpose of questioning him with respect to a charge of murder; the police officer put facts to him which were unsupported by evidence and delayed giving him information which should have been put to the defendant at the beginning of the interview); *R v Tihi* [1990] 1 NZLR 540 (the police officer intentionally deceived the defendant by delaying informing him that the interview concerned a homicide, and not merely an assault, in the hope that the defendant would more readily admit his involvement).

227 *R v Mann*, see note **Error! Bookmark not defined..**

228 At least some High Court judges have adopted this position: *R v Busby*, see note **Error! Bookmark not defined.**; *R v W* see note **Error! Bookmark not defined.**; *R v Tepania* (unreported, High Court, Auckland, 24 May 1989, T230/88); *R v Murphy*, see note **Error! Bookmark not defined..**

229 *R v Admore* [1989] 2 NZLR 210; *R v Fatu*, see note **Error! Bookmark not defined..** In *R v Yeats (No 1)* (unreported, High Court, New Plymouth, 30 April 1991, T 1/91) the statement was admitted despite questioning in breach of the Penal Institution Regulations 1961 reg 116 .

230 *R v Alexander* [1989] 3 NZLR 395.

231 *R v McFelin* [1985] 2 NZLR 750, 763; *R v Webster* [1989] 2 NZLR 129. Note that these cases occurred prior to the enactment of the New Zealand Bill of Rights Act 1990, s 23(1)(b) of which recognises the right to consult and instruct a lawyer.

that causation is a factor to be considered. If the prosecution can prove a complete lack of causation then the evidence will probably be admissible (see paras 0-0).

60 In terms of the fairness discretion it is not clear when a causal link is required between an impropriety and the gathering of the evidence. As far as confessions are concerned, the Court of Appeal stated in *R v Fatu* that the exercise of the discretion in favour of exclusion depends upon an actual causal link between the alleged unfairness and the making of the confession.<sup>232</sup> The court found that there was no causal link between cross-examination which breached the Judges' Rules and the making of the confessions by the defendants. Nevertheless, while not excluding the confessions on the ground of unfairness (or any other ground) the court issued a warning to the police that:

This case is close to the point where the Court must quash convictions in order to ensure that the police appreciate that they must comply with the legal process.<sup>233</sup>

61 The Court of Appeal went further in *R v Mann*, however, and excluded the evidence, while apparently acknowledging that the impropriety in question did not cause the defendant to consent to the medical examination, in order to "emphasise the need for the police to comply with the requirements of the statutes under which they exercise their powers".<sup>234</sup>

62 It may be that the requirement of a causal link depends on the nature of the impropriety, or the nature of any right that has been breached. Some rights and safeguards may be regarded as so important that it is not necessary to demonstrate a causal link between the impropriety and the obtaining of the evidence before the court considers exercising its discretion.<sup>235</sup>

### *Standard of proof*

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232 See note **Error! Bookmark not defined.**, 428. For prior authority see *R v Rogers* [1979] 1 NZLR 307, 315; *R v Vaka* (unreported, Court of Appeal, 19 December 1985, CA 173/85). See also *R v Alexander*, note **Error! Bookmark not defined.**, 403. Compare the High Court case of *R v Busby*, see note **Error! Bookmark not defined.**.

233 *R v Fatu*, see note **Error! Bookmark not defined.**, 432.

234 See note **Error! Bookmark not defined.**, 465.

235 See *R v Mann*, note **Error! Bookmark not defined.**. See also Black, "The Poisoned Tree: Inadmissible Confessions, Subsequent Facts and Reliability" (1991) 4 *Canterbury Law Review* 356, 369-370 and the comments in *R v Webster*, see note **Error! Bookmark not defined.**, 140, prior to the enactment of the Bill of Rights.



63 Differing views have been expressed concerning the standard of proof in respect of the fairness discretion.<sup>236</sup> In *R v Dally* it was stated that:

once the accused has established circumstances raising a case for unfairness, the burden thereafter rests on the Crown to negate unfairness, again to the exclusion of any reasonable doubt.<sup>237</sup>

However, the Court of Appeal in *R v Williams* has now indicated that the following approach should be adopted:

We are disposed to regard the issue as not one to be determined by reference to onus of proof but as one of judgment. The discretion to exclude only assists whenever the evidence is admissible. Whether what has been done is so unfair as to call for the exclusion of admissible evidence will involve the ascertainment of facts and a conclusion as to their quality. That conclusion is one which reflects the public interest. Such matters do not readily succumb to evidentiary rules about onus or standards of proof.<sup>238</sup>

#### *Application of the discretion to confessions*

64 The courts take account of a broad range of matters when deciding whether to exclude a confession. In so doing they are able to mitigate the complexity and rigidity of the voluntariness rule. Thus, the fairness discretion may provide a means to deal with inducements emanating from those who cannot be classified as persons in authority.<sup>239</sup> Factors peculiar to the defendant, whether or not self-induced, and which raise issues about the reliability of the evidence or concerns about whether the defendant was able to exercise his or her rights effectively, may also be taken into account.<sup>240</sup>

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236 See generally Mathias, "Fairness and the Criminal Standard of Proof" [1991] NZLJ 159.

237 See note **Error! Bookmark not defined.**, 188. See also *R v Noble* (1986) 2 CRNZ 583. In *R v Tepania* (see note **Error! Bookmark not defined.**, 10) Crown counsel agreed with the necessity for proof of fairness beyond reasonable doubt "by analogy with the authorities on the subject of voluntariness". In *R v Benson* (1990) 6 CRNZ 1, 4, this solution was regarded as "obvious".

238 (1990) 7 CRNZ 378, 383-384. See also *R v Marsh* (1991) 7 CRNZ 465, 471; *R v Horsfall*, note **Error! Bookmark not defined.**, 122.

239 See eg, *Holder v Police* (unreported, High Court, Auckland, 18 May 1989, AP233/88), though the evidence was not excluded.

240 See *R v H* (1985) 1 CRNZ 453 (drug withdrawal); *R v Aldous* (unreported, High Court, Christchurch, 5 April

65 The courts may inquire whether the person questioning the defendant was in fact a person in authority, or an agent of the State, such as an informer or undercover police officer.<sup>241</sup> This inquiry turns on the propriety of the situation and differs from the inquiry into the defendant's own belief about the questioner's status which is relevant to the person in authority test under the voluntariness rule and s 20 (see para 0).

66 The Judges' Rules provide guidance for the exercise of the discretion in relation to confessions. The Rules were originally formulated by English judges in 1912 as guidelines for the police in their dealings with suspected offenders eg, as to when a person should be cautioned that he or she is not obliged to say anything but that whatever is said will be written down and may be used in evidence. The Rules do not have the force of law. It is the "spirit" of the Rules which guide the courts.<sup>242</sup> On occasions, therefore, the Rules may be breached but the court will not exercise its discretion to exclude the confession.

67 The emphasis placed on the Judges' Rules may vary depending on the characteristics of the individual defendant. The likelihood of exclusion increases when a defendant is a young person or someone who is particularly vulnerable.<sup>243</sup> This, however,

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1989, T64/88) (drug and alcohol intoxication); *R v Busby*, see note **Error! Bookmark not defined.** (hallucinatory drug). In *R v Tihi* (see note **Error! Bookmark not defined.**) one concern leading to exclusion of the statement was the intoxicated state of the 18 year old suspect. In *R v Williams* [1959] NZLR 502 the confession of an emotionally disturbed defendant was excluded but the reasoning, though adopted in *R v Ratcliffe* (1989) 4 CRNZ 300 (and the Supreme Court of Canada in *R v Clarkson* (1986) 26 DLR (4th) 493) was not accepted in *R v Leslie* (unreported, High Court, Christchurch, 3 May 1989, T13/89) (drug withdrawal). For a case involving an interview with a profoundly deaf person see *Macklin v Police* (1989) 4 CRNZ 563; compare *R v Curry* (unreported, Court of Appeal, 27 March 1990, CA8/90) and *R v Curry* (1990) 6 CRNZ 657.

241 See *R v Oldham* (unreported, High Court, Auckland, 10 May 1988, T156/85) discussed by McBride, [1989] NZ Recent Law Review 45, 47. Compare *R v Watene* (1989) 5 CRNZ 202 where the defendant allegedly spoke to a mysterious person presented to him as a lawyer. The court held that the defendant would never have seen such a person as a person in authority and thus the inducement given to the defendant could not affect the voluntariness of the resulting confession. The discretion to exclude unfairly obtained evidence was not considered relevant. In *R v Meyers* (1985) 1 CRNZ 656 the undercover officer did not initiate the discussion so there was "no need" to discuss the test for a person in authority. In *R v Williams* (see note **Error! Bookmark not defined.**) an accomplice was fitted with a body pack recorder to attempt to elicit admissions from the defendant. See also *R v Edgerton* (1988) 1 CRNZ 616 where a friend of the defendant acted as "a self-appointed assistant to the police" to obtain admissions from the defendant.

242 *R v Rogers*, see note **Error! Bookmark not defined.**, 314.

243 *R v W*, see note **Error! Bookmark not defined.**; *M v Police* (1988) 3 CRNZ 506; *R v I* (1987) 3 CRNZ 444; *H v Police* (1989) 4 CRNZ 621; *Ngahevu v Police* (unreported, High Court, Rotorua, 8 August 1989,

may simply reflect the general concern to protect young or otherwise vulnerable people.<sup>244</sup>

68 The fairness discretion may be applied to confessions which are voluntary and reliable (in terms of the test in s 20 of the Evidence Act 1908). Though there is some precedent for the proposition that once the prosecution satisfies the s 20 test the confession is admissible and the discretion cannot be exercised,<sup>245</sup> it seems clear that this is not the current law.<sup>246</sup>

### *Application of the discretion to inadmissible confessions and consequentially discovered evidence*

69 Unfairness may be an issue when real evidence is discovered as the result of information contained in an inadmissible confession, with the real evidence in effect verifying some or all of the statements in the confession<sup>247</sup> (and therefore bringing into question the reason for its exclusion). In such circumstances the real evidence is admissible (although the law is not entirely clear).<sup>248</sup>

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49/89). For cases allowing the statements of young persons into evidence see *R v Andrew* (1989) 4 CRNZ 531 and *R v Hemi* [1986] 2 NZLR 116. The Children, Young Persons, and Their Families Act 1989 now contains provisions relevant to these issues.

244 For exclusion of a young person's statement despite no identifiable breach of the Judges' Rules see *R v Powell and Smith* (unreported, High Court, Auckland, 6 November 1989, T74/89). See too *R v Tuhua* (unreported, Court of Appeal, 22 November 1988, CA 272/88) and the cases cited in note **Error! Bookmark not defined.**.

245 *Cross* (Mathieson), see note **Error! Bookmark not defined.**, para 18.48.

246 *Bocock v Ministry of Transport* see note **Error! Bookmark not defined.**, 5; *R v Cullen and Waa* see note **Error! Bookmark not defined.**, 35-36. The courts typically treat unfairness as a separate ground for exclusion quite apart from involuntariness (and s 20): see eg, *R v Wilson*, note **Error! Bookmark not defined.**, 322.

247 The problems involved in verification are not always obvious. If the defendant confessed that he or she killed the victim with a gun and threw the gun into a field, the finding of the gun may only confirm that the defendant knew where it was, not that he or she killed anyone with it or, indeed, was the responsible party for putting it (or throwing it) into the field: *R v St Lawrence* [1949] OR 215, confirmed by *R v Wray* [1971] SCR 272 and discussed in Mullan, "The Pursuit of Truth - At What Cost?" (1972) 5 NZULR 164.

248 *R v Dally*, see note **Error! Bookmark not defined.**. For some New Zealand authority before *R v Dally* see *R v Wilson*, note **Error! Bookmark not defined.**, 324 (the issue was left open, but it was suggested that real evidence obtained as a result of the inadmissible confession might be inadmissible). For a different view see *R v Postlewaigh* (1985) 1 CRNZ 468, 473. Real evidence discovered as a result of an inadmissible confession obtained in breach of the Bill of Rights is probably in a special category, see para 0. See

70 The difficulty that the prosecution faces is that the real evidence may be excluded as irrelevant if the defendant's statement is inadmissible and there is no other way of showing the defendant's connection with or knowledge of the evidence. It has, however, been held that in order to establish the necessary connection the court may exercise its discretion "to exclude parts of the [improperly obtained] evidence and to admit others capable of establishing a link between the accused and the real evidence".<sup>249</sup>

71 It is not clear precisely what criteria govern the exercise of the discretion in such a situation. It is, however, clear that there is no blanket principle whereby parts of a confession subsequently confirmed as true by the discovery of real evidence are to be admitted. The adoption of such a principle would mean that involuntary (coerced) confessions, such as those obtained by violence or oppression, could be admitted if the discovery of real evidence confirmed their

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generally Mullan, note **Error! Bookmark not defined.**

249 *R v Dally*, see note **Error! Bookmark not defined.**, 193.

reliability. It was suggested in *R v Dally* that:

In exercising the discretion it may be helpful to endeavour to place the conduct in question along a spectrum or continuum, with technical breaches at one end followed by more than technical breaches of a suspect's rights and of procedural requirements, and then wrongful invocation of obligations to provide evidence, finally reaching serious misconduct ...<sup>250</sup>

72 In *Lam Chi-ming v R*<sup>251</sup> the Privy Council stated that the portions of involuntary confessions (in this case obtained by violence) confirmed as reliable by the subsequent discovery of real evidence remained inadmissible. As a result there was no evidence linking the defendant to the murder weapon. Speaking for the Judicial Committee, Lord Griffiths stated:

The privilege against self-incrimination is deep rooted in English law and it would make a grave inroad upon it if the police were to believe that if they improperly extracted admissions from an accused which were subsequently shown to be true they could use those admissions against the accused for the purpose of obtaining a conviction. It is better by far to allow a few guilty ones to escape conviction than to compromise the standards of a free society.<sup>252</sup>

As we later indicate, the Law Commission regards the issues concerning real evidence obtained as the result of inadmissible confessions as amongst the most difficult to resolve satisfactorily (see paras 0-0).

#### *Application of the discretion to other forms of evidence*

73 While the application of the fairness discretion to forms of evidence other than confessions is less developed, some comments can be made about how courts have exercised the discretion in relation to such evidence.

74 There are numerous instances in the field of body samples, more particularly in blood and breath alcohol cases, where the Court of Appeal has relied on the discretion to exclude such evidence when there has been some form of trickery or misrepresentation

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250 See note **Error! Bookmark not defined.**, 193. See also Mathias, "Discretionary exclusion of evidence" [1990] NZLJ 25.

251 [1991] 2 AC 212.

252 See note **Error! Bookmark not defined.**, 222.

by a State representative, even though in good faith.<sup>253</sup> It has been suggested that in cases dealing with body samples there may be a greater likelihood of exclusion of improperly obtained evidence on the ground of unfairness because of the desire to protect the person's bodily integrity and, perhaps, a loosely interpreted protection against self-incrimination.<sup>254</sup>

75 New Zealand courts have been less ready to exclude real evidence obtained in an improper search.<sup>255</sup> Until recently there has been little guidance from the courts concerning the principles to be applied in such cases. In *R v Grace*<sup>256</sup> the Court of Appeal rejected a submission that controlled drugs found in an illegal search should be excluded from evidence, noting that on the facts of the case there was no unfairness to the

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253 For example, *Howden v Ministry of Transport*, see note **Error! Bookmark not defined.**. See also *Auckland City Council v Dixon* [1985] 2 NZLR 489 and *Police v Hall* [1976] 2 NZLR 678.

254 In *R v Pengelley* (1991) 7 CRNZ 333 the Court of Appeal considered the necessity of "informed consent" to the taking of a body sample for DNA analysis. See also *R v Salmond* (1992) 8 CRNZ 93, in particular the judgments of McKay and Casey JJ; and *R v Mei* [1990] 3 NZLR 16 concerning improperly coerced attendance at an identification parade. See further the policy discussion at paras 0-0.

255 See eg, *R v Coombs*, note **Error! Bookmark not defined.**, 321.

256 [1989] 1 NZLR 197.

defendant. The more recent decision in *R v Mann*<sup>257</sup> (internally concealed drugs) indicates that consideration of unfairness requires more than a simple focus on unfairness to the particular defendant. In *Mann* the court excluded the evidence in order to indicate the need for the police to comply with the controls set by the legislature.<sup>258</sup>

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257 See note **Error! Bookmark not defined.**

258 See also *R v Watt* (unreported, High Court, Timaru, 11 December 1991, T11/91) where evidence concerning the search of a car, in breach of s 18 of the Misuse of Drugs Act 1975, was excluded. The court exercised its discretion to exclude the evidence on the ground of unfairness primarily because of the unlawfulness of the search. The court observed that "those [search] powers should, unless there are good reasons to the contrary, be exercised precisely in accordance with the statute which gives the powers and disregard of the statutory requirements should not lightly be excused.", 4-5.

### III

#### Policy Issues

76 The previous chapter endeavours to summarise the current law concerning the admissibility in evidence of confessions and improperly obtained evidence. It is next necessary to elucidate the underlying policy issues. We then consider, in the following chapter, the problems with the current law and the manner in which they should be dealt with by way of reform.

77 Why have certain rules developed leading to the exclusion of confessions and other forms of evidence obtained in breach of those rules? Why do the courts exclude evidence on the ground of unfairness? Is exclusion of the evidence the appropriate response bearing in mind that the evidence may be compelling and lead to a conviction? To answer these questions it is necessary to consider the rationales which may justify the exclusion of such evidence: unreliability, the protection against coerced self-incrimination, privacy, the deterrence of behaviour which fails to comply with standards of acceptable conduct for the gathering of evidence, the preservation of the integrity of the criminal justice system and unfairness to the defendant. Some rationales will require more emphasis than others depending on the form of the improperly obtained evidence or the means by which it was obtained. To some extent the rationales overlap with each other and sometimes more than one rationale will be applicable. We add that the discussion and analysis of these rationales does not necessarily indicate that the Law Commission regards them all as valid (see in particular paras 0-0).

#### UNRELIABILITY

78 The exclusion of evidence is a simple and effective way to deal with the problem of unreliability. However, apart from the exclusion of unreliable hearsay evidence (of which confessional evidence is a special subcategory), this is not the usual way in which unreliable evidence is dealt with. Normally evidence is admitted if it is relevant and the question of reliability is left to the court or jury to determine.

79 Unreliability is plainly one of the reasons for the exclusion of a confession obtained in breach of the voluntariness rule. The traditional justification for the rule is that no one would voluntarily make a damaging admission unless it was true. When improper coercive pressure is used, any confession subsequently obtained is at least potentially



unreliable because the person has been forced against his or her will to make the confession. On the other hand, a strict application of the voluntariness rule can result in reliable evidence being excluded: not all coerced confessions are unreliable. Section 20 was enacted so that involuntary confessions made as the result of certain kinds of inducements, but which are likely to be reliable, are not excluded.

80 Concern about the reliability of other forms of improperly obtained evidence is frequently minimal. On occasion, however, the reason behind the regulation of a particular means of obtaining evidence is to ensure its reliability. The present requirements concerning identification parades or identification by means of photographs are examples of this.<sup>259</sup> Breach of such requirements will call into question the reliability of the evidence obtained.

## PROTECTION AGAINST COERCED SELF-INCRIMINATION

81 The central aspect of this rationale is the right of silence before trial, often formulated in the traditional Latin phrase "nemo tenetur se ipsum prodere" - no one is bound to betray himself or herself. It finds its modern expression in s 23(4) of the Bill of Rights, which provides that everyone who is arrested or detained has the right to refrain from making any statement and to be informed of that right.<sup>260</sup> The right is a protection against coerced self-incrimination and is a fundamental principle underlying the rules about voluntary confessions<sup>261</sup> and the fairness discretion.<sup>262</sup>

82 It could be argued that our present law, in particular s 20 of the Evidence Act 1908, undermines the protection against coerced self-incrimination. If there is to be proper protection then *all* involuntary (ie, coerced) statements should remain inadmissible. The logical conclusion to this argument is that s 20 should be repealed because its effect is to

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259 See Crimes Act 1961 s 344B; *R v Mei*, see note **Error! Bookmark not defined.**; *R v Porima and Wi* (unreported, Court of Appeal, 26 July 1992, CA54/92 and 62/92).

260 Protection against coerced self-incrimination *at trial* is guaranteed by s 25(d) of the Bill of Rights stating that "Everyone who is charged with an offence has, in relation to the determination of the charge ... (d) The right not to be compelled to be a witness or to confess guilt".

261 *R v Harz and Power* [1967] 1 AC 760, 820.

262 See eg, *R v Curtis* (1988) 3 CRNZ 385, 387:

I am concerned ... with the question of whether or not there has been any unfairness in circumstances where the accused has been induced to make statements against his own interest and in effect to be his own betrayer.

See also *R v Webster*, note **Error! Bookmark not defined.**, 140.

allow certain kinds of involuntary (although reliable) confessions in evidence.

83 The Law Commission considers, however, that the protection against coerced self-incrimination is provided for by a combination of rules (including the right to consult and instruct a lawyer and the duty of a police officer to give a caution), breaches of which may operate to exclude a confession despite the fact that it is admissible in terms of s 20. (The new police questioning rules, see "Draft Rules for Questioning After Arrest", and the proposed improperly obtained evidence rule, part II paras 0-0, will also protect defendants against coerced self-incrimination.) In this context the appropriate protection is succinctly stated in the majority judgment of the Supreme Court of Canada in *R v Hebert*:

The state is not obliged to protect the suspect from making a statement; in fact it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities.<sup>263</sup>

84 The desire to protect people against coerced self-incrimination arises in relation both to confessions and to other forms of evidence. The protection against coerced self-incrimination is relevant, for example, when a suspect is wrongly forced to attend an identification parade;<sup>264</sup> and courts in other jurisdictions have regularly considered coerced self-incrimination to be a crucial factor in the decision to admit or exclude improperly obtained evidence.<sup>265</sup> There will, of course, be occasions when the desire to protect against coerced self-incrimination will play no part in a decision concerning the admissibility of improperly obtained evidence, as in the typical case of an illegal search of a dwelling when the owner takes no part in directing the police to the items seized.

## PRIVACY

85 The desire to protect privacy is at most an oblique motivation in the law's treatment of confessions, but it is crucial in the determination whether to exclude many other forms of improperly obtained evidence. The clearest examples are unlawfully intercepted communications and real evidence discovered in an improper search or seizure. Exclusion of evidence occurs, however, *after* there has been an invasion of the defendant's privacy. As has been pointed out in United States constitutional jurisprudence, at that stage nothing can repair the breach of the defendant's privacy and exclusion of the evidence can only be justified on the basis that similar occurrences will be deterred in the

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<sup>263</sup> (1990) 57 CCC (3d) 1, 35, McLachlin J.

<sup>264</sup> See eg, *R v Meji*, note **Error! Bookmark not defined.**.

<sup>265</sup> See Appendix B, paras B18 and B19.

future.<sup>266</sup> It is, however, the desire to protect privacy which motivates the attempt to deter similar police misconduct. Privacy thus remains an important factor in the decision to admit or exclude improperly obtained evidence.<sup>267</sup>

#### FAILURE TO COMPLY WITH STANDARDS OF ACCEPTABLE CONDUCT (DETERRENCE)

86 The failure to comply with the standards of acceptable conduct for the gathering of evidence, for example by the police, is frequently regarded by the courts as a rationale for the exclusion of confessions and other forms of evidence.<sup>268</sup> The primary purpose is to deter similar practices in the future, though another purpose may simply be to condemn the conduct in question. This rationale underlies both the voluntariness rule (excluding confessions obtained by the use of violent or oppressive conduct by the police or any other person) and the fairness discretion (excluding both confessions obtained in breach of the standards of police conduct set by the Judges' Rules and improperly obtained real evidence). The rationale also probably underlies statutory provisions excluding illegally or improperly obtained evidence, such as evidence obtained as a result of an illegal interception of private communications.<sup>269</sup>

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266 *US v Calandra* 414 US 338. Our following discussion of the efficacy of the deterrence rationale is of course highly relevant.

267 See eg, *Howden v Ministry of Transport*, note **Error! Bookmark not defined.** (traffic officers' powers on private property).

268 When considering the discretion to exclude a confession as "unfairly obtained" in *R v Convery* [1968] NZLR 426, 438, it was stated that:

In answering this inquiry the Court may consider not only the case immediately before it, but also the necessity of maintaining effective control over police procedure in the generality of cases ... .

The court expressly relied on the famous statement of Lord Sumner in *Ibrahim v R* see note **Error! Bookmark not defined.**, 614:

[Judges] fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it.

See also *R v Wilson*, note **Error! Bookmark not defined.**, 322, and *R v McCuin*, note **Error! Bookmark not defined.**, 15.

In respect of other forms of evidence see eg, *R v Mann*, note **Error! Bookmark not defined.**, 465; *R v Salmond*, note **Error! Bookmark not defined.**, Hardie Boys J.

269 See the Misuse of Drugs Amendment Act 1978 s 25.

### To whom does the deterrence rationale apply?

87 The deterrence rationale may only relate to official conduct, especially the conduct of the police. They (and most other officials) are members of a responsible and professional organisation and are subject to various legislative rules and written guidelines setting out particular standards of behaviour by which a criminal investigation must be conducted. In this situation it is argued that the exclusion of evidence obtained in breach of a particular standard of conduct can have the effect of deterring similar misconduct in the future. It may, for example, cause the police to modify their behaviour or their interpretation of the relevant rules.

88 It is probable that the exclusion of evidence obtained by an ordinary person (as distinct from an official) in breach of the confessions rules will not deter similar behaviour in the future. Ordinary people are not subject to the same kind of institutional controls as police and other officials. The other rationales for excluding confessions do, however, apply to ordinary people.

### Is exclusion of evidence an effective deterrent?

89 The effectiveness of exclusion of confessions as a deterrent has been the subject of debate. The 1981 English Royal Commission on Criminal Procedure, whose Report led to the enactment of the Police and Criminal Evidence Act 1984 (PACE), concluded that in general the exclusion of confessions is not a satisfactory way of enforcing compliance with rules. Their proposal, not reflected in the final form of PACE, was that the use of "violence, threats of violence, torture or inhuman or degrading treatment" should automatically render a confession inadmissible in order to "mark the seriousness of the breach", but that any lesser violation of the detailed rules of questioning should merely give rise to advice to the jury concerning possible unreliability.<sup>270</sup> The Report concluded that improper police conduct was best left to "police supervisory and disciplinary procedures".<sup>271</sup> In the New Zealand context the establishment in 1988 of the independent Police Complaints Authority is relevant in that regard.<sup>272</sup>

90 The New Zealand Court of Appeal in *R v Alexander*<sup>273</sup> also took the view that

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270 The Royal Commission on Criminal Procedure *Report*, (January 1981, Cmnd 8092) paras 4.132-4.133.

271 See note **Error! Bookmark not defined.**, para 4.127.

272 Some of the issues concerning the control of police behaviour are discussed in McConville, Sanders & Leng, *The Case for the Prosecution* (Routledge, London, 1991).

273 See note **Error! Bookmark not defined.**

police misconduct was best dealt with by disciplinary procedures. In that case the police, in attempting to obtain a confession, breached a "fundamental and important right" of the defendant by deliberately delaying her first appearance in court. Nevertheless, the Court of Appeal held that the defendant's confession was admissible. The court characterised defence counsel's argument for exclusion of the confession as "a request to the Court to use its inherent jurisdiction to punish the police" rather than to prevent the abuse of process. It made more sense in "the public interest in the proper prosecution of crime" to admit the confession and leave the police illegality to be dealt with by disciplinary action within the police force or an action for unlawful detention at the suit of the defendant.<sup>274</sup> It appears that the court's conclusions were not based on the inadequacy of exclusion as a deterrent, but rather on the view that the purpose of exclusion was to punish the police (which could be better accomplished by other means), with the public interests at stake favouring the proper prosecution of crime and, therefore, the admission of evidence.

91 We agree that evidence should not be excluded in order to punish the police. However, the exclusion of evidence is not intended as a punishment of individual police officers in the same way that disciplinary proceedings operate. Rather, exclusion is intended to deter future misconduct and signal to the police that they must comply with the rules and if necessary alter their practices. Since *Alexander* the Court of Appeal has restated the view that future police impropriety is likely to be deterred by the exclusion of evidence obtained by improper means.<sup>275</sup>

92 The views expressed by the English Royal Commission regarding the exclusion of confessions (para 0) were based on research which concluded that the United States exclusionary rule, as it applies to illegal search and seizure, was largely ineffective as a deterrent.<sup>276</sup> However, other more recent studies concerning the exclusion of improperly obtained real evidence have reached contrary conclusions about the effectiveness of exclusion as a deterrent.<sup>277</sup> Reliance on the earlier studies to support the argument that the exclusion of confessions does not deter improper police conduct has also been criticised on the ground that the studies are inapplicable to confessions, as the deterrent

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274 See note **Error! Bookmark not defined.**, 402-403. There is also the possibility of criminal prosecution or a public inquiry. See further part III, para 64.

275 See eg, *R v Mann*, note **Error! Bookmark not defined.**, in relation to real evidence.

276 See Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 University of Chicago Law Review 665.

277 For example, Uchida and Bynum, "Search Warrants, Motions to Suppress and 'Lost Cases': The Effects of the Exclusionary Rule in Seven Jurisdictions" (1991) 81 Journal of Criminal Law and Criminology 1034; Orfield, "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers" (1987) 54 University of Chicago Law Review 1016.

effect is more pronounced in the regulation of the confessions gathering process.<sup>278</sup> The Law Commission's present view is that, while the deterrent effect of the exclusion of confessions and other forms of evidence may well be overstated, those responsible for the conduct of the New Zealand Police certainly endeavour to ensure that police act within the boundaries set by the law and react to judicial rulings accordingly.

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278 Mirfield, see note **Error! Bookmark not defined.**, 72.

## INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

93 The essential basis of this rationale is that the court should not condone illegal or improper conduct at the same time as it punishes a breach of the law by the defendant, since to do so undermines the integrity of the criminal justice system (or, expressed differently, brings the administration of justice into disrepute). This rationale is, for example, reflected in the voluntariness rule for confessions. Thus torture can never be a legitimate means of obtaining a confession, no matter how reliable the confession may be. An analysis of the case law also suggests that this rationale in part underlies the exercise of the fairness discretion in relation to confessions.<sup>279</sup> In addition the rationale lies behind the exclusion of evidence where "entrapment" by the police is established. While rejecting the American notion of a separate doctrine of entrapment, the Court of Appeal has stated that in appropriate cases evidence improperly obtained by the police will be excluded "by invoking an inherent jurisdiction in the Court to prevent an abuse of process by the avoidance of unfairness".<sup>280</sup>

94 The deterrence of behaviour which fails to comply with standards of acceptable conduct also fulfils the aim of preserving the integrity of the criminal justice system. When a confession or other evidence is excluded in order to deter future police misconduct, the integrity of police standards of criminal investigation and, therefore, of the criminal justice system as a whole is maintained.

95 Preserving the integrity of the criminal justice system also requires that when rights are accorded they are able to be exercised. The courts have a responsibility for protecting those rights. One means of so doing is to exclude evidence obtained from a defendant who has not been able to exercise his or her rights in an informed manner.<sup>281</sup>

96 The integrity of the criminal justice system does not focus solely on the interests of the defendant. The rationale does not, for example, require that evidence be excluded in all cases where there is improper conduct on the part of the police. The integrity of the criminal justice system may also suffer when relevant and reliable evidence is excluded, or when offenders are not prosecuted or are acquitted on what is perceived to be a technicality.

## UNFAIRNESS TO THE DEFENDANT

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279 See eg, *R v Dally*, note **Error! Bookmark not defined.**, 192.

280 *R v Loughlin*, see note 71, 238; *R v Katipa*, see note 71, 125.

281 This may occur even though police conduct has been exemplary. See eg, several of the cases in note **Error! Bookmark not defined.**

97 The unfairness rationale is focused on the position of the defendant. If police conduct (even in good faith), or some unknown factor peculiar to the defendant, has created an unfair imbalance of power in the questioning process or in some other evidence-gathering process, then exclusion of the evidence is a possible remedial step to restore the balance at the trial. This is one of the rationales behind the discretion to exclude evidence on the ground of unfairness when it is expressed in the narrow sense of unfairness to the defendant or fair play or fair proceedings.

98 There is a real question whether the "unfairness to the defendant" rationale is a valid one. The purpose of the rationale is said to be to remedy any unfair imbalance between the position of the defendant and the prosecution in the criminal trial, often expressed as ensuring "fair play". Some may think this is in the nature of a "sporting" concept which diminishes the seriousness of the criminal trial process and the important issues at stake.

99 Viewing that issue from another perspective, the question can be asked whether there are occasions when no other rationale except unfairness to the defendant justifies exclusion of evidence. If there are such cases then unfairness to the defendant should be treated as a separate or distinct rationale. There are several situations, based on the reasoning in actual cases, where unfairness to the defendant might be said to justify the exclusion of reliable evidence:

- the defendant, unknown to the police, is extremely intoxicated while being questioned;<sup>282</sup>
- the defendant is questioned about an assault when in fact the victim has died and the inquiry has become one of homicide;<sup>283</sup>
- a police officer obtains real evidence from a person as the result of a misrepresentation of the scope of police powers, albeit in good faith.<sup>284</sup>

In these cases, however, it is arguable that one of the other rationales will in fact provide a more appropriate ground for exclusion (if that is desirable). For example, in the last situation, the preservation of the integrity of the criminal justice system requires that police officers and other State officials should be familiar with, and not misuse, their powers or position of authority, even unintentionally.

100 The Law Commission would like to receive comments on whether the evidence in

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282 See eg, *R v Busby*, note **Error! Bookmark not defined.**

283 See eg, *R v Tihi*, note **Error! Bookmark not defined.**

284 See eg, *Howden v Ministry of Transport*, note **Error! Bookmark not defined.**



these examples should be excluded on the basis of unfairness to the defendant, rather than the other rationales we have outlined. We would also like to know of any situations in which a confession or other evidence might be excluded *solely* on the ground of unfairness to the defendant.

101 The unfairness to the defendant rationale should not be confused with the fairness discretion, which has an important role in determining the admissibility of all forms of improperly obtained evidence. More often than not the use of the word "fairness" in terms of the discretion is a broad label for the other rationales we have discussed, one of which is the narrow rationale of unfairness to the defendant.

## IV

### Proposals For Reform

102 Although some of the present rules do not create significant difficulties in practice, largely because it is rarely necessary for a court to consider them, the Law Commission believes, as did the Evidence Law Reform Committee,<sup>285</sup> that the present law is in need of reform. In summary, our reasons are as follows.

103 Significant parts of the law concerning the admissibility of confessions and improperly obtained evidence remain uncertain, in particular, the definition of voluntariness (in relation to confessions) and the role and scope of unfairness (especially in relation to forms of improperly obtained evidence other than confessions). Reform of the law will reduce the current uncertainties and should also provide more explicit guidance in those areas where a degree of flexibility is both inevitable and desirable.

104 The current law is also unnecessarily complex. For example, difficult distinctions must be made under the voluntariness rule regarding the kinds of inducements rendering a confession involuntary and the status of the people offering those inducements. The understandable reaction by the courts has been to consider these matters in terms of the fairness discretion (see para 0). This, however, adds further complexity to the law.

105 The policies at stake in this field of law are often left unstated, even though they lie at the heart of the criminal justice system. Some of the current rules are difficult to justify on a coherent policy basis (see eg, paras 0 and 0). This is particularly unsatisfactory in an area of the law requiring careful balancing of the often overlapping interests of society and the individual. The law is also in a developing state, especially in relation to the Bill of Rights and the admissibility of improperly obtained evidence. The Law Commission believes that reform which encourages a consistent and explicit application of the policies identified in the previous chapter will help ensure that future developments follow a satisfactory path.

106 Our inquiries have led us to the conclusion that it remains necessary to have particular rules about confessions. The Law Commission considers that there are special concerns about reliability and the protection of the defendant from coerced self-

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285 See note **Error! Bookmark not defined..**

incrimination which require the admissibility of confessions to be controlled by two specific rules (the reliability rule and the oppression rule) in addition to a general rule applicable to all forms of improperly obtained evidence. Before, however, discussing the Commission's proposed rules we should mention two other more radical approaches.

#### ABSOLUTE EXCLUSION OR ADMISSION OF CONFESSIONS?

107 As the introduction to this part of the paper mentioned (para 0), the current law reflects a compromise. It endeavours to balance the fundamental but sometimes conflicting aims underlying our system of criminal justice. It is on this basis that the present law concerning confessions has developed. It is, however, possible to contemplate either the total exclusion of all confessions or, alternatively, the admission of all confessions, in the latter case leaving it to the court or jury to assess the weight, if any, to be given to the confession.

108 We consider first the exclusion of all confessions from evidence. In the New Zealand context this has recently been put forward as part of a series of suggestions regarding the right of silence before and at trial.<sup>286</sup> The suggestions include a formal obligation upon the defendant to co-operate with the police and answer all reasonable questions; a requirement that any confession so obtained should be excluded from evidence (though possibly able to be used in rebuttal); a system of formal pleadings for both the prosecution and defence; and, if there is a *prima facie* case, a further obligation on the defendant to give evidence at the trial, with failure to do so being able to support an inference of guilt.

109 These are significant proposals which in a sense indicate the importance of confessions, for they demonstrate how far it is necessary to go if confessions are largely to be excluded from evidence. Even so, the proposals would not, if confessions are to be used in rebuttal, eliminate the need for special confessions rules.

110 The exclusion of all confessions would profoundly change our system of criminal justice, particularly if coupled with an obligation to co-operate with the police (a failure to do so possibly to be dealt with as obstruction<sup>287</sup>) and the effective abolition of the right of silence both before and at trial. The Law Commission's present view is that the problems concerning confessions do not warrant changes of such magnitude. At paras 36-41 of

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286 Robertson, Guest Memorial Lecture, to be published in 1992 Otago Law Review. See also the address to the Wellington District Law Society Seminar June 1991 reported as "HC Judge questions right to silence" in *Council Brief*, Issue 185, July 1991; and, Atkins, "Les Atkins QC replies to Mr Justice Robertson" *Council Brief*, Issue 186, August 1991.

287 See the address to the Wellington District Law Society Seminar, note **Error! Bookmark not defined.**.

part I of this paper we have indicated some of the issues which arise in relation to the imposition of a legal obligation to co-operate with the police. We are also not convinced that effective removal of the right of silence both before and at trial is desirable (see part I paras 75-84 and 116-124); and that course would now be contrary to the provisions of the Bill of Rights. Finally, a rule excluding all confessions would result in the blanket elimination of relevant and probative evidence which in our view is difficult to justify in the absence of clear evidence that such a step is necessary in the interests of justice.

111 Nor does the Law Commission favour the alternative possibility of admitting all confessions, with the question of weight being left to the judge or jury to assess. We consider that admitting all confessions without qualification would entail a greater risk of wrongful conviction.<sup>288</sup> It would also undermine the protection of fundamental values, such as freedom from coerced self-incrimination.

112 There is a stronger case for contending that, if a safeguard such as video-taping is put in place, the rules relating to reliability (as distinct from violence or oppression) could be relaxed, thereby admitting more confessions in evidence. This could be coupled with rules downgrading the weight to be given to confessional evidence, especially if some related rule, for example concerning police questioning, had been breached. We have given some thought to this possibility but have concluded that it would not greatly simplify the law and would carry risks that a jury, despite being warned, might give inappropriate weight to an unreliable confession which it would be better to exclude entirely. The Law Commission would, however, welcome comments concerning all the above suggestions, bearing in mind the proposals we now make for new confessions rules.

## RULES FOR CONFESSIONS

### Confessions offered in evidence by the prosecution

113 The general rule will be that all confessions tendered as evidence by the *prosecution*<sup>289</sup> are admissible unless the Evidence Code rules require them to be excluded. This rule, and the other confessions rules, will operate as a self-contained regime and not as an exception to the hearsay rule. The Code will expressly provide that

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288 Even when there are rules concerning confessions some false confessions are not excluded and the innocent are sometimes convicted. A recent example is the case of Judith Ward, reported in *The Times*, London, England, 12 May 1992, 1; see also Gudjonsson and Mckeith, "A Proven Case of False Confession: psychological aspects of the coerced compliant-type" (1990) 30 *Medicine, Science and the Law* 329.

289 The Law Commission's present intention is to maintain the existing rule that a defendant's out of court statement (as distinct from evidence given by the defendant in court) is not evidence against a co-defendant. A provision to that effect will probably be included in the rules concerning the conduct of the trial.

the hearsay rule does not apply to confessions tendered by the prosecution.<sup>290</sup> Thus the application of the confessions rules will generally be straightforward. Special considerations, however, arise (as they do under the present law) when a *defendant* seeks to tender his or her own confession or a co-defendant's confession. These issues are discussed more fully in Appendix A.

### **What kind of statements will be governed by the confessions rules?**

114 The term "confession" usually refers to incriminating spoken or written statements made by a defendant to another person. However, as stated earlier (paras 0-0), the prosecution may wish to tender in evidence statements made by a defendant which do not on their face purport to be admissions, but which can be said to demonstrate by implication a consciousness of guilt. In our hearsay discussion paper we concluded that such "implied assertions" should not be regarded as hearsay and therefore should not be subject to the proposed hearsay rule.<sup>291</sup> Nevertheless we consider they should be subject to the confessions rules. Whenever a defendant's words are tendered by the prosecution as an admission of guilt, whether express or implied, the previously identified rationales remain relevant. The same can be said of a defendant's statement which is exculpatory on its face, but which the prosecution seeks to employ in cross-examining the defendant as contradicting the defendant's testimony at trial. Unacceptable pressure used to extract a statement remains unacceptable, and often a source of unreliability, even if the statement is exculpatory on its face, or neutral.

115 Beyond oral or written statements, defendants may also express themselves through non-verbal conduct. When such conduct is intended to convey an assertion eg, a nod of the head, it is on par with oral or written statements and must come within the definition of a confession. An assertion or a consciousness of guilt can also be implied from defendants' non-verbal conduct, but we believe that such matters are too remote to warrant inclusion in the definition of a confession. A consciousness of guilt may, for example, be inferred from the fact that a defendant fled from the scene of the crime, but it would be incongruous to subject such evidence to the admissibility rules for confessions. For practical purposes, therefore, the definition of a confession includes non-verbal conduct only when it is intended as an assertion.

116 Our conclusion is that *all* spoken or written communications and non-verbal conduct by the defendant (with the qualification in para 0) offered by the prosecution should be subject to the rules for admissibility.<sup>292</sup> The word

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290 See section 2 in "Draft Rules for Criminal Proceedings for an Evidence Code".

291 *Evidence Law: Hearsay*, see note **Error! Bookmark not defined.**, para 6.

292 The Evidence Law Reform Committee also made similar recommendations in its 1987 report, see note **Error!**

"confession" tends to have a restricted meaning so we use the word "statement", defining it broadly as:

- (a) a spoken or written utterance, whether or not intended as an assertion of any matter, or
  - (b) non-verbal conduct that is intended as an assertion of any matter,
- and includes a confession, an admission, and an exculpatory statement.

### **Admissibility rules for statements made by a defendant**

117 The Law Commission considers that the rules for admissibility of statements made by a defendant should be reformed by abolishing the common law voluntariness rule and repealing s 20 of the Evidence Act 1908.<sup>293</sup> In their place there should be two rules, one requiring the exclusion of unreliable statements and the other requiring the exclusion of statements influenced by violence or oppression. We emphasise that the Law Commission's aim is not to abandon the values which the voluntariness rule and s 20 protect, but rather to make the protection of those values effective by simplifying and clarifying the rules.

118 The basic criteria of the voluntariness rule and the s 20 exception are restated in the two rules. At present the combined effect of the voluntariness rule and s 20, stated in simple terms, is that a statement is inadmissible if it is obtained by violence or threats or oppression. However, a statement obtained as the result of less serious inducements will be admissible if those inducements were not likely to cause an untrue admission of guilt (the test in s 20). Both these propositions are encapsulated in the two new rules.

119 In addition to the reliability and oppression rules there will be a third rule which will take the place of the present discretion to exclude unfairly obtained evidence and the more recent exclusionary rule for evidence obtained in breach of the Bill of Rights. The proposed third rule will also apply to all forms of improperly obtained evidence (ie, not simply to statements). For that reason we discuss it under the head of improperly obtained evidence (see paras 0-0).

120 The first two rules of admissibility are:

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**Bookmark not defined.**, paras 57, 61, in respect of the voluntariness rule and s 20 of the Evidence Act 1908.

293 In the Police and Criminal Evidence Act 1984 (UK) and the draft Evidence Bill 1991 (Commonwealth of Australia) the voluntariness rule has not been preserved.

### **The reliability rule**

- (1) The reliability rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant only if a defendant raises the issue of the reliability of the statement and informs the court and the prosecution of the grounds for raising the issue.
- (2) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is inadmissible unless the prosecution satisfies the court beyond reasonable doubt that the circumstances pertaining to the making of the statement were not likely to have affected its reliability.
- (3) Without limiting the matters that a court may take into account for the purposes of subsection (2), the court must take into account
  - (a) any pertinent physical, mental and psychological condition of the defendant when the statement was made; and
  - (b) any pertinent characteristics of the defendant including any mental, intellectual or physical disability to which the defendant is subject; and
  - (c) the nature of any questions put to the defendant and the manner and circumstances in which they were put; and
  - (d) the nature of any threat, promise or representation made to the defendant or any other person.
- (4) Subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered in evidence by the prosecution only as evidence of the physical, mental or psychological condition of the defendant at the time the statement was made.

### **The oppression rule**

- (1) The oppression rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant only if a defendant raises the issue of the influence on the statement of conduct, treatment or a threat described in subsection (2)(a) and (b) and informs the court and the prosecution of the grounds for raising the issue.
- (2) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is inadmissible unless the prosecution satisfies the court beyond reasonable doubt that the statement was not influenced by

- (a) oppressive, violent, inhuman or degrading conduct, towards or treatment of the defendant or another person; or
- (b) a threat of conduct or treatment of that kind.

121 While the above two rules of admissibility apply to all statements made by a defendant, in many instances a defendant will not seek to challenge the admissibility of a statement. We would expect a voir dire to be required only where there are grounds to suggest that the statement is unreliable or has been obtained by oppression. The rules do not, however, place any burden on the defendant to put forward or point to some supporting evidence. The defendant is simply required to inform the court and the prosecution of the grounds for raising the issue. Otherwise the prosecution does not know what contentions it has to meet and what witnesses are required. It is not intended that a high degree of disclosure be required. A simple statement informing the court and the prosecution of the grounds will be sufficient.

122 This is not intended to be a change in the law: the Code provisions which refer to raising the issue of admissibility are intended to reflect the present law. If the issue is raised the prosecution must prove compliance with the rule in question beyond reasonable doubt. Once the court determines the statement is inadmissible as part of the prosecution's evidence it remains inadmissible for all prosecution purposes.<sup>294</sup> It should also be noted that the issue of reliability may be raised by a defendant or co-defendant.<sup>295</sup> Whether a defendant who fails to raise the issue of reliability at trial can do so on appeal will be governed by the practice of the Court of Appeal.

#### *Abolition of the concept of voluntariness*

123 The voluntariness rule has not been retained for two reasons. First, the word "voluntary" is to some extent misleading because it masks two fundamental values which the rule seeks to protect: reliability and the protection against coerced self-incrimination. The rule, as it is presently framed, does not protect those policies adequately; eg, it is possible that a confession may be made voluntarily (in both the legal and ordinary senses) but may be unreliable due to the defendant's particular mental disorder. Second, the legal definition of voluntariness does not always correspond with the ordinary meaning of voluntariness or the reality of the circumstances in which many statements are made. If a

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294 For example, it may not be used to contradict the defendant's testimony given on direct examination or cross-examination. Compare the United States "impeachment" doctrine discussed in Appendix B, para B10.

295 The judge may also inform the defendant of the right to raise the issue. Compare the United States requirement of "standing" with respect to breaches of constitutionally protected rights discussed in Appendix B, para B11.



statement is made voluntarily it should mean that the defendant has made a genuinely informed choice. If that requirement were to be translated accurately into a legal rule then no pressure would be permitted upon the person being interviewed. Yet considerable psychological pressure is permitted. This gap between the legal definition of voluntariness and the psychological interpretation of that term has been pointed out both by the courts and law reform agencies.<sup>296</sup>

124 The aim of the proposed rules is to rationalise the law relating to the admissibility of statements. The new rules are intended to protect the same policies as the present rules and we do not envisage they would radically alter the effect of the present law. We acknowledge that the concept of voluntariness has symbolic value and if there is strong support to retain it in the rules this can be done. It would, however, then be necessary to amend the existing rules along similar lines to those proposed in the 1987 *Report on Confessions* by the Evidence Law Reform Committee.<sup>297</sup> This would eliminate many of the technical problems with the existing rules but would still leave voluntariness as a somewhat artificial concept. The fundamental problems discussed in the preceding paragraph would remain.

#### *Relationship of the two rules to the Law Commission's hearsay proposals*

125 The admissibility rules are drafted on the assumption that the Law Commission's other related and interdependent recommendations on hearsay, improperly obtained evidence and questioning after arrest will be enacted at the same time. If the Commission's recommendations on hearsay are not implemented at the same time as new rules, transitional provisions will be necessary because the present hearsay rule will still be applicable. In that event the rules about the admissibility of statements may need to continue to be treated as part of the admissions exception to the hearsay rule.

126 There are several aspects of both new rules which require discussion. We first consider the reliability rule.

#### **The reliability rule: the circumstances pertaining to the making of the statement ...**

127 The reliability rule (para 0) requires the prosecution to prove that the circumstances pertaining to the making of the statement were such as to make it unlikely that the reliability

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296 See eg, *R v Admore*, note **Error! Bookmark not defined.**, 212; Australian Law Reform Commission, *Evidence* (Report No 38, 1987) paras 154-164; *Report of The Royal Commission on Criminal Procedure*, see note **Error! Bookmark not defined.**, para 4.73.

297 See note **Error! Bookmark not defined.**

of the statement was affected. As with s 20, the primary purpose of the rule is to screen out statements which it would be unsafe to admit in evidence because of the risk of unreliability. It is not the function of the rule to determine the truth of the statement. That is for the jury to decide. A reliability rule is necessary in respect of confessions because of the danger that once a statement is admitted the jury will give too much weight to it merely because of the nature of the evidence (ie, because it has come directly from the defendant). This danger justifies some judicial oversight.

128 The proposed reliability rule is broader than s 20. Rather than restricting the court's inquiry to the means by which the statement was obtained, the court is required to examine the circumstances pertaining to the making of the statement. Subsection (3) of the rule endeavours to indicate on a non-exclusive basis the circumstances which the court is to consider.

129 The admissibility of a potentially unreliable statement should not turn on who obtains the statement. It follows that the circumstances which the court should consider are not limited to the conduct of a person in authority.<sup>298</sup> The unreliability of a coerced statement is not dependent on the source of the inducement. The person in authority concept is not, however, always irrelevant. Police and other State officials play an important part in the gathering of evidence and this may on occasions require express recognition, as in the rules concerning police questioning and improperly obtained evidence.<sup>299</sup>

130 The circumstances which the court must take into account encompass both the conduct of those who obtain statements (usually the police) and internal factors affecting the reliability of the statement (factors the police may not be able to control or be aware of eg, a mental disability). Internal factors are at present considered in the exercise of the fairness discretion, and not under the voluntariness rule (see paras 0, 0 and 0), but they are clearly relevant to the determination of reliability. Indeed the central issue in relation to reliability is the actual state of the defendant's mind at the time he or she confessed, rather than the source of the influence.

131 In respect of those factors of which it is difficult or impossible for the police to be aware, it is not the purpose of the rule to attempt to shape police conduct or to impose a duty to make inquiries before commencing an interview. The rule in this respect is aimed at the trial process and not the criminal investigation. However, it should be kept in mind

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298 The Evidence Law Reform Committee made the recommendation that the person in authority requirement be abolished, see note **Error! Bookmark not defined.**, para 106. The person in authority requirement is also eliminated in the Police and Criminal Evidence Act 1984 (UK) s 76, the Evidence Bill 1991 (NSW) clauses 68 and 69, and the Evidence Bill 1991 (Commonwealth of Australia) clauses 90 and 91.

299 See further paras 0-200.

that a secondary concern of the rule is that police interviews of suspects are conducted in a way that minimises the risk of unreliability as far as reasonably practicable.<sup>300</sup> The rationale for exclusion of statements in the latter instance is to deter unacceptable police conduct.

132 The new rule is wider in scope than the rule it replaces. It is expressed in terms similar to the reliability rule proposed by the Australian Law Reform Commission,<sup>301</sup> now incorporated in the Commonwealth of Australia Evidence Bill 1991 clause 91. A number of issues arise from the particular way in which the rule is framed. They relate to the standard of proof, the effect of intoxication and other internal factors, the relevance of evidence of the truth of the statement, and the discovery of real evidence confirming the truth of a statement obtained in circumstances which seem likely to have affected its reliability.

133 The present law in Australia appears to be that all preliminary questions of fact relating to the admissibility of evidence should be satisfied to the civil standard of proof ie, on the balance of probabilities. Though the proposed Australian rule does not expressly state the standard of proof, the Australian Law Reform Commission recommended that the balance of probabilities standard should apply.<sup>302</sup> In contrast, in New Zealand the current standard of proof in relation to voluntariness and s 20 is beyond reasonable doubt, and we have retained that standard in the new rules. Depending on the interpretation of the reliability rule adopted by the court, a statement may be excluded if the court considers there is a *possibility* that the circumstances pertaining to its making affected its reliability. There is potential for the same interpretation to be adopted under the present voluntariness rule and s 20, but the wider scope of the reliability rule, when combined with the high standard of proof, could lead to more statements being excluded. The lesser civil standard of proof may therefore be more appropriate for the new rule. We welcome comment on this issue.

134 The new rule will, as we have mentioned, require the court to give greater consideration to internal factors such as intoxication. We consider that this approach is justified in principle. We are conscious that this places an increased burden on the prosecution, and that a significant number of suspects may be under the influence of alcohol or drugs when the police first wish to interview them. However, in most instances it

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300 The proposed police questioning provisions are also designed to help minimise the risk of unreliable statements eg, the right to consult and instruct a lawyer (section 5(1)) and the right to an interpreter and technical assistance for those suspects who have impaired sight or hearing, or some other disability affecting their capacity to communicate, or who do not have a reasonable fluency in the English language (section 8). See further "Draft Rules for Questioning After Arrest".

301 See Law Reform Commission (Australia), *Evidence* (Report No 38, 1987) 169.

302 See Law Reform Commission (Australia), *Evidence* (Interim Report No 26, 1985) paras 1001-1006.

will not be difficult for the courts to determine whether intoxication is likely to have affected the reliability of the statement. We anticipate that a finding of unreliability will result only on relatively rare occasions where, for example, the defendant is considerably intoxicated (perhaps unknown to the police<sup>303</sup>). In doubtful cases the police will need to hold an intoxicated suspect until a reliable statement can be obtained. The questioning after arrest rules will enable the police to do this (see "Draft Rules for Questioning After Arrest"). We again welcome comment on the issue. We would not, for example, wish to see large amounts of court time consumed by voir dire applications relating to the question of intoxication. Our present view is that this is unlikely, particularly once video-taping is widely available.

135 The reliability rule on its face captures statements made by intoxicated persons which are tendered for purposes other than to prove the truth of the statement or to demonstrate a consciousness of guilt. For example, the prosecution may wish to tender a statement in order to show that the defendant was intoxicated and that a police officer accordingly had good cause to suspect the commission of an offence under the excess breath alcohol provisions in the Transport Act 1962. To delay procedures until intoxication wears off, as suggested in the paragraph above, would defeat the purpose of those provisions. In order to prevent the reliability rule excluding such statements we have provided an appropriate exception to the rule in subs (4). An alternative approach is to redefine "statement". The definition could provide that a statement for the purposes of the admissibility rules is one which is tendered to prove the truth of its contents, whether express or implied. The amended definition of statement would, however, apply both to the oppression rule and to the improperly obtained evidence rule. We seek comments as to whether this approach is preferred to the exception as at present drafted.

136 Normally when dealing with the reliability rule the judge should not consider whether the statement is in fact true. In a jury trial this subverts the function of the jury. It may also lead to the court considering a large volume of evidence and, at the same time, to attention being diverted from questions of improper police misconduct. The Commonwealth of Australia Evidence Bill 1991 therefore expressly provides that evidence of the truth or untruth of the statement is not admissible (see clause 91(3)). An alternative solution is to provide in the rules concerning the conduct of the voir dire (see para 0) that the prosecution may not cross-examine the defendant as to the truth or untruth of the statement. We are interested in receiving comments on which solution is preferred (bearing in mind that the discussion in the following paras 0-0 needs to be taken into account when evaluating the alternatives).

137 In terms of the reliability rule it is possible that a statement will be held inadmissible solely because a condition or characteristic of the defendant is likely to have affected the reliability of the statement, there being no suggestion of police misconduct. The question

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303 See eg, *R v Busby*, note **Error! Bookmark not defined.**

then arises whether the prosecution should be able to tender on the voir dire subsequently obtained real evidence to satisfy the court that the circumstances pertaining to the making of the statement were not likely to affect its reliability. The only rationale for exclusion of the statement in this situation is its supposed unreliability, which the real evidence demonstrates does not exist.<sup>304</sup> If, however, the real evidence is taken into account the judge is in fact considering whether the statement is true.

138 In order to deal with the above situation it may be sufficient simply to enact the rule mentioned in para 0, that on a voir dire the prosecution may not cross-examine on the truth of the statement. This would leave it open to the court to take account of real evidence when assessing the risk of unreliability in those cases where it is only the defendant's condition or characteristic which is in issue. Alternatively, an express exception, allowing the court to admit the subsequently obtained real evidence, could be incorporated in the reliability rule to take account of this problem.

139 We seek comments on the above alternatives. We also seek information on how frequently real evidence confirming the truth of such a statement is subsequently discovered, and whether under the present law such evidence is ever admitted as evidence to establish the test in s 20. Our provisional conclusion is that an express exception to the reliability rule is inconsistent with the way in which the rule is framed ie, in terms of the likelihood that the reliability of the statement has been affected, rather than its actual truth. It may also be that in practice the difficulty is not likely to be encountered. At present the courts seem to have little difficulty in determining in terms of s 20 whether the means used to obtain the statement were likely to cause an untrue admission of guilt to be made, and this would probably also be the case when the relevant factor is a condition or characteristic of the defendant. The chance of a court excluding under the reliability rule a statement that is in fact reliable may be relatively remote.

140 Before leaving our discussion of the reliability rule we mention that the basic aim of the rule is to exclude evidence which it is unsafe to place before the jury. It might, therefore, be possible to frame the rule on that basis. The prosecution would be required to establish that the circumstances pertaining to the making of the statement do not render it unsafe to allow the statement to go before the jury. This would be a broader and somewhat less precise test than that required by the reliability rule, though the court would need to consider much the same matters.

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304 The same concern (that the inadmissible statement may in fact be reliable) may exist when the decision to exclude the statement rests on a finding of police misconduct which is likely to adversely affect the reliability of the statement (as it can do under s 20 at present). However, the concern is not so great because of the additional rationale for the exclusion of the evidence ie, the deterrence of police misconduct.

### **The oppression rule: not influenced by oppressive, violent, inhuman or degrading conduct ...**

141 The oppression rule (para 0) requires the prosecution to prove that the statement was not influenced by oppressive, violent, inhuman or degrading conduct or treatment, or threats of conduct or treatment of that kind. The standard of proof is the same as the current law - beyond reasonable doubt.

142 The principal rationale underlying the rule is the protection against coerced self-incrimination, but reliability, deterrence of unacceptable conduct and the integrity of the criminal justice system are also relevant. The rule protects a defendant's pre-trial right of silence, in combination with the defendant's right to consult and instruct a lawyer and the police duty to caution the defendant (both of which are provided for in the proposed questioning after arrest rules).

143 The aim of the rule is to exclude statements that are influenced by conduct or treatment which must always be regarded as reprehensible. The rule, therefore, also protects the right not to be subjected to torture or to cruel, degrading, or inhuman treatment or punishment.<sup>305</sup> More detailed protection of that right can be found in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.<sup>306</sup> New Zealand has ratified the Convention and has given effect to Article 4 which requires States Parties to ensure that all acts of torture are offences under their domestic criminal law (see the Crimes of Torture Act 1989). The proposed oppression rule would meet the requirements of Article 15 of the Convention,<sup>307</sup> and indeed would go further than the minimum obligations imposed on States Parties by the Convention.<sup>308</sup>

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305 International Covenant on Civil and Political Rights Article 7, NZTS 1978 No 19, AJHR 1979 A 69, AJHR 1984-85 A 6; New Zealand Bill of Rights Act 1990 s 9.

306 (1984) 23 ILM 1027.

307 Article 15 requires each State Party to

ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

308 Torture is defined in Article 1 of the Convention as severe pain or suffering, whether physical or mental, inflicted by or with the consent or acquiescence of a "public official or other person acting in an official capacity". Under the oppression rule it is irrelevant who embarked upon the improper conduct. Further, the Convention does not require States Parties to ensure that statements established to have been made as a result of "cruel, inhuman or degrading treatment or punishment" (as distinct from torture) are not invoked in criminal proceedings, whereas the oppression rule does.

144 The new rule does not use the word "force" because the combination of words used in the rule makes "force" redundant. On the other hand, the word "oppressive" is used in the new rule, whereas under s 20 it roughly corresponds with "other form of compulsion". The proposed rule does not attempt to define oppression because the scope of oppressive conduct is best left for determination by the courts on a case by case basis. The words used to describe other conduct or treatment governed by the rule - "inhuman or degrading" - are also not defined, though the conduct and treatment which they cover is probably more readily able to be specified.

145 Threats of oppressive, violent, inhuman or degrading conduct or treatment are included in the rule. This eliminates the confusing common law distinctions between "threats", "persuasions" and "fear of prejudice". The rule also eliminates the other difficult distinction between threats made by "persons in authority" and threats made by other persons.<sup>309</sup>

146 The rule applies to conduct towards, or treatment of, a person other than the defendant. Violence or threats used to extract a statement are unacceptable no matter against whom the violence or threats are directed. The purpose is always the same: to obtain a coerced admission of guilt.

147 The oppression rule requires a causal connection to be established between the conduct or treatment and the statement, as does the common law voluntariness rule. In contrast, however, with the common law rule, which excludes statements *obtained* by oppression, the new rule requires that the statement be *influenced* by the oppression. This will subject a wider range of unsatisfactory conduct to the rule. We consider this is necessary in order to provide appropriate protection for defendants. Indeed it is arguable that the rule should not require any causal link at all, especially in relation to the right not to be subjected to torture. Though the rule could be worded to reflect this, it is difficult to envisage a situation where violence or oppression would not be an influence on the statement. The Law Commission seeks comments on this formulation and all other aspects of the drafting of the oppression rule.

## **The conduct of the trial**

### *The voir dire*

148 The Law Commission considers that the rules for the conduct of the voir dire as set

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309 There is a possibility that an ordinary person could coerce a statement from a defendant that is in fact reliable. Such a statement would be excluded under the oppression rule, as indeed it would be under the present law. We consider this to be appropriate in terms of the protection of the integrity of the criminal justice system.

out in para 0 should be codified.<sup>310</sup> The rules will apply to any voir dire concerning the admissibility of statements, on whatever ground. They will also continue to apply both to jury and judge alone trials (see para 0). Because the rules are well known and clear we have not as yet included them in our draft statutory provisions.

### *Warnings to the jury about disputed statements*

149 In other jurisdictions doubts have arisen concerning convictions in cases where a statement is the only, or substantially the only, evidence against a defendant. As a result, some jurisdictions require the judge to warn the jury about the dangers of convicting the defendant on the evidence of the statement alone. Though in the New Zealand context an obligation to video-tape statements will eliminate many disputes concerning admissibility, it seems probable that video-taping will only be undertaken in relation to more serious charges (see part III paras 129-131); and, in any event, once a statement is admitted it is for the jury to determine the weight to be given to it. It is, therefore, worth considering whether a warning requirement should be introduced.

150 There are several models for such a warning. One is found in *McKinney v R*<sup>311</sup> where the majority of the High Court of Australia held that a warning should be given to the jury about the dangers of convicting a defendant in circumstances where the only, or substantially the only, basis for finding the person guilty is a statement made in police custody, without access to a lawyer or an independent person, the making of which is not reliably "corroborated".<sup>312</sup> The court considered it appropriate for the judge to emphasise to the jury the need for careful scrutiny of the evidence and the fact that police are often practised witnesses (although this is not a suggestion that police evidence is inherently unreliable). It was also suggested that it is proper for the judge to balance the warning by reminding the jury that persons who make statements sometimes repudiate them.

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310 This was also the recommendation of the Evidence Law Reform Committee in 1987, see note **Error! Bookmark not defined.**, para 101.

311 (1990) 98 ALR 577, 581-582. Clause 176 of the Commonwealth of Australia Evidence Bill 1991 also provides a precedent for a rule requiring a warning about corroboration.

312 Corroboration is used in the sense that there is some independent means of establishing that the defendant actually made the statement in question eg, an independent person or the defendant's lawyer was present, or the statement was video-taped, or the defendant signed the statement. (The defendant's signature to the statement will, however, not always be confirmation that the statement is reliable if it is alleged that the signature was coerced.) The majority in *McKinney v R* (see note **Error! Bookmark not defined.**, 580) observed that video-taping was becoming a more common requirement in state jurisdictions, and that, as the means for video-recording became more generally available, the absence of a recording will tend to bring the reliability of the statement into issue, thus raising the question whether a warning should be given.



151 The Law Commission's present inclination is to favour a rule, similar to the one in *McKinney v R*,<sup>313</sup> requiring a judge to give a suitable warning when a statement has not been video-taped. We seek views whether this should be a statutory rule or whether it should be left to the judge to determine on a case by case basis.

152 An alternative possibility is a requirement for corroborative evidence when a statement has not been video-taped. Difficulties have, however, long been associated with determining what evidence constitutes corroboration. As a consequence, corroboration requirements have been removed from other areas of our criminal law and we are reluctant to see any such requirement reintroduced.

#### A RULE FOR ALL IMPROPERLY OBTAINED EVIDENCE

153 The present fairness discretion has a wide scope. It applies to statements and to other kinds of unfairly or improperly obtained evidence eg, drugs obtained from a defendant by an improper search and seizure. Similarly, the Bill of Rights has a wide scope and breaches of the Bill are likely to lead to the exclusion of various kinds of evidence. The same values are protected whether evidence is excluded in terms of the fairness discretion, or by reason of breaches of the Bill of Rights.<sup>314</sup>

154 In the present legal context those rules operate reasonably satisfactorily. Nevertheless, some aspects of the fairness discretion are unsettled eg, the role that causation plays in the decision to exercise the discretion (see para 0). The present application of the fairness discretion is also in several respects uncertain due to a failure to identify the underlying rationales in particular cases (see para 0). These uncertainties do not, however, appear to cause substantial problems in practice. The rule of exclusion for evidence obtained in breach of the Bill of Rights also has problems of a similar nature, but probably only because the rule is in its early stages of development. Opportunities for the court to clarify some aspects of the rule have not yet arisen (see eg, paras 0-0).

155 The Law Commission has, however, reached the conclusion that it is desirable to have a single general exclusionary rule in place of the fairness discretion and the exclusionary rule developed by the courts in respect of evidence obtained in breach of the Bill of Rights. The improperly obtained evidence rule will apply to all forms of evidence including statements made by defendants. In the Commission's view it is in the interests of simplicity and clarity for the same rule to apply to all improperly obtained evidence, there being no policy reasons to the contrary.

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313 See note **Error! Bookmark not defined.**

314 See chapter III. These values are also protected by the rules of admissibility for statements made by defendants.

156 Under the new rule, improperly obtained evidence will be prima facie inadmissible, but the court will have power to admit the evidence if its exclusion would be contrary to the interests of justice. This represents a change to the existing law. At present improperly obtained evidence is admissible, subject to the court's discretion to exclude it on the ground of unfairness. Similarly, a statement obtained in breach of the Judges' Rules is admissible unless excluded on the same ground. Under the new rule statements obtained in breach of the proposed police questioning rules (which replace the Judges' Rules, see part III para 133) will be prima facie inadmissible. Evidence at present obtained in breach of the Bill of Rights, and therefore prima facie inadmissible, will still be so. However, prima facie inadmissibility is counterbalanced by the ability of the court to admit the evidence if the interests of justice require. This enables the court to take into account all the competing considerations. The court is not required to take a rigid or technical approach to exclusion.

157 While the Law Commission is motivated to recommend this reform by considerations of clarity, certainty and predictability, these are not our sole concerns. The proposed improperly obtained evidence rule must be considered in conjunction with the proposals for change with respect to police questioning procedures. We consider it is appropriate to reflect the proposed changes to those procedures in a new exclusionary rule.

158 The recommended questioning rules provide the police with a reasonable opportunity to question suspects, while at the same time ensuring that all suspects are afforded the appropriate safeguards. When public powers are conferred they should be sufficiently broad to achieve their intended purpose, but also subject to sufficient restraints and controls to meet the demands of principle.<sup>315</sup> It is therefore important that the rules and their safeguards are observed (see part III paras 164-168). Non-compliance will indicate a real danger that the values protected by the rules have been prejudiced. If, for example, the right to consult and instruct a lawyer has been breached, the court should be able to scrutinise the circumstances surrounding the obtaining of the evidence. Accordingly, it is appropriate that evidence obtained as a consequence of a breach should be prima facie inadmissible, with the court then examining the circumstances in order to determine whether the evidence should be admitted despite the breach. It should be emphasised that the occurrence of an impropriety does not dictate exclusion of the evidence in every case. When considering the interests of justice the court may decide that exclusion is not justified, but in reaching that conclusion it will have examined the way in which the evidence was obtained and will have balanced the relevant public interests.

159 A similar approach can be seen in statutory provisions concerning the procedures

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315 Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (rev ed, Report No 6, December 1991) para 48.

for gathering other forms of evidence. For example, illegally intercepted private communications are inadmissible as evidence unless the illegality was a minor one and was not the result of bad faith.<sup>316</sup> And indeed under the present fairness discretion importance is attached to the fact that clear procedures for the gathering of evidence have been enacted in statute in the expectation that they will be, and are able to be, complied with.<sup>317</sup>

160 If police questioning provisions are enacted prior to the proposed improperly obtained evidence rule some transitional provisions may be required. Otherwise there could be uncertainty about the operation of the present rules governing the admissibility of statements, especially the exercise of the discretion to exclude unfairly obtained evidence. For example, the Judges' Rules are non-statutory and are treated as guidelines in the exercise of the court's discretion to exclude a statement, but the Law Commission's proposals concerning police questioning will be in statutory form and will have a different status from the Judges' Rules. The Law Commission accordingly recommends that the rule concerning improperly obtained evidence be enacted at the same time as the police questioning provisions.

161 In order to give some context for the proposal, various relevant common law discretions, constitutional and statutory provisions and suggestions for reform in the United States, Canada, England, Australia and Scotland are set out in Appendix B. The special characteristics of each jurisdiction must, however, be kept in mind. Despite their common heritage, different rules and judicial discretions have evolved in each of the jurisdictions and reform has sometimes reflected these historical developments. The Law Commission has drawn on these precedents to formulate the new rule.

162 The improperly obtained evidence rule provides as follows:

- (1) The improperly obtained evidence rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding only if a defendant raises the issue whether that evidence was obtained improperly and informs the court and the prosecution of the grounds for raising the issue.
- (2) Where the improperly obtained evidence rule applies, evidence offered by the prosecution in a criminal proceeding is inadmissible unless
  - (a) the prosecution satisfies the court beyond reasonable doubt that the evidence was not obtained improperly; or

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316 See the Misuse of Drugs Amendment Act 1978 s 25 and the Crimes Act 1961 s 312M.

317 See eg, *R v Mann*, note **Error! Bookmark not defined.**, and *R v Watt*, note **Error! Bookmark not defined.**

- (b) the court considers that the exclusion of the evidence would be contrary to the interests of justice.
- (3) For the purposes of subsection (1), evidence is obtained improperly if it is obtained
  - (a) in consequence of a breach of the New Zealand Bill of Rights Act 1990;
  - (b) in consequence of a breach of a provision of any enactment or rule of law; or
  - (c) in consequence of a statement made by a defendant that is inadmissible or would be held inadmissible if it were offered in evidence by the prosecution; or
  - (d) unfairly.
- (4) Without limiting the matters that a court may take into account in exercising its power to admit evidence under subsection (2) (b), the court must take into account
  - (a) the special nature of the *New Zealand Bill of Rights 1990* as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
  - (b) the nature and gravity of any impropriety; and
  - (c) whether any impropriety was the result of bad faith; and
  - (d) whether the evidence existed and would have been discovered or otherwise obtained regardless of any impropriety.
- (5) A statement made by a defendant that is inadmissible because of section 3 (the reliability rule) or section 4 (the oppression rule) may not be admitted as evidence under subsection (2) of this section.

### **Improperly obtained evidence offered by the prosecution**

163 The rule applies only to evidence tendered by the *prosecution*. Once the court determines the evidence is inadmissible as part of the prosecution's evidence it remains inadmissible for all prosecution purposes.<sup>318</sup>

164 The Law Commission's view is that an exclusionary rule is not appropriate in

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318 For example, it may not be used to contradict the defendant's testimony given on direct examination or cross-examination. See also note **Error! Bookmark not defined.**

relation to improperly obtained evidence offered by the defence. For our reasons see Appendix A paras A4-A5 where we discuss the same issue with respect to the rules of admissibility for statements made by a defendant. Improperly obtained evidence which is inadmissible as part of the prosecution's case can be tendered in evidence by a defendant if the court does not exercise its general exclusionary power. This is a provisional conclusion and the Commission welcomes comment on this view.

### **What is improperly obtained evidence?**

165 Improperly obtained evidence is defined in subs (3) as evidence obtained in consequence of a breach of the New Zealand Bill of Rights Act 1990, or any other enactment or rule of law, or unfairly. Evidence is also improperly obtained if it is obtained in consequence of a statement which is inadmissible, or would be inadmissible if offered in evidence by the prosecution. Although a statement is admissible in terms of the reliability and oppression rules, it may still be excluded under the improperly obtained evidence rule.

166 At trial it will be open to a defendant or co-defendant to notify the prosecution that there is an issue concerning improperly obtained evidence (in the same way as the issue can be raised under the proposed reliability and oppression rules, see para 0). The evidence is then prima facie inadmissible and the prosecution is required to prove beyond reasonable doubt that the evidence was in fact not obtained improperly. The Law Commission considers that this standard of proof is appropriate because of the importance of the values protected by the rule. We would, however, like to receive comments on whether a standard of balance of probabilities would be preferable.

167 The rule does not endeavour to specify the precise nature of any causal link between the impropriety and the obtaining of the evidence. We have concluded that it is not practicable to do this in a statute (because the circumstances are too varied). Subsection (3) of the rule therefore uses the words "obtained ... in consequence of a breach of". This leaves it open to the court to determine issues of causation by reference to principle but on a case by case basis. Plainly all evidence obtained "following" a breach will not be improperly obtained. There must be some proximity or causal link. On the other hand, if the link is put at too high a level this will result in significant evidence not crossing the threshold of prima facie inadmissibility, thereby defeating the primary purpose of the rule.

168 It will be open to the prosecution to prove a complete absence of causation, in which event the evidence will not be improperly obtained. However, on some occasions a lack of causation may be difficult for the prosecution to prove, especially in relation to items of evidence such as statements or body samples given by a defendant. (It may also be considered inappropriate to have regard to causation in respect of evidence of this kind, see later para 0.) The question usually asked is whether the evidence would have been obtained if the impropriety had not occurred. This may require an inquiry into the state of a defendant's mind, necessarily resting on inferences of fact, which at times may be difficult and tenuous. On the other hand, it may be easier to prove a lack of causation with respect to real evidence, such as drugs found by an improper search and seizure, because the evidence existed independently of the breach. The question of causation also may be relevant when considering the interests of justice (see paras 195-198).

169 Evidence obtained in consequence of an impropriety (ie, indirectly obtained

evidence) also falls within the ambit of the rule. The typical case is real evidence discovered as the result of information contained in an inadmissible statement,<sup>319</sup> but information discovered as the result of an illegal search can also lead to other evidence being obtained.

170 "Unfairly"<sup>320</sup> obtained evidence is included in the definition of improperly obtained evidence. This is intended to have only a residual application. It is important to note that, although cases in which the fairness discretion has been in issue may provide some guide to this aspect of the rule, caution must be exercised because of the different nature of the rule. In the new rule unfairness is simply a threshold test (making the evidence *prima facie* inadmissible), whereas under the current law unfairness is the basis upon which a final decision to exclude the evidence rests.

171 On some occasions evidence will be obtained in a manner which prejudices the values protected by the improperly obtained evidence rule, but which falls outside the ambit of subs (3)(a)-(c).<sup>321</sup> It is this kind of evidence which is intended to be covered by "unfairly" in subs (3)(d). Some examples are where the defendant has been tricked, or entrapped by undercover police officers, or where the police have breached their General Instructions. Since the Judges' Rules will be replaced by the police questioning provisions, see part III para 133, they will have no role in relation to improperly obtained evidence.

### The interests of justice

172 If the prosecution fails to prove that the evidence was properly obtained the evidence may nevertheless be admitted if the court is satisfied that exclusion would be contrary to the interests of justice. A decision in that regard requires a factual and policy judgment in relation to which it is inappropriate to specify an onus or standard of proof. This is in accordance with the Court of Appeal's view with respect to the fairness discretion (see para 0).

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319 This example raises particular difficulties about the admissibility of the statement which we discuss separately at paras 0-0.

320 This part of the statutory definition of improperly obtained evidence should not be confused with the narrow "unfairness to the defendant" rationale discussed at paras 0-0. If evidence is obtained "unfairly" one of the rationales discussed in chapter III will have been prejudiced.

321 This would be the situation if the facts in *R v Waipouri* (unreported, High Court, Auckland, 6 April 1992, T7/92) were to occur under the proposed improperly obtained evidence rule. A witness was asked to make a voice identification of the defendant, who was being interviewed, without the defendant's knowledge. There are no statutory rules, equivalent to those concerning visual identification, controlling this process.

173 The main rationales of the improperly obtained evidence rule are to preserve the integrity of the criminal justice system, to deter police conduct which fails to comply with the requisite standards, to protect privacy, and sometimes to ensure reliability (usually in respect of forms of evidence other than real evidence). Requiring the court to examine whether the exclusion of the improperly obtained evidence would be contrary to the interests of justice entails a balancing of public interests. On the one hand, the integrity of the rules under which the police are expected to operate should be maintained and the exposure of individuals to wrongful State interference in their lives should be avoided; on the other hand, account must also be taken of the public interest in obtaining the convictions of criminal offenders,<sup>322</sup> and the desirability of avoiding the exclusion of relevant and reliable (though improperly obtained) evidence which would aid the trial process.

174 The phrase "interests of justice" encompasses both the interests involved in the individual case before the court and also broader interests concerning the general administration of the law. When the court is considering the interests of justice it must take account of the wider issues and examine the long term consequences for the integrity of the criminal justice system of admitting or excluding the particular type of improperly obtained evidence.

175 An alternative test would allow the court to admit improperly obtained evidence if exclusion of the evidence would "bring the administration of justice into disrepute".<sup>323</sup> This would entail a similar balancing of public interests, but may be a more stringent test than the "interests of justice" (giving some degree of primacy to one rationale, the preservation of the integrity of the criminal justice system). We seek comments on which of these formulations is preferred.

### **Matters the court must take into account**

176 With the aim of making the process both more transparent and consistent, a list of criteria for the court to consider is set out in subs (4) of the rule. These are matters which a court must take into account (if applicable) when deciding whether the exclusion of

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322 This public interest has been described in English cases under s 78 of the Police and Criminal Evidence Act 1984 (PACE, see Appendix B paras B20-B22) as the "interests of the prosecution". It has been suggested that reference should be made to this in subs (4) of the new rule. However, the Law Commission considers this factor is one of the interests the court must balance in terms of subs (2)(b) and we also consider it appropriate that those interests are not specified in the rule itself. The criteria in subs (4) relate to the particular factual circumstances of each case which in turn relate to the policy reasons for excluding the evidence.

323 These words are taken from the Canadian Charter of Rights and Freedoms, see Appendix B, paras B14-B18.



improperly obtained evidence is contrary to the interests of justice. We have drawn on the factors which are at present considered under the fairness discretion and the Bill of Rights exclusionary rule, as well as those considered in overseas jurisdictions. We have, however, omitted some factors which courts and law reform agencies in other jurisdictions consider relevant.<sup>324</sup>

177 We discuss each factor in turn and indicate whether its presence operates in favour of or against the admission of the evidence. It is important to remember that the existence of one factor will not automatically dictate exclusion or admission. All the factors are interdependent and the importance given to each will depend on the particular circumstances.

178 It would be possible to formulate the rule without specifying any of the factors, with the exception of the special nature of the Bill of Rights in subs (4)(a). We think that the courts would then develop similar factors in much the same way as Canadian courts have done under s 24(2) of the Charter of Rights and Freedoms.<sup>325</sup> This may be a more appropriate approach, primarily because it is difficult to envisage all the factors which may be relevant and the court will always need to have regard to the particular facts of the case in question. It is clearly important not to restrict the court from taking into account relevant and appropriate factors. Further, the inclusion of some factors and not others may be debatable. In this regard see the discussion at paras 0-0. We would like to receive comments on this alternative approach.

### *The special nature of the New Zealand Bill of Rights Act 1990*

179 Under the proposed improperly obtained evidence rule we think the courts can be expected to give primacy to the provisions of the Bill of Rights, subject to the requirements of ss 4 and 5 (other enactments not affected and justified limitations).<sup>326</sup> However, in the interests of certainty and clarity, we have included a provision requiring the court to have

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324 See generally Appendix B.

325 See Appendix B, paras B14-B18.

326 Section 4 provides:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or  
(b) Decline to apply any provision of the enactment -  
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Section 5 is set out in note **Error! Bookmark not defined.**

regard to the special nature of the Bill of Rights as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand.

180 While the improperly obtained evidence rule in part replaces the present rule excluding evidence obtained in breach of the Bill of Rights, this is not intended to diminish the importance of the Bill of Rights. The aim of the rule is to enable the courts to ensure that the provisions of the Bill of Rights are neither undermined by too ready a willingness to admit evidence obtained in breach of them, nor interpreted in a rigid or technical way. When determining the appropriate remedy, including exclusion of the evidence, the courts should be able to take account of all the circumstances of the breach (and in particular whether it was minor or inadvertent, and whether it was likely to have real consequences). While substantial breaches of rights given by the Bill should normally lead to exclusion, there should not be a rule of automatic exclusion.

*The nature and gravity of any impropriety*

181 The inquiry under this head is wide ranging, focusing at times on the position of the individual defendant (eg, whether he or she was actively tricked or coerced) and in other cases on wider concerns (eg, whether there was a breach of the police questioning rules).<sup>327</sup> An inconsequential error in a search warrant hardly requires the court's attention, but a clear breach of the Bill of Rights or physical mistreatment of the defendant in the course of a search and seizure will normally be inexcusable and will justify the exclusion of the evidence.

182 The gravity of the impropriety may be dependent on the kind of evidence obtained. For example, breach of a statutory provision controlling the conduct of an internal body search may be regarded as more serious than breach of a statutory provision regulating a search of a residential dwelling (because of the different privacy interests which are compromised in each case).

183 The gravity of the impropriety may also be affected by considerations of urgency or necessity. It is, however, debatable whether the court should consider these issues. They will normally have been taken into account in the formulation of any rules or procedures for gathering evidence. But there may be rare occasions when the police have no option other than to obtain evidence improperly, in order to preserve that evidence against the possibility of destruction or disappearance. In such circumstances it may be desirable to

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<sup>327</sup> The gravity of any impropriety is generally taken into account in statutory provisions for the exclusion of illegally obtained evidence. See eg, Misuse of Drugs Amendment Act 1978 s 25(2); one factor militating against exclusion of the evidence under s 25(2) is that there was "a defect in form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the granting of the interception warrant or emergency permit, or in the manner in which the evidence was obtained".

admit the evidence, despite the impropriety, if other public interests have not been significantly affected. We would be interested to receive comment on whether it is appropriate for the court to take into account considerations of urgency or necessity in this manner.

*Whether any impropriety was the result of bad faith*

184 Bad faith on the part of the police or other State officials who gathered the evidence plainly operates in favour of exclusion.<sup>328</sup> Conduct amounting to a deliberate and perhaps flagrant disregard of the law should not be condoned. On the other hand, good faith may not "save" the evidence if the breach in question is particularly serious.

185 We inquire whether it would be preferable to state this factor positively, perhaps in terms of reasonableness and good faith. (The exception to the United States exclusionary rule, regarding evidence obtained in breach of the Fourth Amendment, is based on these two factors.<sup>329</sup>)

*Whether the evidence existed and would have been discovered or otherwise obtained regardless of any impropriety*

186 The prosecution may be able to demonstrate to the court that the improperly obtained evidence existed and would have been discovered or otherwise obtained regardless of any impropriety. If so, this "inevitable discovery" factor warrants admission of the evidence. *R v Butcher*<sup>330</sup> provides a recent example of the admission of evidence on the basis of inevitable discovery (see para 0). This will only be possible when the evidence has an existence independent of any impropriety ie, real evidence which is not dependent on the defendant for its production eg, drugs or a murder weapon, as opposed to a blood or breath sample. The court must determine whether the police would have obtained the evidence in the normal course of their investigation of the offence.

187 The only rational basis for excluding evidence if the "inevitable discovery" factor is applicable is to deter the police from similar misconduct in the future and thereby maintain the integrity of the criminal justice system. Exclusion could possibly be justified on that basis if the impropriety amounts to a deliberate and flagrant disregard for the law, or is particularly serious. It is, however, clear that there are no grounds for exclusion if other values have not been undermined and the defendant has not been prejudiced.

**Matters not included amongst those which the court must take into account**

188 The factors which we set out below are not included amongst those the court is

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328 This is another factor in s 25(2) of the Misuse of Drugs Amendment Act 1978 test (see note **Error! Bookmark not defined.**), the absence of which warrants the admission of the illegally obtained evidence.

329 See Appendix B, para B7.

330 See note **Error! Bookmark not defined.**.

required to consider under the proposed improperly obtained evidence rule. There may be persuasive arguments both for and against including these factors in subs (4) of the rule.

### *The gravity of the offence*

189 In several other jurisdictions the nature or gravity of the offence is taken into account, in some instances in conjunction with the strength of the other evidence in the case. The Law Commission's provisional view is, however, that it is inappropriate to include the gravity of the offence in the list of factors which the court is required to consider. Our reason for that conclusion is that the operation of the factor is equivocal ie, does it count for or against exclusion? On one argument, the more serious the offence, the stronger the reasons for admitting the improperly obtained evidence. This view gives primacy to the desire to convict the most serious offenders. But it can also be contended that the more serious the offence and the penalty, the greater the need to exclude improperly obtained evidence.

190 Strictly speaking, the gravity or nature of the offence may be irrelevant. We have, therefore, given consideration to an express provision that the court should not take this factor into account. Public perception, however, is that the gravity of the offence is a highly relevant factor to be considered in any decision to exclude evidence. Exclusion is seen to adversely affect the integrity of the criminal justice system - eg, in a murder trial, where the improperly obtained evidence is clearly reliable.

191 In view of the wide variety of circumstances in which the gravity or nature of the offence could be a factor, we think it is preferable to avoid a specific provision. Though this is in the nature of a compromise, it may in this somewhat difficult area be unwise to make a rigid legislative rule.

### *Probative value of the evidence*

192 This again is a factor which could operate for or against the exclusion of the evidence if it is included in subs (4). On one view the more probative the improperly obtained evidence, the more reason for admitting it. But the argument can also be made that if the probative value of the evidence is high then the evidence should be excluded because the defendant is exposed to a greater risk in terms of his or her personal liberty.

193 High probative value may well count in favour of the admission of evidence if other important values do not require its exclusion. This may, however, depend on the nature of the evidence and the impropriety. For example, when real evidence is obtained as the result of information contained in a statement which has been held inadmissible under the reliability rule, the policies requiring exclusion of the statement do not require the

exclusion of the real evidence. The real evidence exists independently of the statement and may have an inherent reliability.<sup>331</sup> On the other hand, the gravity of the impropriety may be regarded as requiring the exclusion of highly probative evidence - eg, when a defendant is coerced into providing a blood sample, thus affecting the defendant's protection against self-incrimination.

194 It seems probable that most evidence which is prima facie inadmissible in terms of the improperly obtained evidence rule will have probative value. The Law Commission's provisional view is that a specific direction to consider probative value would not assist the court, though it may well be that on some occasions the probative value of the evidence will be relevant.

#### *The nature of the causal link*

195 We discussed causation when considering the definition of improperly obtained evidence (see paras 0-0), but the nature of the causal link between the impropriety and the gathering of the evidence may also be relevant to a consideration of the interests of justice.

196 Whether causation should be taken into account by the court will depend on the type of evidence that has been obtained, and the nature of the values which have been undermined by the impropriety. If, for example, the evidence was discovered or otherwise obtained as a direct consequence of an impropriety this may warrant exclusion. This factor will be strongest when the impropriety is a significant, or the only, operating cause, in the sense that "but for" the impropriety the evidence would not have been obtained. In some instances there may not be such a strong causal link between the impropriety and the gathering of the evidence and other factors may dictate the admission of the evidence.

On other occasions it may be difficult to establish whether the impropriety in some way caused the evidence to be obtained (see para 0).

197 Further, the element of causation may have little relevance to the protection of the values undermined by the breach of a particular right. For example, if the right to consult and instruct a lawyer is breached it is arguable that an endeavour to find a direct causal link renders the defendant's right illusory. The value of the right is that it enables the defendant to make an informed choice about whether or not to speak. It may be wrong to speculate whether the defendant would have made the same incriminating statement if there had been no impropriety, because the defendant never had the opportunity to make an informed decision. Moreover, the deterrence of behaviour which fails to comply with acceptable standards for the gathering of evidence, and the protection against coerced self-incrimination (ie, the right to be able to make an informed choice whether to speak to

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331 See *Ministry of Transport v Noort*, note **Error! Bookmark not defined.**, 143, Richardson J. The approach under the Canadian Charter is similar to this, see Appendix B, para B18 (*R v Broyles*, see note 34).

the authorities), will usually be compromised whether or not the impropriety caused the evidence to be obtained.

198 In the light of the above considerations the Law Commission's provisional conclusion is that a specific direction to consider causation would not assist the court.

*Police or other official involvement in the impropriety*

199 We expect that the improperly obtained evidence rule will apply mainly to evidence obtained by the police and other State officials. However, evidence obtained by ordinary persons will, if tendered by the prosecution, also be subject to the rule. If, for example, a private citizen obtains incriminating evidence from a defendant by means of a trick, it is arguable that the evidence was unfairly obtained and therefore *prima facie* inadmissible.

200 When considering the interests of justice the existence of police or official involvement would tend to suggest that the impropriety should not be excused. The police and other State officials operate under statutory and other rules with which they are required to be familiar and to which they are required to adhere. An abuse of power should not be condoned by admitting evidence obtained as a consequence of the abuse, unless there are other countervailing policy factors. (Whether the evidence existed and would have been discovered or otherwise obtained regardless of the impropriety may be such a factor, although of course not in every case.) Ordinary citizens on the other hand are not subject to the same types of institutional and legal controls, with the result that the deterrence rationale has little application to them. It can therefore be argued that it is not in the interests of justice to exclude evidence improperly obtained by a private citizen. In some instances, however, it will be relevant to inquire whether the person was acting as an agent of the police at the time the evidence was obtained. We doubt, however, whether directing specific attention to the above matters would assist the court.

*Other matters*

201 As previously mentioned, the law concerning improperly obtained evidence in various other jurisdictions is summarised in Appendix B. The summary is of considerable interest in demonstrating the wide range of matters which the court may take into account when considering whether to exclude or admit evidence.

**Inadmissible statements and consequentially discovered evidence**

202 The admissibility of a statement confirmed as true by the subsequent discovery of real evidence is discussed separately because of the peculiar difficulties to which it gives rise. The typical case is where the police obtain incriminating real evidence as a result of

the defendant's improperly obtained and therefore inadmissible statement. The admissibility of the real evidence will fall to be determined by the provisions of the new rule concerning improperly obtained evidence. The evidence will be prima facie inadmissible because it has been obtained improperly in terms of subsection (3)(c). However, in many instances the court will be justified in finding that the real evidence should not be excluded in the interests of justice eg, because the evidence existed and would have been discovered in any event.

203 If the real evidence is admissible the question then arises whether the statement itself, or at least the part of the statement subsequently confirmed as true by the discovery of the real evidence, should be admitted. Without the statement as evidence in the proceedings the prosecution may be unable to establish the defendant's connection with or knowledge of the real evidence, and indeed on occasions the real evidence may be inadmissible because the lack of any connection to the defendant renders the evidence irrelevant.

204 There are several approaches to this problem. The whole statement can remain inadmissible on the grounds that it was improperly obtained.<sup>332</sup> This is the case under our proposed rules as they now stand. A rule that the whole statement is inadmissible is simple and also reflects the policies of deterrence of unacceptable conduct and integrity of the criminal justice system. Alternatively, the part of the statement which is confirmed as true by the discovery of the evidence could be admissible. Under the present law a court may take this approach (see para 0).<sup>333</sup> Finally, the whole statement can be admitted in evidence.

205 None of the above solutions is perfect. The first is a logical approach, but it results in the exclusion of reliable evidence. It may also diminish (or destroy) the probative value of the real evidence if the statement provides the only means of connection with the defendant. It is, therefore, debatable whether exclusion is in the interests of justice. The second approach, which involves editing the statement appropriately, to some extent undermines the values which require protection and is also likely to be difficult to implement (although it is currently permissible). The third approach seriously undermines the values which require protection, particularly if there has been a major impropriety. Any solution to the problem is unlikely to be free from difficulty but the Commission would welcome comments and suggestions. We are also interested to know how frequently real evidence is discovered as a result of a statement which is inadmissible, and how often it is necessary for a statement to be admitted in order to link real evidence to the defendant.

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332 As recently decided in *Lam Chi-ming v R*, see note **Error! Bookmark not defined.**

333 See further the article by Black, note **Error! Bookmark not defined.**



**The conduct of the trial**

206 The principles for the conduct of a voir dire in respect of statements made by a defendant are also applicable to a voir dire concerning other forms of evidence obtained improperly from a defendant. We consider that the principles outlined in para 0 should be applicable to jury and judge alone trials in which the admissibility of improperly obtained evidence must be determined.

207 We have also previously recommended that a warning should to be given in respect of a contested statement where it is the only, or substantially the only, evidence against the defendant (see paras 0-0). The warning may be particularly important if the court decides to admit an improperly obtained statement.

**QUESTIONING AFTER ARREST PROPOSALS**

208 As we have mentioned throughout this part of the paper, the rules controlling the questioning of suspects are an important part of the law concerning the admissibility of statements and improperly obtained evidence. In the next part of the paper the present law concerning police questioning and its problems are discussed, and proposals for reform are set out.



## PART III

### QUESTIONING AFTER ARREST



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## The Current Law and its Problems

### HISTORICAL SUMMARY

1 Primary responsibility for investigating the commission of offences has not always rested with the police. Statutes enacted in the 16th century provided for the examination by justices of the peace of persons arrested for murder, manslaughter or felony.<sup>334</sup> As well as interrogating the suspect, the justices examined other witnesses. The suspect had no right to be present or to examine or cross-examine any evidence.

2 Thus Sir James Fitzjames Stephen described the role of the justice at this time as that of public prosecutor,<sup>335</sup> and Glanville Williams has said that:

the justice of the peace was half magistrate, half police officer, and in the latter capacity acted very much like a police detective at the present time except that he was not so scrupulous ... the purpose evidently was to obtain if possible a confession from the defendant.<sup>336</sup>

3 It was in this context that the common law principle requiring an arrested person to be brought before a justice as soon as practicable developed. This principle was clearly expressed in *Wright v Court* in 1825:

it is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can, and the law gives no authority even to a

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334 1 & 2 Phil & Mary, c 13 (1554); 2 & 3 Phil & Mary, c 10 (1555). Stephen suggests:

it is probable .. that from the very earliest times magistrates would make a more or less formal inquiry before they took steps towards the arrest or bail of a suspected person, and it is not at all improbable that the two statutes in question may have given legal sanction to a practice which had grown up without express statutory authority. (Stephen, *A History of the Criminal Law of England* (Macmillan, London, 1883) Vol 1, 219)

335 Stephen, see note 1, 221.

336 Williams, *The Proof of Guilt* (3rd ed, Stevens, London, 1963) 44.

justice to detain a person suspected, but for a reasonable time til he may be examined.<sup>337</sup>

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337 (1825) 4 B & C 596; 107 ER 1182.



4 However, by the early 19th century with the development of the modern police force, responsibility for investigating offences had already begun to pass to the police. Although the statutes providing for the examination of arrested persons by justices of the peace were extended to cover misdemeanours,<sup>338</sup> the enactment of Sir John Jervis's Act<sup>339</sup> in 1848, which gave rise to the modern committal process, signalled a significant change in the role of the justice from an investigative function to a judicial one. This change was closely connected to the establishment of organised police forces:

the establishment of a regular police force ... may have put the magistrates in a new position in fact before the change was embodied in the statute law [Sir John Jervis's Act]. As a regular force was established, first in the towns and then in the country by which charges of crime were investigated, however imperfectly, the magistrates would naturally assume a more and more judicial position.<sup>340</sup>

5 Although the police assumed primary responsibility for investigating offences their ability to question persons suspected of having committed offences was restricted to pre-arrest investigations. Unlike the justices of the peace they were not given the authority to interrogate accused persons. Indeed, it was said that there was a duty on the arresting constable not to ask questions of the arrested person.<sup>341</sup> In an 1882 address to police constables Mr Justice Hawkins said:

Neither Judge, magistrate nor juryman, can interrogate an accused person ... . Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody.<sup>342</sup>

6 Although the authorities contained strong statements to the effect that police officers were not to question arrested persons, the admissibility of answers to questions put

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338 7 Geo 4, c 64, ss 2 & 3.

339 11 & 12 Vic, c 42.

340 Stephen, see note 1, 228-229.

341 See the comments of Prendergast CJ in *R v Potter* (1887) 6 NZLR 92, 96.

342 Reprinted in *Report of the Royal Commission on Police Powers and Procedure* (1929, Cmd 3297) 147. See, similarly, Williams J in *R v Barker and Bailey* [1913] NZLR 912, 920 - "The Magistrate before whom an accused person is brought has no power to question him, and it would be wrong for the Court to give its sanction to a practice which would have the effect of giving to the arresting constable greater powers than the Magistrate. The mischiefs which are likely to arise from a private examination by the police of a prisoner in custody are obvious"; and see *R v Booth & Jones* (1910) 5 Cr App R 177.

by the police in breach of this prohibition was seen as raising a distinct question.<sup>343</sup> On this issue Lord Sumner, delivering the advice of the Privy Council in *Ibrahim v R*, said:

The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. ... Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred.<sup>344</sup>

7 Notwithstanding the promulgation of the Judges Rules in 1912, the Royal Commission on Police Powers and Procedure in 1929 found the law uncertain and recommended a rigid instruction to the police that no questioning of a person in custody, about any crime or offence with which the person is or may be charged, should be permitted.<sup>345</sup> Nevertheless, some 50 years later the Royal Commission on Criminal Procedure said that the law had departed from the earlier authorities:

the criterion of having reasonable grounds for suspicion sufficient to justify arrest is not necessarily sufficient to justify a charge; hearsay evidence, for example, may be sufficient grounds for reasonable suspicion, but it is not sufficient for a person to be charged, since it will not be admissible as evidence at trial. Accordingly, the period of detention [upon arrest] may be used to dispel or confirm that reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest.<sup>346</sup>

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343 *Potter*, see note 8, 96; *Barker and Bailey* see note 9, 920.

344 [1914] AC 599, 614.

345 See note 9, 65.

346 The Royal Commission on Criminal Procedure *Report*, (January 1981, Cmnd 8092) 41. This view of the law in the United Kingdom was confirmed by the House of Lords in *Holgate-Mohammed v Duke* [1984] AC 437.

8 The provisions in the Police and Criminal Evidence Act 1984 (UK) relating to detention following arrest<sup>347</sup> must, therefore, be seen against the background of the previous law and practice in England. It was common for the police to detain arrested persons for an undefined period before charging them and bringing them before a court. In some instances this period of detention could be very lengthy. The Royal Commission expressed the view that the existing law was inadequate to regulate length of detention.<sup>348</sup> The Commission's proposals (and the provisions which are based on those proposals<sup>349</sup>) were intended to regulate and control police practices of long standing.

9 The law relating to detention by the police following arrest has, however, developed differently in Australia<sup>350</sup> and New Zealand, as compared to the United Kingdom, and remains much closer to the old common law position. The leading Australian decision is *Williams v R*.<sup>351</sup> An observation of Gibbs CJ in that case was applied by the New Zealand Court of Appeal in *R v Alexander*.<sup>352</sup> (The current law and practice in New Zealand are discussed at paras 14-19.) In *Williams* the High Court, interpreting a requirement that a person who is taken into custody is to be brought before a justice as soon as is practicable, held that the police were not entitled to delay, for the purpose of questioning, bringing an arrested person before a justice. This rule does not, however, preclude the police from questioning an arrested person. As expressed by Gibbs CJ:

The critical question is whether the arrested person was detained any longer than was reasonably necessary to enable him to be brought before a justice. If he is detained for the purpose of enabling him to be brought before a justice, the fact that he is questioned, whether about the offence for which he was arrested, or about

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347 A person who has been arrested may be kept in police detention for no more than 24 hours without being charged if such detention is necessary for the purposes of the investigation. In respect of serious arrestable offences a police officer may extend the detention period up to 36 hours in total, and warrants for further detention may be sought from a magistrate up to an outer time limit of 96 hours. Any detention is to be reviewed not later than six hours after it was first authorised and subsequent reviews are to be at intervals of not more than nine hours. See ss 37, 39-44. It should be noted that the vast majority of arrested persons are dealt with in 24 hours, Zander, *The Police and Criminal Evidence Act 1984* (2nd ed, Sweet & Maxwell, London, 1990) 81-82.

348 See note 13, 53.

349 See note 14.

350 This fact was expressly noted in judgments delivered in the High Court of Australia decision of *Williams v R* (1986) 161 CLR 278, 299, 310.

351 See note 17.

352 [1989] 3 NZLR 395.

other offences, will not necessarily mean that there has been a failure to bring him before a justice as quickly as was reasonably practicable. On the other hand, if he was detained, not for that purpose, but solely for the purpose of questioning him, the detention will be unlawful. The line may be a fine one, as it often is when a discretion has to be exercised in sensitive matters.<sup>353</sup>

10 Gibbs CJ differed, however, from the other four members of the High Court by accepting that in determining when it was reasonably practicable to bring an arrested person before a court, the police may be allowed time to make such inquiries as are reasonably necessary either to confirm or dispel the suspicion upon which the arrest was based.<sup>354</sup> In this respect his judgment also appears to be inconsistent with the approach taken by the New Zealand Court of Appeal.

11 Mason and Brennan JJ noted that the common law might be seen to strike an incorrect balance between personal liberty and the exigencies of criminal investigation. They stated, however, that any modification of the common law principle was a function for the legislature, which, if deciding as a matter of policy that change should be made in the interests of law enforcement, would be able to prescribe safeguards to provide protection in respect of the coercive aspect of custodial questioning.<sup>355</sup> Wilson and Dawson JJ expressed similar views<sup>356</sup> and stated that:

it is better that legislative change should take place against the background of the common law as it has been understood in this country, which has consistently viewed detention for the purpose of investigation as an unwarranted encroachment upon the liberty of the person. The experience of the common law is something which, in our opinion, should be borne steadily in mind if and when the changing needs of society appear to require statutory adaptation of the existing rules.<sup>357</sup>

12 Reforms and law reform proposals in Australian jurisdictions should, therefore, be seen against the background of the law as explained in *Williams*. The Crimes Act 1914

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353 See note 17, 285, and see Mason & Brennan JJ, 300-301. The section from the judgment of Gibbs CJ forms part of a longer passage which was cited with approval by the New Zealand Court of Appeal in *Alexander*, see note 19, 401-402.

354 See note 17, citing *Dallison v Caffery* [1965] 1 QB 348, 367.

355 See note 17, 296.

356 See note 17, 312-313.

357 See note 17, 313.

(Australia), as amended by the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991, provides that a person who has been lawfully arrested for a Commonwealth offence may be detained for a reasonable period not exceeding four hours for the purpose of investigating whether the person committed the offence or any other Commonwealth offence.<sup>358</sup> If the offence for which the person is under arrest is a serious offence, a judicial officer may extend the investigation period for a further period not exceeding eight hours. Reference should also be made to the relevant Victorian legislation and the recommendations of the New South Wales Law Reform Commission in its report *Police Powers of Detention and Investigation after Arrest*.<sup>359</sup> In Victoria an arrested person may be detained upon arrest for a reasonable time.<sup>360</sup> The New South Wales Law Reform Commission recommended that an arrested person may be detained by the police for the purposes of investigation for a reasonable time up to four hours. Under their proposals a judicial officer could extend the investigation period up to a maximum of eight additional hours.<sup>361</sup>

13 We have set out the foregoing historical and comparative summary because the development of the current law and the principles which lie behind it are relevant to any consideration of the proper basis for reform. In the remaining sections of this chapter we briefly review the current law and then discuss the need for reform. In the following two chapters we discuss the relevant principles and set out our proposals for reform, including the safeguards which are considered to be essential.

## THE CURRENT LAW AND PRACTICE

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358 Or two hours if the arrested person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander.

359 New South Wales Law Reform Commission, *Police Powers of Detention and Investigation after Arrest* (LRC 66 1990).

360 Section 464A of the Crimes Act 1958 (Victoria) (as inserted by the Crimes (Custody and Investigation) Act 1988). Even before *Williams* there were cases in Victoria in which evidence was excluded as obtained during an unlawful detention on the basis that an arrested person had not been brought before a justice as soon as possible. Section 460 of the Victorian Crimes Act was amended in 1984 to provide that an arrested person could be detained for a period up to six hours. This provision was re-examined in 1986 and a Consultative Committee, though finding that over 99.5 per cent of all consensual interrogations or investigations since the 1984 amendment had been completed within six hours of a suspect being arrested, recommended a change should be made to allow the police to detain an arrested person for a reasonable time: Consultative Committee on Police Powers of Investigation, *Report on section 460 of the Crimes Act 1958* (Victoria, 1986).

361 See note 26, 79. The New South Wales Law Reform Commission referred to the comments of Wilson and Dawson JJ, see note 24, in reaching their conclusions.

14 Rule 1 of the Judges' Rules states that:

When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

However, the police have no general power to detain a person against his or her will for questioning<sup>362</sup> and a police officer can only restrain a suspect by means of a lawful arrest<sup>363</sup> or by means of a lawful detention pursuant to a statutory power eg, s 13A of the Misuse of Drugs Amendment Act 1978 (power to detain on belief of internal concealment of Class A or Class B controlled drug).

15 A constable may arrest "Any person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment:" s 315 (2)(b) of the Crimes Act 1961. (Other statutory provisions also confer arrest powers.)

16 Section 316(5) of the Crimes Act provides:

Every person who is arrested on a charge of any offence shall be brought before a Court, as soon as possible, to be dealt with according to law.

The significance of the words "arrested on a charge" is unclear. The phrase does not discriminate between the distinct concepts of arrest and charge and could be interpreted as implying that arrest and charge are part of the same process. It is, however, probable that the words "arrested on a charge" were included in the section in order to allow for s 42 of the Crimes Act (which permits an arrest for breach of the peace which cannot itself be the subject of a charge). Section 23(2) of the Bill of Rights, which provides that "Everyone who is arrested for an offence has the right to be charged promptly or to be released," supports the conclusion that arrest and charge are to be distinguished.

17 Section 23(3) of the Bill of Rights (which reflects s 316(5) of the Crimes Act) provides that:

Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

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362 *R v Admore* [1989] 2 NZLR 210, 213.

363 *Blundell v Attorney-General* [1968] NZLR 341, 354.

In *R v Alexander*<sup>364</sup> it was held that s 316(5) of the Crimes Act requires that an arrested person be brought before the court as soon as is *reasonably* possible.

18 The decision in *Alexander* also establishes that, if an arrested person is being detained for the purpose of bringing him or her before a court, s 316(5) of the Crimes Act does not preclude questioning about the offence for which the person has been arrested or about other offences. However, the arrested person must not be detained any longer than is reasonably necessary to enable him or her to be brought before a court. If the person is detained solely for the purpose of questioning, the detention will be unlawful. Thus, while *Alexander* prohibits *delay* in bringing an arrested person before the court in order to question him or her it does not prohibit the questioning of an arrested person by the police.

19 It is impossible to reconcile the approach in *Alexander* with Rule 3 of the Judges' Rules if, as stated in the 1930 Circular, Rule 3 was never intended to encourage or authorise the questioning or cross-examination of persons in custody.<sup>365</sup>

#### THE NEED FOR REFORM

20 The uncertainty in the law is evidenced by the common perception that the combined effect of s 316(5) of the Crimes Act and Rule 3 of the Judges' Rules is that there is no scope for the questioning of persons once they have been arrested. Accordingly, police frequently delay making an arrest until there is sufficient evidence to charge the suspect.<sup>366</sup> This practice is followed even though there is no apparent distinction between the wording of the legal tests for arrest and for charge: "good cause to suspect" is the basis for arrest pursuant to s 315(2)(b) of the Crimes Act and "just cause to suspect" is specified in the prescribed forms of information set out in the Second Schedule to the Summary Proceedings Act 1957.<sup>367</sup>

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364 [1989] 3 NZLR 395.

365 An accessible source which contains the Judges' Rules and the 1930 Circular is *Adams on Criminal Law* (Robertson, Brooker & Friend, Wellington, 1992) ch 2.4.

366 We have been informed by the Commissioner of Police that "[a]lthough the criteria for arrest in section 315 Crimes Act and most other arrest powers is 'good cause to suspect' the reality is that arrest and charge have been intertwined in New Zealand for many years on a test of 'good cause to suspect and do suspect' or on the basis of a prima facie case".

367 For a case holding that there is a significant difference between the level of evidence needed to justify an arrest and the level needed to lay a criminal charge see *Hussien v Chong Fook Kam* [1970] AC 942, 948-949. *Hussien* envisages that a prima facie case is required for the laying of a charge (the power of arrest in that case required the lesser standard of "reasonable suspicion").

21 Where a police officer is not prepared to arrest a suspect (whether because there is insufficient evidence or because an arrest would hinder further questioning) the ability to question the suspect is dependent on his or her co-operation. Suspects are frequently questioned while "voluntarily co-operating with the police" or "voluntarily assisting the police with their inquiries". The process is clearly open to abuse and the Court of Appeal has in several cases criticised the actions of the police where a suspect has in fact been (unlawfully) detained for questioning without being arrested:

this is yet another example of detention of suspects for interrogation, amounting to cross-examination, where the police have not been prepared to arrest them and no doubt have not had enough evidence to arrest them. Persons who have been arrested have the right not to be cross-examined. The same applies to persons actually in custody though technically not arrested. There is no common law power in New Zealand to detain suspects for questioning. These principles are long-established; but it is apparent from case after case coming before this Court that the police are disregarding or trying to circumvent them.<sup>368</sup>

22 In the recent cases of *R v Butcher* and *R v Narayan*<sup>369</sup> the Court of Appeal held there is a presumption that statements obtained in breach of s 23(1)(b) of the Bill of Rights are inadmissible. Section 23(1)(b) states that a person who has been arrested has the right to consult and instruct a lawyer without delay and to be informed of that right. In *Butcher* a majority of the Court held that "arrest" for the purposes of the Bill of Rights includes de facto detention in police custody with intention or contemplation that the suspect will or may be formally charged.<sup>370</sup> Gault J, however, took the view that arrest does not include de facto detention. On the majority view a suspect who is unlawfully detained without being formally arrested is entitled to consult and instruct a lawyer and to be informed of that right.

23 The decisions in *Butcher* and *Narayan* have been the subject of discussion. In the present context we refer to two particular criticisms that have been made. The first is that, before *Butcher* was decided, police officers would have been justified in regarding the rights contained in s 23 as applying only upon a formal arrest.<sup>371</sup> The second is that it is

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368 *R v Fatu* [1989] 3 NZLR 419, 431, Cooke P. See also *Admore*, see note 29, 214.

369 *R v Butcher* [1992] 2 NZLR 257; *R v Narayan* (unreported, Court of Appeal, 15 April 1992, CA 80/92).

370 See note 36, 264. The majority decision defined de facto detention as a situation in which the suspect is not free to go or, possibly, in which what is said or done by the police causes the suspect reasonably to believe that he or she is not free to go.

371 If this criticism is valid, it is applicable only to interviews conducted before the date of the judgment (25 October 1991). This effect is not uncommon as appellate decisions frequently develop the law - "[g]iven the



difficult for front-line police officers to determine when a suspect will be judged to be in custody, and, therefore, to determine when advice of the right to consult a lawyer should be given.

24 It is, however, important to keep in mind that in each case the decisions rested on an implicit finding that the suspect was unlawfully detained;<sup>372</sup> and the judges were in agreement concerning the actual outcome in both cases. As we noted in para 21, the Court of Appeal has previously expressed concern about the practice of detaining suspects for questioning, warning in one instance that "[t]his case is close to the point where the Court must quash convictions in order to ensure that the police appreciate that they must comply with legal processes".<sup>373</sup> Indeed from a policy perspective it is difficult to justify affording less protection to suspects who are being questioned while unlawfully detained than to suspects who have been lawfully arrested. In our view the recent Court of Appeal decisions, rather than illustrating any practical difficulty arising from the operation of the Bill of Rights, are more appropriately viewed as highlighting problems with the underlying law relating to the questioning of suspects in custody.

25 Although the primary problem with the existing law is manifested in the practice of detaining people for questioning without arresting them, there are other concerns. In some cases suspects are questioned after arrest, Rule 3 of the Judges' Rules notwithstanding.<sup>374</sup> Moreover, the safeguard provided by s 23(3) of the Bill of Rights and s 316(5) of the Crimes Act is arbitrary in its operation in that it depends on the time of day a suspect is arrested. A person arrested at 5pm on a weekday need not be brought before a court until 10am the next morning and (in light of *Alexander*) may be questioned in the meantime. A person arrested at 11am on a weekday can, and therefore should, be brought before a court almost immediately, which leaves the police little opportunity to conduct further investigations. The Australian experience has been that police on occasions give themselves the maximum possible time to conduct their post-arrest investigations by deliberately effecting arrests late in the day.<sup>375</sup>

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nature of litigation, the development or clarification of the law will almost always be provided by the courts at and from a time *after* the time of the events or situations to which that new law is then applied" (*A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17 1990), para 196).

372 There is a question whether this would amount to an arbitrary arrest or detention in breach of s 22 of the Bill of Rights. See *R v Nikau* (1991) 7 CRNZ 214, 218.

373 See note 35, 432.

374 See paras 18-19.

375 New South Wales Law Reform Commission, *Police Powers of Detention and Investigation After Arrest* (LRC 66 1990), para 1.52.

26 Cooke P in *R v Fatu* suggested that the issue of detention for questioning might require the consideration of the legislature:

In the absence of statutory power, many police actions in their attempts to combat crime may well be today of at best doubtful legality. Convictions otherwise fully justified will be in real jeopardy if the issues about detaining and questioning suspects are not faced by the police and Parliament.<sup>376</sup>

In *Butcher*<sup>377</sup> Cooke P returned to this issue and said that he was not convinced that legislation increasing the powers of the police in dealing with suspects (which we understand to mean legislation authorising the detention of persons for questioning) is needed at the present time. Although not necessarily opposed to such legislation provided that there are adequate safeguards, the President pointed out that comparable jurisdictions had not conferred a power to detain for questioning persons who are not arrested.<sup>378</sup>

27 The Law Commission believes that a general power of this nature would be contrary to principle; under the criminal law an individual should not be able to be detained in the absence of good cause to suspect that the individual has committed a serious criminal offence (see para 59). Rather, the central issue, as it has been considered by law reform agencies and legislatures in both the United Kingdom and Australia, concerns the ability of the police to question persons who have been lawfully arrested (ie, in terms of the existing powers to arrest for good cause) but not yet charged and brought before a court.

28 As we earlier noted, the common law rule (now embodied in statute by s 23(1) of the Bill of Rights and s 316(5) of the Crimes Act) requiring an arrested person to be taken before a court as soon as possible developed at a time when interrogation was performed by a magistrate. At that time it was not seen as part of the police function to question the suspect. With the advent of the modern police force the investigation of crime became a police function, yet no specific provision was made to allow the police to detain people for the purpose of questioning.

29 The present law on its face poses difficulties for both the police and suspects. In the first place, the law is, in the various respects we have mentioned, arbitrary in its operation, uncertain, and (in its relationship to the Judges' Rules) contradictory. In the second place, the concept of "voluntary co-operation" in many instances masks situations of dubious legality. Though it might be argued that the police are not in fact unduly

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<sup>376</sup> See note 35, 432.

<sup>377</sup> See note 36.

<sup>378</sup> See note 36, 268.

hindered because the law is not strictly applied and enforced, this contention, even if accurate, does not remove the need for reform. On the contrary, it is a cause for concern in a system based on the rule of law when police practice does not correspond with the rules for criminal investigation. The rules for criminal investigation, as well as reflecting an appropriate balance between the interests of the community and individual rights (bearing in mind that respect for individual rights is in itself a community interest), should be both clear and observed by the police.

## II

### Proposals for Reform: Questioning after Arrest

#### A FORMAL QUESTIONING REGIME

30 The Law Commission proposes that clearly defined and specific provision be made to allow the police to question suspects after arrest and before charge and court appearance. Where the police have good cause to suspect that a person has committed an offence they will be able to arrest the person in order to ask questions about the person's alleged involvement in the offence for a defined period of time before being required to charge and bring the suspect before a court. The rights of the suspect, including the right of silence, will also be clearly specified. This will provide the police with a more satisfactory basis on which to conduct their inquiries. At present, given the uncertainty of the law and the inconsistency of its application, police officers are given little guidance as to what is acceptable or unacceptable in a given situation.

31 The regime should apply to offences for which an arrest can be made.<sup>379</sup> It is appropriate, however, to exclude from the regime any specific legislation governing the way in which evidence may be obtained from a suspect, provided such legislation contains satisfactory safeguards. Examples might be the evidential breath test and blood test provisions of the Transport Act 1962 and ss 63A-63M of the Misuse of Drugs Amendment Act 1978 (referred to in para 14). In due course all exceptions will need to be identified and consideration given to the safeguards which should apply in these special cases. It should also be noted that, though the ability to detain suspects for the purposes of investigation will arise only where there has been a lawful arrest, the safeguards of the questioning regime will apply in the wider range of circumstances outlined in para 76.

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379 As do the Judges' Rules, as the 1930 circular explains - "for the purpose of these rules the words 'crime' and 'offence' are synonymous and include any offence for which a person may be apprehended or detained in custody." Relevant rights under the New Zealand Bill of Rights Act 1990 apply when a person is arrested or detained under any enactment.

32 Thus, the Commission's approach in general aims to ensure that:

- the police in pursuance of their duty to investigate and prosecute crime are afforded a reasonable opportunity to question persons suspected of having committed criminal offences;
- voluntary co-operation is indeed voluntary; that the concept of "assisting the police with their inquiries" is not used when the detention is in fact unlawful;
- all arrested persons are subject to the same regime; that the extent of a suspect's possible exposure to police interrogation does not vary according to the time of day at which an arrest is made;
- the rights of the suspect, and the powers and obligations of the police, are clearly defined;
- there are proper protections for the suspect;
- there are effective means of ensuring that the provisions of the questioning regime, and particularly the safeguards, are complied with.

#### THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

33 It is necessary to consider whether a regime which allows for a period for questioning after arrest and before charge or before the arrested person is brought before a court is consistent with New Zealand's obligations under the International Covenant on Civil and Political Rights and the Bill of Rights. We first discuss the International Covenant which provides:

- 9(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- 9(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power ... .

34 What is required by the word "promptly" in these paragraphs? The term has been considered by the European Court of Human Rights in a case concerning Article 5(3) of the European Convention.<sup>380</sup> (That article is the equivalent of Article 9(3) of the

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<sup>380</sup> *Case of Brogan and others*, judgment of 29 November 1988, Series A, Vol. 145-B.

International Covenant and it can be assumed that the meaning of the word "promptly" will not be significantly different in the context of Article 9(2).) The court described Article 5(3) as enshrining:

a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.<sup>381</sup>

Judicial control of interferences by the executive with the individual's right to liberty was said to be an essential feature of this guarantee, which is intended to minimise the risk of arbitrariness. However, the court recognised that promptness (even as coloured by the use in the French text of the word "aussitôt" with its constraining connotation of immediacy) is a flexible concept which is to be assessed in each case according to its special features. Although it was emphasised that this assessment should never be taken to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority, the court implicitly accepted that the requirement of prompt appearance before a court did not preclude some period of investigation by the authorities after arrest and before being brought before a court.

35 Article 5(3) has also been considered on several occasions by the European Commission. In *X v The Netherlands*<sup>382</sup> the Commission stated that parties to the Convention "are given a certain margin of appreciation, when interpreting and applying the requirement as to promptitude laid down in Article 5, paragraph (3)".<sup>383</sup> A delay of four days in bringing an arrested person before a judicial officer was held not to be inconsistent with Article 5(3). (In *Brogan* the European Court expressly stated that it was not to be seen as determining whether this conclusion was right in respect of ordinary criminal cases.<sup>384</sup>)

36 In its *Interim Report: Detention before Charge* the Gibbs Committee (for the review of Australian Commonwealth criminal law) expressed the opinion that:

neither a provision allowing detention for a reasonable time, nor one which allowed detention for a fixed time such as six or even 12 hours, would contravene article 9(3) of the International Covenant on Civil and Political Rights ...<sup>385</sup>

The Gibbs Committee referred to both *Brogan* and the European Commission decisions.

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381 See note 47, para 58.

382 Yearbook of the Convention, Vol 9, 564 (1966).

383 See note 49, 568.

384 See note 47, para 60.

52 *Review of Commonwealth Criminal Law Interim Report: Detention before Charge* (Canberra, 1989), para 5.5.

In an earlier discussion paper<sup>386</sup> the Committee pointed out that the United States, England and Scotland have legislated to permit delays in bringing an arrested person before a judicial officer from six to 24 hours and that Canada requires an arrested person to be brought before a justice without reasonable delay and in any case within 24 hours. Those are all countries which have accepted the International Covenant on Civil and Political Rights.

37 To this list can be added Australian Commonwealth legislation enacted since the Gibbs Committee Report. Under the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991 a person arrested for a Commonwealth offence may, in defined circumstances, be detained for an investigation period of up to four hours (excluding time such as that spent in travel or facilitating communication with a lawyer). At the end of that period the arrested person must be brought before a magistrate as soon as practicable. The investigation time may be extended by a judicial officer for a period not exceeding eight hours. Similar legislation is in force in some Australian States.

38 A short delay in charging an arrested person and bringing them before a court would, therefore, appear to be consistent with the International Covenant requirements that an arrested person be informed promptly of any charges against him or her and be brought promptly before a judicial officer.

#### THE NEW ZEALAND BILL OF RIGHTS ACT 1990

39 The next question is whether such a delay would be in accordance with the requirements of the New Zealand Bill of Rights Act 1990. The relevant substantive provisions of the Bill of Rights are ss 23(2) and 23(3). If the questioning regime appears to infringe both or either of these provisions then it is necessary to consider whether in terms of s 5 of the Bill the apparent infringement is a reasonable limit which is demonstrably justifiable in a free and democratic society. The relevant sections provide:

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| 23(2) | Everyone who is arrested for an offence has the right to be charged promptly or to be released.  |
| 23(3) | Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.   |
| 5     | Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified |

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386 *Review of Commonwealth Criminal Law Human Rights in relation to the Commonwealth Criminal Law*, (1988), para 3.25.

in a free and democratic society.



40 Again, the requirement that a person be charged *promptly* or be released entails a degree of flexibility so that a charge need not follow immediately upon arrest. In the words of the White Paper:

a certain amount of time may elapse between arrest and the decision of the police whether they have enough evidence to charge the person.<sup>387</sup>

41 Although the White Paper version of what is now s 23(3) used the language of the International Covenant ie, "promptly",<sup>388</sup> it was replaced by the phrase "as soon as possible", presumably on the precedent of s 316(5) of the Crimes Act. Although "as soon as possible" may appear on its face to connote a greater degree of immediacy than "promptly", the Law Commission considers that it would be unrealistic to attach much significance to the difference when examining what is required by s 23(3).

42 The phrase "as soon as possible" clearly allows some latitude as to the length of time for which a person may be held after an arrest. For example, it may not be possible to immediately bring before a court a person who has been arrested during a weekend. And under s 316(5) of the Crimes Act, which similarly requires that every person arrested on a charge of any offence must be brought before a court as soon as possible, reasonable delay is permissible.<sup>389</sup>

43 In *Alexander*<sup>390</sup> the Court of Appeal said that it would have been unreasonable to expect the police to interrupt confessions which were voluntarily being given in order to bring the defendant before the court and that the delay involved was reasonable. This delay was, therefore, regarded as acceptable. Nevertheless it was held that delay in taking an arrested person before a court solely in order to question him or her conflicts with the requirement in s 316(5) that the person arrested be brought before the court as soon as possible.

44 This interpretation of s 316(5) of the Crimes Act should not necessarily be taken as leading to the conclusion that a statutory regime which would allow the bringing of an arrested person before a court to be delayed for the purpose of questioning would be inconsistent with s 23(3) of the Bill of Rights. Section 23(3) is to be interpreted, as with any other statutory provision, in the light of its purpose and in its context.

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387 *A Bill of Rights for New Zealand: A White Paper* 1984-85 AJHR A 6, 92.

388 See note 54, 13.

389 *Alexander*, see note 19.

390 See note 19.

45 The first point to be made is that the Bill of Rights, although not an entrenched constitutional document, is a declaration of rights. The President of the Court of Appeal has said that "a Parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand's commitment to internationally-proclaimed standards, is not to be construed narrowly or technically."<sup>391</sup> Similar statements have been made by other members of the Court. Likewise, in an early Canadian Charter decision Dickson J said:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill or Charter of Rights*, for the unrelenting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".<sup>392</sup>

46 In that case Dickson J was concerned with the interpretation of an entrenched constitutional document, whereas the New Zealand Bill of Rights was enacted as an ordinary statute and must yield to another inconsistent statute (s 4). Nevertheless, Dickson J's remarks remain apposite, particularly when the Bill of Rights is being used as a standard against which the executive and the legislature should measure proposals for new legislation.

47 Many Charter rights are, like that protected by s 23(3) of the Bill of Rights, pre-existing. The approach taken to the interpretation of those rights has been to recognise that some regard must be had to their pre-Charter meaning, but that some different effect or nuance may result from the wording or context. The simple fact that the right is now to be found in a constitutional document may indicate that its meaning is to be viewed in a different light:

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<sup>391</sup> *Butcher*, see note 36, 264.

<sup>392</sup> *Hunter v Southam Inc* (1984) 11 DLR (4th) 641, 649 (emphasis added).

In my opinion, the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the court.<sup>393</sup>

48 Similarly, the fact that a right is now to be found in an Act which aims to protect and promote human rights in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights may mean that the interpretation of a similar provision in the context of another statute may not be "a reliable guide to [the] interpretation and application" of the Bill of Rights provision.

49 As well as having regard to the general approach to be followed in interpreting the Bill of Rights it is necessary to consider the provisions which immediately accompany s 23(3). The requirement in s 23(3) that an arrested person be released or brought as soon as possible before a court must be read in conjunction with and following the requirements in s 23(1) that an arrested person be told at the time of the arrest of the reason for it, and in s 23(2) that an arrested person be charged promptly. A person must be charged before being brought before a court. Therefore the interpretation of the words "as soon as possible" must be coloured by the concept of "promptness" which, as we have seen, should be applied in a flexible manner. To an extent the scope of the meaning of "promptly" in s 23(2) is constrained by the use of the words "as soon as possible" in s 23(3). But, reading the provisions together and interpreting s 23(3) in its statutory context, a short delay, caused by the operation of the provisions of the questioning regime, in the process of charging an arrested person and bringing them before a court could be seen as consistent with s 23 of the Bill of Rights.

50 If the provisions of a questioning regime were to be regarded as infringing s 23(3) on its face, then it would be necessary to consider whether the apparent limitation is justified in terms of s 5 of the Bill. It should not be readily assumed that a limitation is justified. Indeed in the context of court proceedings the onus is on the party relying on s 5 to show that the limit is reasonable and can be demonstrably justified in a free and democratic society.<sup>394</sup>

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393 *R v Therens* 18 DLR (4th) 655, 675 (emphasis added).

394 *MOT v Noort* (1992) 8 CRNZ 114, 141, Richardson J.

51 A preliminary question is whether provisions which allow for a specified period of time before an arrested person must be brought before the court would simply limit the "as soon as possible" requirement rather than completely abrogate it. We consider that the general principle that an arrested person be brought before a court as soon as possible must remain. Our proposals therefore proceed on the basis that the police can only be authorised to delay bringing an arrested person before the court (for a defined period of time) in those cases where the police have reasonable grounds to believe that delay is necessary in order to secure or preserve evidence relating to the offence or to complete investigation into the offence. Accordingly, even if our proposals are considered inconsistent with s 23(3), they are no more than a limitation on the requirements of that section.

52 The limitation would be prescribed by law but would it be a reasonable limitation demonstrably justified in a free and democratic society? At its simplest this requires a consideration of whether the benefits of the legislation outweigh the detrimental effects of the limitation of the right contained in s 23(3) of the Bill of Rights.

53 In deciding this question, drawing on the Canadian jurisprudence in relation to s 1 of the Charter (on which s 5 of the Bill of Rights is based) and the recent discussion by Richardson J in the Court of Appeal decision of *MOT v Noort*,<sup>395</sup> regard should be had to:

- the importance of the objectives of the legislation (whether the limit relates to a purpose which is pressing and substantial in a free and democratic society);
- whether the means chosen to advance the objectives are proportional or appropriate to the ends (whether the limit is reasonable and demonstrably justifiable in a free and democratic society).

It is essential that an analysis of this nature is based on a sound factual foundation. It will be necessary to consider whether our description of current practice and our analysis of the problems with the present process are correct. Some insights will be gained from the experience and views of those who are closely involved with the issues. The Law Commission, in conjunction with the police, is also conducting a study of police questioning practices.

54 Three objectives of the questioning regime are relevant to the first of the two elements set out in the previous paragraph. The first is to ensure that the police are not unduly hindered in their function of investigating and prosecuting crime. The ability to put questions to persons reasonably suspected of being involved in criminal offending is an essential part of the modern police function. Some would say it is not adequately catered

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<sup>395</sup> See note 61, 140-141.

for by the existing law. Second, the desire that police practice should be in accordance with the law (with the rules for criminal investigation maintaining an appropriate balance between the interests of the community and individual rights) reflects a concern for the rule of law, which is the foundation of a free and democratic society. The questioning regime would contain safeguards to ensure that police procedures comply with the law. And a

third objective is equality; the questioning regime, unlike the present law, would apply equally to all arrested persons:

A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms ...<sup>396</sup>

55 The second element of the inquiry described in para 53 is whether the means are proportional or appropriate to the ends. The Supreme Court of Canada has termed this aspect the "proportionality test" and has suggested that, normally, there are three important components of this test:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... . Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". ... The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>397</sup>

With regard to the first limb of the proportionality test, the connections between the objectives of the questioning regime and the means by which the regime would seek to achieve those objectives are explained in para 54.

56 In considering the second limb it is necessary to bear in mind the warning of Dickson CJC in *Edwards Books and Art Ltd v R* that the criteria of the proportionality requirement are not to be applied in a rigid and inflexible way.<sup>398</sup> Subsequently, the Supreme Court of Canada has confirmed on a number of occasions that the absolutely least intrusive means need not be chosen in order for a law to pass the "as little as possible" test.<sup>399</sup> In the present context, given the objectives of the proposed questioning regime, no alternative approach to achieve those objectives in an appreciably less intrusive way is immediately apparent. Our survey of law reform initiatives in comparable

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396 *R v Big M Drug Mart Ltd* 18 DLR (4th) 321, 353, Dickson J.

397 *R v Oakes* 26 DLR (4th) 200, 227-228. See also *Reference re Public Service Employee Relations Act* 38 DLR (4th) 161, 203 cited by Richardson J in *Noort*, see note 61, 141.

398 35 DLR (4th) 1, 41.

399 *R v Swain* 5 CR (4th) 253, 290, Lamer CJC.

jurisdictions which have addressed similar problems to those with which we are now concerned has not revealed any proposals for a different approach.

57 In relation to the third limb of the proportionality test the extent of the intrusion on s 23(3) would not be substantial and, in light of the objectives of the regime, the limit is not disproportionate. What is involved is a limited period of delay (for questioning) before executive detention is subject to judicial supervision. Under the present law considerable (but variable) periods of delay for questioning are possible according to the day and time at which a person is arrested. If a questioning regime is implemented the writ of habeas corpus remains to a person who has been arrested without good cause. And in some instances the original suspicion will be dispelled during the questioning period or it will become clear that, although grounds for suspicion remain, there is insufficient evidence for a charge to be laid. In these cases the approach of the proposed regime will actually operate to protect the liberty of a suspect.

58 The conclusion to which this analysis leads is supported by reference to the law in other common law jurisdictions. As was stated in the White Paper:

The fact that a law similar to that under attack exists in the United Kingdom, the United States, Canada, Australia or Western Europe would tend to show that the law could be justified in a free and democratic society ... . This evidence would not of course be decisive. A judgment is to be made of the New Zealand situation and of the particular reason which gives rise to the legislation, but the comparative material would often be suggestive.<sup>400</sup>

The material cited in paras 36 and 37 would therefore support the conclusion that a questioning regime could, if necessary, be justified in terms of s 5. Again, however, the qualification made in the White Paper that regard is to be had to the New Zealand situation points to the importance of assembling the appropriate facts and proceeding on a well-informed basis in assessing the proposed limitation.

#### NO POWER TO DETAIN MERELY TO QUESTION

59 It is important to emphasise that the Law Commission is not proposing that there be a general power to detain persons for questioning when they have not been arrested. An arrest on traditional grounds (such as are set out in s 315(2)(b) of the Crimes Act ie, "good cause to suspect" the commission of an offence) is an essential prerequisite to the exercise of the power to detain for questioning. This is the standard adopted in other countries (eg, Britain and Australia) where a specific questioning power has been given to the police. Any lesser standard would be likely to allow arbitrary detention and would

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<sup>400</sup> See note 54, 74.

compromise unjustifiably individual liberty. It has, however, long been accepted that an individual's liberty may be constrained when there is good cause to suspect that he or she has committed a serious offence. It is also important to emphasise that an arrested person cannot be required to answer questions against his or her will ie, the right of silence remains: see para 125.

#### WHEN SHOULD THE QUESTIONING SAFEGUARDS APPLY?

60 Before discussing the specific safeguards of the questioning regime it is necessary to decide what circumstances or events will bring the safeguards into operation.<sup>401</sup> The operation of the safeguards cannot be limited simply to the case where a suspect has been arrested. At least in some circumstances the safeguards of the regime should apply to suspects who are being questioned without having been arrested. The question is how those circumstances should be defined. Two different perspectives (both of which are reflected in the Judges' Rules) need to be considered. Both perspectives apply to some factual situations but each also covers circumstances which are not covered by the other. The first perspective focuses on the coercive nature of questioning when a person is in custody. The second perspective focuses on the level of suspicion - whether the inquiry has moved from a general one and begun to concentrate upon a particular person or persons. We consider each perspective separately before suggesting that the rules as to when the safeguards come into operation need to take account of both.

#### Detention

61 The first perspective is that the need for safeguards arises from the coercive nature of questioning when a person is detained. Coercion acts to undermine a suspect's will and therefore safeguards are necessary to ensure that a suspect is afforded the opportunity to exercise the right of silence (see paras 88-90, and note Rule 3 of the Judges' Rules which provides that persons in custody should not be questioned without the usual caution).

62 Coercive pressures will be present in circumstances other than formal arrest. Indeed the Court of Appeal has recognised that *any* questioning of a person by the police will have coercive aspects.<sup>402</sup> Where, however, a person is aware that he or she is able to end the questioning process and leave the scene of the interrogation this in itself provides

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401 The safeguards in question are notification of the reason for questioning, the caution, rights of communication with a lawyer, friend, relative or consular officer, and the right to an interpreter and technical assistance.

402 *R v Edwards* (1992) 7 CRNZ 528, citing *Oregon v Mathiason* 429 US 492.



sufficient protection in respect of the coercive nature of questioning.<sup>403</sup> The central issue is whether the suspect is detained. This should be viewed from the suspect's perspective because the concern relates to the pressure that is brought to bear on the suspect's will. This is not to say that the issue should depend on the *particular* suspect's perspective as this could be unreasonable or impossible to verify. Rather the question should be determined objectively, that is, would a reasonable person in the position of the suspect have believed that he or she was detained. Thus, following an approach which is concerned solely with the coercive nature of custodial questioning, the safeguards of the questioning regime could be required when:

- a formal arrest occurs
- a reasonable person would, in the circumstances, believe that he or she was detained.<sup>404</sup>

63 Taking the coercion rationale to its logical extreme, it could be argued that the regime should also commence even if a suspect has an unreasonable belief that he or she is detained, provided the officer questioning the suspect is aware of that belief and does not disabuse the suspect of it. However, the Law Commission is of the view that an attempt to provide for this unlikely contingency would result in unnecessary complexity. The focus should be on whether the suspect is in fact detained.

64 Throughout the previous discussion we have referred to the question being whether the *suspect* is detained. We emphasise that it is not envisaged that the safeguards of the questioning regime would apply when the police are questioning a witness to, or the victim of, an offence; the questioning must relate to a person's possible involvement in the commission of an offence. This is important when considering how the safeguards of a questioning regime should apply to inquiries at a crime scene, particularly when the offence has taken place in a crowded public place, such as a hotel bar. The police, on arriving at the scene, will obviously need to question those present to ascertain what happened. Given that the police have no power to detain short of arrest, if a person whom the police have no grounds to arrest attempts to leave the scene then he or she must be

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403 One question is whether, in certain circumstances, a person being questioned should be expressly advised that he or she is free to leave, and, if so, what those circumstances should be: see para 92.

404 This could be expressed alternatively as when the suspect believes, on reasonable grounds, that he or she is detained. The advantage of this formulation is that it removes the need to provide the safeguards to a person who has reasonable grounds to believe, but does not in fact believe, he or she is detained. The disadvantage, however, is that, at least technically, it requires a police officer to consider the actual state of mind of the suspect. It is probably preferable to ensure that the test is completely objective, though this may on rare occasions require the safeguards to be extended to a suspect who does not in fact believe he or she is detained.

allowed to do so. If unlawfully detained he or she will have a civil cause of action for wrongful arrest or false imprisonment, or may make a complaint to the Police Complaints Authority. It would be unrealistic, however, in the situation described, to require the police to advise all persons present (most of whom would fall into the category of potential witnesses) of their range of rights.<sup>405</sup> Indeed, we cannot identify any valid policy ground for such a requirement. This general observation does not, however, apply in respect of a person who is the focus of suspicion, a suspect.<sup>406</sup> If such a person is in fact detained then he or she should be informed of the relevant rights.

65 In para 62 we suggested two circumstances which might bring the safeguards of the questioning regime into operation, namely if there is an arrest or if a reasonable person would believe that he or she is detained. We are conscious that the police have expressed concern that the decisions of the Court of Appeal in *Butcher* and *Narayan* make it difficult for front-line police officers to determine when a suspect will be judged to be detained and that a similar concern could be expressed about the second of the two circumstances we propose for bringing the safeguards into operation. The Law Commission's view is that too much emphasis should not be placed on the difficulty of determining when a person is detained ie, is in custody. Police officers must make the same judgment in respect of their potential civil liability for wrongful arrest or false imprisonment, and, indeed, the vital question in terms of the existing law is whether the person being questioned is in custody.<sup>407</sup> In Canada the same question arises in respect of s 10 of the Charter of Rights and Freedoms,<sup>408</sup> and our Court of Appeal has pointed out (referring to the matters which the Canadian courts take into account in determining this issue):

Factors of much the same kind are routinely taken into account when a question of whether there has been custody or detention arises in New Zealand under the Judges' Rules. Ever since *R v Convery* [1968] NZLR 426 it has been regarded as very much a matter of fact to be determined having regard to all the circumstances of the particular case.<sup>409</sup>

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405 In terms of the improperly obtained evidence rule the court will, however, be entitled to exclude any admission or confession obtained while a person is unlawfully detained.

406 In the sense that there is a positive reason to suspect that person, as opposed to the broader sense of a "suspect" being any person who has not been eliminated from the inquiry.

407 Rule 3 of the Judges' Rules requires persons in custody to be cautioned. The test is whether there was "conduct on the part of the police which caused the suspected person on reasonable grounds to think that he was in custody": *R v Convery* [1968] NZLR 426, 435, North P.

408 As it does by reason of the relevant case-law in the United States (*Miranda v Arizona* 384 US 436, and the Australian Commonwealth legislation (Crimes Act 1914 s 23B(b) & (c), as inserted by the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991).

409 *Edwards*, see note 69, 535.

66 Recognising that the issue will depend on all the circumstances of the particular case, the courts in determining whether a suspect was detained have regard to factors such as the place of the interrogation, the time of the interrogation, the degree of suspicion held by the investigating officer, whether the investigating officer would have let the suspect leave if he or she had attempted to do so, the persons present at the interrogation, the existence of physical restraint, who initiated the interview (and how), and the length and form of questioning.

67 The above factors are an indication of matters to which regard may be had, and are not to be applied rigidly or regarded as determinative in their own right without regard to all the circumstances. For instance, the question whether the investigating officer would have permitted the suspect to leave if he or she had attempted to do so is a relevant consideration but is by no means conclusive in itself. The issue is whether, from an objective viewpoint, the suspect was detained.

68 Two further situations require particular consideration - questioning at crime scenes (which we also referred to in para 64) and questioning at police stations. We accept that special difficulties are encountered by front-line officers confronted with suspected offenders at crime scenes. The majority of the US Supreme Court in *Miranda* said that "[g]eneral on-the-scene questioning as to [the] facts surrounding a crime" was not affected by their ruling that certain warnings must be given before a suspect is interrogated in custody.<sup>410</sup> Generally courts in the United States have held that questioning of a suspect at or near the scene of a crime is not custodial unless a formal arrest occurs. We consider that the fact that questioning takes place at the scene of a crime would militate against a finding that the person being questioned was detained.<sup>411</sup>

69 As to questioning at a police station, it is important to recognise that police stations are now required to be secure establishments. The fact that a suspect is questioned at a police station can, therefore, be viewed as a strong indication that he or she was detained (because, for example, doors frequently lock automatically), although this is will not be an invariable conclusion. In *Edwards* the Court of Appeal said:

The fact that [the police] are interviewing a suspect at a police station does not mean that he or she must inevitably be regarded as being detained.<sup>412</sup>

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410 See note 75, 477-478.

411 Depending always on the circumstances of the particular case. See eg, the fact situation which arose in *R v Kirifi* [1992] 2 NZLR 8 where the suspect was clearly detained when handcuffed to a fence, although he was not formally arrested until much later.

412 See note 69, 535. The court also cited *Oregon v Mathiason* 429 US 492, 495.

We have, however, been advised by the police that, given the concern to provide clear guidelines for investigating officers, the safeguards of the questioning regime should apply whenever a suspect<sup>413</sup> is being questioned at a police station. We accept this view.

### Level of suspicion

70 There is a rationale other than the coercive effect of custody for providing safeguards in respect of the questioning process. The courts, in determining when a caution should be given having regard to Rule 2 of the Judges' Rules,<sup>414</sup> have been concerned with the concept of "fairness".<sup>415</sup> In this context the application of the somewhat ill-defined fairness concept appears to reflect the view that where, in the words of the US Supreme Court in *Escobedo*,<sup>416</sup> "the process shifts from investigatory to accusatory" an adversarial situation has arisen in which it is proper for the suspect to have some advice of his or her rights. Thus, a distinction can be made between a general inquiry into an unsolved crime and an investigation which has begun to focus on a particular suspect or suspects. This distinction is consistent with the principle currently stated in Rule 1 of the Judges' Rules.<sup>417</sup>

71 Applying this distinction, where the police are simply making general inquiries into an unsolved crime they will not be required to advise those being questioned of the relevant rights.<sup>418</sup> The key issue, in this approach, is the level of suspicion which should exist before the person being questioned must be advised of his or her rights. In the United Kingdom a person whom there are "grounds to suspect" of an offence must be cautioned

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413 See note 73.

414 Rule 2 states that - "Whenever a police officer has made up his mind to charge a person he should first caution such person before asking him any questions or any further questions, as the case may be."

415 See *R v Rogers* [1979] 1 NZLR 307; *R v Murphy* (1988) 3 CRNZ 342.

416 *Escobedo v Illinois* 378 US 478.

417 See para 14 (when investigating crime there is no objection to police putting questions to anyone).

418 There has been considerable debate as to whether s 215 of the Children, Young Persons, and Their Families Act 1989 allows enforcement officers to undertake "general inquiries" before explaining rights under that section. A Ministerial Review Team reviewing the operation of the Act has recommended that s 215 be amended to make it clear that enforcement officers can make general inquiries without having to explain the relevant rights (*Report of the Ministerial Review Team on the Children, Young Persons, and Their Families Act 1989* (May 1992), 158). This recommendation has been accepted by the Government (*The Government's Response to the Report of the Ministerial Review Team* (May 1992), 46).

before being questioned in relation to that offence<sup>419</sup> and, if not arrested, must at the same time be informed that he or she is not under arrest and is free to leave<sup>420</sup>. (If present at a police station the suspect must be informed that he or she may obtain free legal advice.<sup>421</sup>)

72 It would appear, therefore, that in the United Kingdom the caution must be given at an earlier stage than is required in New Zealand under the Judges' Rules. In *Rogers*<sup>422</sup> it was said that a suspect must be cautioned where an investigating officer has evidence which, objectively considered, supports a prima facie case against the suspect (but compare *Wadde*<sup>423</sup> where it was suggested that in the interests of fairness a caution should be given when the person being interviewed by the police is regarded as a suspect).

73 In this context the approach which the Law Commission favours is that the appropriate safeguards should be provided when there are sufficient grounds to make an arrest ie, when there is *good cause* to suspect that the subject of an interview has committed an offence.<sup>424</sup> In our view these circumstances can be seen as marking the beginning of the "accusatory" stage, because the formal process of bringing the suspect before a court on a criminal charge could then be initiated.

74 It might be argued that the concept of coercion resulting from detention should be the sole basis for determining when the regime should commence. The laws in other comparable jurisdictions, in the main, centre on this issue.<sup>425</sup> Even assuming the

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419 Codes of Practice under the Police and Criminal Evidence Act 1984, Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) 10.1.

420 See note 86, 10.2.

421 See note 86, 3.15.

422 See note 82.

423 Unreported, High Court, Auckland, 25 October 1991, T119/91, 15-16.

424 "Good cause to suspect" is the standard required for an arrest under s 315(2)(b) of the Crimes Act 1961. The Commissioner of Police has pointed out that in practice arrest and charge have become intertwined and arrest powers have been exercised on the basis of a prima facie case, see note 33. Accordingly in the minds of many police officers "good cause to suspect" may denote a higher level of suspicion than is intended. The Commissioner has suggested that that intent be clarified by substituting a different formulation eg, "reasonable grounds for suspicion".

425 See note 75.

question of "focus" is to be determined objectively,<sup>426</sup> as opposed to an approach which attempts to ascertain what was actually in the police officer's mind, it may be difficult to determine in retrospect whether at the time there was "good cause to suspect" the subject of an interview.<sup>427</sup>

75 However the concept of focus has long been part of New Zealand law by virtue of Rule 2 of the Judges' Rules.<sup>428</sup> Further, it is in the Commission's view unacceptable, once there are grounds to arrest a person, for the requirement to inform that person of his or her relevant rights to rest upon whether the power of arrest has been exercised. Providing for a distinction based on whether an arrest has been effected would allow the evasion of the safeguards of the questioning regime.<sup>429</sup>

## Conclusion

76 Combining the tests in paras 62, 69 and 73, the Law Commission considers that the operation of the safeguards of the questioning regime should commence when:

- a person is formally arrested or could lawfully be arrested (ie, when a police officer has good cause to suspect),
- a police officer has grounds to suspect<sup>430</sup> that a person has committed an offence and that person
  - is at a police station, or
  - has reasonable grounds to believe that he or she is being detained.

Thus, the instance of a suspect being questioned at a police station aside, the regime will apply when there has been an arrest or in situations which are analogous to arrest, either in terms of the restraint which operates on a suspect's liberty (the first perspective) or the level of suspicion which exists in relation to a particular suspect (the second perspective).

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426 *Rogers*, see note 82.

427 It will probably be more difficult to determine this question than to determine whether a suspect was in custody, see paras 65-67.

428 See note 81.

429 In *Butcher* (see note 36), the interviewing officer stated that he had delayed arresting a suspect (whom he had decided to charge) until after the interview so that he would not have to inform the suspect of his right to a lawyer (262). Cooke P said that it would be wrong for the Court to countenance such tactics (266).

430 See note 73.

## FURTHER ISSUES

77 Several further issues must be addressed. These relate to:

- the application of the safeguards of the questioning regime to undercover operations;
- planted cellmates;
- the application of the safeguards of the questioning regime to 111 emergency calls;
- when time should start running for the purpose of determining when a suspect should be brought before a court.

We discuss each of these in turn.

78 The Law Commission is of the view that undercover operations should be specifically excepted from the operation of the questioning regime. It would be impractical to require that the proposed safeguards should apply in an undercover situation and, indeed, there is no good reason to do so. In that situation the undercover officer is essentially no different from any other person - he or she is not acting as, and will not be seen as, a person in authority.<sup>431</sup>

79 The planting of an undercover police officer or police informer in a suspect's cell in an attempt to elicit an incriminating admission requires separate attention.<sup>432</sup> (This practice is to be distinguished from the situation which arises when a suspect makes remarks to a cellmate which are then passed on to the authorities.) A suspect in a cell will have been informed at some earlier stage of the right of silence and the right to consult a lawyer. The use of "planted cellmates" may then be seen as a practice which subverts the free and informed exercise of those rights.

80 One approach would be to preclude the use of a "planted cellmate" to obtain evidence which would be admissible against the suspect in question.<sup>433</sup> There is some attraction in this position, and it does reflect current police practice.

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431 See *R v Christou*, *The Times*, London, June 1 1992.

432 We believe that it is necessary to address this issue even though we have been informed by the police that "planted cellmates" are not utilised on the basis that they will later be called to give evidence.

433 Planted cellmates could still be used for investigatory purposes eg, to learn the timetable for future drug importations.

81 However, an absolute prohibition is not required by principle. In the United States the position is that, once an individual's constitutional right to a lawyer has arisen,<sup>434</sup> incriminating statements elicited from the individual by the government, in the absence of a lawyer, are inadmissible.<sup>435</sup> If the statements are not elicited then they are admissible.<sup>436</sup> In Canada the focus is similarly on whether the statements have been elicited by an agent of the State,<sup>437</sup> although the underlying rationale is expressed in relation to the right of silence under s 7 of the Charter<sup>438</sup> rather than the right to a lawyer.

82 The Law Commission favours following the North American approach. Where an undercover officer remains a passive observer the officer is, in this context, no different from any other prisoner. We do, however, have some reservations based on the practical difficulties of determining whether a statement was in fact elicited. We welcome views.

83 The test discussed in para 73 (sufficient grounds to make an arrest) would cater for the situation which arose in *R v Murphy*<sup>439</sup> (initial inculpatory statements made during course of 111 emergency call - no caution given - inculpatory statements made later in the call ruled inadmissible). However, in this situation it would be impractical to require anything more than that the caller be cautioned and the other safeguards would not apply.

84 The preceding discussion has been concerned with the question of when the safeguards (the caution and any other necessary advice) should apply. But another important safeguard is that the charging and bringing of an arrested person before a court can only be delayed for a limited period. It is, therefore, essential to provide a time limit on the period during which an arrested person may be questioned. Our views concerning the appropriate time limit are set out in paras 136-143, but at this juncture we point out that the time limit provisions apply only to the situation where a suspect has been *formally arrested*. We consider that no time limit should apply if there is good cause to suspect that a person

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434 In terms of the Sixth Amendment to the US Bill of Rights the right to a lawyer arises after adversary proceedings have been initiated against a defendant. It is important to note that this is a question of the suspect being indicted rather than merely arrested.

435 *Massiah v United States* 377 US 201.

436 *Kuhlmann v Wilson* 477 US 436.

437 *R v Hebert* (1990) 57 CCC (3d) 1; *R v Broyles* [1992] 1 WWR 289.

438 As explained in *Hebert*, see note 104. The suspect has the right to choose whether he or she will speak to the authorities. To assist in that choice, the suspect is given the right to a lawyer. The State therefore must not resort to tricks which would effectively deprive the suspect of his or her choice.

439 (1988) 3 CRNZ 342.



has committed an offence but that person is not in custody and is free to go - in other words, if the suspect is in fact voluntarily co-operating.<sup>440</sup> And to apply the time limits to *any* custodial questioning of a suspect, even if the suspect has not been formally arrested, would create the (mistaken) impression that it is legitimate to detain for questioning a person who has not been arrested provided that the detention is for a limited time.

85 We emphasise that we have in this section of the paper been focusing upon when any proposed safeguards should apply. Though our proposals take into account that a police officer may wrongly detain a suspect on grounds which are insufficient under the law, they do not in any way justify such a detention. Rather they are designed to ensure that, even in the case of an unlawful detention of a suspect, the safeguards (apart from the time limit) are observed. Existing remedies or consequences arising out of an unlawful detention will continue and the court will be entitled to exclude any confession made during an unlawful detention on the ground that it was improperly obtained (even if the recognised warnings and other safeguards of the questioning regime were observed).<sup>441</sup>

86 It may be suggested that, if suspects are informed of their rights, the courts will be reluctant to rule relevant statements inadmissible on the basis that they were obtained during an unlawful detention. On that assumption, it could be contended that our proposals may have the unintended effect of encouraging the practice of unlawfully detaining people for questioning:

If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted ... . Arrests made without warrant or without probable cause, for questioning or "investigation", would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.<sup>442</sup>

87 We earlier expressed the firm view that there should be no general power to detain for questioning persons who have not been arrested.<sup>443</sup> We have also pointed out<sup>444</sup> that a

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440 A person in this situation should be informed, however, that he or she is free to go, in order to prevent reliance on "voluntary co-operation" undermining the balanced approach of the questioning regime; see para 92.

441 See eg, *Dunaway v New York* 442 US 200.

442 *Brown v Illinois* 422 US 590, 602. See also *Dunaway*, note 108.

443 Para 59.

444 Para 85.

statement made during an unlawful detention will be improperly obtained even if the safeguards of the questioning regime have been complied with. Though it will be possible for the court to admit such a statement on the ground that its exclusion would be contrary to the interests of justice, we think the court will rarely consider this to be appropriate. The alternative approach is simply to provide that any statement obtained during an unlawful detention is inadmissible. The problem with this approach is its rigidity. The Commission's present view is that under our preferred approach the courts will have the ability to admit a statement obtained during de facto detention due to some minor transgression, but will generally require that such statements be excluded from evidence.

### III

## Proposals for Reform: Safeguards

### SAFEGUARDS

88 Since custodial questioning is inherently coercive any regime which permits the questioning of arrested persons must include appropriate safeguards to ensure that improper pressure is not brought to bear on those persons:

custody in itself and questioning in custody develop forces upon many suspects which, in Lord MacDermott's words, so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent.<sup>445</sup>

89 Clearly the proposed regime will, in practice if not in principle, impinge on the right of silence, at least as it relates to silence in response to police questioning. It could be argued that a full recognition of the right of silence would not allow any questioning of detained persons by State officials. However we consider that a reasonable balance is struck by providing individuals with a proper opportunity to exercise the right.

90 The Law Commission, therefore, considers there should be safeguards to ensure that persons subject to the questioning regime are given a proper opportunity to exercise the right of silence. The safeguards in some instances reflect the provisions of the Bill of Rights. In other instances they operate in addition to the requirements of the Bill of Rights (eg, the Bill of Rights requires advice of the reason for arrest whereas the safeguards require advice of the reason for questioning). Where the Bill of Rights requires advice to be given in a different way or at a different time, the requirements of the Bill of Rights will need to be complied with in addition to the questioning safeguards.

#### **Notification of reason for questioning**

91 Natural justice requires that any person (whether arrested or not) whom the police seek to question in relation to the commission or possible commission of an offence by

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445 The Royal Commission on Criminal Procedure *Report*, (January 1981, Cmnd 8092), 94.

that person be given an indication of the matters about which questions are to be put:

once a suspect is being interviewed he is entitled to know the nature and gravity of the offence it is alleged he has committed. Without such information being made known to him, at the time he is cautioned, his right to silence as conveyed in the caution has not been related to the purpose of the inquiry.<sup>446</sup>

The Commission, therefore, considers that before being questioned a suspect must be informed of the reason for questioning. This is in addition to the Bill of Rights requirement that an arrested person be informed of the reason for arrest.<sup>447</sup>

92 Further, we consider that persons who have not been arrested but who are being questioned by the police in a situation where a caution is required<sup>448</sup> should be informed that they are free to leave. If not so informed there is a danger that suspects will wrongly assume that they are under arrest, particularly in light of their being cautioned and informed of the right to a lawyer. Once the police are given a specific opportunity to question suspects following arrest it is important to ensure that, where a suspect is co-operating with the police, the co-operation is indeed voluntary. We point out, however, that the proposal for a "free to leave" warning does not require the warning to be given until the suspect is in a situation where the giving of a caution is required.

### The caution

93 The questioning regime is based on the premise, reflected in part by s 23(4) of the Bill of Rights, that any person has the right to remain silent in response to police questioning. The issues concerning silence before trial are discussed in detail in chapter II of part I of this paper.

94 It is important that the caution effectively communicates the nature of the right.<sup>449</sup> If

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446 *R v Tihi* (1990) 5 CRNZ 472, 483.

447 The requirements of s 23(1)(a) of the Bill of Rights and s 316(1) of the Crimes Act (which are statutory formulations of the common law rule that persons who are arrested are to be informed at the time of the arrest of the reason for it) address a different concern. A person is entitled to resist an arrest unless that arrest is lawful. Without knowing the reason for the arrest a person will not know whether he or she is obliged to submit. See *Christie v Leachinsky* [1947] AC 573, 591, Lord Simonds, and 598, Lord du Parc.

448 A caution is required in the circumstances described in para 76.

449 Rule 5 of the Judges' Rules states that the caution to be administered to a prisoner, when he or she is formally charged, should be in the following words - "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence"; but see note 91.

the Commission's recommendation is accepted that no adverse consequences should follow from a person's silence in response to police questioning (as distinct from silence in court), then the caution could be reworded as follows in the interests of clarity:

You have the right to remain silent and you may exercise that right at any time. You do not have to make any statement and you do not have to answer any questions. If you do make a statement or answer any questions, anything you say will be recorded and may be given as evidence at court.<sup>450</sup>

95 An alternative caution, which is in very similar terms to the standard caution which is currently being used in New Zealand,<sup>451</sup> is that contained in the Codes of Practice under the Police and Criminal Evidence Act 1984 (UK):

You do not have to say anything unless you wish to do so, but what you say may be given in evidence.<sup>452</sup>

Although the suspect is not told expressly that he or she may remain silent at any time, this formulation of the caution does have the advantage of simplicity. As the concern is to ensure that the person receiving the caution will actually understand it, the Law Commission favours this alternative,<sup>453</sup> which does not differ substantially from the terms of the present standard caution.

96 If the right of silence is exercised attempts to undermine the exercise of the right are unacceptable: see paras 125-126.

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450 This caution is based on the caution proposed by the New South Wales Law Reform Commission, *Police Powers of Detention and Investigation after Arrest* LRC 66 (1990), 59.

451 The standard caution which is currently being used in New Zealand (other than at the time of formally charging the suspect) is as follows - "You are not obliged to say anything, but anything you say may be given in evidence."

452 See note 86, 10.4.

453 With some minor modifications - "You do not have to say or do anything unless you want to. If you do say or do anything, what you say or do may be given as evidence in court." When the interview is to be video-taped it will be desirable to alter the caution by stating "What you say or do may be recorded and shown in evidence": see *R v Edwards*, note 69.

## Right to consult and instruct a lawyer

97 Section 23(1)(b) of the Bill of Rights provides that:

Everyone who is arrested or who is detained under any enactment -

- (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right ... .

98 Provision of access to legal advice is a means of ensuring that the right of silence is not improperly infringed and that the questioning process is fair. Thus in a number of jurisdictions legal advice for the suspect is regarded as a central component in the compromise between the competing values at work in the questioning process. The Court of Appeal has recently emphasised the importance of the right to consult a lawyer:

The right to consult a lawyer is part of our basic constitutional inheritance. Not surprisingly it is also a central feature of contemporary international statements of human rights. The right is pivotal in assuring so far as possible that both those detained and those detaining them act in accordance with the law. It recognises the reality that an individual who is arrested or detained is ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State. Access to counsel is a means of reducing that imbalance and of ensuring that anyone arrested or detained is treated fairly in the criminal process. In that regard the right to a lawyer facilitates access to knowledge and also allows for representation by an independent intermediary.<sup>454</sup>

99 The Commission's view is that if the right to consult and instruct a lawyer is to provide an effective safeguard for all persons suspected of having committed an offence then a system should be instituted whereby legal advice is available to suspects who would otherwise be unable to afford a lawyer. Further, in many cases a suspect will not have a lawyer or know how to contact a lawyer; and if a suspect does have a lawyer that lawyer may not be available. Also, the practical exigencies of police investigations are such that many interviews will inevitably be conducted outside of daytime working hours when it may both be difficult to contact a lawyer and to arrange for the lawyer to attend at the police station for the purpose of advising a suspect.

100 The most obvious way of addressing these concerns is to extend the duty solicitor scheme to provide for legal assistance at police stations on a 24 hour basis. Such a scheme exists in England and Wales. A major review of the provision of legal assistance

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<sup>454</sup> Noort, see note 61, 136, Richardson J.

at police stations, conducted for the Lord Chancellor's Department and published in 1989, concluded that:

Duty solicitors provide a valuable safety net both for suspects who have no solicitor and for those who cannot secure the help of their own solicitor. Significantly, the police station in our study which had no duty solicitor scheme ... did have very low rates of request and provision of advice.<sup>455</sup>

101 The study found that around 25% of suspects requested legal advice before charge and a little less than 20% (of all suspects) actually received it. This "gap" was due largely to the unavailability of solicitors. In only half of the cases where legal advice was requested did a legal advisor actually attend at the police station. The rest of the suspects received no legal advice (most of these cancelled their requests) or were advised by telephone.

102 The study revealed that, while fears had been expressed that the provision of access to legal advice would regularly frustrate police questioning, most police officers actually believed that this was not the case.<sup>456</sup> Although most lawyers informed their clients of the right of silence few advised their clients to exercise it; and few suspects exercised their right of silence or simply denied police allegations without explanation.<sup>457</sup>

103 Any extension of the duty solicitor scheme along the lines suggested would have obvious cost implications. Cost considerations will, therefore, need to be taken into account in determining how legal advice can be provided, but it must be stated that without a scheme for legal assistance the effectiveness of the safeguard provided by the right to consult a lawyer will be dependant on a person's social or financial status as well as such arbitrary factors as the time of day at which a suspect is being questioned.

104 The funding issue is one which has already arisen in the context of facilitation of

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455 Sanders et al, "Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme", (Lord Chancellor's Department, November 1989), 183.

456 In *Noort*, see note 61, Hardie Boys J pointed out that the involvement of a lawyer may facilitate the criminal process, 130. See also Richardson J, 136, citing Dixon, "Common Sense, Legal Advice and the Right of Silence" [1991] Public Law 233.

457 The Home Office Working Group on the Right of Silence noted surveys conducted by the Metropolitan Police and the West Yorkshire Police which showed that the proportion of interviews where the suspect exercised his or her right of silence was significantly higher where the suspect had legal advice: *Report of the Working Group on the Right of Silence* (London: Home Office, July 1989), Appendix C. However it is not possible to say whether the results of these surveys are statistically sound: Zander, *The Police and Criminal Evidence Act 1984* (2nd ed, Sweet & Maxwell, London, 1990), 123.

the right to consult and instruct a lawyer under s 23(1)(b) of the Bill of Rights. The legal profession has recognised the need for readily available legal advice and the New Zealand Law Society has pointed out that the provision for payment of lawyers who give advice is essential to ensure that effective arrangements are made. The Legal Services Board is considering proposals for a scheme to enable payment.<sup>458</sup>

105 The Law Commission considers that effective access to legal advice is an essential component of the proposed questioning regime, to the extent that, in the absence of such access, we would not recommend that provision be made to enable the questioning of suspects after arrest and before charge.

106 An important aspect of the right to a lawyer is that questioning of a suspect who has requested legal advice will have to be deferred until such time as the suspect has consulted with a lawyer. If a lawyer cannot be contacted despite reasonable attempts to do so or where a lawyer, having agreed to attend at a police station to advise a suspect, does not arrive within a reasonable time (which may be subject to an outside limit of, say, two hours) the police should be able to endeavour to question the suspect.<sup>459</sup> It will, however, then be open to the suspect to elect to exercise the right of silence on an unqualified basis (or on the basis that the suspect is not willing to say anything until legal advice is available<sup>460</sup>). Prior, therefore, to any questioning after a suspect fails to achieve access to legal advice the suspect should again be cautioned and advised of the reason why the police are seeking to question in the absence of a lawyer.

### Access to a friend or relative

107 Detention for questioning following an arrest will inevitably disrupt the detained person's everyday activities. In other questioning regimes it is a common provision<sup>461</sup> for the arrested person to be given the right, before any questioning commences, to contact a friend, or relative or a person with an interest in the suspect's welfare and to tell such person of the reason for the arrest.

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458 *LawTalk* (Newsletter of the New Zealand Law Society), June 22 1992, 5, where it was reported that "it now seems likely that the Legal Services Board will arrange payment for those called out to give advice, under a stand alone variation of the duty solicitor scheme." See also *LawTalk*, July 20 1992, 5.

459 This provision is necessary to address the valid concern of the police that they have no control over the facilitation of the right of access to a lawyer. The suspect may choose to waive the right (see eg, *R v Biddle* (unreported Court of Appeal, 18 February 1992, CA 432/91)).

460 Given that the suspect has the right to remain silent throughout, there can be no objection to the suspect's decision to speak being conditional on having obtained the advice of a lawyer.

461 See eg, Police and Criminal Evidence Act 1984 (UK) s 56; Crimes Act 1958 (Victoria) s 464C; Crimes Act 1914 (Australia) s 23G(1)(a).



108 The police have expressed the view that a suspect should not have the right to contact friends or relatives prior to being interviewed. Their concern is that, for example, accomplices may be alerted through such contact and that, until the suspect has been interviewed,<sup>462</sup> the officers involved will not know whether there is a likelihood of this occurring. The Law Commission considers, however, that there are extra pressures present when a suspect is questioned while being held incommunicado. We think that the police concern is adequately addressed by allowing for advice of this right to be delayed in certain circumstances (see paras 114-121). This is the approach which is taken in other jurisdictions.<sup>463</sup>

109 The right to contact a relative or friend can be extended to allow the suspect to have another lay person present during the questioning process. This is already the case in New Zealand under the regime established by the Children, Young Persons, and Their Families Act 1989. Prior to the questioning of a child or young person in relation to the commission or possible commission of an offence by that child or young person, an enforcement officer must give notice of the right to consult with, and give any statement in the presence of, a nominated person. (See part II para 34 where we indicate that our present inquiry excludes the provisions of the Children, Young Persons, and Their Families Act.)

110 The Commission inquires whether this form of protection should be extended to members of other vulnerable groups eg, intellectually handicapped persons. If so, how should those groups be identified? Not only will there be problems involved in defining vulnerable groups, but it may also, in practice, be difficult for a police officer to determine whether a particular suspect falls within a vulnerable group as defined. It may be that the concerns relating to the questioning of vulnerable persons are adequately addressed by the rules requiring that statements are reliable and properly obtained (see part II paras 127-140 and 162-187).<sup>464</sup>

## Interpreter

111 It is obviously essential to ensure that both the questions and answers are clearly

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462 This of course depends on the suspect choosing not to remain silent.

463 A study of the operation of the Police and Criminal Evidence Act 1984 (UK) has shown that the exercise of the right under s 56 to have someone informed when arrested was delayed in less than one per cent of cases: Brown, "Detention at the Police Station under the Police and Criminal Evidence Act 1984" (Home Office Research Study No 104, 1989).

464 This observation does not relate to the provisions of the Children, Young Persons, and Their Families Act 1989.

understood. A suspect should be provided with an interpreter wherever that is necessary. This would include suspects with language difficulties and also those who have impaired hearing or sight or have some other physical disability affecting their capacity to communicate. Advice of this right should form part of the initial advice given to a suspect along with the caution and reminder of the right to consult a lawyer. It should be noted that this right is not intended to cover mental disability affecting a suspect's ability to understand and respond to questions. Concerns of that nature are addressed by the rules requiring that statements be reliable and properly obtained.

112 There are wider concerns relating to the use of interpreters, in particular with regard to their independence and the procedures by which statements are recorded.<sup>465</sup> It is, however, impractical to address such matters in the legislation concerning the questioning regime. Nor do we favour the legislative promulgation of a detailed code of rules for police questioning (see the discussion in paras 132-135). These concerns are best addressed by internal police guidelines and the rules requiring that statements are reliable and properly obtained (see para 110).

### **Consular assistance**

113 Suspects who are foreign nationals should, in accordance with Article 36 of the Vienna Convention on Consular Relations,<sup>466</sup> be allowed to communicate with their High Commission, Embassy or Consulate and should be informed of this right.

### **DELAY IN AFFORDING RIGHTS**

114 The Law Commission seeks views on whether the questioning regime should in some circumstances permit delay in affording a suspect the right to communicate with his or her lawyer, friends or relatives.<sup>467</sup> Under the Australian Commonwealth legislation, the Crimes Act 1914 as amended by the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991, the requirement to notify and facilitate these rights may be delayed if, and for so long as, the investigating official believes on reasonable grounds that compliance with the requirement is likely to result in:

- an accomplice of the person taking steps to avoid apprehension; or

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465 See eg, *R v Narayan* see note 36, 3 and the judgment at first instance (unreported High Court, 18 September 1991, T 122/91).

466 See the First Schedule to the Consular Privileges and Immunities Act 1971.

467 A closely related issue is whether questioning can take place prior to the facilitation of the safeguards in circumstances of great urgency where there is a danger to other persons: see paras 122-123.

- the concealment, fabrication or destruction of evidence; or
- the intimidation of a witness.

A further possible ground for delaying the notification of the rights is that notification would hinder the recovery of any property relevant to the alleged offence.<sup>468</sup>

115 Similar provision is made in the Police and Criminal Evidence Act 1984 (UK) in respect of the right of access to legal advice and the right to have someone informed when arrested. However under that Act delay is permitted (only in the case of a person who is in detention for a serious arrestable offence) if the officer in question<sup>469</sup> has reasonable grounds to believe that the facilitation of the right *will* result in one of the consequences listed.<sup>470</sup>

116 No distinction is made in these jurisdictions between delaying communication with friends and relatives and delaying access to a lawyer. However the Law Commission considers that different issues are raised by these situations.

117 Delaying access to a lawyer could be justified only in rare cases. In *R v Samuel*,<sup>471</sup> the leading English decision on the provisions in the Police and Criminal Evidence Act regarding delay in access to lawyers, the Court of Appeal said that the provisions required a belief on the part of a police officer, having regard to the particular lawyer involved, that one of the consequences listed would very probably happen if the suspect was allowed to consult with that lawyer. Therefore, the officer must believe that the lawyer will commit a serious criminal offence - "[w]e think that the number of times that a police officer could genuinely be in that state of belief will be rare."<sup>472</sup> Alternatively a lawyer would have to pass on a coded message unwittingly - an expectation that this might occur would

contemplate a degree of intelligence and sophistication in persons detained, and perhaps a naivete and lack of common sense in solicitors, which we doubt often occurs.<sup>473</sup>

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468 As under the Police and Criminal Evidence Act 1984 (UK) ss 56(5)(c) and 58(8)(c).

469 The officer must be of at least the rank of superintendent.

470 See also the Crimes Act 1958 (Victoria) s 464C.

471 [1988] 1 QB 615.

472 See note 138, 626.

473 See note 138, 626.

118 Indeed, there is a strong case for saying that the police should not be able to deny access to a particular lawyer. The New South Wales Law Reform Commission took this view, saying that lawyers must have conformed with a "good character" requirement to practise law and therefore should be entrusted to provide legal representation without being subject to an additional test determined by a police officer on an occasional basis. The appropriate course of action if there is evidence that a lawyer is involved in criminal or unethical conduct is to initiate criminal or disciplinary proceedings. The Commission's proposals, therefore, did not permit a delay in the provision of the right of access to a lawyer:

To authorise police to delay or forbid communications with lawyers would permit police to effectively "black ban" certain lawyers and disadvantage their clients.<sup>474</sup>

119 The Law Commission would like to receive views concerning this issue, but at present proposes that provision should be made for the very rare cases where the police would be justified in delaying access to a particular lawyer, for example, where they have reasonable grounds to believe that the lawyer is a party to the offence for which the suspect is to be interviewed. The formula used in the Police and Criminal Evidence Act 1984 (UK) would ensure that the provision is invoked only in exceptional cases. Any decision to delay<sup>475</sup> access to a particular lawyer should be made by a commissioned officer, and, in that event, the suspect must be allowed to seek advice from another lawyer.<sup>476</sup>

120 The position with regard to the delay of communication with friends or relatives is different. This safeguard is not guaranteed by the Bill of Rights, and is of somewhat less importance than the right of access to a lawyer.<sup>477</sup> Further, it is more likely than in the case of consulting a lawyer that an accomplice will be alerted or evidence destroyed as a result of the communication. Therefore, taking account of the valid concerns of the police, we propose that provision be made allowing communication to be delayed if the

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474 New South Wales Law Reform Commission, *Police Powers of Detention and Investigation after Arrest* (LRC 66 1990), 127.

475 Although we have spoken of "delaying" access, it should be recognised that the grounds justifying delay may apply throughout the interview process, and that therefore, in some circumstances, access to a particular lawyer will be effectively precluded.

476 As under the Australian Commonwealth legislation: Crimes Act 1914 (Australia) s 23L(2).

477 As we said earlier the right of access to a lawyer is an essential component of the proposed questioning regime, para 105, and see para 98.

police believe that any of the events referred to in para 114 are a possible consequence of such communication. There must, however, be an objective basis for that belief. A suspect's communication rights should not rest on the unreviewable discretion of the officer concerned. We believe that the formula used in the Australian Commonwealth legislation is sound (as it refers to *likelihood*, and requires reasonable grounds for the belief in that likelihood).

121 We also record that the delay of communication rights should be an uncommon event.<sup>478</sup> Again any such decision should be made by a commissioned officer, and if the grounds for the delay cease to apply then communication with a friend or relative must be permitted.

#### QUESTIONING BEFORE FACILITATION OF SAFEGUARDS

122 Under the proposed questioning regime the general principle is that questioning should be deferred to allow the facilitation of the various safeguards if the suspect chooses to exercise them. The Law Commission is, however, of the view that it is reasonable, following the precedent of the Australian Commonwealth legislation<sup>479</sup> and as an exception to the general principle, to permit questioning to take place immediately if the questioning is urgent having regard to the danger to some other person or persons.

123 In these circumstances the police will inform the suspect that he or she is entitled to communicate with a friend or relative or consular officer, or to consult and instruct a lawyer but the facilitation of those rights can be delayed while the emergency situation continues.<sup>480</sup> The suspect remains under no obligation to answer any questions and will have been cautioned to that effect. Any decision to delay the facilitation of the relevant safeguards is to be made by a commissioned officer.

#### CROSS-EXAMINATION

124 Cross-examination would be permitted under the proposed questioning regime, in contrast to the Judges' Rules. In recent times the prohibition against cross-examination in the Judges' Rules has not been strictly applied by the courts. Rather the inquiry has focused on whether the overall pattern of police conduct is oppressive or has resulted in

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478 See note 130.

479 Section 23L(1)(b) of the Crimes Act 1914.

480 This provision would not apply to the statutory right to assistance of an interpreter as the need to ensure effective communication will remain, whatever the urgency of the situation.

unfairness.<sup>481</sup> The issue then concerns the extent to which cross-examination should be permitted. This is a matter of importance because the suspect who elects not to exercise the right of silence at the stage of police questioning does not generally have the same protection as a defendant who elects to give evidence and hence to undergo cross-examination at trial (although a suspect being interviewed by the police can decline to answer *particular* questions).

125 Attempts to undermine a suspect's clear intent to exercise the right of silence are unacceptable. If before or during police questioning a suspect indicates a wish not to answer any questions or any more questions, then no questions, or no further questions, should be asked.<sup>482</sup> However a suspect's invocation of the right of silence should not preclude the police from subsequently seeking to question the suspect further if additional information regarding the commission of the offence is obtained, the suspect is rearrested, and the questioning safeguards again complied with (see paras 151-153). Indeed, fairness requires that a suspect should be given the opportunity to respond to any new evidence obtained.

126 It should be clear that if an arrested person has exercised the right of silence, it is unlawful to continue to detain that person solely in the hope that he or she may have a change of mind and answer questions after being detained for a period of time.<sup>483</sup> This follows from the requirement that an arrested person may be detained for the purpose of questioning only where there are reasonable grounds to believe that questioning is necessary to preserve or obtain evidence or complete the investigation concerning an offence for which a person is under arrest (or another offence for which that person could be arrested).<sup>484</sup>

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481 See eg, *Admore*, see note 29, 220.

482 To ask further questions in such circumstances is an effective denial of the suspect's right to choose whether to speak: see *Miranda*, note 75, 473-474. An exception arises if the subsequent questioning relates to an offence which is unrelated to that which was the subject of the initial caution: *Michigan v Mosley* 423 US 96 (questioning resumed after the passage of a significant period of time and the provision of a fresh set of *Miranda* warnings). In the New Zealand context an endeavour to ask further questions after a suspect has exercised the right of silence would in the Law Commission's view constitute a breach of s 23(4) of the Bill of Rights. The court would then be entitled to exclude the confession on the ground that it had been improperly obtained.

483 This situation is to be distinguished from one in which, although an arrested person has indicated a wish not to answer police questions, the police are conducting other investigations such as questioning witnesses or executing a search warrant. Any evidence obtained as a result of further investigations may be put to a previously silent suspect and the suspect given the opportunity to respond. The suspect may, of course, continue to exercise the right of silence.

484 See para 51.

127 Outside the principle that the police should not seek to deny the suspect's choice to remain silent, it is not possible to lay down hard and fast rules. The propriety and fairness of a particular course of questioning will need to be judged on a case by case basis in terms of the proposed oppression rule and section 5(3)(d) of the proposed improperly obtained evidence rule (see "Draft Rules for Criminal Proceedings for an Evidence Code"). We also note that the availability of video-taping will be particularly important in enabling the court to determine the propriety and fairness of any questioning.

## OTHER INVESTIGATORY PROCEDURES

128 During any period of detention following an arrest in order to preserve or obtain evidence, the police may undertake any investigative procedures which they are authorised or entitled to carry out by statute or at common law. For example, they may search premises under a warrant or, with the suspect's consent, carry out a medical examination or conduct an identification parade. When such procedures involve the participation of the suspect they are covered by the extended definition of questioning contained in section 1 of the Commission's draft rules for questioning after arrest. The actual questioning of a suspect is able to continue while the procedures are being arranged and any break in questioning to enable a given procedure to be carried out (eg, attendance at an identification parade) will be relatively brief. The Commission therefore considers that the time taken for such procedures should form part of the questioning period.

## VIDEO-TAPING

129 There is general agreement as to the benefits of video-recording police interviews and the Law Commission endorses the recommendation of the Beattie Report<sup>485</sup> in that regard. Steps to implement recording of all interviews for indictable offences are now under way.<sup>486</sup> Ideally all such interviews, including the advice concerning the safeguards, should be required to be recorded (possibly by audio tape recorder in situations where video-recording is impracticable) with any statements made prior to arrival at the police station being confirmed and recorded on arrival unless in the circumstances confirmation is unnecessary.

130 At present a suspect must consent to an interview being recorded and we doubt whether there can be any change to that situation.<sup>487</sup> It may, however, be appropriate to provide that the suspect's wish not to be interviewed on video-tape should where practical itself be recorded. A provision of this nature will ensure that a suspect is given the opportunity to have the interview recorded; and if the opportunity is declined that fact is a relevant consideration when determining any allegation that statements subsequently made were inaccurately recorded or obtained improperly.

131 If there is ultimately to be a general rule requiring the police (with consent) to video-

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485 Report to the Minister of Justice from Sir David Beattie, *Electronic Recording of Police Interviews* (Wellington 1988).

486 New Zealand Police, *Electronic Recording of Police Interviews: Policy and Procedural Guidelines*, 3.

487 Given that suspects can decline to answer questions and may choose to do so if the questions and any answers are recorded against their will.



record all interviews concerning indictable offences, the everyday problems relating to the availability of video-recording equipment, such as a situation in which all rooms with video-recording facilities are in use, could be met by a provision allowing for confirmation on video of the procedures which were followed and the statement which was obtained. The Law Commission welcomes views on this issue, but notes that at the present time<sup>488</sup> it would not be practical to recommend a general requirement. This issue should be considered further when electronic recording procedures are fully implemented on a national basis.

## THE FUTURE OF THE JUDGES' RULES

132 Though the courts continue to have regard to the Judges' Rules, *Cooke P* has recently said that the Rules are "now in their literal form largely obsolescent in New Zealand for practical purposes."<sup>489</sup>

### A new code of police practice?

133 The Law Commission is of the view that the Judges' Rules are now clearly inadequate and should be superseded by the proposed questioning regime. The question, however, arises whether, in addition to the provisions relating to police questioning which we propose should be incorporated in statute, a complete code of rules for police questioning should be promulgated. Such a code would provide detailed guidance for police officers. That is the objective, for example, of the code developed in terms of the Police and Criminal Evidence Act in the United Kingdom.<sup>490</sup>

134 The problem with such a code is that, in an area where all the forensic skills of lawyers will be concentrated, the scope for confusion and delay through arguments about the precise interpretation of the particular provisions of the code may far outstrip that which grew up around the nine Judges' Rules.

135 We are attracted to the view that reform of the law in this area should not follow the option of a detailed questioning code. The essential protections for suspects will be provided by the questioning safeguards specified in the legislation. Other more detailed and secondary requirements appropriate to a questioning regime, such as might be found

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488 Electronic recording procedures are being introduced in stages (by region) and as yet there is not nationwide coverage.

489 *R v Butcher*, see note 9, 266.

490 *Police and Criminal Evidence Act 1984 (s 66): Codes of Practice (Effective 1 April 1991)* London: HMSO 1991, 3.

in a code of practice, can be left to the police to develop (in much the same way as they have developed guidelines for video-recording). Both the content of these guidelines and any breaches of them will be subject to the scrutiny of the court ie, in determining whether any statement has been obtained unfairly (in terms of draft section 5(3)(d) of the proposed improperly obtained evidence rule) the courts will have regard, amongst other things, to the internal police guidelines governing questioning. Of course, the police guidelines will not be determinative of the issue. A statement may be found to have been obtained unfairly even though the guidelines were complied with and, conversely, a breach of the guidelines will not lead inevitably to a conclusion that the statement was obtained unfairly. The court will have regard to the adequacy of the guidelines and the conduct of the police questioning as a whole.<sup>491</sup>

## LENGTH OF DETENTION FOR QUESTIONING

136 A person who is detained for questioning after arrest cannot be held for an indefinite time without being charged and brought before a court. Section 23(3) of the Bill of Rights is aimed at protecting against the abuses which may be associated with executive detention and reflects the fundamental role of the courts in standing between the individual and the State. The questioning regime's compliance with the Bill of Rights (and the International Covenant) is therefore dependent on there being strict limits on the time for which a person may be detained by the executive following an arrest without that detention being subject to judicial scrutiny.

137 In our view the Bill of Rights provisions, especially in light of certain factual matters to which we shortly refer,<sup>492</sup> make it very difficult to justify an approach which simply permits questioning to continue "for a reasonable time". We consider that the choices lie between questioning for a reasonable time up to a fixed maximum (four hours but with the ability to extend the time in appropriate cases), or, alternatively, questioning for a reasonable time with an outer limit which would cover all likely situations. This second option is, essentially, a "reasonable time" approach. To a large extent the issue is one of balance between certainty and flexibility in the investigative process.

### **Fixed period with power to extend**

138 Arguments which favour the first option include:

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491 Police internal guidelines are also likely to address the important safeguards required by the statutory regime. Failure to comply with the statutory safeguards will lead to the conclusion that the statement has been obtained improperly.

492 See notes 160-165 and accompanying text.

- A fixed time indicates to all participants in the process (arrested persons, the police, the courts) what length of detention is acceptable.
- A fixed time protects the liberty of the individual. Under the reasonable time approach a detained person would not know when he or she is likely to be released, or whether the detention is even lawful.
- A fixed time provides guidance to police officers and promotes accountability. The alternative of having the courts determine the reasonableness of the length of the detention on an ex post facto basis, in the context of a decision as to whether to exclude evidence, could prove to be an unsatisfactory method of regulating police conduct and would provide little guidance to the police.
- Because of the greater certainty if there is a fixed period, it is likely that there would be less need to hold a voir dire to determine the admissibility of evidence obtained while a suspect was detained. The consequent saving of court time should result in reduced transaction costs, speedier trials, and more expeditious handling of caseloads by the courts.
- According to most studies the vast majority of investigations can be completed within a short time after arrest. A study in Victoria showed that 99.5% of cases were disposed of within an initial six hour period (with no time out periods in respect of travel time, facilitation of access to a lawyer etc).<sup>493</sup> A New South Wales survey showed that in 91% of cases it took less than four hours to process suspects between arrest and charge (again without allowing for time out periods).<sup>494</sup> The New South Wales Law Reform Commission cited American studies which showed that 97% of cases could be cleared within four hours.<sup>495</sup> The New Zealand Video Interview Project found that by far the greatest number of interviews took under 20 minutes to record.<sup>496</sup> The average interview time was 20.17 minutes.<sup>497</sup>

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493 Consultative Committee on Police Powers of Investigation, *Report on section 460 of the Crimes Act 1958* (Victoria, 1986), 40 (and see 47 where the Committee says "[i]t is only in 112 [out of 40 256] cases that s 460 was raised by the police as an issue and that in all of those cases it is arguable that the real issue was the right to silence").

494 Avery (with Drew, Ireland and Haran), *Response by the Commissioner of Police to the New South Wales Law Reform Commission Consultative Document "Police Powers of Arrest, and Detention"* (1988), 58 cited in *Police Powers of Detention and Investigation after Arrest*, see note 26, 91.

495 *Police Powers of Detention and Investigation after Arrest*, see note 26, 90.

496 New Zealand Police, *A Report on the New Zealand Video Interview Project* (Wellington 1991), 27.

- The experience of other jurisdictions indicates that the fixed time option can work well. In South Australia (where, since 1985, the police have been able to detain people for four hours, with a possible judicial extension to eight hours) the Police Commissioner has said that "there have not been any major problems encountered in the application of this legislation".<sup>498</sup>

### **Reasonable time with outer limit**

139 The following arguments can be put forward in support of the second option.

- To fix a specific period is to achieve 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.
- A fixed period, even with provision for extension, ignores the likelihood that the fixed time will prove inadequate in complex offences or offences with multiple suspects.<sup>499</sup> For example, where there are several suspects being interviewed separately at the same time, the police may want to put the evidence of one suspect to another, a tactic that may be difficult if fixed time limits are introduced.
- The cases where a fixed time period may be ineffective are likely to be those of the most concern to the public. To circumscribe the investigative powers of the police in these situations may result in dissatisfaction with the questioning regime.
- If a fixed time limit is set the tendency may be for the maximum to become the norm.
- If there is a fixed time period, there may be a tendency to rush pre-interrogation investigations so as not to use up too much of the investigation period, particularly where a suspect is arrested at the time or shortly after the commission of the offence. It can be contended that in order to question the arrested person properly the police ought to have as much evidence as

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497 See note 163, 28.

498 *Police Powers of Detention and Investigation after Arrest*, see note 26, 90.

499 Consultative Committee on Police Powers of Investigation, *Report on section 460 of the Crimes Act 1958* (Victoria, 1986).

possible at their disposal.

140 The Law Commission favours the "fixed time" approach, which would allow detention for questioning after arrest for a reasonable time, up to a four hour limit, with the ability to extend the time in exceptional cases. In the Commission's view it is preferable to set an initial limit which will be appropriate in the vast majority of cases, rather than to adopt an initial limit designed to cater for what are clearly exceptional cases. It is already a significant departure from the common law tradition to provide expressly for executive detention for investigative purposes and to set an outside limit which has no relevance to most cases would confer on the executive an inappropriate level of discretion with regard to the denial of individual liberty. It would also provide little guidance for the police. In reaching that conclusion we have taken into account the difficulties which the police face in some major investigations. We also recognise the importance of those investigations. We, however, consider that the proposals which we next outline make appropriate allowance for exceptional cases.

141 First, we recognise that the time limits concerned should relate to the time actually available for investigation. Therefore various kinds of waiting time should be excluded from any computation of the detention period. Exclusions might relate to:

- time taken to convey an arrested person to an appropriate place for the purposes of the investigation;
- time spent arranging contact and communication with a lawyer, friend, relative or consular official, or arranging for the services of an interpreter;
- time spent waiting for the arrival at the police station of any of the people above;
- time spent in consultation with any of these people;
- time spent by the detained person receiving medical attention, resting or receiving refreshment;
- time when the detained person cannot be questioned because of intoxication, illness or other physical condition;
- time spent seeking an extension of the detention period.

If, however, the arrested person is in fact questioned during what would otherwise constitute a "time out" period then the whole of that period should be counted as questioning time. To take the first time out ground as an example, a person could be arrested in Christchurch for an offence which was committed in Auckland but it may be necessary for the purposes of the investigation to take the arrested person to the place

where the offence was committed. The travel time would not, however, be counted for the purpose of calculating the time available for the investigation, unless the arrested person was questioned during the course of the journey.

142 Second, provision will be made for the possibility of an extension period in those extraordinary cases where a properly conducted investigation cannot be completed within the initial period. An initial relatively short extension (for a reasonable time up to four hours) could be authorised by a commissioned officer of the police, who should normally not be the person undertaking the questioning. It should only be possible to extend the detention period beyond this in the most serious of cases.<sup>500</sup> Any such extension (for a reasonable period not exceeding 24 hours) should be on the authority of a District Court Judge in order to comply with the principle underlying s 23(3) of the Bill of Rights that interferences by the executive with the individual's right to liberty should be subject to judicial control. However the Bill of Rights not only requires that an arrested person be brought before a court as soon as possible, but also that an arrested person be charged promptly. Therefore there must be a clear limit on the time for which a judge can authorise the detention of an arrested person before they must be charged or released.

143 Any commissioned officer or judge requested to authorise an extension of the detention period would be obliged to consider whether further questioning is necessary to preserve or obtain evidence or to complete the investigation of the offence,<sup>501</sup> and whether the investigation is being conducted properly and without delay. Arrested persons (or their lawyer) should have the opportunity to make representations in respect of any application for an extension of the detention period. A District Court Judge may not immediately be available to hear an application for a further extension and it therefore appears reasonable to provide that any adjournment of the hearing of such an application (which should only be for a short period) should not be counted for the purpose of calculating the detention period, provided that the arrested person is not questioned during that time.

#### TERMINATION OF QUESTIONING: NO FURTHER QUESTIONING AFTER CHARGE

144 At the end of the permitted period of detention following arrest the arrested person must be released or charged (and dealt with according to provisions governing bail, attendance before court etc). We consider that, as a general principle, there should be no questioning of suspects after they have been charged.

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500 We suggest in respect of offences which are punishable on conviction by a maximum penalty of not less than 14 years' imprisonment.

501 Noting the observations made in para 126.

However, it would be appropriate to question suspects who have been charged with an offence if questioning is necessary:

- for the purpose of preventing harm or minimising loss to some other person;
- to clarify an ambiguity in a previous statement or answer to a question;
- in the interests of justice, to give suspects an opportunity to comment on information concerning the offence which has come to light since the time of charge.

145 Before being questioned in such circumstances suspects should again be cautioned and informed of their right to consult a lawyer and given the opportunity to do so.<sup>502</sup>

#### HOLDING CHARGES

146 We raise as a question for comment the propriety of questioning by the police directed to an offence for which there are insufficient grounds for an arrest, when the person has been lawfully arrested in respect of another offence.

147 The New South Wales Law Reform Commission recommended that the use of an artificial "holding charge" should be strongly discouraged in the Police Commissioner's Instructions or any new Codes of Practice.<sup>503</sup>

148 The difficulties surrounding this issue are obvious. On the one hand, consistency requires that the basic protection afforded by the requirement that there must be valid grounds for arrest before there can be detention for questioning should apply to individual offences. Thus, a person arrested on one offence should not be subjected, during the detention, to wide ranging questioning regarding other offences when such questioning during detention could never have taken place but for the fortuitous event of the initial, possibly unrelated, arrest. In this event it could be argued that the detention is not for the purpose of obtaining evidence relating to the offence for which the suspect has been arrested or to an offence for which the suspect could lawfully be arrested<sup>504</sup> and that any statement with regard to another offence which is obtained as a result has therefore been improperly obtained and should not be admitted.

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502 The facilitation of the right of access to a lawyer would again be subject to the exception in urgent circumstances discussed in paras 122-123.

503 *Police Powers of Detention and Investigation after Arrest*, see note 26, 66

504 See para 76.

149 On the other hand, a person may quite properly be arrested for, say, unlawful assembly, when a murder of which the person is suspected has taken place during the unlawful assembly; or a person being questioned about one offence may volunteer information about another offence; or a line of questioning may inexorably lead to questions about other offences when the connection to those offences was not at all clear at the commencement of the questioning. It would be unrealistic to attempt to prohibit this sort of natural progression. (As to the need to comply with the questioning safeguards if grounds to suspect that the arrested person has committed another offence or offences arise during the course of an interview, see paras 154-155.)

150 At this point we have reached no final views but we doubt whether the issue can be the subject of detailed statutory regulation. Rather the problem may need to be addressed by the courts on a case by case basis by means of the application of the rules relating to the admissibility of improperly obtained evidence. We welcome submissions.

#### RE-ARREST FOR FURTHER QUESTIONING

151 If police arrest a person for questioning but subsequently release the person without laying a charge, in what circumstances can re-arrest for further questioning be permitted? The concern is that the limits on the time for which an arrested person may be detained for questioning could be avoided by the simple expedient of releasing and then re-arresting a suspect.

152 The simplest and most appropriate way of addressing this problem is to follow the precedent of the Police and Criminal Evidence Act 1984 (UK)<sup>505</sup> and provide that a person who has been released shall not be re-arrested for the same offence unless new evidence justifying a further arrest has come to light since his or her release. The Law Commission is of the view that the alternative of providing that re-arrest is not permitted within a specified time period is unduly restrictive of the ability of the police to investigate an offence in circumstances where further questioning is justified, and does not in any event directly address the primary concern.<sup>506</sup>

153 In our view, however, the provision in the Police and Criminal Evidence Act does not go far enough. One incident may involve a number of possible offences. For example, a

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505 Section 41(9).

506 The police should not be able to re-arrest a person after a period of time, where there is no new evidence, simply to attempt to obtain a statement in order to test its consistency against any earlier statement made by that person. If an investigation has not been completed within the initial four hour period, then the appropriate course is for the officer concerned to apply for an extension of the period.



single violent confrontation may give rise to good cause to suspect an assault, or injuring with intent or unlawful assembly. A series of arrests could be made with regard to notionally different offences. To address this possibility we propose that a person who has been arrested for an offence and released before being charged with that offence may not, unless new evidence has subsequently come to light, be re-arrested and questioned about that offence or an offence based substantially on the same facts.

#### THE APPLICATION OF THE QUESTIONING REGIME WHEN SEVERAL OFFENCES ARE SUSPECTED

154 How should the safeguards of the questioning regime apply when, from the outset, there are grounds to suspect that a person has committed several offences, possibly arising out of different incidents? Further, what should happen if grounds to suspect that an arrested person has committed another offence or offences arise during the course of an interview with that person? Two issues arise. First, what should be required with regard to the giving of the caution and the advice of rights in relation to the other offence? Second, if the grounds for suspicion would justify an arrest for that offence, how should the limits on the time for which an arrested person may be detained without charge operate?

#### Caution

155 The first question is perhaps more straightforward. If a person is arrested for several offences then the police will state the reasons for the arrest and caution the suspect and give the appropriate advice. If a person has been arrested for one offence, but there are grounds to suspect that that person has committed another offence, and the police want to question the suspect about that offence then, for the sake of consistency, the suspect should be told of the reason for that new line of questioning. It also follows that the suspect should be cautioned and advised<sup>507</sup> in respect of the particular offence.<sup>508</sup> If the police have grounds to suspect that an arrested person has committed another offence but do not want to question him or her with regard to that offence then there is no need to provide a further caution.

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507 With the exception of the entitlements to communicate with a friend or relative, or a consular officer. It is unnecessary to make further provision for these safeguards in this situation.

508 We recognise that in some circumstances (when the police have grounds to suspect that an arrested person has committed another offence but do not have good cause to suspect that that person has committed that other offence), this provision will require that the police give the caution and appropriate advice when detention for investigative purposes is unlawful: see para 148.

### Limits on detention period without charge

156 The second issue is more problematic. It is difficult to formulate rules which would deal appropriately with the range of varying circumstances which may arise.

157 Section 31 of the Police and Criminal Evidence Act 1984 (UK) provides that where a person has been arrested for an offence, is at a police station in consequence of that arrest and grounds arise which would justify an arrest for another offence then he or she must be arrested for that offence. The English Court of Appeal has said that the obvious purpose of that section is to prevent the release and immediate re-arrest of an alleged offender.<sup>509</sup> If somebody already under arrest is arrested for further offences under s 31 then time runs from the time of the initial arrest.<sup>510</sup> (Note that it is possible under the Police and Criminal Evidence Act for an arrested person, in exceptional cases, to be detained for a somewhat longer period without being charged and brought before a court than is contemplated by our proposed questioning regime.)

158 There are, however, difficulties with this approach. A person may be arrested in relation to, say, a burglary, and towards the end of the permissible detention period in respect of that offence the police may obtain good cause to suspect that he or she has committed a murder. Should the police be prevented from invoking the provisions of the questioning regime in their investigation of this unrelated offence?

159 A quite different approach, which would avoid this particular difficulty, is proposed by the New South Wales Law Reform Commission. The Commission suggested that

where police question a suspect about one matter and the person admits involvement in an unrelated criminal matter, this would be a proper basis for arresting the person again (assuming the evidence is strong enough to amount to a reasonable suspicion) and commencing a new period of custodial investigation in respect of the second matter.<sup>511</sup>

160 Although this proposal prevents a series of arrests being made in respect of notionally different offences arising out of the same incident (as do the Law Commission's proposals relating to re-arrest, see para 153), a pattern of criminal activity, like that involved in a number of transactions with a stolen credit card, could see a series of arrests being made with regard to each separate transaction.

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509 *Samuel*, see note 138, 622.

510 Section 41(4).

511 *Police Powers of Detention and Investigation after Arrest*, see note 26, 97.

161 The Australian Commonwealth legislation attempts to address the problems by stating that:

If [a] person has been arrested more than once within any period of 48 hours, the investigation period for each arrest other than the first is reduced by so much of any earlier investigation period or periods that occurred within that 48 hours.<sup>512</sup>

A provision of this nature would go some way to discouraging the possible manipulation of the time limits on the permissible length of the detention period and would not wholly exclude the ability to undertake questioning in the situation contemplated in para 158, although the questioning would have to be delayed. Nevertheless the difficulties would not be completely resolved and, in particular, it may not be realistic to defer a full investigation into a serious offence for a certain period of time.

162 There may, however, be a simpler perspective from which to view the issue and a more flexible way of resolving the problems. An arrested person may only be detained for a reasonable time (within the four hour limit) without being released or charged and brought before a court, and this applies in respect of each arrest. In determining the reasonableness of a period of detention following a subsequent arrest, the courts may have regard to the overall conduct of the investigation and whether there have been any earlier arrests in respect of the pattern of offending (although for different offences)<sup>513</sup>. The Law Commission's view is that this is the appropriate way of guarding against the prospect of indefinite detention in the circumstances mentioned in para 160 without precluding an arrest in the situation discussed in para 158.

163 The Law Commission welcomes submissions on this issue.

## ENSURING COMPLIANCE WITH THE PROVISIONS OF THE QUESTIONING REGIME

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512 Section 23C(6) of the Crimes Act 1914 (Australia).

513 This is implicit in the requirement that the post-arrest investigation period be reasonable "in the circumstances". We do not consider that it is necessary to include a specific provision to this effect in the statute, although this could be done.

164 In this part of the paper the Law Commission has suggested new rules for the conduct of police questioning of suspects, on the basis that the existing law is uncertain and unsatisfactory. We recommend significant change from the common law position by proposing that clearly defined and specific provision be made to allow the police to question suspects after arrest and before charge and court appearance. We also recommend provisions which define the rights of suspects. Our recommendations are intended to reflect an appropriate balance between the interests of the community and individual rights.

165 As a matter of first principle, the law relating to the conduct of police questioning should be observed by the police. We have alluded to the possibility that the existing law has not been strictly applied because of the difficulties faced by the police in investigating and prosecuting crime (see para 29). Without endorsing that approach, we point out the importance of ensuring that the new rules, which afford the police a reasonable opportunity to question persons suspected of having committed criminal offences, are observed.

166 In the introduction to this paper we emphasised the inter-relationship between its various parts. In this context, the proposals which we make in part II concerning confessions and improperly obtained evidence are an important aspect of our overall approach to the law relating to police questioning. Under the proposed improperly obtained evidence rule, evidence obtained in consequence of a breach of the questioning provisions (draft section 5(3)(b)) or unfairly (draft section 5(3)(d)) will be inadmissible unless the court considers that the exclusion of the evidence would be contrary to the interests of justice. A breach of the questioning provisions may also involve a breach of the Bill of Rights; and in determining whether to admit improperly obtained evidence (on the basis that it would be contrary to the interests of justice to exclude the evidence) the court must take into account the special nature of the New Zealand Bill of Rights Act 1990 as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand.

167 The Law Commission considers that the proposed improperly obtained evidence rule is important in ensuring compliance with the provisions of the questioning regime ie, a rule of prima facie inadmissibility of improperly obtained evidence is necessary to discourage unlawful conduct and to indicate the significance of the values protected by the rule.

168 If police questioning provisions are enacted prior to the new rules relating to improperly obtained evidence, two distinct rules with regard to the admissibility of improperly obtained evidence will continue to apply. Where there is a breach of the questioning provisions which is also a breach of the Bill of Rights, the rules established by the courts with regard to breaches of the Bill of Rights will apply. Other breaches of the questioning provisions will be dealt with by way of the fairness discretion. The Law Commission doubts, however, whether the operation of the fairness discretion is sufficient

to ensure that the questioning provisions are complied with. Further, one of the Commission's aims is to ensure that voluntary co-operation is indeed voluntary and that the concept of "assisting the police with their inquiries" is not used when the detention is in fact unlawful. Given that the rule of law which is breached in that situation is not a statutory one there is particular need for an improperly obtained evidence rule to ensure that the law is complied with.<sup>514</sup> The Commission therefore does not favour enacting the police questioning regime without at the same time enacting an improperly obtained evidence rule.

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514 See the discussion at paras 85-87. We are not aware of any instances where a statement has been excluded in terms of the fairness discretion by reason of the fact that it was obtained during a period of unlawful detention, although the Court of Appeal has provided a strong warning in one case, see note 35.



## Summary of Proposals for Reform

1 In this discussion paper the Law Commission considers and makes proposals for the reform of the law relating to the right of silence, confessions, improperly obtained evidence and questioning after arrest. These inter-related areas of the law are of great importance and need to be considered together. For that reason, and also because the law on these topics is complex, the discussion paper is of necessity lengthy. For those who wish to have a reasonable understanding of the Commission's proposals we suggest that this summary should be read in conjunction with the draft legislative provisions and their accompanying commentary (which are found under the heads "Draft Rules for Criminal Proceedings for an Evidence Code" and "Draft Rules for Questioning after Arrest").

2 While the Law Commission indicates the proposals which it favours, it also seeks comment on all the issues raised. In a number of instances this includes advice concerning facts which are relevant to the reform issues. We emphasise that we are not committed to any of the views expressed and our provisional conclusions do not preclude further consideration of the issues.

3 The reform proposals must be considered as a whole. Important fundamental values underlie the new rules. On the one hand there is the public interest in the conviction of those who commit criminal offences; on the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. These interests often require a delicate balance to be struck, with the result that changing one aspect of the rules may have ramifications for other aspects of the proposals.

4 We summarise each topic in the order in which it appears in the discussion paper.

### THE RIGHT OF SILENCE

5 The right of silence in its broadest sense reflects the principle that, in the absence of legislation or a contrary common law rule, citizens are free to remain silent and to decline to provide information to the police or others in authority. There has been lengthy and heated debate about the right of silence, sometimes conducted in misleadingly broad terms. The right refers to a range of situations which differ in nature, origin, incidence and importance, as is shown by the extent to which some aspects of the right have been encroached upon by statute. It is artificial to discuss the right of silence in absolute terms

of preservation or abolition.

6 The central question is whether the undoubted adverse consequences which may flow from a defendant remaining silent before or during trial should be added to or lessened. The debate in this context is mainly confined to two relatively narrow issues:

- the consequences of not raising a defence relied on at trial at an earlier stage;
- whether inferences may be drawn from a defendant's silence before trial or lack of testimony at trial, and whether those inferences may be the subject of comment to the jury.

7 The policy arguments underlying the debate, as defined in terms of the above issues, can be reduced to three main questions: Is the right of silence an essential corollary of the presumption of innocence? Does the right of silence protect the guilty or the innocent? Does the right of silence protect against unwarranted State intrusion into private lives? The differing views concerning these questions are entrenched. It is, however, possible to state some propositions on which the Law Commission's consideration of particular aspects of the right of silence is based:

- The jury or judge as fact-finder will be aware that the defendant has not testified or has raised a defence for the first time at trial and it is unrealistic to expect that they will disregard that fact.
- Silence does not equal guilt. There are reasons other than guilt why a person accused of an offence may remain silent either before or during trial.
- It will be difficult to determine in any particular case what inferences can properly be drawn from silence.
- There are good reasons for distinguishing silence before trial from silence at trial.
- The right of silence has been a central component of our system of criminal justice for three centuries. It is appropriate to tread with caution when considering reform of the law and to require any case for change to be clearly established.
- Any proposals for reform of the law must be compatible with the New Zealand Bill of Rights Act 1990.

## Proposals for reform



8 A detailed consideration of the right of silence reveals that there is a case for some minor reform, principally because there is a less than coherent foundation for the existing rules. We would not, however, wish to see an undue emphasis on right of silence issues diverting attention from the reforms which we consider are required for the law relating to confessions and police questioning.

#### *Silence before trial*

9 The current law concerning silence before trial is in some respects less than certain. As the case law stands, evidence of an allegation and the defendant's subsequent silence is generally inadmissible on the ground that the probative value of the evidence is outweighed by its prejudicial effect. However, the law varies depending on the exact situation ie, silence in response to an allegation or accusation, silence in response to questioning, or silence by way of failure to disclose a defence. When considering silence before trial it is always important to remember that the standard caution administered at the time of questioning does not indicate that any adverse consequences will arise from exercise of the right of silence.

10 A review of the law in other jurisdictions indicates that there is a range of options for reform of the law relating to silence before trial. The Law Commission favours the enactment of a provision preventing any comment on pre-trial exercise of the right of silence in response to official questioning (see section 6 of the "Draft Rules for Criminal Proceedings for an Evidence Code"). The Commission also considers that evidence of silence in response to official questioning should generally be excluded. The Commission's recommendations leave unchanged the present law concerning silence in response to an allegation when the parties are on even terms. Comment will still be possible in that situation. The recommendations will, however, result in some change to the law concerning comment on a belated explanation or comment on a failure to explain recent possession of stolen goods. In relation to those matters comment on failure to give an explanation prior to trial will not be permissible.

#### *Silence at trial*

11 The issues concerning silence at trial are whether any comment is to be made about the fact that the defendant did not testify and if so, what comment may be made and by whom. Again, there is a range of reform options. In the absence, however, of evidence that the existing law is working injustice to either the defence or the prosecution, the Law Commission is disinclined to recommend any substantial change. It will therefore remain open to the judge, but not the prosecution, to comment on silence at trial. The Commission considers that this is appropriate when account is taken of the safeguards available to the defendant at trial. There are various subsidiary issues which require consideration (concerning the circumstances in which comment may be made, the

nature of the comment and the ability of the defendant to predict when comment will be made).

## CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE

12 The law prescribes certain rules for the gathering of evidence in a criminal investigation, and other rules as to when such evidence may be offered in criminal proceedings. Often the admissibility of evidence will be determined by reference to police compliance with those rules. Both sets of rules are interdependent and protect important values.

### **The current law**

13 The current law concerning confessions and improperly obtained evidence is affected by many years of ad hoc development of both the common law and the relevant legislation. The law and its underlying rationales require detailed consideration.

### **Proposals for reform**

#### *Confessions*

14 Some of the rules for admissibility of confessions do not in practice cause difficulty, because it is rarely necessary for the court to consider them. However, parts of the law are uncertain and also complex. The Commission considers that reform which encourages a consistent and explicit application of the policies identified in the paper will help ensure that future developments follow a satisfactory path.

15 The Commission recommends two specific rules to govern the admissibility of confessions: a reliability rule and an oppression rule, which take the place of the voluntariness rule and s 20 of the Evidence Act 1908 (see sections 3 and 4 of the "Draft Rules for Criminal Proceedings for an Evidence Code"). The values protected by the present rules will continue to be protected under the new rules. (In addition there will be a rule applicable to all forms of improperly obtained evidence which will take the place of the present fairness discretion: see paras 20-23.) The two new confessions rules will operate as a self-contained regime, not as an exception to the hearsay rule. They will apply only to evidence tendered by the prosecution. Confessions are defined broadly so that exculpatory and partially exculpatory statements fall within the terms of the definition.

16 The test of voluntariness is not stated in the proposed new rules. The legal definition of voluntariness does not correspond with the ordinary or psychological definition. More importantly, the voluntariness rule masks the two primary values which it

seeks to protect - reliability and immunity from coerced self-incrimination. Nor does it protect those values adequately.

17 At present the combined effect of the voluntariness rule and s 20 of the Evidence Act 1908, stated in simple terms, is that a statement is inadmissible if it is obtained by violence, threats or oppression. However, a statement obtained as the result of less serious inducements will be admissible if those inducements were not likely to cause an untrue admission of guilt (the test in s 20). Both these propositions are encapsulated in the two new rules. There will, however, no longer be a person in authority requirement (since this is not a determinative factor in relation to the reliability of a statement, or whether it has been coerced).

18 The proposed reliability rule will require the prosecution to satisfy the court that the circumstances pertaining to the making of the statement were not likely to have affected its reliability. The rule will enable the court to consider all the circumstances, including factors which are peculiar to the defendant and which may affect the reliability of the statement (factors at present considered in relation to the fairness discretion). These factors are relevant to reliability, the central issue being the actual state of the defendant's mind at the time he or she made the statement, not the source of the influence.

19 The oppression rule will require the prosecution to satisfy the court that a statement was not influenced by oppressive or violent conduct.

#### *Improperly obtained evidence*

20 The third rule of admissibility will apply to all improperly obtained evidence (including improperly obtained statements). The rule will replace the fairness discretion and the rule currently adopted by the courts concerning evidence obtained in breach of the New Zealand Bill of Rights Act 1990. The Commission considers it is in the interests of simplicity and clarity for the same rule to apply to all improperly obtained evidence, there being no policy reasons to the contrary.

21 The rule provides that all improperly obtained evidence is presumptively (ie, prima facie) inadmissible unless the court is satisfied that the exclusion of the evidence would be contrary to the interests of justice (see section 5 of the "Draft Rules for Criminal Proceedings for an Evidence Code").

22 This is a significant change. The Commission considers the new rule will improve the clarity, certainty and predictability of the law; the Commission also considers that the new rule is particularly necessary if the proposed questioning rules are enacted.

23 The factors listed in the rule will provide some guidance to the court about the matters which it is appropriate to consider when deciding whether exclusion of the

evidence would be contrary to the interests of justice. The court will not be required to take a rigid or technical approach.

## QUESTIONING AFTER ARREST

### **The current law**

24 The police may question any person when investigating a criminal offence. However, there is generally no obligation to answer the questions. The police have no general power to detain persons against their will for the sole purpose of questioning.

25 Only by arresting a person or detaining a person pursuant to a statutory power can police lawfully detain someone. If an arrested person is detained for the purpose of bringing him or her before a court, then the police are required to do this as soon as is reasonably possible. Nevertheless, it has been held that this requirement does not preclude questioning of an arrested person about the offence for which the person has been arrested, or about other offences, provided the arrested person is not detained for longer than is reasonably necessary to enable him or her to be brought before a court. If a person is detained solely for questioning then the detention is unlawful. It is impossible to reconcile this approach with Rule 3 of the Judges' Rules if the rule was never intended to encourage or authorise the questioning or cross-examination of persons in custody.

### **The need for reform**

26 The uncertainty in the law is evidenced by the common misperception that the law allows little or no scope for police questioning of suspects once they have been arrested. As a result, the police frequently delay arrest until there is sufficient evidence to charge the defendant. A police officer may not be prepared to arrest a suspect because of insufficient evidence to support a charge or because an arrest would hinder further questioning. Police ability to question a suspect is therefore frequently dependent on the "voluntary co-operation" of the suspect. This process is open to abuse and the actions of the police have been criticised by the Court of Appeal in several cases where suspects have been detained for questioning without being arrested. Recent cases involving breaches of the New Zealand Bill of Rights Act 1990 also highlight the problems with the underlying law relating to the questioning of suspects in custody.

27 The present law on its face poses difficulties for both the police and suspects. In the first place, the law is arbitrary in its operation, uncertain, and (in its relationship to the Judges' Rules) contradictory. In the second place, the concept of "voluntary co-operation" in many instances masks situations of dubious legality. Though it might be argued that the police are not in fact unduly hindered because the law is not strictly applied and enforced, this contention, even if accurate, does not remove the need for reform. On the contrary, it

is a cause for concern in a system based on the rule of law when police practice does not correspond with the rules for criminal investigation. The rules for criminal investigation, as well as reflecting an appropriate balance between the interests of the community and individual rights (bearing in mind that respect for individual rights is in itself a community interest), should be both clear and observed by the police.

28 Although the primary problem with the present law is manifested in the practice of detaining suspects for questioning without arresting them, there are other concerns. In some cases suspects are questioned after arrest, Rule 3 of the Judges' Rules notwithstanding. Further, the safeguard requiring the police to bring an arrested person before the court as soon as possible is an arbitrary one, dependent on the time of day that the person is arrested.

### **Proposals for reform**

29 The present law must be seen in its historical context. The common law rule requiring an arrested person to be brought before a court as soon as possible developed when interrogation was performed by magistrates. At that time it was not seen as part of the police function to question the suspect. When the modern police took up this function no specific provision was made to allow them to detain suspects for the purpose of questioning.

#### *Questioning after arrest*

30 The Law Commission proposes that clearly defined and specific provision be made to allow the police to question suspects after arrest and before charge and court appearance. Where the police have good cause to suspect that a person has committed an offence they will be able to arrest the person in order to ask questions about the person's alleged involvement in the offence for a defined period of time before being required to charge and bring the suspect before a court. The rights of the suspect will be clearly specified. This will provide the police with a more satisfactory basis on which to conduct their inquiries. At present, given the uncertainty of the law and the inconsistency of its application, police officers are given little guidance as to what is acceptable and unacceptable in a given situation. (See "Draft Rules for Questioning After Arrest".)

31 It is important that the rules comply with the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights. The discussion paper concludes that the proposed questioning rules do comply with both the Bill of Rights and the International Covenant.

32 It is important to emphasise that the Commission is not proposing that there be a general power to detain persons for questioning when they have not been arrested. An

arrest on traditional grounds (ie, "good cause to suspect" the commission of an offence) is an essential prerequisite to the exercise of the power to detain for questioning. This is the standard adopted in other countries (eg, Britain and Australia) where a specific questioning power has been given to the police. Any lesser standard would be likely to allow arbitrary detention and would unjustifiably compromise individual liberty. It has, however, long been accepted that an individual's liberty may be constrained when there is good cause to suspect that he or she has committed a serious offence. It is also important to appreciate that an arrested person will not be able to be questioned against his or her will ie, the right of silence will remain.

### *Safeguards*

33 A regime which permits the questioning of arrested persons must include appropriate safeguards to ensure that improper pressure is not brought to bear on suspects. The safeguards proposed by the Commission endeavour to strike a balance between allowing police to question persons in custody and protecting the rights of suspects. The antecedents of the safeguards are, in the main, the Judges' Rules and the Bill of Rights. The safeguards relate to advice concerning:

- the reason for questioning;
- the right of silence;
- the right to consult a lawyer;
- access to a friend or relative;
- access to an interpreter;
- access to consular assistance.

The Commission has endeavoured to formulate clear and relatively simple rules which the police will be expected to observe. Failure to observe the rules may render any evidence obtained inadmissible in terms of the confessions rules and the improperly obtained evidence rule discussed in paras 14-23 above.

34 The safeguards are discussed in detail in the discussion paper, but the right to consult a lawyer warrants particular attention. The discussion paper points out that the right to consult a lawyer should not be regarded as likely to frustrate police questioning. The paper also expresses the view that, if the right is to provide an effective safeguard for all persons suspected of having committed an offence, a system should be instituted whereby legal advice is available to suspects who would otherwise be unable to afford a lawyer. The paper indicates that, in the absence of effective access to legal advice, the Commission would not recommend the implementation of its proposals for a questioning regime.

35 The point in time at which the safeguards of the questioning regime come into operation is of vital importance. It is proposed that the operation of the safeguards should

commence when:

- a person is formally arrested or could lawfully be arrested;
- a police officer has grounds to suspect that a person has committed an offence and that person
  - is at a police station, or
  - has reasonable grounds to believe that he or she is being detained.

36 An important aspect of the questioning regime is the length of time for which a person can be detained for questioning. The questioning regime's compliance with the Bill of Rights (and the International Covenant) is dependent on there being strict limits on the period of detention for questioning by the police. It is preferable in the Law Commission's view to set an initial limit which will be appropriate in the vast majority of cases, rather than to adopt an initial limit designed to cater for what are clearly exceptional cases. The proposed questioning rules therefore provide for an initial period which is reasonable in the circumstances but does not exceed four hours. There is provision for a commissioned officer of police to extend that period by four hours; and, on application to a District Court Judge, a further and final extension of 24 hours can be obtained in exceptional cases. The rules also allow for certain "time out" periods.

37 A number of miscellaneous aspects of the operation of the regime are discussed in the main text. These relate to the termination of questioning, delaying certain of the safeguards, the use of holding charges, and rearrest for further questioning.





## Draft Rules for Criminal Proceedings for an Evidence Code

### INTRODUCTION

C1 This commentary sets out the rules proposed by the Law Commission in parts I (Right of Silence) and II (Confessions and Improperly Obtained Evidence) of the discussion paper. The rules are included in one commentary because all are contained in Division 3 - entitled "Rules for Criminal Proceedings" - of Part 3 (Admissibility Rules) of the proposed Evidence Code. For ease of reference, the rules appear on an even numbered page and the accompanying commentary on the facing page.

C2 The purpose of the Division is to prescribe rules concerning the admissibility in criminal proceedings of evidence offered by the prosecution (but not the defence) consisting of

- statements made by defendants, or
- improperly obtained evidence.

C3 With regard to defendants' statements, the overall scheme is established in section 2 which provides that defendants' statements offered in evidence by the prosecution are admissible unless excluded by one of the three rules in sections 3, 4 and 5. In brief, the first rule excludes statements made in circumstances likely to affect their reliability (section 3 - the reliability rule). The second excludes statements influenced by oppression or violence (section 4 - the oppression rule). The third rule excludes improperly obtained statements (and other improperly obtained evidence) unless the court considers exclusion to be contrary to the interests of justice (section 5 - the improperly obtained evidence rule).

C4 The Division also contains a provision preventing comment on the silence of defendants in the face of questions or allegations put or made before the trial by a police officer or other person whose functions include the investigation of offences.

PART 3

ADMISSIBILITY RULES

*Division 3 - Rules for Criminal Proceedings*

**1 Definition**

In this Division  
**statement** means

- (a) a spoken or written utterance, whether or not intended as an assertion of any matter; or
- (b) non-verbal conduct that is intended as an assertion of any matter,

and includes a confession, an admission, and an exculpatory statement.

## COMMENTARY

**Section 1**

C5 *Section 1* contains an extended definition of "statement". The term "statement" is used in the rules as a broad neutral term in preference to "confession" or "admission". The reliability rule and the oppression rule apply not only to confessions or admissions of guilt but also to all other statements made by defendants, whether exculpatory, inculpatory, of neutral effect or a mixture of some or all of those characteristics. The final line of the definition, although not strictly necessary, expressly indicates this wide application. See generally part II paras 114-115.

C6 *Section 1(a)* of the definition includes assertions implied from spoken or written utterances made by a defendant. (Compare the hearsay rule in Division 1 of this part of the Code, under which the definition of statement does not include "implied assertions", see *Evidence Law: Hearsay* (NZLC PP15 1991) 32-35, section 1.) This means that statements tendered by the prosecution to demonstrate a defendant's consciousness of guilt will be subject to the reliability and oppression rules.

C7 *Section 1(b)* of the definition includes non-verbal conduct that is intended as an assertion of any matter eg, a nod or shake of the head, but it does not include assertions that may be implied from conduct of a defendant. Such "implied assertions" are not subject to the reliability and oppression rules. They are, however, subject to the improperly obtained evidence rule and the general principles in Part 2 of the Evidence Code (see para C0 and *Evidence Law: Codification* (NZLC PP14 1991) 19-20).

## **2 Defendant's statements and hearsay**

- (1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible in relation to that defendant unless the statement is inadmissible because of section 3 (the reliability rule), section 4 (the oppression rule) or section 5 (the improperly obtained evidence rule).
- (2) Division 1 (hearsay evidence) does not apply to evidence offered by the prosecution of a statement made by a defendant.

## COMMENTARY

**Section 2**

C8 *Section 2(1)* establishes the overall pattern of the provisions relating to defendants' statements offered in evidence by the *prosecution*. It provides the general rule that such statements are admissible unless excluded by one or more of the rules in sections 3, 4 and 5. Once a statement (or other form of evidence) is excluded under one of the rules it remains inadmissible for all prosecution purposes.

C9 The rules in this division do not apply to a statement made by a defendant and offered in evidence by the defendant or a co-defendant. See Appendix A where the Law Commission discusses its provisional conclusions with respect to the rules that should apply when the defence tenders such evidence.

C10 The reliability rule (section 3) and the oppression rule (section 4) are rules of automatic exclusion ie, once the conditions in either of those rules are satisfied the evidence is excluded and there is no available discretion to admit the statement or even part of it. The position under those rules must be compared to the improperly obtained evidence rule (section 5), under which improperly obtained evidence is inadmissible but the court may admit the evidence if it considers exclusion to be contrary to the interests of justice.

C11 Section 2(1) must be read with the general principles contained in Part 2 of the Evidence Code (see *Evidence Law: Codification*, 19-20). In particular, section 2(1) does not derogate from the fundamental principle that evidence that is not relevant is not admissible (Part 2 section 2(1)), nor from the general exclusionary provision requiring evidence to be excluded if its probative value is outweighed by the danger that the evidence may have an unfairly prejudicial effect, confuse the issues, mislead the court or jury, or result in unjustifiable expense or consumption of time (Part 2 section 3).

C12 To dispel any possible confusion that might arise, *section 2(2)* declares that the hearsay provisions of the Evidence Code do not apply to those defendants' statements to which Division 3 applies. This means that the rules in Division 3 will operate as a self-contained regime and not by way of exception to the hearsay rule. (Technically, this declaration may not be necessary.)

### 3 The reliability rule

- (1) The reliability rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant only if a defendant raises the issue of the reliability of the statement and informs the court and the prosecution of the grounds for raising the issue.
- (2) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is inadmissible unless the prosecution satisfies the court beyond reasonable doubt\* that the circumstances pertaining to the making of the statement were not likely to have affected its reliability.
- (3) Without limiting the matters that a court may take into account for the purposes of subsection (2), the court must take into account
  - (a) any pertinent physical, mental and psychological condition of the defendant when the statement was made; and
  - (b) any pertinent characteristics of the defendant including any mental, intellectual or physical disability to which the defendant is subject; and
  - (c) the nature of any questions put to the defendant and the manner and circumstances in which they were put; and
  - (d) the nature of any threat, promise or representation made to the defendant or any other person.
- (4) Subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered in evidence by the prosecution only as evidence of the physical, mental or psychological condition of the defendant at the time the statement was made.

- \* See para 133 of part II for discussion of the standard of proof.

## COMMENTARY

**Section 3**

C13 *Section 3* contains the reliability rule. Both this rule and the oppression rule in section 4 apply to *all* statements made by defendants and offered in evidence by the prosecution. Sections 3 and 4 replace the common law voluntariness rule and its limited exception in s 20 of the Evidence Act 1908. They are not intended to abandon values protected by the voluntariness rule but rather to protect those values more effectively by simplifying and clarifying the rules. These issues are discussed more fully in the paper in part II paras 102-106 and 123-124.

C14 There is no requirement that the person who obtained the statement be a person in authority. Although statements are very often made to police officers, this will not always be so. The rules apply to statements made to anyone eg, statements made to parents, acquaintances or employers (bearing in mind that statements tendered in evidence are always subject to the general principles in Part 2 of the Code, see *Evidence Law: Codification*, 19-20).

C15 Under *section 3(1)*, if the issue is raised by the defendant the prosecution must satisfy the court that the circumstances pertaining to the making of the statement were not likely to have affected its reliability. The defendant must inform the court and the prosecution of the grounds for raising the issue. This requirement enables the prosecution to know of the contentions it must meet and the witnesses it should call. There is no evidential burden on the defendant and a high degree of disclosure is not required. A simple statement informing the court and the prosecution of the grounds will be sufficient. This part of the reliability rule is not intended to change the present law. Whether a defendant who fails to raise the issue of reliability at trial can do so on appeal will be governed by the practice of the Court of Appeal.

C16 If the issue is not raised the rule has no application and the statement will be admissible, subject to the applicability of the general principles in Part 2 of the Code, the oppression rule and the improperly obtained evidence rule. But if the issue is raised the prosecution must satisfy the court beyond reasonable doubt that the circumstances pertaining to the making of the statement were not likely to have affected its reliability. A *voir dire* will be held and if the burden is not discharged the statement will be excluded. The Law Commission would like to receive comments on whether a standard of balance of probabilities is preferable: see part II para 133.

C17 The *voir dire* is discussed in part II paras 35-37 and 148 of the discussion paper. The present law concerning the conduct of a *voir dire* will be codified and included in the Evidence Code. (Drafts of these rules will be prepared at a later stage.)

C18 The reliability rule itself is stated in *section 3(2)*. The phrase "circumstances



pertaining to the making of the statement" will enable the court to take into account a broad range of matters which may affect the reliability of the statement, including matters other than the conduct of the person in whose presence the statement was made.

C19 The words "not likely to have affected its reliability" are applicable to exculpatory statements as well as to admissions of guilt. They directly highlight the central issue for this rule ie, reliability.

C20 The focus of the rule is the circumstances which may affect the reliability of a defendant's statement. Truth is not relevant to this test. As a result, subsequently discovered real evidence which confirms the truth of the statement will not be admissible on the voir dire (but see the discussion in part II paras 137-139).

C21 *Section 3(3)* identifies factors which the court is obliged to take into account when applying the reliability rule, while providing also that the court is not limited to those matters in its inquiry. The various factors are intended as a guide to the court and are not exhaustive. The court is only required to take these matters into account if there is some evidential foundation for their existence.

C22 The central issue in relation to reliability is the actual state of the defendant's mind at the time he or she made the statement, rather than the source of any influence on the defendant's mind. Under subsection (3) the court is first directed to the conditions and characteristics of the person who made the statement.

C23 *Section 3(3)(a)* directs attention to any pertinent physical, mental and psychological condition of the defendant at the time when the statement was made. The condition may be a transient one, for example, intoxication. For discussion on the effect of intoxication see part II paras 134-135.

C24 *Section 3(3)(b)* refers to any pertinent characteristics of the defendant, including any mental, intellectual or physical disability to which the defendant is subject. This paragraph directs attention to the permanent or continuing state of the defendant. The court, when taking into account the characteristics of the defendant, is not limited to the matters listed in paragraph (b). Other matters such as age, sex, ethnic or national origin, sexual orientation or health status may also be relevant in a particular case.

C25 *Section 3(3)(c)* requires the court to take into account any questions put to the defendant and the manner in which they were put. This is not limited to police or official questioning. *Section 3(3)(d)* requires account to be taken of any threat, promise or representation made to the defendant or any other person. In respect of paragraphs (c) and (d) there may be some overlap with issues considered under the oppression rule.

C26 *Section 3(4)* contains a limited exception to the reliability rule. A statement may be tendered in evidence by the prosecution for a purpose other than to prove the truth of the

facts stated or a consciousness of guilt. For example, the prosecution may wish to tender the statement of an intoxicated person to prove that he or she committed an offence under the excess breath alcohol provisions in the Transport Act 1962. Subsection (4) disapplies the reliability rule when a defendant's statement is offered only as evidence of a physical, mental or psychological condition of the defendant at the time the statement was made. Otherwise the reliability rule would exclude such a statement. If a statement is offered only as evidence of the condition of the defendant but could nevertheless be used by the jury for other purposes, the court will need to consider whether the statement should be excluded on the ground that its probative value is outweighed by the danger that it will have an unfairly prejudicial effect (and, if the evidence is admitted, whether a special direction to the jury is required).

#### **4 The oppression rule**

- (1) The oppression rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant only if a defendant raises the issue of the influence on the statement of conduct, treatment or a threat described in subsection (2)(a) and (b) and informs the court and the prosecution of the grounds for raising the issue.
- (2) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is inadmissible unless the prosecution satisfies the court beyond reasonable doubt that the statement was not influenced by
  - (a) oppressive, violent, inhuman or degrading conduct, towards or treatment of the defendant or another person; or
  - (b) a threat of conduct or treatment of that kind.

## COMMENTARY

**Section 4**

C27 *Section 4* contains the oppression rule. The concept of voluntariness is not retained, see para C0. Under the oppression rule it is irrelevant whether or not the statement is reliable. While reliability is one of the rationales protected by the rule (since there is always potential for a statement to be unreliable if oppression or violence is used to obtain it), the primary rationales of the rule are to protect people from coerced self-incrimination and to deter police and other State officials from failing to comply with standards of acceptable conduct.

C28 The defence must raise the issue of oppression in accordance with *section 4(1)*. See the discussion at para C0.

C29 *Section 4(2)* states the rule. If the issue is raised, the prosecution must satisfy the court beyond reasonable doubt that the statement was not influenced by the matters listed in the rule. The rule is concerned with the unacceptable conduct of any person, not just a person in authority. The rule requires the exclusion of statements influenced by oppression or violence towards the defendant or another person. The words "influenced by" make a range of conduct subject to the rule.

C30 The rule protects the right not to be subjected to torture or to cruel, degrading, or inhuman treatment or punishment (United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Article 15, 1984, 23 ILM 1027; International Covenant on Civil and Political Rights Article 7, NZTS 1978 No 19, AJHR 1979 A 69, AJHR 1984-85 A 6; New Zealand Bill of Rights Act 1990 s 9). The oppression rule meets the requirements of Article 15 of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and indeed goes further than the minimum obligations imposed on States Parties by the Convention. See part II para 143 and accompanying notes.

C31 The rule does not attempt to define oppression because the scope of oppressive conduct is best left for determination by the courts on a case by case basis. The words used to describe other conduct or treatment governed by the rule - "inhuman or degrading" - are also not defined, though the conduct and treatment which they cover is probably more readily able to be specified.

## 5 The improperly obtained evidence rule

- (1) The improperly obtained evidence rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding only if a defendant raises the issue whether that evidence was obtained improperly and informs the court and the prosecution of the grounds for raising the issue.
- (2) Where the improperly obtained evidence rule applies, evidence offered by the prosecution in a criminal proceeding is inadmissible unless
  - (a) the prosecution satisfies the court beyond reasonable doubt that the evidence was not obtained improperly; or
  - (b) the court considers that the exclusion of the evidence would be contrary to the interests of justice.
- (3) For the purposes of subsection (1), evidence is obtained improperly if it is obtained
  - (a) in consequence of a breach of the *New Zealand Bill of Rights Act 1990*; or
  - (b) in consequence of a breach of a provision of any enactment or rule of law; or
  - (c) in consequence of a statement made by a defendant that is inadmissible or would be held inadmissible if it were offered in evidence by the prosecution; or
  - (d) unfairly.
- (4) Without limiting the matters that a court may take into account in exercising its power to admit evidence under subsection (2) (b), the court must take into account
  - (a) the special nature of the *New Zealand Bill of Rights 1990* as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
  - (b) the nature and gravity of any impropriety; and
  - (c) whether any impropriety was the result of bad faith; and
  - (d) whether the evidence existed and would have been discovered or otherwise obtained regardless of any impropriety.
- (5) A statement made by a defendant that is inadmissible because of section 3 (the reliability rule) or section 4 (the oppression rule) may not be admitted as evidence under subsection (2) of this section.

## COMMENTARY

**Section 5**

C32 *Section 5* contains the improperly obtained evidence rule. In contrast to the reliability and oppression rules, which apply only to statements, the improperly obtained evidence rule applies to all kinds of evidence that may be offered by the prosecution. The new rule replaces the fairness discretion and the exclusionary rule developed by the courts in respect of evidence obtained in breach of the New Zealand Bill of Rights Act 1990. Express provision will be made to this effect if necessary. See further part II paras 153-161.

C33 The improperly obtained evidence rule may apply even if the prosecution has discharged its burden in respect of the reliability and oppression rules. A statement that has not been influenced by oppressive conduct or treatment, and is reliable, will nevertheless be excluded from evidence if it is improperly obtained within the meaning of section 5(3) and is not admitted by the court under section 5(2)(b).

C34 The rule applies to evidence offered by the prosecution only if a defendant raises the issue in the manner prescribed in *section 5(1)*. The procedure is the same as that under the reliability and oppression rules, see para C0.

C35 *Section 5(2)* contains the rule itself. If under section 5(1) the issue is raised, evidence offered by the prosecution is inadmissible unless the prosecution satisfies the court beyond reasonable doubt that the evidence was not obtained improperly (section 5(2)(a)) or unless the court considers that the exclusion of the evidence would be contrary to the interests of justice (section 5(2)(b)). The Law Commission would like to receive comments on whether a standard of proof of balance of probabilities would be preferable.

C36 *Section 5(2)(b)* permits a court to admit improperly obtained evidence if the court considers that the exclusion of the evidence would be contrary to the interests of justice. This is a factual and policy judgment of the court and no standard or onus of proof is specified. A decision to admit the evidence requires the court to balance various public interests (see part II paras 76-101). They extend beyond the interests involved in the particular case and incorporate broader interests concerning the general administration of the law, including the long term consequences for the integrity of the criminal justice system of admitting or excluding the particular type of improperly obtained evidence. The rule allows the court to take into account all the competing considerations. The court is not required to take a rigid or technical approach.

C37 *Section 5(3)* provides that evidence is obtained improperly if it is obtained in consequence of a breach of the Bill of Rights, or any other enactment or rule of law (eg, an unlawful detention), or unfairly. Evidence is also improperly obtained if it is obtained in consequence of a statement which is inadmissible, or would be inadmissible if offered in

evidence by the prosecution. A statement may be inadmissible under the reliability or oppression or improperly obtained evidence rules, or because the court has exercised its general exclusionary power (see paras C0 and C20).

C38 "Unfairly" is listed in a separate paragraph in *section 5(3)(d)*. This part of the definition is intended to have a residual function: see part II paras 170-171. Under the new rule unfairness is simply a threshold test (making the evidence *prima facie* inadmissible), whereas under the current law unfairness is the basis upon which a final decision to exclude the evidence rests.

C39 Section 5(3) does not specify the nature of any causal link between the impropriety and the obtaining of the evidence, but there must be some proximity or causal link. The precise nature of the causal link is left to the courts to determine by reference to principle but on a case by case basis. See further part II paras 167-168 and 195-198.

C40 *Section 5(4)* provides some guidance for the application of the rule by specifying certain matters which a court must take into account in deciding whether the exclusion of improperly obtained evidence would be contrary to the interests of justice. The existence of one factor will not automatically dictate exclusion or admission. All the factors are interdependent and the importance given to each will depend on the particular circumstances. It is open to the court to take into account other relevant matters. See further part II paras 188-201.

C41 *Section 5(4)(a)* requires the court to take into account the special nature of the New Zealand Bill of Rights Act 1990. The words from the long title of the Bill of Rights are repeated in the rule. See part II paras 179-180.

C42 *Section 5(4)(b)* requires the court to take into account the nature and gravity of any impropriety. This may call for a wide ranging inquiry relating to the individual defendant and wider concerns. See part II paras 181-183.

C43 *Section 5(4)(c)* requires the court to consider whether any impropriety was the result of bad faith. See part II paras 184-185.

C44 *Section 5(4)(d)* requires the court to consider whether evidence existed and would have been discovered or otherwise obtained regardless of any impropriety. See part II paras 186-187.

C45 *Section 5(5)* makes it clear that if a statement is inadmissible under the reliability rule or the oppression rule it cannot be admitted under the improperly obtained evidence rule.





## 6 Comment on pre-trial right of silence

- (1) In a criminal proceeding, no person other than the defendant or the defendant's counsel may comment on the failure or refusal of that defendant to answer a question or respond to a statement put or made to that defendant in the course of official questioning before the trial.
- (2) Subsection (1) does not affect the admissibility of nor preclude comment on evidence that a defendant failed or refused to answer a question or respond to a statement put or made to that defendant in the course of official questioning if the failure or refusal is a fact required to be proved in the proceeding.
- (3) In this section  
**official questioning** means questioning by or in the presence of
  - (a) a police officer; or
  - (b) a person whose functions include the investigation of offences,in connection with the investigation of an offence or a possible offence.

## COMMENTARY

**Section 6**

C46 The purpose of *section 6* is to prohibit comment during a criminal trial by the court, the prosecution or a co-defendant concerning any exercise by a defendant of the right to remain silent in the face of official questioning which has taken place before the trial. This changes the present law concerning comment on a belated explanation. See part I paras 53-59.

C47 Section 6 is a provision of general application, but it is not intended that the section derogate from the specific provisions concerning the right of silence in the Serious Fraud Office Act 1990: see part I note 73. Provision to that effect will be included in the Code if necessary.

C48 *Section 6(1)* prevents comment on the failure of a defendant to answer a question or respond to a "statement". This word is defined in section 1: see paras C0-C0.

C49 Section 6(1) applies only to "official questioning". It follows that, subject to the restraints of relevance and prejudice, evidence may be given of the defendant's silence in the face of questions or allegations put to the defendant by a person, such as a friend or relation, with whom the defendant was on even terms.

C50 While section 6(1) prohibits comment on the pre-trial silence of a defendant, it does not exclude evidence of such silence (see the discussion in part I para 79). The admissibility of evidence of the exercise of the right of silence will be determined on the basis of relevance and the general power to exclude evidence if its probative value is outweighed by the danger that the evidence may have an unfairly prejudicial effect, confuse the issues or mislead the court or jury (see *Evidence Law: Codification*, 19-20, sections 2(2) and 3 respectively). It is anticipated that evidence of the exercise of the right of silence prior to trial will generally be excluded, but there may be occasions when the evidence is necessary to obtain a coherent or comprehensible narrative of events. The application of the above principles will also allow a defendant to introduce evidence of his or her pre-trial silence. In such a case, the necessity for the evidence to be relevant to the issues in the proceeding will constitute a practical restraint on the defendant.

C51 Section 6(1) affects the so-called doctrine of recent possession in that the section prevents comment on a defendant's failure, prior to trial, to offer an explanation for possession of recently stolen property (see the discussion in part I paras 85-91). Comment will, however, be able to be made on a failure to offer an explanation at trial.

C52 The Law Commission's proposals do not require any substantial change to the present statutory provisions concerning silence at trial (ss 364 and 366(1) of the Crimes Act 1961). Replacement provisions for those sections will be drafted following receipt of

responses to the discussion paper.

C53 *Section 6(2)* places it beyond doubt that section 6 is not to be construed to prevent evidence of pre-trial silence being given and comment made on that evidence if the failure to answer questions or respond to a statement is itself a fact required to be proved in the proceeding.

C54 The term "official questioning" is defined in *section 6(3)* and is limited to questioning by or in the presence of a police officer or person whose functions include the investigation of offences. The latter category will include officials conducting investigations for the purposes of enforcing an enactment, such as customs officers or fisheries officers, and persons such as insurance investigators or store security staff. The official questioning must be in connection with the investigation of an offence or possible offence.

## Draft Rules for Questioning after Arrest

### INTRODUCTION

C1 The purpose of the questioning rules is to declare and define clearly the rights of suspects and the powers and obligations of the police with respect to questioning about suspected offences. The draft rules provide for a limited investigation period during which the police may question a person who has been arrested for an offence before being required to charge and bring the arrested person before the court. The rules also contain safeguards for suspects and do not derogate from the arrested person's right to decline to answer questions. The objectives of the provisions are summarised in part III paras 30-32. For ease of reference, the rules appear on an even numbered page and the accompanying commentary on the facing page.

C2 The draft rules are directed only to the investigation of offences by the police. The relevance and application of the rules to other law enforcement agencies is a matter which requires further consideration in due course.

## QUESTIONING PROVISIONS

**1 Definitions**

In this part

**offence** means an offence of a kind for which a person may be arrested by a police officer; and

**questioning a person** means

- (a) questioning the person, or
- (b) carrying out an investigation in which the person participates,

about the commission or possible commission of an offence by that person.

## COMMENTARY

**Section 1**

C3 *Section 1* defines the two terms "offence" and "questioning a person".

C4 The word "offence" is defined so as to restrict the application of the regime to offences for which a person may be arrested by a police officer: see part III para 31. It will be necessary to exclude from the regime other specific legislation governing the way in which evidence may be obtained from a suspect (provided such legislation contains satisfactory safeguards).

C5 The definition of "questioning a person" confines the meaning of that phrase to questioning a person about the commission or possible commission of an offence *by that person*. It follows that the questioning provisions are concerned only with the questioning of suspects and not with the questioning of victims or witnesses who are not suspected: see part III para 64.

C6 *Paragraph (b)* extends the definition of "questioning a person" beyond straightforward questions and answers to include "carrying out an investigation in which the person participates". This would include participation in an identification parade, provision of a bodily sample and also physical actions such as a demonstration of an event or pointing out the whereabouts of an object. The extended definition recognises that the police are entitled, for the purpose of conducting such procedures, to delay charging arrested persons and bringing them before a court. It further recognises that suspects who participate in such procedures should have the protection of the questioning safeguards.

## 2 Entitlement to questioning safeguards

- (1) In this Part a reference to the questioning safeguards is a reference to the rights and obligations conferred or imposed by
  - (a) section 3 (notification of reason for questioning); and
  - (b) section 4 (caution); and
  - (c) section 5 (communication with lawyer, friend, relative, consular officer); and
  - (d) section 6 (deferral of grant of right to consult lawyer); and
  - (e) section 7 (deferral of communication rights); and
  - (f) section 8 (interpreter, technical assistance).
- (2) A person is entitled to the questioning safeguards immediately on the occurrence of any of the following circumstances:
  - (a) the person is either arrested for an offence or could lawfully be arrested for an offence by a police officer; or
  - (b) a police officer has grounds to suspect that the person has committed an offence and the person
    - (i) is at a police station; or
    - (ii) has reasonable grounds to believe that he or she is being detained.
- (3) If a person is arrested for an offence and subsequently a police officer has grounds to suspect that the person has committed another offence, that person is entitled to the further application of the questioning safeguards (except those in section 5(1)(b) and (c)) before the police officer questions the person about that other offence.
- (4) The entitlement conferred by subsection (2) does not arise in the case of a person who has not been arrested but could lawfully be arrested by a police officer who is engaged in an undercover operation authorised by a commissioned officer of police.

## COMMENTARY

**Section 2**

C7 *Section 2(2)* defines the categories of persons who are entitled to the questioning safeguards. *Section 2(1)* describes the content of the safeguards in an abbreviated way and indicates where in the draft rules the safeguards may be found. Paras 60-76 of part III discuss the circumstances in which a person should become entitled to the benefit of the questioning safeguards.

C8 The second limb of *section 2(2)(a)* refers to persons who "could lawfully be arrested for an offence" ie, persons whom a police officer has good cause to suspect have committed an offence. These are the only persons covered by the second limb. If it is thought necessary in the interests of clarity, the section could be redrafted to refer specifically to persons whom a police officer has good cause to suspect.

C9 *Section 2(2)(b)(ii)* requires an objective test: would a reasonable person in the position of the suspect believe that he or she was detained? For discussion of a possible alternative formulation see note 71 to para 64 of part III. It should also be noted that in the case of *section 2(2)(b)* the police officer is required to have "grounds to suspect". Accordingly, a police officer is not required to provide the questioning safeguards to persons whom there are no grounds to suspect (eg, persons who are in a police station but are simply witnesses, not suspects).

C10 *Section 2(3)* is supplementary to *section 2(2)*. The intention is to ensure that certain of the safeguards provided in respect of the offence about which the suspect is being questioned are provided again if the police subsequently wish to question the suspect about some other offence.

C11 *Section 2(4)* contains an exception to one of the categories specified in *section 2(2)* (persons who may lawfully be arrested by the police but who have not been arrested). It excludes from that category persons who might lawfully be arrested by a police officer engaged in an authorised undercover operation. The justification for the exception is that in such a case the suspect is not aware of the identity of the police officer and is not subject to the coercive pressures which arise in other circumstances when the identity of the police officer is known.



### **3 Duty to notify reason for questioning**

Before questioning a person who is entitled to the questioning safeguards, a police officer must

- (a) inform the person of the reason for the questioning; and
- (b) if the person has not been arrested but is in the presence of a police officer, inform that person that he or she is free to leave.

## COMMENTARY

**Section 3**

C12 *Section 3* contains the first of the safeguards (the duty to notify of the reason for questioning). It applies to all persons who fall within the categories in section 2, some of whom will have been arrested and some of whom will not. The effect of paragraph (a) is that in every case the suspect must before questioning be informed why he or she is being questioned. Section 3 is complementary to, but where appropriate operates in addition to, section 23(1)(a) of the New Zealand Bill of Rights Act 1990 and section 316(1) of the Crimes Act 1961, which are statutory formulations of the common law rule that persons who are arrested must be informed at the time of arrest of the reason for the arrest.

C13 *Section 3(b)* applies if the suspect has not been arrested. In such a case the suspect must be informed that he or she is free to leave. This provision is necessary to dispel wrongful assumptions that a person is in fact in custody and to ensure that persons voluntarily co-operating with the police are in fact acting voluntarily. The obligation to give such "free to leave" advice does not arise unless the person is a suspect entitled under section 2(2) to the questioning safeguards. The qualification in section 3(b) that free to leave advice need only be given if the person is in the presence of the police officer is necessary to cover, for example, the situation where a person makes a statement to a police officer by telephone and becomes entitled to the questioning safeguards (because the police officer could lawfully arrest the person for an offence as a result of information contained in the person's statement).

#### **4 Duty to caution**

- (1) Before questioning a person who is entitled to the questioning safeguards, a police officer must caution the person in the following terms:

You do not have to say or do anything unless you want to. If you do say or do anything, what you say or do may be given as evidence in court.

- (2) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency.
- (3) The caution need not be given in writing.
- (4) A person must not be questioned if the person's condition or behaviour is such that giving a caution is not practical or a caution would not be understood. The caution must be given as soon as it is practical to do so and the caution would be understood.
- (5) This section does not apply to the extent that another enactment requires the person to answer questions or do things required under that enactment.

## COMMENTARY

**Section 4**

C14 The obligation to caution a suspect before questioning is intended to ensure that a suspect is aware of the right to remain silent. The draft rules include a simple and easily understood form of caution which is adapted from that in the Code of Practice for the Detention, Treatment and Questioning of Police Officers issued in the United Kingdom under the Police and Criminal Evidence Act 1984. Since a suspect is generally not obliged to do anything requested by the police, the proposed caution also deals with that aspect. The caution will require minor amendment when an interview is to be video-taped: see note 120 to para 95 of part III.

C15 *Section 4(4)* recognises that it is pointless to caution a suspect whose condition or behaviour at the time is such that the caution would not be understood. The section provides for the cautioning to be delayed until it is practical and would be understood. During the period of delay the suspect cannot be questioned. This follows from section 5 which requires communication rights to be provided to the suspect after cautioning and before questioning.

C16 *Section 4(5)* puts beyond doubt that section 4 does not apply to the extent that a specific enactment requires questions to be answered or things done.

## **5 Rights and duties concerning communication with lawyer, friend, relative and consular officer**

- (1) After cautioning and before questioning a person who is entitled to the questioning safeguards, a police officer must inform that person
  - (a) that he or she may consult and instruct a lawyer and arrange, or attempt to arrange, for a lawyer to be present during the questioning; and
  - (b) that he or she may communicate, or attempt to communicate, with a friend or relative; and
  - (c) in the case of a person who to the knowledge of the police officer is not a New Zealand citizen, that he or she may communicate with, or attempt to communicate with, a consular officer of the country of which the person is a citizen.
- (2) If the person wishes to consult a lawyer or communicate with a friend, relative or consular officer, the police officer must defer the questioning for a reasonable time and
  - (a) as soon as is practical, give the person reasonable facilities to enable that person to carry out such consultation or communication; and
  - (b) in the case of consultation with a lawyer, allow the person to consult in private with the lawyer and provide reasonable facilities for that consultation.
- (3) If the person who wishes to consult a lawyer is unable to do so or if a lawyer who has agreed to attend at a police station to advise the person fails to do so within a reasonable time (which ordinarily shall not be less than two hours), the police officer need not on that account defer questioning the person any further. In such a case, the police officer must, before questioning the person, again inform the person of the reason for the questioning and caution the person in the manner required by section 4.
- (4) If the person arranges for a lawyer to be present during the questioning, the police officer must
  - (a) allow the person to consult in private with the lawyer and provide reasonable facilities for that consultation; and
  - (b) allow the lawyer to be present during the questioning and to give advice to that person.
- (5) Notwithstanding section 2(2), this section does not apply to a person who
  - (a) makes a statement to a police officer by telephone or otherwise not in the presence of the police officer; and
  - (b) is entitled to the questioning safeguards because the police officer could lawfully arrest that person for an offence as a result of that statement.

## COMMENTARY

**Section 5**

C17 *Section 5(1)* confers rights of communication on persons entitled to the questioning safeguards; they enable the suspect to communicate with a lawyer, a friend or relative and, if the suspect is not a New Zealand citizen, with a consular officer of the country of which he or she is a citizen.

C18 *Section 5(1)(a)* reflects and complements the right in section 23(1) of the New Zealand Bill of Rights Act 1990, but is wider than that right in that it covers some suspects who do not have the advantage of the Bill of Rights provision (which only applies to persons arrested or detained under any enactment). The police officer is required to inform the suspect that he or she "may consult and instruct a lawyer and arrange, or attempt to arrange, for the lawyer to be present during the questioning".

C19 *Sections 5(2)-5(4)* make provision for the facilitation of the consultation right.

C20 *Section 5(5)* contains an exception to the obligations under section 5(1). An incriminating statement may be made during a telephone call or otherwise not in the presence of a police officer. Such a statement may lead the police officer to have good cause to suspect that the person has committed an offence (with the result that the person "could lawfully be arrested"), but in such circumstances the communication rights are neither apposite nor practicable. However, if the police officer questions the person, the duty under section 3 to inform the person of the reason for any questioning and the duty under section 4 to caution remain applicable.

## **6 Deferral of grant of right to consult lawyer**

- (1) The performance of the obligations imposed on a police officer by section 5(2) (to provide facilities for communication and consultation with a lawyer) may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that
  - (a) immediate compliance with the section will result in
    - (i) an accomplice of the person taking steps to avoid apprehension; or
    - (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
  - (b) the questioning is so urgent, having regard to the danger of harm to some other person or persons, that it should not be delayed by compliance with those obligations.
- (2) An exercise of the power to defer under subsection (1) does not imply that questioning must be deferred.
- (3) If the application of subsection (1) on the grounds stated in subsection (1)(a) results in
  - (a) preventing or delaying the person from communicating with a lawyer of his or her own choice; or
  - (b) preventing or delaying a lawyer of the person's choice from attending at any questioning,

the police officer must, before questioning the person, provide reasonable facilities to enable the person to communicate and consult with another lawyer and allow that other lawyer to attend any questioning.
- (4) If a commissioned officer of police defers the performance of an obligation under this section, he or she must
  - (a) make a record of the grounds on which the performance of the obligation is deferred; and
  - (b) except where the services of another lawyer have been accepted and provided under subsection (3), perform the obligation as soon as possible after the grounds for deferral cease to apply.

## COMMENTARY

**Section 6**

C21 *Section 6* enables the police to defer granting the right to communicate with and consult a lawyer in certain strictly limited circumstances and subject to specified conditions. This is discussed in part III paras 114-119. Advice of the right, as distinct from exercise of the right, may not be deferred. The suspect must be informed of the right although the exercise of the right itself is deferred.

C22 *Section 6(2)* places it beyond doubt that if the right to communicate with a lawyer is deferred this does not imply that questioning must be deferred. The suspect may, however, exercise the right of silence if communication with a lawyer is deferred.

C23 *Section 6(3)* recognises that in the very rare case where the police may be justified in delaying access to a lawyer, that decision can only relate to a particular lawyer (for example, because the police have reasonable grounds to believe that the lawyer is also a party to the alleged offence) and not to lawyers in general. In that event the police must provide reasonable facilities to enable the person to communicate and consult with another lawyer. The other lawyer must be allowed to attend at any questioning.



## **7 Deferral of grant of communication rights**

- (1) The performance of the obligation imposed on a police officer by section 5(2)(a) (to give facilities for communication with a friend or relative) may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that
  - (a) immediate compliance with the section is likely to result in
    - (i) an accomplice of the person taking steps to avoid apprehension; or
    - (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or
  - (b) the questioning is so urgent, having regard to the danger of harm to some other person or persons, that it should not be delayed by compliance with that obligation.
- (2) The performance of the obligation imposed on a police officer by section 5(2)(a) (to give facilities for communications with a consular officer) may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that the questioning is so urgent, having regard to the danger of harm to some other person or persons, that it should not be delayed by compliance with that obligation.
- (3) An exercise of the power to defer under subsection (1) or (2) does not imply that questioning must be deferred.
- (4) If a commissioned officer of police defers the performance of an obligation under this section, he or she must
  - (a) make a record of the grounds on which the performance of the obligation is deferred; and
  - (b) perform the obligation as soon as possible after the grounds for deferral cease to apply.

## **8 Right to interpreter and technical assistance**

If a person who is entitled to the questioning safeguards has impaired sight or hearing or some other physical disability affecting his or her capacity to communicate orally or does not have reasonable fluency in the English language, the police officer must

- (a) inform that person that he or she has a right to have the assistance of an interpreter or other technical assistance that is reasonably necessary to facilitate communication during the questioning; and
- (b) if required, arrange for the presence of an interpreter and other necessary assistance and defer questioning until the interpreter or other assistant is present.

## COMMENTARY

**Section 7**

C24 *Section 7* concerns deferral of the right of a suspect under section 5(2) to communicate with a friend or relative. *Section 7(1)* is substantially similar to section 6(1) except that it uses the phrase "is likely to result" rather than "will result". As to the reason for this distinction see part III para 120.

C25 *Section 7(2)* permits deferral of communication rights in the case of consular officers, but only in circumstances where the questioning is so urgent, having regard to the danger of harm to some other person or persons, that it should not be delayed.

**Section 8**

C26 *Section 8* is not intended to cover all aspects of the right to have the assistance of an interpreter. The procedures which should be followed when an interpreter is used are best addressed by internal police guidelines together with the rules requiring that statements must be reliable and properly obtained: see part III para 112. Deficiencies of procedure, understanding or communication may result in the exclusion of a statement under those rules. Section 8 does not require a police officer to advise a suspect who is Maori, but who has reasonable fluency in the English language, that he or she has the right to the assistance of an interpreter. This issue is best addressed by way of an

appropriate amendment to the Maori Language Act 1987.

## 9 Post-arrest investigation period

- (1) A person detained following a lawful arrest may be questioned by the police for a period that is reasonable in the circumstances but does not exceed 4 hours if a police officer believes on reasonable grounds that questioning is necessary to preserve or obtain evidence or to complete the investigation into the offence or another offence for which the police have good cause to arrest the defendant.
- (2) In determining what is a reasonable period for the purposes of this section and section 10, regard shall be had to the number and complexity of matters being investigated.
- (3) In ascertaining a reasonable period for the purposes of this section and section 10, each of the following times shall be disregarded so long as the person is not questioned while that time continues:
  - (a) time reasonably taken to convey the person to an appropriate place for the purposes of the investigation; and
  - (b) time during which questioning is deferred or suspended to allow the person, or some person acting on behalf of that person, to communicate with a lawyer, friend, relative, or consular officer; and
  - (c) time spent waiting for the arrival of persons referred to in paragraph (b) or an interpreter or technical assistant required under section 8; and
  - (d) time during which the person is engaged in consulting a lawyer or communicating with any person referred to in paragraph (b); and
  - (e) time spent by the person receiving medical attention, resting or receiving refreshment; and
  - (f) time when the person cannot be questioned because of his or her intoxication, illness or other physical condition; and
  - (g) time reasonably taken to make an application under subsection (4) or section 10.
- (4) A police officer may, before the end of the period of 4 hours provided for by subsection (1), apply to a commissioned officer of police for an extension of that period. The commissioned officer may grant an extension of the investigation period for a reasonable period that is not to exceed 4 hours if
  - (a) the commissioned officer believes on reasonable grounds that
    - (i) further questioning is necessary to preserve or obtain evidence or to complete the investigation into the offence or another offence for which the police have good cause to arrest the defendant; and
    - (ii) the investigation is being conducted properly and without delay; and
  - (b) the person, or a lawyer on his or her behalf, has been given the opportunity to make representations about the application.
- (5) An investigation period may not be extended under subsection (4) more than once.

## COMMENTARY

**Section 9**

C27 *Section 9* provides for a post-arrest investigation period during which a person who has been arrested by the police for an offence may be questioned concerning that offence or concerning another offence for which the person might lawfully be arrested. It is not necessary for questioning to take place throughout the investigation period. For example, an arrested person may be held while inquiries are made, provided the police officer believes on reasonable grounds that questioning is necessary following completion of the inquiries. Time, however, begins to run when the suspect is arrested and continues to do so whether or not the police are actually questioning the suspect (unless one of the "time out" periods specified in subsection (3) applies). Investigations which will not lead to immediate questioning, for example, a DNA test, are covered by the extended definition of questioning in section 1. If there are no reasonable grounds to believe that questioning is necessary to preserve or obtain evidence or to complete the investigation concerning the offence (or another offence for which the person could be arrested), then the arrested person must either be charged promptly and brought before a court as soon as possible or released.

C28 *Section 9* does not derogate from a suspect's right to decline to answer questions. The safeguards already referred to, including the caution and the right to consult and instruct a lawyer, must be provided before questioning may begin. The section does not permit any attempt to undermine a suspect's exercise of the right of silence: see part III paras 125-127.

C29 The post-arrest investigation period is limited to a period which is "reasonable in the circumstances", subject to an outer limit of four hours. In many instances it will not be reasonable to detain a person for four hours following arrest. If at any stage the grounds justifying detention for investigation following arrest cease to apply then the arrested person must either be charged and brought before a court as soon as possible or released.

C30 *Section 9(3)* lists a number of periods of time which should be disregarded when ascertaining what is a reasonable period for questioning. These times are only to be excluded from the calculation if the suspect is not questioned during the time out period. If any questions are asked during what would otherwise be a time out period, then the whole of that period is counted as questioning time.

C31 Although the large majority of investigations will be completed well within the maximum of four hours stipulated in section 9(1), it is appropriate to provide for a minority of investigations which will reasonably require a longer period. *Section 9(4)* enables a commissioned officer of police (who should normally not be the person who is undertaking the questioning) to grant an extension of the investigation period for a reasonable period which shall not exceed a further four hours. The criteria for extension are set out in paragraphs (a) and (b) of subsection (4) and are dependent on the reasonable belief of the commissioned officer. Under paragraph (b) the arrested person, or a lawyer on his or her behalf, must be given the opportunity to make representations to the commissioned officer of police regarding the application for an extension. Such an

extension can only be granted once.

## **10 District Court Judge may extend post-arrest investigation period**

- (1) A police officer may, before the end of the post-arrest investigation period authorised in respect of a person under section 9(4), apply, orally or in writing, to a District Court Judge for an extension of that period.
- (2) The police officer making an application for an extension must provide the District Court Judge with a statement as to
  - (a) the nature of the offence concerning which the person is being or is to be questioned; and
  - (b) the general nature of the evidence held by the police; and
  - (c) the inquiries already made by the police relating to the offence and the nature of proposed further inquiries; and
  - (d) the reasons for believing that further questioning of the person is necessary for the purposes of those further inquiries.
- (3) If an oral application is made to a District Court Judge, the application and the statement required under subsection (2) must be confirmed in writing before an extension may be granted.
- (4) A District Court Judge may grant an extension authorising the further detention of the person for a reasonable period not exceeding 24 hours if
  - (a) he or she is satisfied that
    - (i) the offence in respect of which the person is being or is to be questioned is punishable on conviction by a maximum penalty of not less than 14 years' imprisonment; and
    - (ii) further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence or another offence for which the police have good cause to arrest the defendant; and
    - (iii) the investigation is being conducted properly and without delay; and
  - (b) the person, or a lawyer on his or her behalf, has had an opportunity to make representations about the application.
- (5) A District Court Judge may adjourn the hearing of an application under this section for not more than 18 hours; and during the period of the adjournment the police may detain but not further question the person to whom the application relates.
- (6) An order extending the post-arrest investigation period shall state the time when it is made and the period of the extension.
- (7) Before questioning a person after an extension order has been made, a police officer must again inform the person of the reason for the questioning and caution the person in the manner required by section 4.
- (8) An investigation period may not be extended under this section more than once.

## COMMENTARY

**Section 10**

C32 *Section 10* makes provision for a further extension of the post-arrest investigation period which will be available only in the very unusual and serious kind of case where the investigation cannot be completed within the eight hour period allowed under section 9. In such a case, an application to a District Court Judge for an extension may be made before the end of the eight hour period.

C33 *Subsection (4)* lists the matters on which the District Court Judge must be satisfied before an extension order may be made. The first of these (paragraph (a)) enables an order to be made only if the investigation concerns an offence which is punishable by imprisonment for 14 years or more. The Judge must also be satisfied that further questioning is necessary and that the investigation is being conducted "properly and without delay". Under paragraph (d), the Judge must be satisfied that the person or a lawyer on his or her behalf has had an opportunity to make representations about the application.

C34 *Subsection (5)* enables a District Court Judge to adjourn an application for a maximum of 18 hours, during which time the suspect may be detained but cannot be questioned by the police. The power of adjournment is necessary because the eight hour investigation period allowed under section 9 could terminate too late in the day for an application to the District Court Judge to be heard until the next morning.

C35 *Subsection (7)* requires that after an extension order is made and before further questioning a suspect, a police officer must again inform the suspect of the reason for the questioning and again caution him or her. This is desirable because of the time which may have elapsed since the information and caution were originally given.

C36 *Subsection (8)* provides that an investigation period may not be extended under section 10 more than once.



## **11 Cessation of post-arrest investigation period**

- (1) A person who is questioned under section 9 or 10 must be either charged with an offence or released immediately the authorised post-arrest investigation periods ends.
- (2) Subsection (1) does not apply during such time as an application for the extension of a post-arrest investigation period is adjourned by a District Court Judge.

## **12 Questioning after charge**

- (1) A police officer may not question a person concerning an offence after the person has been charged with the offence except so far as may be necessary
  - (a) for the purpose of preventing harm or minimising loss to some other person; or
  - (b) to clarify an ambiguity in a previous statement or answer to a question; or
  - (c) in the interests of justice, to give that person an opportunity to comment on information concerning the offence that has come to the notice of the police since the person was charged.
- (2) Before questioning a person under this section, a police officer must
  - (a) inform the person of the reason for the questioning and caution the person again in the manner provided by section 4; and
  - (b) grant the communication and consultation rights in relation to a lawyer conferred by section 5.
- (3) The obligation under subsection (2)(b) (communication and consultation with a lawyer) may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that, having regard to the danger of harm to some person or persons, the questioning is so urgent that it should not be delayed by compliance with that obligation.

## COMMENTARY

**Section 11**

C37 *Section 11* provides that a suspect must be either charged with an offence or released immediately on the expiration of the authorised post-arrest investigation period. *Subsection (2)* makes a necessary technical exception to this general rule to cover the time when an application to a District Court Judge for an extension under section 10 stands adjourned. This cannot be for longer than 18 hours.

**Section 12**

C38 *Section 12* confirms the general principle that after being charged with an offence a person should not be further questioned by the police about that offence. However, in limited circumstances it is desirable to permit questioning after charge. *Subsection (1)* specifies those circumstances.

C39 *Subsection (2)* requires that before questioning a person who has been charged a police officer must inform him or her of the reason for the questioning and give a caution. The person must also be informed of the right to consult a lawyer. This right may be deferred if a commissioned officer of police believes on reasonable grounds that, having regard to the danger of harm to some person, questioning is so urgent that it should not be deferred.

**13 Re-arrest following release**

A person who has been arrested for an offence and released before being charged with that offence (or a related offence based substantially on the same facts) may not subsequently be re-arrested and questioned about that offence or related offence unless additional evidence against that person has come to the notice of the police since the person was released.

## COMMENTARY

**Section 13**

C40 *Section 13* applies to a person who has been arrested for an offence but is subsequently not charged with that offence and is therefore released. Such a person may not be re-arrested and questioned about that offence unless additional evidence against the person has come to the notice of the police since the person was released. This section is necessary to ensure that the provisions concerning time limits are not circumvented: see part III paras 151-153.

## CONCLUSIONS

C41 The questioning provisions as drafted do not specifically refer to remedies for breach. In terms of the Law Commission's proposals in part II a breach of the questioning provisions will be subject to the improperly obtained evidence rule ie, any evidence obtained as a consequence of a breach will be inadmissible unless the court considers that exclusion of the evidence would be contrary to the interests of justice. If the proposed improperly obtained evidence rule is not enacted at the same time as the police questioning rules it will be necessary to consider whether specific provisions concerning breach are required: see part III paras 164-168.



## Appendix A

### Admissibility Rules for Statements Offered in Evidence by Defendants

A1 When a defendant wishes to tender a statement, whether his or her own or that of a co-defendant, the admissibility rules proposed in part II of this discussion paper will not apply. A defendant who, when giving evidence, seeks to tender his or her own previous statement (eg, to show it is inconsistent with a later statement tendered by the prosecution) will not be subject to the confessions rules or the hearsay rules. The Law Commission recommended in its proposals on hearsay that this situation should be dealt with in terms of the general exclusionary power relating to evidence which is unfairly prejudicial, misleading, confusing or time-wasting.<sup>515</sup>

A2 A defendant who calls a police officer to produce the defendant's own statement (eg, blaming a co-defendant), or a statement by a co-defendant, will be subject to the hearsay provisions of the Evidence Code. The statement will be admissible if it has a sufficient assurance of reliability. This will be determined under the Commission's proposed hearsay rule by reference to the "circumstances relating to the statement",<sup>516</sup> which will allow any coercive circumstances to be taken into account. Broadly speaking, the "circumstances relating to the statement" include the nature and contents of the statement, the circumstances in which it was made, and the circumstances relating to the credibility of the maker of the statement. The burden of proof is on the defendant who offers the statement as evidence.

A3 If a defendant calls a police officer to tender the defendant's own statement, both the prosecution and any co-defendant will be able to require the defendant to give evidence and thus be subject to cross-examination. However, if a defendant calls a police officer to tender a co-defendant's statement (and the statement is admitted in evidence on the ground that it has a reasonable assurance of reliability) the co-defendant cannot be required to give evidence.<sup>517</sup>

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515 See *Evidence Law: Hearsay* (NZLC PP15 1991) para 14, and draft section 3, 31.

516 See *Evidence Law: Hearsay*, note **Error! Bookmark not defined.**, 33, 34; ss 1(4), 4 of the draft hearsay sections of the Evidence Code, "Admissibility of hearsay in criminal proceedings"; para C10.

517 See *Evidence Law: Hearsay*, note **Error! Bookmark not defined.**, 34, draft section 4(2)(b).

A4 A particular difficulty arises when a defendant wishes to cross-examine upon or tender a statement made by a co-defendant which has been improperly obtained by the police and is not able to be tendered by the prosecution. As the law at present stands, the defendant has the right to cross-examine the co-defendant concerning the statement, subject to the judge directing the jury not to use the statement as evidence against the co-defendant (see part II para 40); but it has been held that the defendant cannot cross-examine the police officer to whom the statement was made (see part II para 41).

A5 Any solution to the problem is bound to be debatable because the rationales justifying the exclusion of improperly obtained evidence are applicable in relation to the co-defendant. Admission of the statement may gravely affect the co-defendant's case despite the jury being directed not to use the statement as evidence against the co-defendant. On the other hand, the defendant will wish to contend that the statement is reliable and should therefore be before the court. The defendant is not the person who perpetrated the misconduct when the co-defendant's statement was obtained, and in attempting to establish a defence the defendant who wishes to utilise the co-defendant's statement has more important interests at stake than the prosecution, namely personal liberty. On balance, the Law Commission's provisional conclusion is that, assuming the trial cannot be severed, a defendant should be able to cross-examine (both the co-defendant and the police officer to whom the statement was made) concerning the co-defendant's statement, and, subject to the hearsay rule and the general exclusionary power, tender the statement in evidence. That is the position which will pertain as the new rules are at present drafted. The judge will need to direct the jury that the statement is not evidence against the co-defendant. We appreciate that this is a difficult issue and we seek comments about our provisional conclusion.<sup>518</sup>

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518 See further *Evidence Law: Hearsay*, note **Error! Bookmark not defined.**, 15, 38-30 and paras C15, C17.

# Appendix B

## The Admissibility of Improperly Obtained Evidence in Overseas Jurisdictions

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B1 In this appendix the current law on the admissibility of improperly obtained evidence in a number of jurisdictions is summarised, focusing mainly on real evidence discovered as the result of an improper search or seizure. This approach is chosen not only because the issue of improperly obtained evidence is most often discussed in this context, but also because it is this class of evidence which presents the greatest difficulties for those who argue for exclusion by reason of the improprieties in the means employed to obtain the evidence.<sup>519</sup>

B2 The United States, Canada, England, Australia and Scotland have adopted a wide range of solutions to the problems posed by improperly obtained evidence. At one extreme the United States is sometimes said to be a jurisdiction which has adopted an inflexible rule of automatic exclusion, while England is sometimes said to admit any evidence regardless of the means employed to gather it. It will be seen that the real effect of the law in those jurisdictions cannot be stated in such absolute terms; their law also reaches compromises of the kind adopted (with inevitable variations) in Canada, Australia, Scotland and New Zealand. We add, however, that any attempt to summarise the working of this complex area of the law in five separate jurisdictions must necessarily be incomplete and run the risk of over-simplification.

## UNITED STATES

### The exclusionary rule

B3 The Fourth Amendment to the United States' constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". However, the Fourth Amendment says nothing about the consequence of its breach; it merely guarantees the right in question and sets out minimum requirements for search warrants. The rule of exclusion of evidence is a judicial creation and as a result it has been subject to judicial alteration over the last few decades.<sup>520</sup>

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519 If a case can be made to exclude real evidence obtained as a result of an improper search then there should be little difficulty in likewise justifying the exclusion of other forms of evidence where additional values are prejudiced when improprieties occur in the evidence-gathering process. Thus real evidence discovered as the result of an inadmissible confession (and, indeed, the improperly obtained confession itself) will present a stronger case for exclusion because of the additional values (ie, unreliability and the protection against coerced self-incrimination) which relate to the obtaining of confessions (discussed in the text in part II paras 78-84). Unlawfully intercepted communications and improperly obtained body samples also will necessarily involve breaches of privacy more critical than are present in an improper search.

520 Slear, "Overview of the Fourth Amendment" and Kehoe, "Exclusionary Rule" in "Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1989-90" (1991) 79 Georgetown LJ 591, 729 respectively.

B4 In some respects the exclusionary rule adopted in the United States has a broad application, as may be seen in the exclusion of evidence described as "fruit of the poisoned tree" (ie, other evidence found as a result of the initial information provided by the improperly obtained evidence). Other aspects of the rule have, however, been more narrowly interpreted.

### Limits on the exclusionary rule

#### *Definition of unreasonable search or seizure*

B5 Before the express limits on the exclusionary rule are discussed, the judicial definition of what constitutes an unreasonable search or seizure is outlined. The degree of protection given by the Fourth Amendment from unreasonable search and seizure depends on the scope of this definition.

B6 An extensive jurisprudence has developed defining what conduct amounts to a search and seizure and when these occurrences are "unreasonable". For example, items exposed to the public or abandoned are not protected because the individual has not demonstrated a desire to maintain a reasonable expectation of privacy. The degree of intrusiveness involved in an activity alleged to be a search, and an expansive interpretation of what constitutes consent to a search, also determine whether the activity in question amounts to an unreasonable search or seizure. These, and similar concepts, have justified the admission of evidence obtained without a warrant<sup>521</sup> (which is usually required) by the following means:

- "stop and frisk" searches based on a standard of less than "probable cause" to suspect an offence;<sup>522</sup>
- the use of trained dogs to sniff for drugs;<sup>523</sup>
- searches of garbage left for normal pickup;<sup>524</sup> and
- the use of helicopters to discover cannabis growing in a defendant's

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521 *Katz v US* 389 US 347 (1967).

522 *Terry v Ohio* 392 US 1 (1968).

523 *US v Place* 462 US 696 (1983).

524 *California v Greenwood* 486 US 35 (1988).

backyard.<sup>525</sup>

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<sup>525</sup> *Florida v. Riley* 488 US 445 (1989).

*Reasonable and good faith reliance*

B7 One important limitation on the exclusionary rule is the exception admitting evidence obtained as the result of a police officer's reasonable and good faith reliance on a warrant or statute purporting to authorise the search in question, even if the warrant or statute is determined, in retrospect, to be invalid. This "good faith" exception to the rule of exclusion has been justified by the United States Supreme Court on the basis that the prime purpose of exclusion of evidence - deterrence of similar conduct by the police in the future - will not be promoted when the officer's mistake was reasonable and in good faith.<sup>526</sup> If the police will not be deterred, there is no justification for excluding the evidence.

*Inevitable discovery*

B8 Evidence will also be admitted despite the illegality if it would inevitably have been discovered by proper police methods. This exception to the exclusionary rule has already been adopted by the New Zealand Court of Appeal in *R v Butcher*,<sup>527</sup> citing a recent formulation of the exception by the Supreme Court of Canada.<sup>528</sup> It is closely related to the more obvious exception admitting the evidence if, despite an initial impropriety, it is later discovered by acceptable means.<sup>529</sup>

*Attenuation*

B9 Attenuation is another limitation on the United States exclusionary rule. It refers to the strength required of the causal link between the constitutional breach in question and the obtaining of the evidence. Though the familiar "but for" test might have been employed to reject all evidence which would not have been obtained *but for* the impropriety, that test has been rejected by the Supreme Court in favour of a more sophisticated formulation. The question asked is whether the evidence was found by the "exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint".<sup>530</sup> If the

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526 *US v Leon* 468 US 897 (1984).

527 [1992] 2 NZLR 257, and see part II paras 49-53.

528 *R v Black* (1989) 70 CR (3d) 97.

529 *Murray v US* 487 US 533 (1988).

530 *Wong Sun v US* 371 US 471, 488 (1963) citing Maguire, *Evidence of Guilt*, 221; see *US v Ceccolini* 435 US 268 (1978) where this doctrine was applied to admit the testimony of a witness whose identity was discovered as a result of a illegal search.

latter part of that test is met the evidence will be sufficiently attenuated from the illegality to allow for its admission. Three factors are considered relevant in this determination: the time elapsing between the illegality and the acquisition of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.<sup>531</sup>

### *Prosecution evidence in chief*

B10 The rule excludes improperly obtained evidence only from the prosecution's evidence in chief. If the defendant testifies, the rule will not prevent admission of the evidence to contradict his or her testimony. The rationale for this somewhat surprising exception is that the defendant's privilege to testify does not include the right to commit perjury.<sup>532</sup>

### *Standing*

B11 Only the actual victim of police misconduct can invoke the exclusionary rule. Incriminating evidence obtained improperly from co-defendants will, therefore, be admissible at the defendant's trial.<sup>533</sup> In terms of the Fourth Amendment, standing is determined by deciding whether a defendant had a reasonable expectation of privacy in the area searched or the items seized.<sup>534</sup>

## Summary

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531 *Brown v Illinois* 422 US 590 (1975).

532 *US v Havens* 446 US 620 (1980). This exception does not allow tainted evidence to impeach the testimony of other defence witnesses: *James v Illinois* 493 US 307.

533 The issue of standing to complain of a constitutional breach has given rise to much litigation. Thus in *Rakas v Illinois* 439 US 128 (1978) the defendant who asserted no ownership of the car which was searched, or of evidence that was seized, lacked standing to challenge the constitutional validity of the search. In *Alderman v US* 394 US 163 (1969) the owner of premises where illegal electronic interception of communications occurred was granted standing to rely on the breach even though not present when the pertinent conversations occurred.

534 For example, in *Rawlings v Kentucky* 448 US 98 (1980) the defendant lacked standing to challenge the admissibility of drugs seized from the purse of his female acquaintance. The facts showed a lack of any normal precautions by the defendant to maintain his privacy in respect of the drugs he had deposited in the purse and, further, he had admitted under cross-examination that he did not believe the purse was free from government intrusion.

B12 Despite the popular view that the exclusionary rule operates in the United States as a major obstacle to the determination of truth, empirical studies have shown that in practice objections to the admissibility of evidence are successful in only a small percentage of cases.<sup>535</sup> Further, it should be remembered that what is in question in many of the United States cases is evidence obtained as a result of a breach of a constitutionally protected right. Although this covers a wide range of improprieties, it is not all embracing and United States jurisprudence has not developed a similar rule of exclusion for improprieties in obtaining evidence which do not amount to constitutional breaches.<sup>536</sup> In those cases the solutions chosen in various state jurisdictions are often similar to the compromise position reached at present in New Zealand.

## CANADA

### Before the Charter

B13 Before the Charter of Rights and Freedoms was enacted in Canada, evidence obtained by improper means or in violation of the earlier (unentrenched) Bill of Rights was admissible if relevant. A discretion existed to exclude evidence when its prejudicial effect outweighed its probative value, but there was no other discretion to exclude unfairly obtained evidence.<sup>537</sup>

### Exclusion of evidence obtained in breach of the Charter

B14 Section 8 of the Canadian Charter of Rights and Freedoms guarantees the right to be secure against unreasonable search and seizure. Further, it contains an express clause (s 24(2), para B0 below) requiring exclusion of evidence obtained in a manner that infringes or denies any of the rights guaranteed if the admission of the evidence in the proceedings "would bring the administration of justice into disrepute." It would appear to be a safe assumption that the 10 years in which the Charter has been in effect have also

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535 See eg, New South Wales Law Reform Commission, *Police Powers of Detention and Investigation After Arrest* (LRC 66, 1990) 159, footnote 64. ("There were motions to suppress evidence in 7.6 per cent of the cases surveyed, resulting in the successful exclusion of confessional evidence in only 0.16 per cent of cases.") This, of course, would not account for cases where the prosecution makes no attempt to offer the tainted evidence. See also Uchida, Bynum, "Search Warrants, Motions to Suppress and 'Lost Cases': The Effects of the Exclusionary Rule in Seven Jurisdictions" [1991] 81 *Journal of Criminal Law and Criminology* 1034, and Orfield, "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotic Officers" (1987) 54 *University of Chicago LR* 1016.

536 Dix, "Nonconstitutional Exclusionary Rules in Criminal Prosecutions" (1989) 27 *American Criminal LR* 53.

537 *R v Wray* [1971] SCR 272.

had a spin-off effect: in cases where evidence has been improperly obtained, but in a manner not infringing the Charter, the former strict approach which denied a discretion to exclude such evidence may no longer apply.<sup>538</sup>

B15 Section 24 of the Charter provides:

- (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

B16 The test set by s 24(2) of the Charter consciously adopts the policy of preserving the integrity of the justice system, as opposed to the police deterrence rationale that stands in current favour in the United States. Inevitably, there will be some overlapping of the two policies. It was recognised in *R v Collins* that a determination whether or not the admission of improperly obtained evidence "would bring the administration of justice into disrepute" will necessarily have future cases in mind, just as will any decision based on deterring future police misconduct:

it must be emphasised that even though the inquiry under s 24(2) will necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered ...<sup>539</sup>

While the general focus of a decision about exclusion of evidence in the case of any Charter breach must be to preserve the integrity of the criminal justice system, the Supreme Court of Canada has stressed that, in the particular context of unreasonable search or seizure, privacy is the prime value to be protected.<sup>540</sup>

B17 As might be expected, Canadian interpretation of the Charter's exclusionary rule in

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538 See *R v Corbett* [1988] 1 SCR 670; *R v Potvin* [1989] 1 SCR 525; *R v Clarkson* [1986] 1 SCR 383.

539 [1987] 1 SCR 265, 281.

540 *Hunter v Southam Inc* (1984) 11 DLR (4th) 641, 652. The precise nature of the privacy interests protected was fully considered by La Forest J in *R v Dyment* [1988] 2 SCR 417.

cases of unreasonable searches and seizure has been influenced by the now extensive United States experience. However, the different guiding rationales, when combined with other political and cultural factors, have meant that the results in particular cases may vary.

In *R v Duarte*,<sup>541</sup> for example, the Supreme Court of Canada concluded in accordance with United States authority that unauthorised electronic surveillance of a private conversation was an unreasonable search but that, contrary to a United States Supreme Court ruling,<sup>542</sup> such an invasion of individual rights was not cured by the fact that one of the parties to the conversation had consented to its interception by the police.<sup>543</sup>

B18 Though the Canadian treatment of evidence obtained as a result of an unreasonable search or seizure is still in process of development, some clear directions have already been set. The leading case is *R v Collins*<sup>544</sup> in which the majority judgment was given by Lamer J. The following is a summary of the more important principles established by *Collins* as they have been applied in later cases:<sup>545</sup>

- The defendant, as the party alleging a Charter breach, bears the burden of persuading the court that his or her rights have been infringed. In the case of a search, however, there is in Canada (as in the United States<sup>546</sup>) a presumption of unreasonableness when a search is executed without a warrant.
- With regard to the exclusion of evidence, the party requesting exclusion (usually the defendant) bears the burden of persuading the court, on the balance of probabilities, that admission of the evidence would bring the administration of justice into disrepute.

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541 [1990] 1 SCR 30. In the more recent case of *R v Wong* (1991) 60 CCC (3d) 460 a similar ruling to that made in *Duarte* was given in relation to video surveillance. *Duarte* is of interest because no legislation was made inoperative, yet it was concluded that a lawful search could still be unreasonable.

542 *US v White* 401 US 745 (1971).

543 The evidence was, however, admitted by virtue of the good faith of the police who had relied on the legislative exemption of such "participant" interception from the general prohibitory scheme covering unauthorised wiretapping. In New Zealand see *R v Williams* (1990) 7 CRNZ 378.

544 See note **Error! Bookmark not defined.** The case involved a "choke hold" applied without reasonable grounds. There were no drugs located in the suspect's mouth but some were found in her hand.

545 *R v Collins* has been usefully summarised in *R v Jacoy* [1988] 2 SCR 548 and *R v Kokesch* (1990) 61 CCC (3d) 207. See too *R v Elshaw* (1991) 67 CCC (3d) 97 and *R v Broyles* [1991] 2 WWR 289.

546 *Katz v US*, see note **Error! Bookmark not defined.**



- Although s 24(2) of the Charter refers to evidence obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, there need not be a causal connection between the Charter breach and the obtaining of the evidence. It is sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence.<sup>547</sup> In the case of "fruit of the poisoned tree" evidence some consideration may have to be given to the question of relative remoteness.<sup>548</sup> However, the Supreme Court has not hesitated to exclude such evidence in an appropriate case.<sup>549</sup> The United States "inevitable discovery" exception has been adopted in Canada<sup>550</sup> to admit improperly obtained evidence that would have been discovered by proper methods.
- In determining whether evidence obtained in breach of the Charter should be excluded, the court must first consider whether the admission of evidence will affect the *fairness of the trial*. If so, the evidence should generally be excluded. Real evidence obtained in a manner that violates the Charter will rarely operate unfairly for that reason alone; it existed irrespective of the Charter violation and generally its use does not render the trial unfair.<sup>551</sup> The situation is different, however, where, after a Charter violation, the accused is conscripted against himself or herself by a confession or other evidence emanating from him or her.<sup>552</sup> If the improperly obtained evidence is the only evidence tending to incriminate the accused, the fact that the conviction depends on self-incriminatory evidence will increase the unfairness of the trial.<sup>553</sup>

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547 *R v Strachan* [1988] 2 SCR 980.

548 *R v Strachan*, see note **Error! Bookmark not defined.**

549 In *R v Kokesch* (see note **Error! Bookmark not defined.**) the warrant was obtained as a result of an initial unlawful "perimeter search" of the property. The evidence found as a result of the execution of the warrant was excluded.

550 *R v Black* (1989) 70 CR (3d) 97. The test is not easily satisfied: *R v Elshaw*, see note **Error! Bookmark not defined.**, 128. This exception has also been approved by New Zealand's Court of Appeal in *R v Butcher* (see note **Error! Bookmark not defined.**) following *R v Black*.

551 This is by no means an absolute proposition, however, as this kind of evidence was excluded in *R v Collins* itself (see note **Error! Bookmark not defined.**) because of the seriousness of the Charter violation. See also the similar result in *R v Kokesch*, note **Error! Bookmark not defined.**

552 This factor has been called upon to justify exclusion of evidence of breath samples, blood samples and identification parades.

553 *R v Broyles*, see note **Error! Bookmark not defined.**, 307.

- The court must next consider factors relevant to the *seriousness of the Charter violation* including whether it was committed in good faith, or was of a merely technical nature or, on the other hand, whether it was deliberate or flagrant.<sup>554</sup> While good faith is important, it will not reduce the seriousness of the violation where the fairness of the trial has, on the above principles, been affected by the admission of tainted evidence.<sup>555</sup> It is also necessary to consider whether the improper action was motivated by urgency or necessity to prevent the loss or destruction of the evidence. The availability of other investigating techniques and the fact that the evidence could have been obtained without the violation of the Charter tend to make the breach more serious.
- Finally, the court must look at factors relating to the *effect of excluding the evidence*. This consideration is particularly important where the offence is serious, but if the admission of the evidence would result in an unfair trial the seriousness of the offence will not justify the admission of the evidence. The fact that the improperly obtained evidence is not the only evidence incriminating the accused reduces the effect on the reputation of the administration of justice of excluding the evidence.<sup>556</sup> The availability of other remedies to deal with the Charter violation should be irrelevant to the determination whether to exclude the evidence.<sup>557</sup>

## ENGLAND

### Common law rule of admissibility

B19 Prior to the introduction of the Police and Criminal Evidence Act (PACE) in 1984, the House of Lords had ruled that improperly obtained evidence was admissible and in general no discretion existed to exclude it.<sup>558</sup> The only exception, based on the

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554 As to the importance of good faith, see the dissenting judgment of Dickson CJC in *R v Kokesch*, note **Error! Bookmark not defined.**, 222-223. There is an objective aspect to the test of good faith. The police cannot say that they mistakenly believed they had a power they ought to have known did not exist: *Kokesch*, 230, Sopinka J.

555 *R v Broyles*, see note **Error! Bookmark not defined.**, 307.

556 *R v Broyles*, see note **Error! Bookmark not defined.**, 308.

557 *R v Kokesch*, see note **Error! Bookmark not defined.**, 227, Sopinka J.

558 *R v Sang* [1980] AC 402. The judgment of Lord Diplock is usually the one referred to as authoritative, though

importance which English law has long afforded to the protection against coerced self-incrimination, related to evidence "tantamount to a self-incriminating admission which was obtained from the defendant, after the offence had been committed".<sup>559</sup> This distinction is similar to that currently drawn in Canada under s 24(2) of the Charter between real evidence which existed despite a Charter breach and evidence emanating from an accused who has been "conscripted" against himself or herself.<sup>560</sup> Protection against coerced self-incrimination is regarded in both jurisdictions as an important value to be safeguarded.

### **Fairness discretion to exclude evidence (Police and Criminal Evidence Act 1984)**

B20 The common law position was altered by PACE.<sup>561</sup> After considerable debate, a discretionary power to exclude evidence was recognised in two sections of the Act.<sup>562</sup> Section 82(3) provides that "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion" and has generally been interpreted to preserve the limited common law discretion applicable to confessions described above. In addition s 78 provides:

- (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

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Lord Scarman's judgment is much more receptive to the possibility of a discretion to exclude evidence "if justice so requires".

559 This would account for the decision to exclude in *R v Barker* [1941] 2 KB 381 in which, following an inducement which would have made a confession inadmissible, the accused produced incriminating documents. The workings of this exception can be illustrated by *R v Sang* itself (see note **Error! Bookmark not defined.**) where the House of Lords ruled that evidence of the accused's commission of the offence, obtained by police entrapment, could not be excluded. It did not emanate from the accused after commission of the offence.

560 See para B18, notes 33 and 34.

561 The debate leading to the introduction of PACE and a summary of the relevant law is set out in Zander, *The Police and Criminal Evidence Act 1984* (2nd ed, Sweet & Maxwell, London, 1990) 200.

562 These provisions are additional to the tests introduced for the admissibility of confessions in s 76 (see note 45).

- (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.<sup>563</sup>

B21 This express recognition of the elusive principles of "fairness" has been given a broad scope of operation, and often provides the remedy when there has been a breach of the various Codes of Practice promulgated under PACE governing police practices of stop and search, search and seizure, detention and questioning, identification of suspects, and the tape recording of interviews. The major focus of s 78 has been the exclusion of confessions, yet numerous examples can be found in which other forms of evidence have been rejected under s 78 in order to preserve the fairness of the proceedings. Successful applications to exclude evidence have occurred in cases involving identification evidence and incriminating body samples.<sup>564</sup> However, very few examples exist in which s 78 has been relied upon to exclude real evidence obtained as a result of an improperly conducted search or seizure.<sup>565</sup> It is difficult to fit the search and seizure cases within the precise wording of s 78, which focuses on the "fairness of the proceedings", albeit in the context of "all the circumstances, including the circumstances in which the evidence was obtained".

B22 Although PACE is relatively recent legislation, Zander has identified the following propositions which have emerged from judicial application of s 78:<sup>566</sup>

- Unfairness to the defendant is not the sole criterion for exercise of the discretion. The judge should consider the interests of the prosecution (as representing the interests of the public) as well as of the defence (as representing the interests of the individual).
- Evidence will not be excluded simply as a way of penalising the police.
- Most cases in which evidence has been excluded have involved breaches

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563 This subsection is necessary to preserve the exclusionary rule in s 76 of PACE. The essence of s 76 is that if a confession is obtained by oppression, or in consequence of anything said or done which would be likely to render the confession unreliable, it must be excluded from the evidence.

564 These, at least as considered by the Supreme Court of Canada (see notes 33 and 34) can be seen as examples of evidence resulting from the wrongful conscription of the accused against himself or herself and thus possibly fitting within the exception recognised by *R v Sang* (see note **Error! Bookmark not defined.**).

565 One reported example is *R v Fennelley* [1989] Crim LR 142 (breach of the stop and search provisions of PACE: s 2(3) and para A:2.4 of the relevant Code of Practice).

566 Zander, see note **Error! Bookmark not defined.**, 203-205.

of PACE or the Codes of Practice (provisions related to the questioning process eg, access to lawyers and records of interviews).

- Not every breach of PACE or the Codes of Practice will lead to exclusion of the resulting evidence, though significant and substantial breaches will usually lead to exclusion.
- Bad faith on the part of the police might make substantial or significant that which might not otherwise have been so. But the contrary does not follow. So good faith on the part of the police does not cure significant and substantial breaches.
- The burden of proof is on the defence to show that the case is a proper one for invocation of the jurisdiction under s 78.

### **An alternative illegally obtained evidence rule**

B23 When PACE was under consideration as a bill Lord Scarman introduced a provision which would have excluded illegally obtained evidence except in defined circumstances. (The provision was ultimately defeated and the current s 78 enacted.) Unlike similar rules and proposals in other jurisdictions (eg, clause 130 of the Commonwealth of Australia Evidence Bill 1991, see para B0), Lord Scarman's provision excluded confessions from its operation. The provision stated:

- (1) If it appears to the court in any proceedings that any evidence (other than a confession) proposed to be given by the prosecution may have been obtained improperly, the court shall not allow the evidence to be given unless -
  - (a) the prosecution proves to the court beyond a reasonable doubt that it was obtained lawfully and in accordance with a code of practice (where applicable) issued, approved, and in force, under Part VI of this Act; or
  - (b) the court is satisfied that anything improperly done in obtaining it was of no material significance in all the circumstances of the case and ought, therefore, to be disregarded; or
  - (c) the court is satisfied that the probative value of the evidence, the gravity of the offence charged, and the circumstances in which the evidence was obtained are such that the public interest in the fair administration of the criminal law requires the evidence to be given, notwithstanding that it was obtained improperly.
- (2) For the purposes of this section, evidence shall be treated as having been obtained improperly if it was obtained -
  - (a) in breach of any provision of this Act or of any other enactment or rule of law; or
  - (b) in excess of any power conferred by or obtained under this Act or any other enactment; or
  - (c) in breach of any provision of a code of practice issued, approved, and in force under Part VI of this Act; or
  - (d) as a result of any material deception in obtaining or exercising any power under this Act or any other enactment.

B24 The rule has been described as a "reverse onus exclusionary rule".<sup>567</sup> In other words, rather than the evidence being admissible with the onus on the defendant to persuade the court to exercise its discretion to exclude the evidence, the evidence is

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<sup>567</sup> House of Lords Hansard Vol 455 column 654, 31 July 1984.

inadmissible unless the prosecution can satisfy the court that it should be admitted. The primary aim of the rule is to control police practices. If evidence appears to the court to have been "obtained improperly" (as defined in subclause (2)) then the evidence is inadmissible unless one of three alternatives can be satisfied. The first alternative is that the evidence must be admitted if the prosecution proves beyond reasonable doubt that the evidence was obtained lawfully. The other two alternatives allow the court to decide to admit the evidence when either the impropriety was of no material significance or other factors require the evidence to be admitted despite the impropriety.

## AUSTRALIA

### Public interest discretion to exclude evidence

B25 In *R v Ireland*<sup>568</sup> the High Court of Australia consciously adopted a middle course between rules of absolute exclusion or admission of improperly obtained evidence. The court's solution was to recognise a discretionary power to exclude such evidence in an appropriate case. *Ireland* involved the police wrongly compelling the defendant to allow his hands (which carried incriminating wounds) to be photographed and medically examined. In the course of concluding that this evidence should have been excluded, Barwick CJ succinctly summarised the issues at stake in the area under discussion:

On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.<sup>569</sup>

B26 This discretion to exclude improperly obtained evidence was given close scrutiny in *Bunning v Cross*,<sup>570</sup> a case in which the High Court held that illegally obtained evidence of the defendant's breath alcohol level was nonetheless admissible. The leading judgment of Stephen J and Aickin J rejects the view that "fairness to the accused" is the proper focus of the inquiry whether or not to admit improperly obtained evidence, and stresses the importance of protecting privacy interests:

It is not fair play that is called in question in such cases but rather society's right to insist that a citizen's precious right to immunity from arbitrary and unlawful intrusion

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<sup>568</sup> (1970) 126 CLR 321.

<sup>569</sup> See note **Error! Bookmark not defined.**, 335.

<sup>570</sup> (1978) 141 CLR 54.

into the daily affairs of private life may remain unimpaired.<sup>571</sup>

B27 *Bunning v Cross* sets out the following criteria as being relevant to the decision whether to exclude improperly obtained evidence.<sup>572</sup>

- *Intent*: if the impropriety was due to a mistake and made in good faith then this factor weighs in favour of including the evidence; however a deliberate or reckless disregard of the accused's rights has the opposite effect.
- *Cogency of the evidence*: cogent evidence should be more readily admitted when there has been an error by the police committed in good faith, and if the illegality in question has not affected the cogency of the evidence; when there has been deliberate or reckless impropriety by the police the cogency of the evidence should not make the evidence more readily admissible, but an exception is when the evidence is vital and of a perishable or evanescent nature; if there is other equally cogent and legally obtained evidence available there is less need to admit the illegally obtained evidence.
- *Ease of compliance with the law*: sometimes the ease with which the law could have been complied with may be a factor tending against admission, but this will not always be so.
- *Gravity of the offence*: evidence should be more readily admitted in the trials of more serious offences; the comparative seriousness of the offence and the unlawful conduct of the law enforcement authority should be examined.<sup>573</sup>
- *Nature of the irregularity*: if there is legislation which deliberately limits the police power to obtain the evidence in question, then evidence obtained in breach of the legislation should be more readily excluded.

B28 As appears from a summary review of these factors, rejection of evidence through the operation of the discretion discussed in *Bunning v Cross* is likely to be a relatively rare occurrence. We are unaware of any case in which real evidence, other than body

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571 *Bunning v Cross*, see note **Error! Bookmark not defined.**, 75. The further concern for integrity of the judicial system is evident in the quotation of the words of Holmes J in *Olmstead v US* 277 US 438, 470 (1928) that it may be "a less evil that some criminals should escape than that the Government should play an ignoble part."

572 See note **Error! Bookmark not defined.**, 78-80, Stephen and Aickin JJ.

573 This is an element in the process required in *R v Ireland*, see note **Error! Bookmark not defined.**.



samples,<sup>574</sup> obtained as a result of an improper search has actually been excluded on this basis.<sup>575</sup>

### Unfairness discretion to exclude evidence

B29 More recent Australian state authority has concluded that, in addition to the discretion which concerned the High Court in *Bunning v Cross*, there is scope for the operation of a separate discretion to exclude improperly obtained evidence on the ground that its use at trial would be unfair to the defendant. The discretion may be available whenever the reception of evidence (whatever form it takes) would cause unfairness. It has been said that the discretion could extend beyond its usual sphere of confessional evidence to both identification evidence and real evidence obtained, for example, as a result of an improper search.<sup>576</sup>

### Proposals for reform

B30 Recently, law reform proposals in Australia have recommended more ready exclusion of improperly obtained evidence than is possible under the common law discretions outlined above. The Australian Law Reform Commission's final report on *Evidence* concluded that:

once misconduct has been established, the burden should rest on the prosecution to persuade the Court that the evidence should be admitted.<sup>577</sup>

A similar rule has been recommended by the New South Wales Law Reform Commission.<sup>578</sup>

B31 The Commonwealth of Australia Evidence Bill 1991 provides two models for a codified discretion: one is a specific fairness discretion to exclude statements made by the

574 For example, *R v Ireland* itself, see note **Error! Bookmark not defined.**.

575 *R v Tilev* (1983) 33 SASR 344 is typical. By application of *Bunning v Cross*, documents obtained by virtue of an illegal search were admitted into evidence. See also *Wilson v Marshal* [1982] Tasmanian State Reports 287 and *Coxan v Mazey* [1981] Tasmanian State Reports 209.

576 *R v Edelsten* (1990) 21 NSW LR 542, 554. See also *Duke v The Queen* (1989) 63 ALJR 139, Brennan J.

577 *Evidence* (Report No 38, 1987) para 164(a).

578 See the review in the Commission's Report, note **Error! Bookmark not defined.**, paras 6.34-6.45.

defendant (ie, "admissions"<sup>579</sup>) and the other is a more general discretion to exclude improperly or illegally obtained evidence. Clause 96 allows a court to exclude "admissions":

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

- (a) the evidence is adduced by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

B32 In its interim report the Australian Law Reform Commission (ALRC) had recommended that the common law discretion to exclude statements, on the ground of unfairness to the defendant, be abolished.<sup>580</sup> The ALRC gave several reasons for adopting this approach. First, fairness is a vague concept and the courts had failed to define precisely the principles behind it or considerations relevant to it. The result is uncertainty and unpredictability. Second, each possible rationale for the discretion can be met just as well by the other rules proposed by the ALRC, and the retention of the discretion would further complicate those rules. Finally, because there are so few cases where the discretion is exercised in favour of the defendant, the psychological comfort induced by the discretion may well be illusory and may be veiling a position which is causing injustice. In most cases the rule is redefined rather than enforced.

B33 In its final report the ALRC decided to retain a fairness discretion after assessing the submissions it received on the interim report proposals.<sup>581</sup> The ALRC concluded that a discretion which took account of any unfairness to the defendant would deal more effectively and appropriately with situations where the defendant chose to speak on the basis of false assumptions, whether because of untrue representations or not. The reliability rule proposed by the ALRC<sup>582</sup> is not concerned with the choice whether or not to make the statement, but rather with the circumstances affecting the truth of it. The illegally obtained evidence rule can deal with the situation but it requires a balancing of public interests rather than focusing on any unfairness to the particular defendant. The ALRC thought that the rule would, therefore, be less effective than the fairness discretion. (But see our discussion in the main text of the "unfairness to the defendant" rationale, part II paras 96-100.)

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579 Defined in the Bill as statements adverse to the person's interest in the outcome of the proceeding.

580 *Evidence* (Interim Report No 26, 1985) Vol 1 paras 382-384, 967.

581 See note **Error! Bookmark not defined.**, para 160(b).

582 Similar to the New Zealand Law Commission's proposed reliability rule, see main text, part II paras 127-140.

B34 Clause 130 of the Australian Bill determines when improperly or illegally obtained evidence will be admitted as evidence:

- (1) Evidence that was obtained:
  - (a) improperly or in contravention of a law; or
  - (b) in consequence of an impropriety or of a contravention of a law;
 is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
  
- (2) Without limiting subsection (1), evidence of an admission and evidence obtained in consequence of an admission, is taken, for the purposes of that subsection, to have been obtained improperly if:
  - (a) an admission was made during or in consequence of questioning; and
  - (b) the person conducting the questioning knew or ought reasonably to have known that:
    - (i) doing, or omitting to do, an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
    - (ii) making a false statement was likely to cause the person who was being questioned to make an admission;
 but nevertheless, in the course of that questioning, the person conducting the questioning did, or omitted to do the act or made the false statement.
  
- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
  - (a) the probative value of the evidence; and
  - (b) the importance of the evidence in the proceeding; and
  - (c) the nature of the offence, cause of action or defence in relation to which the evidence is sought to be admitted and the nature of the subject-matter of the proceeding; and
  - (d) the gravity of the impropriety or contravention; and
  - (e) whether the impropriety or contravention was deliberate or reckless; and
  - (f) whether the impropriety or contravention was contrary to or consistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
  - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
  - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of a law ...<sup>583</sup>

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583 The last matter originally read "whether the evidence could have been obtained in some other way":

A similar provision exists in the Evidence Bill 1991 (NSW) clause 124.

B35 It is important to note that this provision applies to all kinds of illegally and improperly obtained evidence, not just admissions. The evidence is *prima facie* inadmissible if it is improperly obtained in terms of the clause. (Subclause (2) relates only to admissions; it is concerned particularly with coercion and deception issues and may overlap to some extent with the reliability rule for admissions contained in clause 91 of the Australian Bill.) The defendant must establish the misconduct after which the prosecution must persuade the court that the evidence should be admitted. The rule requires a judgment by the court about the desirability of admitting the evidence; the section provides mandatory though not exclusive criteria for the court to consider when making this judgment.

## SCOTLAND

B36 The position taken in Scotland regarding the admissibility of improperly obtained evidence is worthy of mention because of the degree to which the principles established there some time ago have influenced development elsewhere. In the leading case of *Lawrie v Muir*<sup>584</sup> real evidence discovered as a result of an unlawful search (by Milk Board private investigators) was excluded by operation of a recognised judicial discretion to do so. What sets apart the discretion exercised in Scotland from the similar discretion currently recognised in New Zealand and Australia is that, as appears from the judgment of Lord Cooper in *Lawrie v Muir*, the onus is on the prosecution to satisfy the court that the impropriety should be excused.

B37 Lord Cooper's judgment begins with a frequently quoted summary of the need to balance:

- (a) the interests of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and
- (b) the interests of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any mere formal or technical ground.

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*Evidence* (Interim Report No 26, 1985) Vol 2, 58, Appendix A draft bill cl 116(3)(h).

584 [1950] SLT 37 (minor regulatory offence of defendant using milk bottles not belonging to her); see also *M'Govern v H M Advocate* [1950] SLT 133 (on a charge of burglary evidence was excluded of an improperly obtained body sample - fingernail scrapings); *H M Advocate v Turnbull* [1951] SLT 409 (documents improperly obtained in a search were excluded on fraud charges).

His Lordship put particular emphasis on "the discretionary principle of fairness" from the law relating to confessions, which might be called in aid of the decision to admit real evidence obtained by means of an unfair trick.

B38 The following criteria were isolated in *Lawrie v Muir* and cases which have since applied Lord Cooper's judgment:<sup>585</sup>

- *Gravity of the offence*: illegally obtained evidence may, in the public interest, be more likely to be excluded when the offence is a trivial one and more likely to be admitted when it is serious.
- *Urgency*: when the situation is one of urgency in that there appears to be a danger that the evidence may be lost or destroyed before a warrant can be obtained, evidence secured in violation of strict procedure will generally be admitted.
- *Nature of the irregularity*: where the irregularity involves a breach of specified statutory procedure for obtaining evidence of a statutory offence, the evidence is likely to be excluded on the ground that Parliament has seen fit to make special provision as to circumstances in which evidence may properly be recovered.
- *Good faith*: this is an important, though not a conclusive factor; the good faith of the inspectors who conducted the search in *Lawrie v Muir* itself was accepted, but the evidence was nonetheless excluded.
- *Status of investigators*: this was the factor that tilted the balance in *Lawrie v Muir*; the inspectors who conducted the illegal search had none of the residual powers of the police and they should have been better aware of the strict statutory powers under which they purported to act.
- *Ease of rectification of irregularity*: this has been said to be an equivocal factor with its importance varying according to the circumstances of the individual case; on the one hand it may be argued that if the impropriety could have been easily rectified this signifies that the invasion of the accused's rights was small, but on the other hand this may mean that there was no excuse for not following the prescribed procedures.

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<sup>585</sup> The following summary is taken from the *Stair Memorial Encyclopedia: The Laws of Scotland* (1990) Vol 10, 399.

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The structure of the bibliography is similar to that of the discussion paper. Material referred to in each part of the paper is in the corresponding part of the bibliography, and additional relevant material not referred to in the text is also included.

We have preceded the main body of the bibliography with a section of general texts, articles and reports which have been referred to in relation to more than one topic of the paper.

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