
LAW COMMISSION

Report No 31

Police Questioning

October 1994
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

The Commissioners are:

Sir Kenneth Keith KBE—President
The Hon Justice Wallace
Professor Richard J Sutton
Leslie H Atkins QC
Joanne Morris OBE

The Director of the Law Commission is Alison Quentin-Baxter QSO.
The office is at 89 The Terrace, Wellington.
Postal address: PO Box 2590, Wellington, New Zealand 6001.
Document Exchange Number 8434.
Telephone: (04) 473 3453. Facsimile: (04) 471 0959.
Email: Director@lawcom.govt.nz

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3 October 1994

Dear Minister

I am pleased to submit to you Report No 31 of the Law Commission, *Police Questioning*.

The report is a major response to the Commission's reference on criminal procedure. It relates as well to the reference on the law of evidence. The Commission has now completed 10 preliminary papers and reports on those two large references.

The report proposes legislative reform of the present law

- to give persons suspected of criminal offences precisely defined rights to be informed of their rights, especially to remain silent and to have legal assistance,
- to give the police powers to detain and question suspects for the defined periods after they have arrested them in exercise of their current powers of arrest, and
- to give clear guidance to the courts when exercising their powers to refuse to admit evidence obtained unlawfully or unfairly.

The Commission has taken very careful account of the extensive comments made on its proposals set out in the discussion paper published over a year ago. They have helped the Commission present proposals which strike a balance between the public interests in detecting and convicting offenders and in ensuring that the fundamental rights of individuals are not overborne. The proposals are to be seen as a whole.

The Law Commission recommends the enactment of the draft legislation set out in the report.

Yours sincerely

K J Keith
President

Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Terms of Reference

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.

But the Commission is not asked in this reference to consider questions of sentencing or to re-consider questions of what courts or other judicial bodies should exercise criminal jurisdiction, or of appeals.

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.

Summary of Report

THE BACKGROUND

1 In the criminal procedure reference the Minister of Justice asks the Law Commission to examine and make recommendations about the law, structures and practices governing the procedure in criminal cases from the time that there is a suspicion of an offence having been committed until the end of the trial. This report examines the duties and powers of the police relating to the questioning of suspects and the related rights and liabilities of suspects. Also relevant is the reference on the law of evidence, particularly the part concerned with the admissibility of evidence obtained in breach of the questioning rules.

2 The terms of reference taken together indicate relevant principles and values:

- conformity with the International Covenant on Civil and Political Rights, now reflected in the New Zealand Bill of Rights Act 1990, and with the principles of the Treaty of Waitangi;
- ensuring the fair trial of people accused of offences, protecting the rights and freedoms of people suspected or accused of offences, and providing effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases;
- facilitating the fair, just and speedy judicial resolution of disputes; and
- making the law as clear, simple and accessible as is practicable.

This list indicates several possible conflicts of principles and values, especially between the public interest in detecting and convicting offenders on the one hand and ensuring that the fundamental rights of individuals are not overborne on the other. Giving appropriate

protection to each of those interests will often require establishing and monitoring a delicate balance.

THE CURRENT LAW

3 In the course of investigating criminal offences, the police may question any person. However, the person is not, in general, obliged to answer the questions put by the police (although in many areas, such as those regulated in the interests of safety and financial probity, there may be specific statutory obligations to provide certain information). The police's questioning powers are further limited by the freedom of the person (if the person is not arrested) to walk away from the questioning at any time. The police have no general power to detain people for the sole purpose of questioning them. That is the law. Practice may differ from the law; in part because the law is not understood.

4 The police do, however, have statutory powers to arrest without warrant people whom they have good cause to suspect of having committed an imprisonable offence or a breach of the peace. If the person who is arrested is not released (eg, because no charge is laid or the person is released on police bail following charge), the police are obliged to bring him or her before a court as soon as possible to be dealt with according to law. Rule 3 of the Judges' Rules (rules which have traditionally been applied by New Zealand courts, although no longer in operation in their country of origin, England) provides that "persons in custody should not be questioned without the usual caution being first administered". An explanatory note to rule 3 indicates that the rule was never intended to encourage or authorise the questioning or cross-examination of a person in custody after cautioning.

5 As a consequence of the enactment of the Bill of Rights Act, and especially of the courts' application and interpretation of it, confessions and other forms of evidence obtained in breach of the Act are now excluded from the trial unless there is good reason to admit them. Confessions may also be excluded on the ground of unfairness; this is a particular application of the discretion which the courts have to exclude all forms of unfairly or improperly obtained evidence.

THE NEED FOR REFORM

6 There are a number of reasons to reform the present law relating to police questioning and the rights of suspects:

- the police sometimes illegally detain and question suspects without arresting them or advising them of their rights (especially the rights to remain silent and to have the assistance of legal advice), on the basis that the suspects are “assisting the police with their enquiries” or “voluntarily co-operating”;
- there is confusion about the rights of the police to ask questions after arrest or charge. This can result in delays in taking those steps, as well as in giving the advice and warnings to suspects;
- the law can be arbitrary in its operation. The length of time a suspect is detained in police custody will, in many instances, depend on the time when he or she is arrested and charged in relation to the time the court next sits (eg, a suspect taken into police custody on a Saturday may, if charged and kept in custody, be required to wait until Monday to be brought before a court);
- the existing law is uncertain, as evidenced by the common misconception that it allows little or no scope for police questioning of suspects once they have been arrested, and by varying judicial interpretations of what constitutes “arrest” and “detained under any enactment” under s 23 of the Bill of Rights Act; and
- the law concerning the admissibility of evidence wrongly obtained (including the fairness discretion) is in some respects uncertain and open to distortion because its purposes are rarely articulated. The results are that some cases do not appear to be based on consistent, logical reasoning and it may on occasions be difficult to predict how a court will exercise the discretion.

PROPOSALS FOR REFORM

7 The Law Commission proposes a three-pronged reform of the law:

- people suspected of criminal offences will have precisely defined statutory rights to be given timely advice of their rights, especially the right of silence and the right to legal assistance; in practice the advice might need to be given before the police decide to arrest and charge the suspect;
- the police will have express limited powers to detain and question suspects for a defined period after they have arrested them for an imprisonable offence on the basis of their present powers of arrest;
- a new rule, the improperly obtained evidence rule, will replace the fairness discretion and the rule currently adopted by the courts

concerning evidence obtained in breach of the Bill of Rights Act.

In its general approach the reform will be characterised by the greater accessibility and clarity of the law, stated in a coherent, principled set of legislative provisions.

8 People suspected of criminal offences whom the police wish to question will have the following safeguards designed to ensure that improper pressure is not brought to bear on them:

- the right to be informed of the reasons for questioning;
- the right of silence;
- the right to consult a lawyer without delay, in private, and free of charge;
- access to a friend or relative;
- access to an interpreter, appropriate person or technical assistance;
- access to consular assistance; and
- the right to be advised of all of the above safeguards.

9 The time when a person becomes entitled to the above safeguards is of vital importance. It is proposed that entitlement to the safeguards, as distinct from the power to detain and question, should commence when

- a person is formally arrested or could lawfully be arrested, or
- a police officer has grounds to suspect that that person has committed the offence and the person is at a police station, or has reasonable grounds to believe that he or she is being detained.

10 Therefore, a person will be entitled to the safeguards if he or she is in a coercive situation (as defined in s 6(2) of the draft legislation), even if that person has not been, or could not lawfully be, arrested. The proposed police questioning powers are defined by the point at which they can be invoked, the period of questioning and the possibility of extension. It is only when the police have good cause to suspect that a person has committed an imprisonable offence (ie, when they have power under the current law to arrest that person, otherwise than for a breach of the peace) that they will be able to arrest and detain the person in order to ask questions about his or her alleged involvement in the offence.

11 The questioning can last only for a reasonable period. When that period ends, the police are required to release the suspect or charge and

bring him or her before a court. The initial period must be a period which is “reasonable in the circumstances” (determined by reference to statutory criteria) not exceeding 6 hours. A District Court Judge may extend the period of detention and questioning for a further period of 6 hours, where satisfied that that course is necessary. Where the person is being questioned about an offence punishable by not less than 14 years imprisonment, a District Court Judge may, in exceptional circumstances, extend the detention and questioning period for one further period of 6 hours. Both the initial detention and questioning period and any extensions are subject to the overriding requirement that the period must not exceed a period which is “reasonable in the circumstances”.

12 In relation to the exclusion of evidence which has been improperly or illegally obtained, a new rule will replace the fairness discretion and the rule currently adopted by the courts concerning evidence obtained in breach of the Bill of Rights Act. All improperly obtained evidence will be presumptively inadmissible. The courts will, however, have the ability to admit the evidence if it is in the “interests of justice” to do so. The rule contains a list of factors to assist the court in determining 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.

13 The draft legislative proposals relate only to the police. As appropriate, the Law Commission will consult with other enforcement agencies about the possible extension of the draft legislation to those agencies.

DRAFT LEGISLATION

14 A draft Police (Questioning of Suspects) Act, giving effect to the recommendations in this report, is set out in chapter 6. The Commission recommends the enactment of this legislation.

1

Introduction

15 The Law Commission received both the criminal procedure and evidence references from the Minister of Justice in August 1989. The scope of both references requires that they proceed in stages. A report on *Disclosure and Committal* (NZLC R14 1990) and an issues paper on *The Prosecution of Offences* (NZLC PP12 1990) have been published. A discussion paper, *Criminal Evidence: Police Questioning* (NZLC PP21 1992), followed. It considered the right of silence, confessions, improperly obtained evidence and police questioning after arrest. This report, containing final recommendations and draft legislation to regulate police questioning of suspects and the admissibility of improperly obtained evidence, is based on the proposals put forward in that discussion paper. It is a major step in completing the Commission's criminal procedure reference.

16 We expressed the hope that the discussion paper would draw a wide response. In that respect we were not disappointed. No doubt indicating the importance of the issues under consideration, both widespread public debate and a large number of submissions were generated by *Criminal Evidence: Police Questioning*. The focus of the submissions and public debate was largely on one particular, though central, aspect of the discussion paper—the proposed enactment of legislation to allow police officers to detain and question arrested people about suspected offending before deciding whether or not they should be charged. A number of submissions also addressed the improperly obtained evidence rule.

17 The range of views expressed on the appropriateness of post-arrest questioning was matched by the diversity of the sources from which those views came. Most of the public debate following publication of *Criminal Evidence: Police Questioning* was informed and constructive, greatly assisting the Commission's consultative processes. It valuably

tested the proposals made by the Commission. Some of the debate, however, was emotive and uninformed, advanced by people who had not taken the time to familiarise themselves with the substance of the Commission's proposals. At times that debate failed to acknowledge the unsatisfactory state of aspects of the current law.

18 In addition, the Commission's consideration of the issues was greatly enhanced by the range of submissions received. The Commission very much appreciates the time taken by individuals and organisations to prepare written submissions. All were given careful consideration in the finalisation of the Commission's recommendations for reform. Appendix B lists those who made submissions.

19 Following publication of the discussion paper, members of the Law Commission participated in two seminars on its proposals. In October 1992, the Criminal Bar Association of New Zealand organised a session with members of the legal profession in Auckland. In November 1992, the Commission, in association with the Centre for Continuing Education, Victoria University of Wellington, organised a wide-ranging seminar concerning all aspects of the proposals and generating focused discussion on them. About 50 people attended—barristers, academics, members of the New Zealand Police and Crown Law Office, representatives of the Department of Justice, Police Association, Legal Services Board, Council for Civil Liberties, Wellington Community Law Centre, judges of the District Courts, the High Court and the Court of Appeal, and one member of Parliament. The Law Commission wishes to thank those who participated in these two seminars. Appendix C contains further details of the seminars.

20 Consultation continued as the focus of attention shifted to the re-drafting of the legislation proposed in this report. Mr R Mahoney, Senior Lecturer in Law, University of Otago, who undertook the research that formed the foundation of the Commission's discussion paper, continued to act as a consultant in the finalisation of recommendations. In addition, the Commission has consulted with the New Zealand Law Society, the Auckland and Wellington Criminal Bar Associations, individual members of the judiciary and the legal profession, the police, the Law Reform Division of the Department of Justice, the Legal Services Board and the Crown Law Office. Mr G C Thornton QC, Legislative Counsel, has provided valuable assistance in the drafting of the recommended legislation.

21 Throughout, in accordance with the Commission's obligations under s 5(2) of the Law Commission Act 1985 and the terms of reference for criminal procedure, the Commission has taken into account

te ao Maori (the Maori dimension), the principles of the Treaty of Waitangi and the multi-cultural character of New Zealand society. After extensive consultation and consideration of the submissions, the Commission has formed the view that none of these matters requiring special consideration gives rise to issues which have not already been covered by the provisions of our draft legislation applying to all suspects.

22 In finalising its recommendations for reform, the Law Commission has striven to achieve a measure of balance. There are the competing public interests of excluding unreliable evidence and securing the conviction of offenders. Balance is assisted by clear rules that stipulate the powers of law enforcement officers (in this instance, the police) and, in particular, the limits of those powers. Also of importance are the clear definition and the practicality of the safeguards provided to citizens being questioned. Both those who apply the law and those to whom it is applied have an interest in clear, comprehensible and principled law.

2

The Current Law and the Need for Reform

THE CURRENT LAW

General

23 The following discussion of the current law relating to the questioning of people suspected of criminal offending summarises the more comprehensive discussion in *Criminal Evidence: Police Questioning*. In some areas, partly because of the growing jurisprudence under the New Zealand Bill of Rights Act 1990, the law has developed since that earlier publication. Some of those developments are referred to in this and subsequent chapters.

Questioning

24 The police may question any person when they are investigating a criminal offence. The Judges' Rules are a series of rules originally formulated by English judges in 1912 (and supplemented and clarified in 1918 and 1930, although now no longer in operation in England) to provide guidance to police officers conducting investigations. Rule 1 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, there is generally no obligation to answer such questions. Nor do the police have any general power to detain people against their will for the sole purpose of questioning.

Arresting and charging

25 A person can be lawfully detained only under a specific statutory power. Various statutory powers exist. The main one, in the context

of police powers, is contained in s 315(2)(b) of the Crimes Act 1961. A constable may arrest and take into custody “[a]ny person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment”. However, several categories of powers of arrest can be found in legislation. These can be roughly divided into four groups:

- powers stated absolutely and objectively (eg, s 315(2)(a) of the Crimes Act states that a constable may arrest and take into custody “[a]ny person whom he finds disturbing the public peace or committing any offence punishable by imprisonment”);
- powers requiring belief on reasonable and probable grounds (eg, s 88 of the Fire Service Act 1957 provides that a member of the police who believes on reasonable and probable grounds that a person has committed prescribed offences may arrest the person);
- powers requiring belief on reasonable grounds (eg, s 53 of the Summary Proceedings Act 1957 states that a member of the police who believes on reasonable grounds that a defendant on bail has absconded, or is about to do so, or has breached bail conditions may arrest the defendant); and
- powers requiring reasonable, good or just cause or grounds to suspect (eg, s 315(2)(b) of the Crimes Act, as quoted above).

26 The standard grounds for laying an information against a person for an offence (ie, charging) are contained in Forms 1 and 2 of the Second Schedule to the Summary Proceedings Act. These are that the police officer has “just cause to suspect, and [does] suspect”. It appears, somewhat strangely, that the test for charging (in terms of laying an information) is, at least in relation to the first three categories of arrest powers referred to in para 25, easier to satisfy than is the test for arrest. However, the grounds for the principal power of arrest, contained in s 315(2)(b) of the Crimes Act, and the grounds for charging are in essence the same, namely “good” or “just cause to suspect”. The addition of “and do suspect” in the information laying provision appears to add nothing of substance, because arresting officers who *do not* suspect will have difficulty arguing that they nevertheless have “just” or “good cause to suspect”. The Commissioner of Police has previously pointed out that, in practice, arrest and charge have become intertwined and arrest powers have been exercised on the basis of “just cause to suspect, and do suspect”.

27 Anyone who is arrested and charged with an offence, and is not released by the police on bail or summons, must be brought before a

court as soon as possible. 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.

In *R v Alexander* [1989] 3 NZLR 395, the Court of Appeal held that s 316(5) requires an arrested person to be brought before a court as soon as is reasonably possible. The court further held that the provision 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. Delay in bringing an arrested person before the court due to questioning is prohibited. The decision in this case was obviously based on the absence of any statutory power to detain and question after arrest.

28 Section 23(2) of the Bill of Rights Act provides that:

Everyone who is arrested for an offence has the right to be charged promptly or to be released.

Section 23(3) of the Bill of Rights Act (the wording, but not necessarily the interpretation, of which is similar to s 316(5) of the Crimes Act) states 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.

Both of these provisions must be interpreted realistically. In particular, they allow a reasonable time for deciding whether a person should be charged, for the process of laying a charge, and for incidental matters. Further, if the person arrested, having been cautioned and informed of the reason for the arrest and right to consult a lawyer, wishes to make a statement or wait for the arrival of a lawyer, a reasonable time may be allowed for either to occur (*R v Te Kira* [1993] 3 NZLR 257, 263, Cooke P). The decision in *R v Rogers* (14 October 1993, CA 370/92, 3) also recognises that emergency situations, such as a danger to life or property, may at times require the more immediate attention of the police, again resulting in reasonable delay.

29 Section 23(2) and (3) of the Bill of Rights Act prohibit unreasonable delay in charging and bringing before a court people arrested for an offence (see also article 9(2) and (3) of the International Covenant on Civil and Political Rights). The case of *Te Kira*, for example, makes it clear that a police officer is not entitled to delay taking an arrested and charged person before a court in order to facilitate a police investigation. Cooke P said:

[This] is a decision which applies when a person arrested is deliberately kept in custody under a holding charge while the case is being further investigated rather than being brought before a court. In such a case, by virtue of the Bill of Rights, a confession subsequently obtained cannot be allowed in evidence unless it is proved that the obtaining of the confession was not caused or materially contributed to by the custody, or there is some other special reason for letting in the confession. (263)

The Court of Appeal in *Te Kira* was not, of course, considering the compatibility of any statutory police power to detain and question after arrest with the provisions of the Bill of Rights Act.

Further safeguards

30 Rule 3 of the Judges' Rules prohibits the questioning of people in custody without their first being cautioned. The wording of the rule implies that the questioning of people in custody is possible, but the explanatory note provided to rule 3 in 1930 explains that the rule "was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned . . .". There is some difficulty in reconciling this explanation with the approach in decisions such as *Alexander*.

31 Section 23(1) of the Bill of Rights Act states that everyone who is arrested or detained under any enactment must be informed at the time of the arrest or detention of the reason for it and of the right to consult and instruct a lawyer without delay. Section 23(4) of the Act provides that people arrested or detained under any enactment for any offence or suspected offence have the right to refrain from making any statement and to be informed of that right.

32 The word "arrested" has produced some difficulty in definition for Bill of Rights Act purposes, as is indicated by *R v Butcher* [1992] 2 NZLR 257 and *R v Goodwin* [1993] 2 NZLR 153. In *Goodwin* the word "arrest", in the context of s 23(1), was to be understood "in terms of the communication or manifestation by the officer of an intention to apprehend and to hold the person concerned in the exercise of a purported authority to do so" (Richardson J 190). Cooke P formulated the test for when an arrest occurs as follows:

If a police officer makes it clear to a suspect that he is not free to go and is to be interrogated by the officer on suspicion of a crime, that person is arrested within the meaning of s 23(1)(b) of the New Zealand Bill of Rights Act. (181)

Richardson J further noted that whether a police officer manifests an

intention to hold a person must turn on an assessment of the evidence in each case.

33 That difficulties remain is illustrated by *R v Jones* (16 July 1993, CA 312/92), in which the court was divided on the issue of arrest, despite the assistance of *Goodwin*. In *Jones* the respondent had, during the course of being interviewed, admitted possession of cannabis found in his bedroom. Questioning continued, however, with respect to an alleged importation of cocaine. The majority took the view that, in the absence of any overt indication by the interviewing officer that his intention was to charge the suspect, there was no arrest. The minority view was that, from the time of the cannabis admission, in reality the accused was being treated, and must have understood that he was being treated, as not free to go. At that point the accused was under arrest and s 23(1)(b) should have applied. One of the majority, Hardie Boys J, noted:

There may well be a sound case for bringing forward the requirement for the s 23(1)(b) [right to consult a lawyer] advice to an earlier stage of the interrogation process, when perhaps the need for it is the greater. But that is not what the statute directs, and the courts must apply the statute. (3)

34 The scope of the words “detained under any enactment” has also produced disagreement. In *Police v Smith (and Herewini)* (1993) 11 CRNZ 78, the two respondents were in hospital after motor accidents, and blood specimens were sought under s 58E of the Transport Act 1962. The majority in the Court of Appeal were of the view that any restraint of the person for the purpose of taking a blood sample was minimal, was only a temporary check and intrusion on the individual’s liberty and did not amount to detention under s 23(1). In addition, Hardie Boys J suggested that, for a situation to constitute detention, there must be “a clear and deliberate act or statement by the officer whereby he exerts an authority to restrain” (100). However, the minority of Cooke P and Casey J, giving weight to the coercive pressure generated by the context in which the blood samples were to be taken, considered that, in reality, the respondents had been detained. In apparent conflict with Hardie Boys J’s approach, the minority’s view was that the necessary element of coercion or compulsion could arise from a reasonable belief that one does not have a choice.

THE NEED FOR REFORM

35 There are four criticisms of the current law which justify its reform. We now consider each of these criticisms in turn.

Delays in arresting and cautioning

36 The police often delay making an arrest until there is sufficient evidence to establish a strong case against the suspect. There is also an obvious temptation to delay arrest further still in order to obtain, through questioning, additional evidence to support the charge at trial. A person who is neither arrested nor detained under any enactment has no right to be cautioned under s 23(4) of the Bill of Rights Act about the right to remain silent or to be advised under s 23(1)(b) of the right to consult a lawyer.

Insufficient protection from abuses

37 When 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 is dependent on the suspect's co-operation. There is a "grey area", clearly open to abuse, in which it is difficult to determine where co-operation ends and coercion begins. Sometimes suspects said to be "voluntarily co-operating with the police" are in fact detained, and should not continue to be questioned without receiving the caution and advice of their rights. In a number of cases the Court of Appeal has been critical of the actions of the police where a suspect has been (unlawfully) detained for questioning without being formally arrested. For instance, Cooke P in *Butcher* at 268 mentioned an earlier expression of concern about an apparent trend in New Zealand to stretch the law so as to enable interrogation in de facto custody.

Arbitrariness

38 In some cases suspects are questioned after arrest rather than being brought before a court, notwithstanding s 316(5) of the Crimes Act, s 23 of the Bill of Rights Act and rule 3 of the Judges' Rules. Though this practice has led to the courts quashing convictions (*Te Kira; Rogers*), the protection provided by s 23(3) of the Bill of Rights Act and s 316(5) of the Crimes Act is arbitrary in its operation, in that it depends on the time of day, and the day in the week, a suspect is arrested. A person arrested at 11 am on a weekday can usually be, and is therefore required to be, brought before a court almost immediately, which leaves the police little opportunity to make further enquiries. A person arrested at 5 pm on a weekday need not be brought before a court until 10 am the next morning, and (in light of *Alexander*) may be questioned in the meantime. A similar situation arises where a person is arrested in the weekend and is not brought before a court until Monday.

39 The Australian experience has been that the police on occasions give themselves the maximum possible time to conduct their post-arrest investigations, by deliberately effecting arrests late in the day or in the weekend (New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest* (LRC 66 1990), para 1.52). We are aware of allegations of similar practices occurring in New Zealand, with people being questioned for lengthy periods after arrest.

Uncertainty

40 As discussed in paras 32 to 34 above, the “trigger points” for when the rights of detained people arise are not sufficiently clear under current law. In specific situations, what constitutes “arrest” or “detained under any enactment” in s 23 of the Bill of Rights Act is the subject of differences of view among the judges of the Court of Appeal. There needs to be greater clarity in the law. There should be clarity concerning whether, for example, the right to consult a lawyer in s 23(1) applies when a suspect believes on reasonable grounds that he or she is not free to leave, due simply to the inherently coercive nature of the situation in which the suspect is placed, or whether the right only arises when specific words or actions of the police officer engender in the person questioned a reasonable belief that he or she is not free to leave (see para 34 for discussion of a case highlighting these two possibilities).

41 The uncertainty in the law also arises from the difficulty of reconciling the approach in *Alexander*, of allowing questioning of an arrested person as long as bringing the arrested person before the court is not delayed in order to question, with rule 3 of the Judges’ Rules. On one reading of the 1930 explanatory note to the Judges’ Rules, there is no scope for questioning people once they have been arrested.

CALLS FOR REFORM

42 On a number of occasions the Court of Appeal has indicated that reform in the area of detention and questioning might require the consideration of the legislature. Cooke P for the Court of Appeal in *R v Fatu* [1989] 3 NZLR 419, 432, mentioned the warning given in *R v Admore* [1989] 2 NZLR 210, and suggested that:

In the absence of a 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.

Three years later in *Butcher*, Cooke P returned to this issue, noting that the suggested legislation concerning powers of detention had not been implemented. By contrast, the Bill of Rights Act had been enacted. He said that:

Legislatures appear to be unwilling to take the step of authorising detention [of non-arrested persons] for questioning, and I am not persuaded that at the present stage the Courts should urge such legislation. I would not be opposed to it, provided that there were adequate safeguards, but consider that this controversial matter is best left to the legislature. (268)

In the following year in *Goodwin*, Cooke P further noted:

If wider powers are needed they should be conferred by Parliament; and it is to be expected that legislation would include safeguards. (163)

CONCLUSIONS

43 The law relating to police questioning needs to be reformed. However, reform should not take the shape of a general power to detain simply for questioning in the absence of an arrest (ie, in the absence of good cause to suspect that a person has committed a serious criminal offence). It is the Law Commission's view that reform should focus on the ability of the police to question people who have been lawfully arrested (ie, in terms of the existing powers to arrest, where there is good cause to suspect that they have committed imprisonable offences) but who have not yet been charged and brought before a court. Law reform agencies and legislatures in both Australia and the United Kingdom have also considered this to be the central issue (eg, see the Australian Crimes (Investigation of Commonwealth Offences) Amendment Act 1991 and the United Kingdom Police and Criminal Evidence Act 1984).

44 The historical context of the present law must be recognised. The common law rule (now embodied in statute by s 23(3) of the Bill of Rights Act 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 (see the comments to that effect by Prendergast C J in *R v Potter* (1887) 6 NZLR 92, 96). With the advent of the modern police force, the investigation of crime became a police function, yet no specific provi-

sion was made to allow the police to detain an arrested person for the purpose of questioning.

45 Some of those who made submissions suggested that the police are not unduly hindered by the arbitrary, uncertain and contradictory aspects of the current law (paras 38–41) because the law is not strictly applied and enforced, and therefore reform is unnecessary. However, this argument is not persuasive. On the contrary, it is unacceptable in a system based on the rule of law if police practice does not correspond with the rules for criminal investigation, which should be both clear and observed by the police. Moreover, this argument would leave unchanged abuses occurring in the current system (discussed in paras 25, 36, 37, 39 and 41). The law needs to be reformed to reflect an appropriate balance between the public interests in effective law enforcement and in protecting individual rights, bearing in mind that respect for individual rights is itself a public interest.

3

The Law Commission's Original Proposals

QUESTIONING AFTER ARREST

46 In part III of *Criminal Evidence: Police Questioning*, the Law Commission proposed the creation of a statutory power for the police to detain and question suspects after arrest and before charge and court appearance. It is important to emphasise that the Commission did not propose that there be a general power to detain and question people who have not been lawfully arrested. We considered that an arrest on traditional grounds must occur before the power could be invoked (ie, the officer must have “good cause to suspect”). Any lesser standard would be likely to allow arbitrary detention and would unjustifiably compromise individual liberty.

47 In the Commission’s opinion, a power to detain and question arrested people, within certain prescribed limits, was capable of being interpreted as consistent with both the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights (see paras 90–92 below for a more detailed discussion).

48 The proposals did not seek to authorise the questioning of an arrested person against his or her will. If, before or during questioning, a suspect clearly exercises the right of silence, the suspect should not continue to be detained and questioned solely in the hope that he or she might have a change of mind and answer questions after being “worn down” for a period of time. Attempts to undermine a suspect’s clear intent to exercise the right of silence were seen as unacceptable. It was the Commission’s view that such attempts would constitute a breach of s 23(4) of the Bill of Rights Act (ie, the right of a person who has been arrested or detained under any enactment to refrain from making a statement and to be informed of that right) and would be unfair, with the court then being entitled to exclude any resultant confession on either basis.

QUESTIONING SAFEGUARDS

49 The Commission considered that, in order to be fair, any regime which permits the questioning of arrested people must include appropriate safeguards to ensure that improper pressure is not brought to bear on those people. The safeguards proposed in our discussion paper endeavoured to strike a balance between allowing the police to question people in custody and protecting the rights of suspects. The main antecedents of the safeguards proposed were the Judges' Rules, the Bill of Rights Act and the International Covenant on Civil and Political Rights. The proposed safeguards related to giving suspects information concerning

- the right to be informed of the reasons for questioning,
- the right of silence,
- the right to consult a lawyer,
- access to a friend or relative,
- access to an interpreter or technical assistance,
- access to consular assistance, and
- the right to be advised of all of the above safeguards.

50 A fundamental issue was the point at which entitlement to safeguards should arise. As already discussed in chapter 2, a major criticism of the current law is that it encourages the police to delay arresting in order to facilitate the questioning of suspects. The Commission believed that in order to address this criticism, entitlement to the safeguards should arise at least at the point when the suspect could be formally arrested (ie, when a police officer has good cause to suspect the person has committed an offence). However, it considered that the introduction of the safeguards only at this point would be too late in the process for those suspects who were questioned in coercive circumstances prior to that point. The Commission therefore proposed that the safeguards should be available when

- a person is or could be formally arrested (ie, when a police officer has good cause to suspect the person has committed the offence), or
- a police officer has grounds to suspect that a person has committed the offence and that person is either at a police station or has reasonable grounds to believe that he or she is being detained.

This approach also had the advantage of clarifying the uncertainties in the current law relating to when a person is entitled to counsel under

s 23(1)(b) of the Bill of Rights Act (see paras 32–34 for a discussion of those uncertainties).

51 It is important to emphasise that the proposed safeguards applied only to suspects. We envisaged that the safeguards would have no application when the police were questioning a witness or victim of an offence. Undue application of the safeguards to people who are not suspects was regarded as unnecessary for their protection and liable to unduly hamper the police when they are making general enquiries. In addition, the safeguards are not designed to protect such people.

REASONS FOR QUESTIONING

52 The Commission considered that the police should be required to inform a suspect being questioned of the reasons for questioning, in order that the suspect can make informed decisions, such as whether to consult a lawyer and whether to exercise the right of silence.

53 Further, the Commission proposed that, if a person was entitled to the questioning safeguards, yet had not been arrested, the person should be informed that he or she is free to leave. If not so informed, suspects could wrongly assume they were under some form of coercion, particularly in light of having been cautioned and informed of the right to consult a lawyer. Because the proposals gave the police new powers to question after arrest, we considered it important to ensure that, where a person who has not been arrested is co-operating with the police, that co-operation is indeed voluntary.

THE CAUTION

54 As noted in para 48, the proposals in the Commission’s earlier paper were premised on the principle that people have the right to remain silent in response to police questioning. The proposed caution was to be worded as follows:

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.

The reference to not being required to do anything was intended to encompass potentially incriminating actions which the police might request the suspect to perform, but which there is no legal requirement to perform, for example, taking the police to the scene of the crime (see C24 for the changes to the wording of the caution which the Commission now recommends).

ACCESS TO LEGAL ADVICE

55 The Commission's proposals were formulated specifically on the basis that a system would be established for making legal advice available to all suspects, and that the questioning of a suspect who has requested legal advice would be deferred until a reasonable opportunity had been given to consult a lawyer. The importance of access to legal advice as a fundamental protection against human rights infringements was summarised by Richardson J in the Court of Appeal case *MOT v Noort* [1992] 3 NZLR 260, 279:

The right to consult a lawyer is part of our basic constitutional inheritance 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.

56 The lawyer's role is not limited to protection against human rights infringements, however. It can be advantageous to a suspect to acknowledge guilt promptly, and a lawyer's advice and assistance in that regard is also significant. Richardson J noted that "the common assumption that criminal justice is an inevitably confrontational system is not borne out by experience" (279).

57 The importance of the right to consult a lawyer is reflected in the Legal Services Amendment Bill, recently introduced to the House. The Bill provides for the establishment and administration of legal assistance schemes to provide legal advice to people who have been detained by the police or other authorities and who wish to exercise their right under the Bill of Rights Act to consult and instruct a lawyer.

ACCESS TO A FRIEND OR RELATIVE

58 Detention and questioning may disrupt the detained person's everyday activities. As a means of lessening the disruption, the Commission proposed affording a suspect the right to contact a friend or relative before questioning commences. This right was seen as all the more important where the suspect did not wish to, or could not, obtain legal advice, as he or she would otherwise be detained incommunicado.

ACCESS TO AN INTERPRETER

59 Under a police questioning regime, it is obviously essential to

ensure that both the questions and any resultant answers are clearly understood. Accordingly, the Commission proposed that a suspect should be provided with an interpreter whenever necessary. Such access was to extend to those who have difficulty communicating orally due to disability, as well as to those who cannot understand English or speak it fluently.

ACCESS TO CONSULAR ASSISTANCE

60 The Commission's previous proposals recognised that suspects who are foreign nationals should, in accordance with article 36 of the Vienna Convention on Consular Relations (opened for signature on 24 April 1963), be allowed to communicate with their consular officers and should be informed of this right. The text of the Convention is reproduced in the First Schedule to the Consular Privileges and Immunities Act 1971.

DEFERRAL OF COMMUNICATION RIGHTS

61 The Commission suggested as a matter for discussion that, in very rare cases where a belief existed that the lawyer requested by the suspect is a party to the offence for which the suspect is being interviewed, access to that particular lawyer should be delayed. On the same grounds it was also proposed that there could be delay in providing communication with friends or relatives. In addition, a delay in affording communication rights was seen as permissible in situations where danger or harm to others is imminent.

THE DETENTION AND QUESTIONING PERIOD

62 Compliance with the Bill of Rights Act and the International Covenant on Civil and Political Rights requires that there be strict time limits on the period for which a person may be detained following an arrest without being brought before a court. The Commission proposed that questioning should be for a reasonable time, up to a 4-hour limit, with the ability to extend the period of detention for up to another 4 hours on the authorisation of a commissioned officer of police. Where the offence for which the suspect was being questioned was punishable by a maximum period of imprisonment of not less than 14 years, there could be a further extension for a reasonable period up to 24 hours, but only on the authority of a District Court Judge.

63 Under the proposals, detention and questioning would be permissible only where there were reasonable grounds to believe that questioning was necessary to preserve or obtain evidence or complete the investigation concerning an offence for which the person was arrested (or another offence for which that person could be arrested). It was the Commission's view that, if an arrested person exercised his or her right of silence, detention solely in the hope that the person would change his or her mind and answer questions after being held for a period of time would be unlawful under s 23(4) of the Bill of Rights Act.

ENSURING COMPLIANCE WITH THE QUESTIONING REGIME: THE IMPROPERLY OBTAINED EVIDENCE RULE

64 *Criminal Evidence: Police Questioning* emphasised the importance of police compliance with the limits on the proposed new police power to detain and question after arrest and with the questioning safeguards. The Commission considered that, where evidence was improperly obtained, a rule of presumptive inadmissibility was necessary to discourage unlawful conduct and to indicate the significance of the values protected by the rule. Under the proposed improperly obtained evidence rule, evidence obtained in consequence of a breach of the law or obtained unfairly would be inadmissible unless the court considered that the interests of justice warranted admission of the evidence. Where there was a breach of the Bill of Rights Act in determining whether to admit the evidence, the court would also be required to take into account the special nature of the Act, as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand.

4

The Law Commission's Final Recommendations

GENERAL

65 The wide consultation undertaken by the Law Commission in finalising its recommendations in relation to the questioning of suspects by the police has been described in chapter 1. We now focus on the major points arising from that consultation. None of these was so serious as to require modification of the essential thrust of the Commission's proposals. They have, however, led the Commission to make some important changes in matters of detail.

POINT AT WHICH THE SAFEGUARDS ARISE

66 The submissions on the point at which the right to the safeguards arose, as proposed in *Criminal Evidence: Police Questioning*, raised a number of issues. The police suggested that entitlement to the safeguards should not arise until they have grounds to arrest (ie, "good cause to suspect" or the equivalent, "reasonable grounds to suspect" that the person being questioned has committed an offence). Entitlement to the safeguards at an earlier point was, the police contended, likely to unduly hamper them in making enquiries. In particular, it was strongly argued that to entitle to safeguards people whom there were only "grounds to suspect" of having committed an offence when such people reasonably believed they were being detained would seriously hinder police investigations at crowded crime scenes. By way of illustration, the police suggested that what is now s 6(2) of the draft legislation would require all people present in a crowded bar in which a stabbing occurred to be cautioned, told they are free to leave, and provided with an opportunity to consult with a lawyer (etc) before the police could make any enquiries.

67 In the Commission's view, neither the intention nor the effect of s 6(2)(b) is to provide entitlement to the questioning safeguards at a crime scene where only general enquiries are being made. Conceivably, a person at the scene who is asked for his or her name and address could have reasonable grounds to believe that he or she is being detained for the short time it takes to convey the requested information. However, unless the police officer has "grounds to suspect" that particular person being questioned, as distinct from others at the scene, the entitlement to the safeguards does not arise. In order to signal this more clearly, the word "that" has been inserted before "person" in s 6(2)(b).

68 Although the questioning safeguards will have no application in the absence of grounds to suspect a particular person or persons, it should be remembered that other protections remain. Section 22 of the New Zealand Bill of Rights Act 1990 prohibits arbitrary arrest or detention and s 23 guarantees specific rights in relation to detention under an enactment.

69 The Commission is committed to the view that providing entitlement to the questioning safeguards only at the point where the police have "reasonable grounds to suspect" or "good cause to suspect" the person of having committed the offence is too late in the investigative process to afford the suspect any real protection. If s 6(2)(b) necessitated this level of suspicion, before entitlement to the safeguards arose, advice of the right of silence and the right to a lawyer (etc) would be given too late to have any real effect.

70 The safeguards may be of little practical use at the point of arrest because the suspect could already have incriminated himself or herself. Further, delaying entitlement to the safeguards until there are "reasonable grounds" or "good cause to suspect" would not conform with the purpose of, and may in some situations conflict with, s 23(1) and (4) of the Bill of Rights Act, which provide information rights and the right to consult a lawyer once a person has been "arrested or detained under any enactment". The decisions of the Court of Appeal show that the safeguards contained in the Bill of Rights Act may be required in coercive situations falling short of those in which the suspect is, or could lawfully be, arrested (eg, see Cooke P in *Goodwin*, 165). For these reasons, the Commission would oppose the implementation of its proposals conferring an express power on the police to detain and question after arrest if the point of entitlement to the safeguards were delayed until the police officer had "reasonable grounds to suspect" the person had committed the offence.

71 Differences of opinion about whether entitlement to the questioning safeguards should occur once the police have “grounds to suspect” or “reasonable grounds to suspect” have also arisen in the context of the Children, Young Persons, and Their Families Amendment Bill, which was reported back to the House from the Social Services Select Committee on 24 March 1994 (see C97–C101 for a discussion of the two alternatives in the context of the amendment Bill).

72 Some submissions identified a difficulty with the draft legislation’s provision of entitlement to the safeguards “immediately on the occurrence” of a number of events. The submissions suggested that immediate provision of the questioning safeguards may be impossible when, for example, apprehending an armed or violent offender.

73 The submissions misconceived the relationship between the point of entitlement (as indicated in s 6(2)) and the point at which the safeguards actually came into operation (as indicated in the sections succeeding s 6 on individual safeguards). Under the Commission’s previous proposals, there was no obligation to actually provide the safeguards until just before questioning commenced. Therefore, in an emergency, where there would be no time to question, the safeguards did not immediately apply.

74 Other submissions highlighted a problem with the provision of specific safeguards “before questioning a person”. Because questioning may in practice occur some time after arrest, there existed the possibility that people could be entitled to the safeguards yet not be provided with them. Submissions indicated there was some doubt about whether or not a statement made after the obligation to provide the safeguards arose but before they were actually provided would be admissible as evidence.

75 In the draft legislation the Commission has now altered the point at which the safeguards come into operation so that the obligation to provide them arises “as soon as practicable after” the events described in s 6(2). In addition, where there is a delay of more than one hour between the initial provision of the safeguards and the actual commencement or recommencement of questioning, advice of the right to consult a lawyer and the caution must now be repeated.

ACCESS TO LEGAL ADVICE

76 Consultation clearly emphasised the importance of the suspect’s access to legal advice under a police questioning regime. Many submis-

sions stressed the need for adequate state funding to provide a duty solicitor roster capable of delivering legal advice to people detained for questioning who could not otherwise afford it. A number of commentators queried the practicality of a suspect locating a solicitor at odd hours or in a remote part of the country.

77 The Commission endorses the comments in the submissions about the availability of legal advice as an essential element of the proposed questioning regime. We said in our discussion paper that, unless such advice were made available, we would not recommend the implementation of the proposed questioning regime. We remain firmly committed to that view. The draft legislation now provides that if a person indicates a wish to consult a lawyer or arrange for one to be present during questioning, but such consultation or presence does not occur after a reasonable time, questioning may not occur unless the police obtain on video recording or in writing a waiver by that person of the right to counsel. There is also a requirement that the police record a waiver of legal advice where the suspect does not wish to consult a lawyer (see s 10(6) of the draft legislation).

78 Aspects of a person's entitlement to a lawyer have been spelt out with greater precision in the draft legislation. This is partly in response to the concerns raised in the submissions and partly as a result of the differing judicial interpretations of s 23(1)(b) of the Bill of Rights Act. The draft legislation now clearly requires people to be informed that they may attempt to communicate with a lawyer of their choice, in private and without delay. If the lawyer is a lawyer operating under the police legal assistance scheme established under the Legal Services Amendment Bill, legal advice will be provided free of charge. Further, the police must offer reasonable facilities, including the use of a telephone, to facilitate that communication and must enquire whether a lawyer is sought. The Commission's view is that these are necessary requirements which are in keeping with the Bill of Rights Act.

ACCESS TO A FRIEND OR RELATIVE

79 The police raised concerns about the proposed right of suspects to communicate with friends or relatives. A strong fear was voiced that exercising such a right would seriously prejudice many investigations by enabling relevant evidence to be destroyed or disposed of.

80 In light of these concerns, aspects of a suspect's entitlement to communicate with friends or relatives have now been more clearly stated. The draft legislation now provides that the identity of the friend

or relative must be declared to the police and the right is limited to communication of the whereabouts of the accused and the reasons for which he or she is being questioned. Again, there is a requirement that police enquire as to whether communication with a friend or relative is sought by the suspect. It should also be noted that the right to communicate with a friend or relative, unlike the right to consult a lawyer, is not a right to communicate in private.

81 The Commission believes the suspect's right to communicate with a friend or relative is an important one and should be retained, given the inevitable disruption to the person's everyday activities. It is also a right provided in other jurisdictions (see, for example, Police and Criminal Evidence Act 1984 (UK) s 56 and Crimes Act 1958 (Victoria) s 464c).

DEFERRAL OF ACCESS TO LEGAL ADVICE

82 The New Zealand Law Society, along with a number of others, expressed concerns about the proposed police power to defer access to a lawyer when a belief exists that the lawyer requested is implicated in the offending being investigated. Fears were raised that this would result in some counsel wrongly being "black-listed" because of their effectiveness. The profession was also concerned about the possibility that a suspect who requests a lawyer, but who for reasons beyond his or her control is unable to arrange for one to be present during questioning, would nonetheless be questioned by the police.

83 The Commission's original proposals did include safeguards which, at least in part, addressed the Law Society's concerns. However, owing to the strength of feeling on this issue concerning the fundamental importance of the right to consult a lawyer, the ability to defer access to a lawyer has now been limited to situations in which there exists urgent physical danger to some other person or persons.

ACCESS TO INTERPRETER, APPROPRIATE PERSON OR TECHNICAL ASSISTANCE

84 The submissions raised concerns about the scope of the obligation to provide an interpreter or technical assistant under the draft legislation. In particular, the suggestion was made that the interpreter or technical assistant should be available where mental, in addition to physical, disability impacts on the suspect's ability to communicate.

85 In recognition of the fact that the right to an interpreter is of

central importance to some suspects, as a right through which all other safeguards will flow, the right has now been shifted to the fore of the questioning safeguards in the draft legislation. It now clearly states that the right to such assistance is applicable in relation to all other safeguards and the police must use their best endeavours to do whatever is necessary to inform the suspect that assistance is available, free of charge. The scope of the right to assistance has also been widened. The provision now applies to the following:

- people who do not have reasonable fluency in a language common to them and the police officer;
- people who have impaired hearing or some other apparent physical disability affecting their ability to communicate orally; and
- people whom the police have grounds to suspect are mentally ill or mentally handicapped so as to affect their capacity to comprehend.

86 The draft legislation now provides for access to an interpreter, appropriate person or technical assistance. If there are communication problems, because of a physical disability, technical assistance may be necessary. In the case of mentally ill or mentally handicapped suspects who have difficulties in comprehending advice of their rights, an appropriate person (either because of his or her knowledge of the suspect or skill, experience or qualifications in dealing with mentally ill or mentally handicapped people generally) should be brought in to assist. This is, of course, subject to the prohibition on questioning any person where his or her condition or behaviour is such that giving a caution is not practical or a caution would not be understood (s 8(3) of the draft legislation).

POSSIBLE ABUSES OF POWER TO DETAIN AND QUESTION

87 A number of submissions raised significant philosophical objections to the concept of detention and questioning. In particular, there was a concern that, despite detention being for a “reasonable period”, the maximum allowable periods would become the norm. Many commentators indicated strong concern about the potential length of both the initial and the overall detention periods. Some commentators questioned the appropriateness of providing the commissioned officer of police with the power to extend a detention period. Some also envisaged problems in always being able to make immediate contact with a District Court Judge for the purpose of making an application for extension of a detention and questioning period. Others indicated

a need for provision for the grant of bail, particularly where extension applications had been adjourned.

88 The maximum detention periods have now been altered. In light of concerns that a commissioned officer of police could too readily extend an initial 4-hour detention period to one of 8 hours, the two initial detention periods have been replaced by a single period of up to 6 hours, subject to the requirement that the period is reasonable in the circumstances (to be determined by reference to statutory criteria). Under the draft legislation, commissioned officers of police will now have no authority to extend detention periods. Instead, if there is to be an extension, it must be granted by a District Court Judge. The Commission had previously proposed that a District Court Judge should be able to extend the period by up to 24 hours, but it now recommends that the first grant of an extension by a District Court Judge may be only for a period of 6 hours. In exceptional cases, for the most serious offences and again on the authority of a District Court Judge, a further extension of of 6 hours may be granted. Both the initial detention and questioning period and any extensions are subject to the overriding requirement that the period must not exceed a period which is “reasonable in the circumstances”.

89 Telephone applications for the extension of detention periods are now envisaged in order to reduce the need for adjournments. The procedural requirements of applying for extended detention, in particular the rights of suspects or their lawyers in that procedure (eg, to make representations to the judge), have been defined with greater precision in the draft legislation. Further, we envisage that, where appropriate, bail will be available if an adjournment of an application for extension is granted by a District Court Judge. The draft legislation now expressly provides for that eventuality, and for the police and the suspect, or a lawyer on the suspect’s behalf, to make representations to a District Court Judge concerning bail. It is envisaged that a roster will be compiled of District Court Judges available to hear telephone applications for the extension of the detention periods. The objective is 24 hour coverage throughout the country. This proposal has been discussed with, and approved of by, representatives of the District Court Judges.

COMPLIANCE WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND THE CRIMES ACT 1961

90 The Commission previously suggested that a delay in bringing a suspect before the court or in releasing him or her, caused by the

operation of the provisions of the questioning regime, could be seen as consistent with s 23(3) of the Bill of Rights Act, read with s 5 of that Act. An argument in support of that conclusion was that other jurisdictions have chosen to legislate along similar lines (see *A Bill of Rights for New Zealand: A White Paper* 1984–85 AJHR A 6, para 10.34, which refers to the weight to be given to similar legislation in other jurisdictions). The United States, England, Scotland and Australia have legislated to permit delays of from 6 to 24 hours in bringing an arrested person before a judicial officer. These countries are also parties to the International Covenant on Civil and Political Rights.

91 The reduction of the total *maximum* detention and questioning time from 32 to 18 hours, and the fact that the decision about whether to extend the period of detention now resides with a District Court Judge rather than the police, strengthen our view that the draft legislation complies with the Bill of Rights Act. It is also relevant that, where there is an application for extension of the detention and questioning period, a hearing by a District Court Judge is tantamount to bringing a person before a court in accordance with s 23(3) of the Bill of Rights Act (although the hearing occurs prior to charging the suspect). The judge will be required to decide whether the police should be authorised to detain the person for a further period. This is an essentially similar task to determining whether a person who has been charged with an offence should continue to be detained; and the suspect who is dealt with by telephone has the same right to be heard as if he or she were brought before a court.

92 The wording of the obligation to bring an arrested person before a court or release him or her as soon as possible in s 23(3) of the Bill of Rights Act is similar to that of s 316(5) of the Crimes Act 1961. However, it cannot be assumed that the two provisions are to be interpreted in exactly the same way. This is primarily because of the status of the Bill of Rights Act as a constitutional document, and because of the “reasonable limits” test in s 5 of the Act. After careful consideration, the Commission concluded that s 316(5) requires amendment so that it is subject to the power to detain and question proposed in the draft legislation. In the longer term, s 316(5) should probably be repealed (with all the attendant consequential amendments to other Acts). Arguably, the provision is no longer necessary because express provision is made in the draft legislation for detention after arrest within set limits, and s 23(3) of the Bill of Rights Act encompasses s 316(5). The Commission is not at this stage recommending the repeal of s 316(5), because further consultation would be necessary, along with consideration of the many consequential changes required.

THE EFFECT OF EXERCISING THE RIGHT OF SILENCE

93 Many submissions emphasised the right of a suspect (expressed in the caution) to refuse to answer questions. Some commentators suggested that the draft legislation should expressly provide that questioning should cease once a suspect indicates he or she wishes to exercise the right of silence, with the police then being obliged immediately to charge or release.

94 We stated earlier (para 48) that the proposals in *Criminal Evidence: Police Questioning* recognised the right of silence and were not intended to override it. That remains the Commission's intention with respect to the current proposals. Under the draft legislation, a suspect will be entitled to the caution at an earlier point than may currently be the case under s 23(3) of the Bill of Rights Act. Section 6(2) of the draft legislation provides that the entitlement to the questioning safeguards arises where a suspect is in coercive circumstances, whether those are engendered by actions or words of the questioning officer or solely by the environment in which the questioning takes place. Given this, it would, in the Commission's view, be unreasonable to provide that the suspect must be charged or released the moment he or she exercises the right of silence.

95 The circumstances in which a suspect is placed will be many and varied. There will be circumstances in which it is in the interests of both guilty and innocent suspects to remain silent. Equally, there will be circumstances in which it is in suspects' interests to answer questions. Either way, the circumstances may not be susceptible of quick assessment, and the information disclosed as a basis for questioning, as well as the questions themselves, may reveal considerations which affect or alter a suspect's decision. The suspect will have counsel available to him or her, assisting a considered assessment of whether the suspect should exercise, or continue to exercise, the right of silence.

96 Questioning must not be continued, however, as a means of wearing down the suspect's resolve to exercise the right of silence. Continued detention and questioning for that purpose would be unreasonable and therefore contrary to s 13. Section 14 provides the police and District Court Judges with a list of factors that they must take into account in determining what is a reasonable period. Whether or not the suspect has exercised his or her right of silence is one of the most important of those factors and, in those instances where the suspect after due consideration unequivocally chooses to exercise the

right, detention and questioning will no longer be reasonable.

97 The availability of legal advice, reinforced by the enactment of the Legal Services Amendment Bill, will operate to ensure that questioning is not used to wear down a suspect's resolve, and the growing use of video recorders will assist the courts in detecting whether such pressure has been applied. Continued detention in the situation where a suspect clearly exercises his or her right of silence will be subject to the control provided by the improperly obtained evidence rule to be inserted in the Evidence Act 1908.

OTHER ENFORCEMENT AGENCIES

98 The draft legislation does not apply to enforcement agencies other than the police. Instead, officials' powers and obligations in investigating offences are governed by the particular Act applying to them (see, for example, s 267 and Part VIII of the Customs Act 1966, Parts I and II of the Serious Fraud Act 1990 and Part VI of the Fisheries Act 1983). The Commission acknowledges that the restricted scope of the draft legislation will give rise to anomalies. Where, for example, parallel powers are conferred upon other enforcement officers, and a police officer is making the enquiry, entitlement to the questioning safeguards will arise, but if another investigative officer, such as a customs officer, is making the enquiry, entitlement to the safeguards will not arise. Parallel powers can be found in several of the Acts governing enforcement officers (eg, s 267 of the Customs Act gives both the police and customs officers powers of arrest without warrant for Customs Act offences). In the Commission's view, the potential for discrepancies in relation to the application of the draft legislation indicates the desirability of a comprehensive review of statutory powers of detention, investigation and enquiry vested in state agencies other than the police, with a view to bringing them into line with the Commission's proposals, where possible. Accordingly, the Commission proposes to consult with other enforcement agencies about the extension of the draft legislation to those agencies.

THE IMPROPERLY OBTAINED EVIDENCE RULE

99 Submissions on the improperly obtained evidence rule focused on a number of issues, such as the meaning of "interests of justice", the desirability of a rule presumptively in favour of exclusion, and the appropriateness (or otherwise) of the standard of beyond reasonable doubt, which the draft legislation required the prosecutor to discharge

in order to establish that evidence had not been improperly obtained.

100 The improperly obtained evidence rule will be a strong prima facie rule of exclusion, with specific attention being drawn to breaches of the Bill of Rights Act. The courts' ability to admit the evidence in the "interests of justice" means that they will not be required to take a rigid or technical approach to the admissibility of the evidence. In addition, the rationale behind the rule is clearly articulated: the rule provides for the exclusion of *improperly* obtained evidence. The lack of clarity in the guiding principles behind the current fairness discretion (ie, to exclude evidence on the ground of unfairness) has, therefore, been addressed by the proposed rule. No substantive changes have been made to the scope of the improperly obtained evidence rule proposed in the Commission's previous discussion paper. However, a change has been made to a different aspect of the rule: where the defence raises an issue that evidence has been improperly obtained, the prosecution will be required to satisfy the court on the balance of probabilities, rather than beyond reasonable doubt, that the evidence has not been improperly obtained. The proposed standard of proof is currently applied by the courts in deciding whether a breach of the Bill of Rights Act has occurred.

CONCLUSIONS

101 In determining the appropriate response to the submissions and comments arising out of the consultation it has undertaken, the Commission has kept firmly in mind the need for balance (highlighted at the beginning of this report) between the public interest in the conviction of guilty offenders and the public interest in protecting the rights of individuals and excluding unreliable evidence. The Commission views its proposals as a package, the usefulness and acceptability of which would be severely impaired by alterations to any important component part, such as the point at which the questioning safeguards arise and the provision of free legal advice to suspects. In respect of the latter of these important components, we welcome the proposed enactment of the Legal Services Amendment Bill.

5

Summary of Final Recommendations

102 The Law Commission recommends the enactment of legislation which

- gives a person an express, detailed right to the questioning safeguards if
 - that person is formally arrested or could lawfully be arrested;
 - or
 - a police officer has grounds to suspect that that person has committed an offence and the person is at a police station or the person has reasonable grounds to believe that he or she is being detained,
- authorises the police to detain people and question them after arrest and before charge for a limited and clearly defined period and subject to the provision of questioning safeguards, and
- inserts a new section in the Evidence Act 1908 providing that all improperly obtained evidence is presumptively inadmissible, with special attention being drawn to breaches of the New Zealand Bill of Rights Act 1990, but giving the courts the ability to admit the evidence if admission is in the interests of justice.
- The relevant provisions of the Children, Young Persons, and Their Families Act 1989 should remain. However, where those provisions afford less protection to children or young people than the Commission's proposals do, that Act should be amended to bring it into line with those proposals (see C95–C103 for the specific changes we propose).

103 To give effect to these recommendations, the Law Commission further recommends the enactment of the draft Police (Questioning of Suspects) Act set out in chapter 6.

104 The Law Commission also proposes to consult with other law enforcement agencies about the extension of its proposals to those agencies.

6

Draft Police (Questioning of Suspects) Act

Note about format

In its report, *The Format of Legislation* (NZLC R27 1993), the Law Commission recommended that a new format should be adopted, involving changes to both typography and design. The purpose is to increase readability, and in that way improve access to the law for those who use it.

The draft Police (Questioning of Suspects) Act is reproduced in the recommended format.

POLICE (QUESTIONING OF SUSPECTS) ACT 199-

Public Act [] of 199-

Royal assent: []

Comes into force: []

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The Parliament of New Zealand enacts the
Police (Questioning of Suspects) Act 199-

PART 1
PRELIMINARY

1 **Purpose**

The purpose of this Act is to establish safeguards applicable to police questioning of persons suspected of offences, to confer limited authority on the police to detain and question arrested persons concerning offences, and to enact rules governing the exclusion, or admission in the interests of justice, of improperly obtained evidence.

2 **Commencement**

This Act comes into force on — 199-.

3 **Application**

Parts 1 to 3 do not apply to persons

- (a) suspected of having committed any of the offences contained in sections 58A to 58E of the *Transport Act 1962*; or
- (b) who are children or young people, as defined in the *Children, Young Persons, and Their Families Act 1989*.

4 **Crown bound**

This Act binds the Crown.

5 **Definitions**

In this Act,

detention and questioning period means a period during which a person who has been lawfully arrested for an offence punishable by imprisonment may be lawfully detained and questioned by the police under and in accordance with section 13 or 16;

offence means an offence of a kind for which a person may be arrested by a police officer;

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.

PART 2
QUESTIONING SAFEGUARDS

6 **Entitlement to questioning safeguards**

- (1) In this Act, a reference to the **questioning safeguards** is a reference to

- the rights and obligations conferred or imposed by
- (a) section 7 (interpreter, appropriate person or technical assistance), and
 - (b) section 8 (caution), and
 - (c) section 9 (notification of reasons for questioning), and
 - (d) section 10 (communication with lawyer, friend, relative, consular officer), and
 - (e) section 11 (deferral of grant of right to consult lawyer), and
 - (f) section 12 (deferral of communication rights).
- (2) A person is entitled to the questioning safeguards in respect of an offence, on the occurrence of any of the following circumstances:
- (a) the person is either arrested for the offence or could lawfully be arrested for the offence by a police officer; or
 - (b) a police officer has grounds to suspect that that person has committed the 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 entitled to the questioning safeguards and prior to or during the questioning the police officer has grounds to suspect that the person has committed another offence, that person is also, in respect of that other offence, entitled to the safeguards (except those in section 10(4)) before the police officer questions the person about the other offence.
- (4) The entitlement conferred by subsection (2) does not arise only because a person who has not been arrested
- (a) is requested by a police officer to provide particulars of name and address for the purposes of laying an information for a summary offence under the *Summary Proceedings Act 1957*; or
 - (b) could lawfully be arrested for an offence by a police officer who is engaged in an undercover operation authorised by a commissioned officer of police.

Definitions: **offence**, **questioning a person**, s 5; **questioning safeguards**, s 6; **appropriate person**, **technical assistance**, s 7; **consular officer**, **information**, *Acts Interpretation Act 1924* s 4

7 Right to interpreter or assistance

- (1) This section applies to a person who is entitled to the questioning safeguards and
- (a) does not have reasonable fluency in a language common to the person and the police officer; or
 - (b) has impaired hearing or some apparent physical disability affecting his or her capacity to communicate orally; or
 - (c) whom the police officer has grounds to suspect has a mental illness or mental handicap affecting his or her capacity to comprehend the caution and all other information that he or she is entitled to receive.

- (2) The caution, and all other information that a police officer is required to give to a person who becomes entitled to the questioning safeguards, must be given in or translated into a language in which the person is able to communicate with reasonable fluency and in a manner which assists the person to comprehend that caution and information.
- (3) As soon as practicable after a person to whom this section applies is entitled to the questioning safeguards, a police officer must
 - (a) use his or her best endeavours to do whatever is necessary to inform that person that he or she has a right to have, free of charge, the assistance of an interpreter or of an appropriate person or technical assistance that is reasonably necessary to facilitate communication or comprehension, and
 - (b) if the circumstances require, arrange for the presence or availability of an interpreter, an appropriate person, or technical assistance and defer questioning until the interpreter, person or technical assistance is available and any previous performance of the obligations in sections 8, 9 and 10 has been repeated with the assistance of the interpreter, person or technical assistance.
- (4) In this section,

appropriate person means a person who because of his or her knowledge of a person to whom subsection (1)(c) applies, or because of his or her skill, experience, or qualifications in dealing with persons of that kind, is likely to be able to assist the person to comprehend the caution, information and questions;

technical assistance includes communication in writing where that is likely to assist a person to whom subsection (1)(b) applies to communicate.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6

8 Duty to caution

- (1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must caution the person in the following terms:

You do not have to say anything unless you want to. If you do say anything, what you say may be given as evidence in court.
- (2) If a person was cautioned more than one hour before questioning commences or recommences, a police officer must again caution the person in the manner required by subsection (1) before questioning commences or recommences.
- (3) 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.

- (4) This section does not apply to the extent that, in the circumstances, another enactment requires the person to answer questions by a police officer without being cautioned.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6

9 Duty to notify reasons for questioning

- (1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must
- (a) inform the person of the reasons for questioning, and
 - (b) if the person has not been arrested but is in the presence of a police officer, inform the person that he or she is not under arrest and is free to leave.
- (2) If any additional reasons for questioning a person arise prior to or during the questioning of that person, a police officer must inform the person of those additional reasons for questioning.
- (3) The performance of the obligation imposed on a police officer by subsection (1)(b) may be deferred if and for so long as the person is
- (a) required by a police officer acting under lawful authority to submit to a search; or
 - (b) detained under sections 13A to 13M of the *Misuse of Drugs Amendment Act 1978*; or
 - (c) apprehended or detained under section 109 or 112 of the *Mental Health (Compulsory Assessment and Treatment) Act 1992*.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6

10 Rights and duties concerning communication with lawyer, friend, relative and consular officer

- (1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must inform the person that
- (a) he or she may consult and instruct a lawyer in private without delay, and
 - (b) he or she may arrange, or attempt to arrange, for a lawyer of that person's choice to be present during the questioning, and
 - (c) if desired by that person, legal advice is available to the person free of charge.
- (2) If a person was informed of his or her right to consult and instruct a lawyer more than one hour before questioning commences or recommences, a police officer must again inform the person of the right to

do so in the manner required by subsection (1) before questioning commences or recommences.

- (3) Before questioning a person who is entitled to the questioning safeguards, a police officer must enquire whether the person wishes to consult a lawyer.
- (4) After cautioning and before questioning a person who is entitled to the questioning safeguards, a police officer must
 - (a) inform that person that he or she may communicate with, or attempt to communicate with, a friend or relative (whose identity is disclosed to the police officer) to inform the friend or relative of the person's whereabouts and the reasons for the questioning, and enquire whether the person wishes to do so, and
 - (b) in the case of a person who to the knowledge of the police officer is not a New Zealand citizen, inform that person 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, and enquire whether the person wishes to do so.
- (5) 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 practicable, give the person reasonable facilities, including the use of a telephone, 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.
- (6) If
 - (a) the person wishes to consult a lawyer but is unable to do so within a reasonable time; or
 - (b) a lawyer who has agreed to attend at a police station to advise the person fails to do so within a reasonable time; or
 - (c) the person does not wish to consult a lawyer,the police officer may not question the person unless the person waives in writing or on a video recording his or her entitlement to consult and instruct a lawyer. In such a case, the police officer must, before questioning the person, again inform the person of the reasons for questioning and caution that person in the manner required by section 8.
- (7) 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.

- (8) Notwithstanding section 6, this section does not apply to a person who makes a statement to a police officer by telephone or otherwise without being in the presence of a police officer.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6; **consular officer**, *Acts Interpretation Act 1924* s 4

11 Deferral of grant of right to consult lawyer

- (1) The performance of the obligations imposed on a police officer by section 10(5) 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 the questioning is so urgent, having regard to the danger of physical 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 a commissioned officer of police permits deferral of the performance of an obligation under subsection (1),
- (a) a police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and
 - (b) the commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Definitions: **questioning a person**, s 5

12 Deferral of grant of communication rights

- (1) The performance of the obligation imposed on a police officer by section 10(5)(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 obligation 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 physical 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 10(5)(a) to give facilities for communication 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 physical 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 permits deferral of the performance of an obligation under this section,
 - (a) a police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and
 - (b) the commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Definitions: **questioning a person**, s 5; **consular officer**, *Acts Interpretation Act 1924* s 4

PART 3 QUESTIONING AFTER ARREST

13 Post-arrest detention and questioning

- (1) A person lawfully arrested for an offence punishable by imprisonment may be detained and questioned if a police officer believes on reasonable grounds that questioning of that person is necessary to preserve or obtain evidence or to complete the investigation into the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person.
- (2) The period for which a person may be detained and questioned by the police under this Act must not exceed a period that is reasonable in the circumstances, and must not exceed
 - (a) a period of 6 hours from the time that the person was or should have been first cautioned; or
 - (b) if an extension is granted under section 16(2) or (4), the period authorised by the extension.
- (3) The detention and questioning periods authorised by this section must be computed in accordance with section 15.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5

14 Determination of reasonable detention and questioning period

The reasonableness in the circumstances of a period of detention and

questioning depends on, among other relevant matters,

- (a) whether the person being detained and questioned has exercised his or her right of silence, and
- (b) the apparent age and apparent mental and physical condition of the person being detained and questioned, and
- (c) whether the questioning is being conducted properly and without delay, and
- (d) the number and complexity of the matters being investigated, and
- (e) the seriousness of the offence concerning which the person is being detained and questioned.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5

15 Times excluded from detention and questioning period

- (1) In computing the period for which a person may be detained and questioned by the police under section 13, each of the following times shall be disregarded if the person is not during those times asked any questions about the commission or possible commission of an offence by that person:
 - (a) time reasonably taken to convey the person to an appropriate place for the purposes of questioning or providing medical attention, and
 - (b) time during which questioning is deferred or suspended to allow the person to communicate with a lawyer, friend, relative or consular officer, and
 - (c) time spent waiting for the arrival of an interpreter, appropriate person or technical assistance required under section 7, or a lawyer or consular officer required under section 10, 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 or 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 and determine an application for an extension of a detention and questioning period under section 16, including any period when such an application is adjourned under section 17(7).
- (2) If a period of time, or more than one consecutive period of time, that is disregarded under this section exceeds one hour, a police officer must again caution the person in the manner required by section 8 before questioning commences or recommences.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5; **consular officer**, *Acts Interpretation Act 1924* s 4

16 Extension of detention and questioning period

- (1) A police officer may, before the expiry of the initial detention and questioning period authorised under section 13, apply to a District Court Judge for an extension of that period.
- (2) A District Court Judge may grant an extension of the initial detention and questioning period for a further period of 6 hours, if the District Court Judge is satisfied that
 - (a) the offence in respect of which the person is being detained and questioned is punishable by imprisonment, and
 - (b) the initial detention and questioning period has not expired because the period of detention and questioning was unreasonable in the circumstances, and
 - (c) the initial maximum detention and questioning period of 6 hours has not expired, and
 - (d) further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person, and
 - (e) the questioning is being conducted properly and without delay, and
 - (f) the total period of time taken for one or more of the purposes referred to in section 15 is not unreasonable in the circumstances, and
 - (g) the person has been informed that he or she, or a lawyer on his or her behalf, may make representations to the District Court Judge about the application.
- (3) A police officer may, before the expiry of a detention and questioning period authorised under subsection (2), apply to a District Court Judge for an extension of that period.
- (4) A District Court Judge may in exceptional circumstances grant a further extension of a detention and questioning period authorised under subsection (2) for a period of 6 hours, if the District Court Judge is satisfied that
 - (a) the offence in respect of which the person is being detained and questioned is punishable by not less than 14 years imprisonment, and
 - (b) the detention and questioning period authorised under subsection (2) has not expired because the period of detention and questioning was unreasonable in the circumstances, and
 - (c) the maximum detention and questioning period authorised under subsection (2) has not expired, and
 - (d) further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence or another offence punish-

- able by a maximum penalty of not less than 14 years imprisonment for which the police have lawful grounds to arrest the person, and
- (e) the questioning is being conducted properly and without delay, and
 - (f) the total period of time taken for one or more of the purposes referred to in section 15 is not unreasonable in the circumstances, and
 - (g) the person has been informed that he or she, or a lawyer on his or her behalf, may make representations to the District Court Judge about the application.
- (5) Before questioning a person in respect of whom an extension of a detention and questioning period has been granted under subsection (2) or (4), a police officer must again inform the person of the reasons for the questioning and caution the person in the manner required by section 8.
 - (6) A detention and questioning period may be extended once only under subsection (2) and once only under subsection (4).
 - (7) If a question arises whether evidence obtained during a period alleged to be a detention and questioning period under this Act was improperly obtained, a purported extension of a preceding detention and questioning period under this section does not affect the question whether, before its purported extension, that period had expired.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5; **District Court Judge**, *Acts Interpretation Act 1924* s 4

17 Application for extension of detention and questioning period

- (1) This section applies to all applications to a District Court Judge for an order extending a detention and questioning period.
- (2) The police officer making the application to a District Court Judge may do so in writing or orally, either in person or by telephone.
- (3) The police officer making the application to a District Court Judge 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 nature and extent of the questioning of the person already undertaken by the police and the nature and extent of proposed further questioning, and
 - (d) the reasons for believing that further questioning of the person is necessary, and
 - (e) the time when the person was first cautioned and any subsequent periods of time during which any of the circumstances referred to in section 15(1) applied, and

- (f) whether the person has instructed a lawyer, and
 - (g) whether any deferral under section 11 or 12 has occurred, and
 - (h) whether one or more applications have already been made under section 16 for an extension of a detention and questioning period, and, if so, the decision on every application so made.
- (4) The information referred to in subsection (3) must be provided to the person in respect of whom the application is made in sufficient time for that person, or a lawyer on his or her behalf, to make representations to the District Court Judge concerning that application.
 - (5) The person in respect of whom the application is made, or a lawyer on his or her behalf, must be given an opportunity to make representations to the District Court Judge concerning the application.
 - (6) If an oral application is made, the application and the statement required under subsection (3) must be confirmed in writing and provided to the District Court Judge within 24 hours after the application is made.
 - (7) A District Court Judge may adjourn the hearing of an application for not more than 18 hours if
 - (a) the person in respect of whom the application is made is charged with a complex offence or offences or numerous offences, and
 - (b) the adjournment would enable the application to be dealt with in court as soon as the period of adjournment has elapsed, and
 - (c) the person in respect of whom the application is made, or a lawyer on his or her behalf, has been given an opportunity to make representations to the District Court Judge.
 - (8) During the period an application is adjourned, the police may, unless bail is granted under section 18, detain but not further question the person to whom the application relates.
 - (9) Every application is to be determined as a matter of urgency (unless adjourned under subsection (7)) and, so far as is practicable, is to be determined before the end of the detention and questioning period to which the application relates.
 - (10) Where a District Court Judge grants an order extending a detention and questioning period, he or she must
 - (a) make a record of
 - (i) the time and date when the order is made, and
 - (ii) the grounds on which the order was made, and
 - (b) file the record referred to in paragraph (a) in the nearest District Court Registry, together with a copy of the application and police officer's statement referred to in subsection (3).

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5; **District Court Judge**, *Acts Interpretation Act 1924* s 4

18 Bail on adjournment of application for extension of detention and questioning period

- (1) A District Court Judge who adjourns, under section 17(7), an application for an order extending a detention and questioning period may, of his or her own initiative or on the application of the person concerned or that person's lawyer, direct the release of the person on bail.
- (2) A person granted bail under this section must be released on condition that he or she attend personally for the hearing of the application
 - (a) at a time specified by the District Court Judge (which must be no later than 18 hours after the time of the adjournment), and
 - (b) at a District Court specified by the District Court Judge.
- (3) The District Court Judge may impose any other conditions on the person's release that he or she considers necessary to ensure that the person
 - (a) attends at the specified time at the specified District Court, and
 - (b) does not interfere with any witness or any evidence, and
 - (c) does not commit any offence while on bail.
- (4) A police officer who releases a person granted bail under this section must give that person a written notice of the conditions imposed under subsections (2) and (3) and use his or her best endeavours to do whatever is necessary to ensure that the person understands those conditions.
- (5) Sections 53 to 55 of the *Summary Proceedings Act 1957* apply to a person released on bail under this section subject to any necessary modifications, but no other provisions of that Act or the *Crimes Act 1961* relating to bail apply to bail granted under this section.
- (6) If a person who is released on bail under this section is subsequently arrested under section 53 or 55 of the *Summary Proceedings Act 1957*, the adjourned application for extension of the detention and questioning period is to be determined as if the detention and questioning period had not expired.
- (7) This section does not authorise any police officer to question a person granted bail under this section about the offence in respect of which the person was being questioned pending the determination of the application for extension of the detention and questioning period.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5; **District Court**, **District Court Judge**, *Acts Interpretation Act 1924* s 4

19 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 physical 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 for any of the reasons specified in subsection (1), a police officer must
 - (a) inform the person of the reasons for the questioning and caution the person again in the manner required by section 8, and
 - (b) grant the communication and consultation rights in relation to a lawyer conferred by section 10.
 - (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 the questioning is so urgent, having regard to the danger of physical harm to some other person or persons, that it should not be delayed by compliance with that obligation.
 - (4) An exercise of the power to defer under subsection (3) does not imply that questioning must be deferred.
 - (5) If a commissioned officer of police permits deferral of the performance of an obligation under subsection (3),
 - (a) a police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and
 - (b) the commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Definitions: **offence, questioning a person**, s 5

20 Re-arrest following release

A person who has been detained and questioned following a lawful arrest for an offence and released without being charged with that offence, or a related offence based substantially on the same facts, and has been re-arrested, may not again be questioned about that offence, or a related offence based substantially on the same facts, unless additional material information has come to the notice of the police since the person was released.

Definitions: **offence, questioning a person**, s 5

PART 4
IMPROPERLY OBTAINED EVIDENCE

21 Amendment to Evidence Act 1908

The *Evidence Act 1908* is amended by inserting after section 20 the following section:

“20A Admissibility of improperly obtained evidence

- (1) Improperly obtained evidence offered by the prosecution in a criminal proceeding is, subject to subsection (4), inadmissible unless the court considers that the exclusion of the evidence would be contrary to the interests of justice.
- (2) Evidence is improperly obtained 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 any enactment or rule of law; or
 - (c) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
 - (d) unfairly.
- (3) In exercising its power to admit evidence under subsection (1), the court must consider, among other relevant matters,
 - (a) the significance 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, 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.
- (4) Subsection (1) applies only if a defendant raises an issue of whether the evidence was improperly obtained and informs the court and the prosecution of the grounds for raising the issue.
- (5) If the defendant raises the issue under subsection (4), the prosecution must satisfy the court on the balance of probabilities that the evidence was not improperly obtained.”

PART 5
OTHER ENACTMENTS

22 Amendments

The enactments specified in schedule 1 are amended in the manner indicated in that schedule.

SCHEDULE 1
ENACTMENTS AMENDED

See section 22

Crimes Act 1961 (1961/43) (R.S.1)
section 316

Repeal subsection (5)

Substitute:

“(5) Subject to the provisions of the *Police (Questioning of Suspects) Act 199-*, 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.”

United Nations (Police) Act 1964 (1964/1) (R.S.11)
section 5

Repeal subsection (1)

Substitute:

“(1) The provisions of the *Crimes Act 1961* and the *Police (Questioning of Suspects) Act 199-*, relating to arrest, shall apply in respect of the arrest of any member of the Police for any act or omission to which this Act applies in all respects as if the act or omission had occurred in New Zealand.”

Ombudsmen Act 1975 (1975/9) (R.S.21)
section 16

Repeal subsection (2)

Substitute:

“(2) Notwithstanding any provision in any enactment, where any letter appearing to be written by any person in custody on a charge or detained under the *Police (Questioning of Suspects) Act 199-*, or after conviction of any offence, or by any patient of any hospital within the meaning of the *Mental Health Act 1969*, is addressed to an Ombudsman it shall be immediately forwarded, unopened, to the Ombudsman by the person for the time being in charge of the place or institution where the writer of the letter is detained or of which he or she is a patient.”

Police Complaints Authority Act 1988 (1988/2)
section 14(5)

Delete: “(a) A person in custody on a charge or after conviction of any offence; or”

Substitute: “(a) A person in custody on a charge or detained under the *Police (Questioning of Suspects) Act 199-*, or after conviction of any offence; or”

Children, Young Persons, and Their Families Act 1989 (1989/24)

section 215

Repeal subsection (1)**Substitute:**

- “(1) Subject to sections 233 and 244 of this Act, every enforcement officer shall, before questioning any child or young person whom there are grounds to suspect of having committed an offence, explain to that child or young person —
- (a) Subject to subsection (2) of this section, if the circumstances are such that the enforcement officer would have power to arrest the child or young person without warrant, that the child or young person may be arrested if, by refusing to give his or her name and address to the enforcement officer, the child or young person cannot be issued with a summons; and
 - (b) Subject to subsection (2) of this section, that the child or young person is free to leave and is not obliged to accompany the enforcement officer to any place for the purpose of being questioned, and that if the child or young person consents to do so, that he or she may withdraw that consent at any time; and
 - (c) That the child or young person is under no obligation to make or give any statement; and
 - (d) That if the child or young person consents to make or give a statement, the child or young person may withdraw that consent at any time; and
 - (e) That any statement made or given may be used in evidence in any proceedings; and
 - (f) That the child or young person is entitled to consult free of charge with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222 of this Act; and
 - (g) The reasons for questioning.”

Insert:

- “(1A) Subject to sections 233 and 244 of this Act, every enforcement officer shall, before questioning any child or young person whom there are grounds to suspect of having committed an offence, enquire whether that child or young person wishes to consult a barrister or solicitor.”

section 216

Delete: “the enforcement officer shall explain to that child or young person

- (c) Except where the child or young person is under arrest, the matters specified in paragraphs (a) and (b) of section 215(1) of this Act; and
- (d) The matters specified in paragraphs (c) to (f) of section 215(1) of this Act.”

Substitute: “the enforcement officer shall

- (c) Explain to that child or young person, except where the child or young person is under arrest, the matters specified in paragraphs (a) and (b) of section 215(1) of this Act; and
- (d) Explain to that child or young person the matters specified in paragraphs (c) to (g) of section 215(1) of this Act; and
- (e) Enquire as to the matter specified in section 215(1A) of this Act.”

section 217

Delete: “to (f) of section 215(1) of this Act.”

Substitute: “to (g) of section 215(1) of this Act and enquire as to the matter specified in section 215(1A) of this Act.”

section 221(2)(a)(ii)

Delete: “to (f) of section 215(1).”

Substitute: “to (g) of section 215(1) of this Act and enquired as to the matter specified in subsection 215(1A).”

section 227

Repeal subsection (1)

Substitute:

“(1) Subject to sections 233 and 244 of this Act, an enforcement officer shall, in relation to any child or young person who is at an enforcement agency office for questioning in relation to the commission or possible commission of an offence by that child or young person, as soon as practicable after the child or young person arrives at the enforcement agency office, inform that child or young person that the child or young person is entitled to consult free of charge with a barrister or solicitor.”

Repeal subsection (2)

Substitute:

“(2) Subject to sections 233 and 244 of this Act, every enforcement officer who arrests a child or young person shall, on arresting the child or young person, inform the child or young person that the child or young person is entitled to consult free of charge with a barrister or solicitor at the enforcement agency office to which the child or young person is to be taken following arrest or, if the child or young person is arrested at an enforcement agency office, at that office.”

Repeal subsection (3)

Substitute:

“(3) Subject to sections 233 and 244 of this Act, every child or young person who is at an enforcement agency office for questioning in relation to the commission or possible commission of an offence

by that child or young person, or who is taken to an enforcement agency office following arrest, or who is arrested at an enforcement agency office, as the case may be, is entitled to consult privately and free of charge with a barrister or solicitor at that enforcement agency office.”

section 228(1)

Delete: “is entitled to consult privately with a barrister or solicitor at that hospital.”

Substitute: “is entitled to consult privately and free of charge with a barrister or solicitor at that hospital.”

APPENDIX A

Commentary on Draft Police
(Questioning of Suspects) Act

PART 1
PRELIMINARY

1 Purpose

The purpose of this Act is to establish safeguards applicable to police questioning of persons suspected of offences, to confer limited authority on the police to detain and question arrested persons concerning offences, and to enact rules governing the exclusion, or admission in the interests of justice, of improperly obtained evidence.

2 Commencement

This Act comes into force on — 199-.

3 Application

Parts 1 to 3 do not apply to persons

- (a) suspected of having committed any of the offences contained in sections 58A to 58E of the *Transport Act 1962*; or
- (b) who are children or young people, as defined in the *Children, Young Persons, and Their Families Act 1989*.

Section 1

C1 This Act gives the police new powers to detain and question suspects after arrest and provides safeguards for suspects when they are questioned in coercive circumstances during detention or after arrest. Section 1 describes the purpose of the Act. In the Law Commission's recommended format, it replaces the long title. The Act applies only to questioning of suspects (not witnesses) by the police (not other enforcement officers). The detention provisions facilitate questioning of a specific person who has been arrested because there are grounds to suspect that person of having committed a particular imprisonable offence. They do not permit the arrest, detention and questioning of a person in the course of general criminal investigations. The Act contains a rule, called the improperly obtained evidence rule, encouraging compliance with the questioning safeguards and detention provisions by providing for the exclusion of improperly obtained evidence unless the court decides that the exclusion of the evidence would be contrary to the interests of justice.

Section 2

C2 The Act comes into force on a day to be appointed.

Section 3

C3 Section 3 provides that nothing in parts 1 to 3 of the Act relating to police questioning or questioning safeguards has any application to people suspected of offences under ss 58A to 58E of the Transport Act 1962 and children and young people, as defined in the Children, Young Persons, and Their Families Act 1989.

C4 Sections 58A to 58E of the Transport Act authorise enforcement officers to require certain people suspected of having committed drink driving offences under that Act to undergo breath screening tests, evidential breath tests, blood tests and hospital blood tests. Initial consideration at least suggests that the principles embodied in the draft legislation should apply across the board. However, there is a need to examine carefully and in detail the way in which those principles should be applied to existing schemes for questioning and obtaining evidence from particular classes of suspects.

4 Crown bound

This Act binds the Crown.

5 Definitions

In this Act,

detention and questioning period means a period during which a person who has been lawfully arrested for an offence punishable by imprisonment may be lawfully detained and questioned by the police under and in accordance with section 13 or 16;

offence means an offence of a kind for which a person may be arrested by a police officer;

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.

C5 The Commission has considered the possibility of recommending the repeal of those sections of the Children, Young Persons, and Their Families Act which would be covered by its proposals. However, the issues which arise in considering the relationship between the proposed questioning regime and scope of the provisions in the Act (eg, its application to questioning by any government officer, rather than merely a police officer) make repeal difficult. The Commission has, therefore, concluded that, at least for the time being, the relevant provisions of the Children, Young Persons, and Their Families Act should remain. However, where those provisions afford less protection to children or young people than the Commission’s proposals, that Act should be amended to bring it into line with the proposals (see C95–C103 for the specific changes we propose).

Section 4

C6 Section 4 states that the Act binds the Crown. For a discussion of the application of legislation to the Crown, see the Law Commission’s report *A New Interpretation Act: To Avoid “Prolivity and Tautology”* (NZLC R17 1990, paras 161–191).

Section 5

C7 Section 5 defines the terms **detention and questioning period**, **offence** and **questioning a person**.

C8 **Detention and questioning period** appears in part 3 of the Act. It is a period which is “reasonable in the circumstances”, in accordance with s 13 and, taking into account the factors determining what is reasonable in the circumstances in s 14, does not exceed the maximum period of 6 hours, or any extension of that period authorised under section 16.

C9 **Offence** is defined to restrict the application of the Act to offences for which a person may be arrested by a police officer (see s 315(2) Crimes Act 1961). The questioning safeguards in part 2 of the Act must be afforded, in accordance with the criteria in s 6(2), when a person is being questioned about any arrestable offence. Under part 3, post-arrest questioning is permitted where a person has been arrested on suspicion of having committed an arrestable offence punishable by imprisonment. The rationale behind the Commission’s proposals has always been the need for effective police powers in investigating *serious* offences.

C10 The definition of **questioning a person** confines the meaning of

PART 2
QUESTIONING SAFEGUARDS

6 Entitlement to questioning safeguards

- (1) In this Act, a reference to the **questioning safeguards** is a reference to the rights and obligations conferred or imposed by
 - (a) section 7 (interpreter, appropriate person or technical assistance), and
 - (b) section 8 (caution), and
 - (c) section 9 (notification of reasons for questioning), and
 - (d) section 10 (communication with lawyer, friend, relative, consular officer), and
 - (e) section 11 (deferral of grant of right to consult lawyer), and
 - (f) section 12 (deferral of communication rights).
- (2) A person is entitled to the questioning safeguards in respect of an offence, on the occurrence of any of the following circumstances:
 - (a) the person is either arrested for the offence or could lawfully be arrested for the offence by a police officer; or
 - (b) a police officer has grounds to suspect that that person has committed the 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 entitled to the questioning safeguards and prior to or during the questioning the police officer has grounds to suspect that the person has committed another offence, that person is also, in respect of that other offence, entitled to the safeguards (except those in section 10(4)) before the police officer questions the person about the other offence.
- (4) The entitlement conferred by subsection (2) does not arise only because a person who has not been arrested

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. 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 body sample and also physical actions, such as the 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 (which must be conducted with the consent of the person), to delay charging arrested people and bringing them before a court. This is subject to the requirement that suspects who participate in these procedures will have the protection of the questioning safeguards.

Section 6

C11 Section 6(1) describes the content of the safeguards in an abbreviated way and indicates where in the Act the safeguards may be found.

C12 Subsection (2) defines the points at which people are entitled to the questioning safeguards (see generally NZLC PP21 part III paras 60–76). It is important to note that, although subs (2) accords entitlement to the safeguards prior to arrest, it does not in any way lower the standard of suspicion required for a lawful arrest, or allow detention and questioning at an earlier point than under the existing law. Subsection (2) addresses the difficulties in the current law concerning insufficient protections for suspects from unlawful detention and coercive pressure (discussed in paras 35–41 of the report). There will be no investigative advantage in delaying arresting a suspect, because, under para (a), entitlement to the safeguards arises as soon as the suspect *could* lawfully be arrested, in addition to when the suspect is actually arrested. The subsection also addresses the uncertainty and lack of clarity in the current law concerning what constitutes “detained under any enactment” in s 23 of the New Zealand Bill of Rights Act 1990. The questioning safeguards will apply, even in the absence of an act or statement by the police officer exerting authority to charge or restrain the suspect (see subs (2)(b)).

C13 Subsection (2)(b) provides that the entitlement to the safeguards

- (a) is requested by a police officer to provide particulars of name and address for the purposes of laying an information for a summary offence under the *Summary Proceedings Act 1957*; or
- (b) could lawfully be arrested for an offence by a police officer who is engaged in an undercover operation authorised by a commissioned officer of police.

Definitions: **offence, questioning a person**, s 5; **questioning safeguards**, s 6; **appropriate person, technical assistance**, s 7; **consular officer, information**, *Acts Interpretation Act 1924* s 4

arises when there are “grounds to suspect a person”, coupled with the suspect’s reasonable belief that he or she is being detained or with questioning at a police station. “Grounds to suspect” the person has committed an offence can only arise once general enquiries into an offence begin to focus on a particular suspect or suspects (using “that” to qualify the reference to “person” in para (b) reinforces this intention). Therefore, a person being questioned is not entitled to the questioning safeguards while the police are conducting only general enquiries into an unsolved crime. However, the threshold of “grounds to suspect” means that the safeguards will apply at an earlier point than they would if the existence of “reasonable grounds to suspect” were referred to in the provision. If the latter was the point of entitlement, the safeguards would not apply until the suspect could be arrested (ie, the point referred to in subs (2)(a)), which is, in most cases, too late in the investigative process to be of any real assistance to the suspect.

C14 Subsection (2)(b)(i) recognises that police stations are invariably secure establishments and that considerable coercive pressure usually underlies a “request” to accompany a police officer to a police station for questioning. Similar pressure may sometimes, but not necessarily, be felt where a suspect is asked to accompany a police officer in a police vehicle. The Commission decided not to make specific provision for the latter situation. However, subs (2)(b)(ii) will apply if the police officer has grounds to suspect that the person travelling in the police vehicle has committed an offence and the person has reasonable grounds to believe that he or she is being detained. Subsection (2)(b)(ii) contains an objective test: would a reasonable person in the position of the suspect believe that he or she is detained? The manner of the questioning, the content of the questions, and the context and environment in which questioning occurs will all be relevant factors.

C15 Subsection (3) is supplementary to subs (2). The intention is to ensure that safeguards provided in respect of an offence about which the suspect is being questioned are also provided if the police wish to question the suspect about some other offence. Most commonly, this situation is likely to occur while the suspect is being detained in relation to one offence and suspicion that he or she has committed another offence arises during the period of detention. Although subs (3) necessitates the repetition of the safeguards, it does not authorise the police to commence a new detention period to investigate the additional offence or offences.

C16 Subsection (4) contains two important exceptions to the entitlement conferred by subs (2), where an arrest has not been made. The first,

7 Right to interpreter or assistance

- (1) This section applies to a person who is entitled to the questioning safeguards and
 - (a) does not have reasonable fluency in a language common to the person and the police officer; or
 - (b) has impaired hearing or some apparent physical disability affecting his or her capacity to communicate orally; or
 - (c) whom the police officer has grounds to suspect has a mental illness or mental handicap affecting his or her capacity to comprehend the caution and all other information that he or she is entitled to receive.
- (2) The caution, and all other information that a police officer is required to give to a person who becomes entitled to the questioning safeguards, must be given in or translated into a language in which the person is able to communicate with reasonable fluency and in a manner which assists the person to comprehend that caution and information.
- (3) As soon as practicable after a person to whom this section applies is entitled to the questioning safeguards, a police officer must
 - (a) use his or her best endeavours to do whatever is necessary to inform that person that he or she has a right to have, free of charge, the assistance of an interpreter or of an appropriate person or technical assistance that is reasonably necessary to facilitate communication or comprehension, and
 - (b) if the circumstances require, arrange for the presence or availability of an interpreter, an appropriate person, or technical assistance and defer questioning until the interpreter, person or technical assistance is available and any previous performance of the obligations in sections 8, 9 and 10 has been repeated with the assistance of the interpreter, person or technical assistance.

in para (a), arises where the offence being investigated is a summary offence and the person who could lawfully be arrested is asked to supply a name and address so that proceedings can be initiated by way of an information laid in court rather than by arresting and charging the person. Where court processes are initiated without arresting or questioning the person, there is little need for provision of specific safeguards. The entitlement to the safeguards arises if, after providing details of name and address, the person is arrested or questioned further, either in respect of the summary offence or another offence. The second exception, in para (b), arises when a person could lawfully be arrested by a police officer engaged in an authorised undercover operation. The justification for this 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 that arise in other circumstances when the identity of the police officer is known.

Section 7

C17 Section 7 gives certain suspects entitled to the safeguards a right of access to an interpreter, appropriate person, or technical assistance. The provision applies to people who are not fluent in the relevant language, or have an apparent physical disability affecting their capacity to communicate orally, or whom the police suspect are mentally ill or mentally handicapped so as to affect their capacity to comprehend the requisite information. The word “apparent” is used in connection with physical disability because most police officers will not be qualified to give a clinical diagnosis of whether the suspect is in fact physically disabled. For mentally ill or mentally handicapped suspects, the right to assistance occurs in a broader range of circumstances, due to the fact that some such people do not have apparent difficulties in communication, although they may have real difficulties in comprehending.

C18 The words “reasonable fluency in a language common to the person and the police officer” in subs (1)(a) indicate that the assistance of an interpreter will not be needed if both the police officer and the suspect share reasonable fluency in any language, including but not restricted to English. However, where questioning proceeds in a foreign language without an interpreter, questions and any answers or statement should be recorded in the language of the person providing the answers or statement.

C19 Subsection (2) requires all information relating to the safeguards to be conveyed in a language appropriate to the suspect. The word “language” includes deaf sign language.

(4) In this section,

appropriate person means a person who because of his or her knowledge of a person to whom subsection (1)(c) applies, or because of his or her skill, experience, or qualifications in dealing with persons of that kind, is likely to be able to assist the person to comprehend the caution, information and questions;

technical assistance includes communication in writing where that is likely to assist a person to whom subsection (1)(b) applies to communicate.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6

C20 Subsection (3)(a) imposes specific obligations upon a police officer. The officer must use his or her best endeavours to do whatever is necessary to inform the suspect of the right to a free interpreter, appropriate person or technical assistance. The tests are objective and their performance (or non-performance) can be reviewed by a court. Subsection (3)(b) contains further specific obligations, where the circumstances require:

- to arrange for the presence of the relevant assistant or assistance;
- to defer questioning until the arrival of the assistant or assistance; and
- to repeat any previously performed safeguards with the help of the assistant or assistance.

The obligation to provide an interpreter (etc) does not authorise deferral of the performance of the obligations to provide the caution or other questioning safeguards. A suspect should not be held in custody for a long time while the relevant assistance is arranged, without a reasonable attempt being made to caution the suspect and advise him or her of the rights of communication with a lawyer, friend, relative or consular officer.

C21 Where an interpreter or appropriate person is used, it is highly desirable that he or she is not a police officer. This is a factor which the courts are likely to consider in deciding whether evidence has been improperly obtained. However, a statutory requirement that interpreters and appropriate persons for the purposes of this section should not be police officers could lead to practical difficulties in interviewing suspects. This is particularly so in light of the rule that improperly obtained evidence is *prima facie* inadmissible (see s 21).

C22 The obligations contained in subs (3), as with the other questioning safeguards, arise “as soon as practicable” after a person is entitled to the questioning safeguards. Ordinarily, this will occur immediately after entitlement arises. The term “as soon as practicable” must, however, be interpreted realistically. If the exigencies of the moment require immediate attention, then a degree of reasonable delay will not constitute a failure to provide the safeguards “as soon as practicable”. This is subject to the important proviso that, during that period of delay, the suspect is not questioned. If a suspect is questioned, the questioning itself indicates that it is practicable to provide the questioning safeguards. In an emergency situation, for example a bomb scare, questioning without safeguards may occur but the statement

8 Duty to caution

- (1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must caution the person in the following terms:

You do not have to say anything unless you want to. If you do say anything, what you say may be given as evidence in court.

- (2) If a person was cautioned more than one hour before questioning commences or recommences, a police officer must again caution the person in the manner required by subsection (1) before questioning commences or recommences.
- (3) 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.
- (4) This section does not apply to the extent that, in the circumstances, another enactment requires the person to answer questions by a police officer without being cautioned.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6

would be presumptively inadmissible under the improperly obtained evidence rule as evidence against its maker. The court would, however, be able to admit the statement if it is in the interests of justice to do so.

C23 Subsection (4) contains two definitions. By virtue of the first definition, access to an **appropriate person** is only available to mentally ill or mentally handicapped suspects referred to in subs (1)(c). The assistance most likely to be useful to such people is that of a person who is qualified to deal with them or of a person who is known to the suspect. The definition of appropriate person refers to both categories of assistants. The definition of **technical assistance** is not exhaustive. It merely clarifies that the informational safeguards can be given in writing where this mode of communication is likely to assist a physically disabled suspect.

Section 8

C24 Section 8(1) contains the caution. The obligation to caution a suspect before questioning is intended to ensure that the suspect is aware of the right to remain silent. The form of the caution is adapted from the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, issued in the United Kingdom under the Police and Criminal Evidence Act 1984. Unlike the caution proposed in *Criminal Evidence: Police Questioning*, the form of caution now omits the reference to the suspect not having to “do anything”. The Commission decided that retention of those words would be misleading because many statutes in fact impose obligations on people to do things (eg, supply fingerprints). Where the police request a suspect to do things he or she is not legally required to do, such as taking the police to the scene of the crime, the police should warn the suspect that participation is not obligatory and that evidence gathered as a result of participation may be referred to subsequently in court.

C25 Subsection (2) imposes an obligation to repeat the caution (one of the most important safeguards) if a delay of more than one hour occurs between the first caution and the commencement or recommencement of questioning. Such a delay may occur while, for example, a person is arrested and then taken to a police station where interview video recording facilities are available.

C26 Subsection (3) recognises that it is pointless to caution a suspect whose condition or behaviour (including severe intoxication) at the time

9 Duty to notify reasons for questioning

- (1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must
 - (a) inform the person of the reasons for questioning, and
 - (b) if the person has not been arrested but is in the presence of a police officer, inform the person that he or she is not under arrest and is free to leave.
- (2) If any additional reasons for questioning a person arise prior to or during the questioning of that person, a police officer must inform the person of those additional reasons for questioning.
- (3) The performance of the obligation imposed on a police officer by subsection (1)(b) may be deferred if and for so long as the person is
 - (a) required by a police officer acting under lawful authority to submit to a search; or
 - (b) detained under sections 13A to 13M of the *Misuse of Drugs Amendment Act 1978*; or
 - (c) apprehended or detained under section 109 or 112 of the *Mental Health (Compulsory Assessment and Treatment) Act 1992*.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6

is such that the caution would not be understood. In such instances an interpreter, appropriate person or technical assistance may need to be obtained. Questioning must not occur before the caution is properly communicated.

C27 Good police practice will result in the recording of the caution and the other safeguards in the suspect's writing or on video. Video recording is becoming more frequent as facilities for it are introduced throughout the country. Written recording by the suspect has been suggested as a requirement by the Director of Public Prosecutions, United Kingdom, in submissions to the Royal Commission on the Criminal Justice System. Such practices remove much of the scope for subsequent argument about whether safeguards were provided. The Commission has not gone as far as proposing that video recorded statements must be obtained, for two main reasons. First, not every police station in the country has the necessary equipment. Second, in some cases questioning will occur away from video recording facilities.

Section 9

C28 Section 9(1) imposes an obligation on the police to inform a suspect of the reasons for questioning (subs (1)(a)) and, if the suspect is not under arrest, that he or she is free to leave (subs (1)(b)). Subsection (1)(a), where applicable, operates in addition to s 23(1)(a) of the Bill of Rights Act and s 316(1) of the Crimes Act. These latter provisions are formulations of the common law rule that people who are arrested must be informed at the time of arrest of the reasons for the arrest. The intention is that quite specific reasons will be given in order to convey to the suspect the seriousness of the situation which he or she faces. Otherwise, an informed decision to answer questions or consult a lawyer cannot be made. Where possible, the reasons should indicate the specific charges being contemplated by the police. A broad statement such as "drugs", for example, would not appropriately convey the reasons for questioning a suspect.

C29 The requirement in subs (1)(b), that a suspect who is not under arrest should be told he or she is free to leave, is necessary to dispel incorrect assumptions and to ensure that people "co-operating" with the police are in fact acting voluntarily. The Commission emphasises that, once the entitlement to the questioning safeguards arises, the provision of free to leave advice does not remove the obligation under the Act to give the other safeguards. Subsection (1)(b) contains a qualification, namely that free to leave advice need only be given if the person is in the presence of a police officer. This is necessary to address the situation where, for example, a person makes a statement to a police

10 Rights and duties concerning communication with lawyer, friend, relative and consular officer

- (1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must inform the person that
 - (a) he or she may consult and instruct a lawyer in private without delay, and
 - (b) he or she may arrange, or attempt to arrange, for a lawyer of that person's choice to be present during the questioning, and
 - (c) if desired by that person, legal advice is available to the person free of charge.
- (2) If a person was informed of his or her right to consult and instruct a lawyer more than one hour before questioning commences or recommences, a police officer must again inform the person of the right to do so in the manner required by subsection (1) before questioning commences or recommences.
- (3) Before questioning a person who is entitled to the questioning safeguards, a police officer must enquire whether the person wishes to consult a lawyer.
- (4) After cautioning and before questioning a person who is entitled to the questioning safeguards, a police officer must
 - (a) inform that person that he or she may communicate with, or attempt to communicate with, a friend or relative (whose identity is disclosed to the police officer) to inform the friend or relative of the person's whereabouts and the reasons for the questioning, and

officer by telephone and becomes entitled to the questioning safeguards (because the officer could lawfully arrest the person for an offence as a result of the information contained in the person's statement).

C30 Subsection (2) recognises that, either before or during questioning, a suspicion of further offending may arise. When this occurs, suspects must be informed of those further suspected offences. The rationale is that any previous waiver of safeguards may then be reassessed by the suspect, in the light of the seriousness of the situation which he or she actually faces.

C31 Subsection (3) recognises exceptions to the obligation to provide free to leave advice in the context of a number of statutory provisions which authorise the police to detain people without arresting them. Subsection (3)(b) covers searches conducted pursuant to a warrant and warrantless searches authorised by statute or the common law, but does not apply to searches conducted with the consent of the person being searched.

Section 10

C32 Section 10(1) obliges police officers to inform suspects that they may consult and instruct a lawyer in private without delay and that, if arranged by the suspect, they may have a lawyer present during questioning. The provision also requires that suspects be told legal advice is available free of charge (where the lawyer chosen is a legal assistance scheme lawyer). Subsection (1) reflects and complements the right in s 23(1)(b) of the Bill of Rights Act to legal advice, but subs (1) is wider, in that it includes notification that legal advice is available free of charge. It also covers a wider range of suspects than the Bill of Rights Act provision (ie, suspects covered by s 6(2)(b) of this Act who do not come within the meaning of "detained under any enactment" in s 23(1)(b) of the Bill of Rights Act).

C33 As we stated in *Criminal Evidence: Police Questioning* (and at para 77 of this report), the Law Commission does not propose a police power to detain and question suspects after arrest unless free legal advice is available to suspects being questioned. The provision of free legal advice is a crucial factor in maintaining the balance between the public interest in detecting and prosecuting offenders and the public interest in protecting individuals from abuses of power by officials.

C34 The importance the Commission accords to the provision of legal advice can also be seen in the requirement under subs (2) that advice of the right must be repeated if a delay of more than one hour

- enquire whether the person wishes to do so, and
- (b) in the case of a person who to the knowledge of the police officer is not a New Zealand citizen, inform that person 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, and enquire whether the person wishes to do so.
- (5) 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 practicable, give the person reasonable facilities, including the use of a telephone, 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.
- (6) If
- (a) the person wishes to consult a lawyer but is unable to do so within a reasonable time; or
 - (b) a lawyer who has agreed to attend at a police station to advise the person fails to do so within a reasonable time; or
 - (c) the person does not wish to consult a lawyer,
- the police officer may not question the person unless the person waives in writing or on a video recording his or her entitlement to consult and instruct a lawyer. In such a case, the police officer must, before questioning the person, again inform the person of the reasons for questioning and caution that person in the manner required by section 8.
- (7) 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.
- (8) Notwithstanding section 6, this section does not apply to a person who makes a statement to a police officer by telephone or otherwise without being in the presence of a police officer.

Definitions: **questioning a person**, s 5; **questioning safeguards**, s 6; **consular officer**, *Acts Interpretation Act 1924* s 4

occurs between first giving the advice and the commencement or recommencement of questioning.

C35 Subsection (3) imposes a specific obligation on police officers to enquire whether consultation with a lawyer is desired before questioning a suspect. This obligation is designed to ensure that the suspect focuses on one of the most important of the safeguards, thus avoiding subsequent arguments about his or her ability to comprehend.

C36 Subsection (4) imposes two duties upon the police. The first is a duty to inform suspects of the right to communicate with a friend or relative and enquire whether suspects wish to do so (para (a)). The second is a duty to inform suspects known to be foreign nationals of their right to communicate with a consular officer of their country and enquire whether suspects wish to do so (para (b)). In relation to the first duty, communication is for the purposes of advising the friend or relative of the suspect's location and of the matter about which the suspect is being questioned. There is a reciprocal obligation on suspects to disclose to police officers the identity of the people they are attempting to communicate with, so that the police can decide whether or not it is appropriate to exercise the powers of deferral contained in s 11. Unlike the right to consult a lawyer, the right to communicate with a friend or relative need not be given in private. These aspects of the right to communicate with a friend or relative should ensure that the police can prevent abuses of the right, such as the destruction of evidence, tampering with witnesses, or the "tipping off" of a co-offender. Where the suspect chooses not to, or fails to, consult with a lawyer, the right to consult with a friend or relative will be all the more important in order to avoid a situation where the suspect is being held incommunicado. Conceivably, though infrequently, the friend or relative may be legally qualified. Where this occurs, unless the suspect nominates the person as his or her lawyer, the right to consult a lawyer must be independently complied with.

C37 Subsections (5) to (7) provide for the facilitation of the consultation and communication rights. Subsection (5) specifically envisages telephone consultations and obliges police officers to provide reasonable facilities for the purposes of consultation. What constitutes "reasonable facilities" (eg, whether they extend to permitting toll calls) is a question of fact to be decided in the circumstances of each particular case and is to be reviewed by a court in the event of dispute. Subsection (6) requires that a suspect who waives the right to the assistance of a lawyer (either by choice or because a lawyer cannot be located or does not appear at the police station within a reasonable period) must be

11 Deferral of grant of right to consult lawyer

- (1) The performance of the obligations imposed on a police officer by section 10(5) 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 the questioning is so urgent, having regard to the danger of physical 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 a commissioned officer of police permits deferral of the performance of an obligation under subsection (1),
 - (a) a police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and
 - (b) the commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Definitions: **questioning a person**, s 5

12 Deferral of grant of communication rights

- (1) The performance of the obligation imposed on a police officer by section 10(5)(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

recorded in writing or on a video. The suspect must also be cautioned again prior to such questioning. The recording obligation will ensure that there can be no dispute about whether the suspect waived his or her right.

C38 Subsection (8) contains an exception to the obligations that otherwise arise under s 10. An incriminating statement may be made during a telephone call or in another situation where the suspect is 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”). In such circumstances the communication rights are neither apposite nor practical. However, if the police officer questions the person, the duty under s 8 to caution and the duty under s 9 to inform the person of the reasons for questioning remain applicable.

Section 11

C39 Section 11(1) enables the police to defer granting the right to communicate and consult with a lawyer in certain strictly limited circumstances involving danger of physical harm to other people, and subject to specified conditions. Advice of the right, as distinct from the performance of the right, cannot be deferred. The suspect must be informed of the right, even if its performance is deferred.

C40 Subsection (2) makes it clear that if the right to communicate with a lawyer is deferred under subs (1), this does not mean that questioning must be deferred. The suspect may, of course, exercise the right of silence if communication with a lawyer is deferred.

C41 Subsection (3)(a) requires a record to be kept of the grounds for any deferral. This is intended to facilitate the subsequent review by the courts of any such deferral. Subsection (3)(b) requires that any deferral must be as short as possible and imposes a specific obligation to caution again before further questioning.

Section 12

C42 Section 12 concerns the deferral of the right of a suspect under s 10(5) to communicate with a friend, relative or consular officer. Although s 11 is similar to s 12, the latter is wider in scope.

- (a) immediate compliance with the obligation 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 physical 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 10(5)(a) to give facilities for communication 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 physical 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 permits deferral of the performance of an obligation under this section,
- (a) a police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and
 - (b) the commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Definitions: **questioning a person**, s 5; **consular officer**, *Acts Interpretation Act 1924* s 4

PART 3 QUESTIONING AFTER ARREST

13 Post-arrest detention and questioning

- (1) A person lawfully arrested for an offence punishable by imprisonment may be detained and questioned if a police officer believes on reasonable grounds that questioning of that person is necessary to preserve or obtain evidence or to complete the investigation into the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person.
- (2) The period for which a person may be detained and questioned by the police under this Act must not exceed a period that is reasonable in the circumstances, and must not exceed

C43 Subsection (1)(a) recognises that communication with friends or relatives may on occasion be likely to result in accomplices of the suspect taking steps to avoid apprehension or to conceal, fabricate or destroy incriminating evidence. If police officers have reasonable grounds to believe this is likely to happen, then the obligation to provide facilities for communication may be deferred.

C44 Subsections (1)(b) and (2) recognise that, in the case of friends and relatives and consular officers, physical danger to other people is also a valid ground for deferral of communication rights.

Section 13

C45 Section 13(1) provides for a post-arrest detention and questioning period during which a suspect may be questioned concerning the offence for which he or she has been arrested or concerning another offence punishable by imprisonment. In order for a police officer to detain and question the suspect, the police officer must believe on reasonable grounds that questioning is necessary to preserve or obtain evidence or to complete the investigation into the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person. This is a continuing condition for lawful detention

- (a) a period of 6 hours from the time that the person was or should have been first cautioned; or
 - (b) if an extension is granted under section 16(2) or (4), the period authorised by the extension.
- (3) The detention and questioning periods authorised by this section must be computed in accordance with section 15.

Definitions: detention and questioning period, offence, questioning a person,
s 5

and questioning which is separate from, but linked with, the requirement in subs (2) (and also in s 16(2)(b) and (4)(b)) that the period of detention and questioning must not exceed a period which is reasonable in the circumstances. See further the commentary on s 14, para C49. Section 13 does not authorise questioning where there are no lawful grounds to arrest the person. If at any stage the grounds justifying detention and questioning cease to apply, the arrested person must either be charged promptly and brought before the court as soon as possible, or released.

C46 Subsection (2) restricts the duration of the detention and questioning period. The period must not exceed a period which is “reasonable in the circumstances”. Reasonableness will be ascertained by considering the factors contained in s 14. Paragraphs (a) and (b) provide that the detention and questioning period must not exceed 6 hours or any extension period (of 6 hours) authorised under s 16. The “reasonable in the circumstances” and 6-hour limits are distinct requirements. In the vast majority of cases, the application of the “reasonable in the circumstances” requirement will mean that a period as long as 6 hours is excessive. The initial detention and questioning period begins to run from the time when the suspect was or should have been first cautioned for the offence to which the questioning relates. The reason why the period commences upon cautioning is that this will ordinarily mark the point at which questioning after arrest, or in a similarly coercive situation, can begin.

C47 Subsection (3) requires the detention and questioning periods authorised by s 13 to be computed in accordance with s 15. Section 15 provides for time-out periods which will not be taken into account as part of the detention and questioning period.

C48 Questioning a person, by virtue of the definition in s 5, extends to physical activities, for example, participation in an identification parade or provision of a body sample for DNA analysis. The ability to question after arrest in s 13 is conferred on police officers only (see the definitions of **detention and questioning period** and **offence** in s 5). If other officials who have powers of arrest think there is a need in a particular case for questioning after arrest, they should utilise the services and skills of the police. Regardless of whether a police officer or another official makes an arrest, once a police officer becomes involved, the suspect will be entitled to the full range of questioning safeguards.

14 Determination of reasonable detention and questioning period

The reasonableness in the circumstances of a period of detention and questioning depends on, among other relevant matters,

- (a) whether the person being detained and questioned has exercised his or her right of silence, and
- (b) the apparent age and apparent mental and physical condition of the person being detained and questioned, and
- (c) whether the questioning is being conducted properly and without delay, and
- (d) the number and complexity of the matters being investigated, and
- (e) the seriousness of the offence concerning which the person is being detained and questioned.

Definitions: **detention and questioning period, offence, questioning a person,**
s 5

15 Times excluded from detention and questioning period

- (1) In computing the period for which a person may be detained and questioned by the police under section 13, each of the following times shall be disregarded if the person is not during those times asked any questions about the commission or possible commission of an offence by that person:
 - (a) time reasonably taken to convey the person to an appropriate place for the purposes of questioning or providing medical attention, and
 - (b) time during which questioning is deferred or suspended to allow the person to communicate with a lawyer, friend, relative or consular officer, and
 - (c) time spent waiting for the arrival of an interpreter, appropriate person or technical assistance required under section 7, or a lawyer or consular officer required under section 10, 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 or 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 and determine an application for

Section 14

C49 Section 14 contains a non-exhaustive list of factors that a police officer detaining and questioning a suspect, a District Court Judge hearing an application for extension of a detention and questioning period, or a court subsequently considering whether evidence has been improperly obtained, must take into account in determining what is a “reasonable period in the circumstances”. Whether or not a suspect has exercised his or her right of silence is a very important factor. Where a suspect gives a clear indication that he or she does not wish to answer any questions or any further questions, there may, for example, be no reasonable grounds for believing that questioning or further questioning is necessary to preserve or obtain evidence or to complete the investigation into the offence (see s 13(1)). Therefore, no application for extension of a detention and questioning period should be made or granted. In addition, the detention and questioning period which is “reasonable in the circumstances” will have ended. The suspect must be charged and brought before a court as soon as possible, or released (see paras 93–97 of the report for a more detailed discussion of the effect of exercising the right of silence on the detention and questioning period).

Section 15

C50 Section 15(1) lists a number of periods of time which must be disregarded when ascertaining whether the detention and questioning period authorised by s 13 has ended. These times are only to be excluded from the calculation if the suspect is asked no questions during the time-out period. If any questions are asked, then the whole of that period is counted as questioning time. The Commission decided against the continued inclusion of time during which the suspect is resting within the listed time-out periods. This was chiefly because of the not easily discernible difference between resting and waiting.

C51 Subsection (2) requires a suspect to be cautioned again if the various “time-out” periods under subs (1) total a continuous period of more than one hour. The one hour period may be made up of more than one type of time-out period.

an extension of a detention and questioning period under section 16, including any period when such an application is adjourned under section 17(7).

- (2) If a period of time, or more than one consecutive period of time, that is disregarded under this section exceeds one hour, a police officer must again caution the person in the manner required by section 8 before questioning commences or recommences.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5; **consular officer**, *Acts Interpretation Act 1924* s 4

16 Extension of detention and questioning period

- (1) A police officer may, before the expiry of the initial detention and questioning period authorised under section 13, apply to a District Court Judge for an extension of that period.
- (2) A District Court Judge may grant an extension of the initial detention and questioning period for a further period of 6 hours, if the District Court Judge is satisfied that
- (a) the offence in respect of which the person is being detained and questioned is punishable by imprisonment, and
 - (b) the initial detention and questioning period has not expired because the period of detention and questioning was unreasonable in the circumstances, and
 - (c) the initial maximum detention and questioning period of 6 hours has not expired, and
 - (d) further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person, and
 - (e) the questioning is being conducted properly and without delay, and
 - (f) the total period of time taken for one or more of the purposes referred to in section 15 is not unreasonable in the circumstances, and
 - (g) the person has been informed that he or she, or a lawyer on his or her behalf, may make representations to the District Court Judge about the application.
- (3) A police officer may, before the expiry of a detention and questioning period authorised under subsection (2), apply to a District Court Judge for an extension of that period.
- (4) A District Court Judge may in exceptional circumstances grant a further extension of a detention and questioning period authorised under subsection (2) for a period of 6 hours, if the District Court Judge is satisfied that

Section 16

C52 Although, in the vast majority of cases, questioning will be completed well within the maximum period of 6 hours referred to in s 13(2), it is necessary to provide for the few cases where investigations will reasonably require a longer period of questioning. Section 16 makes provision for an extension of the detention and questioning period where the questioning necessary to complete the investigation cannot be completed within the initial maximum period of 6 hours. In such a case, an application to a District Court Judge by a police officer must be made before the end of that period. If the District Court Judge decides to grant the requested extension, the suspect may be detained and questioned for a further period of 6 hours which will commence on the expiry of the initial maximum period of 6 hours. This is subject to the overriding requirement that the period must not exceed a period which is “reasonable in the circumstances”.

C53 In addition to authorising a District Court Judge to grant an extension of the initial detention and questioning period, subs (2) contains a list of criteria with which the District Court Judge must first be satisfied. The list is quite stringent, in line with the intention that extensions will only need to be granted infrequently. Paragraphs (b) and (c) require the District Court Judge to be satisfied that the detention and questioning period authorised by s 13 has not already expired at the time when the application is made and considered. In order to be so satisfied, the District Court Judge will refer to the factors relevant to what is a “reasonable period in the circumstances”, listed in s 14. The time-out periods listed in s 15 are not to be computed as part of the detention and questioning period authorised by s 13; nevertheless the District Court Judge will be required to be satisfied that the duration of any such periods has not been unreasonable in the circumstances (para (f)).

- (a) the offence in respect of which the person is being detained and questioned is punishable by not less than 14 years imprisonment, and
 - (b) the detention and questioning period authorised under subsection (2) has not expired because the period of detention and questioning was unreasonable in the circumstances, and
 - (c) the maximum detention and questioning period authorised under subsection (2) has not expired, and
 - (d) further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence or another offence punishable by a maximum penalty of not less than 14 years imprisonment for which the police have lawful grounds to arrest the person, and
 - (e) the questioning is being conducted properly and without delay, and
 - (f) the total period of time taken for one or more of the purposes referred to in section 15 is not unreasonable in the circumstances, and
 - (g) the person has been informed that he or she, or a lawyer on his or her behalf, may make representations to the District Court Judge about the application.
- (5) Before questioning a person in respect of whom an extension of a detention and questioning period has been granted under subsection (2) or (4), a police officer must again inform the person of the reasons for the questioning and caution the person in the manner required by section 8.
- (6) A detention and questioning period may be extended once only under subsection (2) and once only under subsection (4).
- (7) If a question arises whether evidence obtained during a period alleged to be a detention and questioning period under this Act was improperly obtained, a purported extension of a preceding detention and questioning period under this section does not affect the question whether, before its purported extension, that period had expired.

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 3; **District Court Judge**, *Acts Interpretation Act 1924* s 4

17 Application for extension of detention and questioning period

- (1) This section applies to all applications to a District Court Judge for an order extending a detention and questioning period.
- (2) The police officer making the application to a District Court Judge may do so in writing or orally, either in person or by telephone.
- (3) The police officer making the application to a District Court Judge must provide the District Court Judge with a statement as to
 - (a) the nature of the offence concerning which the person is being or

C54 Subsection (3) permits the police officer to apply for a second extension for a period of 6 hours. Again, this is subject to the overriding requirement that the period must not exceed a period which is “reasonable in the circumstances”. A second application will only be granted in very exceptional cases. In addition to the restrictions on the granting of an extension contained in subs (2), the criteria in subs (4) limit the ability of a District Court Judge to grant a second extension period to circumstances where the offence for which the person is being detained and questioned is punishable by not less than 14 years imprisonment (para (a)). If granted, the extension period will commence on the expiry of the first extension period.

C55 Subsection (5) requires that, after an extension is granted and before further questioning, a police officer must again inform the suspect of the reasons for questioning and again caution him or her. This is desirable because of the time which may have elapsed since the original information and caution were given.

C56 Subsection (6) provides that a detention and questioning period may be extended only once under subs (2) and only once under subs (4).

C57 Subsection (7) indicates that any decision made by a District Court Judge about whether the current period authorised under s 13 has expired, will not determine the issue for the purpose of subsequent proceedings in which a decision is to be made about whether evidence obtained during that period was improperly obtained.

Section 17

C58 Section 17 applies to all applications to a District Court Judge for an order extending a detention and questioning period. Subsection (2) provides that written or oral applications may be made. In particular, it recognises that telephone applications may be made.

C59 Subsection (3) lists a number of matters concerning which the police must provide the District Court Judge with information. This is to assist the District Court Judge to be satisfied that the prerequisites of

- is to be questioned, and
- (b) the general nature of the evidence held by the police, and
 - (c) the nature and extent of the questioning of the person already undertaken by the police and the nature and extent of proposed further questioning, and
 - (d) the reasons for believing that further questioning of the person is necessary, and
 - (e) the time when the person was first cautioned and any subsequent periods of time during which any of the circumstances referred to in section 15(1) applied, and
 - (f) whether the person has instructed a lawyer, and
 - (g) whether any deferral under section 11 or 12 has occurred, and
 - (h) whether one or more applications have already been made under section 16 for an extension of a detention and questioning period, and, if so, the decision on every application so made.
- (4) The information referred to in subsection (3) must be provided to the person in respect of whom the application is made in sufficient time for that person, or a lawyer on his or her behalf, to make representations to the District Court Judge concerning that application.
- (5) The person in respect of whom the application is made, or a lawyer on his or her behalf, must be given an opportunity to make representations to the District Court Judge concerning the application.
- (6) If an oral application is made, the application and the statement required under subsection (3) must be confirmed in writing and provided to the District Court Judge within 24 hours after the application is made.
- (7) A District Court Judge may adjourn the hearing of an application for not more than 18 hours if
- (a) the person in respect of whom the application is made is charged with a complex offence or offences or numerous offences, and
 - (b) the adjournment would enable the application to be dealt with in court as soon as the period of adjournment has elapsed, and
 - (c) the person in respect of whom the application is made, or a lawyer on his or her behalf, has been given an opportunity to make representations to the District Court Judge.
- (8) During the period an application is adjourned, the police may, unless bail is granted under section 18, detain but not further question the person to whom the application relates.
- (9) Every application is to be determined as a matter of urgency (unless adjourned under subsection (7)) and, so far as is practicable, is to be determined before the end of the detention and questioning period to which the application relates.

an extension referred to in ss 13 to 17 are fully satisfied.

C60 Subsection (4) imposes a specific obligation on police officers to provide the information referred to in subs (3) to the suspect being detained, or to his or her lawyer, at an appropriate time. In accordance with the principles of natural justice, this enables the suspect being detained, or his or her lawyer, to be fully informed when making representations to the District Court Judge about a proposed extension.

C61 Subsection (5) specifies the right of the suspect or his or her lawyer to make representations to the District Court Judge about any application for extension.

C62 Subsection (6) recognises that the statement required under subs (3) may be given orally (eg, when a telephone application is made), and provides that within 24 hours of such an application being made, written confirmation of the statement must be given. Facsimiles can be utilised in this respect.

C63 Subsection (7) enables a District Court Judge to adjourn an application for a maximum of 18 hours, provided that the three prerequisites in that subsection are satisfied. These prerequisites are intended to limit the occasions on which the hearing of applications is adjourned. The prerequisite that the adjournment would enable the application to be dealt with in court as soon as the period of adjournment has elapsed will prevent suspects being detained in the weekend for longer than 18 hours because the courts are closed.

C64 Subsection (8) indicates that the police may detain but not further question the suspect who is the subject of the adjourned hearing.

C65 The necessity for speed in processing and determining applications for the extension of detention and questioning periods is reflected in the requirement in subs (9) that such applications should be determined as a matter of urgency.

C66 Subsection (10) places an obligation on the District Court Judge hearing an application for extension to record, whether by tape-recorder or in writing, his or her reasons for granting the application (where applicable) and the time and date when the order was made. It also requires the filing of that record, together with a copy of the written application and accompanying statement prepared by the applicant police officer, in the nearest District Court Registry.

- (10) Where a District Court Judge grants an order extending a detention and questioning period, he or she must
- (a) make a record of
 - (i) the time and date when the order is made, and
 - (ii) the grounds on which the order was made, and
 - (b) file the record referred to in paragraph (a) in the nearest District Court Registry, together with a copy of the application and police officer's statement referred to in subsection (3).

Definitions: **detention and questioning period**, **offence**, **questioning a person**, s 5; **District Court Judge**, *Acts Interpretation Act 1924* s 4

18 Bail on adjournment of application for extension of detention and questioning period

- (1) A District Court Judge who adjourns, under section 17(7), an application for an order extending a detention and questioning period may, of his or her own initiative or on the application of the person concerned or that person's lawyer, direct the release of the person on bail.
- (2) A person granted bail under this section must be released on condition that he or she attend personally for the hearing of the application
 - (a) at a time specified by the District Court Judge (which must be no later than 18 hours after the time of the adjournment), and
 - (b) at a District Court specified by the District Court Judge.
- (3) The District Court Judge may impose any other conditions on the person's release that he or she considers necessary to ensure that the person
 - (a) attends at the specified time at the specified District Court, and
 - (b) does not interfere with any witness or any evidence, and
 - (c) does not commit any offence while on bail.
- (4) A police officer who releases a person granted bail under this section must give that person a written notice of the conditions imposed under subsections (2) and (3) and use his or her best endeavours to do whatever is necessary to ensure that the person understands those conditions.
- (5) Sections 53 to 55 of the *Summary Proceedings Act 1957* apply to a person released on bail under this section subject to any necessary modifications, but no other provisions of that Act or the *Crimes Act 1961* relating to bail apply to bail granted under this section.
- (6) If a person who is released on bail under this section is subsequently arrested under section 53 or 55 of the *Summary Proceedings Act 1957*, the adjourned application for extension of the detention and questioning period is to be determined as if the detention and questioning period had not expired.

Section 18

C67 Section 18 provides for the grant of bail to a suspect who is the subject of an application for extension of a detention and questioning period. During an authorised detention and questioning period, the event of the suspect exercising his or her right of silence may mean that the period should come to an end and the suspect should be charged promptly or released (see paras 93–97 for a discussion of the effect of exercising the right of silence on the detention and questioning period). However, the Commission considers that, once an application has been made, and if the District Court Judge has adjourned the hearing of the application, the District Court Judge should decide whether or not the suspect should be released on bail during the period of the adjournment. Therefore, s 18 makes provision for bail prior to charge where the hearing of an application is adjourned.

C68 Subsection (1) provides that the District Court Judge adjourning the hearing of an application for extension of the detention and questioning period may grant bail of his or her own motion, or on the application of the person who is being detained or his or her lawyer. Bail is not available during the initial detention and questioning period.

C69 Subsection (2) provides that, where bail is granted, it must be on condition that the suspect released appear at the requisite time before the specified District Court for the hearing of the application for extension of the detention and questioning period. The period of release on bail can be no longer than 18 hours, in line with the 18-hour maximum adjournment period authorised in s 17(7).

C70 Subsection (3) states that a person released on bail shall be subject to any other conditions the District Court Judge considers necessary to prevent the person from failing to appear, tampering with witnesses (etc) or committing an offence. These conditions are broadly analogous

- (7) This section does not authorise any police officer to question a person granted bail under this section about the offence in respect of which the person was being questioned pending the determination of the application for extension of the detention and questioning period.

Definitions: **detention and questioning period, offence, questioning a person**, s 5; **District Court, District Court Judge**, *Acts Interpretation Act 1924* s 4

19 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 physical 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.

to those which a judge can impose under s 49(2)(a) of the Summary Proceedings Act 1957, in relation to people released on bail after charge.

C71 Subsection (4) provides that the police officer releasing the suspect shall furnish him or her with a notice of the bail conditions imposed by the District Court Judge. Because the intention is that applications for extensions and for bail will usually be made over the telephone, the suspect will be in police custody and will therefore be released on bail from police custody, rather than court custody.

C72 Subsection (5) states that ss 53 to 55 of the Summary Proceedings Act will apply with any necessary modifications. Those sections deal with the arrest of people on bail without warrant where they have absconded, or are about to abscond, or have failed to comply with the conditions of bail (eg, failure to appear at the hearing).

C73 Subsection (6) is necessary to address the situation where the suspect granted bail fails to appear at the hearing of the application for extension of the detention and questioning period. Subsequent arrest may take place some time after the original period of detention and in another region. The subsection enables any District Court Judge to hear the application for extension as if the original period had not expired. It is, in effect, an exception to the requirement in s 17(7) that an adjournment of an application for an extension may only be for 18 hours.

C74 Subsection (7) indicates that the police have no power to question during the period between making an application for extension and its favourable determination. If there was power to question during this period, there would be no need to obtain an order from a District Court Judge authorising a further detention and questioning period.

Section 19

C75 Section 19 confirms the general principle that, after being charged with an offence, a suspect should not be questioned further by the police about that offence. However, as the current law already recognises (in the form of rules 7 to 9 of the Judges' Rules), in limited circumstances it may be desirable to permit questioning after charge. Subsection (1) specifies those limited circumstances. If any statement made as a result of questioning after charge is challenged, a court can review, on the facts, the question whether there were grounds for further questioning.

- (2) Before questioning a person for any of the reasons specified in subsection (1), a police officer must
 - (a) inform the person of the reasons for the questioning and caution the person again in the manner required by section 8, and
 - (b) grant the communication and consultation rights in relation to a lawyer conferred by section 10.
- (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 the questioning is so urgent, having regard to the danger of physical harm to some other person or persons, that it should not be delayed by compliance with that obligation.
- (4) An exercise of the power to defer under subsection (3) does not imply that questioning must be deferred.
- (5) If a commissioned officer of police permits deferral of the performance of an obligation under subsection (3),
 - (a) a police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and
 - (b) the commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Definitions: offence, questioning a person, s 5

20 Re-arrest following release

A person who has been detained and questioned following a lawful arrest for an offence and released without being charged with that offence, or a related offence based substantially on the same facts, and has been re-arrested, may not again be questioned about that offence, or a related offence based substantially on the same facts, unless additional material information has come to the notice of the police since the person was released.

Definitions: offence, questioning a person, s 5

PART 4 IMPROPERLY OBTAINED EVIDENCE

21 Amendment to *Evidence Act 1908*

The *Evidence Act 1908* is amended by inserting after section 20 the following section:

C76 Subsection (2) requires that, before questioning a suspect about an offence with which he or she has been charged, for any of the purposes specified in subs (1), a police officer must inform the suspect of the reasons for questioning and caution him or her. The reasons should include the grounds in subs (1). The suspect must also be informed of the right to consult a lawyer.

C77 Subsection (3) provides that consultation with a lawyer may be deferred if a commissioned officer of police believes on reasonable grounds that, having regard to the danger of harm to some other person, questioning is so urgent that it should not be deferred. Subsections (4) and (5) impose similar obligations to those imposed under s 11, in respect of deferral of consultation with a lawyer.

C78 Nothing in s 19 in any way derogates from a suspect's right to decline to answer questions. Where the suspect answers police questions, the subsequent admissibility of these answers as evidence in court will be subject to the control provided by the improperly obtained evidence rule (see s 20(A)(2)(d), to be inserted in the Evidence Act 1908 by s 21 of this Act).

Section 20

C79 Section 20 applies to a person who has been detained following a lawful arrest for an offence but who is not subsequently charged with that offence (or a related offence) and is therefore released. Such a person may not, if re-arrested, be questioned again about that offence unless additional material information 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. The information may be something less than admissible evidence against the person, but it must be material to the offence.

Section 21

C80 Section 21 provides for the improperly obtained evidence rule to be inserted amongst the general rules of evidence contained in the

“20A Admissibility of improperly obtained evidence

- (1) Improperly obtained evidence offered by the prosecution in a criminal proceeding is, subject to subsection (4), inadmissible unless the court considers that the exclusion of the evidence would be contrary to the interests of justice.
- (2) Evidence is improperly obtained 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 any enactment or rule of law; or
 - (c) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
 - (d) unfairly.
- (3) In exercising its power to admit evidence under subsection (1), the court must consider, among other relevant matters,
 - (a) the significance 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, 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.
- (4) Subsection (1) applies only if a defendant raises an issue of whether the evidence was improperly obtained and informs the court and the prosecution of the grounds for raising the issue.
- (5) If the defendant raises the issue under subsection (4), the prosecution must satisfy the court on the balance of probabilities that the evidence was not improperly obtained.”

Evidence Act 1908. A breach of the questioning provisions will result in the application of 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).

C81 Subsection (1) contains the rule itself. If the court finds that evidence offered by the prosecution was improperly obtained, it is inadmissible unless exclusion 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 further NZLC PP21 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.

C82 The improperly obtained evidence rule applies to all kinds of evidence that may be offered by the prosecution in criminal proceedings. It does not apply to evidence offered by a defendant or a co-defendant.

C83 The new rule replaces the fairness discretion and the exclusionary rule developed by the courts in respect of evidence obtained in breach of the Bill of Rights Act, where the evidence has been improperly obtained within the meaning of subs (2). Subsection (2) provides that evidence is improperly obtained if obtained in consequence of a breach of the Bill of Rights Act, 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 improperly obtained evidence rule or because the court has exercised its general exclusionary powers.

C84 The ground of the evidence being obtained unfairly is listed in a separate paragraph in subs (2)(d). This part of the definition is intended to have a residual function (see further NZLC PP21 part II paras 170–171). Unfairness is impossible to define exhaustively. Under the new rule, unfairness is simply a threshold test, whereas under the current law, unfairness is the basis upon which a final decision to exclude the evidence rests. Accordingly, although cases in which the fairness discretion has been an issue may provide some guidance to this

aspect of the law, caution must be exercised. Subsection (2) 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, although on a case by case basis (see further NZLC PP21 part II paras 167–168 and 195–198).

C85 Subsection (3) 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 omission. 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 NZLC PP21 part II paras 188–201).

C86 Subsection (3)(a) requires the court to take into account the special nature of the Bill of Rights Act. The words from the long title of the Bill of Rights Act are repeated in the rule (see further NZLC PP21 part II paras 179–180). Subsection (3)(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 position of the individual defendant (eg, whether he or she was actively tricked or coerced) and to other concerns (see further NZLC PP21 part II paras 181–183). Subsection (3)(c) requires the court to consider whether any impropriety was the result of bad faith (see further NZLC PP21 part II paras 184–185). Subsection (3)(d) requires the court to consider whether evidence existed (real evidence) and would have been discovered or otherwise obtained regardless of any impropriety (see further NZLC PP21 part II paras 186–187).

C87 The onus on the prosecution to prove that evidence was not improperly obtained arises only if a defendant raises the issue in the manner specified in subs (4). The defendant must inform the court and the prosecution of the grounds for raising the issue. This requirement enables the prosecution to be aware of the issues it must address 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. Whether or not a defendant who fails to raise the issue at trial can raise it on appeal will be governed by the practice of the Court of Appeal. The trial judge may advise an unrepresented or inadequately represented defendant that he or she may challenge evidence under the rule where the defence has not done so.

PART 5
OTHER ENACTMENTS

22 Amendments

The enactments specified in schedule 1 are amended in the manner indicated in that schedule.

SCHEDULE 1
ENACTMENTS AMENDED

See section 22

Crimes Act 1961 (1961/43) (R.S.1)

section 316

Repeal subsection (5)

Substitute:

“(5) Subject to the provisions of the *Police (Questioning of Suspects) Act 199-*, 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.”

United Nations (Police) Act 1964 (1964/1) (R.S.11)

section 5

Repeal subsection (1)

Substitute:

“(1) The provisions of the *Crimes Act 1961* and the *Police (Questioning of Suspects) Act 199-*, relating to arrest, shall apply in respect of the arrest of any member of the Police for any act or omission to which this Act applies in all respects as if the act or omission had occurred in New Zealand.”

Ombudsmen Act 1975 (1975/9) (R.S.21)

section 16

Repeal subsection (2)

Substitute:

“(2) Notwithstanding any provision in any enactment, where any letter appearing to be written by any person in custody on a charge or detained under the *Police (Questioning of Suspects) Act 199-*, or after conviction of any offence, or by any patient of any hospital within the meaning of the *Mental Health Act 1969*, is addressed to an Ombudsman it shall be immediately forwarded, unopened, to the Ombudsman by the person

C88 According to subs (5), once the issue is raised by the defendant, the evidence will be admissible if the prosecution satisfies the court on the balance of probabilities that the evidence was not improperly obtained. The standard of proof to be enacted is that currently applied by the courts in deciding whether a breach of the Bill of Rights Act has occurred.

Section 22

C89 Section 22 provides that the Acts specified in the schedule are amended as indicated in that schedule.

Schedule 1

C90 Schedule 1 provides for amendments to s 316 of the Crimes Act 1961, s 5 of the United Nations (Police) Act 1964, s 16 of the Ombudsmen Act 1975, s 14(5) of the Police Complaints Authority Act 1988, and various amendments to the Children, Young Persons, and Their Families Act 1989.

C91 Section 316(5) of the Crimes Act currently provides that:

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 the law.

The replacement subsection clarifies that the obligation to bring a person before a court as soon as possible is subject to this Act (see para 92 for a discussion of why the Commission considers it necessary to amend s 316(5) to accord with its proposals and not to amend s 23(3) of the Bill of Rights Act).

C92 Section 5(1) of the United Nations (Police) Act will expressly apply the Police (Questioning of Suspects) Act, in addition to the Crimes Act, to the arrest of any member of the police for any act or omission outside New Zealand while he or she is a member of the police forming part of a United Nations force.

C93 Section 16(2) of the Ombudsmen Act, which among other things safeguards correspondence between a person in custody on a charge and the Ombudsmen, will extend to correspondence between the Ombudsmen and a person detained and questioned under this Act.

C94 Section 14(5) of the Police Complaints Authority Act determines the jurisdiction of the Police Complaints Authority in investigating complaints of people in custody. The amendment will have the effect of including people detained and questioned under this Act within the

for the time being in charge of the place or institution where the writer of the letter is detained or of which he or she is a patient.”

Police Complaints Authority Act 1988 (1988/2)

section 14(5)

Delete: “(a) A person in custody on a charge or after conviction of any offence; or”

Substitute: “(a) A person in custody on a charge or detained under the *Police (Questioning of Suspects) Act 199-*, or after conviction of any offence; or”

Children, Young Persons, and Their Families Act 1989 (1989/24)

section 215

Repeal subsection (1)

Substitute:

“(1) Subject to sections 233 and 244 of this Act, every enforcement officer shall, before questioning any child or young person whom there are grounds to suspect of having committed an offence, explain to that child or young person—

- (a) Subject to subsection (2) of this section, if the circumstances are such that the enforcement officer would have power to arrest the child or young person without warrant, that the child or young person may be arrested if, by refusing to give his or her name and address to the enforcement officer, the child or young person cannot be issued with a summons; and
- (b) Subject to subsection (2) of this section, that the child or young person is free to leave and is not obliged to accompany the enforcement officer to any place for the purpose of being questioned, and that if the child or young person consents to do so, that he or she may withdraw that consent at any time; and
- (c) That the child or young person is under no obligation to make or give any statement; and
- (d) That if the child or young person consents to make or give a statement, the child or young person may withdraw that consent at any time; and
- (e) That any statement made or given may be used in evidence in any proceedings; and
- (f) That the child or young person is entitled to consult free of charge with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222 of this Act; and
- (g) The reasons for questioning.”

scope of the Police Complaints Authority's jurisdiction.

C95 Section 215(1) of the Children, Young Persons, and Their Families Act governs the point at which a child or young person being investigated in relation to an offence must be informed of his or her rights. Subsection (1) currently provides that the obligation to inform commences "before questioning any child or young person in relation to the commission or possible commission of an offence by that child or young person". The new subsection would provide that the obligation to inform commences "before questioning any child or young person whom there are grounds to suspect of having committed an offence". This would bring the wording in s 215(1) into line with the preparatory words of s 6(2)(b) of this Act.

C96 The Children, Young Persons, and Their Families Amendment Bill was reported back to the House from the Social Services Select Committee on 24 March 1994. Section 215(1) of the Bill provides that the information rights contained in paras (a) to (f) will not apply until the law enforcement officer "has reasonable grounds to suspect" the child or young person of having committed an offence. In its submission to the select committee, the Commission opposed this wording, principally on the basis that it will unduly delay the commencement of the safeguards in the Act. An enforcement officer will not be required to inform the child or young person of his or her rights unless and until there is sufficient evidence to arrest, charge and bring him or her before the court. At this point the safeguards are of no practical use to the child or young person. If the safeguards are required to be given when there are "grounds to suspect", as distinct from "reasonable grounds to suspect", that the child or young person has committed an offence, the safeguards will be of value. The Commission remains strongly of this view.

C97 In the wake of the report of the Review Team, chaired by Mr Ken Mason, concerning the operation of the Children, Young Persons, and Their Families Act, an interdepartmental working party was constituted to report on s 215 of the Act. It was the unanimous view of the working party that "the vulnerability of children and young people entitles them to special protection during investigations, and that this special protection includes having rights explained". Therefore, in the Commission's view it is anomalous for the safeguards to be provided to children under s 215(1) at a later time than they are provided to adults under s 6(2)(b) of this Act. The answer to the anomaly is for s 215(1) to be amended to provide that the threshold of "grounds to suspect" is the point at which children and young people should be informed of their rights.

Insert:

“(1A) Subject to sections 233 and 244 of this Act, every enforcement officer shall, before questioning any child or young person whom there are grounds to suspect of having committed an offence, enquire whether that child or young person wishes to consult a barrister or solicitor.”

section 216

Delete: “the enforcement officer shall explain to that child or young person

- (c) Except where the child or young person is under arrest, the matters specified in paragraphs (a) and (b) of section 215(1) of this Act; and
- (d) The matters specified in paragraphs (c) to (f) of section 215(1) of this Act.”

Substitute: “the enforcement officer shall

- (c) Explain to that child or young person, except where the child or young person is under arrest, the matters specified in paragraphs (a) and (b) of section 215(1) of this Act; and
- (d) Explain to that child or young person the matters specified in paragraphs (c) to (g) of section 215(1) of this Act; and
- (e) Enquire as to the matter specified in section 215(1A) of this Act.”

section 217

Delete: “to (f) of section 215(1) of this Act.”

Substitute: “to (g) of section 215(1) of this Act and enquire as to the matter specified in section 215(1A) of this Act.”

section 221(2)(a)(ii)

Delete: “to (f) of section 215(1).”

Substitute: “to (g) of section 215(1) of this Act and enquired as to the matter specified in subsection 215(1A).”

section 227

Repeal subsection (1)

Substitute:

“(1) Subject to sections 233 and 244 of this Act, an enforcement officer shall, in relation to any child or young person who is at an enforcement agency office for questioning in relation to the commission or possible commission of an offence by that child or young person, as soon as practicable after the child or young person arrives at the enforcement agency office, inform that child or young person that the child or young person is entitled to consult free of charge with a barrister or solicitor.”

Repeal subsection (2)

Substitute:

“(2) Subject to sections 233 and 244 of this Act, every enforcement officer who arrests a child or young person shall, on arresting the child or young person, inform the child or young person that the

C98 To accede to the view that the questioning safeguards for adults should not commence until there are “reasonable grounds to suspect” the adult has committed an offence, would be to remove a critical factor in the balance which the Commission believes has been achieved in its proposals. The protection provided by the safeguards would not be available until the police officer is ready to arrest (ie, “reasonable grounds to suspect” is tantamount to “good cause to suspect”), by which point the suspect may already have incriminated himself or herself. As already noted at para 70 of the report, the Commission would not support the implementation of the questioning proposals if the point at which the safeguards arose was only once the police officer had “reasonable grounds to suspect” that the person had committed the offence.

C99 One of the scheduled amendments fleshes out the requirement in s 215(1)(f) that the child or young person be informed that he or she is entitled to consult with a barrister or solicitor, consistent with s 10(1)(b) of this Act. It also refers to the right to consult free of charge, consistent with s 10(1)(c). The Commission considered whether subs (1)(f) requires further alteration. Information of the right to consult a barrister or solicitor is dealt with in the paragraph, rather than the right to consult itself. According to s 227, the right to consult arises on arrest or on being at an enforcement agency office for questioning. Where detention takes place somewhere other than at an enforcement agency office, activation of the right to consult occurs only on arrest. This means that the right to consult under s 227 may occur at a later time than under s 6(2)(b)(ii) of this Act. The latter provision allows for the right to consult where there are grounds to suspect that the person has committed an offence and he or she is questioned at a police station or has reasonable grounds to believe that he or she is being detained. The Commission decided not to amend s 215(1)(f) to address this discrepancy, on the basis that s 23(1)(b) of the Bill of Rights Act will apply in any case (ie, access to legal advice). Furthermore, if slightly less protection is afforded to children and young people in this instance, arguably this is acceptable, due to the absence of post-arrest questioning powers in relation to them (see s 3 of the draft legislation).

C100 The schedule adds a new paragraph, para (g), to s 215(1). This is in line with s 9(1) of this Act. It requires the enforcement officer to inform the child or young person of the reasons for questioning.

C101 The schedule contains a new subsection to be inserted after s 215(1). Subsection (1A) requires an enforcement officer, before questioning a child or young person whom there are grounds to suspect

child or young person is entitled to consult free of charge with a barrister or solicitor at the enforcement agency office to which the child or young person is to be taken following arrest or, if the child or young person is arrested at an enforcement agency office, at that office.”

Repeal subsection (3)

Substitute:

“(3) Subject to sections 233 and 244 of this Act, every child or young person who is at an enforcement agency office for questioning in relation to the commission or possible commission of an offence by that child or young person, or who is taken to an enforcement agency office following arrest, or who is arrested at an enforcement agency office, as the case may be, is entitled to consult privately and free of charge with a barrister or solicitor at that enforcement agency office.”

section 228(1)

Delete: “is entitled to consult privately with a barrister or solicitor at that hospital.”

Substitute: “is entitled to consult privately and free of charge with a barrister or solicitor at that hospital.”

of having committed an offence, to enquire whether the child or young person wishes to consult a barrister or solicitor. The subsection equates with s 10(3) of this Act and is another example of a provision inserted to accord children and young people no lesser safeguards than those to which adults are entitled under this Act.

C102 As is the case with s 215(1), the new subs (1A) will be subject to ss 233 and 244 of the Children, Young Persons, and Their Families Act. Section 233 provides that nothing in ss 214 to 232 limits or affects the powers of traffic officers or constables under any of the breath-alcohol and blood-alcohol provisions of the Transport Act. Section 244 provides that nothing in ss 214 to 243 limits or affects any provision of the Immigration Act 1987, other than ss 126(4) and 142 of the latter Act.

C103 The schedule contains several further changes to the Children, Young Persons, and Their Families Act, consequential on those just discussed. The new ss 216(c), (d) and (e), 217 and 221(2)(a)(ii) refer to paras (c) to (g) of s 215(1) and enquiry as to the matters referred to in s 215(1A) (ie, whether the suspect wishes to consult a barrister or solicitor), taking into account the addition of new para (g) to s 215(1) and the new subs (1A). Sections 217 and 221(2)(a)(ii) require the enforcement officer to enquire whether the child or young person wishes to consult a barrister or solicitor, as envisaged by the new s 215(1A). A reference to the child's or young person's right to consult with a barrister or solicitor "free of charge" is inserted in s 227, consequential on the new s 215(1)(f), which refers to consultation being free of charge. Section 228(1), which deals with the entitlement of a child or young person to consult a barrister or solicitor where taken to hospital following arrest or where questioning occurs at hospital, fleshes out the entitlement to consult a barrister or solicitor with a reference to consultation free of charge.

APPENDIX B

Submissions Received on *Criminal Evidence: Police Questioning*

1. Professor R Allen, North Western University School of Law, Chicago, United States of America
2. C Amery, Barrister
3. J Armour, Barrister and Solicitor
4. Auckland Council for Civil Liberties (Inc)
5. Auckland Unemployed Workers' Rights Centre
6. Dr G Barton, QC
7. D Bates, Barrister
8. J Billington, Barrister
9. Canterbury District Law Society Public Issues Committee
10. The Rt Hon Sir Maurice Casey
11. Sir Muir Chilwell
12. The Comptroller, New Zealand Customs
13. The Rt Hon Sir Robin Cooke, KBE, President of the Court of Appeal
14. Criminal Bar Association of New Zealand (Inc)
15. Department of Justice
16. D Dixon, Senior Lecturer in Law, University of New South Wales, Australia
17. Dunedin Community Law Centre
18. R Glover, Barrister and Solicitor

19. Grey Lynn Neighbourhood Law Office, Mangere Community Law Centre
20. B Grierson, Barrister and Solicitor
21. M Henaghan, Senior Lecturer in Law, University of Otago
22. High Court Judges' Working Party (comprising primarily the Hon Justice McGechan, the Hon Justice Fisher, the Hon Justice Robertson)
23. The Hon Justice Holland
24. His Honour, Judge Kerr
25. M Knowles, Barrister and Solicitor
26. His Honour, Judge Laing
27. Legal Services Board
28. R Mahoney, Senior Lecturer in Law, University of Otago
29. T McBride, Senior Lecturer in Law, University of Auckland
30. J K McLay Limited
31. Morley Security Group
32. The Hon Justice Neazor
33. New Zealand Council for Civil Liberties
34. New Zealand Law Society
35. New Zealand Police Association
36. J Paterson, Barrister and Solicitor
37. Police National Headquarters
38. M Radford, Barrister and Solicitor
39. J Rowan, Barrister
40. R Stapleton, Barrister
41. K Stone, Barrister and Solicitor
42. G Turkington, Barrister
43. Wellington South Community Law Centre
44. The Hon Justice Williamson

45. His Honour, Judge Young, Chief District Court Judge
46. Youth Law Project (Inc)
- 47 S Zindel, Barrister and Solicitor

In addition to the above, a variety of informal, oral and personal responses were received.

APPENDIX C

Seminars on *Criminal Evidence:* *Police Questioning*

SEMINAR 1

Seminar on Law Commission's Preliminary Paper No 21, 28 October 1992 at the Auckland District Law Society Building, Auckland. The seminar was organised by the Criminal Bar Association of New Zealand (Inc). It was chaired by Mr Michael Harte.

Programme

Right of Silence: What is it that we are trying to change and why?

Police Questioning

SEMINAR 2

"Police Questioning"—a seminar on Law Commission's Preliminary Paper No 21, 27 and 28 November 1992 at The Terrace Regency Hotel, Wellington. The seminar was organised by the Victoria University of Wellington Centre for Continuing Education.

Programme

Session I Police questioning: questioning before and after arrest

Session II Safeguards for suspects being questioned by the police

Session III The detention regime, the enforcement of the safeguards and the arguments for and against separate codes

Session IV The admissibility of confession evidence

Session V The treatment of improperly obtained evidence

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