

THE GATHERING & ADDUCING OF ADMISSIONS IN NSW & THE ACT

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INTRODUCTION

1. The aim of this paper is to assist ALS lawyers practicing in New South Wales (NSW) and the Australian Capital Territory (ACT) in challenging the admissibility of admissions sought to be led against their clients.
2. It should be regarded as merely an attempt to achieve a broad overview of the applicable law placed in an historical perspective. Only a fraction of the existing case law and commentary is referenced in this paper and it should be treated as perhaps a useful starting point.
3. The paper explores the admissibility of admissions by examining:
 - The law that directly regulates the adducing into evidence of admissions, that is, the law of evidence that applies in the courtroom; and
 - The law that regulates police conduct when they gather admissions in the course of criminal investigations, that is, the law that applies in the police station (and other places where police seek to gather admissions).
4. The interplay between these two forms of regulation is of course significant and the distinction between them sometimes blurred. The paper focuses particularly, but not exclusively, on the way in which these two forms of regulation have and do operate in respect of Aboriginal suspects and accused.
5. However this paper does not explore in detail voir dire procedure and law. This paper also does not explore in detail the issues surrounding the important twin questions of what, as question of law, is an admission and whether in a particular case, as a question of fact, what is alleged to have been said or done is in fact an admission.²
6. The paper endeavors to state the law as of 1 August 2012.
7. The paper seeks to juxtapose the historic and the contemporary regimes in respect of the gathering and adducing into evidence of admissions. In doing so the paper seeks to demonstrate the historical roots of much of the current law. The hope is that doing so will assist lawyers in gaining a deeper understanding of the relevant principles and issues.

² In summary to be regarded as an admission a statement must meet the definition of that word in the dictionary to the Evidence Act 1995 (NSW). That is, be a previous representation made by a party adverse to the person's interest in the proceeding. Previous means otherwise than in the course of giving evidence in the proceeding. Representation includes express or implied representations (whether oral or in writing), or representations inferred from conduct. This question becomes often more complex when the admission is said to be constituted by conduct such as flight or by lies. Admissions cannot be second hand (see section 82 of the Act) and cannot be constituted by exercising the right to remain silent (see section 89 of the Act). Admissions can be made on authority (see section 87 of the Act). The question of whether an admission has actually been made is generally a question for the tribunal of fact and it is generally not appropriate or necessary to hold a voir dire to determine if an admission was in fact made. On a voir dire regarding the admissibility of an admission, section 88 of the Evidence Act 1995 (NSW) states that the court must, "...for the purpose of determining whether evidence of an admission is admissible ... find that a particular person made the admission if it is reasonably open to find that he or she made the admission".

8. The structure of the paper is as follows.

The Gathering of Admissions

Historical

9. **Firstly** the paper examines some of the direct ways in which the gathering of admissions by police was regulated prior to the introduction in New South Wales of the Uniform Evidence Law and specific protective statutory regulation of police detention of suspects.³

10. This includes an examination of:

- The Judges Rules.
- Police Commissioner's Instructions.

11. **Secondly** the paper examines some of the early aboriginal specific 'protections' that existed in various Australian jurisdictions and attempted to regulate the police gathering of admissions. This includes an examination of:

- The Anunga Rules & other judicial guidance.
- Notification Schemes.
- Police Commissioners Instructions.

12. This paper does not examine why it is that many Aboriginal people have been and continue to be, at a disadvantage in their dealings with police and therefore in need of special protection when it comes to being interviewed by police as suspects. These issues will be well known to the audience.⁴

Contemporary

13. **Thirdly** the paper examines the current law that directly regulates the police gathering of admissions. (It is seen that these laws replaced the more informal regime of Judges Rules & other Police Commissioners Instructions). This includes an examination of:

- Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA).
- Part 1C of the *Crimes Act* (CTH) which applies in the ACT (The Cth Crimes Act).

14. **Fourthly** - the paper examines the current special protections applicable to Aboriginal persons which directly regulate the gathering of admissions from Aboriginal people. This includes an examination of

- The Regulations made pursuant to LEPRA; and

³ With the passage of the *Crimes Amendment (Detention After Arrest) Act 1997*, which created Part 10A of the Crimes Act 1900, the predecessor legislation to Part 9 of the Law Enforcement (Powers and Responsibilities) Act 1998.

⁴ For an examination of the various historical, cultural and other reasons for the need for special protection see the paper by Dina Yehia SC presented at the Uluru Conference in August 2012. 'Admissibility of Admissions - Aboriginal and Torres Strait Islander Suspects' August 2012. This paper should be available at http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_defenderbank.

- Various provisions of The Cth Crimes Act.⁵

The Adducing of Admissions

Historical

15. **Fifthly** the paper examines the general law dealing with the admissibility of admissions which exists at common law and applied in NSW prior to the introduction of the *Evidence Act 1995* (NSW) (Evidence Act). The paper seeks to do this with a particular focus on authorities involving aboriginal accused.

16. This includes examination of:

- The rule that to be admissible confessions must be voluntary.
- The “Lee”/“Cleland” fairness discretion.
- The “Ireland”/“Bunning v Cross” improperly/illegally obtained evidence discretion.

Contemporary

17. **Sixthly** - the paper examines the current general law relating to the admissibility of admissions. This includes an examination of:

- Part 3.4 of Chapter 3 of the *Evidence Act*.
- Part 3.11 of Chapter 3 of the *Evidence Act*.
- Section 281 of the *Criminal Procedure Act 1986* (NSW) (Criminal Procedure Act).
- Section 23V of the *Cth Crimes Act*.
- Section 13 of the *Children (Criminal Proceedings) Act 1987* (NSW) (Children (Criminal Proceedings) Act)
- Section 67 of the *Young Offenders Act 1997* (NSW) (Young Offenders Act)
- Part 10 of the *Crimes Act 1900* (ACT) (The ACT Crimes Act)

18. The paper concludes with an ‘admissions checklist’ against which lawyers can consider the admissibility of admissions.

⁵ Much of this part of the paper comes from an earlier paper written by the author (and available on www.criminalcle.net.au) “Admissibility Issues Arising From the Detention of Suspects for Investigation under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.”

ONE – THE GATHERING OF ADMISSIONS

HISTORICAL GENERAL REGULATION OF THE GATHERING OF ADMISSIONS BY POLICE

THE JUDGES RULES – A NON LEGAL STANDARD TO BE APPLIED IN CONSIDERING THE OPERATION OF DISCRETION

ORIGIN

19. The 'Judges Rules' were a set of rules for the interrogation of suspects promulgated in 1912 by English judges. Some additional rules were added in 1918. In 1964 they were varied and re-issued in the United Kingdom. In 1984 they were abrogated entirely in the United Kingdom upon the passing into law of the *Police and Criminal Evidence Act 1984*, (which however did restate many of their requirements within a Code issued pursuant to a provision of the Act).

20. In *R. v. Voisin* [1918] 1 KB 531 Lawrence J stated

"..In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial".

INCORPORATION INTO AUSTRALIA

21. These rules were later promulgated by the various Australian police forces in the form of Guidelines or Directions from the various Commissioners.

22. As is discussed below the Judges Rules never attained the status of law and were at best a guide to police procedure in questioning people in relation to criminal offences.

23. The Australian Law Reform Commission in Report 31 Recognition of Aboriginal Customary Laws stated in relation to the Judges Rules:

"The Judges Rules. *In 1912 the Judges of the Kings Bench in England laid down a set of guidelines for the police when questioning suspects. Various amendments have been made to the rules since that time and a complete*

revision was published in 1964. Versions of the Judges Rules in their pre-1964 form apply in most Australian jurisdictions either by incorporation in police standing orders or by adoption by the relevant court as guidelines in exercising its discretion to exclude confessions. The Judges Rules attempt to balance the competing principles of the protection of the rights and liberties of the individual citizen and the interest of the community in bringing offenders to justice, which requires that the police be granted sufficient powers to investigate crime. Their principal requirement is that a person who is to be subjected to police questioning by the police be told of his right to remain silent: this is to be done by the police issuing a caution to this effect at various stages of the investigation. Other rules regulate the extent to which questions may be asked, especially where a person is making a voluntary statement. The rationale for the rules was well expressed by the Royal Commission on Criminal Procedure (UK) in 1981:

The presumption behind the Judges Rules is that the circumstances of police questioning are of their very nature coercive, that this can affect the freedom of choice and judgement of the suspect (and his ability to exercise his right of silence), and that in consequence the reliability (the truth) of statements made in custody has to be most rigorously tested."

THE 1912 RULES

24. The 1912-1918 Rules were as follows⁶ :

THE JUDGES' RULES 1912 -1918

One - 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.

Two - Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

Three - Persons in custody should not be questioned without the usual caution being first administered.

Four - If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

Five - The caution to be administered to a prisoner when he is formally charged should therefore be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Care should be taken to avoid any suggestion that his answers can

⁶ Annexed to The Law Reform Commission of Hong Kong Report Confession Statements and their Admissibility in Criminal Proceedings. Topic 8. Available online at <http://www.hkreform.gov.hk/en/docs/radmissibility-e.pdf> (accessed 21/07/2012).

only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

Six - A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

Seven - A prisoner making a voluntary statement must not be cross examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

Eight - When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

Nine - Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

THE 1964 RULES

25. The 1964 Judges Rules were as follows:

JUDGES' RULES

These Rules do not affect the principles:

- That citizens have a duty to help a police officer to discover and apprehend offenders;
- That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;
- That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of the investigation or the administration of justice by his doing so;
- That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;
- That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that

person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

The principle set out in paragraph above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Nonconformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

RULES

One - When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

Two - As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions relating to that offence. The caution shall be in the following terms :- "*You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.*" When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

Three (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms :- "*Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.*"

Three (b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement. Before any such questions are put the accused should be cautioned in these terms :- "*I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.*" Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

Three (c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

Four. All written statements made after caution shall be taken in the following manner :- (a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following :- *"I,, wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."* (b) Any person, writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material. (c) The person making the statement, if he is going to write it himself shall be asked to write out and sign before writing what he wants to say, the following :- *"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."* (d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him. (e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement :- *"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."* (f) If the person who has made a statement refuses to read it or to write the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

Five - If at any time after a person has been charged with or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something he shall at once be cautioned or further cautioned as prescribed by Rule III(a).

Six - Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

26. The rules were long considered as a guide to fairness and proper police practice. Their breach was considered as relevant to the exercise of the discretion to exclude evidence.
27. The Rules contained the fundamental requirement to caution and a standard against which it could be determined when a caution should be given.

QUESTIONING POST CHARGE UNDER THE JUDGES RULES

28. The difference between the two sets of rules in relation to when a caution should be given is interesting. The 1912 Rules required a caution to be given "*Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be*". The 1964 Rules represented a tightening of the requirement, so far as they required that "*a caution be given, as, 'soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence'*".⁷
29. The Rules recognized the significance of the advent of adversarial criminal proceedings and only allowed questioning post charge in certain limited circumstances. The 1964 Rules stating, "*It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement*".
30. This aspect of the Rules however does not seem to be reflected in any currently applying law or standard governing questioning. The propriety under the current regime of regulation of questioning post charge is discussed below.

CASE LAW ON THE RULES

31. In *Van Der Meer v R* (1988) 62 ALJR 656 Mason J stated in relation to the Judges Rules:

"As some of these criticisms are designed to reflect the injunction contained in the English Judges' Rules as amended in 1964, I should deal with the status of those Rules before turning to the specific points of criticism. The Judges' Rules no longer have a part to play in the United Kingdom. They were displaced by the new regime introduced by the Police and Criminal Evidence Act 1984 (U.K.) which introduced entirely new procedures regulating, amongst other things, powers of arrest and detention and conditions of

⁷ This difference resonates with the current discrepancy in section 139 of the Evidence Act between the requirement to caution an arrested person before any questioning and the looser requirement to caution a person in a state of constructive arrest only where, "the official believes that there is sufficient evidence to establish that the person has committed an offence". The latter requirement allows police to question persons not under arrest without a caution even when they may have a reasonable suspicion which falls short of constituting evidence sufficient to establish.

detention and questioning: see Leigh, "The Police and Criminal Evidence Act 1984: (1) Search, Entry and Seizure", (1985) *Criminal Law Review* 535.

16. It has been repeatedly stated that the Judges' Rules do not have the force of law in Australia. It is worthwhile repeating the statement made by the Chief Justices of the Commonwealth, the Australian States and New Zealand at the conclusion of their conference in New Zealand on February 1965. The statement was in these terms:

1. "Neither the old nor the new English Judges' Rules have the force of law in Australia or in New Zealand. In considering whether confessional statements made by persons charged with crimes ought to be admitted in evidence the Australian and New Zealand courts have taken into account whether police officers have complied with the spirit of these Rules. But our courts have never regarded compliance or non-compliance as a decisive factor and have always emphasised that it is for the court to take into account all the circumstances of an individual case in determining whether a confessional statement should be admitted."

2. "The Australian Chief Justices emphasised that they had no authority to make any such rules. It is for the authorities in charge of the various Police Forces to make their own rules for the good conduct and guidance of their officers. The judges are always on their guard to ensure that fair conduct is observed by the police in the examination of suspects. The law requires a judge to determine whether in the light of all the circumstances of a case there are such elements of unfairness in the use made by the police of their position in relation to the accused that a confession alleged to have been made by him ought to be rejected. There is a right of appeal against the decision of a judge admitting an incriminatory statement."

17. This statement reflected the view expressed by Dixon J. in *McDermott v. The King* (1948) 76 CLR 501, at pp 514-515:

"This Court is now invited to lay it down that the practice now obtaining in England must be followed and in particular that the Judges' Rules must be accepted as a standard of propriety. To do so would be to go beyond the function which this Court so far has exercised in appeals by special leave in criminal matters. No rule of law has yet been established either here or in England imposing either upon the judge at a criminal trial or upon the Court of Criminal Appeal the duty of rejecting

confessional statements if they have been obtained in breach of the 'Judges' Rules' or if they have been obtained by questioning the accused after he has been taken into custody or while he is 'held,' though held unlawfully."

In like vein, in R. v. Lee [1950] HCA 25; (1950) 82 CLR 133, the Court said (at p 154):

"With regard to the Chief Commissioner's Standing Orders, which correspond in Victoria to the Judges' Rules in England, they are not rules of law, and the mere fact that one or more of them have been broken does not of itself mean that the accused has been so treated that it would be unfair to admit his statement. Nor does proof of a breach throw any burden on the Crown of showing some affirmative reason why the statement in question should be admitted."

The Court went on to say (at p 154):

"The rules may be regarded in a general way as prescribing a standard of propriety, and it is in this sense that what may be called the spirit of the rules should be regarded. But it cannot be denied that they do not in every respect afford a very satisfactory standard. ... It is indeed, we think, a mistake to approach the matter by asking as separate questions, first, whether the police officer concerned has acted improperly, and if he has, then whether it would be unfair to reject the accused's statement. It is better to ask whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused."

32. The rules (long ago incorporated into internal police guidelines) largely ceased having relevance in New South Wales with the advent of legislative rules as to the interrogation of suspects.

POLICE GUIDELINES RELATING TO THE DETENTION OF SUSPECTS

33. Prior to the advent of LEPPRA style legislation there were a variety of police internal guidelines governing the treatment of arrested persons. They were contained within Police Commissioner's Instructions.
34. The NSW Law Reform Commission 1990 report notes the existence of the following protective Instructions:
- **Relating to the right to legal advice** - Instructions 32.35 and 32.45-32.51.
 - **Relating to the right to contact a friend or relative** - Instructions 32.35 and 32.54.
 - **Relating to the right to an interpreter** - Instruction 85 (though the NSWLRC notes the instruction did not contain a rule).
 - **Relating to the right to consular assistance** - Instruction 32.56. See also Instruction 57.37-57.46.
 - **Relating to Humane treatment** - See Instructions 32.60 (re medical assistance); 32.86 and 77.15 (re washing and toilet facilities); and 32.87 (re change of clothes).
35. The author has not been able to obtain copies of them to compare and contrast them to current day protections.

EARLY ABORIGINAL SPECIFIC PROTECTIONS

JUDICIAL STANDARDS FOR THE DETENTION AND INTERROGATION OF ABORIGINAL SUSPECTS

THE ANUNGA RULES

36. In *R v Anunga* (1976) 11 ALR 412 (a judgment delivered 30 August 1976) the Northern Territory Supreme Court set down in effect guidelines for the way in which police interview Aboriginal people. These became known as the "Anunga Rules".
37. The rules were not intended to establish new law in respect of questioning Aboriginal people but rather were intended to provide guidance for investigators in how to interview Aboriginal people in a way that could best ensure confessional evidence could be considered voluntary and fair to admit.
38. Forster J stated:

"I preface this statement of guidelines by pointing out that Aboriginal people often do not understand English very well and that, even if they do understand the words, they may not understand the concepts which English phrases and sentences express. Even with the use of interpreters this problem is by no means solved. Police and legal English sometimes is not translatable into the Aboriginal languages at all and there are no separate Aboriginal words for some simple words like "in", "at", "on", "by", "with" or "over", these being suffixes added to the word they qualify. Some words may translate literally into Aboriginal language but mean something different. "Did you go into his house?" means to an English-speaking person, "Did you go into the building?", but to an Aboriginal it may also mean, "Did you go within the fence surrounding the house?" English concepts of time, number and distance are imperfectly understood, if at all, by Aboriginal people, many of the more primitive of whom cannot tell the time by a clock. One frequently hears the answer, "Long time", which depending on the context may be minutes, hours, days, weeks or years. In case I may be misunderstood, I should also emphasize that I am not expressing the view that Aboriginal people are any less intelligent than white people but simply that their concepts of certain things and the terms in which they are expressed may be wholly different to those of white people.

Another matter which needs to be understood is that most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. Indeed, their action is probably a combination of natural politeness and their attitude to someone in authority. Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked?

Bearing in mind these preliminary observations which are based partly upon my own knowledge and observations and partly by evidence I have heard in numerous cases I lay down the following guidelines. They apply, of course, to persons who are being questioned as suspects:--

(1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilized whenever necessary to ensure complete and mutual understanding.

(2) When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.

(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand you do not have to answer the questions?" Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

(4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.

(5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources. Failure to do this, among other things, led to the rejection of confessional records of interview in the cases of Nari Wheeler and Frank Jagamala.

(6) Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.

(7) It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.

(8) Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal, states he does not wish to answer further questions or any questions the interrogation should not continue.

(9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.”

39. In relation to the consequences of failing to comply with these rules the court stated:

“These guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded.”

40. *Anunga* was, however, not the first expression of judicial concern about the need for ‘special measures’ in respect of Aboriginal suspects.

EARLY SOUTH AUSTRALIAN AUTHORITY AND POLICE CIRCULARS

41. In *R v Sydney Williams* (1976) 14 SASR 1 Wells J gave judgment in a voir dire concerned with admissions said to have been made by an Aboriginal man suspected of the murder of a woman.

42. The judgment gives an interesting insight into the judicial development of special protections for Aboriginal suspects pre-*Anunga*, the way in which judicial protections were transformed into administrative guidelines, and the early origins of the notification system as a protective measure relating to interrogation (as opposed to being measure related to the representation of Aboriginal people before courts).

43. Wells J stated (under the heading, ‘The Principles to be Observed when Questioning Aboriginal Natives of Australia’):

“The questioning of aboriginal natives has always presented difficulties to police officers. The former find it difficult to speak and understand English and to comprehend certain kinds of concepts and reasoning; most white Australians do not speak and understand any dialect of the aboriginal native or comprehend his intuitive reasoning about his own life and affairs. Furthermore, many aboriginal natives – more especially full blooded tribal aborigines – show a tendency to defer to persons in positions of authority, including police officers, that is far more pronounced and enduring than the average white Australian. Until recently the problems thrown up by those difficulties were dealt with, case by case, by applying the general rules applicable to the community as a

whole. In the course of time, however, the rulings given were seen to fit into a pattern the perception of which prompted Bright J to formulate certain principles and to make certain suggestions in Reg. v Gibson (Unreported. 12th November, 1973). It is unnecessary to reproduce here what he said because his discussion and suggestions were adopted and used to form the basis for a police circular entitled Aboriginal Legal Rights Movement – Field Officers and Police Liaison Officers (dated 24th March, 1975). The material portions of the circular form an appendix to this judgment. The circular is obviously of prime importance to the community as a whole, to police officers who are called on in the performance of their duties to question aboriginal natives, and especially, of course, to the aboriginals themselves. It is essential, therefore, that its status, operation, and effect in the general law – as contrasted with its significance within the police force – be clearly understood. Treating as a guide the High Court’s attitude towards the standing orders referred to in R v Lee, I am of the opinion that the circular should be regarded as similar to the so-called Judges Rules drawn up by the Judges of the Kings Bench Division at the request of the Home Secretary and promulgated in 1912”.

44. The circular attached to the judgment is lengthy, important parts include:

- ALRM Field Officers should not be hindered in attending interviews where the suspects requests their presence.
- No persistent questioning of Aboriginal suspects once they decline to answer questions except in the presence of a third party.
- Where interviewing a ‘tribal or semi tribal’ aboriginal every effort must be made to have an independent third party present, if practicable a solicitor or field officer.
- Upon arrival at the police station post arrest, ALRM to be notified except if the prisoner objects.
- Where printed information relating to ALRM is available at the police station prisoners to be provided it.
- When a prisoner requests the presence of a field officer every practical effort should be made to secure their presence.

NEW SOUTH WALES POLICE COMMISSIONER GUIDELINES

45. Prior to the advent of LEPR style legislation the New South Wales Police Force did maintain internal guidelines on the detention and interrogation of Aboriginal and Torres Strait Islander people.

46. The existence of such guidelines is referred to in the New South Wales Law Reform Commission Report 66 of 1990 ‘Criminal Procedure: Police Powers of Detention and Investigation after Arrest’. The relevant guideline were apparently contained within:

- Police Commissioner’s Instructions – 32.38, 32.49 and 38.48.

47. However the author has been unable to obtain copies of them.

NOTIFICATION SCHEMES

48. It is unclear to the author exactly when notification schemes in respect of arrested Aboriginal people first began to operate in Australia. The current New South Wales scheme seems to have commenced as late as 1995.
49. As early as 1975 there was a notification scheme operating in South Australia pursuant to an agreement between Police and the ALRM⁸ embodied in a police standing order.⁹
50. An examination of the evolution of the Victorian notification system gives an interesting insight into the emergence of the current notification systems from highly paternalistic assimilation era legislation concerned more with the appearance of Aboriginal people before courts.
51. Section 37 of the Aboriginal Affairs Act 1967 (Vic) originally stated (my emphasis):
- 37. (1) Where an aborigine is a party to any criminal proceedings the court or the justices hearing such proceedings shall inform the Director of Aboriginal Affairs thereof and if it considers that it is in the interests of the aborigine may adjourn the hearing to enable the Director or his deputy to appear on behalf of the aborigine.*
- (2) In such a case the Director or some other person authorized in writing by the Minister may appear on behalf of the aborigine and make any application to the court which the Director or the person so appointed may deem necessary in the interests of the aborigine.*
52. This act was amended the following year to oblige police to report the charging of Aboriginal people to the Director of Aboriginal Affairs. It stated (my emphasis):
- "37. (1) Where an aborigine is charged with any offence (other than being drunk or being drunk and disorderly in a public place) or where an aboriginal child is the subject of any proceedings before a Children's Court and the informant is a member of the police force the informant shall forthwith after the charge is laid or the proceedings are instituted notify the Director of Aboriginal Affairs by telegram giving the name of the aborigine, the nature of the offence or proceedings, the place where charged, and the name and rank of the informant.*
- (2) Where an aborigine appears for the hearing of proceedings referred to in sub section (1) the court may if it considers, it is in the interests of the aborigine adjourn the hearing to enable the Director or his deputy to appear on behalf of the aborigine.*
- (3) In such proceedings the Director or some other person authorized in writing by the Minister may appear on behalf of the aborigine and may make any application to the court which the Director or the person appointed may deem necessary in the interest of the aborigine."*

⁸ The Aboriginal Legal Rights Movement (the South Australian Aboriginal Legal Service).

⁹ *R v Sydney Williams* (1976) 14 SASR 1 at 9.

53. Following the repeal of the Aboriginal Affairs Act in 1974 a similar notification system was implemented through police standing orders.
54. The Australian Law Reform Commission stated as follows in its Recognition of Aboriginal Customary Laws Report:

“Following the repeal of the 1967 Act, similar provision was made in Police Standing Orders. A new notification system was established in 1980 with the insertion of a new para 1A in Police Standing Orders:

Where a person who is of Aboriginal ancestry or whose appearance indicates Aboriginal ancestry, or who claims to be of Aboriginal ancestry is arrested for any offence (other than for drunkenness) or is the subject of a care application, the arresting member shall promptly telephone or telex particulars of the case to the Missing Persons Bureau.

In practice the Missing Persons Bureau telephones the Victorian Aboriginal Legal Service (VALS) with name, location and principal charges preferred against the offender as soon as the Bureau has been notified. All offences, regardless of degree of seriousness, are notified. The name and rank of the informant are also notified. It has been said that the system does not work very satisfactorily because the Missing Persons Bureau is not always notified by Police Stations that they have arrested an Aborigine. This means that VALS is not in a position to provide legal advice at an early stage in the legal process:

“Other problems still exist which I believe will not finally be overcome until the system is given some legislative backing and clout. Whilst there are instances where legal advice is able to be given to Aboriginal persons prior to the conducting of a record of interview, it would certainly be true to say that in most situations, the notification system simply operates as a means of enabling us to know the forthcoming court dates of Aboriginal clients”.¹⁰

55. As of 1986 however there was no notification system operating in New South Wales.¹¹ This remained the case at the time of the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody. The report noted:

“..In Victoria there is a longstanding practice that whenever an Aboriginal is taken in to custody, police must inform the Missing Persons Bureau, which in turn notifies the Victorian Aboriginal Legal Service. A practice of notifying the Tasmanian Aboriginal Legal Service has now been adopted in Tasmania. In New South Wales there is no general practice, and it is highly desirable that one should be introduced”.

56. One of the formal recommendations was:

¹⁰ VALS Submission to the ALRC Inquiry.

¹¹ Part 22. ALRC Recognition of Aboriginal Customary Laws Report.

“..Notification of the Aboriginal Legal Service when Aboriginal people are arrested or detained”

57. It seems the first notification system in New South Wales was legally mandated in 1998 with the passage of the *Crimes (Detention after Arrest) Regulation 1998*. Regulation 28 stated:

“If a detained person is an Aboriginal person or Torres Strait Islander, then, unless the custody manager is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

- (a) immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified that the person is being detained in respect of an offence, and*
- (b) notify such a representative accordingly.*

58. However there was a notification system operating prior to that. Eric Wilson SC advised the author by e-mail as follows:

“There was in fact a notification system prior to the legislation in 1998. I was aware of it and today I have verified it with Brian Hancock and Dina Yehia. Brian was the principal solicitor with the WALS between June 1992 and April 1997. He went on leave between April 1995 and September 1995 during which time Dina was the Acting Principal Solicitor. When Brian left for his holiday there was no system of notification in place, but when he returned it had been started. The arrangement with the WALS and I think with the other 5 organisations, Hewitt Whyman could verify this, was that the office phone would be diverted to the landline at home of the solicitor on duty both overnight and on the weekend. Mobile phones were not being used inside the WALS at this point. The WALS number had been provided to all the police stations regionally where the WALS operated. When someone was arrested and placed in custody there would be a phone call. The Solicitor on duty would have to spend the weekend at home with the phone. Solicitors would receive calls in relation to offensive behavior charges in the early hours of the morning. This process was streamlined over time. The first notification system occurred about mid 1995. Before that time solicitors or field officers were told by family members that people were in custody. I would inquire of field officers if they knew who was in custody and who was not or we would attend the police station and ask who was in the cells to appear in court. People were frequently arrested while court was sitting, interviewed and charged before we were even aware it was happening. If someone demanded to see us then the police would contact us. At times the only one available in early times in Brewarrina, Bourke or Wilcannia where arrests were frequent were field officers. At times they were excluded from giving advice before interviews took place and then voir-dires would be run on the resulting records of interview”.

59. John McKenzie (Chief Legal Officer ALS NSW/ACT) advised the author by e-mail as follows in relation to the advent of the 1998 New South Wales notification system:

“As I understand the history, though I was not personally involved at the time, the Sydney-based SRCLS (noting that between 1996 and June 2006, in

NSW there were 6 autonomous ALS's based on a regional division of the state) was the first to institute a centralised notification system. That early scheme was supposed to apply only to Aboriginal persons arrested within the SCRALS boundaries (greater metropolitan Sydney plus the south coast down to Wollongong), but that was impossible to enforce, as more police became mindful of the legislative requirement to notify an "Aboriginal legal aid organisation". The scheme depended on the physical handing over of THE mobile phone with the number provided to police to call between the solicitors performing shifts on the scheme.

Subsequent to the 1998 legislation, police in other areas in NSW began variously to call the SCRALS line so as their detainees could receive legal advice, or to simply send a fax advising of the detention to the nearest ALS office (in a generic sense). Those faxes often turned up at empty offices after office hours, providing little assistance. Sometimes a fax received during office hours would result in a visit by an ALS field officer or solicitor, if available, to the police station. Sometimes, particular police in some locations would telephone direct to the relevant ALS field officer, even when out of working hours, but only where there had been a reasonable relationship established between the local police and the local ALS office. Of course, there would be times when the field officer was uncontactable or unavailable to attend the police station to speak with the detained person. In my experience, it was only in the most serious cases, such as homicide, that senior police would make any efforts to arrange for an ALS solicitor to attend the station and conference with the arrested person. And that usually occurred after the person had been interviewed in relation to the charges. Obviously, a very unsatisfactory situation.

In 2006, early 2007, after the amalgamation of the 6 regional ALS's into the present-day "ALS (NSW/ACT)Limited", we developed the CNS to provide seamless telephone notification and advice by a solicitor in relation to every Aboriginal person arrested anywhere in the state".

CURRENT GENERAL LAW REGULATING THE GATHERING OF ADMISSIONS BY POLICE

60. The 'soft' regulation described above was replaced in New South Wales with the enactment of Part 10A of the NSW Crimes Act, the predecessor scheme to part 9 of LEPRA. This followed the NSW Law Reform Commission's 1990 Report 'Criminal Procedure: Police Powers of Detention and Investigation after Arrest'.

61. At a Commonwealth level and in the ACT the same thing occurred with the passage of the Crimes (Investigation of Commonwealth Offences) Act 1991. This followed the 1975 Australian Law Reform Commission's Report 2 'Criminal Investigation'.

62. This is not to say that no 'soft' regulation remains.

CRIME (CUSTODY, RIGHTS, INVESTIGATION, MANAGEMENT AND EVIDENCE)

63. Police continued to be guided by internal guidelines and rules. One example is the Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence). This document is available online at:

- http://www.police.nsw.gov.au/__data/assets/pdf_file/0007/108808/Code_CRIME_-_January_2012.pdf

64. Breaches of CRIME could amount to improper conduct for the purposes of section 138 or be otherwise relevant to an exclusionary provision.

65. CRIME in some respects merely simply states and summarises LEPRA obligations, but it does create some clear guidance for Police not emerging directly from LEPRA. Examples include:

- "Defer questioning suspects affected by alcohol or drugs until they are no longer affected".
- "Refer to the guidelines titled 'Disability issues' in the *NSW Police Handbook* if you suspect the person you are interviewing has a disability".
- "Do not do or say anything to dissuade someone in police custody from obtaining legal advice".
- "Do not conduct lengthy preliminary interviews with a suspect before a formal, electronically recorded interview at a recognised interviewing facility.
- Avoid interviewing a child at school. Where possible, interview the child at home".

66. CRIME is well worth a read for gaining an understanding of best practice police interviewing.

67. The fact of a breach of CRIME may be relevant to the section 138 discretion.¹²

¹² R v Powell, Steven [2010] NSWDC 84 paras 72 – 96 for a discussion of the relevance of a breach of CRIME.

PART 9 OF LEPRA

68. Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) “LEPRA” is a short but complex piece of legislation which gives rise to a large number of potential admissibility issues, particularly in relation to admissions.
69. The Part contains a detailed regime for the treatment of detained persons by police and has a particular focus on questioning.
70. This part of the paper firstly attempts to explain the historical basis for the introduction of Part 10A¹³ of the *Crimes Act 1900* (NSW), the predecessor legislation of the current Part 9 scheme. (Part 10A was re-enacted as Part 9 of LEPRA in 2002 and was in all respects similar).
71. It is seen that the enactment of the scheme was primarily a reaction to a number of decisions of the High Court of Australia and the Supreme Court of New South Wales which clarified the power of police to delay the taking of arrested persons to court in order to question or otherwise investigated the suspect.
72. These decisions, which ruled unlawful the police practice of delaying the taking of persons before a Court in order to question them, were based on the long standing legal principle forbidding arrest for questioning.
73. It was also a reaction to growing recognition (including by Law Reform Commissions but also by the Royal Commission into Aboriginal Deaths in Custody) of the need to formalize the rights of people in detention.
74. Secondly, this part of the paper explains the key operative provisions of Part 9.
75. It is seen that key provisions of the part are applicable both to persons who have been arrested and to persons who are in the company of police and in a state of ‘deemed arrest’.
76. Thirdly, the paper explore some admissibility issues that arise as a result of the operation of the Part including:
- Part 9 and ‘arrests’ for the purposes of questioning.
 - Breach of the investigation period limit and time outs.
 - Breach of other protective provisions in Part 9.

WHY DOES PART 9 EXIST

77. As will be explored in detail below Part 9 allows a person to be detained for the purpose of questioning and other investigation following their arrest.
78. This detention often has the effect of delaying the time that it takes for a person to be taken before a Court.

¹³ Inserted into the *Crimes Act* by the *Crimes Amendment (Detention after Arrest) Act* (No 48 of 1997)

79. This power is exceptional, in that the law has long required arrested persons to be taken before a court as soon as practicable following arrest and time taken investigating or questioning a suspect was previously not a lawful basis for extending the detention of a suspect.

80. Currently in New South Wales the requirement to take a person before a court as soon as practicable comes from a number of legislative provisions:

- Section 239 of the *Criminal Procedure Act* 1986 states, “...A person who is arrested under a warrant must be brought before a Judge, a Magistrate or an authorised officer as soon as practicable.”
- Section 99(4) of LEPRA states, “...A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.”
- Section 3 of the same Act defines “authorised officer” to mean:

“..a Magistrate or a Children’s Magistrate, or

a registrar of the Local Court, or

an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office”.

- Section 20 of the *Bail Act* 1978 (NSW) states (note that authorized officer has a different meaning in the Bail Act to LEPRA),

“..Where an accused person is refused bail by an authorised officer or is not released on bail granted by an authorised officer:

(a) the police officer for the time being in charge of the police station at which the person is in custody, or

(b) if the person is not in custody at a police station, a police officer who has custody of the person,

shall, as soon as practicable, bring the person or cause the person to be brought before a court for the purpose of having the court exercise its powers in relation to bail or for the purpose of the person being dealt with otherwise according to law”

81. In a series of High Court cases¹⁴ the High Court considered the question of whether it was consistent with similar provisions for police to delay taking an arrested person to court in order to question them for the offence for which they had been arrested.

82. In *Williams v R* (1986) 161 CLR 278 the High Court considered the following factual scenario:

“..In the early hours of the morning of 17 May 1984 police at Scottsdale, a town in the north of Tasmania, received information that the applicant had

¹⁴ Apparently commencing with *Regina v. Iorlano* [1983] HCA 43

been seen in hotel premises at Scottsdale apparently in the act of committing a burglary. The applicant fled from the scene in a motor vehicle and was eventually arrested after his car had run off the road and he had attempted to escape into the bush. The arrest was made at about 6.00 a.m. by Constable Gibson who told the applicant that he was satisfied that he was responsible for several burglaries in the northern area of Tasmania. The applicant was then taken to the police station at Scottsdale and was kept there until he could be interviewed by officers of the C.I.B. who had to come from Launceston. Those officers, Detective Sergeant Otley and Detective Canning, arrived at about 8.45 a.m. Sergeant Otley told the applicant that he wanted to speak to him about matters that had occurred at Scottsdale that morning or on the evening before. In the circumstances the learned trial judge concluded that the applicant was taken into police custody only for those crimes which he had committed at Scottsdale - namely, the crimes the subject of counts twenty-seven to twenty-nine in the indictment. The applicant was later taken in a police vehicle to Launceston, where he arrived at about 11.00 a.m. After he had been shown a number of police reports, he indicated that he had been involved in a number of offences during the previous month in other parts of Tasmania - these were the crimes that were the subject of counts one to twenty-six. At about 1.10 p.m. the detectives commenced to conduct a series of interviews with the applicant and to make records of the interviews, in the course of which the applicant confessed to the various crimes. The interviews, which related to different counts, were conducted in no particular order. The first record related to counts one and two and was completed by about 1.45 p.m.; the second related to counts twenty-seven to twenty-nine (the Scottsdale matters) and was completed by about 3.00 p.m. None of the records was signed. The last of the interviews concluded at about 8.30 p.m. At about 9.03 p.m. the applicant was taken before a police inspector to whom he confirmed the correctness of each of the records of interview. He was taken before a magistrate at 10.00 a.m. on the following day".¹⁵

83. The relevant legislative provision was Section 34A(1) of the *Justices Act 1959* (Tas) which stated:

"..Where a person has been taken into custody for an offence, he shall, unless he has been released under section 34, be brought before a justice as soon as is practicable after he has been taken into custody."

84. Brennan and Mason JJ stated at 15:

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

85. In reaching this conclusion Brennan and Mason JJ issued an invitation for legislative consideration of the issue, stating at 17:

¹⁵ *Williams v R* (1986) 161 CLR 278 Gibbs CJ at 2

“..The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. King C.J. in Reg. v. Miller (1980) 25 SASR 170, in a passage with which we would respectfully agree (at p 203) pointed out the problems which the law presents to investigating police officers, the stringency of the law's requirements and the duty of police officers to comply with those requirements - a duty which is by no means incompatible with efficient investigation. Nevertheless, the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck: see, for example, the Australian Law Reform Commission Interim Report on "Criminal Investigation", Report No. ALRC 2, Ch.4. But the striking of a different balance is a function for the legislature, not the courts. The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armory of law enforcement. It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation. If the legislature thinks it right to enhance the armory of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody”.

86. These decisions were followed by the Supreme Court of New South Wales. In *Ainsworth* (1991) 57 A Crim R 174 Hunt J considered the question of what the test of 'reasonable practicability' means in the context of a legislative requirement to bring a person before a court. Hunt J stated:

“..It permits reasonable time to be taken to decide to charge the person arrested and to prefer that charge...It does not permit any delay for the purpose of interrogating or investigating the offence, although each is permitted - provided that the arrested person is still brought before a justice when it becomes reasonably practicable to do so”.

87. In *Michaels v The Queen* (1995) 184 CLR 117 Brennan, Deane, Toohey and McHugh JJ stated:

“..on one aspect the law is quiet clear. It is unlawful for a police officer to delay taking an arrested person before a Justice in order to question the person or to make further inquiries relating to the offence for which the person has been arrested, or to some other offence”.

88. In the same case Gaudron J stated:

“..Personal liberty is the most important and fundamental of all common law rights. And it is well settled that statutory provisions are to be construed as abrogating important common law rights only to the extent that their terms clearly require that course. Nothing in s.212 of the Act requires abrogation of the common law rule that a person may not be detained merely for the purpose of questioning. Thus, as was held in Reg. v. Iorlano (23), it does not authorise delay for the purpose of questioning an arrested person. And, as was held in Williams v. The Queen (24), the same is true of s.34A(1) of the Justices Act 1959 (Tas.) and s.303(1) of the Criminal Code (Tas.) which,

respectively, are expressed in terms of the arrested person being brought before a justice "as soon as is practicable" and "without delay".

89. These authorities rest on the long standing principle that arrest for the purposes of questioning is unlawful. The decisions stand for the proposition that a necessary corollary of this principle is that extension of detention for the purposes of questioning is similarly unlawful.
90. The operation of Part 9 can therefore be understood as an exception to the general state of the law as created by the legislation discussed above and as an exception to the long standing principle that forbids detention for the purposes of questioning/investigation. It is in this sense that the part can be described as exceptional.
91. This stream of authority placed the questioning of arrested suspects into a heightened state of uncertainty and are one of the direct reasons for the existence of Part 9 of LEPR.
92. The New South Wales Law Reform Commission was tasked to investigate the matter and produced its 1990 Report 'Criminal Procedure: Police Powers of Detention and Investigation after Arrest'.¹⁶
93. The Commission identified three problems with the strict approach of the Courts stating:

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

1.52 The second problem follows from the first: it is in the interests of police, especially in complex cases, to purposely effect an after-hours arrest in order to gain substantially more time to complete their investigations. There is nothing actually unlawful in this gimmickry, but it is not a sound or ethical basis on which to operate a system of criminal investigation. In the course of the recent Royal Commission of Inquiry into the circumstances surrounding the arrest and charging of Insp. Harry Blackburn, it emerged that the arresting officers had received and followed the advice of a senior Crown Prosecutor to stage the arrest at "4:00 pm or so", rather than the planned 6:00 am, in order to give themselves more time for questioning and to avoid the Williams issue.⁷⁵

¹⁶ Report 66.

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

94. The Commission recommended (my emphasis):

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

(1) Providing clear and comprehensive rules of procedure for police to follow in dealing with suspects;

(2) Allowing police a realistic opportunity for proper investigation in the period between arrest and charging a person before a court (or release on police bail), within a regulated structure;

(3) Enunciating and enhancing the safeguards available to persons in the custody of police, so that such “rights” become meaningful, realisable, and enforceable;

(4) regularising the treatment of persons in police custody, so that this is no longer contingent on the time or day of arrest, the sophistication of the person involved, the location of the custody, or notions of “voluntariness” or “consent” on the part of the person in custody;

(5) Increasing confidence in the integrity of police investigative methods and the evidence subsequently produced in court;
and

(6) Significantly reducing delays and costs in the criminal justice system by reducing the great amount of time currently spent in criminal trials considering challenges (on voir dire) to the admissibility of Crown evidence”.¹⁷

95. The result was Part 10A of the *Crimes Act* 1900. As is clear from the recommendations and the report generally the concern of the Law Reform Commission was not solely the question of extending detention following arrest but also the need for protective safeguards for the benefit of detained persons.

96. Many of the safeguards enacted surely were inspired by the much earlier (1975) Australian Law Reform Commission Report Number 2 ‘Criminal Investigation’ which recommended in Chapter 4 titled ‘Custody and Custodial Investigation’:

¹⁷ Chapter 2 Summary of Recommendations

- A four hour 'investigation period' during which arrested persons could be questioned.
- The enactment in law of substantive rights for detained people, including a right to seek legal advice and to contact friends and relatives.
- An obligation on police to notify persons of their rights prior to questioning.
- An obligation on police to advise people of their custody status and to notify certain persons of the detained persons' whereabouts.
- Special provisions for minority groups, including Aboriginal people.

97. The Attorney-General made the following comments in his second reading speech for the *Crimes Amendment (Detention After Arrest) Act 1997* noting the role the High Court decision in *Williams* played in the development of the reform (my emphasis):

"..The Government is pleased to introduce the Crimes Amendment (Detention after Arrest) Bill. This is a very important piece of legislation. It is a significant milestone in the history of the criminal justice system of this State. For many years, the law has been that the purpose of arrest is to take a suspected person before a justice. The police have had no power to arrest and detain a person for investigation of an alleged offence. Prior to 1986 the position was interpreted by some courts with a measure of flexibility. In particular, whether or not police could delay taking a lawfully arrested person before a justice, in order to investigate the alleged offence, was arguably unclear. However, in 1986 the High Court handed down its decision in the case of Williams v The Queen. In that judgment, the High Court affirmed that there is no power to delay taking before a justice an arrested person in order to question that person or in order to complete any other investigatory procedure.

Accordingly, at common law, it is unlawful for a police officer, having the custody of an arrested person, to delay taking that person before a justice in order to provide an opportunity to investigate the person's involvement in an offence. So much has been clear in this State since 1986. The High Court observed that this rule "does nothing to assist the police in the investigation of criminal offences". Their Honours, Mr Justice Wilson and Mr Justice Dawson, stated that, "It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime." However, the court took the view that it was for the legislature, not for the courts, to address that question of balance.

The decision in Williams' case has been very much honoured in the breach over the years. Honourable members will be aware that there exists a judicial discretion to admit illegally or improperly obtained evidence. Because of the way that discretion has, on many occasions, been exercised in favour of the admission of such evidence, it could be said that the right to be free of unlawful detention has not been able to be properly exercised in practice. Where the law and practice diverge in this way, the law is inevitably tarnished. Citizens are denied the right to know the law. They can have no certainty that there will be any sanction for the breach of their liberties. That is a problem that must be remedied.

The Crimes Amendment (Detention After Arrest) Bill addresses the problem. It does so by creating a regime whereby police are empowered to detain persons in custody after arrest for the completion of investigatory procedures,

but only for strictly limited periods. A detailed system is set out whereby police and citizens will know precisely their rights and obligations. In short, the bill strikes a proper balance between allowing the police to make legitimate investigations of alleged offences on the one hand, and, on the other hand, safeguarding the rights of ordinary citizens suspected of having committed those offences”

WHAT DOES PART 9 DO

98. Part 9 allows an arrested person to be further detained for the purpose of investigation and questioning and confers certain rights and protections to detained persons subject to questioning and other investigative procedures.

PERSONS TO WHOM THE PART APPLIES

99. Section 111 states that the part applies to “...a person, including a person under the age of 18 years, who is under arrest by a police officer for an offence”.

100. Section 110 expands the category of persons considered to be under arrest, in stating:

- (2) *A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:*
 - (a) *The police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or*
 - (b) *The police officer would arrest the person if the person attempted to leave, or*
 - (c) *The police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.*

101. It is significant to note that this ‘deemed arrest’ provision is in identical terms to section 139(5) of the *Evidence Act 1995* (NSW) which requires police to caution persons who have been arrested, as such, case law in relation to that section may be of assistance where the applicability of the definition is in issue.

102. Section 113 states, “...this part does not confer any power to arrest a person, or to detain a person who has not been lawfully arrested”.

103. Section 113 is in the opinion of the writer an important qualifier as it ensures that no argument could be made that section 114 could be read with section 110(2) to create a form of detention for the purposes of questioning of persons not actually arrested by police, i.e. as a way to justify detention subject to section 114 in the absence of a previous lawful arrest.

104. The expanded definition of arrest would appear to be in the Part to ensure that the range of rights existing for persons detained pursuant to Division 3 of the Part are also applicable to persons who are not detained pursuant to the part but are nonetheless being subject to investigatory procedures.

105. This interpretation is consistent with the second reading speech for the introduction of the predecessor legislation where the Attorney-General stated:

“..Second, the bill adopts a broad concept of arrest by way of the definition in proposed section 355(2). That again is something that is of the utmost importance because of the power imbalance that could exist between police officers and persons in custody. The bill recognises that, even when a person in custody is not formally under arrest, that person may feel or believe that he or she is not free to leave the company of police. Such a perception may arise because of something said or implied by the police, but equally it may arise when the person’s belief does not arise from actions of police. The bill ensures that, where appropriate, a situation of that sort is treated in the same way as a situation in which the person is formally under arrest”.

106. The expanded definition in section 110 should therefore be understood as a mechanism to apply the range of rights contained within Division 3 of the part to persons deemed to be arrested.
107. Curiously however nowhere in Division 3 is the word ‘arrest’ or ‘arrested’ used, so as to directly bring into play the expanded definition.
108. Rather the division uses the word ‘detained’, (which could more readily be presumed to be a reference to detention pursuant to Division 2).
109. On balance however the better view would seem to be that section 110(2) must be intended to apply Division 3 rights to persons deemed to be arrested and that it does in fact succeed in doing so. No other purpose for the expanded definition is discernable. Persons arrested are as a question of law in a state of detention and it should be considered that the use of the word detained/detention in Division 3 triggers the application of section 110 despite the lack of precision in the language used.
110. Section 113 is also of importance in ensuring that the part has no lawful application to persons whose initial arrest was unlawful. As is discussed below the admissibility of any investigation and questioning undertaken during a period while a person was in such custody will need to be considered.

DETENTION FOR THE INVESTIGATION PERIOD

111. Division 2 of the part begins with section 114, the most significant operative provision of the part.
112. Sub-section (1) states, *“a police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115”.*
113. Sub-section (2) limits this detention in stating, *“..a police officer may so detain a person for the purpose of investigating whether the person committed the offence for which the person is arrested”.*
114. Further sub-sections make it clear that the person may also be investigated for other offences during this investigation period where police form a reasonable suspicion as to the person’s involvement in such an offence. Importantly however the section does not grant another investigation period or increase the length of the investigation period in those circumstances.

LENGTH OF THE INVESTIGATION PERIOD AND ITS EXTENSION

115. Section 115 states that the investigation period is:

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

116. Section 116 requires police to take into account a range of factors in determining what reasonable time is and states in sub-section (2) that, *“..the burden lies on the prosecution to prove on the balance of probabilities that the period of time was reasonable”.*

117. There is perhaps a tendency among some to assume that if an interview or other procedure was undertaken within the 4 hour period that it is legitimate and the fruits admissible. This assumption is a dangerous one as the legislation is clear that 4 hours is the maximum period (unless extended) not the default permissible period of detention.

118. Section 117 is an important qualifier to the investigation period provisions. It stated that a number of time periods are to be disregarded in determining how much of the investigation period has lapsed.

119. These exceptions include:

- “(a) any time that is reasonably required to convey the person from the place where the person is arrested to the nearest premises where facilities are available for conducting investigative procedures in which the person is to participate,*
- (b) any time that is reasonably spent waiting for the arrival at the place where the person is being detained of police officers, or any other persons prescribed by the regulations, whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation,*
- (c) any time that is reasonably spent waiting for facilities for complying with section 281 of the Criminal Procedure Act 1986 to become available,*
- (d) any time that is required to allow the person (or someone else on the person’s behalf) to communicate with a friend, relative, guardian, independent person, Australian legal practitioner or consular official,*
- (e) any time that is required to allow such a friend, relative, guardian, independent person, Australian legal practitioner or consular official to arrive at the place where the person is being detained,*
- (f) any time that is required to allow the person to consult at the place where the person is being detained with such a friend, relative, guardian, independent person, Australian legal practitioner or consular official,*

- (g) *any time that is required to arrange for and to allow the person to receive medical attention,*
- (h) *any time that is required to arrange for the services of an interpreter for the person and to allow the interpreter to arrive at the place where the person is being detained or become available by telephone for the person,*
- (i) *any time that is reasonably required to allow for an identification parade to be arranged and conducted,*
- (j) *any time that is required to allow the person to rest or receive refreshments or to give the person access to toilet and other facilities as referred to in section 130,*
- (k) *any time that is required to allow the person to recover from the effects of intoxication due to alcohol or another drug or a combination of drugs,*
- (l) *any time that is reasonably required to prepare, make and dispose of any application for a detention warrant or any application for a search warrant or crime scene warrant that relates to the investigation,*
- (m) *any time that is reasonably required to carry out charging procedures in respect of the person,*
- (n) *any time that is reasonably required to carry out a forensic procedure on the person under the Crimes (Forensic Procedures) Act 2000, or to prepare, make and dispose of an application for an order for the carrying out of such a procedure”.*

120. As with section 116, “...the burden lies on the prosecution to prove on the balance of probabilities that the particular time was a time that was not to be taken into account”.

121. Section 118 allows an ‘*authorised officer*’¹⁸ upon the application, in person or over the telephone, of a police officer, to extend the investigation period for one period of up to a maximum of 8 hours if satisfied:

- “(a) *the investigation is being conducted diligently and without delay, and*
- (b) a further period of detention of the person to whom the application relates is reasonably necessary to complete the investigation, and*
- (c) there is no reasonable alternative means of completing the investigation otherwise than by the continued detention of the person, and*

18 Defined in section 3 of the Act, authorised officer means:

- (a) a Magistrate or a Children’s Magistrate, or
- (b) a registrar of the Local Court, or
- (c) an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office.

(d) circumstances exist in the matter that make it impracticable for the investigation to be completed within the 4-hour period”.

SAFEGUARDS RELATING TO PERSONS IN CUSTODY FOR QUESTIONING

122. Division 3 of the Part creates a bundle of rights attaching to persons being detained.

WHO DO THE SAFEGUARDS APPLY TO?

123. The title of the division curiously only refers to persons detained for ‘questioning’, however it is clear the Division is not limited to persons being questioned and that the detention can be for the purpose of investigating the persons involvement in the offence, or other offences, and a variety of ‘investigative procedures’ might occur during that period. See for example section 123 and its reference to ‘investigative procedures’.

124. The rights created by the division are clearly bestowed upon arrested persons whose detention has been extended pursuant to section 114.

125. As discussed above, in the author’s view the safeguards also apply to persons in a state of ‘deemed arrest’ pursuant to section 110.

126. The Division would appear to have no application to arrested persons not subject to detention under section 114 (such as persons arrested for breach of bail, on sentence warrants, parole warrants and so on), except where the commencement of an investigative procedure triggers the application of the expanded definition in section 110(2) and the application of the Division 3 rights.

WHAT ARE THE SAFEGUARDS

127. The safeguards contained in Division 3 are in the form of legislative obligations placed on the ‘custody manager’.

128. This term is defined in section 3 to mean:

“..the police officer having from time to time the responsibility for the care, control and safety of a person detained at a police station or other place of detention”.

129. Schedule 2 to the *Law Enforcement (Powers and Responsibilities) Regulation 2002* is a ‘Guideline to Custody Managers’ and is prescriptive as to what such persons should do and not do in the conduct of their duties under the Act. They are well worth reading and contain reference to the treatment of aboriginal people.

130. Under Division 3 a person detained (or deemed to be under arrest) must:

- Be cautioned, section 122(1)(a)
- Be given a document, being, *“..a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised officer and*

that the person, or the person's legal representative, may make representations to the authorised officer about the application" under section 122 (1) (b).

- Be given the opportunity to communicate in private whether in person or on the telephone with a friend, relative, guardian or independent person and Australian legal practitioner, section 123¹⁹
- Be told of, *"..of any request for information as to the whereabouts of the person made by a person who claims to be a friend, relative or guardian of the detained person"*, section 126²⁰
- Be told of, *"..of any request for information as to the whereabouts of the person made by a person who claims to be an Australian legal practitioner representing the detained person, or a consular official of the country of which the detained person is a citizen, or a person (other than a friend, relative or guardian of the detained person) who is in his or her professional capacity concerned with the welfare of the detained person"*, section 127.²¹
- Be provided with an interpreter, section 128.²²
- Receive *"..medical attention if it appears to the custody manager that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody manager"*.
- Be given, *"..reasonable refreshments and reasonable access to toilet facilities" and be given "facilities to wash, shower or bathe and (if appropriate) to shave" if "it is reasonably practicable to provide access to such facilities, and the custody manager is satisfied that the investigation will not be hindered by providing the person with such facilities" under section 130.*

131. Section 131 creates an obligation on the custody manager to maintain records in relation to all detained persons.²³

132. This provision is of central practical importance in the conduct of admissibility arguments concerning evidence gathered during procedures to which Part 9 applies.

133. The section states:

- ".. (1) The custody manager for a detained person must open a custody record in the form prescribed by the regulations for the person.*
- (2) The custody manager must record the following particulars in the custody record for the person:*
 - (a) the date and time:*
 - (i) the person arrived at the police station or other place where the custody manager is located, and*

¹⁹ Subject to the exceptions in section 125 of the Act.

²⁰ Subject to the exceptions contained in the section.

²¹ Subject to the exceptions contained in the section.

²² Subject to the exceptions contained in the section.

²³ Regulations made pursuant to the Act contain additional requirements in relation to these records.

- (ii) *the person came into the custody manager's custody,*
- (b) *the name and rank of the arresting officer and any accompanying officers,*
- (c) *the grounds for the person's detention,*
- (d) *details of any property taken from the person,*
- (e) *if the person participates in any investigative procedure, the time the investigative procedure started and ended,*
- (f) *details of any period of time that is not to be taken into account under section 117,*
- (g) *if the person is denied any rights under this Part, the reason for the denial of those rights and the time when the person was denied those rights,*
- (h) *the date and time of, and reason for, the transfer of the person to the custody of another police officer,*
- (i) *details of any application for a detention warrant and the result of any such application,*
- (j) *if a detention warrant is issued in respect of the person, the date and time a copy of the warrant was given to the person and the person was informed of the nature of the warrant and its effect,*
- (k) *the date and time the person is released from detention,*
- (l) *any other particulars prescribed by the regulations.*
- (3) *The custody manager is responsible for the accuracy and completeness of the custody record for the person and must ensure that the custody record (or a copy of it) accompanies the person if the person is transferred to another location for detention.*
- (4) *The recording of any matters referred to in this section must be made contemporaneously with the matter recorded in so far as it is practicable to do so.*
- (5) *As soon as practicable after the person is released or taken before a Magistrate or authorised officer or court, the custody manager must ensure that a copy of the person's custody record is given to the person.*

134. Invariably in voir dire hearings concerning such evidence there is information of use in these documents.

ADMISSIBILITY ISSUES ARISING FROM THE OPERATION OF PART 9

ARREST FOR QUESTIONING

135. Consistent with the deemed arrest provision in section 110 of the Act police regularly apply Part 9 of the Act to persons who have not been arrested

136. This is perfectly permissible, to the extent that Division 3 rights are given, except if in doing so police actually do arrest the person or act so as to convey the direct impression to the person that they have been arrested.
137. Such an impression can be given simply by the provision of standard documents issued to persons pursuant to the Part.
138. An example of this can be seen from the judgment of Judge Nicholson in the matter of *R v Steven Powell* [2010] NSWDC 84 (8 March 2010).
139. The factual scenario in *Powell* was that an accused had been remanded in custody in respect of an offence after refusing a police interview. Subsequent to his remand police visited him at Wellington prison (without notifying the ALS, his legal representatives when he was remanded in custody) and arranged for his transfer to police custody pursuant to a Local Leave Order issued pursuant to section 25 of the *Crimes (Administration of Sentence) Act 1999*.
140. Police then used this order to transfer Mr. Powell into police custody at a designated part of the prison. He was then interviewed.
141. Judge Nicholson stated as follows in relation to the question of whether Mr. Powell had been arrested (my emphasis):

"..24. Senior Constable Renee Smith, Detective Senior Constable Peter Ensor and Senior Constable Simon Thorsteinsson made their way to Wellington Correctional Centre for the purposes of speaking to a number of inmates. Steven Powell was included among their lists of inmates to be spoken to. Upon arrival the three police officers were escorted by custodial staff to the Wellington Police Control Area. About 12.30pm or perhaps a little before that time Steven Powell was brought to the control area and at least technically remained under secure escort of correctional officers at all times.

25. Senior Constable Renee Smith received the accused at the Police Custodial Centre at Wellington Correctional Centre and introduced him to the Custody Manager, Senior Constable Thorsteinsson who entered him into police custody at 12.36pm. Whether he was informed orally that he was under arrest is not clear but he was certainly informed in writing that he was arrested. That arrest is confirmed by the custody records as occurring at 12.35pm by Detective Senior Constable Renee Smith. The grounds for arrest are identified as B & E, SMV. B & E I assume stands for break and enter and SMV, as I understands it, steal motor vehicle.

26. He was certainly informed orally by Senior Constable Thorsteinsson that he was "here in custody with us". He was given the standard Caution and Summary of Pt 9 of LEPRA. The first three sentences under the heading IMPORTANT are worth noting:

"This Form tells you about some of the things the police will do for you when you are in their custody at a police station...You have been arrested by police and they can keep you in their custody for a reasonable time to conduct their investigations." (My emphasis)

27. The Caution and Summary document is signed by Senior Constable Thorsteinsson as an acknowledgement that at 12.40pm he had informed the detained person of the information contained in the form”.

142. It can thus be seen that the standard police documents created pursuant to Part 9 may have played a crucial role in the accused being effectively arrested.
143. Another fairly common police practice is to actually arrest a person in order to facilitate the application of Part 9 to them. The author recently appeared in an ALS Dubbo Local Court matter where a suspect in a matter involving an offence of aggravated dangerous driving attended voluntarily at a police station to be interviewed.
144. The client was immediately informed orally he was under arrest, entered into Part 9 custody and an interview subsequently took place. The client was released at the conclusion of the interview and subsequently served a future CAN.
145. It was difficult upon a reading of the record of interview to see how its content could have undermined any reasonable suspicion that led to the arrest. The overwhelming inference was that the person had been arrested in order to apply Part 9 to them and to conduct a record of interview. This can only be considered an arrest for questioning and accordingly unlawful. The admissibility of any interview given in these circumstances will need to be determined under section 138 of the *Evidence Act 1995*.
146. In another recent ALS Wentworth Children’s Court matter the author was involved in, the arresting officer admitted in cross-examination the purpose of the “arrest by appointment” in the foyer of the Wentworth Police Station was to “apply Part 9” to the 12 year old boy. The admissions made subsequently were excluded by the Magistrate on the basis the arrest was an arrest for questioning.
147. By contrast in another matter that the author was recently involved in a more sophisticated approach was evident. Police were seeking to interview a suspect who had not been arrested. The suspect was informed that she was not under arrest and was given amended Part 9 documents which made it clear that she was not detained.
148. The amended documents stated that she was being questioned subject to “section 110 of the LEPPRA” (presumably a reference to the deemed arrest definition) and that she was free to leave at any time.
149. These issues would seem to generally arise from a lack of understanding among some police of the actual purpose of Part 9 and the inter relationship between the operation of the Part and the arrest powers in section 99 of the Act.

EXTENSION OF DETENTION FOLLOWING AN UNLAWFUL ARREST

150. Section 113(1) states:

*“..This Part does not:
(a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested”*

151. This section means that a person who remains in custody post-arrest pursuant to section 114 may be in unlawful custody. It will therefore always be important when considering the admissibility of evidence gathered during an investigation period to consider the lawfulness of the actual arrest. (Generally the lawfulness of an arrest needs to be considered under the relevant sections of LEPR including Parts 8 and 15 of the Act).

EXTENSION OF DETENTION FOR THE PURPOSE OF INVESTIGATING MATTERS FOR WHICH THE PERSON HAS NOT BEEN ARRESTED

(Extension of Detention when no Investigation Period Available)

152. In a recent Dubbo District Court matter of *Regina v Dwayne Peckham* [2011] NSWDC (15 December 2011) ADCJ Lerve dealt with a situation where a suspect had been arrested on a sentence warrant issued pursuant to section 25 of the *Crimes (Sentencing Procedure) Act* 1999 and taken to a police station in Sydney.

153. Police then detained the suspect pursuant to Part 9 of LEPR in order that he could be interviewed by Dubbo police in relation to an armed robbery matter, for which the evidence suggested he was not arrested in relation to.

154. Time outs under section 117 of LEPR were recorded in the custody management records in respect of the armed robbery matter and the accused ultimately detained for over 24 hours before being taken to Court.

155. The fundamental problem with this approach is that there will generally be no 'investigation period' available to police when a person has been arrested pursuant to a sentence warrant as the person has already been convicted. It will generally follow that there can be no detention, "*..for the purpose of investigating whether the person committed the offence for which the person is arrested*" and police will be unable to justify detention for the purpose of investigation under section 114.

156. It was accordingly therefore not open to police to extend the detention of the accused in respect of the armed robbery matter.

157. Acting Judge Lerve stated at 29:

"..In these circumstances I am left with the impression that the accused was in fact being detained not for the purpose prescribed by the relevant legislation but rather to ensure that the police from Dubbo had an opportunity to question the accused. The initial arrest of the accused on the warrant was lawful, but his detention thereafter was not. This is reason enough to exclude the record of interview and the evidence of the DNA".

158. This admissibility argument will be potentially open whenever a person has been arrested for a matter where there is no investigation period available but where the person has been investigated for other matters for which they have not been arrested for. If detention is extended in such circumstances there will almost certainly be a question as to unlawful detention.

DETENTION WHEN THE INVESTIGATION PERIOD HAS BEEN EXCEEDED

159. It is important to note that section 114 states:

“..If, while a person is so detained, the police officer forms a reasonable suspicion as to the person’s involvement in the commission of any other offence, the police officer may also investigate the person’s involvement in that other offence during the investigation period for the arrest. It is immaterial whether that other offence was committed before or after the commencement of this Part or within or outside the State”.

160. This means that the question of whether investigations in relation to a matter (for which a person has not been arrested for) have occurred within a reasonable period for the purposes of section 115 will depend entirely on what is the reasonable investigation period for the matter the person has actually been arrested for.

161. For example, a four hour investigation period for a common assault matter may be unreasonable. It will be irrelevant to that question that the police were also investigating the person for a murder for which they had not been arrested.

162. In *R v Phung* [2001] NSWSC 115 Wood CJ stated of the predecessor legislation to LEPR:

“63 Additionally, I observe that police should not automatically assume that their obligations under the legislation, can be met by a rote reading of the requisite cautions and advice, or by the handing over of printed forms for an accused to read for himself or herself. Nor should they assume that compliance can be proved by the securing of a simple signature or initial on the custody management report. There is a positive obligation, under the legislation, to ensure that a child or vulnerable person can understand what is being said - for example see regulation 29. That may extend to satisfying themselves that he or she can speak English or can read. Moreover, the regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights - see regulation 20.

64 The final observation that needs to be made, in this context, is that the onus of proving compliance with the legislative regime rests upon the Crown. That means that it will need to have the necessary evidence available, if an issue is taken up in relation to the interview of a child as well as in relation to all other accused who are interviewed or subjected to forensic tests in circumstances attracting the legislation. Unless police secure that evidence, then it may well be necessary, as in this case it was, for the evidence to be excluded”.

CRIMES (FORENSIC PROCEDURES) ACT

163. This act contains an obligation on police in respect of the questioning of persons subject to forensic procedures.

164. Section 45 of the Crimes (Forensic Procedures) Act states:

45 No questioning during forensic procedure

(1) A forensic procedure must not be carried out while the suspect is being questioned. If questioning has not been completed before the forensic

procedure is to be carried out, it must be suspended while the forensic procedure is carried out.

- (2) *In this section, a reference to **questioning** of a suspect is a reference to questioning the suspect, or carrying out an investigation (in which the suspect participates), to investigate the involvement (if any) of the suspect in any offence (including an offence for which the suspect is not under arrest).*

165. Section 46 states:

46 Suspect must be cautioned before forensic procedure starts

Before anyone starts to carry out a forensic procedure on a suspect, a police officer must caution the suspect that he or she does not have to say anything while the procedure is carried out but that anything the person does say may be used in evidence

PART 1 C OF THE CTH CRIMES ACT

166. Part 1C contains a regime for the detention and treatment of suspects that is in many respects similar to that contained in Part 9 of LEPRA.

167. The regime contained in Part 1C of the Commonwealth Crimes Act applies to the investigation of Commonwealth offences and to the investigation of ACT offences. This is so because of the combined effect of section 187 of the ACT Crimes Act and section 23A(6) of the Commonwealth Crimes Act.

EXTENSION OF DETENTION

168. Under section 23C a person can be detained for the investigation period for the purpose of investigating whether they have committed the offence for which they are arrested or another offence.

169. 'Investigation period' is defined in section 23C and 23DB (my emphasis):

(4) For the purposes of this section, but subject to subsections (6) and (7), the investigation period begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances, but does not extend beyond:

(a) if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander—2 hours; or

(b) in any other case—4 hours;

after the arrest, unless the period is extended under section 23DA.

(5) In ascertaining any period of time for the purposes of this section, regard shall be had to the number and complexity of matters being investigated.

170. Sub-section 6 contains special provision is made for circumstances where a person has been arrested more than once in the previous 48 hours, with the investigation period for the first matter to be reduced from the second, unless one of the exceptions applies.

TIME OUTS UNDER PART 1C

171. Sub-section 7 provides a list of "time outs" similar to the LEPRA provision. (As in Part of LEPRA the prosecution has the burden to prove a time out applies). Time not be counted includes time:

(a) to allow the person to be conveyed from the place at which the person is arrested to the nearest premises at which the investigating official has access to facilities for complying with this Part;

(b) to allow the person, or someone else on the person's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter or other person as provided by this Part

(c) to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place;

(d) to allow the person to receive medical attention;

(e) because of the person's intoxication;

(f) to allow for an identification parade to be arranged and conducted;

(g) to allow the making of an application under section 3ZQB or the carrying out of a prescribed procedure within the meaning of Division 4A of Part IAA;

(h) to allow the making and disposing of an application under section 23D, 23WU or 23XB;

(i) to allow a constable to inform the person of matters specified in section 23WJ;

(j) to allow the person to rest or recuperate;

(k) to allow a forensic procedure to be carried out on the person by order of a magistrate under Division 5 of Part ID;

(l) because section 23XGD applies and the time is to be disregarded in working out a period of time for the purposes of that section.

(7A) To avoid doubt, subsection (7) does not prevent the person being questioned during a time covered by a paragraph of subsection (7), but if the person is questioned during such a time, the time is not to be disregarded.

Evidentiary provision

(8) In any proceedings, the burden lies on the prosecution to prove that:

(a) the person was brought before a judicial officer as soon as practicable; or

(b) any particular time was covered by a provision of subsection (7).

EXTENSION OF THE INVESTIGATION PERIOD

172. Section 23D creates a regime for further judicial extension of detention in certain circumstances in respect of 'serious commonwealth offences'. (Defined to include an offence punishable by imprisonment for more than 12 months).

173. Under sub-section 3(D) the Magistrate must be made aware if the suspect in respect of whom extension is proposed is aboriginal.

174. Under section 23DA the Magistrate may extend detention if (my emphasis):

(2) Subject to subsection (3), the magistrate may extend the investigation period, by signed written instrument, if satisfied that:

(a) the offence is a serious Commonwealth offence (other than a terrorism offence); and

(b) further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another serious Commonwealth offence; and

(c) the investigation into the offence is being conducted properly and without delay; and

(d) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

175. Section 23DB through to 23DF contains a special regime for terrorism offences.

DIVISION 3 RIGHTS

176. Division 3 bestows a number of beneficial rights upon detained suspects in much the same way as Division 3 of Part 9 of LEPR.

177. These rights must be provided for, unless an exception contained in section 23L applies.

178. These rights include:

23F - Cautioning persons who are under arrest or protected suspects

(1) Subject to subsection (3), if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.

(2) The investigating official must inform the person of the caution in accordance with subsection (1), but need only do so in writing if that is the most appropriate means of informing the person.

(3) Subsections (1) and (2) do not apply so far as another law of the Commonwealth requires the person to answer questions put by, or do things required by, the investigating official.

23G Right to communicate with friend, relative and legal practitioner

(1) Subject to section 23L, if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, inform the person that he or she may:

(a) communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and

(b) communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for a legal

practitioner of the person's choice to be present during the questioning;

and the investigating official must defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication and, if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning.

(2) Subject to section 23L, if a person is under arrest or a protected suspect and wishes to communicate with a friend, relative or legal practitioner, the investigating official must:

(a) as soon as practicable, give the person reasonable facilities to enable the person to do so; and

(b) in the case of a communication with a legal practitioner—allow the legal practitioner or a clerk of the legal practitioner to communicate with the person in circumstances in which, as far as practicable, the communication will not be overheard.

(3) Subject to section 23L, if a person is under arrest or a protected suspect and arranges for a legal practitioner to be present during the questioning, the investigating official must:

(a) allow the person to consult with the legal practitioner in private and provide reasonable facilities for that consultation; and

(b) allow the legal practitioner to be present during the questioning and to give advice to the person, but only while the legal practitioner does not unreasonably interfere with the questioning.

23K Persons under 18

(1) Subject to section 23L, if an investigating official:

(a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is under 18; or

(b) believes on reasonable grounds that a person who is under arrest or a protected suspect is under 18;

the official must not question the person unless an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard.

(2) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.

(3) In this section:

interview friend, in relation to a person to whom subsection (1) applies, means:

- (a) a parent or guardian of the person or a legal practitioner acting for the person; or
 - (b) if none of the previously mentioned persons is available—a relative or friend of the person who is acceptable to the person; or
 - (c) if the person is an Aboriginal person or a Torres Strait Islander and none of the previously mentioned persons is available—a person whose name is included in the relevant list maintained under subsection 23J(1); or
 - (d) if no person covered by paragraph (a), (b) or (c) is available—an independent person.
- (4) The rights conferred by this section are in addition to those conferred by section 23G but, so far as compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.

23M Providing information relating to persons who are under arrest or protected suspects

- (1) An investigating official must inform a person (the first person) who is under arrest or a protected suspect of any request for information as to his or her whereabouts by any of his or her relatives, friends or legal representatives.
- (2) The investigating official must then provide that information to the other person unless:
- (a) the first person does not agree to the provision of that information; or
 - (b) the investigating official believes on reasonable grounds that the other person is not the first person's relative, friend or legal representative.
- (3) This section has effect subject to section 23L.

23N Right to interpreter

Where an investigating official believes on reasonable grounds that a person who is under arrest or a protected suspect is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language, the official must, before starting to question the person, arrange for the presence of an interpreter and defer the questioning or investigation until the interpreter is present.

23P Right of non-Australian nationals to communicate with consular office

- (1) Subject to section 23L, if a person who is under arrest or a protected suspect is not an Australian citizen, an investigating official must, as soon as practicable:

(a) inform the person that if he or she requests that the consular office of:

(i) the country of which he or she is a citizen; or

(ii) the country to which he or she claims a special connection;

be notified that he or she is under arrest or a protected suspect (as the case requires), that consular office will be notified accordingly; and

(b) if the person so requests—notify that consular office accordingly; and

(c) inform the person that he or she may communicate with, or attempt to communicate with, that consular office; and

(d) give the person reasonable facilities to do so; and

(e) forward any written communication from the person to that consular office; and

(f) allow the person a reasonable time to, or to attempt to, communicate with that consular office.

(2) Without limiting subsection (1), an investigating official must not start to question the person unless paragraphs (1)(c), (d) and (f) have been complied with. Investigation of Commonwealth offences Part IC Obligations of investigating officials Division 3 Section 23Q Crimes Act 1914 367

23Q Treatment of persons under arrest

A person who is under arrest or a protected suspect must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.

23U Tape recording of information required to be given to person under arrest

(1) If a person is under arrest or a protected suspect, an investigating official who is required by this Part to give the person certain information (including a caution) must tape record, if practicable, the giving of that information and the person's responses (if any).

(2) In any proceedings, the burden lies on the prosecution to prove whether it was practicable to tape record the giving of that information and the person's responses (if any).

CURRENT ABORIGINAL SPECIFIC PROTECTIONS

179. Much of the historical regulation of the treatment of Aboriginal suspects was concerned in part with distinguishing between 'tribal' and 'non-tribal' aboriginals or 'full blood' or mixed race Aboriginals. It was often implicit (or explicit) that the application of the protective regime should depend on the degree of 'Aboriginality' of the suspect.

180. The judgment of Wells J in *R v Sydney Williams* (cited above) was a classic example of this approach:

"..For example, circumstances may vary enormously with the person about to be questioned. At one end of the scale, an investigating officer may encounter an aboriginal native (whether full blooded or less than full blooded) with quite an advanced formal education, well acquainted with his rights and duties as a citizen, fully in command of the situation, and no more affected by the presence of police officers than the average white Australia. At the other end of the scale, an investigating officer may wish to question a person who turns out to be a full blooded aboriginal native, living with his tribe, and knowing no or virtually no English. In between there will be an enormous variety of cases. Where the aboriginal is of the kind first mentioned, it would be a work of supererogation²⁴ to insist that questioning take place only in the presence of a field officer or Community Welfare Worker, and with the assistance of an interpreter; the person being questioned might well resent an unwarranted paternalism, and wish to handle his own affairs in his own way".

181. This approach is long gone under LEPRA and the Cth Crimes Act. The terms 'Aboriginal' and Torres Strait islander are used without qualification.

182. The terms are defined in the Dictionary to LEPRA and the Cth Crimes Act:

"Aboriginal person means a person who:

- (a) is a member of the Aboriginal race of Australia, and*
- (b) identifies as an Aboriginal person, and*
- (c) is accepted by the Aboriginal community as an Aboriginal person".*

"Torres Strait Islander means a person who:

- (a) is a member of the Torres Strait Island race, and*
- (b) identifies as a Torres Strait Islander, and*
- (c) is accepted by the Torres Strait Island community as a Torres Strait Islander".*

"Aboriginal person" means a person of the Aboriginal race of [Australia](#).

²⁴ To do more than is required, ordered, or expected.

"Torres Strait Islander" means a descendent of an indigenous inhabitant of the Torres Strait Islands".

183. Notwithstanding the fact that Aboriginal people are deemed to vulnerable by the legislation in an unqualified manner there is case law to the effect that the actual degree of vulnerability is to be considered.

184. Ipp JA in *R v Mark Helmut* [2001] NSW CCA 372 stated at para 6-12 (my emphasis):

"6 During argument in the appeal the Court raised the issue whether, in determining whether evidence obtained in contravention of cl 28 should be admitted pursuant to s 138 of the Evidence Act, the judge should have regard to the particular characteristics of the Aboriginal person from whom the evidence was obtained in order to assess that person's capacity to deal adequately with police questioning in the absence of legal representation. This was not a topic directly addressed by Bell J in deciding that the evidence should be admitted.

7 Counsel for the Crown submitted that the question should be answered in the negative. She pointed out that the legislation made no allowance for distinguishing between Aboriginal persons on the basis of an assessment of degree of vulnerability. She submitted that the Regulation imposes safeguards for all persons falling within the category of vulnerable persons, irrespective of the actual vulnerability of the individual.

8 The words "desirability" and "undesirability" in s 138(1) are of very broad import. Section 138(3) sets out matters that are to be taken into account in making a determination under s 138(1) but specifically stipulates that they do not limit the matters that the Court may take into account. The general tenor of s 138 does not reflect an intention to confine the inquiry.

9 In my view, the argument advanced by the Crown overlooks the fact that some human beings are more vulnerable in facing police interrogation than others. Many factors bear upon an individual's vulnerability. Age, education, personality, and general experience of life are some that are relevant to an individual's capacity to deal with police questioning. Plainly, that capacity varies from individual to individual. This means that a contravention of cl 28 must have different consequences depending upon the particular characteristics of the individual who is interviewed by the police.

10 In my view, the consequences to the particular individual of a contravention of cl 28 are highly relevant to a determination under s 138(1). This was accepted in principle in *R v Phung & Huynh* [2001] NSWSC 115 where Wood CJ at CL was required to make a determination under s 138(1) in regard to a police interview which had involved contraventions of various statutes, including the Regulation (although, not cl 28). In holding that the interview should not be admitted, his Honour said:

"I take into account the fact that [the accused person] had a background of drug addiction, that he was separated from his parents, and that he had a limited education and capacity to read English. I also take into account the fact, it would seem, that he had used drugs within the 24 hours preceding the interview, a period during which he had allegedly been involved in two separate instances of serious criminality,

and which was likely as a consequence, to have been a somewhat turbulent period for him”.

11 Put in another way, the consequences in question may make it unfair for the evidence to be admitted. In my view, considerations of fairness are to be taken into account in making a determination under s 138(1). I appreciate that s 90 of the Act deals specifically with evidence that should not be admitted because its use may be unfair, but that is no reason to exclude considerations of fairness from s 138. The use of particular evidence may not be so unfair as to warrant refusal under s 90, but when taken with other matters may be refused under s 138. The two sections address different categories of circumstances and the considerations relevant to each are not mutually exclusive. See in this regard **R v Phung & Huynh** where Wood CJ at CL applied considerations of fairness in deciding under s 138 to refuse to admit evidence of a police interview different to that referred to above. As his Honour put it:

“ I would exclude the evidence, since I am of the view that the apparent failure of those concerned to secure compliance with the regime gives rise to an unfairness, and outweighs the probative value of the admissions obtained, powerful as they might have been”.

12 In any event, in my view, the issue raised is resolved by s 138(3)(d) which requires the Court to take into account the “gravity” of the contravention concerned. I do not see how the gravity can be considered without reference to the consequences of the contravention on the individual concerned. A contravention of cl 28 involving an Aboriginal youth, who does not have a good command of English, who has had no dealings with police, who has lived his entire life in, say, desert surroundings and has never lived in a town or city, could well be severe. On the other hand, the consequences if the Aboriginal person is of mature years, has had many dealings with police and is not intimidated by the idea of being questioned by them, and who, generally, may be regarded as a well educated, sophisticated and worldly wise person, are likely to be minimal.

185. Hulme J stated in *Helmout* to similar effect at para 40:

“There can be no doubt that in at least many cases any consideration of the gravity of the impropriety of contravention to which s138 requires attention will involve a consideration of the particular accused’s personal characteristics. Demonstrably a breach of clause 28 in the case of an uneducated and ignorant Aboriginal would be a graver contravention than in the case of one who was in fact a practicing criminal lawyer. Thus I disagree with the submissions advanced on behalf of the Crown to the effect that, as all Aboriginal persons are regarded by the Crimes (Detention after Arrest) Regulation as “vulnerable”, there is no occasion to consider their situation individually. A fortiori, is this so as the expression “vulnerable person” is defined to include not only aboriginals but also children (necessarily of a wide variety of ages) and persons with impaired intellectual functioning (whose degrees of impairment are also likely to extend over a wide range).

Thus as a general proposition a judge should, when considering s138 and in particular the requirements of s138(3)(d), direct attention to the Appellant’s personal characteristics”.

186. Sperling J in *Helmout* stated at para 62:

“Clause 28 of the regulation operates whenever the person concerned is known to be an Aborigine. If the clause is not complied with, there is an illegality. When one comes, then, to s138(1), considerations relevant to the weight to be given to the illegality will include the actual vulnerability of the person concerned to police questioning by reason of his or her aboriginality (if there is any such actual vulnerability) and, necessarily, the nature and extent of any such vulnerability and its consequences (if any).”

To that extent, I agree with what Ipp AJA and Hulme J have written concerning the relevance of actual vulnerability. Otherwise, I would prefer to reserve for a future occasion what are, to my mind, a number of difficult and problematic questions. In particular, I doubt whether a trial judge is bound to consider the question of actual vulnerability arising from aboriginality in a case such as this, where that was not raised as a consideration in argument at the trial. I also doubt whether an appellant can rely on the trial judge not having adverted to actual vulnerability arising from aboriginality in the absence of evidence of such actual vulnerability, appearing from the trial record or otherwise shown by affidavit to have been evident. Such questions can be resolved, if necessary, in a future case where determination of those questions is required and where the questions involved would be more fully argued”.

187. An appropriate position may be that vulnerability is deemed and must be assumed (in a manner free from stereotypical and subjective assumptions). But variations from the standard deemed degree of vulnerability that favor the accused can be proven. It would seem anomalous indeed that legislation should deem someone vulnerable without qualification and it then be suggested that the reverse can be proved.
188. Judge Nicholson considered the same issue in *R v Steven Powell* [2010] NSWDC 84 (8 March 2010) and stated at 102-104 (my emphasis)

*“Nothing said by Ipp AJA in *R v Mark Helmut* [2001] NSW CCA 372, is to be understood as diminishing the requirement that an Aboriginal person is to be regarded by police as a vulnerable person for the purposes of Part 9 of LEPR.*

Given that LEPR and the associated regulations, classifying Aboriginal persons as vulnerable, was passed by the New South Wales Parliament, it is difficult to understand the extreme example of an Aboriginal youth his Honour selected in paragraph 12 of his Honour’s judgment. The number of Aboriginals in New South Wales who would replicate the metaphorical youth described by his Honour in that paragraph are minimal or miniscule. There may be more of them in Western Australia where his Honour earlier practised.

One must assume, when the New South Wales Parliament passed the act and approved the Regulations, it well knew the general profile of Aboriginals resident in all areas of New South Wales, city, regional and rural. It may well make sense that a Court evaluating the affront to a vulnerable person would have regard to the level of vulnerability. I am far from convinced that a custody officer involved in an investigative procedure is excused from complying with Regulation 24 unless the Custody Manager reasonably

believes the person is not Aboriginal. That is because there are wide spread cultural norms among Aborigines that contribute to their vulnerability. These include, but are not limited to, a desire to avoid confrontation with strangers, or authority figures, and a predisposition to agree with propositions put to them, even though adverse to their interests. While alcohol, drugs, mental health issues, education and experience in European culture may dissipate these cultural norms, the norms are well recognised among anthropologists, lawyers, and I believe, the police”.

PART 9 OF LEpra – SPECIAL PROVISIONS FOR VULNERABLE PEOPLE (INCLUDING ABORIGINAL AND TORREST STRAIT ISLANDER PERSONS

189. Section 112 of the Act allows regulations to be made which modify the application of the Part to:

- (a) *persons under the age of 18 years, or*
- (b) *Aboriginal persons or Torres Strait Islanders, or*
- (c) *persons of non-English speaking background, or*
- (d) *persons who have a disability (whether physical, intellectual or otherwise).*

190. The *Law Enforcement (Powers and Responsibilities) Regulation 2005* then creates a number of additional rights/obligations/protections for these ‘vulnerable’ people.

191. Many of these protections can be seen to have been inspired directly by the content of the Judges Rules, the *Anunga* Rules and the pre-existing notification schemes.

ASSISTANCE IN EXERCISING RIGHTS

192. Regulation 25 states:

“..The custody manager for a detained person who is a vulnerable person must, as far as practicable, assist the person in exercising the person’s rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, support person or other person”.

SUPPORT PERSONS

193. Regulation 27 states:

“..A detained person who is a vulnerable person is entitled to have a support person present during any investigative procedure in which the detained person is to participate”

194. Various provisions within Regulation 26 and 27 govern who can be a support person and the circumstances in which the right operates.

195. Regulation 29 states that a child cannot waive the right to have a support person present.
196. Regulation 28 states that “*..a detained person is a vulnerable person is entitled to a support person under clause 27 or to consult with a friend, relative, guardian or independent person under section 123 (4) of the Act, but not both*”, “*..however, a friend, relative, guardian or independent person of the detained person who, under section 123 (1) (a) (ii) of the Act, attends the place of detention is not prevented by this clause from acting as a support person if the detained person requests it*”.
197. Regulations 30 and 31 govern the role of support persons.
198. Under regulation 35 certain times expended in relation to support persons can be disregarded in determining the ‘investigation period’.
199. The parallel between this special measure and the ‘prisoners’ friend in the *Anunga* Rules is clear. Rule 2 stating, “*..when an Aboriginal is being interrogated it is desirable where practicable that a “prisoner’s friend” (who may also be the interpreter) be present. The “prisoner’s friend” should be someone in whom the Aboriginal has apparent confidence*”.
200. In *R v Phung* [2001] NSWSC 115 Wood CJ at CL ruled on the admissibility of two records of interview conducted with a juvenile suspected at the time of murder and armed robbery. The interviews were done subject to the predecessor legislation to LEPRA contained within the now repealed Part10A of the NSW Crimes Act. (There were a variety of issues involved only some of which relates to support person issues).
201. Before ruling on the objections His Honour stated as follows in relation to the purposes of the legislative regime dealing with the criminal investigation of children, including section 13, at 34-39 (my emphasis):

“It may be accepted that the purpose of the legislative regime, that now applies to the interview of children, and particularly those in custody following arrest, is to protect them from any disadvantage inherent in their age, as well as to protect them from any form of police impropriety. As to the former, what is required is compliance with the procedure laid down so as to prevent the young or vulnerable accused from being overawed by the occasion of being interviewed, at a police station, by detectives who are likely to be considerably older and more experienced than they are.

This principle derives from what was said by Lee J in Warren (1982) 2 NSWLR 360; by Roden J in Williams NSW Supreme Court 9 August 1982; by Hunt J in Cotton (1990) 19 NSWLR 593; by Carruthers J in Dunn NSW CCA 15 April 1992; and also by Hidden J in H (supra).

The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise

unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights.

That position is reinforced by the requirements of the regulations so far as they apply in relation to vulnerable persons, of which a child is one. In particular reg20 requires the custody manager to assist a vulnerable person in exercising that person's rights, and reg26 requires the custody manager to explain to a support person that his or her role is not confined to acting merely as an observer, but also extends to doing the other things specified.

It is important that police officers appreciate that the regime now established is designed to secure ethical and fair investigations, as well as the protection of individual rights, of some significance, which attach in particular to children. Those rights, obviously, are of great importance when a child is facing a charge as serious as murder or armed robbery.

The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law”.

CAUTIONS

202. Regulation 34 places additional obligations on police in respect of cautioning vulnerable people, stating:

- (1) If a detained person who is a vulnerable person is given a caution, the custody manager or other person giving the caution must take appropriate steps to ensure that the detained person understands the caution.*
- (2) If the detained person is given a caution in the absence of a support person, the caution must be given again in the presence of a support person, if one attends during the person's detention.*
- (3) A reference in this clause to the giving of a caution is a reference to the giving of a caution that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.*

203. The parallel between this and the caution requirement in the *Anunga Rules* is obvious. Rule 3 of the *Anunga Rules* stating, “..great care should be taken in administering the caution when it is appropriate to do so”.

204. This regulation would seem to apply to both the custody manager and the interviewing officer.

DETENTION WARRANTS

205. If an investigation period has been extended in relation to a vulnerable person certain additional information must have been provided to the authorised officer.

CUSTODY NOTIFICATION SCHEME

206. Regulation 33 is the sole legislative basis for the ALS Custody Notification Scheme. The historic basis of the scheme in the Police and other schemes discussed above will be obvious.

207. The Regulation states:

“..33 Legal assistance for Aboriginal persons or Torres Strait Islanders

(1) If a detained person is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

(a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified:

(i) that the person is being detained in respect of an offence, and

(ii) of the place at which the person is being detained, and

(b) notify such a representative accordingly”

208. The regulation seems designed to interplay with section 123 of the Act and also operates to allow aboriginal people to speak to a lawyer over the telephone while in police custody.²⁵

209. In *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284 Hidden J quashed a decision of a Magistrate to admit an ERISP despite the notification requirement having been breach. The appeal was not decided on the notification point, but Hidden J stated:

“I should observe, in passing, that the obligation under cl 33 is twofold: not only to notify the ALS that an Aboriginal person is in detention, but also to inform that person that the ALS will be notified. That additional requirement is itself an important safeguard, ensuring that the suspect is aware of the availability of legal assistance through that organisation. As I have earlier noted, the document summarising the LEPRA procedures which was furnished to the plaintiffs is silent about the requirements of cl 33. This is not an issue which appears to have been raised at all on the voire dire in the present case and, of course, it is in no sense determinative of this appeal”.

210. In two recent ALS District Court trial matters the counterpart notification provision contained in section 10(4) of the *Crimes (Forensic Procedures) Act* was considered in circumstances where investigating police had not notified the ALS that a suspect was to be asked to consent to a forensic procedure. The legislative scheme in section 10(4) is designed to ensure that Aboriginal persons can get advice about the forensic procedure specifically before they consent unless they waive the right to have a lawyer present under sub-section (5).

²⁵ *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284 is an authority dealing with the regulation.

211. In *R v Ryan & Fitzhenry* [2011] NSWDC 19 October 2011, a District Court trial matter heard before Judge English sitting in Wagga Wagga, Her Honour stated as follows when ruling upon an application to exclude DNA evidence following a breach of section 10 of the Act:

"..Pursuant to s 10(4), before asking a suspect who is of Aboriginal heritage and therefore a vulnerable person to consent to a forensic procedure, the police officer must inform the suspect that a representative of an Aboriginal Legal Aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure and to notify such a representative accordingly. It is in mandatory terms. There is absolutely no evidence whatsoever in the Crown case that the officer who undertook the forensic procedure complied with that requirement. The video of the buccal swab procedure has been played and when the officer reaches a point in the document from which he is reading regarding the rights of the accused to have legal representation present, he makes an inquiry of the accused as to whether or not he had spoken to a legal representative or not. The words used appear to be, "You have already spoken to the ALS haven't you?" The accused did in fact speak to a legal representative but that was at a time well before he had been informed of the intention to take a buccal swab. As I have said, there is simply no evidence that there was compliance with s 10(4)(a) of the Act. Of course, s 5 provides that a police officer does not have to comply with the provisions of s 4(b) if the accused has expressly waived his or her right to have a legal representative present. The procedure generally I find was carried out with undue haste and certainly not in circumstances where the accused was made aware of the requirement of the police to notify the ALS that a forensic procedure was about to take place. That must necessarily affect whether or not his consent was expressly and voluntarily given in the full understanding of his rights. He was, as I have said, a vulnerable person who had been in custody for at least seven hours".

212. In *R v Dwayne Peckham* discussed above ADCJ Lerve also dealt with a similar situation, holding:

"..This situation with the taking of the DNA sample and subsequent testing that I am considering is similar indeed to the situation met by her Honour Judge English of this Court in the Wagga Wagga District Court in R –v- Ryan and Fitzhenry unrep. [2011] NSWDC 19.10.11. As with the matter before her honour Judge English there is simply no evidence that the officer complied with s.10(4) of the Act. Further, as with that matter before her Honour Judge English, the accused had spoken to a solicitor from the Aboriginal Legal Service but that was many hours before the buccal swab was taken by Constable Williams. The failure by Constable Williams to observe what is a well known and clearly stated provision of the Act causes me considerable disquiet, particularly in circumstances where he has been authorised by an Assistant Commissioner to take DNA samples. That authority is part of exhibit 9 on the voir dire. I would also exclude the evidence relating to the DNA sample on the basis of a breach of s.10(4) of the Crimes (Forensic Procedures) Act 2002".

PART 1C OF THE COMMONWEALTH CRIMES ACT

213. Part 1C contains a number of Aboriginal specific provisions. Some have been discussed above, they include:

- The default investigation period is 2 hours, as opposed to 4 for others
- A Magistrate considering an application to extend detention must be told the detained person is Aboriginal.

CUSTODY NOTIFICATION SCHEME

214. The substantive special protection however contained in the Part is that in section 23H which states:

23H Aboriginal persons and Torres Strait Islanders

(1) Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during the questioning, the official must:

(a) immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified that the person is under arrest or a protected suspect (as the case requires); and

(b) notify such a representative accordingly.

SUPPORT PERSONS/INTERVIEW FRIENDS

215. Section 23H also makes provision for support persons, known as 'interview friends'.

(2) Subject to subsection (7) and section 23L, if an investigating official:

(a) interviews a person as a suspect (whether under arrest or not) for a Commonwealth offence, and believes on reasonable grounds that the person is an Aboriginal person or a Torres Strait Islander; or

(b) believes on reasonable grounds that a person who is under arrest or a protected suspect is an Aboriginal person or a Torres Strait Islander;

the official must not question the person unless:

(c) an interview friend is present while the person is being questioned and, before the start of the questioning, the official has allowed the person to communicate with the interview friend in circumstances in which, as far as practicable, the communication will not be overheard; or

(d) the person has expressly and voluntarily waived his or her right to have such a person present.

(2A) the person suspected, or under arrest, may choose his or her own interview friend unless:

(a) he or she expressly and voluntarily waives this right; or

(b) he or she fails to exercise this right within a reasonable period; or

(c) the interview friend chosen does not arrive within 2 hours of the person's first opportunity to contact an interview friend.

(2B) If an interview friend is not chosen under subsection (2A), the investigating official must choose one of the following to be the person's interview friend:

(a) a representative of an Aboriginal legal aid organisation;

(b) a person whose name is included in the relevant list maintained under subsection 23J(1).

(3) An interview friend may be excluded from the questioning if he or she unreasonably interferes with it.

(4) In any proceedings, the burden lies on the prosecution to prove that an Aboriginal person or Torres Strait Islander has waived the right referred to in subsection (2) or (2A), and the burden is not discharged unless the court is satisfied that the person voluntarily waived that right, and did so with full knowledge and understanding of what he or she was doing.

(5) In any proceedings, the burden lies on the prosecution to prove that, at the relevant time, a person who is under arrest or a protected suspect had, to the knowledge of the investigating official concerned, made an arrangement of the kind referred to in subsection (1).

(6) The rights conferred by this section are in addition to those conferred by section 23G but, to the extent (if any) that compliance with this section results in compliance with section 23G, the requirements of section 23G are satisfied.

(7) If the person is under 18, subsection (2) does not apply and section 23K applies.

(8) An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person's level of education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.

(9) In this section:

interview friend, in relation to a person to whom subsection (2) applies, means:

- (a) a relative or other person chosen by the person; or*
- (b) a legal practitioner acting for the person; or*
- (c) a representative of an Aboriginal legal aid organisation; or*
- (d) a person whose name is included in the relevant list maintained under subsection 23J(1).*

23J Lists of interview friends and interpreters

(1) The Minister must, so far as is reasonably practicable, establish and update at such intervals as the Minister thinks appropriate, a list, in relation to a region where there are likely to be persons under arrest and under investigation for Commonwealth offences, of the names of persons (not being constables) who:

(a) are suitable to help Aboriginal persons or Torres Strait Islanders under arrest and under investigation for Commonwealth offences; and

(b) are willing to give such help in that region.

(2) In establishing and maintaining a list in relation to a region, the Minister or his or her delegate must, from time to time, consult with any Aboriginal legal aid organisation providing legal assistance to Aboriginal persons or Torres Strait Islanders in that region.

(3) The Minister must, so far as is reasonably practicable, establish and update at such intervals as the Minister thinks appropriate, a list, in relation to such a region, of the names of persons who are able and willing to act as interpreters for Aboriginal persons or Torres Strait Islanders who:

(a) because of inadequate knowledge of the English language, or a physical disability, are unable to communicate orally with reasonable fluency in that language; and

(b) are under arrest and under investigation in that region for Commonwealth offences.

(4) The list of names referred to in subsection (3) must, so far as is reasonably practicable, specify the languages that each person on the list is able to understand and converse in.

(5) The Minister may, in writing, delegate to an officer of the Department all or any of the powers of the Minister under this section.

TWO - THE ADDUCING OF ADMISSIONS

GENERAL LAW ON ADMISSIONS AT COMMON LAW

VOLUNTARINESS

THE BASAL REQUIREMENT

216. The fundamental or 'basal'²⁶ requirement at common law is that to be admissible in a criminal trial an admission made by the accused person has to be voluntary, in the sense of having been freely made.

217. In *McDermott v The King* (1948) 76 CLR 501 at 511 Dixon J encapsulated the two aspects of the voluntariness rule in this way (my emphasis):

"At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made: per Cave J. in R. v. Thompson (1893) 2 QBD 12, at p 17. The expression "person in authority" includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority (Ibrahim v. The King (1914) AC, at pp 609, 610; R. v. Voisin (1918) 1 KB, at pp 537, 538). That is the classical ground for the rejection of confessions and looms largest in a consideration of the subject".

218. This is a non-discretionary rule, unless the court is satisfied the admission was voluntarily made is inadmissible.

219. Any question of discretionary exclusion only arises if this basal requirement is satisfied.

²⁶ Dixon J in *McDermott v R* (1948) referred to the rule as "the basal principle" of admissibility of confessions.

A RULE DERIVED FROM THE ENGLISH COMMON LAW

220. The requirement that a confession be voluntary to be admissible emanates from the common law of England and has its origin in a time when the accused was not a competent witness in their own defence.²⁷

221. In *R v Thompson v R* [1893] 2 QB 12 Cave J stated that if a confession:

“..Proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible”.

222. In *Ibrahim v R* [1914] AC 599 Lord Sumner stated:

“..It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority”.

223. The principle became part of the common law of Australia, and over time the English and Australian common law varied in a number of respects.²⁸

224. The early rationale for the rule was a concern about the reliability of involuntary statements but over time:

*“..the curial concern about unreliability was subsumed by a concern about the nature of the inducement and its effect on the will of the confessionalist. The latter concern reflected the traditional objection to compulsory interrogation”.*²⁹

BURDEN AND STANDARD OF PROOF

225. The accused has perhaps what could be likened to an evidentiary burden in relation to voluntariness, but once the issue is “raised” it is for the prosecution to prove the confession is voluntary. If nothing in the evidence raises the issue then the evidence would be ‘assumed’ to be voluntary.³⁰

226. In New South Wales the prosecution was required to prove that a confession was voluntary only on the balance of probabilities and not to the criminal standard of beyond reasonable doubt.³¹ In this sense the common law of New South Wales differed from that of England where the voluntariness of an admission needed to be proved beyond a reasonable doubt.³²

²⁷ *R v Swaffield* (1998) 192 CLR 159, Brennan CJ at 167

²⁸ Particularly in relation to the standard of proof, discussed in paragraph 20, but also in relation to whether an inducement had to cause the admission, or simply precede it. The latter position was adopted in many Australian cases, the former in many English cases.

²⁹ *R v Swaffield*, *Pavic v R* (1998) 192 CLR 159 at 170 per Brennan CJ.

³⁰ *R v MacPherson* (1981) 147 CLR 512

³¹ *McKellar v Smith* (1982) 2 NSWLR 950 at 952

³² *Director of Public Prosecutions v Ping Lin* [1976] AC 574

NO NEED TO PROVE IMPROPRIETY

227. The question of voluntariness does not necessarily involve assessing whether police have acted improperly, nor does it turn on the intention of the person who procured the confession.

228. In *Collins v R* (1980) 31 ALR 257 Brennan J stated:

“The ultimate question is whether the will of the person making the confession has been overborne, or whether he confessed in the exercise of his free choice. If the will has been overborne by pressure or by inducement of the relevant kind it does not matter that the police have not consciously sought to overbear the will. A finding that there has been an attempt to overbear by persons in authority is neither determinative of, nor an essential prerequisite to, a finding that the will of the person making the confession was overborne...”

“A confession is not held to be involuntary merely because the confessionalist is by nature or temperament predisposed to confess and is furnished with an opportunity to do so: it is the effect of an external factor ... upon the will which determines admissibility. “Voluntary” does not mean “volunteered”, but “made in the exercise of a free choice to speak or be silent”. So the admissibility of the confessions as a matter of law (as distinct from discretion ...) is not to be determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focusing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of a particular accused.”

229. The question is therefore a wholly subjective one, focused as Brennan J stated in *Collins*, on a “..careful assessment of the effect of the actual circumstances of a case upon the will of a particular accused”.

NO NEED TO SHOW CAUSATION

230. Generally an inducement vitiates the voluntary nature of an admission when the inducement comes from a person in authority. This was often said to be so even when no causative relationship could necessarily be demonstrated between the inducement and the admission. This is another sense in which the common law of Australia perhaps differs from the common law of England.

231. Wood J (as he then was) in *Dixon & Smith v R* (1992) 62 A Crim R 465 at 479 stated:

“..The question whether the inducement caused the confession, or whether it is sufficient if it merely preceded its making, has attracted some difference in

judicial opinion. In England the balance of authority would seem to favour the former: Ibrahim; Sparks [1964] AC 964 at 981-982; DPP v Ping Lin at 594-595, 601, 606; 16-18, 22-23, 26; and Priestley (1966) 50 Cr App R 183 at 187. These decision do not sit entirely happily with other observations, including those in the cases earlier cited, that even the slightest inducement will suffice, or that it is sufficient if the confession may have been secured by the inducement. In Australia the authorities tend the other way: McDermott at 511; Lee at 144; Pratt [1966] 2 NSWLR 516 at 518; Eyres (1977) 16 SASR 226 at 229”.

232. Wood J went on to note some contrary tendencies in the Australian cases. It seems possible that the latter view is not much more than an expression of the burden and standard of proof rather than a fundamental difference of principle.

PERSON IN AUTHORITY

233. While much of the case law arose from circumstances where the conduct of a person in authority was impugned there is however no strict requirement that the inducement come from a person in authority in order to render the subsequent confession inadmissible.

234. Wood J in *Dixon & Smith v R* at 477 stated (*my emphasis*):

“..By this concluding observation, his Honour recognized the practical reality that, in almost every case, the inducement will stem from a person in authority since it is that fature which attracts the confession. Absent that authority and the suggestion of influence which it implies, there is unlikely to be any persuasive effect in the inducement, so that the confession is more likely to be self generated”.

....

“..The present case was argued at the trial, and on appeal, as a “person in authority” case; and as a consequence of my conclusion it becomes unnecessary to consider whether any basis existed for exclusion of the evidence according to the wider common law principle referred to in McDermott”.

235. The “promise, threat or offer of advantage need not be expressed, but can be implied: Cornelius (1936) 55 CLR 235 at 245”³³.

INDUCEMENTS

236. Much of the case law on voluntariness is concerned with inducements (as opposed to violence, threats etc). The current edition of Ross on Crime at pg 328 provides a list of statements (generally made by police) found by courts to constitute an inducement.

³³ *Dixon & Smith v R* (1992) 62 A Crim R 465

STATUTORY PROVISION

237. For many years the Crimes Act 1900 (NSW) contained section 410 which covered much of the same territory as the common law voluntariness rule and stated:

410 Confessions etc, when inadmissible

- (1) *No confession, admission, or statement shall be received in evidence against an accused person if it has been induced:*
 - (a) *by any untrue representation made to him by the prosecutor, or some person in authority, or*
 - (b) *by any threat or promise, held out to him by the prosecutor, or some person in authority.*
- (2) *Every confession, admission, or statement made after any such representation or threat or promise shall be deemed to have been induced thereby, unless the contrary be shown.*
- (3) *Provided that no confession, admission, or statement by the accused shall be rejected by reason of his having been told, by a person in authority, that whatever he should say might be given in evidence for or against him.*

238. The courts however interpreted this section as not abrogating the common law but applying in addition to it.³⁴

239. In *Dixon & Smith v R* Wood J stated:

“...The common law requirement of voluntariness for the admission into evidence of a confession is not abrogated by this section: McDermott (1948) 76 CLR 501 at 511; Bodsworth (1968) 87 WN (Pt 1) (NSW) 290; A-G (NSW) v Martin (1909) 9 CLR 713; MacPherson (1981) 147 CLR 512 at 519. It has generally been accepted as extending the common law so far as it applies to untrue representations (see McDermott at 512), but otherwise it may be narrower so far as it speaks only of a “threat or a promise”, or is confined to an inducement from a person in authority”.

CASE LAW EXAMPLES OF ABORIGINAL SUSPECTS AND THE RULE

DIXON & ORS V MCCARTHY & ANOR [1975] 1 NSWLR 617

240. For an example of the voluntariness principle being applied in relation to an aboriginal defendant in a summary matter see *Dixon & Ors v McCarthy & Anor* [1975] 1 NSWLR 617.

241. In this matter Yeldham J was dealing with an appeal (under s.112 of the *Justices Act 1902* – in respect of Supreme Court appeals the predecessor legislation to the current *Crimes (Appeal and Review) Act*) against an order of a Magistrate (sitting in Bourke) finding the appellants guilty of larceny and receiving offences.

³⁴ *Dixon v McCarthy* [1975] 1 NSWLR 617 at 638

242. The sole incriminatory evidence against the boys was their written confessions. It was common ground that a co-offender (who had been discharged by the Magistrate) had been violently assaulted by a police officer in the presence of the appellants before the confessions had been made.

243. Yeldham J held (my emphasis):

“..That the Magistrate did not apply the correct test is demonstrated, in my opinion, by the very admission of the documents themselves. I am of the view that only one answer was reasonably open to the question whether the prosecution had proved, on a balance of probabilities, that the statements of Richard Dixon, Glen McKellar and Edwards were voluntary, and that answer must inevitably have been in the negative. The Magistrate was dealing with children aged thirteen and fourteen and merely to give them the usual caution was not sufficient. He had already found that their friend, aged eleven, had been assaulted by a police officer in the presence of at least two of these three plaintiffs whilst they were together in a room at the police station waiting to make their written statements. None of their parents was present, and, at best, token attempts appear to have been made to obtain them. Certainly no evidence was led by the prosecution as to what was done or as to the availability of the parents or any other responsible person. In my opinion, the evidence clearly failed to establish that the statements were voluntarily made, and, had the Magistrate addressed his mind properly to this issue, he must inevitably have come to the same conclusion”

244. It is of note that the determination of voluntariness is not confined to consideration of whether a threat, promise or some other factor undermining of the exercise of free will was present (though in this case clearly the assault on their friend was relevant). His Honour was also concerned to examine the nature of the caution and the lack of parents to assist the children in the context of determining whether the confessions were voluntary. Evidently the general coercive effect of being a child in custody was taken into account.

K (1984) 14 A CRIM R 226

245. In K (1984) 14 A Crim R 226 Wood J was concerned with a confession made by a man suspected of a sexual assault on his young daughter. The accused was an “illiterate uneducated aborigine” who confessed after an interviewing police officer told him, “you are telling lies ... and you have guilt all over your face”.

246. Wood J in excluding the confession stated at 233:

“This is not a case in which the accused was wrongfully detained or subjected to any lengthy interrogation. I have no doubt that the police officers concerned acted honestly and conscientiously, and also with consideration in their treatment of the accused. I am also satisfied that the remark complained of was not part of any deliberate stratagem to trick the accused. I accept that it was a spontaneous remark and it reflected what Detective Cuell genuinely believed. Nevertheless, in all the circumstances of this accused, I am not satisfied as to the voluntariness of the confessional material. It followed immediately upon the remark as to his guilt and I must infer that it was the accused’s reaction to this confrontation alone that brought it about”.

247. Another historical ALS case concerned with voluntariness of admissions is *Dixon & Smith v R* a case emanating from Bourke.

248. The Court of Criminal Appeal was concerned with appeals against conviction for manslaughter and robbery and the admissibility of confessions made after a Police Aboriginal Community Liaison Officer urged one of the appellants to “tell the truth” because it would “help him” and “would pay in the long run”.

249. Hunt CJ at CL on the voluntariness question noted the:

“...Difficult line to draw between the permissible exhortation to a witness merely to tell the truth and the impermissible imputation conveyed thereby of prejudice or advantage according to whether or not the confession is made. Like Wood J, I am not persuaded by the Crown that the statements made by Mr. Demmery were exhortations to the appellant merely to tell the truth. I agree that the record of interview was inadmissible”.

250. Wood J held (in holding the confession to be inadmissible):

“ I consider that it was clearly open for the appellant as a young aboriginal, held in police cells and charged with serious crime, to have assumed that Mr. Demmery was a person in authority. As an Aboriginal Community Liaison Officer, he was likely to be seen as a person of some standing and influence with the police at Bourke; to be associated with them in his office, and to be in a position both to offer advice as to what he should do and also to secure some help for him in relation to the charges he was facing”.

.....

“..I am of the view that the remarks of Mr. Demmery went beyond a mere urging or exhortation to tell the truth. The observation that the appellant could “help himself” if he told the truth, and that “it would pay in the long run” if he did so, in their ordinary use, held out the prospect that confession could or even would be in his interest, and might improve his position”.

251. Once a court was satisfied a confession was voluntarily made several other potential questions arose in determining admissibility.

RELATIONSHIPS TO SECTIONS 84 AND 85 OF THE EVIDENCE ACT

252. The current sections 84 and 85 of the Evidence Act have in part their roots in this body of common law, though it is important to note that the current sections 84 and 85 differs in many significant respects from the common law rule. (Perhaps the most important distinction is that the Evidence Act regime does not embody a strict rule that to be admissible an admission must be have been made voluntarily. This is discussed further below).

UNFAIRNESS DISCRETION – THE “LEE” DISCRETION

THE HISTORICAL ORIGINS OF A DISCRETION TO EXCLUDE VOLUNTARY ADMISSIONS

253. At common law a discretion existed to exclude voluntary statements if the way they were obtained meant it was unfair to use them against an accused at trial. In Australia this is known as the *Lee* discretion. The discretion is rooted in the court's power/obligation to ensure a fair trial for the accused.

254. Dixon J in *McDermott* described the discretion as of ‘comparatively recent growth and attributed its development to three factors:

- “*..In part perhaps it may be a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person's free choice to speak*”.³⁵
- “*In part the development may be due to the fact that the judges in 1912 framed or approved of rules for the guidance of the police in their inquiries (see R v Voisin[24]; Archbold on Pleading, Evidence and Practice in Criminal Cases[25]) and not unnaturally have sought to insist on their observance*”.³⁶
- “*In part too it may be due to the existence of the jurisdiction of the Court of Criminal Appeal to quash a conviction if the court is of opinion that on any ground whatsoever there was a miscarriage of justice*”.³⁷

THE UNFAIRNESS DISCRETION

255. Dixon in *McDermott* was clearly of the view that the primary consideration in considering the discretion was an assessment of the propriety of the police conduct, i.e. an assessment of the fairness with which the suspect was treated at the time of the confession.³⁸

*“..In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused”.*³⁹

256. Later cases however shifted the concern to the fairness of using the admissions in the trial. The requirement of demonstrating unlawful or improper conduct on behalf of the police seems to have however remained.

257. In *Lee v The Queen* (1950) 82 CLR 133 the High Court stated in a unanimous judgment (Latham C.J, McTiernan, Webb, Fullagar and Kitto(1) JJ stated (my emphasis):

³⁵ at 512.

³⁶ at 513 .

³⁷ at 513.

³⁸ *McDermott v The King* (1948)76 CLR501 at 513.

³⁹ *McDermott v The King* (1948)76 CLR501 at 513.

"It is indeed, we think, a mistake to approach the matter by asking as separate questions, first, whether the police officer concerned has acted improperly, and if he has, then whether it would be unfair to reject the accused's statement. It is better to ask whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused. We know of no better exposition of the whole matter than that which is to be found in the two passages from the judgment of Street J. (as he then was) in R. v. Jeffries (1947) 47 SR (NSW), at pp 311-314; 64 WN 71 which are quoted by O'Bryan J. in the present case. His Honour said (1947) 47 SR (NSW), at p 312; 64 WN 71 : "It is a question of degree in each case, and it is for the presiding Judge to determine, in the light of all the circumstances, whether the statements or admissions of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him"

258. The High Court in *Lee* rejected the notion that courts should reject evidence as a sanction for police impropriety (in *Lee* there was said to have been a contravention of the Judges Rules).⁴⁰ The Court considered police compliance with internal rules as, "a matter which is of course entirely for the executive".⁴¹ In this sense the focus remained entirely on the fairness of the use of the statement.

259. Deane J in *Cleland v R* at 19 compared the policy rationales for the voluntariness rule and the fairness discretion in this way (my emphasis):

"..The rational basis of the principle that evidence can only be received of a confessional statement if it be shown to be voluntary should be seen as a combination of the potential unreliability of a confessional statement that does not satisfy the requirement of voluntariness and the common law privilege against self-incrimination (see the cases mentioned in Schrager, "Recent Developments in the Law Relating to Confessions", McGill Law Journal, vol.26 (1981),p.435). The rational basis of the principle that evidence of a voluntary confessional statement should be excluded if, in the view of the trial judge, its reception would be unfair to the accused is the requirement of public policy that an accused be protected against either procedural or substantive unfairness in the course of the administration of criminal justice in the courts".

RELIABILITY OF KEY, BUT NOT SOLE, RELEVANCE TO THE DISCRETION

260. In *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666, Wilson, Dawson and Toohey JJ stated:

" In considering whether a confessional statement should be excluded, the question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him: Lee[39]; Cleland[40]. Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement."

⁴⁰ At 155.

⁴¹ At 155.

261. Brennan CJ in *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at noted his earlier expressed view in *Duke v R* (1989) 180 CLR 508 at 513) that reliability was not the sole criterion in determining unfairness and stated at 175:

“However, if dubious reliability is not the only justification for excluding a voluntary confession on the ground of unfairness, the nature of the unfairness which justifies the exclusion of a confession that is voluntary and apparently reliable should be identified”.

ADMISSIONS CAUSED BY UNLAWFUL POLICE CONDUCT

262. One well established ground of unfairness distinct from reliability is where but for unlawful conduct the admissions would not have been made, for example where the admissions were obtained while the accused was unlawfully detained.⁴² Though this would not appear to be good law under the Evidence Act.

DINSTINCT FROM THE DISCRETION TO EXCLUDE IMPROPERLY OBTAINED EVIDENCE

263. This discretion is a separate one to the discretion that exists at common law to exclude improperly obtained evidence (discussed in detail below).

264. However as the case law on the separate discretion to exclude unlawfully or improperly obtained evidence developed the distinction between the two discretions began to blur.

265. Case law that had expanded the unfairness discretion to include considerations relating to the sanctioning of police conduct began to collide with the hardening public policy considerations embodied in the *Ireland/Bunning v Cross* line of authority (discussed below) that was eventually abrogated by section 138 of the Evidence Act.

266. In *Cleland v The Queen* (1982) 151 CLR 1 the High Court considered whether the discretion to exclude unlawfully or improperly obtained evidence should properly have any application to confessional evidence given the broad ambit of the fairness discretion. The majority were of the view that it should.

267. Deane J stated at 23-24:

“The conclusion to which I have come is that the more general discretion to exclude unlawfully or improperly obtained evidence is applicable to confessional evidence. It is true that a confessional statement or an admission stands in a special category both in that its acceptance constitutes an exception to the hearsay rule and in that there is a special body of rules governing its admissibility. In my view, however, that consideration does not justify excluding confessional statements from the ambit of the discretion to exclude evidence of facts or things improperly ascertained or procured. Evidence that an accused has admitted the criminal activities with which he is charged is liable, if accepted, to be regarded as decisive of his guilt and can overcome deficiencies in “real evidence” which might otherwise inevitably

⁴² *Duke v R* (1989) 180 CLR 508 at 526-27 per Toohey J. *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159.

lead to an acquittal. The attractions of such evidence, from the point of view of those concerned with law enforcement, are apparent. The comments of Bright J. (in an unreported ruling) which King J. quoted with approval in Walker v. Marklew (1976) 14 SASR 463, at p 485 make plain that the common tendency of law enforcement officers to regard "the obtaining of a confession as a victory and a scrutiny of the methods used as a frustration" is not unknown in South Australia. The special principles relating to confessional evidence, with their emphasis on voluntariness and fairness to the accused, may provide adequate protection for the accused. Nonetheless, the considerations of public policy which constitute the rationale of the discretion to exclude unlawfully or improperly obtained evidence may be plainly, indeed particularly, appropriate in the case of evidence of confessional statements procured by unlawful or improper conduct. Nor, in my view, is there anything in what was said in this Court in Bunning v. Cross which would warrant a conclusion that the discretion to exclude unlawful and improperly obtained evidence is inapplicable to the case of confessional evidence. (at p23)

268. In *Foster v The Queen* (1993) 67 ALJR 550 at 554 Mason CJ, Deane, Dawson, Toohey and Gaudron JJ stated (my emphasis):

"It is now settled that, in a case where a voluntary confessional statement has been procured by unlawful police conduct, a trial judge should, if appropriate objection is taken on behalf of the accused, consider whether evidence of the statement should be excluded in the exercise of either of two independent discretions. The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence. The second of those discretions is a particular instance of a discretion which exists in relation to unlawfully obtained evidence generally, whether confessional or 'real'. It is the discretion to exclude evidence of such a confessional statement on public policy grounds. The considerations relevant to the exercise of each discretion have been identified in a number of past cases in the Court. To no small extent, they overlap. The focus of the two discretions is, however, different. In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy' and the relevance and importance of fairness and unfairness to the particular accused will depend upon the circumstances of the particular case".

269. Brennan CJ in *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at 181 stated:

"..now that the development of the public policy discretion allows for the balancing of the public interest in refusing to sanction unlawful or improper conduct and the public interest in placing all relevant and admissible evidence before a court, there is much to be said for remitting consideration of the conduct of law enforcement officers to the public policy discretion in all cases except where that conduct makes the reliability of the confession dubious. The fairness discretion would then focus on cases where the conduct which

induces the making of a voluntary confession throws doubt on its reliability and thereby establishes the unfairness of using the confession against the confessionalist on his trial”.

270. Brennan CJ appeared to not resolve the issue, going on to state, “...Of course, the two discretions do overlap and in a sense it is immaterial whether a trial judge considers the facts of a case under one heading rather than another”.⁴³

271. Brennan CJ went on to dismiss the appeal on the basis that the type of error identified in *House v The King*⁴⁴ as a threshold for appellate intervention had not been demonstrated.

272. The judgment of Toohey, Gaudron and Gummow JJ similarly noted that, “once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred”.⁴⁵

FREEDOM TO SPEAK OR NOT SPEAK IMPUGNED

273. The majority placed significance on the concept of freedom to speak to the police and whether that freedom had been impugned:

“However, the notion of compulsion is not an integral part of the fairness discretion and it plays no part in the policy discretion. In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. This invests a broad discretion in the court but it does not prevent the development of rules to meet particular situations”.

BURDEN AND STANDARD OF PROOF

274. The accused had the burden on the balance of probabilities to persuade a court to exercise the discretion.⁴⁶

CASE LAW EXAMPLE OF THE DISCRETION INVOLVING ABORIGINAL ACCUSED

MCKELLAR V SMITH & ANOTHER; BOOTH V SMITH & ANOTHER [1982] 2 NSWLR 950

⁴³ at 182.

⁴⁴ (1936) 55 CLR 499.

⁴⁵ at 189-190.

⁴⁶ *Lee v The Queen* 82 CLR 133 at 153.

275. In *McKellar v Smith* Miles J, summarized the fairness rule (and distinguished it from the improperly obtained evidence rule), in this way:

“I turn now to the discretion of the magistrate to exclude the confessional material under the general law apart from the provisions of the Child Welfare Act, s81C. Assuming that the Magistrate found that the statements of the plaintiffs at the Wilcannia police station were made voluntarily, it was incumbent upon him to consider the exercise of a discretion not to allow such statement into evidence because to do so would operate unfairly against the plaintiffs, alternatively or additionally because the obtaining of such statements was by the use of unfair or unlawful means. The nature of this discretion has long been recognized and is the subject of many judicial authorities. Since the proceedings in Wilcannia and indeed since I reserved my own decision, the nature of the discretion (or perhaps more properly, discretions) has been further clarified by the High Court in Cleland v The Queen (1982) 57 ALJR 15; 43 ALR 619. There is a discretion to reject evidence of a confession obtained in circumstances which render it unfair to use it against the accused as evidence in a trial. That is the discretion described in such cases as McDermott v The King (1948) 76 CLR 501 and R v Lee. There is a separate discretion in relation to evidence unlawfully or improperly obtained. That discretion is recognized and described in cases such as R v Ireland (1970) 126 CLR 321 and Bunning v Cross (1978) 141 CLR 54”.

276. The facts in *McKellar* were that the two plaintiffs, young aboriginal males from Bourke, aged under sixteen years, were interviewed by police in Wilcannia without the presence of a support person in accordance with section 81 of the *Child Welfare Act 1939* (NSW). The Magistrate had allowed their confessions into evidence on the basis that because the boys came from Bourke, it was not practicable to comply with the Act following their arrest in Wilcannia. The Magistrate was satisfied that the presence of an older female relative chosen by the boys was sufficient. Miles J found that the Child Welfare Act had not been complied with and that the boys had in fact been unlawfully detained at the time of the admissions (because their detention was extended for the purpose of questioning).

277. Miles J considered the admissions should have been excluded pursuant to both the common law discretions, and stated:

“In reaching the above conclusions it has been possible for me, as it was for Yeldham J in Dixon v McCarthy, to leave out of consideration the fact that the plaintiffs are aboriginals. I should not like it to be thought however that I consider this fact to be without relevance in determining questions of voluntariness and the discretion to exclude confessional evidence. Whilst the position of the Aboriginal people in New South Wales has not been regarded as such that it requires the formulation of particular body of guidelines, like those enunciated in Anunga, the history of relations between Aboriginals and law enforcement authorities, particular in the western parts of the State, should put a tribunal on notice that an Aboriginal person may be at a substantial disadvantage in the interrogation process. As Brennan J put it in Collins v The Queen (1980) 31 ALR 257, at p 311:

“the rule is the same for the Aboriginal and for the non-Aboriginal, but the consequences of applying the rule may vary if a particular Aboriginal exhibits,

in given circumstances, a different strength of will, or of understanding or of sophistication from that exhibited by a non-Aboriginal.”

In this connection, too, lawyers should not continue to ignore the provisions of the Racial Discrimination Act 1975 (Cth) nor to overlook the possibility that courts may take judicial notice of the ratification by this country of the International Covenant on Civil and Political Rights, the declaration of the Rights of the Child and other international instruments which contain provisions and establish standards which may be relevant to the exercise of judicial discretion: see Koowarta v Bjelke-Peterson (1982) 56 ALJR 625; 39 ALR 417 and Murphy J dissenting, in McInnis v The Queen (1970) 143 CLR 575, at p 593”.

278. Examples from the case law of circumstances in which the fairness discretion has been used to exclude admissions include:

RELATIONSHIP TO SECTION 90 OF THE EVIDENCE ACT

279. The current section 90 of the Evidence Act 1995 (NSW) has its roots in this body of law. The similarities and differences between the section 90 and the common law discretion are discussed below.

BUNNING V CROSS – IMPROPERLY OR UNLAWFULLY OBTAINED EVIDENCE

A DISCRETION TO EXCLUDE EVIDENCE GENERALLY

280. There exists at common law a discretion to exclude evidence where it has been improperly or unlawfully obtained. This discretion applies not only to evidence of admissions but potentially to any evidence.

281. Barwick CJ (with whom the other members of the Court agreed) in *R v Ireland* (1970) 126 CLR 321 at 334-5 identified two significant policy considerations that needed to be balanced in exercising the discretion and stated (my emphasis):

“Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. ... On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion”.

282. *Ireland* was a case where the prosecution had adduced into evidence photographs of the hands of the accused which showed he had injuries consistent with having handled the murder weapon. The photographs had been improperly

obtained in that police had incorrectly told the accused while he was detained that they had a legal right to take the photographs.

283. In *Bunning v Cross* (1977) 141 CLR 54 the decision of Ireland was followed and more guidance provided in relation to the exercise of the common law discretion. The High Court was concerned with a situation where police had compelled a suspect to undergo a breath test in circumstances where he had not first undergone a road side preliminary test. In the circumstances this was unlawful though it seemed common ground that the police had honestly but mistakenly believed they were acting lawfully.

284. Stephen and Aiken JJ (with whom Barwick CJ in this respect agreed) noted that the common law in Australia differed from the common law in England and elsewhere in that the question of discretionary exclusion of unlawfully obtained evidence in Australia was not governed largely by questions of fairness to the accused, but rather was to be determined according to considerations of "high public policy".⁴⁷ Those considerations being the two broad considerations identified in Ireland's case. In their Honours' view considerations of fairness were irrelevant in the circumstances.⁴⁸

285. Before indicating the criteria they saw as relevant, in the factual circumstances of the case, to the exercise of the discretion Stephen and Aitken JJ made the following preliminary observation:

*"The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be "a less evil that some criminals should escape than that the Government should play an ignoble part" - per Holmes J. in *Olmstead v. United States* [1928] USSC 133; (1927) 277 US 438, at p 470 [1928] USSC 133; (72 Law Ed 944 at p 953)".*

286. In this spirit, Stephen and Aiken JJ then propounded the following factors as relevant, in the circumstances, to the discretion:

"The first material fact in the present case, once the unlawfulness involved in the obtaining of the "breathalyzer" test results is noted, is that there is here no suggestion that the unlawfulness was other than the result of a mistaken belief on the part of police officers that, without resort to an "on the spot" "alcotest", what they had observed of the appellant entitled them to do what they did"

⁴⁷ at 75

⁴⁸ at 77 they held, "If a "breathalyzer" test, properly performed and with all attendant safeguards observed, discloses an excessive level of alcohol in a motorist's blood it is in no sense "unfair" to use it in the conviction of the motorist, just as it is surely not "unfair" to use, against a person accused of having in his possession weapons or explosives, evidence obtained by means of an unlawful body search so long, once again, as that search is so conducted as to provide all proper safeguards against weapons or explosives being "planted" on the accused in the course of the search".

*"Although such errors are not to be encouraged by the courts they are relatively remote from the real evil, a deliberate or reckless disregard of the law by those whose duty it is to enforce it".*⁴⁹

*"The second matter to be noted is that the nature of the illegality does not in this case affect the cogency of the evidence so obtained" "To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless" ... "If other equally cogent evidence, untainted by any illegality, is available to the prosecution at the trial the case for the admission of evidence illegally obtained will be the weaker".*⁵⁰

*"A third consideration may in some cases arise, namely the ease with which the law might have been complied with in procuring the evidence in question. A deliberate "cutting of corners" would tend against the admissibility of evidence illegally obtained. However, in the circumstances of the present case, the fact that the appellant was unlawfully required to do what the police could easily have lawfully required him to do, had they troubled to administer an "alcotest" at the roadside, has little significance" "Although ease of compliance with the law may sometimes be a point against admission of evidence obtained in disregard of the law, the foregoing, together with the fact that the course taken by the police may well have been the result of their understandably mistaken assessment of the condition of the applicant, leads us to conclude that it is here a wholly equivocal factor".*⁵¹

*"A fourth and important factor is the nature of the offence charged. While it is not one of the most serious crimes it is one with which Australian legislatures have been much concerned in recent years and the commission of which may place in jeopardy the lives of other users of the highway who quite innocently use it for their lawful purposes. Some examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element in the process required by Ireland's Case [1970] HCA 21; (1970) 126 CLR 321".*⁵²

*"Finally it is no doubt a consideration that an examination of the legislation suggests that there was a quite deliberate intent on the part of the legislature narrowly to restrict the police in their power to require a motorist to attend a police station and there undergo a "breathalyzer" test. This last factor is, of course, one favouring rejection of the evidence. However it is to be noted that by the terms of s. 66 (1) the legislation places relatively little restraint upon "on the spot" breath testing of motorists by means of an "alcotest" machine. It is essentially the interference with personal liberty involved in being required to attend a police station for breath testing, rather than the breath testing itself (albeit by means of a more sophisticated appliance), that must here enter into the discretionary scales".*⁵³

⁴⁹ At 79

⁵⁰ at 79

⁵¹ at 80.

⁵² At 80

⁵³ at 80

RELATIONSHIP TO SECTION 138 OF THE EVIDENCE ACT

287. Those familiar with section 138 will of course recognize many of the criteria found in that section.

288. Section 138 to a very significant extent codifies the common law in this respect. Though there are some significant differences. These are discussed below.

THE CHRISTIE DISCRETION – APPLICATION TO ADMISSIONS

289. There existed at common law a discretion to exclude evidence where its probative value was outweighed by its prejudicial effect. The discretion was also applicable to admissions.

290. The rule originated in the English common law.

291. In *R v Christie* [1914] AC 545 at 564-565 Lord Reading stated:

"Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it."

292. It was adopted in Australia. In *Driscoll v The Queen* (1977) 137 CLR 517 Gibbs J stated at 541:

*"Although as a matter of law a document is admissible against an accused person who has adopted it, that does not seem to me to be the end of the matter. It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused. The exercise of this discretion is particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused: see, e.g., *R. v. Christie* (1914) AC 545, at p 560 ; *Noor Mohamed v. The King* (1949) AC 182, at p 192 ; *Harris v. Director of Public Prosecutions* (1952) AC 694, at p 707 ; and *Kuruma v. The Queen* (1955) AC 197, at p 204 . In *Reg. v. Clarke* (1964) QWN 8 , Lucas A.J., in the exercise of this discretion, advised the Crown Prosecutor not to tender the typed record of an interview between a police officer and the accused, when the accused, although assenting to the truth of the facts recorded, refused to sign the document. From later reported cases, however, it would appear that not all judges have shown the same disposition to exercise their discretion by excluding the evidence in cases of this kind".*

293. An obvious potential for overlap similarly existed in respect of this discretion vis a vis the other two discussed above.

JUDICIAL REGULATION OF MANNER OF POLICE QUESTIONING

294. Additional regulation of questioning arose from judicial rulings on whether questions asked in particular police interviews later tendered in criminal proceedings were admissible.
295. Many of these 'rules' laid down survive to the present day and breaches of them can enliven a number of exclusionary provisions. It is often a question of degree as to whether the question is impermissible and it pays to read the authorities in question before too readily relying on any broad principle said to emerge from them.
296. Many of the rules are also reflected in CRIME, the New South Wales Police manual on Detention and Questioning discussed above.
297. Questions criticized in authority include (many of these examples are drawn from Ross on Crime pg 334):
- "Why would the complainant lie" – See *Graham v The Queen* (1998) 195 CLR 606.
 - Questioning after the Suspect has sought to exercise their right to remain silent – see *Phan v R* [2001] NSWCCA 29 for a discussion of the authorities including *R v Ireland* (1970) 126 CLR 321. Note this is not an absolute rule.
 - Questions asked after a request for legal advice - *R v Stafford* (1976) 13 SASR 392.
 - Questions conveying 'undisguised ridicule and incredulity' - *R v Pritchard* [1991] 1 VR 84).
 - Questioning amounting to cross-examination – *Smith v The Queen* (1957) 97 CLR 100.
 - Questions that put the statement of the complainant to the suspect – *R v C* (1991) 59 A Crim R 46.
 - Questions that misrepresent the facts to the suspect – *Hawkins v The Queen* (1994) 181 CLR 440. See also section 138(2)(b) for specific statutory embodiment of this rule.

CURRENT GENERAL LAW ON ADMISSIONS

298. The common law of evidence discussed above was abrogated in NSW by the passage of the Evidence Act in 1995.
299. This occurred following the referral in 1979 from the Cth Attorney-General to the Australian Law Reform Commission of a reference requesting the ALRC to report on a reform of evidence law. The ALRC reported in 1985 and 1987.

300. In 1988 the New South Wales Law Reform Commission recommended the adoption of the proposed Cth Act.

301. In 1991 the Standing Committee of Attorneys-General agreed in principle on the adoption of the law throughout Australia as a uniform law. However not all jurisdictions have adopted the law. Those jurisdictions currently include Western Australia, South Australia, Northern Territory and Queensland.

302. Subsequently the Cth and NSW introduced the uniform law.

303. The Uniform Evidence Act has been implemented in Victoria, New South Wales, the Australian Capital Territory, Tasmania and Norfolk Islands.

304. The common law in respect of the admissibility of confessions largely continues to operate in the remaining jurisdictions in Australia yet to adopt the Uniform Evidence Act.

305. The Evidence Act effectively abrogates the common law as it dealt with admissions.

306. Section 9(1) of the Act states:

“This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment”.

307. Section 56 of the Act states:

“(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible”.

308. The common law however continues to offer guidance and assistance to courts interpreting the Evidence Act.⁵⁴

⁵⁴ Habib v Nationwide News Pty Ltd [2010] NSWCA 34 at paras 176 – 180.

PART 3.4 OF THE EVIDENCE ACT

309. This part of the Evidence Act titled 'Admissions' contains most of the provisions of the Act concerning the admissibility of admissions.

SECTION 84 – EXCLUSION OF ADMISSIONS INFLUENCED BY VIOLENT AND OTHER CONDUCT

310. Section 84 titled 'Exclusion of admissions influenced by violence and certain other conduct' states:

- (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:*
 - (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or*
 - (b) a threat of conduct of that kind.*
- (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.*

311. This rule of admissibility should be seen as emerging from the common law voluntariness rule discussed above.

312. The section covers circumstances where the conduct may have influenced 'the admission' or 'the making of the admission'. The use of the word influenced means that something less than conduct which caused the admission to be made may lead to exclusion.

313. The Court must be satisfied of a negative, i.e., that the admission and its making were not influenced by the conduct. In criminal proceedings this effectively places the burden on the prosecution once the accused "has raised in the proceeding an issue about whether the admission or its making were so influenced". The section in effect creates a presumption against the admissibility of admissions unless the court is so satisfied.

314. This should mean that the accused does not necessarily have to even prove on balance that the impugned conduct took place, it being for the prosecution to satisfy the court of the negative.

315. Each limb of the statutory formulae must be allowed its full meaning and any given case may turn on the various meanings of 'violent', 'oppressive', 'inhuman' or 'degrading'. None of the words are defined in the Act.

316. The reliability of the admissions would not seem, on the ordinary meaning of the words of the section, to be relevant.

317. There is not a large amount of case law based on the section. Some decided cases are as follows:

318. This case concerned a woman charged with accessory after the fact to murder. The accused was the mother of a young child.

319. The accused gave evidence on the voir dire, at 23:

“The accused said that, while she was at the Queanbeyan Police Station that morning, a police officer said to her, “if I didn’t tell the truth and I went to Court I would look like a bad mother”. The accused said she considered this remark to be a threat. It led her to decide that she should tell the police the truth. Thereafter, she participated in the interview with Senior Sergeant Little. On the accused’s behalf it was submitted that the making of such a remark in the circumstances amounted to oppressive conduct within the meaning of s84(1) of the Act and that the Crown had failed to show that it had not influenced the accused in the making of the later admissions to Senior Sergeant Little”.

320. The judge accepted her evidence and found that she was not satisfied as required by section 84 and therefore the interview was inadmissible, at 34:

“It is upon the Crown to affirmatively satisfy me that the statement did not influence the making of the admission. I do not consider the Crown has discharged that onus. Accordingly, I find that the contents of the accused’s interview with Senior Sergeant Little on 20 June 1998 are inadmissible”.

321. The appellant was a bank manager convicted of fraud committed in the course of his employment. He made admissions in an internal bank investigation interview and a subsequent police interview. The bank interview was preceded by a caution that he could remain silent and that any answers might be used in “the bank’s deliberations”. The appellant gave evidence on the voir dire that he did the interview because he felt he had to and that if he had known it could have been used against him in subsequent criminal proceedings he would not have been interviewed.

322. The substantive complaints contended to enliven the operation of section 84 related to the manner of questioning in the bank interview, they were summarized as follows in the judgment:

“(i) The appellant was required to attend the bank interview in fear of penalty (akin to disciplinary proceedings).

(ii) There would have been adverse consequences to the appellant if he did not attend and participate in the interview.

(iii) The cross-examination of the appellant was substantial and wide ranging.

(iv) There was scepticism expressed by the bank investigators concerning some aspects of the account by the appellant.

(v) There was a suggestion in certain questions that answers such as “I don’t know” would provoke ongoing questioning.

(vi) The bank interview was not conducted in a voluntary manner in that there was a requirement to attend and disciplinary action was a likely consequence of failing to attend.

(vii) Although the appellant was told that he could have an “advisor” present, he was not told what that meant.

(viii) There was inadequacy in the bank caution in failing to make it clear that the interview could be used in subsequent criminal proceedings”.

323. Hoeben J (with whom Sully and Bell JJ agreed) did not agree any of the factors, alone or in combination, demonstrated an error in the trial judge’s conclusion:

“I accept that s 84 does not require the isolation of a single reason or a single incident of conduct provoking the confession. There may be a number of factors working together (R v Zhang [2000] NSWSC 1099, Simpson J). I also accept that there is no definition of “oppressive” in the Act and that the concept should not be limited to physical or threatened physical conduct but can encompass mental and psychological pressure. That said I am firmly of the view that nothing in the bank interview, either on its own or in combination, amounted to “oppressive conduct” as envisaged by s 84”

HABIB V NATIONWIDE NEWS PTY LTD [2010] NSWCA 34

324. In *Habib* the Court of Appeal was concerned with an appeal by Mr. Habib against jury verdicts in a defamation case in favour of Nationwide news. The jury had accepted that Nationwide News had established the truth of defamatory imputations made against Mr. Habib. This defence had essentially relied upon statements made by Mr. Habib in interviews given in unusual circumstances:

“The appellant was in Afghanistan on 11 September 2001. In early October 2001 he was detained in Pakistan by Pakistani authorities. He was held in custody in Pakistan until late October or November 2001. While he was so held ASIO officers interviewed him on three occasions in the presence of Pakistani officials. In or about late October or November 2001, the appellant was taken to Egypt, then to Afghanistan, before being taken to Guantanamo Bay in Cuba where he was interviewed by the Australian Federal Police and an ASIO officer”.

325. Mr. Habib had sought the exclusion of the interviews at the trial pursuant to section 84.

NO ONUS ON ACCUSED TO PROVE IMPUGNED CONDUCT SAID TO ENLIVEN THE SECTION

326. The Court of Appeal (Hodgson, Tobias and McColl JJA) found that the trial judge had effectively reversed the onus of proof in requiring Mr. Habib to prove that the impugned conduct (the conduct accepted by the trial judge was summarized by the COA at para 257 and 271) had occurred. This finding was made at para 273.

327. The Court stated at 227-230:

“Returning to the respondent’s submission the critical issue is whether, before s 84(1) could apply, the appellant had to adduce evidence

positively establishing a causal nexus between the proscribed conduct and the alleged admission.

[228] In our view, the language of s 84(2) does not support that proposition. The expression “has raised” does not import any notion that the s 84(2) party has to prove the issue being “raised”, namely whether “the admission or its making” were influenced by the s 84(1) conduct.

[229] The concept of a party raising the issue in s 84(2) is juxtaposed with the proposition in the same sub-section that another party is seeking to “adduce” “evidence of the admission” — a strong internal indication that the party seeking to raise the issue may do so without having to establish the fact of conduct actually having influenced the admission. Otherwise the effect of s 84(2) would be to reverse the negative test required by s 84(1) to be satisfied before the relevant admission becomes admissible.

[230] Further, in contrast to s 84(2), other provisions of the Evidence Act in which the concept of a matter being “raised” appears do refer to the necessity to adduce evidence: see for example s 146(2) (evidence produced by processes, machines and other devices); s 147(2) (documents produced by processes, machines and other devices in the course of business); s 155(2) (evidence of official records); s 160(1) (postal articles); s 161(1) (electronic communications) and s 162(1) (lettergrams and telegrams) all of which provide: “It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) ...”. These are contextual contradictions of the respondent’s construction argument”.

328. The Court held the proper test was as follows (my emphasis):

*“We would conclude from the language of s 84, the statutory context and legislative history and the common law position when s 84 was enacted that in order to raise a s 84 issue, that there must be some evidence that indicates through legitimate reasoning that there is a reasonable possibility an admission or its making were influenced by proscribed conduct (cf *Colosimo v DPP (NSW)* [2006] NSWCA 293 (at [19](1) per Hodgson JA, Handley and Ipp JJA agreeing). However it is not necessary that that evidence prove as a fact that an admission or its making were so influenced”.*

MEANING OF ‘INFLUENCE’

329. On the question of the meaning of ‘influence’ the court held at 237-239:

*“As we have said, under the common law voluntariness rule, the question was whether the will of the confessionalist was overborne by the allegedly improper conduct. This language is still used in some judgments. In *Higgins v R* [2007] NSWCCA 56 (at [28]) Hoeben J (Sully and Bell JJ agreeing) referred to the lack of evidence that “[the maker’s] will was overborne in any way”. However, as Adams J observed in *R v Ul-Haque* [2007] NSWSC 1251 ; (2007) 177 A Crim R 348 (at [120]), that is not the relevant test under s 84.*

The Macquarie Dictionary Online defines “influence”, relevantly, to mean “modify, affect, or sway”, while the Oxford English Dictionary Online refers to “influence” as to “affect the mind or action or; to move or induce by influence” and also “to affect the condition of, to have an effect on”. Neither of these definitions evokes a particularly high test of causation.

In R v Zhang [2000] NSWSC 1099 (at [44]), Simpson J held that:

... s 84 does not require the isolation of a single reason, or a single event or incident or instance of conduct provoking the confession; there may be a number of factors working together that, combined, cause the admission to be made. If oppressive conduct on the part of police is one of those factors (or, more accurately, if the Crown has failed to negative such conduct as one of those factors) then the evidence is inadmissible. (emphasis added)"

MEANING OF OPPRESSION

330. On the meaning of oppression the Court stated at 245-248

"The Macquarie Dictionary defines "oppressive", relevantly as "burdensome, unjustly harsh ... causing discomfort because uncomfortably great, intense" and "oppression" as "the exercise of authority or power in a burdensome, cruel or unjust manner". The Macquarie Dictionary also defines "degrade" relevantly as "to lower in dignity or estimation; bring into contempt".

In Higgins (at [26]) Hoeben J held "that the concept [of 'oppressive' in s 84(1)] should not be limited to physical or threatened physical conduct but can encompass mental and psychological pressure".

In Zhang (at [40]), Simpson J concluded there had been oppressive conduct within the meaning of s 84 in circumstances where the accused:

... was offered witness protection in exchange for co-operation in the context of being confronted with two alternatives only: to co-operate with police or be charged with murder. He was offered those alternatives at the same time as being told that he could expect a reduced (or no) sentence in return for his co-operation. There was a threat of some kind, of physical violence (when Detective Goodwin told him he would like to hit his face); and, finally and importantly, he was told that once Detective Goodwin had left the room he would have no further opportunity to co-operate with police. This last was calculated to apply pressure to the accused.

In Ul-Haque (at [95]), Adams J observed that the precise boundaries of the term "oppressive ... conduct" in s 84 were uncertain. While he commented that some assistance was afforded by the other conduct mentioned in s 84(1)(a), it was unnecessary to elaborate as he had concluded the impugned conduct (assumption of unlawful powers of direction, control and detention) "was well within the meaning of the phrase".

TIMING OF THE CONDUCT

331. The Court ultimately found that the respondent had not satisfied the burden under section 84 of proving admissibility (in light of the findings of certain conduct) and also observed that it was not necessary that the impugned conduct occur at the time of the admissions, just that it have influenced the admissions, at 280 (my emphasis):

"In our view the respondent did not discharge that onus. The first point to note in this respect is that the primary judge approached this issue on too narrow a basis. As we have observed, the question whether an admission was "not influenced by" relevant s 84(1) conduct is not a stringent test. We

have set out the s 84(1) conduct the primary judge did find the appellant had established. In our view one could not be satisfied that that conduct did not influence the appellant making admissions in both Pakistan and Guantanamo Bay. It will be recalled that Mr Evatt had identified a number of circumstances as constituting oppressive conduct. That conduct properly, in our view, extended beyond the particular circumstances of the interviews. As the earlier discussion demonstrates, it is not necessary that the s 84(1) conduct actually take place at the time the admission is made. Rather, the relevant inquiry to which s 84(1) directs the court is as to whether any admission was not influenced by s 84(1) conduct. It is clear that that conduct may have occurred prior to any relevant interview and need not have been the conduct of those interviewing the relevant party. The question is whether such conduct did not have any influence at the time of the interview".

R V UL-HAQUE [2007] NSWSC 1251

332. In Ul-Haque Adams J excluded admissions made to Australian Federal Police officers in two separate interviews on the basis that prior improper and unlawful conduct by Australia Security Intelligence Officers (ASIO) meant that section 84 rendered the admissions inadmissible. The conduct was summarized in this way at 95:

"The precise boundaries of the term "oppressive ... conduct" are uncertain. Some assistance is afforded by the other conduct mentioned in para 84(1)(a). For the purposes of this case, however, it is not necessary to approach the boundaries of the term. In my view, the conduct of ASIO, in particular by officers B15 and B16, was well within the meaning of the phrase. In substance, they assumed unlawful powers of direction, control and detention. It was a gross interference by the agents of the state with the accused's legal rights as a citizen, rights which he still has whether he be suspected of criminal conduct or not and whether he is a Muslim or not. Furthermore, the conduct was deliberately engaged in for the purpose of overbearing the accused in the hope that he would co-operate. It involved using a part of his parents' home to hold him incommunicado for the purposes of an interview under cover of a warrant which the officers knew well did not justify any such conduct but which I think they rightly believed neither the accused nor his family understood. Whatever "oppressive" means for the purposes of s 84, I do not doubt that the conduct of the ASIO officers falls well within it".

PRIOR CONDUCT CONTINUED TO INFLUENCE AT TIME OF POLICE INTERVIEW

333. The judge was satisfied the prior conduct of ASIO was sufficient to warrant exclusion, but also noted that the presence of an ASIO officer at the AFP officer ensured that the influence of the prior conduct continued, at 98:

"The evidence of the ASIO conduct, considered alone, would be sufficient to establish oppressive conduct within the section. But the oppression was continued, in my view, by the conduct of the AFP. Mr Gordge's presence at the interviews was a clear signal to the accused of the inextricable link between ASIO and the AFP and an implicit reminder that he should not depart from anything already said. The conversations with him at the end of

the interview on 7 November and when he came to AFP headquarters on 10 November continued the thrust of the message communicated by ASIO at the first meeting: co-operate or else”.

NO NEED FOR ACCUSED TO PROVE CONDUCT OR EVEN BE BELIEVED ON BALANCE

334. This statement by Adams J is instructive in relation to the burden of proof question, at 99 (my emphasis):

“The Crown has not been able to persuade me that these two interviews were not influenced by the oppressive conduct. I accept the accused’s evidence that they were. Even if I were uncertain as to whether the accused was telling the truth or not, I would not be persuaded by the evidence called by the prosecution that the accused was not so influenced”.

335. [2009] NSWSC 851 Howie J was concerned with a situation where admissions made during a stand off with police were to be relied upon by the prosecution. The accused stood trial for murder. The evidence suggested that shortly after stabbing his wife he became involved in the stand off with police. During it (and while armed with a knife and being confronted by police firearms) the accused made admissions to have killed his wife.

336. Other cases considering the section include:

- R v Ye Zhang [2000] NSWSC 1099.
- R v JF [2009] ACTSC 104.

337. The section is similar in some respects to section 76 of the Police and Criminal Evidence Act 1985 (UK) and cases decided on that section may be useful.

SECTION 85 – CRIMINAL PROCEEDINGS – RELIABILITY OF ADMISSIONS

338. Section 85 of the Evidence Act states:

85 Criminal proceedings: reliability of admissions by defendants

- (1) *This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:*
 - (a) *to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or*
 - (b) *as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.*
- (2) *Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.*

- (3) *Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:*
 - (a) *any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and*
 - (b) *if the admission was made in response to questioning:*
 - (i) *the nature of the questions and the manner in which they were put, and*
 - (ii) *the nature of any threat, promise or other inducement made to the person questioned.*

339. Similar to section 84 the section creates a presumption against admissibility unless the prosecution satisfied the court that it is 'unlikely that the truth of the admission was adversely effected'.

340. The focus is on the "circumstances" of the making of the interview. This raises the question of whether that includes just the circumstances of the questioning or whether it extends to other things occurring earlier in time.

341. Another live question is whether the test is objective, i.e. whether the court can look at the actual reliability of the admission, or whether the focus is on the objective likely effect of the circumstances in which it was made. This question in turn will determine whether on a voir dire an accused could seek to prove an admission was not true and thus was made in circumstances in which its truth was adversely affected.

DOKLU V R [2010] NSWCCA 309

342. In this matter the appellant was convicted of attempting to poison his wife by forcing poison down her throat during a fight in which he was also stabbed. He appealed, in part on the basis that his admissions to investigating police were wrongly admitted. Police had attended the family home after the wife had locked the appellant out and called police. Police spoke to the appellant initially in relation to his stab wounds and he admitted attempting to poison his wife.

343. It was submitted by the appellant:

"It is submitted that the circumstances in which the admissions were made make it likely that the truth of them was adversely affected in that the ability of the Appellant to make rational decisions was impaired by reason of his serious injuries and associated treatment. The Appellant was at the time giving irrational responses to police questioning and was making highly emotionally charged statements generally".

344. The Court of Criminal Appeal (McFarlane J, with whom Simpson and Hall JJ agreed) stated:

"I do not accept this submission. The evidence of the relevant ambulance officer, which was accepted by the trial judge, indicated that the appellant was conscious and coherent at the relevant time. The question asked by Constable Warren that led to the relevant admission was a simple one to which the appellant gave a simple answer. There is no reason to think that he did not understand what he was being asked or that the question was in

any way unfair or misleading. Whilst the appellant's answers to the police questions preceding that to which the appellant responded with the relevant admission hardly constituted a model of usage of the English language, they did not to my mind (nor to that of the trial judge) indicate that the appellant was not understanding what he was being asked or that the accuracy of his answer to the critical question that followed should be regarded as being in doubt".

SECTION 86 – EXCLUSION OF RECORDS OF ORAL QUESTIONING

345. Section 86 states:

- (1) This section applies only in a criminal proceeding and only if an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official.*
- (2) A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response.*
- (3) The acknowledgement must be made by signing, initialling or otherwise marking the document.*
- (4) In this section:*
document *does not include:*
 - (a) a sound recording, or a transcript of a sound recording, or*
 - (b) a recording of visual images and sounds, or a transcript of the sounds so recorded.*

346. This section seems to be little used, probably because of the effect of section 281 of the Criminal Procedure Act which is discussed below.

347. It would seem however to apply where drawings or diagrams are made by a suspect intending to visually depict oral admissions that have already been made.

SECTION 90 – DISCRETION TO EXCLUDE ADMISSION

348. Section 90 of the Evidence Act states:

- In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:*
- (a) the evidence is adduced by the prosecution, and*
 - (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.*

A SAFETY NET PROVISION?

349. A live question is what work is left to be done by a fairness discretion given the various other provisions of the Evidence Act concerned with oppression etc,

reliability and improperly obtained evidence. The ALRC Report 2 'Interim Report on Evidence' recommended the abolition of the discretion but it was ultimately retained.

350. In *Em v the Queen* (2007) 232 CLR 67 the High Court considered the section.

351. Gummow & Hayne JJ were of the view that the provision is effectively a safety net provision:

“‘Unfairness’, whether for the purposes of the common law discretion or for the purposes of s 90, may arise in different ways. But many cases in which the use of evidence of an out-of-court admission would be judged, in the exercise of the common law discretion, to be unfair to an accused are dealt with expressly by particular provisions of the Act other than s 90. Thus although the discretion given by s 90 is generally similar to the common law discretion considered in Lee, it is a discretion that will fall to be considered only after applying the other, more specific, provisions of the Act referred to at the start of these reasons. The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating authorities) are not to be dealt with under s 90. The consequence is that the discretion given by s 90 will be engaged only as a final or ‘safety net’ provision”.

352. Assuming that the section is properly viewed as a safety net provision then the content of the discretion will necessarily depend on the extent to which the facts actually engage the other provisions.

RELIABILITY

353. An example of this arises in relation to reliability, long held at common law to be relevant to the unfairness discretion. Section 85 to the extent it is concerned with reliability, only excludes admissions made in the presence of an investigating official or as a result of an act of a person capable of influencing the decision to prosecute.

354. In a case where a potentially unreliable admission was made to a civilian witness, the section would have greater content.

PROTECTION OF THE RIGHTS OF THE ACCUSED/FREEDOM TO SPEAK OR REMAIN SILENT

355. In *R v Em* [2003] NSWCCA 374 Howie J (with whom Ipp JA and Hulme J agreed) stated at 104:

“The purpose of the discretion is the protection of the rights and privileges of the accused. It is concerned with the right of an accused to a fair trial and includes a consideration of whether any forensic advantage has been obtained unfairly by the Crown from the way the accused was treated”.

356. These rights would include the right to silence and the privilege against self incrimination. This was a significant issue in *R v Em* where the accused had been secretly recorded by police after refusing to be interviewed while recording

equipment was used. The High Court agreed the secretly recorded admissions were admissible largely because police had, in their view, done nothing to encourage the suspect to talk and had merely taken advantage of his ignorance. Nothing in the circumstances indicated to the High Court that his freedom to speak or to remain silent was impugned.

357. Cases where the suspects right to speak or remain silent has been impugned is likely to raise the issue of section 90 exclusion. This would include admissions held to be, according to common law standards, involuntary. It would also include cases where police have taken advantage in an unfair way of a suspect's vulnerability as part of a secret recording process.

PART 3.11 OF THE EVIDENCE ACT

SECTION 137 – DISCRETION TO EXCLUDE UNFAIRLY PREJUDICIAL EVIDENCE

358. Section 137 of the Act states:

“In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant”.

359. This section has a broad application and can apply to admission evidence.

SECTION 138 – IMPROPERLY & UNLAWFULLY OBTAINED EVIDENCE

360. Section 138 of the Evidence Act states:

138 Exclusion of improperly or illegally obtained evidence

(1) *Evidence that was obtained:*

(a) *improperly or in contravention of an Australian law, or*

(b) *in consequence of an impropriety or of a contravention of an Australian law,*

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) *Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:*

(a) *did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or*

- (b) *made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.*
- (3) *Without limiting the matters that the court may take into account under subsection (1), it is to take into account:*
 - (a) *the probative value of the evidence, and*
 - (b) *the importance of the evidence in the proceeding, and*
 - (c) *the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and*
 - (d) *the gravity of the impropriety or contravention, and*
 - (e) *whether the impropriety or contravention was deliberate or reckless, and*
 - (f) *whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and*
 - (g) *whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and*
 - (h) *the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.*

Note. *The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 of the Commonwealth.*

361. This section is of key importance in determining the admissibility of admission evidence and is a key area in which the law that regulates the gathering of admissions interplays with the law that regulates the admissibility of admissions.

362. It is impossible to precisely detail the circumstances in which admissions can be excluded pursuant to this section.

363. The following circumstances might enliven the operation of the section:

- Questioning Following an Unlawful Arrest.
- Questioning that occurs only because Police have unlawfully or improperly obtained other evidence which led them to the accused.
- Questioning following a breach of any of the suspects LEPR rights.
- Questioning that breaches some of the well recognized principles of police questioning.
- Questioning that breaches internal police guidelines, such as CRIME - R v Em [2003] NSWCCA 374.

364. In the experience of the author many ERISPS are obtained in contravention of Part 9 of LEPRA, often because police misunderstand their arrest and/or detention powers. Any consideration of the admissibility of an ERISP made while an accused is in custody should involve close scrutiny of the status of the custody and compliance with Part 9.

365. The ALS matters of *R v Peckham* and *R v Powell* discussed above are examples of interviews being excluded because of various breaches of Part 9.

PERSISTENT QUESTIONING OF VULNERABLE SUSPECTS

366. Persistent questioning is a common way in which section 138 is enlivened.

367. In *Phan v R* [2001] NSWCCA 29 the Court of Criminal Appeal stated (at para 51):

“..The admissibility of an interview conducted in the face of an indication, by the interviewee, that he does not wish to be interviewed, needs to be considered not only in the light of s138 but also in the light of s90 of the Evidence Act. Although no express reference was made to this provision, his Honour did give careful attention to various technical breaches of the procedure laid down in Pt10A of the Crimes Act 1900, and in the Crimes (Detention After Arrest) Regulation 1998. A substantial, although imperfect, compliance with these provisions was found. Such failure to comply with the relevant requirements was described by his Honour as “not a simple and contumelious disregard” of them.”

368. Earlier authorities on this point include *R v Evans* [1962] SASR 303 and *R v Ireland* (1970) 126 CLR 321.

369. It is also an issue that seems to arise in the ALS practice often, at least in the author’s experience in the west of the state. Arguments about persistent questioning of Aboriginal people should rely heavily on the vulnerable status of the suspect under LEPRA

370. Judge Nicholson stated in the *Powell* matter at 47 (in relation to an ERISP where in questions 10 and 11 the suspect had attempted to remain silent):

“Advantage Taken In Interview

47. In the course of the interview Detective Senior Constable Smith deliberately pressed on with her interview after questions 10 and 11. She made no inquiry as to whether the accused was exercising his right to silence for fear that he would indicate he was. That conduct by her was not honourable, particularly where she was dealing with someone who LEPRA recognises as vulnerable.

48. At question and answer 24 it should have been clear to Detective Senior Constable Smith that the accused did not understand his right to silence. She deliberately made no inquiry as to whether he did understand, because she knew the prosecution could seek to rely upon her asking these questions after

the caution at question 3. Again she chose to ignore his vulnerable status, but sought to secure an answer to what she regarded as an important aspect of her inquiry, namely the identity of any other person who may have been with the accused that night”.

371. It is the vulnerable status of Aboriginal people that may enable lawyers to convince a court that the persistent questioning crossed the line from acceptable to unacceptable.

QUESTIONING OF ACCUSED PERSONS POST CHARGE

372. There would seem to be a viable argument that questioning post charge might be improper in circumstances where it is not done through a person’s legal representatives and/or where it is done other than pursuant to a request by an accused person that the interview occur.

373. Judge Nicholson commented in an ALS Dubbo matter of *R v Steven Powell* [2010] NSWDC 84 (8 March 2010):

“The case raises the interesting question of whether a charged person’s status, particularly one who has retained legal representation, carries any additional rights or privileges by comparison with a suspect not yet charged and not yet involved in the litigation process. There can be little doubt that at law the formal charging of a suspect marks the commencement of criminal proceedings against that suspect and that commencement of criminal proceedings may well have attached to it the notion that all contact thereafter ought be with (the charged person’s) legal representative”.

374. Wood CJ at CL stated in *R v Phung and Huynh* [2001] NSWSC 115 at 54:

‘In this regard I observe that the undesirability of police re-interviewing persons already charged with an offence, for the purpose of gaining further information concerning that offence, remains unchanged. It was previously a matter taken up in the police instructions. The reasons for the undesirability of any such post charge interview are obvious, save of course for the important exception in a case where an accused voluntarily approaches police with a view to supplying fresh information, particularly if that is intended to be exculpatory or explanatory of anything which might have been obtained from a prior interview”.

SECTION 139 - THE REQUIREMENT TO CAUTION

375. Section 139 states:

139 Cautioning of persons

- (1) For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:*
(a) the person was under arrest for an offence at the time, and

- (b) *the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and*
 - (c) *before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.*
- (2) *For the purposes of section 138 (1) (a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:*
- (a) *the questioning was conducted by an investigating official who did not have the power to arrest the person, and*
 - (b) *the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence, and*
 - (c) *the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.*
- (3) *The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.*
- (4) *Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.*
- (5) *A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:*
- (a) *the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or*
 - (b) *the official would not allow the person to leave if the person wished to do so, or*
 - (c) *the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.*
- (6) *A person is not treated as being under arrest only because of subsection (5) if:*
- (a) *the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth, or*
 - (b) *the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.*

NEED TO DEMONSTRATE UNDERSTANDING OF THE CAUTION

376. In *Regina v Deng* [2001] NSWCCA 153, Greg James J stated at 16-18 in relation to the meaning of the section:

“Whatever may be the appropriate test necessary for precise definition of the terms in the section, her Honour’s findings of fact appear to go to the extent of

holding that the accused was able to understand in English the caution the police officers gave him.

In my view the section is purposive. It does not operate on an accused's general language ability. It operates on the ability to understand the concept underlying the caution and the function of a caution. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence.

For my own part, I would conclude that there was an overwhelming case made that this offender did have the relevant understanding communicated to him, particularly when I have regard to what he said and how he acted in the video which has been before us”.

377. This is a useful decision which can be used to make the argument that in circumstances where a suspect can be found to have not understand the caution it can be contended that no caution has in fact been given.

378. Similar issues arose in *R v Taylor* [1999] ACTSC 47 Higgins J (as he then was) stated at 18-21:

“The requirement to facilitate comprehension of the caution is contained in s 139(3). It provides:

The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.”

In my view, because it is, albeit deemed, improper for a police officer (or other relevant official) to omit a caution, or to deliver a caution where the person cautioned will not comprehend it, it seems to me that the caution will fail to satisfy s 139(3) if the circumstances are such that the officer knows, or ought to know, that the caution has not been understood. However, there is no such failure if a reasonable person in the position of the officer, acting with proper respect for the rights of suspects, did not and could not reasonably have been expected to perceive that the suspect did not understand the caution.

*Usually the suspect's acknowledgement that he or she has heard and understood the caution will suffice. There may be cases, however, and, in fact, this was one of them, where further enquiry such as Constable Schultz made but did not pursue, would be required (see, for example, the Anunga rules in relation to Aboriginal suspects: *R v Anunga* (1976) 11 ALR 412). It was, or should have been, apparent to Constable Schultz that the accused was intoxicated and a person likely to be mentally disadvantaged. He knew that the accused was a resident of Ainslie Village which is well known as a refuge for those whose coping skills have become marginal, whether because of substance abuse, mental dysfunction or otherwise. It follows that s 139(3) is not satisfied.*

However, though the discretion under s 138(1) may be regarded as enlivened as a result of the failure to comply with s 139(3), I would not have excluded the evidence merely on the grounds of the deemed impropriety”

ADMISSIBILITY OF UNRECORDED STATEMENTS

SECTION 281 OF THE CRIMINAL PROCEDURE ACT

379. A recurrent and serious problem prior to the introduction of wide ranging legislation aimed at protecting the rights of suspects was the police practice of “verballing” where police officers would give evidence that a suspect had made an admission that they had not in fact made.

380. Section 281 (previously section 108) is the successor provision to section 424A of the New South Wales Crimes Act.

381. Section 424A was introduced in 1995 (as part of the package of reforms associated with the introduction of the Evidence Act). The Attorney in the Second Reading Speech stated (my emphasis):

“It also makes an amendment to the Crimes Act 1900, making the tape-recording of admissions to police compulsory where an accused person is suspected of an indictable offence that may not be tried summarily without the defendant's consent. The Police Service has already introduced a system for the electronic recording of interviews, implementing the 1986 report of the criminal law review division of the Attorney General's Department. That report set out four objectives for adopting an electronic recording system:

1. To provide the courts with a reliable account of statements made by persons accused of crime whilst in police custody.

2. To provide an objective means of resolving disputes about the conduct and substance of police interviews.

3. To deter and/or prevent the use of unfair practices by the police prior to, during, and after interviews.

4. To deter the making of unfair and false allegations of improper behaviour by police.

This bill implements one of the recommendations of that report by providing that any unreasonable failure to adhere to the system will result in the inadmissibility of the evidence. The courts are thereby enabled to supervise the operation of the system

382. Section 281 of the Criminal Procedure Act states:

281 Admissions by suspects

(1) *This section applies to an admission:*

(a) *that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and*

(b) *that was made in the course of official questioning, and*

- (c) *that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.*
- (2) *Evidence of an admission to which this section applies is not admissible unless:*
 - (a) *there is available to the court:*
 - (i) *a tape recording made by an investigating official of the interview in the course of which the admission was made, or*
 - (ii) *if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or*
 - (b) *the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.*
- (3) *The hearsay rule and the opinion rule (within the meaning of the Evidence Act 1995) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).*

(4) *In this section:*

investigating official means:

- (a) *a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or*
- (b) *a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences prescribed by the regulations.*

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

reasonable excuse includes:

- (a) *a mechanical failure, or*
- (b) *the refusal of a person being questioned to have the questioning electronically recorded, or*
- (c) *the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.*

tape recording includes:

- (a) *audio recording, or*
- (b) *video recording, or*

(c) a video recording accompanied by a separately but contemporaneously recorded audio recording.

383. In summary the section applies to exclude admissions:

- Made in the course of official questioning, (which does not include spontaneous utterances⁵⁵)
- When the suspect was or could reasonably have been suspected of an offence (including where the police officer did not suspect them but should have⁵⁶)
- That relate to an indictable offence, except one that can be dealt with summarily without consent of the accused (even when the admission was made to a summary offence but is later sought to be led against the accused at trial of the indictable matter⁵⁷).
- If:
 - There is not a tape recording available of the interview; or if there was a reasonable excuse for that not being made, a recording of a subsequent interview in which the earlier admission is adopted.
 - Or, there is not a reasonable excuse as to why the recordings are not available.

384. There is a body of case law examining the provision and similar interstate provisions.

CL V DIRECTOR OF PUBLIC PROSECUTIONS (NSW) [2011] NSWSC 943

385. CL is an ALS case and the most recent authority on the section.

386. CL was convicted on unrecorded admissions after the Chief Magistrate ruled that the offence (against section 112(2)) could be dealt with in the Childrens Court pursuant to section 31(1) of the Children (Criminal Proceedings) Act and therefore could not be said to relate to, “an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person”.

387. Fullerton J held at 16:

“The question of construction raised by the first ground of appeal is readily resolved and in the plaintiff’s favour. Consistent with the analysis given to the equivalent provision formerly in s 424A of the Crimes Act by Smart AJ in R v Rowe [2001] NSWCCA 1 ; 50 NSWLR 510 at [40], I am satisfied that the qualification in s 281(1)(c) is to the type of offence to which the admission relates (namely an indictable offence that can be prosecuted without the

⁵⁵ *Donnelly* (1997) 96 A Crim R 432.

⁵⁶ *R v Frangulis* [2006] NSWCCA 363.

⁵⁷ *DPP v Farr* (2001) 118 A Crim R 399.

accused's consent under Tables 1 and 2 of Sch 1 of the Criminal Procedure Act) and not the nature of the proceedings where the admission is sought to be led as might have been the case were the exception in s 28(1)(c) to read "other than an indictable offence that is dealt with summarily without the consent of the accused".

388. Another recent authority is *R v Paul Darcey Armstrong* [2010] NSWSC 483 where the accused was charged with murdering a man he had left an Oxford St nightclub with many years before. Advances in DNA science had enabled police to analyse material beneath the deceased's fingernails which led to a match with the accused.

389. Apart from containing an examination of much of the case law dealing with the section the judgment also examines closely the concept of a reasonable excuse (as defined in the section) for not recording admissions.

390. The voir dire on the admissions involved a situation where a police officer visited a charged person in custody after he had been remanded to serve him with paperwork. The officer took recording equipment with him in case the remandee wanted to discuss the murder. After serving the paperwork the officer asked the accused if he had a chance to think about if he wanted to tell the officer why he killed the deceased. The accused then asked the officer what would happen if he told him that he had killed the deceased after they had sex and the deceased had told him he had HIV. At no point at this stage had the accused refused to be recorded. Counsel for the accused argued that because of the definition in section 281(4) of 'reasonable excuse' there could be no "*refusal of a person being questioned to have the questioning electronically recorded*" where they were not asked about a recording prior to the interview commencing.

391. Buddin J stated in excluding the admissions at 42:

"The definition of "reasonable excuse" provides for three different possibilities. In the present case, as I have said, recording equipment was available. Nor did any issue of mechanical failure arise. Putting aside the situation in which there is a mechanical failure but one which occurs only during the course of the interrogation process, ordinarily the question of mechanical failure, and the unavailability of recording equipment are matters that would be apparent from the outset of the interview process. Such a state of affairs would lend support to the proposition that the question of the suspect's consent (and possible refusal) should also be dealt with at the outset".

.....

[49] In all the circumstances, I accept the submissions made on behalf of the accused that the Crown has failed to establish that there was a "refusal" on the part of the accused to have the "questioning electronically recorded". It follows that the Crown has not demonstrated that there was a "reasonable excuse" as to why a tape recording within the meaning of s 281(2)(a)(i) could not be made. The Crown did not contend that any other kind of "reasonable excuse" could be made out. That being so, there is no further work in the circumstances of the present case for either ss (2)(a)(ii) or (b) to do.

SECTION 23V OF THE CTH CRIMES ACT

392. Section 23V of Part 1C of the Commonwealth Crimes Act states:

(1) If a person who is being questioned as a suspect (whether under arrest or not) makes a confession or admission to an investigating official, the confession or admission is inadmissible as evidence against the person in proceedings for any Commonwealth offence unless:

(a) if the confession or admission was made in circumstances where it was reasonably practicable to tape record the confession or admission--the questioning of the person and anything said by the person during that questioning was tape recorded; or

(b) in any other case:

(i) when questioning the person, or as soon as practicable afterwards, a record in writing was made, either in English or in another language used by the person during questioning, of the things said by or to the person during questioning; and

(ii) as soon as practicable after the record was made, it was read to the person in the language used by him or her during questioning and a copy of the record was made available to the person; and

(iii) the person was given the opportunity to interrupt the reading at any time for the purpose of drawing attention to any error or omission that he or she claimed had been made in or from the record and, at the end of the reading, the person was given the opportunity to state whether he or she claimed that there were any errors in or omissions from the record in addition to any to which he or she had drawn attention in the course of the reading; and

(iv) a tape recording was made of the reading referred to in subparagraph (ii) and of everything said by or to the person as a result of compliance with subparagraph (iii), and the requirements of subsection (2) were observed in respect of that recording; and

(v) before the reading referred to in subparagraph (ii), an explanation, in accordance with the form in the Schedule, was given to the person of the procedure that would be followed for the purposes of compliance with that subparagraph and subparagraphs (iii) and (iv).

(2) If the questioning, confession or admission, or the confirmation of a confession or admission, of a person is recorded as required under this section, the investigating official must, without charge:

(a) if the recording is an audio recording only or a video recording only--make the recording or a copy of it available to the person or

his or her legal representative within 7 days after the making of the recording; and

(b) if both an audio recording and a video recording were made--make the audio recording or a copy of it available to the person or his or her legal representative within 7 days after the making of the recording, and inform the person or his or her legal representative that an opportunity will be provided, on request, for viewing the video recording; and

(c) if a transcript of the tape recording is prepared--make a copy of the transcript available to the person or his or her legal representative within 7 days after the preparation of the transcript.

(3) Where a confession or admission is made to an investigating official who was, at the time when it was made, engaged in covert investigations under the orders of a superior, this section applies as if the acts required by paragraph (1)(b) and subsection (2) to be performed were required to be performed by the official at a time when they could reasonably be performed without prejudice to the covert investigations.

(4) Despite any arrangement made under the Commonwealth Places (Application of Laws) Act 1970, this section applies to any offence under a law applied by that Act if the investigating official is a member or special member of the Australian Federal Police.

(5) A court may admit evidence to which this section applies even if the requirements of this section have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

(6) A court may admit evidence to which this section applies even if a provision of subsection (2) has not been complied with if, having regard to the reasons for the non-compliance and any other relevant matters, the court is satisfied that it was not practicable to comply with that provision.

(6A) To avoid doubt, subsection (6) does not limit subsection (5).

(7) If a judge permits evidence to be given before a jury under subsection (5) or (6), the judge must inform the jury of the non-compliance with the requirements of this section, or of the absence of sufficient evidence of compliance with those requirements, and give the jury such warning about the evidence as he or she thinks appropriate in the circumstances.

SECTION 13 OF THE CHILDREN (CRIMINAL PROCEEDINGS) ACT

393. Section 13 of the Children (Criminal Proceedings) Act states:

13 Admissibility of certain statements etc

- (1) Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall not be admitted in evidence in those proceedings unless:*
 - (a) there was present at the place where, and throughout the period of time during which, it was made or given:*
 - (i) a person responsible for the child,*
 - (ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,*
 - (iii) in the case of a child who is of or above the age of 14 years—an adult (other than a member of the police force) who was present with the consent of the child, or*
 - (iv) an Australian legal practitioner of the child's own choosing, or*
 - (b) the person acting judicially in those proceedings:*
 - (i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given, and*
 - (ii) considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.*
- (2) In this section:*
 - (a) a reference to a person acting judicially includes a reference to a person making a determination as to the admissibility of evidence in committal proceedings, and*
 - (b) a reference to criminal proceedings is a reference to any criminal proceedings in which a person is alleged to have committed an offence while a child or which arise out of any other criminal proceedings in which a person is alleged to have committed an offence while a child, and*
 - (c) a reference to a person responsible for a child does not include a member of the police force (unless he or she has parental responsibility for the child).*
- (3) Nothing in this section limits or affects the admissibility in evidence in any criminal proceedings against a child of any statement or information that the child is required to make or give by virtue of the provisions of any Act or law.*

394. As discussed above regulation 29 of LEPR also provides that a child cannot waive their right to a support person.

395. In *H (A Child)* 85 A Crim R 481 Hidden J considered the admissibility under section 13 of admissions made by a 17yr old in two records of interview and a crime scene visit. The child's father was excluded from the interview by police and his sister remained, but there was no evidence this occurred with either the consent of the father (relevant to sub-paragraph (1)(a)(ii)) or the child (relevant to sub-paragraph (1)(a)(iii)).

396. At 486 Hidden J stated (my emphasis):

"The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his/her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice. No one could suggest that a barrister or solicitor, whose presence is envisaged by s 13(1)(a)(iv), could be restrained from tendering advice. Nor should any other adult. Further, within appropriate limits, the adult might assist a timid or inarticulate child to frame his/her answer to the allegation. For example, the child might be reminded of circumstances within the knowledge of both the child and the adult which bear on the matter. Obviously the right of an adult to intervene in an interview is not unfettered. Police should not be required to tolerate behaviour which is abusive or obstructive. Nor should the adult be permitted to become the child's 'mouthpiece', so that the answers supplied are not really those of the child. Unacceptable behaviour of this kind may justify interviewing police in demanding that the adult leave the interview room, however, the interview should not continue until the presence of another appropriate adult has been secured, and the selection of that person must be dictated by the terms and legislative purpose of s 13(1)(a)".

397. Further at 487:

"The fact remains that the significant part of the interview was conducted in the presence only of R.. There can be no suggestion that she maintained her presence with the consent of any person responsible for the accused, within the meaning of s 13(1)(a)(ii). As already observed, the accused himself was not asked whether he consented to her presence, pursuant to subpara (ii). The Crown Prosecutor submitted that that consent could be inferred from all the circumstances. He raised no objection to his sister being there and she gave evidence of being close to the accused, particularly since their mother had left the family home when he was only six years old. I have no doubt the accused did not object to his sister remaining during the interview, but that falls short of the consent required by the sub section.

That consent, whether it be of a person responsible for the child pursuant to subpara (ii), or of the child himself or herself under subpara (iii), must be given in the light of the protective purpose of the legislation spelled out in the authorities to which I have earlier referred. There cannot be consent in the relevant sense when the child (or the person responsible for the child) has

had no opportunity to select a person considered appropriate for that purpose. No doubt the accused is very fond of his sister but, if given the opportunity, he may not have chosen her to safeguard his interests in the situation in which he found himself at the Moruya police station”.

SECTION 67 OF THE YOUNG OFFENDERS ACT 1997 (NSW)

398. Section 67 of the Young Offenders Act relates to cautioning and youth justice conferencing and states:

67 Certain statements inadmissible

- (1) Any statement, confession, admission or information made or given by a child during the giving of a caution or a conference under this Act is not to be admitted in evidence in any subsequent criminal or civil proceedings.*
- (2) Despite subsection (1), an outcome plan agreed at a conference may be produced to a court if the court has referred a matter for a conference.*

PART 10 OF THE CRIMES ACT 1900 (ACT)

399. Section 252G of the ACT Crimes Act is concerned with the interviewing of children. (Strictly speaking it is concerned with the gathering of evidence, rather than the adducing of evidence. Breach of the section would need to be considered in light of the operation of section 138 of the Evidence Act).

400. The section states:

Interviewing children and young people about offences

- (1) This section applies if a police officer—*
 - (a) suspects on reasonable grounds that a child or young person may have committed, or be implicated in the commission of, an offence; or*
 - (b) is holding a child or young person under restraint.*
- (2) A police officer must not interview the child or young person about an offence, or cause the child or young person to do anything in relation to the investigation of an offence, unless—*
 - (a) one of the following people (who is an adult and who the police officer does not believe on reasonable grounds to be an accomplice of the child or young person in relation to the offence) is present:*
 - (i) a parent of the child or young person;*
 - (ii) someone else who has daily care responsibility, or long-term care responsibility, for the child or young person;*

(iii) a family member of the child or young person who is acceptable to the child or young person;

(iv) a lawyer acting for the child or young person;

(v) another suitable person who is acceptable to the child or young person; or

(b) if the police officer has taken reasonable steps to have a person mentioned in paragraph (a) present but it was not practicable for such a person to be present within 2 hours after being asked to be present—someone else who is not a police officer and has not been involved with the investigation of the offence.

Example—suitable person—par (a) (v)

a person trained by the public advocate to attend interviews of children and young people

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(3) In this section:

"accomplice", in relation to an offence, includes a person who a police officer believes on reasonable grounds to be likely to secrete, lose, destroy or fabricate evidence relating to the offence.

401. Note that the terms 'under restraint' and 'in the company of a police officer' are defined earlier in the same part of the Act.

402. The requirement in 252G is not absolute. Section 252H states:

Interviewing children and young people about offences—urgent circumstances

A police officer may interview a child or young person if—

(a) the police officer—

(i) suspects on reasonable grounds that the child or young person may have committed, or be implicated in the commission of, an offence; or

(ii) is holding the child or young person under restraint; and

(b) the police officer believes on reasonable grounds that it is necessary to interview the child or young person without delay to avoid—

- (i) *a risk of death or serious injury of a person; or*
- (ii) *serious damage to property.*

403. Sections 252I, 252J and 252K contain various other protections in relation to young suspects.

THREE - AN ADMISIONS CHECKLIST

404. In every matter where admissions have been obtained it will be necessary to consider carefully the compliance with the various provisions detained above.

405. Asking the following questions may be a useful checklist:

GENERAL

- Was your client cautioned? (Section 139)
- Did they understand the caution?
- Were the admissions recorded? (Section 281)
- If they were a child did they have the required person/s present during the interview (Section 13)
- Were the admissions made in a youth justice conference (Section 67)

SURROUNDING CIRCUMSTANCES

- Was there conduct or circumstances capable of influencing the reliability of the admissions? (Mental illness? Inducements?)
- Was there conduct that was violent, oppressive, inhuman or degrading, which may have influenced the making of the admission or its contents? (Duress? Mental Pressure? Threats? Intimidation? Inducements?)
- If the admission is a written record, did the maker acknowledge its truth by marking the document?
- Would it be, in the relevant legal sense, unfair to admit the admission? (see below)
- Were the admissions improperly or unlawfully obtained or as a consequence of such conduct such as to enliven section 138? (see below)

FURTHER QUESTIONS RELEVANT TO THE DISCRETIONARY EXCLUSIONARY POWERS

- Was the arrest lawful? (if there was an arrest, as opposed to a deemed under section 110)

- Was there an investigation period available for the matter for which the person was arrested?
- Was the investigation period utilized reasonable? (Can the prosecution prove that (as they have the burden)
- Are the time outs claimed reasonable? (Can the prosecution prove that? as they have the burden)
- Was the extension of the period pursuant to a detention warrant done in compliance with the Act?
- If your client was not given Part 9/Part 1C rights, were they in a state of deemed arrest and therefore should have been?
- Was your client cautioned by the custody manager?
- Were they given a Part 9 Summary of Rights?
- Were they given the proper opportunity to communicate in private with a friend, relative, guardian or independent persons and a lawyer?
- Were they told of inquiries made about them while in custody as required?
- Did they receive medical attention etc if required?
- Were they given reasonable access to refreshments, toilet facilities etc?
- Were the proper records maintained?
- Did the custody manager assist them in exercising their rights as required by Regulation 25?
- Were the support person/interview friend requirements complied with?
- Did the custody manager take appropriate steps to ensure they understood the caution (which is more than just reading it to them)
- Was the Custody Notification Scheme contacted?
- Was your client intoxicated at the time?
- Was your client able to exercise their rights in a meaningful way? Especially the privilege against self incrimination and the right to silence?

MANNER OF QUESTIONING

- Was CRIME complied with?
- Does the manner of questioning enliven any of the discretions? (persistent questioning, cross-examination etc)

406. Not all negative answer to the questions above will lead to exclusion though some may individually. Alternatively a combination of other negative may lead to exclusion.

407. The author welcomes comments and feed back on this paper.

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