

ADMISSIBILITY OF ADMISSIONS

ABORIGINAL AND TORRES STRAIT ISLANDERS SUSPECTS

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Contents

INTRODUCTION	1
The Problems	1
(i) Language difficulties	1
(ii) Cultural Difficulties	2
(iii) The Caution	2
NORTHERN TERRITORY	3
The Anunga Rules	5
Legislative Provisions in Northern Territory	8
QUEENSLAND	10
WESTERN AUSTRALIA	12
VICTORIA	15
SOUTH AUSTRALIA	18
TASMANIA	20
COMMONWEALTH	21
NEW SOUTH WALES	23
A CHECKLIST	33
SECTION 281 CRIMINAL PROCEDURE ACT 1986	35
DEFINITION OF ADMISSION	36
MEANING OF "RELATES TO" - SUMMARY AND INDICTABLE OFFENCES	37
REASONABLY SUSPECTED	38
OFFICIAL QUESTIONING	40
REASONABLE EXCUSE	43
CONCLUSION	44

INTRODUCTION

The need to protect the rights of Aboriginal and Torres Strait Islander (ATSI) suspects during police interrogation has been the subject of legislative and judicial comment across Australian jurisdictions. Not all Australian States have introduced specific legislation to protect such rights. In the Northern Territory, for example, lawyers rely upon the Anunga Rules, case law and internal police policies to argue for the exclusion of admissions where the rights of their clients have been breached.

The first section of this paper will endeavour to provide an outline of the relevant position in each State and Territory with respect to police questioning of ATSI suspects. The second section will focus on the legislative and judicial position in NSW with respect to the admissibility of admissions by ATSI suspects where the police fail to comply with the rules and guidelines provided.

The Problems

The specific vulnerabilities of ATSI suspects being questioned by police are well documented and recognised in numerous reports and articles.¹ Peculiar difficulties that might be faced by ATSI suspects include the following:

(i) Language difficulties

- Many Aboriginal people, especially in the Northern Territory, are not fluent in English and many are illiterate. A key issue for Aborigines and Torres Strait Islanders is language skills and English comprehension. In 2006, there were 517,000 Indigenous people in Australia, up from 459,000 in 2001 (SCRGSP 2009²). Although the difficulties in obtaining accurate data were acknowledged, it has been estimated that there are about 55,000 speakers of Indigenous languages in Australia, the majority of whom would have 'poor, or limited, understanding of English' (Kimberley Interpreting Service 2004: 3³). Notwithstanding this, Cooke (2004) conducted research in remote areas in the Northern Territory and found police reluctant to engage interpreters' services.⁴ Furthermore, difficulties of finding interpreters can mean courts water down the requirement to conduct interviews with interpreters.⁵
- Many common words in English are used very differently by ATSI people. Some words and concepts do not translate.
- ATSI people may not be accustomed to question / answer form but may be more comfortable with the use of narratives.
- Confusion can arise from either / or questions.
- In some communities Aboriginal languages have no counting system similar to English. This is sometimes reflected in a suspect's inability to answer a question requiring the number of people present at a particular location. An ATSI suspect may provide a more reliable answer by listing the people present.
- Chronic middle ear infections mean large numbers of Aboriginal people suffer hearing loss. In Australia, the issue of hearing loss among Indigenous people has become an area of particular concern, with the

¹ The following articles provide informative perspectives of the particular issues facing ATSI suspects: "Redressing the Imbalance Against Aboriginals in the Criminal Justice System", The Honourable Justice Dean Mildren, Criminal Law Journal Vol 21, February 1997, page 7; "Practical Guidelines for Conducting Investigative Interviews with Aboriginal People", Martin Powell, Current Issues in Criminal Justice Volume 12, Number 2 page 181; "The Cultural Specificity of Evidence: The Current Scope and Relevance of the Anunga Guidelines", Heather Douglas, (1998) UNSW Law Journal Volume 21 (1) page 27.

² Steering Committee for the Review of Government Service Provision (SCRGSP) 2009. *Overcoming Indigenous Disadvantage: Fact sheet—Women, men and children*. Melbourne: Productivity Commission cited in "Police Interviews With Vulnerable Suspects", Dr Lorana Bartels, Australian Institute of Criminology, Report No 21, July 2011.

³ Kimberley Interpreting Service 2004. *Indigenous language interpreting services: Discussion paper*. http://www.arts.gov.au/__data/assets/pdf_file/0011/20450/indigenous-languageinterpreting-discussion-paper.pdf cited in Bartels Note 2.

⁴ Cooke M 2004. *Caught in the middle: Indigenous interpreters and customary law*. Background paper no. 2. Perth: Law Reform Commission of Western Australia cited in Bartels, Note 2.

⁵ *Redressing the Imbalance Against Aboriginals in the Criminal Justice System*, The Honourable Justice Dean Mildren, Criminal Law Journal Vol 21, February 1997, pages 8-9.

Senate Community Affairs References Committee (SCARC 2010: 121⁶) finding in its inquiry into hearing health in Australia that '[e]vidence presented to the committee strongly suggests that...it has a strong association with Indigenous engagement with the criminal justice system'. The Committee noted the High Court's finding in *Ebatarinja v Deland* (1998) 194 CLR 444, which 'suggests that undiagnosed hearing impairment in a convicted person could, in some circumstances, render that conviction unsafe' (SCARC 2010: 142). The Committee made several relevant recommendations, including that:

*"guidelines for police interrogation of Indigenous Australians in each state and territory be amended to include a requirement that a hearing assessment be conducted on any Indigenous person who is having communication difficulties, irrespective of whether police officers consider that the communication difficulties are arising from language and cross-cultural issues (SCARC 2010: Rec. 31)."*⁷

(ii) Cultural Difficulties

- Reluctance of an ATSI suspect to discuss a particular topic may be because culturally only certain people are allowed to discuss the matter.
- Use of long silences in conversations, gestures and reluctance to make eye contact can be misinterpreted.
- Some Aboriginal people have difficulties distinguishing between what they know personally and what they have been told.
- Some questions that do not raise offense in other cultures may be offensive to an ATSI person (e.g. Aboriginals do not refer to the name of a deceased).
- Deference to authority and a propensity to answer leading questions in the way ATSI suspects consider the questioner wants, mean they may agree with statements put to them by police. An issue of particular concern is 'gratuitous concurrence', that is, freely saying 'yes' in response to a yes/no question, regardless of the suspect's understanding of the question or their belief in the truth or falsity of the proposition. Dr Eades observes:

*"Aboriginal English speakers often agree to a question even if they do not understand it. That is when Aboriginal people say 'yes' in an answer to a question it often does not mean 'I agree with what you are saying to me'. Instead, it often means 'I think that if I say 'yes' you will see that I am obliging, and socially amenable and you will think well of me, and things will work out between us'."*⁸

(iii) The Caution

- Many ATSI suspects have difficulty understanding the caution. Asking a suspect "Do you understand that?" may not be helpful.
- Use of the term 'have to' in "you do not have to answer question" can also unhelpful.
- Telling a suspect they do not have to answer questions then asking them to answer a question ('do you understand this?') can be confusing.
- Often suspects choose a close friend or family member who may not have any better understanding than the suspect of their role and the rights of the suspect.

⁶ Senate Community Affairs References Committee (SCARC) 2010. *Hear us: Inquiry into hearing health in Australia*. http://www.aph.gov.au/senate/committee/clac_cte/hearing_health/report/report.pdf cited in Bartels, Note 2.

⁷ Ibid.

⁸ D Eades, "Aboriginal English and the Law", Continuing Legal Education Department, Queensland Law Society Inc. 1992 p. 26.

NORTHERN TERRITORY

The Anunga Rules

The first, and arguably, most extensive attempt to provide protection to Aboriginal suspects are the Anunga Rules. The Anunga Rules are guidelines formulated by the Northern Territory Supreme Court in 1976 for the questioning of Aboriginal suspects. Although they have been copied into police guidelines they have not been incorporated into legislation. They have force in the Northern Territory as precedent.

R v Anunga (1976) 11 ALR 412

"(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."

In relation to the consequences of failing to comply with these statements the court said:

"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."

Breaching the Anunga Rules will not necessarily result in a record of interview being excluded. Decisions as to the admission of evidence continue to be based upon the common law principles of voluntariness, unfairness and public policy. Central to the rules is the importance of a suspect understanding their right to silence. A failure to understand this can mean a finding that the interview is not voluntary.

In **Jabarula** (1984) 11 A Crim R 131 at 132, the Court said:

"Anunga made no new law which intruded upon authoritative decisions as to voluntariness or fairness. The guidelines were merely designed to ensure that those who by reason of their ethnic origins, by reason of their separate cultures and traditions, and by reason of embarrassment or fear will not suffer disadvantage in their dealings with the law."

In **Gudabi** (1984) 12 A Crim R 70 at 81, the Court observed [at p 81]:

"The guidelines, which have as their object the assistance of investigating officers in conducting their inquiries in such a manner as to be fair to the person being interviewed while at the same time serving the public interest by not unduly inhibiting the investigating process, are not rules of law. It would be wrong to treat what is said in Anunga as laying down principles or rules the breach of which in any respect will result in confessional material being rejected as inadmissible. Equally it cannot properly be said that evidence of a confessional statement will always be admissible if it can be shown that the investigating officers did not in any respect contravene those guidelines. The legal question will always be whether the confessional statement was voluntary in the sense in which that expression is used in the relevant authorities."

These guidelines have been considered and applied in a large number of cases in the Northern Territory. Judges have excluded admissions where breaches of guidelines have meant the admissions are involuntary or unfair.

The following summary of cases provides an overview of the application of the Anunga guidelines in the Northern Territory:

In **Butler (No 1)** (1991) 102 FLR 341 at 344 Kearney J stated:

"I consider that it is desirable that a "prisoner's friend" should desirably possess other qualities as well as those emphasised above. He should be aware of the respective rights and duties of the police and of the suspect in that interview, so that he can ensure that the suspect is aware of the possible consequences of the answers he gives. He should be seen to be independent of the police and have a temperament such that he is not himself intimidated by the interviewing environment. He should be able to speak the suspect's principal language. There will usually be practical difficulties in obtaining the services of people with all the desirable attributes. In any event, the choice of the "friend" is for the suspect alone, not the police, though the police may assist in securing the services of a "prisoner's friend", if expressly requested to do so by the suspect: see Gudabi v R (1984) 1 FCR 187 at 199-200. The Commissioner's General Orders Q2.8, 2.9 and 2.16 provide suitable instructions to interrogating police officers in relation to the "prisoner's friend".

In **Echo** (1997) 6 NTLR 51; (1997) 136 FLR 451, Martin CJ, said:

It is not enough that an Aboriginal suspect being interrogated have an understanding and an ability to converse in the English language, particularly if he or she has apparently lived a more traditional lifestyle. To such a person the standard caution may well be bewildering, as the accused's conflicting answers to questions testing his understanding show. There is no evidence to show that notwithstanding his frequent contact with police prior to this occasion, the accused has ever

indicated his understanding of the right to remain silent. It certainly does not appear from the transcript of the 1994 interview. An understanding of everyday English may not be enough when concepts such as those lying behind the caution are a consideration and that is why application of the rule is important. The difficulty was compounded by the accused's commitment to take part in the interview prior to any proper attempt being made to caution him on that occasion. Had the rule been applied, and the accused's responses not demonstrated his understanding of his right, then it would have been opportune to seek the services of an interpreter. There was no reason for haste. I am not satisfied that the accused's participation in the interview at Katherine was with an understanding of his right to remain silent.

In Dumoo v Garner (1997) 7 NTLR 129 Kearney J followed Azar (1991) 56 A Crim R 414 and Nundhirribala (1994) 120 FLR 125 and concluded that the fact that a suspect is not aware of the right to silence does not make confessions involuntary per se: (p. 141):

... If the appellant did not know at the time he made the admissions that he had the right to speak or to be silent, that lack of knowledge did not per se render his admissions involuntary, though it may be of practical or evidentiary significance" in determining whether he spoke in the exercise of a free choice.. (p. 141).

Kearney J went on to consider the role of the Anunga guidelines in establishing an Aboriginal suspect's understanding of his or her right to silence and avoiding inappropriate questioning that provokes 'gratuitous concurrence' answers.

"Mr Thomson noted that in Nundhirribala (supra) at 134 Mildren J considered that where the Anunga guidelines apply to an accused who is having the caution explained to him, his answers such as "yeah" to questions like "Do you understand that?", are "virtually worthless". I respectfully agree; see p32. His Honour considered at 134 that the "most important part of [Anunga] guideline (3)" is that an "interrogation should not proceed until the Aboriginal [being questioned] had an apparent understanding of his right to remain silent". I respectfully agree; I consider that that is the fundamental purpose of Police General OQ2.5.3, and Anunga guideline (3). For a police officer to continue with an interrogation in the absence of such an objectively established "apparent understanding" is to run the risk that admissions thereby obtained will be excluded, as was made clear in Anunga (supra) at 415. Of course, exclusion does not automatically follow - see Gudabi (1984) 52 ALR 133; 12 A Crim R 70.

Mr Thomson submitted that here the appellant's answers of "yeah" and "no" to Constable Lindsay's questions intended to inform him of his right to silence (p4), were indicative of exactly the sort of evil that the Anunga guidelines were directed at. His answers were examples of what has been called "gratuitous concurrence" by Professor Eades in her article 'Aboriginal English and the Law' (CLE Dept, Queensland Law Society Inc, 1992) at p. 51 - p. 54. With reference to the questioning of Aboriginal people in police and courtroom situations Professor Eades explains "gratuitous concurrence" in this way at p. 51:

"Often it seems that the Aboriginal person thinks that if they agree with whatever the non-Aboriginal person in authority is suggesting, then they will get out of trouble more quickly. The agreement is made regardless of either an understanding of the question or a belief about the truth or falsity of the proposition being questioned. Thus, it does not necessarily mean the Aboriginal person agrees with the proposition."

I accept that the phenomenon of "gratuitous concurrence" in these circumstances is well-established, as Forster J pointed out in Anunga (supra) at 414, and the possibility that it occurred here is not excluded. (pp. 141-142).

The failures in this case included:

- Inappropriately offered assistance of police officer
- Not informed about the role of prisoner's friend
- Inappropriate questioning
- Failed to have suspect repeat back caution

Ultimately Kearney J held that although the magistrate had not erred in finding the confession voluntary and not exercising the unfairness discretion, in view of the many failures to comply with the Anunga provisions, the evidence of the admissions should have been excluded.

*"In all the circumstances, bearing in mind the nature of the charges involved, I consider that the **public interest** that the Anunga guidelines and the matters in Police General OQ2 be observed in the investigation of crime (an essential safeguard for the protection of Aboriginal persons) in this case outweighs the goal of bringing this particular wrongdoer to conviction and punishment." (p. 150) (emphasis added)*

In Bara (1998) 106 A Crim R 1 NTSC Kearney J did not exclude the police interview. The offence was murder. The failure to comply with the Anunga guidelines included a failure to provide a full caution and a failure to inform and provide an opportunity for the suspect to contact a prisoner's friend. His Honour was satisfied that the failure to put a full caution was inadvertent and that the suspect understood the right to silence. His Honour was also satisfied that the suspect was made sufficiently aware of the right to a friend and the absence of a friend in the interview did not mean the suspect's will was overborne. It was noted that it was preferable to have an interpreter. The breaches did not make the admissions unreliable in the circumstances of case (particularly in taking into account the seriousness of the offence). The discretion to exclude the evidence on the grounds of public policy was not exercised.

In Jako [1999] NTSC 46 Mildren J ruled that a number of breaches of the Anunga guidelines rendered the Record of Interview involuntary and thereby inadmissible. The charges were murder, aggravated robbery and unlawful use of a motor vehicle. One of the complaints made was that the suspect had indicated she did not wish to answer questions but was asked questions regardless:

"[36] ... The questioning clearly breached guideline eight of the Anunga guidelines, which recognises the particular vulnerability Aboriginal people have to subtle pressure by persons in authority who persist in questioning after the suspect has indicated his or her wish to remain silent: cf Jabarula (1984) 11 A Crim R 132 per Muirhead J at 133. It is the experience of this Court that few Aboriginal people would be able to resist answering questions in circumstances such as these, where the express wish of the suspect is ignored."

Further complaints included the fact that there had been no attempt to properly explain the role of a prisoner's friend to ensure a proper choice was made, there was no explanation of the role of the prisoner's friend chosen, no arrangements made for private conversation between the suspect and friend and the friend was stopped from assisting the suspect in interview [44]-[45].

There had also been a failure to properly administer the caution. Mildren J raised the difficulty of providing an understandable caution:

"[48] Probably one of the most difficult concepts to interpret or to explain is that of the caution. One of the problems with the standard caution is that the order in which the ideas and concepts are contained in the caution is liable to create confusion. Another problem is that, in many Aboriginal cultures, remaining silent is an indication of guilt. In an article "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) 21 Crim LJ at 11 - 12, I set out a form of caution which I believe would be more appropriate to be used with Aboriginal people, than the usual form. If that formula, or something like it, is not used, police take the risk that the caution will not be understood. As Forster J observed in Anunga, (supra), at 414:

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 questions being asked?

It is even more illogical and bewildering to tell some Aboriginal people, that they are not obliged to answer any questions, and then insist on an answer to the question, "do you understand that?" An intelligent person might think that this is all some ritual being played out, by the police, which apparently does not mean what it says.

[49] In the present case, Detective Kelly began by dividing the caution up into segments as suggested by guideline (3). He began well enough, and after telling Ms Marshall that she had a choice as to whether she spoke about "that trouble" or whether she wanted to "sit and be quiet", he asked her to explain in her own words what was meant by 'choice'. Ms Marshall did not respond. Ms Swan said "I don't think she understands". Detective Kelly repeated his explanation, but this time he did not ask her to repeat back what he had said, as suggested in guideline (3), but instead was told by the interpreter that she had said, "Yes, I hear you". He then proceeded with the rest of the caution, by explaining it in segments, but falling into the very trap which guideline (3) suggested he should avoid, by asking "Do you understand that?" to which the inevitable response of "Yes" or "Yeah. I hear you" was elicited.

[50] I do not know how many times judges of this Court have admonished police for this ridiculous practice, and yet, it appears as resilient as ever. One wonders what sort of training police are given by their superiors that such an elementary error is repeated time and again by numerous police all over the Territory, notwithstanding the frequency with which judges have pointed out that this is a complete waste of time. No further attempt was made to get Ms Marshall to repeat back what had been said to her."

In **Spencer** (2000) 113 A Crim R 252 per Thomas J, at [29]-[34], the accused was charged with murder. There was a failure to adequately explain the role of prisoner's friend but the suspect made it clear he did not want anyone with him in the interview. In those circumstances it was held that the failure to explain did not render the admissions involuntary. It was held that there was no unfairness to the suspect. Thomas J declined to exercise the public policy discretion to exclude the admissions.

In **Weston** [2005] NTSC 49 per Thomas J, underage Aboriginal males were arrested for sexual offences. The Records of Interview were excluded because the trial judge was not satisfied they were voluntary: [91]-[97]. Police failure to comply with the **Anunga** guidelines included findings that the prisoner's friends in this case had scant understanding of their role [60], failure to contact Aboriginal Legal Aid as required by **Police General Orders** [90], failure to use an interpreter (not a breach of the guidelines in the circumstances of case but did raise concerns about the interview) [67], neither the suspects nor prisoner's friends were advised of the alleged sexual allegation and the inappropriate use of a female as a prisoner's friend when discussing sexual matters because it inhibited the suspect answering questions [152]-157].

In **Thomas** [2006] NTSC 87 per Riley J, despite a failure to follow the guidelines and have the suspect repeat back the caution, the trial judge was satisfied that the suspect understood the choice to remain silent and had chosen to speak. The admissions were held not to be involuntary [16]-[17]. There was no error in failing to provide the interpreter as the suspect did not need one [18]. Despite a failure to explain to the suspect the role of a prisoner's friend, the suspect was found to have been 'clearly' aware of the right and chose to participate in the interview alone. There was no unfairness [20]-[26].

In **Nagawalli** [2009] NTSC 25 per Thomas J, a female Aboriginal suspect with a speech impediment was charged with the murder of her partner. There was a failure to provide reasonable facilities to contact a friend or relative. Although the caution complied with s.140 of the (NT) **Police Administration Act**, it did not comply with the **Anunga** Rules. The police failed to ascertain the suspect's understanding of the caution. The police asked leading questions.

The trial Judge considered the application of s.143 (NT) **Police Administration Act** discretion as to the voluntariness and reliability of admissions but could not be satisfied that the suspect understood the caution or that what she said was being recorded and could be subsequently used in court. The admissions were excluded on the basis that they were so unreliable as to amount to unfairness.

In **RR** [2009] NTSC 44 per Riley J, the suspect was charged with the sexual assault and murder of his wife. After unsuccessful attempts to obtain a prisoner's friend over several days, an interpreter acted as a friend at the request of the suspect. The police gave no explanation to the suspect or the interpreter of the role of a friend. The interpreter explained to the suspect her understanding of the limitations of the role. It was held that the support and comfort provided by the interpreter did not lead to any relevant unfairness. While it is preferable that another person be used as a prisoner's friend, an interpreter can fill that role at least partially where no other suitable person is available.[36]-[53]

In **Robinson** [2010] NTSC 9 per Kelly J the suspect was charged with murder. At the interview the police assumed the suspect's sick father could not attend. The trial judge observed that a failure to have a prisoner's friend would not necessarily render interview involuntary [25]. Furthermore, the requirement to have a suspect repeat back the caution is less necessary where the caution is given in the suspect's own language although it should still comply with guidelines [31]. Failure to comply with the guidelines does not mean automatic exclusion. The true test is whether admissions are made voluntarily [33].

In **Gaykamanu** [2010] NTSC 12 per Olsson AJ the suspect was charged with arson following an assault upon his wife. One of the issues relating to the admissibility of the interview was ascertaining whether the suspect understood the caution. Olsson ruled that while it was preferable to have the suspect repeat back the caution, it is not essential. In this case only part of the caution was repeated back, however, the judge found that there was no doubt the suspect understood all of the caution [56]-[65]:

"[62] Whilst the Crown bears the onus of establishing, on the balance of probabilities, that not only was a proper caution administered to the accused and that he understood it, nevertheless

that onus does not require proof that the accused was able to and did accurately recite back to the police officers in English and understanding of the substance of the caution.

[63] Such a recitation is but a simple, advised method of confirming the requisite comprehension. At the end of the day, the question remains as to whether, on the whole of the evidence, the Crown has demonstrated, on the balance of probabilities, that the accused did comprehend what was said to him - due allowance being made for the cultural tendency of gratuitous acquiescence, to which I have earlier referred.

[64] ... It was pointed out by Kelly J in her recent ruling in Robinson [2010] NTSC 09 that, where a caution is given to a suspect in his own language, the reason for having that person explain the meaning of it in his own words is, in any event, less compelling. I respectfully agree with that comment."

The judge also considered whether a failure to properly brief either the suspect or the prisoner's friend as to the role of a prisoner's friend breached the guidelines and rendered the interview inadmissible. In the circumstances of case it was held that there was no doubt both understood the role of a prisoner's friend. It was observed that the requirement to properly explain the role is not a rule of law but just one factor in considering voluntariness of admissions and the exercise of the fairness discretion [66]-[83].

In Age [2011] NTSC 104 per Blokland J the suspect was charged with murder. His Honour stated that although a failure to comply with the guidelines does not automatically exclude admissions, in this case there was good reason why the guidelines needed to be followed. Here, the failure to follow the guidelines meant the police had not established that the suspect understood the caution and therefore the trial Judge was not satisfied the confessions were voluntary [27]-[29].

Legislative Provisions

Although the Anunga Rules have been copied into the police guidelines they have not been incorporated into legislation. There is no specific provision relating to ATSI suspects in Division 6A of the (NT) **Police Administration Act** relating to the recording of confessions and admissions.

The Police General Orders cited in Weston [2005] NTSC 49 per Thomas J do incorporate the Anunga rules in the following ways:

Order 2

- 2.2 *Investigators must determine, as part of the investigation, whether or not a particular suspect is entitled to the benefit of the guidelines. Evidence must be gathered to demonstrate whether or not a particular suspect is so entitled. Such evidence might include:*
- 2.2.1 *the investigator's observations of, and dealings and conversation with the suspect;*
 - 2.2.3 *evidence from relatives and acquaintances of the suspect's use and understanding of language.*

Order 5 The Role of a 'Prisoner's Friend'

- 5.1 *The 'prisoner's friend' must understand his/her role - the following procedures will ensure that this point is not overlooked:*
- 5.2 *Prior to commencing an interview in the presence of a 'prisoner's friend', Police are to explain to the chosen 'friend' in simple terms:*
- 5.2.1 *the reason for the interview;*
 - 5.2.2 *the form the interview will take;*
 - 5.2.3 *brief particulars of the alleged offence;*

- 5.2.4 *that the 'friend' has been chosen by the suspect to sit with the suspect in a supporting role;*
- 5.2.5 *the right of the 'friend' to assist or support the suspect with help or clarification if at any time it appears necessary;*
- 5.2.6 *the right of the 'friend' to talk to, or otherwise communicate with the suspect at any time that he/she is acting as a 'friend'; and*
- 5.2.7 *the right of the suspect to communicate with the 'friend' at any time for advice or for any reason.*
- 5.3 *The above points, and any other conversation with the 'prisoner's friend', are to be recorded, generally by the same means as the interview with the suspect.*
- 5.4 *If practicable, a statement should be taken from the 'prisoner's friend' at the conclusion of the interview with the suspect, to clarify that the 'friend' understood his/her role and was satisfied that Police conducted the interview in a fair and proper manner. If the 'prisoner's friend' is unable to read, the statement should be read to him/her and suitable wording incorporated in the statement to describe the relevant circumstances.*
- 5.5 *Should a 'prisoner's friend' speak or communicate with a suspect or vice versa during a record of interview, the words or fact of communication should be accurately recorded in the record of interview. In addition any questions put by the interrogating member direct to the 'prisoner's friend' and the replies received must also be accurately recorded in the record of interview.*
- 5.6 *A 'prisoner's friend' should be invited to identify themselves in all records of interview at which he/she is present.*
- 5.7 *It should be clearly understood that the qualities that should be met by a person acting as a 'prisoner's friend' are:*
 - 5.7.1 *The person should be 'someone in whom the suspect has apparent confidence ... by whom the suspect will feel supported'.*
 - 5.7.2 *The person should be a person 'who knows and is known to the suspect'.*

Orders A7 titled "Arrests"

- 28.2 *Subject to paragraph 28.5 and to any 'protocol agreement', an Aborigine taken into police custody (not including protective custody) is to be asked, on arrival at the Police Station, whether he/she wishes Aboriginal Legal Aid informed.*
- 28.3 *If the Aborigine is a juvenile, the member in charge will notify Aboriginal Legal Aid as well as the parent, guardian or other person responsible for the juvenile. (Refer also to Part 3 of the Custody Manual - Children (Juveniles) as Offenders). The nearest Aboriginal Legal Aid Service is to be contacted as soon as practicable whenever an Aborigine in custody requests legal assistance or where the Aborigine is unable, for whatever reason to make a decision. However, this action is subject to any existing protocol agreement between the local police and Aboriginal organisations.*

The Northern Territory has adopted the **Uniform Evidence Act**. At the time of writing this paper it appears to have been passed but is not yet operational. The NSW cases relating to the admissibility of admissions with respect to police interviews with ATSI suspects may be of some assistance although it should be noted that the very different circumstances that exist in the Northern Territory may well allow for distinguishing the NSW authorities.

QUEENSLAND

Queensland is one of only three jurisdictions (Commonwealth and New South Wales being the others) to enact specific statutory provisions to protect vulnerable people in detention. The (Qld) **Police Powers and Responsibilities Act 2000** contains the following provisions:

"The Act does not affect the common law under which a court in a criminal proceeding may exclude evidence in the exercise of its discretion or stay the proceeding in the interests of justice:
s. 10.

When questioning a person the police officer reasonably believes is an Aborigine or Torres Strait Islander the officer must notify or attempt to notify a legal aid organisation unless aware the person has arranged for the presence of a legal practitioner - a police officer is not required to do so if he/she "reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally": s. 420.

Must not interview an Aborigine or Torres Strait Islander until provided the suspect with an opportunity to have a private conversation with a support person, and support person present in interview. This requirement does not apply if a person expressly and voluntarily by writing or electronically waived right: s. 420.

A support person may be excluded if the police officer believes he or she is 'unreasonably interfering with questioning' - provisions for what constitutes unreasonable interference. The officer must administer a warning before excluding a person from questioning. The officer must provide an alternative person for interview: s. 420-426.

A police officer may exclude a support person if he/she believes the support person is unable to properly perform the role and it would be in interests of suspect to arrange a different support person: ss. 427-430.

A caution must be given in a language in which the suspect is reasonably fluent and in writing if the suspect cannot hear properly. If police reasonably suspect the person does not understand the caution they may ask the person to explain the meaning of the caution in his or her own words": s. 431.

Under the (Qld) **Police Powers and Responsibilities Regulations 2000** the following provisions apply specifically where a police officer reasonably suspects the person is an Aborigine or Torres Strait Islander:

A police officer about to question someone the officer reasonably suspects is an adult Aborigine or Torres Strait Islander must, unless he or she already knows the relevant person, ask questions to establish the person's level of education and understanding: reg. 36(1)-(2).

If a police officer is contacting legal aid he/she must notify the person: reg 36(3).

A police officer must advise a person of the right to a support person in interview: reg. 36(4)-(5):

'Is there any reason why you don't want to telephone or speak to a support person and arrange for a person to be present during questioning?

Do you understand that arrangements can be made for a support person to be present during the questioning?

Do you also understand that you do not have to have a support person present during questioning?

Do you want to have a support person present?'

A police officer must arrange for a support person if he/she "reasonably suspects the person is at a disadvantage in comparison with members of the Australian community generally": reg. 36(6).

The caution must substantially comply with the following: reg. 37(1):

'Before I ask you any questions I must tell you that you have the right to remain silent.

This means you do not have to say anything, answer any question or make any statement unless you wish to do so.

However, if you do say something or make a statement, it may later be used as evidence.

Do you understand?'

If a police officer reasonably suspects the person does not understand the caution, he/she may ask the person to explain the meaning of the caution in his or her own words - if necessary must further explain the caution: reg. 37(2)-(3).

Information to be given to support person to ensure they understand their role must include the following: reg. 44A:

- (a) a summary of relevant sections of the Act;*
- (b) a statement that the support person must act in the best interests of the relevant person;*
- (c) a statement that, unless the support person is a lawyer, the support person must not provide legal advice to the relevant person but may ask the relevant person questions to ensure the relevant person understands:*
 - (i) that the person may ask for a lawyer to be present during questioning or at any time before questioning ends; and*
 - (ii) that the person is not obliged to say anything during questioning; and*
 - (iii) that anything the relevant person says during questioning may be used in evidence in a court; and*
 - (iv) what is said by a police officer during questioning.*

In ***R v Bowen*** [2004] QSC 364 per MacKenzie J his Honour noted that a breach of requirements under (Qld) **Police Powers and Responsibilities Act** is to be considered under the common law discretions to exclude evidence (s. 10). In this case the police ignored the suspect's right to remain silent and the desire of the suspect to obtain legal advice prior to the interview. The evidence was excluded.

In ***R v Brown*** [2006] QCA 136 the Appeal Court dealt with a case involving an offence of murder where there had been failure to comply with the relevant provisions for interviewing Aboriginal suspects (s. 251 now s. 420). The Court found that the failures were a result of misunderstanding on the part of the police as to their responsibilities rather than a deliberate breach. It was held that it was not unfair to admit the interview because the suspect was capable of acting in his best interests in the circumstances of the case and therefore the admission was reliable.

In ***R v Martin*** [2011] QCA 342, a case of murder, the Court considered the failure to comply with s. 420 and s. 423 (intoxicated persons) and the discretion to exclude illegally obtained evidence under ***Ireland***, a finely balanced question. The Court held there was no error in the exercise of discretion to admit evidence in this case.

WESTERN AUSTRALIA

Under the (WA) **Aboriginal Affairs Planning Authority Act 1972** s 49 a court could examine an Aboriginal suspect to see if he or she understood the nature of the interview. This section was repealed when the (WA) **Criminal Investigation Act 2006** commenced. There are no provisions under this legislation to provide additional protection to Aboriginal or Torres Strait Islanders.

The Law Reform Commission of Western Australia, Aboriginal Customary Laws Project 94, Sept 2006 made the following recommendations in relation to the interviewing of Aboriginal persons:

"That the following rights be protected in legislation so as to render inadmissible any confessional evidence obtained contrary to them save in exceptional circumstances:

1. That an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspect understands the caution. In order to be satisfied that the suspect understands the caution the interviewing police officer must ask the suspect to explain the caution in his or her own words.

2. If the suspect does not speak English with reasonable fluency the interviewing police officer shall ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before any interview commences.

3. That before commencing an interview the interviewing police officer must advise the suspect that he or she has the right to contact a lawyer and provide a reasonable opportunity for the suspect to communicate (in private) with a lawyer.

4. In the case of a suspect who is an Aboriginal person the interviewing police officer must notify the Aboriginal Legal Service prior to the interview commencing and advise that the suspect is about to be interviewed in relation to an offence. The interviewing police officer must provide a reasonable opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing police officer does not have to comply with this requirement if the suspect has already indicated that he or she is legally represented by another lawyer or if the suspect states that he or she does not want the Aboriginal Legal Service to be notified.

5. If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available, the interviewing police officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing police officer does not have to comply with this requirement if it has been expressly waived by the suspect.

6. That appropriate exceptions be included, such as an interviewing police officer is not required to delay the questioning in order to comply with this provision if to do so would potentially jeopardise the safety of any person.

That the Western Australia Police, in conjunction with relevant Aboriginal interpreter services, develop a set of protocols (including linguistic guidelines) for the purpose of considering whether an Aboriginal person requires an interpreter during an interview." (emphasis added)

In case law the Anunga Rules from the Northern Territory have been adopted as guidelines in considering the fairness and reliability of admissions: see for example **Williams** (1992) 8 WAR 265; **Webb** (1994) 13 WAR 257.

In **Siddon v Western Australia** [2008] WASC 100, McKechnie J at [21] noted that the Commissioner of Police had adopted the Anunga Rules into the Commissioner's Orders and Procedures Manual, a recent recognition of their importance. They are not binding but provide guidelines for police. A failure to comply gives a strong indication that the interview is not voluntary. The admission of an interview is based on a question of voluntariness (**Lee** (1950) 82 CLR 133 at 149). 'Voluntary' means made in the exercise of a free choice to speak or be silent. In this case, reference to a 'quick chat' misrepresented the nature of the questioning and meant the suspect did not exercise an informed choice as to having support person. Furthermore the trial judge was not satisfied the initial caution was understood. The interview was excluded.

In **Bundamurra v Western Australia** [2008] WASC 106 McKechnie J held that the voluntariness principle under **Lee** applies. The police used the suspect's brother as a support person. Although he had no appreciation or understanding of the task, the judge found that this did not make the interview involuntary or unfair in view of the suspect's background, age and presentation at interview. His presentation and answers at the interview indicated that the suspect understood the caution. The interview was admitted.

In **Slater v Western Australia** [2009] WASC 144, Hasluck J at [38]-[39] noted that the Anunga Rules do not have the force of law but operate as guidelines, (citing **Webb** (1994) 13 WAR 257 at 259) and that a failure to comply with police guidelines does not make a confession inadmissible because there is no binding legislative effect (citing **Norton** [2001] WASC 207). In this case the judge found that the suspect appeared to understand the caution and questions and consequently there was no unfairness.

VICTORIA

There is no specific legislative provisions for the questioning of ATSI suspects by police. The (Vic) **Crimes Act 1958** Part III Division 30A deals with custody and investigation. It provides for the recording of confessions and reasonable time detention. However, there is no specific reference to ATSI suspects.

In October 2010, Victorian police released a revised version of its police manual. A section of the Manual deals with 'interviewing specific categories of persons'. The policy relates to a broad range of people including children and those outside Victoria, as well as people affected by mental disorder, alcohol or drugs, and those who are deaf/mute or non-English speaking. ATSI people are not mentioned in the policy.⁹

In ***R v Narula*** (1986) 22 A Crim R 409 the Court discussed the application of the Anunga Rules (at 426-427), although the case involved foreign suspects and only refers to the rules in passing. However, the Court appeared to have taken a narrow approach to the application of the guidelines, emphasising that they were not designed to introduce a new system for aboriginal suspects but the application of general principles to a specific group:

*The second basis argued for exclusion which rested upon the exercise of judicial discretion, involved the contention that the conduct of the police officers in detaining the applicant for such a substantial period of time created circumstances in which it would be unfair to the applicant that his words should be used against him. A further proposition based upon the guidelines set out by Forster J in *Anunga* (1976) 11 ALR 412 was advanced to support this ground.*

On this basis it was contended that the applicant is a person of foreign nationality and residence who could be presumed to have had at the time he was interrogated by the police, little understanding or experience of the system of criminal investigation which is generally employed in this country and who may have been unfamiliar with the rights afforded by the law to a person suspected of some criminal offence. Accordingly, it was said that greater care should have been taken by the police officers conducting the interview to ensure that the applicant was aware of his rights under the law so that any statement made by him could be clearly seen to have resulted from the exercise of a free choice to speak rather than to remain silent in the circumstances and that it was fairly obtained.

*Although *Anunga's* case was primarily concerned with the situation of some Aboriginal people whose cultural, educational, or social background may be such that the inference of voluntariness or fairness in the making of a confessional statement may be less confidently drawn than when considering other members of the community, and accordingly a greater measure of care may be required when dealing with such persons, there is no premise underlying that case which suggests that there is a separate principle of law applicable to any specific ethnic group in this society.*

The group of persons with which the Supreme Court (NT) was primarily concerned in this context was obviously constituted by a number of Aborigines whose disadvantageous position relative to others in the community was conspicuous. However, the learned Chief Judge who, with the approval of the other members of the Supreme Court set out a number of guidelines was, as I understand the position, concerned not to establish a different system or to create new legal concepts applicable to those Aborigines but to ensure that the rights which exist under the law have, in a practical sense, operation in situations where a suspected person may be under some serious disadvantage. The problem may arise by reason of cultural, educational, or social background, or by reason of some intellectual or other handicap including age, under which the suspected person may be suffering.

The questions which arise in dealing with confessional statements must remain essentially the same for all persons and are to be answered in accordance with the principles laid down in the cases to which I have earlier referred. However, it may well be that situations will arise in which, by reason of the possibility of such disadvantage, that particular care should be taken by investigating officers to ensure that rights of such suspected persons are clearly indicated to and understood by them so that no unfairness may result from the interrogation process.

*Whilst the particular guidelines set out in *Anunga's* case may not be appropriate in dealing with other disadvantaged persons, directed as they are to the difficulties which may be confronted by members of a particular group, nevertheless, in situations where a police officer becomes*

⁹ Bartels, Supra n. 2 at p. 9.

aware of the reasonable possibility that a person who he desires to interview may be suffering under some such disadvantage or disability, it is to be expected that particular care will be taken in relation to any such questioning. In circumstances where doubt exists as to the suspect's knowledge of his rights under the law, or as to his ability to respond adequately to questions asked of him or as to his capacity to choose freely to speak or remain silent, a failure to take reasonable steps to ensure that such knowledge or capacity exists may provide part of the basis for a finding of unfairness and result in the discretionary exclusion of any statement made.

SOUTH AUSTRALIA

South Australia has no legislative provisions relating specifically to aboriginal suspects. The (SA) Summary Offences Act 1953 s 79A provides for general rights upon arrest to all persons.

South Australia does have administrative directions that require police officers to contact a representative of the appropriate Aboriginal service where a suspect is a tribal or semi-tribal aboriginal.

(SA) Police General Order 3015 paragraphs 11-13

12. INTERROGATION OF ABORIGINALS

In addition to the requirements of the Summary Offences Act, 1953 relating to the rights of a person apprehended by a member of the police force (see section 79A Summary Offences Act 1953), when an Aboriginal person is to be interrogated in relation to an offence, the member proposing to conduct the investigation shall ensure that:

12.1 *when a tribal or semi-tribal Aboriginal is involved, every effort is made to have an independent third party present at the interrogation. If practicable, such a party should be either a solicitor or an A.F.O (Aboriginal Field Officer). If practicable, the person attending should have some understanding of the native language of the person being interrogated.*

...

13 ARREST OF ABORIGINALS

When an Aboriginal person is arrested the officer in charge of the receiving station shall ensure that:

13.1 *approved printed information from the Aboriginal Legal Rights Movement explaining the nature of their services is supplied to the prisoner where available;*

13.2 *the offender has no objection to his name and the nature of the charge being supplied to the Aboriginal Legal Rights Movement;*

13.3 *if the offender raises no objection, the details of the offender, the charge and the time and place of the Court hearing are supplied to an A.F.O;*

13.4 *when an Aboriginal person is in custody at this station and that person requests the attendance or assistance of an A.F.O. to arrange bail or legal advice, then every practical endeavour is made to contact the nearest available A.F.O;*

13.5 *if a telephone call other than a local call is necessary, then that call is made and charged either to the prisoner or by reverse charge call to the A.F.O. who will accept a reverse charge call if the prisoner suspect has insufficient funds to meet the cost:*

13.6 *when an A.F.O. attends he is granted the same facilities that a visiting solicitor or relatives are accorded*

In **R v Williams** (1976) 14 SASR 1 (Supreme Ct) Wells J said

'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. Those Rules have, ever since their promulgation, been regarded, not as inflexible rules of law, any breach of which would automatically vitiate a confession or admissions, but as setting general standards of reasonableness and fairness which were to be applied with due regard to the exigencies of each particular situation. It has for long been uncontested law that a breach of the rules forms but part of the material upon which, first, the trial judge resolves the issue

of voluntariness, and, secondly (and perhaps more often), the trial judge determines whether, in the exercise of his discretion, he will exclude the confessional material tendered.

In my opinion, the circular in question should be similarly used, and breaches of the directions contained in it should have similar consequences, but no other or further consequences. In other words, it must be reasonably and not unreasonably understood and applied by courts.'

The case of **Walker v Marklew** (1976) 14 SASR 463 (SACCA) affirmed **Williams** by stating that a breach does not automatically render a subsequent confession inadmissible, but it is a material and very important matter to be considered in relation to the exercise of the discretion to exclude.

In **R v McKenzie** (1977) 17 SASR 304 at 315 (S.Ct), the failure to comply with directions did not a breach where it was found that the suspect was an educated and articulate aboriginal, although in view of the circumstances of detention it would have been better to have offered assistance. The confession was excluded because of the failure to administer the caution.

In **R v Ajax** (1977) 17 SASR 88 (S.Ct) the confessions were excluded due to the failure to comply with the police instructions. The 'friend' provided was a hostile aboriginal authority figure.

In **R v Brady** [2012] SADC 3, confessions were excluded because of a failure to comply with the police instructions.

There appears to be no reference in any directions as to the appropriate manner and content of a caution given to an aboriginal suspect. In **R v Williams** (1976) 14 SASR 1 (S.Ct) Wells J considered the tendency of aboriginals to defer to authority and the irresistible compulsion to answer questions

It must first be emphasized that, as I understand the law, an overwhelming determination, on the part of a person being interviewed, to answer all questions put by the investigating officer can never, of itself, have the effect of rendering a confession or admission involuntary, unless that determination resulted from a threat or an inducement held out by a person in authority contrary to the Judges' Rules. It is immaterial that the determination was the product solely "of internal pressures or internal motives": Where it is shown that the interrogating officer was aware that the accused was affected by such pressures or motives that fact will no doubt be taken into account by the trial judge with all other relevant material, but of itself it cannot be decisive.

...

Where an aboriginal native was under questioning by the police, the trial judge will no doubt bear in mind the letter and the spirit of the Circular, and watch carefully to see whether there is any ground for supposing that the former was overawed by authority. If any such ground exists he may, I apprehend, not hesitate to find that it would be unfair to admit the impugned evidence even though the material upon which he acts would not, of itself, have justified his decision if it had not been combined with evidence suggesting marked submissiveness to authority. In reaching such a finding he will, no doubt, take carefully into account any breaches of the Circular's principles disclosed on the voir dire.

TASMANIA

There are no relevant legislative provisions relating to police questioning of ATSI suspects. The Tasmania Police Manual states at 7.10.2(1) that where an Aboriginal person is detained and or interviewed the custody officer or senior interviewing officer should make every effort to:

- Notify a relative or friend and the ALS.
- Take all reasonable steps to make arrangements for attendance.
- Advise the District Liaison Officer or Tasmania Police Aboriginal Liaison Co-ordinator.

A recent report (May 2011) from the Tasmania Law Reform Institute, Consolidation of Arrest Laws in Tasmania suggests that the proposed **Arrest Act** should include protective provisions for Aboriginal and Torres Strait Islanders which should stipulate the following:

- (1) *That the arresting officer must record in writing the reason for effecting an arrest rather than employing an alternative to arrest;*
- (2) *That a vulnerable person must be informed at the time of the arrest of his or her right to communicate with a friend, relative, parent/guardian, responsible person, legal practitioner and/or interpreter (relevant person) as is appropriate;*
- (3) *That when a vulnerable person is arrested there should be an obligation to inform a relevant person of the arrest:*
- (b) *When an Aborigine or Torres Strait Islander is arrested the Aboriginal Legal Service should be notified via the on-call Field Officer in accordance with Tasmania Police requirements (Aboriginal Strategic Plan).*
- (4) *That the police must assist an arrestee who is a vulnerable person in communicating with a relevant person and the relevant person should be present during any interview.*

COMMONWEALTH

In 1991 the (CTH) **Crimes Act 1914** was amended by the (CTH) **Crimes (Investigation of Commonwealth Offences) Amendment Act 1991** to insert Part 1C Investigation of Commonwealth Offences. The provisions relate to the detention and questioning of suspects. Under s. 23A(6) these provisions apply also to the ACT for offences punishable by imprisonment of over 12m: s. 23A(6).

The following are provisions provided specifically for Aboriginal and Torres Strait Islander persons in detention:

The period of detention permitted for Aboriginal and TSI suspects is not to exceed 2h unless extended (detention period for other suspects is not to exceed 4 hours): s. 23C(4)(a) (Non-Terrorism Offences) / s.23DB(5)(a) (Terrorism Offences).

Where an investigating official believes on reasonable grounds suspect is an Aboriginal or TSI he or she must immediately inform the suspect a representative of an Aboriginal legal aid service will be notified, and must notify such representative unless he or she is aware the suspect has already made arrangements: s. 23H(1).

Police must not question a suspect believed to be, on reasonable grounds, an Aboriginal or TSI unless the suspect has been allowed to communicate with an interview friend in private and the interview friend is present during the questioning, or the suspect has expressly and voluntarily waived his or her right: s. 23H(2).

The suspect may choose their own interview friend unless they expressly and voluntarily waive their right, they fail to exercise the right within a reasonable period or the interview friend chosen does not arrive within 2 hours: s. 23H(2A).

Where an interview friend is not chosen or available the investigating official must choose, as an interview friend, a representative of an Aboriginal legal aid organisation or a person whose name is included in a list of interview friends maintained under subsection 23J(1): s. 23H(2B).

An interview friend may be excluded from the questioning if he or she unreasonably interferes with it: s. 23H(3).

The onus is on the prosecution to prove the suspect waived their right to an interview friend. The court must be satisfied the suspect voluntarily waived he or her right with full knowledge and understanding: s. 23H(4).

The investigating official is not required to comply if he or she believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally: s. 23H(8).

An interview friend means:

a relative or other person chosen by the person; or

a legal practitioner acting for the person; or

a representative of an Aboriginal legal aid organisation; or

a person whose name is included in the relevant list maintained under subsection 23J(1): s. 23H(9).

Under s. 23J(1), (2) a list must be kept of people suitable and willing to act as interview friends, having consulted with any Aboriginal legal aid organisations.

An interview friend for any suspect under 18 years means:

a parent or guardian of the person or a legal practitioner acting for the person.

if none of the previously mentioned persons is available - a relative or friend of the person who is acceptable to the person.

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).

if no person covered by paragraph (a), (b) or (c) is available - an independent person: s. 23K(3).

An interpreter must be provided where an investigating official believes on reasonable grounds a suspect is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language: s. 23N.

Under s. 23J a list must be kept of people suitable and willing to act as interpreters for Aboriginal and TSI persons: s. 23J(3), (4).

In ***Applebee*** (1995) 79 A Crim R 554 ACTSC 13.4.1995 per Higgins J, the admissions were excluded. There was a breach of the provision relating to the detention period. The suspect was not asked if he was Aboriginal yet had the appearance of an Aboriginal. No interview friend was arranged and although the suspect later waived his right to consult with a solicitor, it was not certain he did so freely. In those circumstances the interview was ruled unfair:

'The alleged confessional statement contained very little that could have assisted the prosecution case. The disregard of the rights of the accused, rights granted by the Parliament of the Commonwealth, was reckless, although I am not positively persuaded that it was deliberate. It could easily have been avoided. It was my view that the public interest in fairness to the accused and in observance of safeguards granted to suspected persons, outweighed the public interest in admitting evidence otherwise relevant against a person alleged to have committed an offence, particularly in circumstances where the prosecution case is not a strong one.' (At p. 560).

NEW SOUTH WALES

In 1997 Part 10A was inserted into the (NSW) **Crimes Act 1900** by the (NSW) **Crimes Amendment (Detention after Arrest) Act**. The legislation came about partly in response to a series of decisions that emphasised that arrest for the purposes of questioning is unlawful.

In ***Williams v R*** (1986) 161 CLR 278 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".

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

"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 armoury 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 armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody".

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".

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 R 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".

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'.¹⁰

The Commission identified three problems with the strict approach of the Courts stating:

¹⁰ Report 66.

“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. 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.

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”.

The Commission recommended:

“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 *voire dire*) to the admissibility of Crown evidence.¹¹

The result was Part 10A of the (NSW) **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.

¹¹ Chapter 2 - Summary of Recommendations.

The resulting Part 10A was also due, in part, to the recommendations of the Royal Commission into Aboriginal Deaths in Custody to have legislation requiring Aboriginal Legal Service to be notified upon arrest or detention of Aboriginal persons.

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

“..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”.

In 2005 Part 10A was repealed and replaced with (NSW) **Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)** and (NSW) **Law Enforcement (Powers and Responsibilities) Regulations 2005**. Both commenced operation on 1.12.2005. Part 9 of **LEPRA** contains a number of provisions regulating the questioning of persons under arrest and conferring certain rights and protections on detainees.

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.

Division 2 of Part 9 begins by stating that 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': s. 114(1).

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".

Section 116 requires police to take into account a range of factors in determining what is reasonable time 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".

Section 117 sets out a number of time periods that are to be disregarded in determining how much of the investigation period has lapsed. 'Time out' periods include:

- time that is reasonably required to convey the detainee to a police station;
- any time reasonably spent waiting for a support person to attend;
- any time required to allow the person to communicate with family;
- any time required to allow the person to rest or receive refreshments;
- any time required to allow the person to recover from the effects of intoxication due to alcohol or drugs;
- any time that is reasonably required to allow for an identification parade to be arranged and conducted;
- any time required for the person to receive medical attention.¹²

Section 118 allows an 'authorised officer' 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:

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

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

Be cautioned: s. 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

¹² See s. 117 for a complete list of the 'time out' periods.

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": s. 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: s. 123.

Be told "*..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*": s. 126.

Be told "*..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*": s. 127.

Be provided with an interpreter: s. 128.

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*": s. 129.

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*": s. 130.

Under s. 112 (NSW) **LEPRA** the regulations may make special provisions in respect of Aboriginal persons or Torres Strait Islanders. The (NSW) **LEPRA Regulations** create a number of additional rights and obligations for these 'vulnerable' people.

These regulations contain the following provisions:

A vulnerable person includes persons who are Aboriginal persons or Torres Strait Islanders but does not include a person whom the custody manager reasonably believes is not a person falling within any of those categories: reg. 24.

The custody manager must assist a vulnerable person 'as far as possible' to exercise their rights: reg. 25.

Support persons for a vulnerable person must be over 18 years and either a relative, friend or any other person (other than a police officer) who has the consent of the detained person to be the support person or, a person (other than a police officer) who has expertise in dealing with Aboriginal persons or Torres Strait Islanders: reg. 26.

A vulnerable person has the right to have a support person present during any investigative procedure. A vulnerable person must be informed of that right and must be provided reasonable opportunity to contact a support person in private. An investigative procedure must be deferred for up to two hours to allow contact: reg. 27.

A custody manager must inform the support person of their right to do the following:

assist and support, and

observe whether or not the interview is being conducted properly and fairly, and

identify communication problems: reg. 30:

A support person may be excluded from an investigative procedure if they unreasonably interfere with the procedure': reg. 31.

The custody manager must notify the Aboriginal Legal Service representative unless aware the detained person has arranged for a legal practitioner to be present: reg. 33.

If cautioned the custody manager or person giving the caution must 'take appropriate steps to ensure that the detained person understands the caution': reg. 34.

These provisions are, to an extent, replicated in the (NSW) Police Force Code of Practice for CRIME.

The (NSW) **Evidence Act 1995** contains a number of provisions dealing with the exclusion of confessions/admissions. Sections 85, 138 and 90 have application where the police have failed to comply with the provisions of **LEPRA** or the regulations. The following NSW decisions involved applications to exclude admissions on the basis that one or more of the legislative provisions were not complied with.

In **R v Dorothy Riley** NSW District Court, 12 February 2002 per Shadbolt DCJ an application to exclude the ERISP was successful. The female Aboriginal suspect was arrested and charged with robbery in company. The ALS was not contacted. During the interview the suspect made admissions as to her role in the robbery. In their evidence, the arresting officers said they had not contacted the ALS because the suspect had consented to being interviewed and because they knew that the ALS would have advised her to remain silent. Without the confession, the police would not have had any identification evidence. In his decision, Shadbolt DCJ outlined the history of the regulations and stated that the duties imposed are non-delegable. It was no excuse for the custody manager to say that he had told the arresting officer to contact the ALS. In carrying out the balancing exercise required pursuant to s. 138 of the (NSW) **Evidence Act 1995** his Honour acknowledged that the probative value of the interview was high, but also noted that the offence was toward the lower end of the scale of seriousness. His Honour was of the view that the breach of the statute was grave. Importantly, his Honour found that the breach was deliberate and conscious¹³.

In the case of **R v Helmhout** [2000] NSWSC 185, and (2000) 112 A Crim R 10 an Aboriginal adult suspect was charged with murder. He made admissions in a recorded interview. Prior to the interview it was clear to the arresting officers that the suspect had recently been affected by alcohol and marijuana. The custody officer had failed to comply with cl 28 of the (NSW) **Crimes (Detention After Arrest) Regulations 1998**, in that he did not contact the ALS. During the trial he gave evidence that he simply could not remember whether he had contacted the ALS although he conceded he knew he was obliged to do so. As trial judge,

Bell J did not exclude the ERISP. Her Honour made a finding that the failure to contact the ALS was neither deliberate nor reckless. On the other hand, the charge was very serious. The desirability of admitting the admissions outweighed the undesirability of admission.

On appeal, (2001) 125 A Crim R 257, the Court of Criminal Appeal found that the trial judge did not err in admitting the ERISP. Ipp AJA and Hulme J both expressed the opinion that in considering admissibility under s 138 the judge must consider individual characteristics of the suspect.

Ipp AJA stated at [12]:

"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, are likely to be minimal".

This reasoning has a superficial attraction in that a person who is more isolated and less well educated could be perceived as more vulnerable in the arena of a police interview room. However, the legislation makes no distinction when it includes in the definition of "vulnerable persons" Aboriginal and Torres Strait Islander people. Furthermore, just because an Aboriginal person lives in a town and has more contact with police, does not necessarily make that person better educated or more resilient.

¹³ See the analysis of this case in an article by Sheryn Omeri, Special Provisions for Vulnerable Persons, Law Society Journal, October 2005 at p. 69.

A comparison of the reasoning and outcomes in **Helmhout** and **Riley** reveals that important considerations relevant to the exercise of the discretion to exclude are the seriousness of the offence and whether the breach was a deliberate or conscious act by the police. This approach by the courts appears to allow or excuse forgetfulness or inadvertent breaches of duty by police. Police have a duty to fulfil their obligations under the Regulations.

In this regard, Stephen Odgers has noted the comments made by the Australian Law Reform Commission that:

“if misconduct is less culpable because it was inadvertent, then the moral imperative to avoid judicial taint is reduced, since the taint itself is not so serious. But this factor is less important from a deterrence perspective...The fact that an individual officer acted under a mistaken, even reasonable, belief as to facts or the law would not negate the deterrent effect of evidentiary exclusion. The effect of exclusion would be to encourage officers to discover and conform to the legal requirements. Similarly, it is largely irrelevant to the criminal suspect that his rights were infringed deliberately or mistakenly¹⁴.”

In **Campbell v DPP** [2008] NSWSC 1284 (3 December 2008) Hidden J, an Aboriginal suspect attended the police station outside hours for an interview in relation to allegations of assault and affray. No fax was sent to the ALS as required under cl 33(1) **LEPRA Regulations 2005**. The police were aware that no one would be at the ALS office at that hour to receive the fax. The court held that the magistrate had failed to properly consider the deliberate nature of the breach where the police had arranged for the accused to attend for interview outside office hours knowing no one would be present at the ALS office. The appeal was allowed.

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

“[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.

In **Lamb & Thurston** [2002] NSWSC 357, Dunford J admitted a police interview notwithstanding breaches of Part 10A (NSW) **Crimes Act 1900**. The suspect had not been given a copy of the Caution and Summary document and not requested to sign it. The Custody Manager had failed to properly assist in relation to arrangements for the attendance of a support person. The suspect could not read but the trial judge accepted that he was willing to answer questions and there was no evidence he wanted a support person. His Honour held that the admissions were of ‘extremely’ high probative value, the evidence was important and the offence (murder) a serious offence.

R v APC; CP [2006] NSWDC 12, Nicholson DCJ, involved an allegation of robbery of an 81 year old female on the street by two juvenile Aboriginals. A 13 year old boy was arrested and placed in a police cell to sleep because of the early hour (3.00am). Several issues of concern were noted including the fact that the suspect was constantly woken up to ascertain if he had any complaints. The notification was faxed to the ALS which was found to be generally not sufficient compliance. His Honour was of the view that the notification should have been addressed to a ‘representative’ of the organisation. There was a failure to ensure the suspect understood his rights and choice as to a support person. The suspect in the interview appeared tired, uncertain of the formal caution and questions. He appeared to be under pressure from the police and his Aunt. The solicitor attending the police station to explain the rights to the suspect was turned away.

Nicholson DCJ Found the admission true but that it would be unfair to admit it (under s. 90 (NSW) **Evidence Act 1995**) because of the failure to protect the rights of the accused. His Honour also held that the admissions should be excluded pursuant to s. 138 as he was concerned about the endemic nature of the breaches.

In **R v Powell; Steven** [2010] NSWDC 84, per Nicholson DCJ, a 19 year old Aboriginal male was charged with aggravated BES and theft of a motor vehicle. The police interview was excluded pursuant to ss. 90 and 138 (NSW) **Evidence Act 1995**. Although the suspect was given the standard *Caution and Summary of Pt 9*

¹⁴ S. Odgers, Uniform Evidence Law, Sydney Lawbook Co, 2004 pp. 312-313.

of *LEPRA* it did not sufficiently make clear that silence of the suspect cannot be used as evidence against him. There was a failure to ascertain whether the suspect understood the right to silence. The trial judge found that the juxtaposition of the right to remain silent and the requirement to answer police was confusing. [104] His Honour was also of the view that the custody manager should not be making value judgments about Aboriginal suspects as suggested under *Helmhout*. Although there was no illegality in the record of interview, the police conduct was improper, unethical and breached the principle of fairness. These breaches were found to be reckless or negligent rather than deliberate.

In the case of *Honan* NSWSC, 26 March 1996, Hidden J excluded the police interview with the young person finding that the requirements of s. 13 (NSW) **Children (Criminal Proceedings) Act 1987** had not been satisfied. The young person (17 years old) was charged with malicious wounding. He was taken back to the police station and interviewed in the presence of his father and his sister. The father was ejected by police from the interview room for interrupting the interview. His sister was allowed to remain but was warned not to interrupt. The young person was not asked whether he consented to the presence of his sister.

His Honour found that there was no appropriate adult present pursuant to s 13, that there was no proper or sufficient reason for the absence of such an adult and that the father had been wrongly excluded from the interview.

As to the role of a support person his Honour said:

“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).”

As to consent to a support person his Honour said:

“The fact remains that the significant part of the interview was conducted in the presence only of Rebecca Honan. 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”.

Often the decision as to whether or not an admission will be excluded depends upon the seriousness of the offence and the extent to which the relevant provisions have been breached by investigating police. It is

important therefore to consider the whole gambit of provisions applicable to the admissibility of evidence and assess whether they have been complied with.

In ***Phung & Huynh*** [2001] NSWSC 115, Wood CJ at CL excluded evidence of admissions as a result of multiple breaches by the police. The case involved a 17 year old boy being charged with murder. He participated in two Records of Interview. The trial judge found that there had been a delay in contacting a support person, the support person was not present during the forensic procedure, the young person was given no opportunity to make representations as to the detention warrant, the police selected a support person without ascertaining the wishes of the young person; no legal practitioner had been contacted; the support person selected by police was relatively immature; the police failed to allow the young person to speak privately to the support person, the young person had had limited sleep, displaying signs of fatigue and drug withdrawal and there was no evidence that the young person had been properly advised of his rights.

In exercising his discretion to exclude the evidence Wood CJ at CL said:

"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.

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 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/her rights.

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.

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 the ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law".

In ***JB v Regina*** [2012] NSWCCA 12, the suspect was convicted of murder. During the trial an admission made to a support person was admitted into evidence. The support person worked as a youth liaison officer with the Sudanese community. The support person attended the police station and was allowed to speak to the suspect in private. During that conversation the suspect admitted he had stabbed the deceased.

In admitting the evidence, the trial judge found that the admissions fell into the category of 'unguarded incriminating statements'. Her Honour rejected the argument that the admissions fell into the category of client legal privilege under s118 of the (NSW) **Evidence Act 1995**, or that they fell within the concept of 'protected confidence' under s 126B of the **Act**.

On appeal it was submitted that her Honour erred in that she:

- (i) Concluded that the suspect's admission fell into the category of 'unguarded incriminating statements';
- (ii) Failed to advert to the regulatory position of the support person and the underlying rationale;
- (iii) Held that the relevant inquiry was the suspect's state of mind and in particular whether his freedom to speak or refrain from speaking had been compromised.

The suspect had refused to speak to the police. He was allowed to speak to the support person in private and in the absence of the police. In those circumstances it is reasonable to infer that the suspect comprehended the role of the support person as that of an individual whom he could speak to as a confidant.

However, the CCA rejected the appellant's arguments. In dismissing the appeal Whealy J said:

[29] With respect, I am unable to accept this argument. I shall briefly state my reasons. First, Mr Clayton's relationship with the appellant did not fall within any of the restricted categories of relationship (as outlined by Parliament) that protect unique relationships. There is, for example, no protection equivalent to s 118 Evidence Act for the relationship between a support person and a juvenile. There is no protection for the relationship between a support person and a juvenile as a "special relationship" such as may arise under s 126A, or in the case of religious confessions (s 127) and other privileged communications.

[30] Secondly, it may be seen that there is a fundamental difference between each of those "protected" relationships and the relationship, on the other hand, of a support person and young person. Certain specific relationships have been given special legislative protection because it is central to the function of those relationships that free and frank disclosure exists between the two persons involved. For example, a lawyer needs to obtain confidential information from his client to do his job adequately. It is part of the legal requirement of the solicitor/client relationship that confidences exchanged between them are to be strictly treated as confidential by the practitioner. No such legal or ethical relationship applies to a person playing a support role for a juvenile at a police station. The fundamental role of the support person is to assist the juvenile in his or her dealings with the police. It is to protect children from the disadvantaged position they are in as a consequence of their age. It is to protect them from police impropriety or from the disadvantages that arise simply because they are in a custodial situation and at the mercy of mature and experienced police officers (R v Honan; DPP v Toomalatai; R v Huynh and Phung).

[36] In my opinion neither the Act nor the Regulations on which Mr Smith placed reliance alter or enlarge the essential role of a support person. Nor do they provide an absolute prohibition on the admissibility of an admission or confession made by a juvenile to a support person.

[37] Of course, it does not follow that every admission made to a support person, even if given freely, will be admissible in criminal proceedings against the juvenile. If the support person has cajoled or tricked the accused into making an admission, it may well be that s 90 has effective work to do. Similarly, if the support person has been acting at the direction of the police, there may emerge a powerful argument as to why the admission should not be allowed at the trial. There is no need to envisage or list the many possible circumstances that might be said to constitute unfairness so as to warrant the justified use of the safety-net provided by s 90 Evidence Act .

[40] Mr Smith's principal argument fails ultimately because his attempt to equate the position of a support person with that of a lawyer, counsellor, priest or other confidant in a special position is simply not warranted. If the legislature thought that special protection should be extended to communications between a support person and a juvenile, it could have extended the range of protected relationships. It has not done so.

This decision raises a number of issues of concern. If we accept that a support person's role is to protect the vulnerable suspect from police impropriety and assist in the suspect's dealings with police, then there is a strong argument that to fulfil that role the vulnerable suspect perceives the support person as someone in whom they can confide. That perception is indeed encouraged by virtue of the fact that a support person and suspect are allowed to speak in private.

In the absence of a caution by the support person that any admission made by the vulnerable suspect can be used in evidence against him or her, how is the vulnerable suspect to know that there is no confidentiality attached to the conversations with the support person?

If this decision is to stand, legislative reform is required to either mandate a caution before a support person asks questions of the suspect or the relationship between support person and vulnerable suspect should be given specific legislative protection.

A CHECKLIST

In every matter where admissions or other evidence have been obtained following Part 9 detention it will be necessary to consider carefully the compliance with the various provisions detailed above.

Asking the following questions may be a useful checklist:

- Was the arrest lawful?
- Was there an investigation period available for the matter for which your client 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 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 person 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 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?¹⁵

¹⁵ This checklist was compiled by Stephen Lawrence, Principal Solicitor ALS Dubbo 2012.

SECTION 281 CRIMINAL PROCEDURE ACT 1986

Since 1 September 1995 oral admissions allegedly made in the course of official questioning are inadmissible unless the requirements of s 281 of the (NSW) **Criminal Procedure Act 1986** are satisfied. Those requirements are that the admissions:

- are tape-recorded; or
- there was a reasonable excuse for not tape-recording but the admission was later confirmed on a tape-recording; or
- there was a reasonable excuse for not making either of the above tape-recordings.

The prohibition only applies where:

- the admission was made by an accused person who was, or could reasonably have been suspected by an investigating official of, having committed an offence;
- the admission took place in the course of "official questioning";
- it is not an offence that can be dealt with summarily without the consent of the accused.

In the Attorney General's Second Reading Speech (Parliamentary Debates, Legislative Council, 24 May 1995 at 117), dealing with amendments to the (NSW) **Crimes Act 1900** making the tape-recording of admissions compulsory, four objectives were set out:

- (i) To provide the court with a reliable account of statements made by persons accused of crime whilst in police custody.
- (ii) To provide an objective means of resolving disputes about the conduct and substance of police interviews.
- (iii) To deter and/or prevent the use of unfair practices by the police prior to, during, and after interviews.
- (iv) To deter the making of unfair and false allegations of improper behaviour by police.

DEFINITION OF ADMISSION

An “admission” is defined in the (NSW) **Evidence Act 1995** in the following terms:

Admission means a previous representation that is:

- (a) made by a person who is or becomes a party to the proceeding (including a defendant in a criminal proceeding), and
- (b) adverse to the person's interest in the outcome of the proceeding.

In ***R v Horton*** (1998) 45 NSWLR 426 the Court was concerned with s 424A of the (NSW) **Crimes Act 1900**. The Court considered the definition of the word “admission” with reference to the definition contained in the (NSW) **Evidence Act 1995**. The appellant had been charged with the stabbing of her boyfriend. When the police officer attended the scene the victim said: “She stabbed me”, indicating the appellant. The officer then asked: “What happened, Anne?”. The appellant responded: “He fell on the knife”.

At trial, the evidence was admitted, notwithstanding the fact that the statement was not recorded at the time allegedly made and the appellant was not asked to adopt it when subsequently interviewed by way of electronically recorded interview.

The CCA held that the definition of an “admission” contained in the (NSW) **Evidence Act 1995** included a representation that was “adverse to the person's interest in the outcome of the proceedings. Although on its face the representation here was an exculpatory statement, it was “*adverse from the time it was made, since its effect was to weaken if not destroy reliance by the defence upon intoxication or accident, and to facilitate the prosecution in removing any reasonable doubt upon the issues that arose in that regard*”.

The Court held that the evidence should not have been received. The appeal was allowed and a retrial ordered.

In ***Eposito*** (1998) 105 A Crim R 27, the Court considered the definition of “admissions” in the context of an objection made during the trial pursuant to s.85 of the (NSW) **Evidence Act 1995** (reliability of admissions as the appellant was under the effects of drugs), s 90 (unfairness), s 135 (general discretion) and s 137 (unfair prejudice).

The appellant was charged with murder. During an ERISP, she denied having been anywhere near the scene of the stabbing or knowing anything about it. At trial, it was the appellant case that she had no memory at all of the events in question.

The Crown did not rely upon the answers as admissions in the sense that they were expressly inculpatory, but rather as admissions by conduct in the sense that, by distancing herself from Kings Cross and by providing an exculpatory account for the night's events, the appellant had lied and displayed a consciousness of guilt.

The Court held that a statement that appears exculpatory on its face may be an admission where relied upon as constituting an implied admission of guilt.

In ***Regina v Khamis*** [1999] NSWCCA 270, the Court held that a representation fell into the category of an admission where it was a false denial of ownership of an item found at the suspect's home, in circumstances where credibility was strongly at issue in the trial.

MEANING OF “RELATES TO” - SUMMARY AND INDICTABLE OFFENCES

Where unrecorded admissions relate to summary offences they are admissible. However, unrecorded admissions to summary offences that relate to indictable offences are not admissible against an accused on trial for the indictable offences.

In ***DPP v Farr*** (2001) 118 A Crim R 399, NSWSC, Smart AJ stated:

“[34] Section 424A(4) draws a distinction between summary offences and indictable offences. Admissions which do not relate to an indictable offence do not have to be tape-recorded. In other words, admissions as to the commission of summary offences do not have to be tape-recorded. What do the words ‘relates to’ mean in the context? What work do they do?”

[35] Section 424A operates in these situations. Subject to s 424A(2)(c) the section precludes evidence being led of an admission of facts constituting an indictable offence or of the offence itself unless the requisite tape-recording has been made. However, the section has a wider reach because of the words, ‘relates to an indictable offence’. On trials of indictable offences the section prohibits the reception of admissions made as to other offences (usually related) whether indictable or summary if no tape-recording was made even though such admissions would have probative value at such trial. This case is a good example. The admissions made as to the goods in custody and possession of cannabis would have significant probative value on the trial of the charge of supply”.

REASONABLY SUSPECTED

The prohibition does not apply where, at the time of making the admissions, the person was not suspected and **could not reasonably** have been suspected of committing an offence. However, it is no answer to a failure to tape-record an admission that the police officer did not in fact suspect the subject. If the circumstances are such as to suggest that the police officer ought to have suspected that the subject committed an offence, the unrecorded admission may be inadmissible.

R v Franqulis [2006] NSWCCA 363 came before the Court of Criminal Appeal by way of a 5F Appeal by the Crown against a decision of the trial judge to exclude evidence of a statement made by the accused to a detective and an interview conducted with the accused by a private investigator engaged by an insurance company.

The accused was the proprietor of a restaurant that was destroyed by fire. In the early hours of the day after the fire the accused made a statement to Detective Thornton, giving an account of his movements on the day of the fire, including how many times he attended at the restaurant activating and de-activating the alarm.

On the voir dire, Detective Thornton denied that he considered the accused a suspect at the time he took the statement. The detective gave evidence that he simply believed that he was taking a statement from the proprietor of the restaurant, that is, the victim of the offence. The trial judge rejected that evidence in light of other evidence adduced on the voir dire. The trial judge accepted that, before taking the statement, Detective Thornton was aware that the fire was deliberately lit and that there were no signs of forced entry.

The trial judge made the finding that knowledge that the fire was deliberately lit and the absence of forced entry were “capable of supporting the formation of the opinion and did result in the formation of the opinion” by the detective that the accused could have been involved in setting the fire.

The Court of Criminal Appeal held that it was open to the trial judge to make such a finding; thereby rejecting the evidence on the basis that s 281 had not been complied with.

In the case of ***R v Taouk*** (2005) 154 A Crim R 69, the appellant had attended a police station to report a disturbance at his home. In the course of making the report he admitted to shooting:

“I want to report a disturbance at my house”.

“What’s happened?”

“I’ve just shot someone at my house. I had an argument with my brother and he had a gun. I took it off him and fired a few shots...”

One of the questions on appeal was whether the appellant “could reasonably be suspected of committing an offence” in the circumstances of the present case. The Court held that there was no basis for reasonably suspecting involvement.

(per Smart J)

“[73] However, in my opinion, even accepting that a purposive interpretation should be given to s 281, it is necessary that some regard be had to the actual language of s 281 and some effect be given to the word ‘reasonably’ in the expression ‘could reasonably have been suspected’. A person could not reasonably have been suspected by a police officer of having committed an offence, unless something has been said or done which would provide some grounds for a police officer reasonably suspecting that the person has committed the offence.

[74] In my opinion, the attendance by the appellant at a police station, even in the early hours of the morning, and the saying by the appellant to a police officer of words to the effect that the appellant wished to report some untoward occurrence which had happened at his house did not provide any grounds on which the police officer could reasonably have suspected that the person had committed an offence”.

(per Hall J)

"[160] The basis of the suspicion referred to in s 281(1)(a) is the state of mind of an investigating official. That state of mind is more than mere surmise. Applying a similar approach as has been applied with respect to search warrant legislation, it is one arrived at on the basis of material that is capable of supporting the formation of an opinion, even if only a slight opinion, that the person in question (the accused) could have committed the offence".

OFFICIAL QUESTIONING

Not all admissions made to police officers are rendered inadmissible simply because they are not recorded. One of the requirements of s 281 is that the admission was made in the course of official questioning. A "spontaneous" admission to a police officer is not covered by the section: ***Mankotia*** NSWSC, Sperling J 27 July 1998.

In the case of ***Donnelly*** (1997) 96 A Crim R 432 NSWSC per Hidden J, the accused was charged with killing his wife. Some days later he attempted suicide. On admission to hospital he requested that his cousin, a police officer, attend. The accused made a spontaneous admission of guilt. He was cautioned and then further interviewed. It was held that the initial conversation was not "official questioning". The accused's cousin had attended as a family member thinking that the accused wished to talk about his suicide attempt.

In ***Matheson*** [2001] NSWSC 216, Howie J, 21 March 2001, the police attended the accused's parents' home investigating the possible commission of a murder by the accused. The father was speaking to the accused on the telephone who was obviously upset. The police officer spoke to the accused and ascertained that the accused was threatening to kill himself. Another police officer asked the accused what had happened. The accused confessed to the murder. Although his Honour found that the intention of the police was to talk to the accused in an effort to stop him from killing himself, they did suspect him of the murder. In that case "official questioning" was interpreted broadly. The evidence was excluded.

In ***Sharp*** [2003] NSWSC 1117, Howie J, 3 December 2003, the accused was charged as an accessory after the fact to murder. When initially approached by police she declined to answer questions. However, she did agree to accompany them back to the unit so they could execute a search warrant. While waiting outside, she had a conversation with one of the police officers, Detective Bennett:

Bennett: How are you doing?

Accused: Okay, I just don't understand why all the guns.

Bennett: This is a dangerous situation, we're investigating a very violent murder, we're not going to take any risks and you can't tell us whether he is in there or not.

Accused: I know it's a serious matter.

Bennett: We're about to do a search warrant here, before we get in there is there anything at all you want to tell me about before we go in.

The accused, without replying put her head in her hands and commenced to cry. The conversation continued:

Bennett: Are you okay, what is scaring you?

Accused: No, I'm not.

Bennett: Whatever is scaring you, whatever is scaring you, we can help.

Accused: No you can't, you don't know him, he's going to kill me, he's going to kill my family.

Bennett: We can give you protection.

Accused: You don't understand.

Bennett: I think I do, but I'd rather you tell me what did happen.

Accused: Brad and him had a fight and Brad hit him with a hammer.

Bennett: Where?

Accused: Over the head.

Bennett: Yes, but whereabouts?

Accused: In the flat, in there”.

Howie J decided as follows:

“[16] ... the term official questioning must, in my view, have some limit and the conversation under consideration must be reasonably capable of being construed as questioning by a police officer.

...

[20] ... But the word used is ‘questioning’ and it seems to me that it at least implies that the police officer is attempting to elicit from the person a response that the officer foresaw might provide information relevant to the investigation of the commission of an offence or possible offence, or be to the person’s prejudice in that regard. I would be prepared to find in an appropriate case that statements made by the officer to the suspect might amount to ‘questioning’ even though there may be no question asked. However, the mere fact that an admission occurs in response to a question or statement made by a police officer cannot retroactively convert the conversation into ‘official questioning’ if it did not fall within the definition at the time the admission was made.

[In relation to the conversation with Detective Bennett]

[23] ... I do not believe that he intended by anything he said, to elicit an admission from her or to obtain information beneficial to their investigation of the murder. Nor should the officer have reasonably foreseen that an admission might be made as a result of what he said to the accused...

[24] ... I am satisfied that the intention of the officer was not to question the accused at all but rather to allay her fears.

[25] But even if I had been wrong in the view I formed about the conversation and it did fall within the wide ambit to be given to the term ‘official questioning’ and hence within the scope of the provision, I was persuaded that there was a reasonable excuse in the failure to record it. In the view that I held, it was unrealistic and unreasonable to expect that the police officer would, in the course of the conversation, realise that it was official questioning, that an admission might be made, and that the conversation should be recorded. It has to be accepted as a matter of common sense, that not all conversations with suspected persons will amount to ‘official questioning’ and it is impracticable to require that police officers be in a position to record any statement made to them by a suspect howsoever it might occur. On the other-hand clearly the courts should be vigilant to ensure that admissions are not induced from suspects under the colour of ‘innocent’ or casual conversations. But that is not the present case”.

In this case, the police were aware that the accused had given a version to her employer about the disappearance of the deceased. In those circumstances, it is arguable that the detective foresaw that the accused might provide information relevant to the investigation, or be to her prejudice. Howie J did note that the facts of this case were at the very margin of the circumstances in which the provision would not operate to exclude the evidence.

The High Court had occasion to consider the expression “in the course of official questioning” in *Kelly v The Queen* (2004) 218 CLR 216. The Court there was considering the expression in the context of Tasmanian legislation dealing with unrecorded confessions.

During a video recorded interview the appellant retracted an earlier unrecorded admission claiming it had been made under duress. A short time after the interview was concluded, the appellant allegedly said to police: “sorry about the interview – no hard feelings. I was just playing the game”. The statement was not made in response to any question asked by police.

Gleeson CJ, Hayne and Heydon JJ (McHugh and Kirby JJ dissenting) held that the expression “in the course of official questioning” meant the period between when questioning commenced to when it ceased. Since the admission had been made after police questioning had ceased the statement was admissible.

Sections 85 and 89 of the **Evidence Act 1995** were amended in response to Kelly. The phrase “in the course of official questioning” was replaced by “made ... to, or in the presence of, an investigating official who at the time was performing functions in connection with the investigation of the commission, or possible commission, of an offence”. Under s 281 “official questioning” was already defined as “questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence”.

The most recent decision concerning the phrase “in the course of official questioning” is the case of Naa [2009] NSWSC 851 (26 August 2009) per Howie J. After stabbing his former partner inside her house, the accused became involved in a standoff with police outside the house for several hours while the accused was armed with a knife. During this time, he made several admissions, both spontaneously and in response to questioning by a policewoman who was dealing with the standoff. No caution was given to the accused during this time and the conversation was recorded in a notebook by one police officer and partially and poorly recorded by audio. At his subsequent trial for murder, the admissibility of the admissions was challenged on several bases, Howie J finding against the accused on all points and allowing the evidence.

In relation to the s 281 point, Howie J found that the intention or purpose of the questioning by the police officers was to disarm the accused and protect persons in the vicinity. This made the questioning a negotiation not an interrogation and the section did not apply; [79]. His Honour noted that, had he been of the opinion that s 281 applied, there was a reasonable excuse for the failure to record the admissions. The accused later refused to be interviewed by way of recorded interview.

REASONABLE EXCUSE

The question of whether there is a reasonable excuse for the failure to record an admission, depends upon the circumstances of each case. Reasonable excuse not to record admissions includes a refusal by an accused to be electronically interviewed: **LMW** NSWSC, Studdert J, 23 November 1999.

It has been held that reasonable excuse may also be established in circumstances where an accused participates in an ERISP but goes “off the record” for part of the interview and makes admissions during that time. In the case of **Walsh** [2003] NSWSC 1115, Howie J, 3 December 2003, the accused agreed to participate in an ERISP. During the latter part of the interview he placed his hand over the microphone and indicated that what he had to say he did not want electronically recorded.

The danger is that a dishonest police officer might well fabricate an admission and assert that he had a reasonable excuse for failing to record the admission in that the accused refused to have that part of the conversation recorded.

In **Nicholls & Coates** (2005) 213 ALR 1, the High Court considered provisions under Western Australian legislation that is similar to the NSW provisions. The Court adopted a purposive approach allowing the appeal.

(per McHugh J)

“[106] The focus of any inquiry directed to the application of the ‘reasonable excuse’ exception must take account of the conduct of the police, as well as the fairness or otherwise to the accused of permitting the admissions to be admitted. In construing similar provisions in MDR, Wicks J held that the conduct of the police officers was relevant to the question whether it would be ‘in the interests of justice’ to admit evidence of admissions by the accused. His Honour thought relevant matters included whether non-compliance with the provisions was deliberate or the product of a reckless disregard of the provisions or was inadvertent or otherwise excusable. Such matters are also relevant in determining whether there was a ‘reasonable excuse’ for not recording the admission. Most importantly of all, however, is whether the officers attempted to have the off-camera admission recorded. If, on camera, the accused denies making an off-camera admission, it will be highly relevant in determining whether there was a ‘reasonable excuse’ for there not being a recording on videotape of the admission”.

Generally speaking, where an accused spontaneously makes an admission to police in circumstances where the admission is not elicited in response to police questioning, a court will not exclude the unrecorded admission: see also **Bullock** [2005] NSWSC 825, Buddin J, 19 August 2005. Each case will depend upon its own facts. Where, for example, police are involved in a standoff with an accused where they engage in “conversation” with that accused and in the course of conversation the accused makes admissions, such admissions may be admissible. In **Naa**, Howie J found that it would have been difficult and possibly dangerous to record the conversation in the circumstances and this constituted reasonable excuse.

However, the “strongly preferable” course is that interviews with questions and answers given at a crime scene be recorded by an audio tape recorder.

CONCLUSION

Legislation, guidelines and protocols designed to protect the rights of ATSI suspects vary from State to State. Their application relies on police practice and judicial discretion and they have been applied inconsistently. A more uniform approach may be achieved if all States were prepared to pass legislation similar to the New South Wales **LEPRA** provisions, setting out the rights and obligations governing police questioning of suspects.

As practitioners, we must rigorously test the evidence of admissions by ensuring that the relevant laws and/or guidelines have been complied with. We must also be familiar with the case law in our respective jurisdictions. The Aboriginal Legal Services have had an important and central role in monitoring police practice with respect to the questioning of ATSI suspects. These organisations have also protected the rights of ATSI suspects by providing advice, attending police stations and challenging admissions in court proceedings. Their input and dedicated service has been and will continue to be crucial in ensuring fairness to ATSI suspects.