Reform of Policing by Legal Regulation: International Experience in Criminal Investigation†

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Law in policing

Discussions of police reform usually focus on eye-catching problems (such as misconduct and corruption) and dramatic remedies (such as new leaders and new institutions). My concern is with more mundane issues of everyday policing and with a more modest reform technique — legal regulation. What can legal regulation — that is, the use of rules and other legal techniques and principles — contribute to the process of police reform? Two very different answers have often been given.

It has frequently been taken for granted that the appropriate way to change policing (or to respond to demands for change, which may not be the same thing) is to create a new rule, or a new set of rules. The traditional volumes of Standing Orders or Police Instructions provide bulky testament to this. This approach was encouraged by the claim that policing was dominated by law and that police organisations were rational bureaucracies in which management could effect change in working practices. It is now rare to find such a simplistic approach to the relationship between law and policing. The best examples tend to be provided by politicians' knee-jerk legislative response to problems, although there are also some disingenuous assertions by certain police researchers about the effects of legal change in the context of criminal investigations which will be noted below.

Much more common today is a variety of sceptical views about the potential for law to change policing, and indeed more generally about the legal regulation of police work. The most familiar example is the assertion that policing is impervious to legal change because it is "police culture" not law that dominates policing. Discourse about "police culture" provides a fascinating example of how an academic concept can become popularised into everyday usage, even though its explanatory power is more apparent than real.[1] Simplistic references to police culture have two relevant weaknesses.[2] First, they ignore significant differences within policing: by inaccurately portraying homogeneity, the potential for encouraging desirable commitments and attitudes may be lost. At the least, we have to speak of police cultures, and to recognise their complexity and variety. Second, the idea that police cultures are immune to legal influence is inaccurate: elements of police cultures have

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1 Dixon, D, *Law in Policing: Legal Regulation and Police Practices* (forthcoming) at Chapter 1.

2 For others, see Chan, J, "Changing Police Culture" *British Journal of Criminology* (forthcoming).

been formed (and changed) by the legal environment within which many policing activities occur.

Scepticism about legal regulation brings together some unlikely bed-fellows. In the context of criminal investigation, an influential group of academics (whom I tagged "new left pessimists")[3] have argued that policing cannot be changed significantly by any politically feasible legal intervention.[4] More influentially and from a very different political position, authors associated with the Kennedy School of Government have articulated the view that close legal regulation is inappropriate for a professional police service, and that good policing inevitably entails the exercise of very broad discretion.[5] Between the lines of these arguments is a wide-ranging political opposition to due process and the "legalisation" of criminal justice.[6] Such critiques of law have proved irresistible to some police, providing a respectable and convincing mode of voicing opposition to legal (or indeed any external) control of policing.

In this paper, I argue (broadly but with qualifications) in favour of legal regulation, criticising both those who promote it as a panacea, and those who dismiss it as an irrelevance. My examples are taken from the area of criminal investigation, specifically the detention and questioning of suspects. When people argue about law's potential, it is such central areas of policing practice which are really of concern. (No-one would suggest that law is irrelevant or ineffective in the many other ways in which it affects policing, for example in the regulation of pay and conditions of service.) While it is a cliché in policing literature to observe that most police work concerns general order maintenance rather than law enforcement and the use of powers, the symbolic significance of the latter (and reform thereof) is crucial. I begin by considering the lessons which can be learnt from the experience of the *Police and Criminal Evidence Act* 1984 (PACE) in England and Wales.

The impact of PACE

The most significant sections of PACE provided police with clear and extensive power to detain suspects for investigative purposes between arrest and charge. Such detention can continue for four days in serious cases. However, the process of continuing detention is punctuated by increasingly high legal obstacles, as investigating officers have to seek authority to continue detention from an inspector (after six and 15 hours), a superintendent (after 24), and a magistrates' court (after 36 and again after 72 hours).[7] Detained suspects have substantial rights. Most significantly, they must be informed of the availability of free legal advice before and during questioning. Legal aid resources have been allocated

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3 Dixon, D, "New left pessimism" in Noaks, L, Levi, M and Maguire, M (eds), *Issues in Contemporary Criminology* (1995).

4 McConville, M, Sanders, A and Leng, R, *The Case for the Prosecution* (1991).

5 See, for example, Moore, M H and Stephens, D W, *Beyond Command and Control* (1991) Police Executive Research Forum, Washington.

6 Feeley, M and Simon, J, "Actuarial Justice: The Emerging New Criminal Law" in Nelken, D (ed), *The Futures of Criminology* (1994) at 173.

7 In Australia, there is often critical comment about this length. It has to be pointed out that the shorter detention periods in Australian "fixed-time" schemes are deceptive in that the time limited is that devoted to active investigation, not the full period of detention which will be swollen by extensive provisions for "time-outs" or "dead-time". In "reasonable-time" schemes, detention is potentially infinite. It would be good to see some comparative research on the actual time which is spent in detention by suspects under the various schemes.

and duty solicitor schemes have been established. In providing rights to suspects and, more generally, regulating the process of investigative detention, PACE relies on managerial supervision, bureaucratic record-making, and imposing specific legal responsibility on particular officers.

There has been considerable research on the effects of PACE, much of it commissioned by the Home Office directly or via the Economic and Social Research Council.[8] Perhaps not surprisingly, extensive research has not led to consensus, quite the opposite. The impact of PACE is one of the most controversial issues in British criminology.[9] Reflecting the contrasting attitudes to legal regulation noted in the introduction, one group of writers suggests that PACE fundamentally changed criminal investigation, shifting it towards a supposedly American model of due process.[10] Specifically, a prominent police officer claims that there "has been a sea-change in the way that police officers question suspects ... A new climate has been created in which there is strict adherence to the new rules".[11] Another police officer concluded from his research that PACE was "being religiously followed".[12]

In stark contrast, some of England's leading criminal justice scholars argue that nothing (or, at any rate, nothing for the better) has been changed by PACE.[13] In this "new left pessimist" account, policing is dominated by crime control values; legal specifications of powers are open to endless manipulation by police who persistently seek to evade or exploit legal controls; bureaucratic measures legitimate activities without controlling them; and internal managerial controls are ineffective because of a common commitment to achieving goals established by police culture. In sum, "PACE has been easily absorbed by the police ... (T)he basic message from our research is of the *non-impact* of PACE on police practices".[14] From this perspective, legal reform merely legitimises police practices.

It is not appropriate here to detail my critique of these very different accounts. It is enough to say that the presentation of PACE as a "sea-change" lacks credibility because of methodological research deficiencies and all-too-apparent proselytising motives, while the new left pessimists' work is hamstrung by theoretical essentialism, empirical overgeneralisation, and political gloom.[15] Rather, I will concentrate on my account of what is interesting and significant about PACE, drawing both on my empirical research and critiques of other studies. At the outset, I emphasise that legal reform cannot be considered in isolation from its contexts: the success of a proposal or rule change will usually depend

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8 With colleagues in England, I was responsible for one of the most wide-ranging of these assessments: see Bottomley, A K, Coleman, C A, Dixon, D, Gill, M and Wall, D, *The Impact of PACE* (1991) Centre for Criminology and Criminal Justice, Hull UK; Dixon, D, Bottomley, A K, Coleman, C A, Gill, M and Wall, D, "Safeguarding the rights of suspects in police custody" (1990) 1 *Policing and Society* at 115. For a very useful review of the literature, see Brown, D, *Research on PACE: A Review of the Literature* (forthcoming) Home Office Research Study, London.

9 Dixon, D, "Legal regulation and Policing Practice" (1992) 1 *Social and Legal Studies* at 515; Noaks, L, Levi, M and Maguire, M (eds), *Issues in Contemporary Criminology* (1995) at ch 9–13.

10 See for example McKenzie, I and Gallagher, G P, *Behind the Uniform* (1989) at 136. Apart from their other faults, such accounts are remarkably ignorant about the realities of American criminal justice. For a corrective account, see Walker, S, *Taming the System: The Control of Discretion in Criminal Justice 1950–1990* (1993).

11 Williamson, T, *Strategic Changes in Police Interrogation* (1990) PhD Thesis, University of Kent at 1, 6.

12 Mackay, P, "Changes in Custody Practice Since the Introduction of the Police and Criminal Evidence Act 1984" (1990) 14 *The Criminologist* at 63.

13 McConvill, Sanders and Leng, above n4.

14 Id at 189, original emphasis.

15 For elaboration of these criticisms, see Dixon above n9; above n3.

on whether or not it goes with the flow of other pressures for change within and outside the organisation. My perception is that PACE had significant beneficial effects to the extent that it was able to join and give strength to such non-legal pressures. However, it is extremely difficult, if not impossible, to isolate the specific effect of one legislative measure when it coincided with many other legal and non-legal changes.

The context into which PACE was placed was not, as is implied by the accounts noted above, a simple one. Far from police organisations being homogeneous and police culture being consensual, policing is more accurately seen as driven by pressures for change, competing factions, and uncertainty. Specifically, PACE provided a significant resource for officers trying to create a new police "professionalism". The traditional role model for investigating officers is the "craftsman" who arrests on hunches, interrogates aggressively, and is prepared to give weak cases "a run" in court. This has certainly not disappeared, but its dominance has at least been challenged by officers who regard its exponents as "dinosaurs", who have learnt that their work can be done within the rules, and who, specifically, have accepted the need to change questioning practices. None of this necessarily entails any particular devotion to "due process" (and I argue below that criminal justice urgently requires an understanding of such foundational principles to be injected). Rather, the key value is efficiency: the new professionals' critique of the dinosaurs has been fuelled by the long series of prosecutions which have failed because officers have refused (or been unable) to change their investigative practices. It must be emphasised that I am not claiming that a "new professionalism" is hegemonic, or anything near to that. Rather, there is a significant tension which indicates shifts and variations within police cultures and practices. It is such tensions within a changing institution which are amongst the most sociologically significant themes in this area.

PACE was presented (and often greeted by police) as bringing legal certainty to an area which was previously thoroughly unsatisfactory: the opacity of the Judges' Rules was notorious. The common law's prohibition of investigative detention had been qualified by the courts,[16] but until PACE it was quite unclear how long a suspect could be detained before charge in more serious cases. Meanwhile, the "rights" of suspects were uncertain, ill-defined, and lacked any substance in the form of organised provision (for example, of legal advice). A visitor from New South Wales would have felt very much at home.

It is undoubtedly the case that PACE has beneficially removed much uncertainty about crucial aspects of police powers and suspects' rights: detainees who ask to see a lawyer will not usually be told that they have been watching too much television. Custody officers must inform suspects that free advice is available: the latest research suggests that 38 per cent of suspects now request such advice.[17] Suspects (or at least their lawyers) know that their detention is not infinite. Officers usually do not feel that they have to take a chance, for example, in deciding to search a suspect's house.

However, it is a simplistic, positivist view of law which expects complete certainty. A crucial development in the impact of PACE has been the progressive interpretation by the courts of some sections: the result has been to leave some officers feeling that the "sea change" has been into a "sea of uncertainty".[18] A notable example of this is the *Heron*

16 See *Dallison v Caffery* [1965] 1 QB 348; *Holgate-Mohammed v Duke* [1984] AC 437.

17 Phillips, C and Brown, D, *Entry into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes* (forthcoming) Home Office Research Study, London.

18 Northumbria Police (1994) *Report of an Enquiry into the Practices and Procedures Adopted by Police Of-*

case,[19] in which a suspect's confession to the murder of a young girl was excluded from evidence (leading to his acquittal) despite the investigating officers' belief that they were acting within the rules, the lack of complaint from the suspect's legal advisers, and the approval of the Crown Prosecution Service. The trial judge's expansive treatment of the concept of oppression (in PACE section 76) caused consternation amongst many police officers. The point, of course, is that law has interpretative flexibility as a central characteristic. Such interpretations will change (despite the pleas for certainty), particularly as contexts change: in the case of interpreting "oppression", a crucial factor was clearly judicial unease with continuing revelations about police malpractices.[20] Considerable scepticism was expressed in the 1980s about the judiciary's expected conservatism in interpreting the PACE provisions on the exclusion of evidence.[21] Practice has proved to be rather different, with considerable judicial activism and expansive interpretation of PACE. This does not mean that our scepticism was ill-founded (on the contrary, the English judiciary's record fully justified it). Rather, the context of the miscarriage of justice cases (originating both before and after PACE) and judicial ire provoked by some notorious cases of police arrogance in ignoring PACE led some judges to apply PACE to the police much more strictly than it was realistic to expect.

Recognition of law's open texture has to be connected to recognition of the broader political context of reform work, in which the simplistic dichotomy between success and failure (sea change and no change) is of little value. Taking legal regulation seriously implies a commitment to reform (legal or other) in which one is aware of the dangers of deflection, co-optation and legitimisation, but, equally, in which the success or failure of reform projects is not considered in isolation. As Brown comments (in relation to campaigns for due process rights in prison disciplinary hearings) the:

> point is that such developments have a multitude of effects ... And further that these effects are not fixed once and for all but are the subject of continuing struggles which seek to overturn, subvert or bypass a particular balance of forces ... which in turn generate new struggles.[22]

It was suggested above that the effect of legal reforms depend upon their context. It also, not surprisingly, depends upon the nature of the reform's target. A notable feature of PACE has been that it has had much more impact on policing practices inside than outside the station. In particular, the attempt at legal regulation of stop and search activities had little real impact.[23] In the two revisions of the PACE Code of Practice A (dealing with stop and search), the definition of sufficient "reasonable suspicion" has been honed and polished, but to little effect. Indeed, the PACE regulation of stop/search is an excellent example of what the Policy Studies Institute termed "presentational rules".[24] Stop and

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ficers During Interviews with George Robert Thomas Heron Following the Murder of Nikki Davie Allan (1994) Ponteland: Northumbria Police, unpublished.

19 Unreported, Leeds Crown Court, 18 October 1993.

20 See, for example, the Lord Chief Justice's comments in the "Cardiff Three" appeal (*R v Paris, Abdullahi and Miller* [1992] 97 Cr App R 99) which provided the basis for the defence counsel's and trial judge's approach in *Heron*.

21 See for example, Dixon, D, Bottomley, A K, Coleman, C A, Gill, M and Wall, D, "Reality and Rules in the Construction and Regulation of Police Suspicion" (1989) 17 *International Journal of the Sociology of Law* at 185.

22 Brown, D, "The Politics of Reform" in Zdenkowski, G, Ronalds, C and Richardson, M (eds), *The Criminal Injustice System* (1987) at 260.

23 Dixon et al, above n21; Brown, above n8 at ch2.

24 Smith, D J and Gray, J, *Police and People in London* (1985).

search is notoriously hard to supervise; it provides an important source of arrests[25] and rare opportunities for proactive work by uniformed officers; it has to be understood as much as a tool of order maintenance and information collection as of law enforcement; and the division between a PACE stop/search and one carried out by "consent" (thereby avoiding legal restrictions and conditions[26]) is unclear.

By contrast, PACE has had effects within the police station, where the pressures to produce evidence which may have to pass judicial scrutiny have more force, and where there is at least potential for realistic supervision. Notable features of the PACE system are the allocation of specific personal responsibility for the treatment of detainees to custody officers, and the exploitation of the traditional antipathy between uniform and detective officers. Custody officers are usually unwilling to tolerate behaviour from investigating officers which could have serious consequences for them, including being called to court to account for a suspect's treatment or facing disciplinary action. A custody officer to whom I was expressing guarded scepticism about his "independent" role made the point bluntly: "A cough, at the end of the day, is less important to me than my job". Organisational interest in rule compliance is equally pragmatic: custody officers often see their role as ensuring that investigators do not "lose a case" by unnecessarily breaching PACE. From this perspective, PACE provides ample room for police to operate: indeed, if used properly, it will lead to the collection of evidence (including interview and custody records) that defence lawyers will find hard to challenge.

A notable feature of PACE has been the variety and adaptability of the modes of legal regulation employed. The basis is the statute itself. It is important that fundamental matters be given the authority of an Act of Parliament: for example, the inclusion of the right to legal advice in PACE section 58 was of both symbolic and practical importance. But the most significant use of rules has been the Codes of Practice dealing with stop/search, search of premises, detention and questioning, identification, and tape recording. The codes contain a variety of material, ranging from straightforward supplementary rules, to explanations of and advice on the interpretation of other rules. Much of the material is of the sort which in NSW might be included in the Commissioner's Instructions. However, there are some telling differences. The codes have statutory authority and weight: PACE section 67 provides that breach of the code is a disciplinary offence and the codes are to be taken into account where relevant in court proceedings. A result has been extensive judicial consideration of their requirements and implications. They are produced, not as internal police documents, but as secondary legislation requiring the approval of both Houses of Parliament. Drafts of codes are subject to a consultative process: this has proved to be more than a formality, with the Home Office paying more attention than might be expected to the findings and views of outsiders, including academics.[27] The codes are adaptable (significantly more so than primary legislation), and have been revised twice since 1986. These revisions allow account to be taken of experience and developments. As would be expected, PACE and the codes are supplemented by Home

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25 Although a relatively small proportion of stop/searches lead to arrest, the number of arrests made is significant, as is their perceived contribution to clearing up certain offences. See above n21; Brown, above n8 at ch2.

26 See Dixon, D, Coleman, C A and Bottomley, A K, "Consent and the Legal Regulation of Policing" (1990) 17 *Journal of Law and Society* at 345; above n1 at ch3.

27 I was a member of a Home Office working party which considered the implications of research findings for the 1991 revision of the codes.

Office circulars (notably 22/1992 on "Principles of Investigative Interviewing") and various force orders and instructions.

In sum, PACE provides an important example of legal regulation, an exercise in rule-making which demonstrates many of the techniques and methods which are features of modern public law. Its impact has varied according to the area of policing affected, the nature of the rules employed, their relationship with informal "working rules", and the influence of contextual factors.[28]

What can NSW learn from PACE?

Asking the question so bluntly is likely to raise some hackles. It may well be suggested that the time for Australia to take lessons from England has long gone in general, and that, in particular, the English criminal justice system has been a figure of scorn, not a model of virtue in recent years. Such sentiments are detectable in some responses to proposals for reform in Australia which have drawn on the PACE model.[29] It is therefore perhaps worth concentrating on what NSW should *not* do in changing the law of criminal investigation. Here, a fine model is provided by the Crimes (Detention After Arrest) Amendment Bill which was promoted by the Fahey Government in 1994.

The legal background to the Bill should briefly be provided. The common law provided no power for police to detain suspects for investigative purposes between arrest and charge: suspects were to be taken without delay to a magistrate. As long as magistrates took the leading role in criminal investigation, this arrangement was appropriate. However, in the mid-nineteenth century, the police took over from magistrates the task of criminal investigation and went on to make their monopoly of crime investigation a central plank of the search for recognition as professionals. The common law did not recognise the implications of this change in the police role until, in England in the 1960s, the appeal courts accepted that suspects could be detained for investigative purposes.[30] But Australian common law has rejected this judicial extension of power to the police. In the leading case of *Williams*, the High Court made quite clear that investigative detention was impermissible and that, if the law was to be changed to accommodate it, the responsibility for doing so lay not on the judges, but on legislatures. This was a matter of both principle and practicality: only legislative change could provide a regulatory framework of safeguards for detained suspects, including "precise limits" on detention length.[31]

Eight years after *Williams* and three years after the Law Reform Commission reported on the matter, the NSW Government finally published its long-awaited Crimes (Detention after Arrest) Amendment Bill. Despite this long gestation and the possibility of learning from the experience of similar legislation elsewhere, the result was deeply unsatisfactory, misunderstanding or ignoring central aspects of the issue.

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28 My assessment is strongly supported by an authoritative Home Office review of the research literature: see Brown, above n8.

29 See, for example, New South Wales Law Reform Commission (1990) *Police Powers of Detention and Investigation after Arrest* NSW LRC 66, Sydney; Criminal Justice Commission, *Report on a Review of Police Powers* (1994) vol 4, Criminal Justice Commission, Brisbane.

30 See *Dallison v Caffery* and *Holgate-Mohammed v Duke* and the discussion in above n1 at ch4.

31 [1986] 66 ALR 385, Wilson and Dawson JJ at 410; see also Mason and Brennan JJ at 398.

The Government rejected the schemes of legally regulated detention length introduced for investigations of Commonwealth offences and proposed for New South Wales by the NSW Law Reform Commission. Rather than providing specified maximum periods of detention, the Bill would have allowed police to detain suspects for a "reasonable period". The Attorney-General claimed the experience of other states in justification for rejecting fixed time detention: "That model was first trialled (sic) in Victoria. Victoria rejected it and changed the law as it was unworkable. All the other States have rejected the concept as unworkable".[32]

This argument was specious. As the Law Reform Commission's Report explained, the Coldrey Committee found the Victorian scheme to be working successfully, but "surprisingly recommended its abandonment on the basis that it had 'the potential to cause problems in the future'".[33] Such problems as there had been were due to a strange provision which required a suspect to consent to an extended period of detention and to suspects' use of their right to silence: the former could have been remedied by legislative amendment, while the latter had nothing directly to do with the detention regime. It would seem that the rejection of fixed time periods in Victoria was due more to the political influence of the Victorian Police than to its inherent weakness. In other jurisdictions, fixed times have been used successfully. The Law Reform Commission reported that South Australia's police were satisfied with that state's fixed time provision.[34] The Commonwealth's legislation provides a fixed time model very similar to that recommended by the NSW Law Reform Commission, and no evidence of problems in its operation has been made public. It is encouraging to see that the Government's "initial position" is to resist pressure from the Federal Police for a "reasonable time" provision.[35]

So, no satisfactory case was made against the fixed time model. Far from the "reasonable time" model being preferable, experience elsewhere illustrates its deficiencies. In *Heiss*, the Northern Territory Supreme Court strongly criticised the lack of guidance to police in that jurisdiction's reasonable time provision, rejected suggestions that the courts should clarify reasonableness, and suggested that this was properly a legislative function.[36] In the NSW Bill, "reasonable time" for detention was to be determined by the investigating officer: there was no requirement for involvement of supervisory officers. It seems clear that the real issue was not that fixed time cannot work, but that the police object to the constraints that they expect it to put upon them. This episode reflects the continuing strength of police influence on criminal justice policy in Australia. The Government's priority was acknowledged: it was not the unlawful detention of suspects, but "the uncertainty now faced by police at operational level as to the extent of their powers (which) clearly required a response from the Government".[37] In addition, the Bill did not deal with the central problem of "volunteers", despite the Law Reform Commission's clear exposition of the pressing need to do so.[38]

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32 *The Sydney Morning Herald*, 28 August 1993.

33 NSW LRC, above n29 at para 4.18.

34 Id at para 4.17; see also McEniery, P, "The Regulation of Custodial Interrogation in South Australia" (1995) unpublished LLM research paper, University of New South Wales.

35 Attorney General's Department, *Review of Part 1C of the Crimes Act 1914: Discussion Paper* (1995) Commonwealth Attorney General's Department, Canberra, at 18.

36 [1991] 101 FLR 433, at 455, 457–9 per Nader J.

37 Attorney General's Press release, 7 August 1993.

38 NSW LRC, above n29 at paras 3.27–37.

Control of detention practices was to be provided by guidelines and by "judicial supervision". While details were not provided of the promised "guidelines" and clarifications of suspects' rights, it seems most unlikely that it was intended to give real substance to suspects' rights as, for example, by providing a right to free legal advice during custody backed by a duty solicitor scheme and rules requiring police to enable suspects to contact it.[39] Police were not to be able to refuse access to legal advice in contrast to access to family and others, which could be refused in specified circumstances, but lawyers were only to be given two hours to get to a station before the obligation to delay questioning or other investigation expired. This would have been likely to encourage officers arresting suspects thought potentially able to employ a lawyer to do so at inconvenient times. It is ironic that, while a principal argument against fixed detention lengths was that they would be impractical in rural areas, a short period was considered adequate for the arrival of legal advice. While the Bill borrowed some of PACE's terminology, referring to custody officers and custody records, it left elaboration of arrangements to police management and subordinate legislation. Special groups were dealt with only in permissive sections on interpreters and by providing that a suspect's age, and physical, mental and intellectual conditions were to be taken into account in determining a "reasonable" detention length. No reference was made to Aboriginality. The duty to inform suspects of their rights rested with "the police officer concerned", presumably the investigating officer. Finally, the Bill was unacceptably permissive in stating that the Governor "may" make regulations which "may" provide a code of practice relating to arrested persons.

The 1994 Bill could properly be described as offering the legal nonregulation of detention for questioning: the law was to be used merely to authorise and legitimate what police do. What police currently do is to detain suspects for investigative purposes despite the High Court's clear statement of the common law in *Williams*. Two devices are available in order for them to do so: the fiction of "voluntary attendance" means that suspects "consent" to being taken to stations for questioning, making irrelevant the prohibition of detention. Otherwise, suspects are arrested at times when the courts are not open, so that the duty to present the suspects can be conveniently delayed. These devices attracted the deserved scorn of the Law Reform Commission: "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".[40] Straightforward unlawful detention remains available as an alternative, and is one which officers are effectively encouraged to adopt by judges who tolerate illegally obtained evidence, as well, of course, as by a justice process which fundamentally and increasingly depends upon guilty pleas and the reduction of opportunities for objection to be made at trial.

Simply legislating for business as usual (as the 1994 Bill would have done) would be to encourage police cynicism about the law by confirming their belief that they, as professionals, are the only people who know what is needed to get the job done. It would miss an opportunity for creative and constructive legal regulation, drawing on the experience of other jurisdictions. It is unnecessary here to expand on what form the legal regulation of investigative detention should take: in this area's notorious "graveyard of reports"[41], there is available a detailed package of proposals in the 1990 Report of the NSW Law Reform

39 Ibid at paras 5.20–36.

40 Ibid at 15.

41 Kirby, M D, "Controls Over Investigation of Offences and Pre-trial Treatment of Suspects" (1979) 53 *Australian Law Journal* at 628.

Commission, which can be usefully supplemented by reference to the 1994 Report of the Criminal Justice Commission.[42] Neither of these falls into the obvious trap of ignoring contextual factors and assuming that "what works" in England will inevitably work here.

The prospects for legal regulation

> What determines whether legal rules are obeyed? There is a convincing body of opinion which suggests that this is a product of a complex interaction between the nature of the rules, the way in which they are expressed, methods of implementation and enforcement and their relationship with existing methods of working.[43]

In an article assessing the early effects of PACE, I suggested that its success depended upon certain minimal conditions:

(a) clear expression of desired standards;

(b) effective training in order to modify police culture;

(c) favourable political circumstances;

(d) the backing of effective sanctions for non-compliance; and

(e) public knowledge of rights and the limits of police powers.[44]

A vital addition to this list in the context of New South Wales would be genuine commitment to change by the police and other criminal justice agencies. This means, clearly, that legal change must not be used for merely presentational purposes. This entails challenging the deep complacency and conservatism of criminal justice professionals, making them accept that "the way it's always been done"[45] may not be the only or the best way. It must be stressed that these comments are not directed solely at the police. Politicians, lawyers and the judiciary are at least as resistant to change. The case of investigative detention again provides a good example. As indicated above, police have been able, indeed were encouraged, to detain suspects unlawfully or by means of legal trickery and loopholes because legislators paid no attention to the issue, judges routinely allowed illegally obtained evidence to be used in their courts, prosecutors advised police to exploit legal loopholes[46] and defence lawyers did not challenge such evidence and encouraged guilty pleas. NSW courts have displayed a consistent commitment to crime control ideology in their treatment of defendants who challenge the legality of their treatment during police detention.[47]

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42 It is appropriate to declare an interest: I acted as a consultant in the writing of both reports.

43 Brown, above n8 at 334.

44 Dixon et al, above n21 at 192.

45 A phrase symptomatically used by a senior Queensland law officer resisting proposals for reform which were eventually elaborated in CJC, above n29. In depressingly familiar fashion, the Queensland Government rejected the CJC's central recommendations and, in January 1996, brought forward legislation based on a reasonable time regime.

46 For example, in the Blackburn investigation: see NSW LRC, above n29 at 15.

47 This is argued in detail in above n1 at ch5. At the Institute of Criminology seminar, Chief Justice Gleeson argued that confessions had to be shown to be voluntary before the issue of exercising discretions to exclude arose, and it was therefore not surprising that few confessions were excluded from evidence on the ground that they had been obtained unlawfully. In my view, the underlying problem was the inadequacy of the concept of "voluntariness" and the priorities of judges who have regarded convicting defendants as more important than that police should operate under the rule of law. The cost of such attitudes is demonstrated by the revelations

A notable feature of the miscarriage of justice cases in England has been the challenge to judicial and legal complacency. The judges, so complicit in those injustices, have had put in their face the evidence that they and their prejudices were wrong. This, as suggested above, has contributed to some unexpected activism in interpretations of PACE. The point should not, of course, be over-extended: the whispering campaign, for example about the "real guilt" of the Guildford Four and Tottenham Three shows how deeply ingrained is the reluctance to acknowledge mistakes.

The inadequacies of defence lawyers, and their responsibility for miscarriages of justice, have attracted considerable attention in England. The quality (or rather lack thereof) of legal advice at police stations has been pointed out by a series of researchers.[48] Their passivity and subservience to police was strongly criticised in *Heron*, in which a solicitor sent clerks (one of whom had previously served as a police officer junior to the interrogating officers) to advise a murder suspect. The trial judge said that this was "a state of affairs which must never be allowed to occur again".[49] In the case of the Cardiff Three, the Lord Chief Justice suggested that a solicitor was "gravely at fault for sitting passively through this travesty of an interview ... The solicitor who sat in on the interviews appears to have done that and little else".[50] Such legal advisers may harm rather than protect their client's interests both by giving a spurious appearance of propriety and, as in *Heron*, by actively encouraging a confession. Whether the English legal profession is able to change its entrenched attitudes towards criminal justice and provide adequate services to clients in custody remains to be seen — as does the truth of the oft-made claim that Australian lawyers would not be so supine.

But cynicism must be tackled at a deeper level than mere unwillingness to consider other ways of working. Consider, for example, the former Chair of the Police Board's comment on calls for legislative reform: "I confess that I sometimes wonder if it matters very much. With the present powers, our police manage to keep the criminal courts quite busy and the prisons full".[51] There is evidence here of some ideas about criminals and crime control which are deeply rooted in Australian cultures. It suggests a stone-age lay criminology in which "criminals" are distinguishable from respectable society, and the justice system should not be subject to pettifogging legal restraints in dealing with them. From this perspective, providing suspects with substantial rights makes little sense. NSW authorities seem to struggle with the very idea that suspects could have rights which need to be given substance. (This is illustrated by recurrent descriptions of unconvicted suspects as "offenders".[52]) Their primary concern is the demands and desires of crime control. The

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of police practices by the Royal Commission into the NSW Police Service, which published an Interim Report in February 1996. The *Evidence Act* 1995 replaces voluntariness (s84) and recasts the exclusionary discretions (ss90, 135, 138). The English case of *Heron* (see above n19) provides a notable example of a judge excluding an unlawfully obtained confession to a murder, which he apparently thought was true.

48 Dixon et al, above n8; Sanders, A, Bridges, L, Mulvaney, A and Crozier, G, *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (1989) Lord Chancellor's Department, London; McConville, M, Hodgson, M, Bridges, J and Pavlovic, A, *Standing Accused* (1994).

49 Mitchell J's ruling on voir dire in *R v Heron*, above n19.

50 *R v Miller, Paris and Abdullahi*, above n20. For the background of this case, see Williams, J, *Bloody Valentine: A Killing in Cardiff* (1993).

51 Jackson, G, "Reform of policing in New South Wales" (1991) 20 *Anglo-American Law Review* at 25.

52 See, for example, NSW Police Service, "Response by the Commissioner of Police to the NSW LRC Discussion Paper" (1988) unpublished, Sydney; Drew, K J, "Criminal investigation: the police perspective" (1989) 1 *Current Issues in Criminal Justice* 1 at 46.

preferred Australian self-image of anti-authoritarianism has to be set against the all too common reality of intolerance for "criminals" and support for vigorous action against them. Jill Bolen points out how this element of popular culture has constituted a serious obstacle to the reform process in Queensland in the very material shape of juries and magistrates refusing to convict police officers of palpable offences.[53]

The usual metaphorical device for making these arguments is the need for "balance" in criminal justice between various interests. Despite repeated exposures of its deficiencies, the balance is usually said to be between the civil liberties of suspects and society's right to protect "itself" by providing police powers. In cruder formulations, "suspects" are replaced with offenders or criminals, which, leaping to the conclusion which the justice process is intended to decide upon, ends any useful discussion. In more sophisticated formulations, it may be acknowledged that there is a communal and not just an individual interest in the protection of rights. This is not merely a matter of principle — specifically the principle that a democratic society deserving the name treats its citizens in a certain way. There is also the instrumental interest, which is a glaring but often ignored lesson of the miscarriage cases: if failure to provide suspects with substantial rights leads to a wrongful conviction, then those really guilty escape justice (usually forever, because the investigation has been misdirected for so long). It bears emphasising that cases like the Birmingham Six were miscarriages of justice not only for those who wrongfully spent years in jail, but also for the victims of appalling crimes, and their families and society generally because of the failure to identify and punish the guilty. The Hilton bombing is an obvious local equivalent, and investigation of similar cases shows that there is no room for complacency.[54] From this perspective, protecting the rights of suspects is no mere civil libertarian concern: it is vital for the efficient and effective operation of the justice process. Rights are organisational and social, as well as individual, interests.

This discussion suggests that, seductive as it may be, the concept of balance is inappropriate. Certainly, experience suggests that it provides an irresistible temptation to degenerate into crude and unhelpful formulations. More significantly, use of the concept itself has recently been subjected to a devastating critique by Andrew Ashworth, for whom it is "the scourge of many debates about criminal justice policy". He argues convincingly that its superficial utilitarianism trivialises important interests and inappropriately treats them as if they can be weighed off against each other. He calls for a fundamental reconsideration of the principles and fundamental purposes of criminal justice, a "rights-based" approach.[55]

Among the attractions of his argument is that it would provide access to a level of sophistication in debates about criminal justice which has been very rare. This is not a mere academic preference: a major problem in policing and criminal justice more generally is a failure by many practitioners to appreciate the political significance of their powers and responsibilities. For a state official to detain a citizen without charge for investigative purposes is a major incursion into a liberty which is a constitutive part of liberal democracy. This does not make it unacceptable: it simply requires that such powers be clearly defined and be no more extensive than necessary. That something of political significance is involved in

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53 See Bolen, J, *Prospects for Sustainable Police Reform* (1995) Seminar Paper presented at the Institute of Criminology seminar "Police Reform: Options for Change" 20 September 1995, Parliament House, Sydney; and, for example, "Jury Acquits Detective on Drug Charge" *Courier Mail* 15 April 1994; "Police Cleared of Abducting Black Children" *The Australian* 25–6 February 1995.

54 Carrington, K, Dever, M, Hogg, R, Bargen, J and Lohrey, A (eds), *Travesty* (1991).

55 Ashworth, A, *The Criminal Process* (1994) at 292–6.

the use of police powers might have been understood in the early nineteenth century, when the role of the new police was being negotiated. There is a real need for the recreation of a similar level of popular political consciousness, both amongst the public and the police.

Conclusion

My argument is that legal regulation must play an important part in the reform of policing.[56] For far too long, central aspects of police powers and responsibilities have been neglected. As the Law Reform Commission commented, it:

> is remarkable that an area of law of such fundamental importance to personal liberty has been left in a state which is so informal, so uncertain and so inconsistent for so long ... It is highly unlikely that an area of law which dealt with the ownership of property would have been allowed to remain in this state without urgent legislative attention.[57]

It is important to stress the positive aspects of legal regulation. To dismiss such proposals as "giving the police too much power" or, alternatively, "police-bashing" is to slip into the crude rhetorical opposition of police powers versus suspects' rights which is so tiresome and unhelpful.

Regulating does not just imply restricting and constraining: it can also be creative, in at least three ways. First, making clear that police may legally detain for investigative purposes opens the way for the rights of those detained to be given substance. The use of legal powers entails limits, and those limits are the beginnings of rights. Second, the provision of substantial rights to suspects does not necessarily impede effective policing. Constant arguments to the contrary rely on the concept of balance which has been criticised above, in which, by metaphorical necessity, raising rights must lower powers. The best example is the constant complaint that providing detained suspects with access to legal advice will lead inevitably to their refusal to answer police questions, with the result that "guilty" suspects walk free. The extensive research on police interrogation and the role of legal advisers has made clear that this "common-sense" account is inaccurate: lawyers rarely advise silence; even when they do, suspects find it very difficult to keep silent; and suspects who do refuse to answer questions often do so because of antagonism to police, not as a result of legal advice.[58] On the contrary, many police officers reported that the presence of a lawyer assists them.[59] To some extent, this is because legal advisers do not do their job properly: reference was made above to problems in this respect. But it would be misleading to focus just on "bad" legal advice. The fact is that in a system structured around the guilty plea, advice to cooperate may well be good advice. If, as research indicates, an effect of PACE has been to increase the amount of non-confessional evidence collected by crime investigators,[60] then silence is less likely to help a suspect avoid being charged. Of course, now that adverse inferences can be drawn from silence,[61] the

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56 It must be stressed that this does not mean that legal regulation is the only tactic to be adopted, only that it should be one tactic in a broader strategy.

57 NSW LRC, above n29 at 18.

58 Dixon, D, "Common Sense, Legal Advice and the Right to Silence" (1991) *Public Law* at 233; McConville et al, above n48.

59 Dixon, ibid.

60 Brown, above n8.

61 As a result of the *Criminal Justice and Public Order Act* 1994. The British Government simply ignored

legal adviser's role inevitably is affected. More generally, the point here is that the experience of PACE made many practitioners reconsider their prejudices and "common sense" about how the system works.

Third, the clarity which regulation can provide is beneficial to police. A consistent response from officers interviewed about the impact of PACE in England was that they appreciated knowing what they could and could not do.[62] This is not a trivial point: if police professionalism is desirable, then getting rid of the conditions under which they must find loopholes in the law to do their work (with the consequential cynicism about both law and public attitudes to policing) would be of substantial benefit. An important theme in recent policing literature is the need to define good policing, to tell police what they should be doing, not just provide leaky negative prohibitions.[63] In this context, legal regulation could provide an important contribution to ideological as well as instrumental change in policing.[64]

Methods of dealing with corruption currently dominate debate about police reform. I would emphasise the link between attitudes to law and "process"[65] or "good cause" corruption: if officers justify acting unlawfully by pointing to the inadequacy of their powers and by insisting that the end justifies the means, then "good cause" corruption is born. While this does not suggest the beginning of some inevitable slippery slope into other forms of corruption, the significance of a general atmosphere or culture in which deviance is encouraged and tolerated must not be underestimated. This does not, of course, mean that the police must be given every legal power which they seek. There is always likely to be a gap between what the law provides and what the police would like. But this does not imply some iron law of police deviance. Powers can be provided which police can accept as adequate, making excursions outside the rules not just less necessary, but also less ideologically attractive (as suggested in the comments on "new professionalism" above).

How should new rules be made? A first lesson is that simply imposing them on police is undesirable, and likely to affect compliance. Police should be widely consulted in the process of rule creation as a way of encouraging responsibility and challenging cynicism.[66] Again, the consultative process used in the revision of the PACE codes is a useful example. This is very different from the arrangements often found in Australia, in which it "almost seems as if ... the police have come to treat police powers questions as industrial relations issues to be negotiated ... on a semi-private basis with government".[67] Consultation about police powers has to be wide-ranging and inclusive. However, public opinion

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the findings of research in this area: the result was a depressing example of ideological commitment sweeping aside sound advice.

62 Dixon et al, above n8.

63 See, for example, Braithwaite, J, "Good and Bad Police Services and How to Pick Them" in Moir, P and Eijkman, H (eds), *Policing Australia* (1992).

64 For sophisticated accounts of how legal regulation has affected American criminal justice in this way, see Walker, S, *The Rule Revolution: Reflections on the Transformation of American Criminal Justice 1950–1988* (1988) Institute for Legal Studies Working Paper #3:10. University of Wisconsin, Madison; Walker, above n10.

65 See *Royal Commission into the NSW Police Service Interim Report* (February 1996) at par 2.6.

66 Goldsmith, A, "Taking Police Culture Seriously" (1990) 1 *Policing and Society* at 91; Dixon, D, "The Normative Structure of Policing" (1995) Unpublished Paper for the Royal Commission into the NSW Police Service, Sydney.

67 Willis, J and Sallman, P, "The Debate About Section 460 of the Victorian Crimes Act" (1985) 18 *ANZ Journal of Criminology* at 226. On the influence of police associations, see Finnane, M, *Police and Government* (1994) at 44–51.

must be well-informed before it is of value. Here, the poverty of much public debate about criminal justice provides real problems. In the 1995 NSW election campaign, politicians' wilful misrepresentations of the crime problem and manipulation of fear of crime exemplified the political cynicism which has blighted criminal justice. A starting-point has to be a recognition that criminal justice is an important and complex area of public policy and administration, not simply the administration of a criminal class to be exploited in the scrabble for government. Taking criminal justice seriously means beginning by paying serious attention to fundamental principles. That this does not entail slipping into philosophical obscurity can be seen from examples such as the analysis which the Royal Commission on Criminal Procedure developed as the basis of its recommendations,[68] and Ashworth's more recent discussion of the foundations of criminal justice.[69]

Cynicism has been identified as a crucial problem at several stages above. It is a persistently corrosive influence in criminal justice. Police reform by means of legal regulation promises not just instrumental, but also ideological change.

68 *Report of the Royal Commission on Criminal Procedure* (1981) Cmnd 8092, HMSO, London.
69 Above n55.