CHAPTER 16

POLICE POWERS

16.1 In the law relating to the powers of police to investigate offences and apprehend offenders, the societal interest in law enforcement is traded off against a set of other societal interests:

- *The need to protect innocent persons from investigative procedures that might eventually produce wrongful convictions.* For example, high-pressure interrogations may be efficient in extracting confessional statements but the results may not always be reliable.
- *The need to protect privacy.* Procedures that might lead to the identification of offenders may be eschewed because they are too intrusive. An example is searches of dwellings by police officers on mere suspicion that offences are being committed or that evidence can be found. The law has imposed various safeguards respecting search warrants in order to limit the investigative powers of police in the interest of protecting privacy. In the protection of this interest, there is a cost to law enforcement.
- *The need to ensure equality before the law, in the sense that all persons who have committed offences are exposed to a roughly similar risk of investigation and apprehension.* This requires various measures not only to safeguard against overt discrimination but also to protect persons who may be disadvantaged in their dealings with police by factors such as intellectual disability or mental disorder. The spectre of the law being enforced more vigorously against some sectors of the community than others can be avoided only at some cost for law enforcement.
- *The need for the rule of law to be respected in the operations of the criminal justice system, so that the system can command the loyalty of the community.* This means that agents of the system, such as police, prosecutors and judges, must themselves obey the law governing their work. They must operate within the framework of whatever rules have been laid down, even if this means forgoing convictions in particular cases.

The balance of competing interests is not always struck in a way that favours the innocent person. Any system of law enforcement carries a risk of wrongful convictions and some degree of this risk must be accepted if any guilty person is ever to be detected and convicted.

The scope of police powers

16.2 At common law, a police officer had few special powers relating to the investigation of crime. For example, there was no power to stop a suspect, to demand identification, or to require submission to a search. Law enforcement largely depended on the police using general liberties to look, listen and ask questions that are available to everyone and also on exploiting opportunities to obtain consent for more intrusive action: see **16.6**-**6.7**, **16.9**-**16.11**. However, the general principle of tight restrictions on police powers has been substantially eroded by statute in most jurisdictions. A range of powers to act, and often to do so without warrant, has now been conferred upon the police.

16.3 In recent years, Solomon Islands, Kiribati and Tuvalu have all enacted specific statutes on police powers to investigate crime. In this chapter, these statutes will be collectively described as the 'Police Acts': see Solomon Islands Police Act (PA) 2013; Kiribati Police Powers and Duties Act (PPDA) 2008; Tuvalu Police Powers and Duties Act (PPDA) 2009. Some matters are still dealt with by older provisions of the Criminal Procedure Codes (CPC). In addition, there are provisions of the Criminal Procedure Codes dealing with matters now also covered by the Police Acts. They have not been repealed but can be treated as being largely superseded by the Police Acts. This Chapter will analyse only some of the most important powers, focusing on those respecting searches of persons and vehicles, search warrants, arrests, and caution interviews in custody. The Solomon Islands Police Act also authorises some intimate intrusions upon the persons of suspects that are called 'forensic procedures'.

16.4 The distinction between 'felonies' and 'misdemeanours' (see **2.4**-**2.6**) can be significant for the law of police powers. Some powers can only be exercised with respect to felonies: see, for example, PPDA Ki ss 108-109; Tu ss 122-123 on the power to detain and question a person arrested for a felony for a period of time before taking them before a court. A felony is an offence declared as such or carrying a penalty of 3 years' imprisonment or more; other offences are misdemeanours. On the classification of offences, see **2.5**.

16.5 The exercise of special police powers is subject to rights conferred on suspects by the Bills of Rights in the Constitutions: see Constitution of Solomon Islands ss 5, 9-10; Constitution of Kiribati ss 5, 9-10; Constitution of Tuvalu ss 17, 21-22. These constitutional rights cannot be abrogated by ordinary legislation or by the development of the common law. They include:

- the right on arrest or detention to be informed of the reasons: SI/Ki s 5(2); Tu s 17(3);
- the right of a person under arrest or detention to be brought without undue delay

before a court: SI/Ki s 5(3); Tu s 17(4)(c);

- the right not to be subject without consent to search of the person or property, except in Solomon Islands and Kiribati under the authority of laws that are reasonably justifiable in a democratic society (SI/Ki s 9) and in Tuvalu under the authority of laws made for certain specified purposes including 'the purpose of protecting the rights or freedoms of others': Tu s 21;
- the right to be presumed innocent: SI/Ki s 10(2)(a); Tu 22(3)(a);
- rights on being charged with an offence to be informed of the nature of the charge and to have adequate time and facilities for the preparation of a defence: SI/Ki 10(2)(b)-(c); Tu s 22(3)(b)-(c).

Investigating crime: general liberties and special powers

16.6 The police need to have special powers conferred by law only when they go beyond what is permitted under the general liberties of the ordinary person. Much police work in investigating offences does not depend upon any special powers because it falls within the exercise of these general liberties. Without resort to special powers, the police can look, listen and ask questions in the same way that anyone else can look, listen and ask questions.

16.7 The exercise of general liberties by the police is, however, subject to the liberties of the person under investigation. For example, a police officer can look through a window, but the occupant is free to draw the curtains or blinds. Similarly, a police officer can ask a question of a pedestrian, but the pedestrian is free to ignore the question and walk on. These general liberties of the ordinary person are protected by the criminal law and by the law of torts. If the officer physically restrains the pedestrian from walking on, an assault, criminal or tortious, may be committed. The role of the law of special investigative powers is to override the barrier of protection and to authorise the police (and other persons acting for the purposes of law enforcement) to take action that would not be permitted under general liberties. Invasions of property may be authorised as may be the use of physical force against a person.

16.8 A key element in the law of investigative powers is the distinction between powers that can be exercised without a warrant and powers that can only be exercised with a warrant. In both cases, the law can prescribe grounds on which the power may be exercised. The distinction between them turns on who makes the primary decision about whether the grounds for the exercise of the power exist. Where a warrant is not required, the decision is made by the person who exercises the power (although it may be subject to subsequent review by superiors or by the courts). For powers that require a warrant,

however, an independent determination of whether grounds exist for the issue of a warrant is made before the power is exercised. The warrant itself is an authorisation to exercise the power. A warrant is issued by a judicial officer such as a magistrate, following a complaint that establishes the justification for the warrant to be issued. The role of the process is to ensure that an independent agency, acting in a quasi-judicial manner, has determined that the relevant invasion of privacy is justifiable.

The relevance of consent

16.9 If police obtain consent for their actions, there is no need to rely on special powers. Consent can legitimise what would otherwise be an assault upon a person or a misappropriation of property. Nevertheless, in the context of police action, care needs to be taken to distinguish consent from compliance. Words may be formally phrased as a request, but their utterance by a police officer may lead to them being interpreted as a demand for compliance with authority.

16.10 In the decision of the Supreme Court of Canada in *Dedman v The Queen* [1985] 2 SCR 2; (1985) 20 CCC (3d) 97, it was suggested that compliance with a police demand or direction cannot constitute consent unless it is made clear that the person is free to refuse to comply. Le Dain J said (at CCC (3d) 116–17):

> A person should not be prevented from invoking a lack of statutory or common law authority for a police demand or direction by reason of compliance with it in the absence of a clear indication from the police officer that the person is free to refuse to comply. Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense.

The same principle has been recognised in several contexts in Australia. Roberts-Smith J of the Western Australia Court of Criminal Appeal said in *Norton v R (No 2)* (2001) 24 WAR 488; [2001] WASCA 207 at [101]: 'To avoid a conclusion that a person is under arrest or in custody the police officers must make it clear that they are free to go.'

16.11 A general principle that notification is required may therefore operate as part of common law doctrine on the meaning of consent. Moreover, even if appropriate advice has been provided, it may be unsafe to infer consent in the absence of a reply indicating that consent has been given. In Western Australia, a lack of reply signifies lack of consent

to a search: Criminal Investigation Act 2006 (WA) s 23.

Exclusion of wrongfully obtained evidence

16.12 A complex body of rules governs the admissibility of evidence in a criminal trial. For the most part, these rules deal with issues relating to the worth of evidence, such as its relevance and its weight. These matters generally do not fall within the scope of this book. There is, however, one part of the law of criminal evidence which does fall within its scope. In some instances, evidence may be excluded from a trial because it was wrongfully obtained: either unlawfully or improperly, in breach of good standards of investigative practice. In this respect, the law of evidence and the law of criminal procedure overlap.

16.13 A traditional weakness of the law governing police powers has been a lack of effective enforcement mechanisms. A police officer who breaks the law in investigating an offence or apprehending an offender could conceivably be prosecuted or disciplined for the breach. The prosecutorial and disciplinary processes, however, are subject in large measure to the control of the police themselves. A more effective way of ensuring that the rule of law applies to police work is to remove the incentive for wrongful conduct by excluding evidence obtained in this way.

16.14 Three bases for the exclusion of wrongfully obtained evidence have been recognised at common law:

- Mandatory exclusion of 'involuntary' confessions: the 'voluntariness' rule.
- Discretionary exclusion of confessional evidence that it would be unfair to the accused to admit: the 'fairness' discretion.
- Discretionary exclusion of any evidence that was unlawfully or improperly obtained and that it would be contrary to public policy to use: the 'public policy' discretion.

These three bases for excluding wrongfully obtained evidence have been detailed in the Solomon Islands Evidence Act 2009 ss 168-170. The Act adopts the provisions of the Australian Uniform Evidence Act, which has been introduced in several Australian jurisdictions. In Kiribati and Tuvalu, the voluntariness rule is enshrined in legislation: PPDA Ki s 113/Tu s 127(1); the fairness and public policy discretions can operate as matters of common law in these jurisdictions.

16.15 Questions of admissibility will usually be resolved by the judge before the trial. The question of admissibility can, however, be raised at any stage, even after the evidence has been heard.

16.16 Where the voluntariness of a confession is in issue, its voluntariness must be proved beyond reasonable doubt by the prosecution: see, for example, Evidence Act SI s 168(2). However, the burdens of proof and justification respecting discretionary exclusion are more complex matters. Factual allegations of wrongdoing must generally be proved by the party making them. The position is more complicated when it has been established that evidence was wrongfully obtained and the issue is whether it should therefore be excluded.

- In Kiribati and Tuvalu, it might be argued that the burden should lie on the accused to make a convincing argument in favour of exclusion.
- In Solomon Islands, however, the Evidence Act s 170(1) provides that wrongfully obtained evidence is inadmissible unless the desirability of admitting the evidence outweighs the undesirability of admitting it.

16.17 The 'public policy' discretion applies to any form of evidence: for example, both real evidence obtained through unlawful searches and confessional evidence obtained through improper practices in questioning suspects. This broad discretion will be analysed here, before the scope of police investigative powers is examined. The special grounds for excluding confessional evidence will be discussed later, when questioning suspects is examined.

Public policy

16.18 In modern times, the courts have recognised a common law discretion to exclude evidence of any type that was obtained unlawfully or otherwise improperly on grounds of public policy: see, for example, *Bunning v Cross* (1978) 141 CLR 54, [1978] HCA 22; *Ridgeway v R* (1995) 184 CLR 19, [1995] HCA 66. The 'public policy discretion' has been incorporated in legislation in the Solomon Islands Evidence Act s 170(1). In Kiribati and Tuvalu, the discretion can operate as a matter of common law.

16.19 The public policy discretion covers not only evidence that was obtained directly by unlawful or improper means but also additional evidence obtained in consequence of an earlier illegality or impropriety: sometimes called 'the fruit of the poisoned tree'. See Solomon Islands Evidence Act s 170(1)(b). For example, questioning of a suspect may be conducted in a proper manner. However, a resulting confession could still be excluded if

the suspect was unlawfully detained at the time.

16.20 The rationale for the 'public policy' discretion is the protection of the public interest in appropriate police behaviour rather that the protection of the innocent accused. When evidence is excluded on public policy grounds, the accused is merely an incidental beneficiary of the way in which the public interest is pursued. For example, there may be no question about the reliability of evidence of items seized in an unlawful search. Yet, the public interest in maintenance of privacy interests may sometimes justify exclusion of that evidence. However, where confessional evidence is in issue, there are additional grounds for exclusion which focus on issues of reliability: see **16.95**–**16.102**.

16.21 The exercise of the public policy discretion involves balancing the desirability of convicting an offender against the undesirability of condoning unlawful or improper action in law enforcement. As it was expressed in the leading case of *Bunning v Cross* (1978) 141 CLR 54, [1978] HCA 22 at [27]:

> …the weighting against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.

Later decisions have extended the discretion to conduct which is improper although not unlawful: *Ridgeway v R* (1995) 184 CLR 19, [1995] HCA 66 at [22]-[25].

16.22 The Evidence Act SI s 170(1) expresses the test for exclusion in this way:

> Evidence that was obtained –
> (a) improperly or in contravention of any law; or
> (b) in consequence of an impropriety or of a contravention of any law;
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

This is a similar test as that at common law. Assessing the desirability and undesirability of admitting evidence requires that the public interest in prosecuting the offence be weighed against the public interest in condemning the misconduct.

16.23 There are some differences between the discretion at common law and under the

Evidence Act: see *Kadir v R, Grech v R* [2020] HCA 1 at [11]-[14].

- The Act places the onus on the prosecution to justify the admission of the evidence, whereas at common law the defendant carries the onus to justify exclusion: see **16.16**.
- The discretion under the Act extends to evidence gathered through unlawful or improper conduct by any person, whereas the common law discretion is confined to the conduct of law enforcement officials:

16.24 In exercising the public policy discretion, a court will need to balance the seriousness of the official misconduct against the seriousness of the offence in issue: *Bunning v Cross* (1978) 141 CLR 54, [1978] HCA 22 at [42]. Thus, the High Court of Australia in *Ridgeway v R* (1995) 184 CLR 19 at 38, [1995] HCA 66 at [26] viewed decisions on whether to admit or exclude evidence as turning primarily on 'the degree of criminality' in issue versus the gravity (more precisely 'the nature, seriousness and effect') of the police misconduct. The worse the criminality, the more likely the evidence will be admitted; while the worse the police misconduct, the more likely the evidence will be excluded.

- The concept of 'degree of criminality' was not analysed closely in *Ridgeway*. There appear to be at least two dimensions. One is obviously the legal seriousness of the offence in issue, as reflected in the penal liability which has been prescribed; another is the personal culpability of the individual under investigation.
- Moreover, in assessing the seriousness of the procedural violation, consideration needs to be given not only to the impact on the accused but also to the culpability of the officer. Was the violation deliberate, reckless or negligent, or the result of an innocent mistake? A significant development in *Ridgeway* was the suggestion at [26], [28] that the police misconduct under scrutiny should include not only the conduct of the officer involved in the investigation, but also that of other officials. 'Entrenched' misconduct was viewed as particularly bad. Moreover, it was said that any illegality or impropriety would become more serious if it was encouraged or tolerated by a superior official.

16.25 A longer list of factors that may be taken into account was offered by the High Court of Australia in *Bunning v Cross* (1978) 141 CLR 54, [1978] HCA 22:

- the nature of the official misconduct, in particular whether it was due to a mistaken belief about or to deliberate disregard of the law: at [36];
- the cogency of the evidence obtained: at [37];
- the ease with which the evidence might have been obtained in compliance with the law: at [40];
- the seriousness of the offence charged: at [41];

- indications of legislative intent to impose tight restrictions on the exercise of the power in issue: at [42].

16.26 The Solomon Islands Evidence Act a 170(3) contains its own list of factors that may be taken into account, reflecting in parts the list from *Bunning v Cross*:

> Without limiting the matters that the court may take into account under subsection (1), it is to take into account –
> (a) whether the impropriety or contravention was contrary to or inconsistent with a right of a person; and
> (b) the probative value of the evidence; and
> (c) the importance of the evidence in the proceeding; and
> (d) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
> (e) whether the impropriety or contravention was deliberate or reckless; and
> (f) the gravity of the impropriety or contravention; and
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
>
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of any law.

16.27 A difficulty with these lists is that the relevance of some factors may vary, depending on features of particular cases.

- The cogency or probative value of the evidence was treated in *Bunning v Cross at* [38]-[39] as a factor favouring admission, but only where the illegality arose from a mistake. It was said at [38] that 'cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless'.
- Ease of compliance with the law was treated in *Bunning v Cross* at [40] as a factor favouring exclusion, but only where there was deliberate cutting of corners'. It was said to be a 'wholly equivocal' factor in a case where the police were operating under a mistake. In *Kadir v R, Grech v R* [2020] HCA 1 at [20], it was even suggested that ease of compliance could be a factor favouring admission in a case where 'action is taken in circumstances of urgency in order to preserve evidence from loss or destruction'. Thus, depending on the circumstances, ease of compliance can be a factor favouring exclusion, or a neutral factor, or a factor favouring admission.

16.28 The Solomon Islands Evidence Act also deems confessional evidence to have been obtained improperly if the questioning was conducted in certain ways or in certain

contexts: SI ss 170(2), 171. These provisions are examined, below at **16.xx**, in a broader analysis of the law relating to confessional evidence.

Exercising powers: reasonable suspicion and reasonable belief

16.29 The exercise of most investigative powers requires a justification in *reasonable suspicion* of (or, in alternative but synonymous phrases, *reason to suspect* or *reasonable grounds for suspecting*) the commission of an offence. See, for example, the power of a police officer to detain and search a person without warrant under PA SI s 93; PPDA Ki s 44; Tu s 58, and the power of a magistrate to issue a warrant to search a place under CPC SI/Ki/Tu s 101. Some other investigative powers can only be exercised on the basis of *reasonable belief* (or alternatively *reason to believe* or *reasonable grounds for believing*). See, for example, the power to issue a warrant to use a surveillance device or equipment under PA SI s 107.

16.30 Suspicion and belief are distinct.

- *Suspicion*. In *George v Rockett* (1990) 170 CLR 104; [1990] HCA 26 at [14], the High Court of Australia endorsed the following definition of suspicion by Kitto J in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303:

  > A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a 'slight opinion but without sufficient evidence', as *Chambers Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

  See also the recent endorsements of this statement in *Maeda v DPP* (Cth) [2015] VSCA 367 at [49]-[52]; *R v Bennetts* [2018] QCA 99 at [14-[15].
- *Belief*. The High Court in *George v Rockett* at [14] said of 'belief': 'Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition.' It was also said that something may be reasonably believed to be true even though it cannot be proved to be so. Even so, reasonable belief sets a higher standard than reasonable suspicion.

16.31 'Reasonable suspicion' and 'reasonable belief' incorporate objective standards. It is not sufficient that the officer honestly suspects or believes; the honest suspicion or belief

must also be reasonable. A state of mind may be reasonable even though it is eventually found to have been based on a mistake. In the Australian case of *Ruddock v Taylor* (2005) 222 CLR 612; [2005] HCA 48, it was said, at [40]: '… what constitutes reasonable grounds for suspecting a person … must be judged against what was known or reasonably capable of being known at the relevant time'.

16.32 A police officer may form a suspicion about a person because of immediate circumstances such as his or her location or behaviour. A person may also fall under suspicion because of a past record of criminal conduct or a pattern of association with other persons with criminal records, or because of certain general characteristics such as gender, age or appearance that are associated with high offence rates. A critical issue is how far factors other than immediate circumstances may be taken into account in assessing the reasonableness of a suspicion. In answering this question, account must be taken of the significance of a finding of reasonable suspicion for entitlement to use special powers such as a power to search. If privacy is to be afforded meaningful protection, police cannot be allowed to identify someone as a suspect, liable to the exercise of special powers, regardless of where they are and what they are doing. There must be some circumstantial basis for a suspicion to be reasonable.

16.33 The more difficult cases are those where there is some circumstantial basis for suspecting a person but that person's characteristics, history or associations bolster the officer's suspicion. Suppose, for example, police officers go to a neighbourhood following a report that someone was seen breaking into property; they then want to search a person found in that neighbourhood because of that person's characteristics, history or associations rather than because of any additional circumstantial grounds for suspicion. Whether or not such a search would be reasonable might depend in part on how close the person was to the scene of the reported break-in. It might also depend on whether additional factors could be taken into account. In principle, it should acceptable to take account of additional factors as long as they are supplementary considerations rather than the driving force for the suspicion.

16.34 An officer exercising a power without a warrant must personally have grounds for reasonable suspicion or belief. The officer can rely on appropriate information provided by another person but cannot simply follow the instructions of a superior: *O'Hara v Chief Constable of the RUC* [1997] AC 296; 1 All ER 129 at 294, 301–01. In contrast, a warrant provides authorisation to anyone to whom it is directed, which could be all the police officers of a state.

Search powers

16.35 The Constitutions of Solomon Islands, Kiribati and Tuvalu impose limited restrictions on the search powers of police. SI/Ki s 9(1) provides:

> Except with his own consent, no person shall be subjected to search of his person or his property or the entry by others on his premises.

Tu s 21(1) is in similar terms. However, the force of these provisions is undercut by SI/Ki s 9(2); Tu s 21(2), which make it permissible for a law to authorise searches for a range of specified purposes if the law is 'reasonably justifiable in a democratic society'.

- In Solomon Islands, the approved purposes include the 'prevention and investigation of breaches of the law': SI s 9(2)(a).
- In all three Constitutions, the approved purposes include protecting the rights and freedoms of other persons (SI/Ki s 9(2)(b); Tu s 21(2)(a)) and authorising the entry upon any premises for the purpose of law enforcement: SI/Ki s 9(2)(e); Tu s 21(2)(d)(ii).

Search warrants can be covered by the last provision respecting laws authorising entry upon premises. Laws permitting street searches of suspects without a warrant may be justifiable in the Solomon Islands by s 9(2)(a). In Kiribati and Tuvalu, they may be justifiable under the broad provision respecting protecting the rights and freedoms of other persons.

16.36 The Police Acts authorise for investigative purposes both warrantless searches of persons and vehicles (PA SI ss 93, 102; PPDA Ki ss 44-45; Tu ss 58-59) and searches of places with a warrant: PA SI ss 104-105; Ki s 48; Tu ss 61-62. The relevant standard is reasonable suspicion. There are older provisions on search powers in the Criminal Procedure Codes. These provisions are similar to those of the Police Acts. They can be treated as largely superseded by the provisions of the Police Acts.

Warrantless searches and seizures

16.37 The Police Acts authorise the police to stop, detain and search persons and vehicles without warrant when they suspect on reasonable grounds that they will find certain items, including weapons, drugs, stolen property, and instruments for committing offences: PA SI ss 93(1), 102(1); PPDA Ki ss 44(1)-(2), 24(1)-(2); Tu ss 58(1)-(2), 59(1)-(2). In Solomon Islands, the power extends more broadly to include searching for anything that is evidence of the commission of an offence: SI ss 93(1)(g), 102(1)(g). In all three

jurisdictions, anything found that may provide evidence of the commission of an offence can be seized, whether or not it was an object of the search: PA SI ss 93(2), 102(2); PPDA Ki ss 44(3), 45(5); Tu ss 58(3), 59(5).

16.38 The requirement for reasonable grounds to suspect what will be found applies only where a person is not already in lawful custody. The requirement disappears once a person has been arrested and a search may be conducted for reasons of security. An arrested person may be searched and anything in their possession may be seized that it is suspected on reasonable grounds may provide evidence of an offence: PA SI s 91; PPDA Ki s 97; Tu s 111

16.39 Public places may be searched without a warrant and items seized that are suspected on reasonable grounds to be evidence of an offence. There are express provisions to this effect in PPDA Ki s 46; Tu s 60. 'Public place' is defined as 'a place that is open to the public, but only while the place is ordinarily open to the public: PPDA Ki s 8; Tu s 9. This would include privately-owned facilities such as restaurants and bars. Such a power may also be implied in Solomon Islands, where a police officer may enter and remain on a public place to investigate an offence: PA SI s 61.

16.40 Maintenance of dignity is an important element of privacy. There are general requirements that minimal embarrassment be caused, that reasonable care be taken to protect dignity, that public searches ordinarily be confined to outer clothing and that more thorough searches ordinarily be conducted out of public view: PA SI s 92(1); PPDA Ki s 57(1); Tu s 71(1). A search must ordinarily be conducted by an officer of the same sex as the person searched or a medical practitioner: PA SI s 92(2); PPDA Ki s 57(2); Tu s 71(2).

16.41 Strip searches are specifically authorised in Kiribati and Tuvalu. The officer must, however, explain what will happen and why it is necessary, and also ask for cooperation; the suspect must be given the opportunity to remain partly clothed; reasonable privacy must be afforded; the search must be conducted as quickly as reasonably practicable; there must ordinarily be no physical contact with genital or anal areas although these can be visually examined: PPDA Ki s 59; Tu s 73. In Solomon Islands, similar conditions for strip searches are likely to follow from the general requirements for searches to be conducted in ways that minimize embarrassment and protect dignity,

16.42 A power to search a person necessarily implies the right to use some degree of force for this purpose. The Police Acts state that an office exercising a power may use as much force as is 'reasonable and proportionate' (Solomon Islands) or 'reasonably necessary' (Kiribati and Tuvalu): PA SI s 68; PPDA Ki s 39; Tu s 52. Causing death or serious injury is

prohibited unless it is necessary to prevent death or serious injury to some person or, in Kiribati and Tuvalu, to prevent an offence punishable by life imprisonment or escape after arrest for such an offence: PA SI s 68(2); PPDA Ki s 39(2)-40; Tu s 52(3)-53. The Solomon Islands provision simply states that this degree of force must be necessary. In contrast, the provision in Kiribati and Tuvalu refers to the officer believing on reasonable grounds that it is necessary; if practicable, the officer must first call on the person to stop doing the act: PPDA Ki s 40(5); Tu s 53(5).

Search warrants

16.43 'Search warrants' are quasi-judicial authorisations to look for and take possession of things in ways that would otherwise be unlawful. Although searches of persons, vehicles and public places may often be conducted without warrant, warrants are generally required to enter and search places that are private property. The role of a person issuing a warrant is to make an independent assessment of whether the statutory grounds for the search are present. In the event that an application for a warrant is initially refused, it is possible for a police officer to apply to another judicial officer. However, careful scrutiny of a second or subsequent application would be justified.

16.44 Powers that may be exercised under the authority of a warrant include searching the place and anything or any person in it; opening anything that is locked; removing walls, ceilings or floors; and digging up land: PA SI s 105(2); PPDA Ki s 47(1); Tu s 61(1). Although the common term is *search* warrant, the warrant also covers seizure of items found in the course of executing the warrant. Anything may be seized that it is suspected on reasonable grounds may be the evidence sought: PA SI s 105(2)(j); PPDA Ki s 47(1)(m); Tu s 61(1)(m). The Solomon Islands legislation goes further and authorises seizure of anything suspected on reasonable grounds of being evidence connected with 'any offence', which would include an offence not named in the warrant: PA SI s 105(2)(k). In Kiribati and Tuvalu, application could be made for a separate warrant in respect of such evidence; alternatively, it could be seized under common law powers.

16.45 Obtaining a warrant can be a complicated process demanding a personal appearance of the police officer in a quasi-judicial hearing before a magistrate. This protects privacy interests but the process of obtaining a warrant can impede law enforcement, resulting in the destruction of evidence or the escape of a suspect.

16.46 Some jurisdictions have introduced expedited procedures to obtain 'telewarrants' or dispensed altogether with the need for a warrant in particular circumstances. Pacific jurisdictions have taken some steps in this direction, for example by authorising entry into

premises without warrant to prevent violence or to make an arrest: see PA SI ss 57, 64-65; PPDA Ki ss 34-35; Tu ss 35-36. However, there are only a few circumstances where entry to search for evidence can be made without a warrant.

- In Solomon Islands, when a person has been arrested for a serious offence, a police officer may enter premises where the arrest was made and search for evidence of the offence if the officer has reasonable grounds to believe evidence is there: PA SI s 65(2).
- In Kiribati and Tuvalu, an officer who suspects on reasonable grounds that evidence of a felony may be concealed or destroyed unless an immediate search is made, may enter and search a place without warrant: PPDA Ki s 52; Tu s 66. The officer must apply for a warrant as soon as reasonably practicable afterwards. This is called a 'loss of evidence warrant'. If the warrant is refused, anything seized must be returned or disposed of.

In addition, Kiribati and Tuvalu distinguish between entry onto property and entry into premises located in that property. An officer may enter private property without a warrant to investigate a matter by asking questions and making observations but may not enter private premises without consent or a warrant: PPDA Ki s 32; Tu s 33.

16.47 There are two main steps in the process of obtaining a search warrant: first, a police officer making an application for a warrant and, second, a magistrate issuing the warrant. Statutory and common law requirements attach to both stages. The main authority on the common law is the judgment of the High Court of Australia in *George v Rockett* (1990) 170 CLR 104; 93 ALR 383; [1990] HCA 26. The distinction between the two stages is made clear in the legislation of Kiribati and Tuvalu, where the requirements for each stage are specified separately. Somewhat confusingly, the Solomon Islands Police Act directly addresses only the application step. Authority to issue a warrant is addressed separately by the Criminal Procedure Code s 101

16.48 The standard governing the issue of a warrant to search for evidence is reasonable grounds to suspect that evidence of an offence is or will be in the place to be searched. This is indicated clearly in PPDA Ki s 48(1), (5); Tu s 62(1), (5):

> (1) The magistrate may issue the search warrant only if satisfied that there are reasonable grounds for suspecting that evidence of the commission of an offence:
> (a) is at the place; or
> (b) is likely to be taken to the place within the next 72 hours.

The Solomon Islands Police Act adopts a similar standard in the conditions for making an application for a warrant in s 104(1):

> A police officer may apply to a magistrate for a warrant to enter and search a place in order to obtain evidence of the commission of an offence or to recover stolen property if the police officer has reasonable grounds to suspect that the evidence or property sought is on or in the place to be searched.

See also the Solomon Islands Criminal Procedure Code s 101 on authority to issue a warrant. The Code provides that a Magistrate or Justice may issue a warrant where it is proved 'that in fact or according to reasonable suspicion anything upon, or in respect of which an offence has been committed or anything which it is necessary to the conduct of an investigation into any offence' is in the place to be searched.

16.49 An application must state the grounds on which the warrant is sought. It must identify the place to be searched, the item(s) to be sought and the reason for the search (for example, the offence in respect of which evidence is sought). For example, the Solomon Islands Police Act s 104(2) states that an application for a search warrant must state:

> (a) the name, rank and station of the officer seeking the warrant;
> (b) a description of the place to be searched;
> (c) if the place is occupied, the name of the occupier if it is known;
> (d) the offence to which the application relates;
> (e) a description of the thing sought that is suspected of being evidence of the commission of the offence;
> (f) the information or evidence that is being relied upon to support a suspicion that evidence of the commission of an offence is at the place or is likely to be at the place at the time the warrant is executed; and
> (g) if the warrant is to be executed at night, the reason why it is necessary to execute the warrant at night.

PPDA Ki s 48(3); Tu s 68(3) are in similar terms. Without this information, the resulting warrant cannot effectively perform its function of controlling the search and ensuring that the invasion of privacy is justifiable.

16.50 The application must be on oath. This is a common law requirement: *George v Rockett* at [9]. It is also a statutory requirement under CPC SI s 101; PPDA Ki s 48(3); Tu s 68(3). In addition, the application will usually be in writing. In *George v Rockett* at [11], the High Court of Australia indicated that a written application is desirable. However, the

officer making the application is usually expected to be present in person and available for questioning by the justice.

16.51 The issuer of a warrant must then be personally satisfied that the grounds to issue the warrant are present in the application: *George v Rockett* at [6]–[8]. The issuer can question the applicant in order to confirm any points but if an application fails to address some essential matter, the responses to questions cannot cure the defect: *George v Rockett* at [10]–[12]. Finally, the warrant must on its face indicate that the magistrate is satisfied that the grounds for issuing it are established by the application. This is a requirement of common law: *George v Rockett* at [6].

16.52 The contents of a warrant are specified in PPDA Ki s 49; Tu 63, in terms that echo the provisions on the contents of an application:

> (a) a description of the place that may be entered; and
> (b) brief particulars of the offence to which the warrant relates; and
> (c) what evidence may be seized under the warrant; and
> (d) the hours of the day or night when the place may be entered; and
> (e) the date and time when the warrant ends; and
> (f) that a police officer may exercise the warrant powers defined in [Ki 47; Tu 61] in accordance with the warrant.

The Solomon Islands Criminal Procedure Code s 101 does not address what must be included in a warrant. Similar requirements to those of Kiribati and Tuvalu can be derived from the common law and by implication from the requirements of the Police Act for the application. The warrant must be consistent with the application, although there will be no need to disclose in the warrant the information or evidence relied on to support the application.

16.53 In *George v Rockett* (1990) 170 CLR 104; [1990] HCA 26 at [5], the High Court of Australia insisted on 'strict compliance' with any statutory conditions for the issuance of a search warrant. Nevertheless, in State of New South Wales v Corbett (2007) 238 CLR 120; [2007] HCA 32 at [104]–[107], the High Court took the view that, in interpreting the significance of statutory conditions, the guiding principle is the purpose of ensuring the proper identification of the object of the search. If a warrant imposes appropriate limits on the scope of a search, it will not be automatically invalidated by non-compliance with some statutory condition.

16.54 Warrants can be held invalid on the ground that they are too general. A search warrant cannot be an entitlement to conduct a wide 'fishing expedition'. However, there

will often be some uncertainty about what kind of evidence may be available and where it can be found. An obsession with specificity could impose unreasonable fetters on the investigative process. How specific a warrant must be is therefore a difficult question. Much can depend on the circumstances of the particular search which is to be made. In *R v Tillett* [1969] 14 FLR 101, the court was particularly concerned about the generality of a warrant to search a bank, presumably because of the risk to the financial privacy of persons unconnected with the warrant. Countervailing concerns that investigative processes should not be unduly inhibited are demonstrated by *Beneficial Finance Corp Ltd v Commissioner of Australian Federal Police* (1991) 31 FCR 523; 103 ALR 167. In that case, the court rejected the idea of an 'exact object' test. Neither the item to be sought nor the offence for which it may provide evidence needs to be described exactly. Moreover, in *State of New South Wales v Corbett* (2007) 238 CLR 120; [2007] HCA 32, it was held that a defect in the description of the offence would not have invalidated the warrant. In terms of general principle, perhaps little more can be said than that the warrant must be sufficiently specific to provide adequate controls on the search in light of all the circumstances.

16.55 The validity of warrants can be challenged in proceedings for judicial review of administrative action or in a civil action for trespass. Remedies may include return of any items which have been seized. Moreover, when evidence has been obtained by means of an invalid warrant or in breach of the terms of a valid warrant, it is potentially liable to be excluded at trial in the exercise of the 'public policy' discretion: see above at **16.25**–**16.35**.

Arrests

16.56 The law of arrest in Solomon Islands, Kiribati and Tuvalu is a complex mixture of provisions of the Constitutions, the Police Acts and the Criminal Procedure Codes. The Criminal Procedure Codes can be treated as superseded where the Police Acts deal with the same matters. However, there are some matters for which continuing resort to the Codes is necessary.

16.57 An arrest is a restraint on a person's freedom of movement, often with force or threat of force being used to impose the restraint. There are two forms of arrest. Although many arrests will involve actual physical restraint through the application of some force, an arrest can also be made by words accompanied by submission of the suspect to the authority of the person making the arrest. The Criminal Procedure Codes s 10(1) provide:

> In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a

submission to the custody by word or action.

Essentially, for a non-contact arrest, the suspect must accept that physical restraint will occur if there is any resistance. The words spoken by the person making the arrest must indicate that an arrest is being made and there must be some indication of submission by the suspect either by word or conduct. Whether or not an arrest has been made can be an issue in relation to liability for the offence of attempting to escape: Penal Codes SI s 125; Ki/Tu s 117.

16.58 At common law, 'arrest' has been traditionally conceived as detention for the purpose of bringing an accused before a court to face a charge: see *Williams v R* (1986) 161 CLR 278; [1986] HCA 88, Wilson and Dawson JJ at [8]-[9]; *NSW v Robinson* [2019] HCA 46 at [30], [63], [92]. Under the law of Solomon Islands, Kiribati and Tuvalu, there are four ways of compelling an appearance before a court:

- by a summons issued by the court: CPC SI/Ki/Tu s 77;
- by a warrant of arrest issued by the court: CPC SI/Ki/Tu s 77;
- by an arrest without warrant either by a police officer (PA SI s 90; PPDA Ki s 74; Tu s 88) or by a private person: CPC SI/Ki/Tu s 21;
- in Kiribati and Tuvalu only, by a notice to appear issued by a police officer: PPDA Ki s 88; Tu s 102.

Other terms, such as 'detention', have often been used to describe the use of physical restraint for other purposes relating to law enforcement, such as preventing offences or conducting bodily searches. Usage does, however, vary. The Police Acts authorise what is called an 'arrest' for a variety of purposes: PA SI s 88(2); PPDA Ki s 74(2); Tu s 88(2). See below, **16.75**.

16.59 The general principle respecting the use of force is that as much force may be used as is reasonably necessary in the circumstances. Express restrictions are imposed on the use of force that is likely to cause death or grievous bodily harm.

- In Solomon Islands, PA SI s 68 provides:

> (1) A police officer who is exercising or attempting to exercise power against an individual under this or any other Act or law may use reasonable and proportionate force to exercise the power.
> (2) The force that a police officer may use under this section shall not include force that is likely to cause death or grievous bodily harm to a person unless it is necessary to prevent death or serious injury to the police officer or another person.

- In Kiribati and Tuvalu, PPDA Ki s 39(1); Tu s 52(1) provides:

> A police officer who is exercising or attempting to exercise a power… may use reasonably necessary force to exercise the power.

However, force that is likely to cause death or grievous harm can only be used against a person who the officer suspects on reasonable grounds has committed, is committing, or is about to commit, or is attempting to escape arrest for, an offence that is punishable by life imprisonment, or is doing something that is likely to cause death or grievous harm to another person and that cannot otherwise be prevented: Ki s 40; Tu s 53.

16.60 A person who is arrested or detained has constitutional and statutory rights to be informed of the reasons as soon as is reasonably practicable: Constitutions SI/Ki s 5(2); Tu s 17(3) and PA SI s 95; PPDA Ki s 92; Tu s 106.

16.61 As an incident of custody, police officers may search an arrested person without warrant and seize anything that it is suspected on reasonable grounds might provide evidence of an offence or that might endanger the safety of any person or be used for an escape: PA SI s 91; PPDA Ki s 97; Tu s 111.

16.62 Police may also take 'identifying particulars' such as photographs, fingerprints, palm-prints and footprints of a person in custody: PA SI s 97; PPDA Ki s 99; Tu s 113. These items are to be destroyed in the event that the person is eventually acquitted or no further proceedings are taken: PA SI s 979(2); PPDA Ki s 103; Tu s 117.

16.63 In Solomon Islands, police may conduct forensic procedures to obtain forensic samples that may provide evidence: PS SI s 98. 'Forensic procedures' are defined in s 2 to include:

> (a) an examination of a part of the body that requires touching of the body or the removal of clothing;
> (b) the taking of a sample of hair;
> (c) the taking of a sample from or under a fingernail or toenail;
> (d) the taking of a sample of saliva;
> (e) the taking of a sample by swab or washing from any external part of the body, including the mouth and the ears;
> (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body;
> (g) taking an impression or cast from a part of the body;
> (h) the taking of a breath sample for breathalyser analysis; and

(i) the taking of a sample of blood, urine or other bodily fluid, excretion or substance.

16.64 Unless there is lawful authority for the use of force and the arrest is conducted in a lawful manner, adverse consequences can follow for the person purporting to make an arrest:

- There is potential for tortious liability for false imprisonment and for both tortious and criminal liability for assault.
- Evidence that is obtained in consequence, such as evidence of a confession by the detained person, is liable to be excluded from a trial: see above at **16.17–16.18**.

In addition, the lawfulness of an arrest determines whether a person who resists or attempts to escape commits an offence: see Penal Codes SI ss 125, 247(b); Ki/Tu ss 117, 240(b).

16.65 Powers of arrest are subject to the constitutional guarantee that no person shall be deprived of personal liberty except as authorised by law in cases that meet certain conditions: Constitutions SI/Ki s 5(1); Tu s 17(2). The conditions range across a variety of matters including health, unlawful immigration and deportation, and care of persons needing protection from themselves as well as the commission of offences. The conditions that relate to the commission of offences are:

> *For Solomon Islands and Kiribati:*
> (e) for the purpose of bringing him before a court in execution of the order of a court; (f) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force…
>
> *For Tuvalu:*
> (d) in order to bring the person before a court to be dealt with in accordance with law; (e) in the case of detention of a person on reasonable suspicion of his having committed, or being about to commit, an offence.

Where detention occurs in one of these cases, the Constitutions require that a person who is not released be brought before a court 'without undue delay': SI/Ki s 5(3); Tu s 17(4). The court will then review the need for continuing detention. In Tuvalu this protection extends to persons temporarily detained for apprehended violence, disorder or breach of the peace, or for their own protection or the protection of others.

Arrest without warrant

16.66 Police have broad statutory powers of arrest without warrant in connection with the commission of an offence.

- In Solomon Islands, an officer may arrest: anyone who is about to commit or is the act of committing an offence; anyone whom the officer has reasonable grounds to suspect is about to commit, to be committing or to have committed an offence; anyone who has escaped lawful custody: PA SI s 88(1).
- In Kiribati and Tuvalu, an officer may arrest anyone who the office suspects on reasonable grounds has committed or is committing an offence: PPDA Ki s 74(1); Tu s 88(1).

16.67 There is a distinction between the standard for making an arrest and the standard for formally charging an arrested person with an offence. The former requires reasonable grounds for suspicion of an offence; the latter requires a 'prima facie case' or 'reasonable and probable cause' for prosecution in the sense of sufficient evidence to obtain a conviction. As it was put in *NSW v Robinson* [2019] HCA 46 at [115]:

> Reasonable suspicion requires an arresting officer to have reasonable suspicion of guilt. This is less than reasonable and probable cause for prosecution.

See also *Williams v R* [1986] HCA 88; (1986) 161 CLR 278 at 300. Thus, questioning or other investigations after an arrest may show that there is insufficient evidence on which to bring a charge.

16.68 Police may not make an arrest merely because an offence has been committed or is reasonably suspected to have been committed, even though these are required conditions for a lawful arrest. Additionally, the arrest must be made for one or more of a range of reasons.

- In Solomon Islands, under PA s 88(2), the officer must *believe* on reasonable grounds that the arrest is necessary for one of these reasons:
  (a) to enable the name, address and identity of the person to be ascertained;
  (b) to prevent the person from suffering injury or causing injury to themselves or any other person;
  (c) to prevent the person causing loss, damage or destruction to property;
  (d) to prevent the person from committing another offence;
  (e) to protect a child or other vulnerable person;
  (f) to allow the prompt and effective investigation of the offence or of the conduct of the person; or

(g) to prevent any prosecution for the offence being hindered by the disappearance of the person in question.

- In Kiribati and Tuvalu, under PPDA Ki s 74(1); Tu 88(1), the officer must *suspect* on reasonable grounds that the arrest is reasonably necessary for one of these reasons:
  (a) to prevent the continuation or repetition of an offence, or the commission of another offence;
  (b) to make inquiries to establish the person's identity;
  (c) to ensure the person's appearance before a court;
  (d) to obtain or preserve evidence relating to the offence;
  (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;
  (f) to prevent the fabrication of evidence;
  (g) to preserve the safety or welfare of any person, including the person arrested;
  (h) to prevent a person fleeing from a police officer or the location of an offence;
  (i) because the offence is an offence against [Ki s 140 or 141; Tu s 169 or 170;
  (j) because of the nature and seriousness of the offence.

In addition, Ki s 74(2); Tu s 88(2) allow an arrest to be made in order to:
(a) question the person about the offence; or
(b) investigate the offence.

16.69 Ensuring that a suspect is prosecuted before a court is only one of the reasons why an arrest can be made under the Police Acts: see PA SI s 88(2)(g); PPDA Ki s 74(1)(c); Tu s 88(1)(c). Yet, a court appearance 'without undue delay' for any detained person is mandated by the Constitutions SI/Ki s 5(3); Tu s 17(4). The relationship between arrest and court appearance is examined further at **16.74**-**16.81**.

16.70 In forming a belief or suspicion, police officers often rely on what they have been told by their superiors or colleagues. In *O'Hara v Chief Constable of the RUC* [1997] AC 286; [1997] 1 All ER 129, the House of Lords refused to accept that an order to make an arrest would be sufficient by itself to provide reasonable grounds for suspicion. However, it was accepted that such grounds could be established by information conveyed by the superior in a briefing. The principles outlined in *O'Hara* should be applicable in Solomon Islands, Kiribati and Tuvalu.

16.71 Private persons have powers of arrest without warrant: CPC SI/Ki/Tu s 21. However, these are restrictive. A private person can arrest someone committing a 'cognisable

offence' *in his or her view* or someone reasonably suspected of having committed a felony *provided a felony has been committed*: s 21(1). In addition, a person committing an offence involving injury to property can be arrested by the owner, an employee of the owner or a person authorised by the owner: s 21(2). A private person can activate these arrest powers only where an offence has actually been committed or is being committed. It is not enough that there is a suspicion or belief that an offence has been or is being committed. A private person risks acting unlawfully if there is a misapprehension about whether an offence has actually been or is being committed.

Arrest warrants

16.72 The existence of an arrest warrant issued by a magistrate removes the need for the person making an arrest to hold any personal suspicion or belief about the person to be arrested. A police officer 'acting under a warrant' can arrest any person named in it: PA SI s 90; PPDA Ki s 78; Tu s 92. A warrant will be directed to all police officers of the state, so that any officer can execute it: see CPC SI s 91(1); PPDA Ki s 80(1)(b); Tu s 94(1)(b).

16.73 Arrest warrants operate in much the same way as do search warrants: see above, **16.50-16.62**. The justification for the warrant is provided through a complaint made on oath (or by the non-appearance of an accused person following a summons or notice to appear): CPC SI ss 87-88; PPDA Ki s 79; Tu s 93. A warrant must state the offence with which the person is charged, the name of the person against whom it is issued, and the person to whom it is directed: CPC SI s 89(2); PPDA Ki s 80; Tu s 94.

Investigative arrest and court appearance

16.74 A person who is held under arrest must be brought before a court as soon as reasonably practicable, unless the person is released because the reason for the arrest no longer applies or because bail is granted.

- This is a common law principle: see *Williams v R* (1986) 161 CLR 278 at 283, 300; [1986] HCA 88, Mason and Brennan JJ at [10], Wilson and Dawson JJ at [2]; *NSW v Robinson* [2019] HCA 46 at [30], [63], [89], [92].
- It is also a constitutional requirement in Solomon Islands, Kiribati and Tuvalu that, where are arrest is made to bring a suspect before a court or because of reasonable suspicion about the commission of an offence, a person who is not released must be brought before a court 'without undue delay': SI/Ki s 5(3); Tu s 17(4); see **16.65**.

16.75 In *Williams v R* (1986) 161 CLR 278 at 283, 300; [1986] HCA 88, Mason and Brennan

JJ at [25] and Wilson and Dawson JJ at [23] interpreted similar phrases such as 'without delay', 'without undue delay' and as soon as is 'reasonably practicable' or 'reasonably possible' as all having the same meaning, namely that the accused must be taken before a court as soon as is reasonably practicable. This could require a prompt appearance if the arrest occurs during the day when a court is open. On the other hand, there could be a substantial delay if the accused is arrested at night or over a weekend. Moreover, police workload can affect the determination of what is reasonably practicable in a particular situation, as can distance to a court.

16.76 At common law, police who are obliged to take a person before a court as soon as is reasonably practicable can question the person while awaiting the court appearance. Incidental questioning is permitted at common law as long as this is not for the purpose of delay in bringing the accused before a court and it results in no additional delay: see *Williams v R* (1986) 161 CLR 278 at 306; [1986] HCA 88, Mason and Brennan JJ at [26], Wilson and Dawson JJ at [9].

16.77 Nevertheless, a corollary of the requirement to take an arrested person before a court is that questioning or other investigative procedures must be conducted without undue delay to the court appearance. Indeed, the common law prohibited any arrest merely for the purpose of questioning and investigation: *Williams v R* (1986) 161 CLR 278 at 283, 300; [1986] HCA 88, Mason and Brennan JJ at [20] and Wilson and Dawson JJ at [8]; *NSW v Robinson* [2019] HCA 46 at [63]. This position has been reversed in the Police Acts:

- PA SI s 88(2) allows an arrest to be made: '…(f) to allow the prompt and effective investigation of the offence or of the conduct of the person'.
- PPDA Ki s 74(2); Tu s 88(2) allow an arrest to be made in order to: '(a) question the person about the offence; or (b) investigate the offence'.

Yet, authority to arrest a person for questioning does not imply authority for the police to detain them for this purpose beyond the time when they could be taken before a court. The requirement for court appearance is constitutionally entrenched and cannot be overridden by the Police Acts.

16.78 There could therefore be constitutional problems with legislative schemes in Kiribati and Tuvalu that allow a person under arrest for a felony to be detained for 'a reasonable time' and questioned: PPDA Ki s 108; Tu s 122. There is a list in Ki s 108(3); Tu s 122(3) of factors to be considered in deciding what is 'a reasonable time':

> (a) whether the suspect's detention is necessary for the investigation of a felony;
> (b) the number of felonies under investigation;
> (c) the seriousness and complexity of a felony under investigation;

(d) whether the suspect has indicated a willingness to make a statement or to answer questions;
(e) the suspect's age, physical capacity and condition, and mental capacity and condition;
(f) for a suspect who was arrested for the felony - any time spent questioning the suspect before the arrest;
(g) the need to delay or suspend questioning of the suspect for time out purposes.

There is also an upper limit for the detention specified in Ki s 108(5); Tu s 122(5):

(a) 24 hours; or
(b) in the case of a suspect who is arrested after the courts close on a Friday afternoon - 72 hours.

However, the detention period can be extended for another four hours by order of a magistrate: Ki s 109; Tu s 123.

16.79 Provision is made for 'time-outs' from questioning. The suspect can be questioned for up to four hours during the initial detention period (Ki s 108(6)(a); Tu s 122(6)(a)) and for less than half of any extension period: Ki s 109(10); Tu s 123(10). In addition, a suspect who is detained for six hours or more must be given reasonably sufficient food and drink: Ki s 108(6)(b); Tu s 122(6)(b).

16.80 Such schemes have been introduced in many jurisdictions in modern times. They reflect a perceived need to balance the right of a person to liberty against the need for police to have adequate time to investigate properly a possible offence. The elaborate safeguards in Kiribati and Tuvalu are characteristic of these schemes. Nevertheless, in Kiribati and Tuvalu, the powers can only be exercised within the constraints imposed by the constitutional requirement for a court appearance 'without undue delay'. In some cases, police may be able to take full advantage of the time periods specified in the Police Acts. In other cases, however, detention and therefore questioning will have to be curtailed to remain constitutionally permissible. In the result, the Kiribati and Tuvalu schemes codify the common law power of incidental questioning rather than extend the power of detention.

16.81 Failing to take an accused before a court as soon as reasonably practicable may render a detention unlawful. However, the High Court of Australia has taken the view that the lawfulness of the detention may fluctuate back and forth with the circumstances: see *Michaels v R* (1995) 184 CLR 117; [1995] HCA 8. Thus, a detention that was originally lawful

may become unlawful because of delay in proceeding to court but may then become lawful again when the decision to proceed to court is made.

Bail

16.82 Bail is a process whereby an arrested accused is released from custody while awaiting trial or during the course of a trial. The Constitutions SI/Ki s 5(2); Tu s 17(5) recognise the practice and that the release may be unconditional or on reasonable conditions. Bail may be granted by a court or, under some circumstances, by a police officer: CPC SI/Ki/Tu ss 23, 106. It takes the form of 'a recognisance with or without sureties'. A recognisance is a promise to appear in court at a named time and place. Financial sureties will rarely be appropriate in Solomon Islands, Kiribati or Tuvalu and are not widely used in wealthier jurisdictions such as Australia or New Zealand.

16.83 A police officer who makes an arrest without warrant, or the officer in charge of the police station, can grant bail under some circumstances.

- When an arrest without warrant is made for an offence other than murder or treason and that is not of a serious nature, the officer in charge of the police station should grant bail if a court appearance within 24 hours does not appear practicable: CPC SI/Ki/Tu s 23. The phraseology is 'shall…release', so that granting bail is required.
- There is also a power for an arresting officer or a court to grant bail: CPC SI/Ki/Tu s 106. This applies to an arrest without warrant for any offence other than murder or treason. However, the power is discretionary.

16.84 In deciding whether to grant bail under CPC s 106, the primary considerations are likely to be the seriousness of the charges and the likelihood of the accused person appearing in court to answer them. However, many considerations may be taken into account. The Criminal Procedure Codes do not provide guidance in this respect. However, there is a helpful, detailed list in the Fiji Bail Act s 19:

> (1) An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be —
>
> (a) the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;
>
> (b) the interests of the accused person will not be served through the granting of bail; or
>
> (c) granting bail to the accused person would endanger the public interest or

make the protection of the community more difficult.

(2) In forming the opinion required by subsection (1) a police officer or court must have regard to all the relevant circumstances and in particular —

(a) as regards the likelihood of surrender to custody —

(i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);

(ii) any previous failure by the person to surrender to custody or to observe bail conditions;

(iii) the circumstances, nature and seriousness of the offence;

(iv) the strength of the prosecution case;

(v) the severity of the likely penalty if the person is found guilty;

(vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);

(b) as regards the interests of the accused person —

(i) the length of time the person is likely to have to remain in custody before the case is heard;

(ii) the conditions of that custody;

(iii) the need for the person to obtain legal advice and to prepare a defence;

(iv) the need for the person to be at liberty for other lawful purposes (such as employment, education, care of dependants);

(v) whether the person is under the age of 18 years (in which case section 3(5) applies);

(vi) whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;

(c) as regards the public interest and the protection of the community —

(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;

(ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person:

(iii) the likelihood of the accused person committing an arrestable offence while on bail.

16.85 Conditions may be attached to a grant of bail, including agreeing to observe specified conduct and reporting requirements. Such conditions will usually be included in a written agreement respecting the court appearance.

Questioning and confessions

16.86 There is no need for any special legal power to ask questions in the course of a criminal investigation. Any person is at liberty to ask a question of another person. This general liberty can be used by police officers who are investigating offences to ask questions of anyone who may be able to provide evidence, including a suspect who may provide a confession or make an incriminating admission. The general liberty to ask questions is, however, matched by a general liberty to refuse to answer. This general liberty is bolstered by a series of specific rights.

16.87 The common law has long recognised a right to remain silent, to be informed of this right, and to have no adverse inferences drawn from the exercise of this right. On the caution about the right to silence, see below **16.103-16.109**. On the prohibition on drawing adverse inference form the exercise of the right, see the Solomon Islands Evidence Act s 173. The right to silence can afford little protection, however, when persons are questioned in custody. The suspect may feel intimidated by the custodial setting and inclined to comply with police requests for information. The police may also be able to break down resistance through sustained questioning over an extended period of time. There is a requirement to take an arrested or detained person before a court as soon as is reasonably practicable; see above at **16.74**-**16.81.** However, incidental questioning is permitted in the meantime and the meantime can sometimes be lengthy.

16.88 In the result, evidence of an incriminating statement by the accused person is often presented at trial but disputed by the defendant. Even if a full confession has not been made, there may be evidence of an incriminating admission: such as an admission of presence at the scene of a crime or participation in some aspect of it. There could also be a statement that is alleged to indicate guilt even though involvement in the crime is denied: such as a statement showing knowledge that only the perpetrator of the crime could have. The term 'confessional evidence' is used in this chapter to cover all these kinds of incriminating statements.

16.89 Such evidence can be decisive, even if the accused claims that the statement was never made or that it was untrue. However, there are a number of problems with confessional evidence with which the courts have been concerned:

- A statement may have been fabricated, particularly an alleged oral confession.
- A statement may be unreliable. Even though the statement may have been made, the circumstances of its making may put the truth of its contents in doubt. For example, it may have been elicited by techniques of interrogation that could make an innocent person falsely confess.

- A statement may have been obtained in a way that violated the procedural rights of the suspect. Some procedural improprieties will affect the reliability of the statement and will be handled through the mechanisms for dealing with the problem of unreliability. In other instances, however, the impropriety will not make the statement unreliable; for example, a confession may be elicited by quite proper techniques of questioning but the suspect may be illegally detained at the time when the questioning occurs.

Particular concern has been expressed about evidence of confessions and admissions made in custody. A custodial setting may facilitate fabrication of a statement. In addition, a person who is held in custody may be disoriented or frightened and, therefore, more likely to make an untrue statement.

16.90 Concerns about the fabrication of confessional evidence led to the decision of the majority of the High Court of Australia in *McKinney v R* (1991) 171 CLR 468; [1991] HCA 6. It was ruled (at CLR 476) that, in a case where the making of a confessional statement by a person in custody has been disputed and has not been reliably corroborated, a jury should be warned to give careful consideration to the dangers of convicting on the basis of that statement. This ruling only applied to alleged confessional statements made by a person in custody, but the underlying principle could justify a warning wherever the alleged statement was made. In a judge-alone trial, the judge can be expected to administer a similar reminder to himself or herself.

16.91 It was suggested in *McKinney* that a signature would not always be reliable corroboration and that an audiovisual recording of the making of the confession would be preferable. The decision in *McKinney* gave impetus to the practice of making audiovisual recordings of interviews with suspects, already becoming common in Australia at that time. In addition to protecting the suspect, recording has two attractions for the police. It can establish that a confession or admission was actually made. It can also forestall any challenge to the reliability of the statement by showing the demeanour of the suspect and the manner in which the interrogation was conducted.

16.92 Recording interviews with suspects has not yet become standard practice in the Pacific but has been introduced in Fiji. It is now standard practice throughout Australia. Moreover, in several Australian jurisdictions, an audio or video recording has been made a statutory requirement for the admissibility of a confession or admission unless the case falls within certain exceptions: see, for example, Police Powers and Responsibilities Act 2000 (Qld) ss 436–439; Crimes Act 1914 (Cth) s 23V.

16.93 As noted above at **16.14–16.29**, there are three main bases on which evidence of an incriminating statement can be excluded at trial:

- on the ground that it was unlawfully or improperly obtained, in which case exclusion is discretionary.
- on the ground that it was involuntary, in which case exclusion is mandatory;
- on the ground that its admission would be unfair to the accused, in which case exclusion is discretionary.

16.94 Problems with how confessional statements were obtained fall into three groups:

1. An incriminating statement by a person in custody may have been unlawfully obtained because the arrest or detention was unlawful: either the conditions for a lawful arrest or detention were not met, or the arrest or detention was carried out in an unlawful manner, for example with excessive force, or a lawful arrest or detention became unlawful when the person was not taken before a court as soon as reasonably practicable.
2. Police may have omitted to give required advice or warnings before questioning a suspect. For example, a caution about the right to silence may have been omitted or inadequately delivered.
3. The manner of questioning a suspect may have been improper or unfair. For example, it may have been oppressive or it may have involved deceit about the information already available to the police.

The public policy discretion will be engaged by a claim for exclusion on the ground that the detention was unlawful. All three grounds of exclusion can be in issue when allegations are made about inadequate advice or warnings or about the manner of questioning.

Voluntariness and fairness

16.95 The principal concern of the voluntariness rule and the fairness discretion is with the reliability of confessional evidence. The voluntariness rule and the fairness discretion are designed to protect innocent persons who may have been lured into making statements that risk a wrongful conviction. In this context, a 'confession' means any admission by a person accused of an offence 'stating or suggesting that the person committed an offence': Evidence Act SI s 167. The admission may not be a full confession. It may even be a denial of the offence but an admission of some element of it: for example, an admission of the conduct elements of an offence with a denial of the fault elements; or an admission of both the conduct elements and the fault elements with an assertion of an exculpatory defence such as self-defence.

16.96 The precise scope for exclusion of involuntary confessions has been subject to debate and the rule has been differently expressed by different courts. As formulated by the High Court of Australia in *Tofilau v R* (2007) 231 CLR 396; [2007] HCA 39, two categories of exclusion are involved:

1. There is a narrow rule excluding incriminating admissions induced by force or by a threat or promise held out by a person in authority. Some of the judges in *Tofilau* called this 'the inducement rule'. In *Tofilau*, the majority of the court agreed that, for the purposes of this rule, a 'person in authority' must be someone perceived to be wielding the coercive power of the state. Hence, the rule does not apply to the actions of police officers working undercover.
2. There is a broader principle or rule (different judges have used different terminology) of 'basal involuntariness'. This requires the exclusion of any incriminating admission which is involuntary in the sense that it was not made in the exercise of the person's free choice of whether to speak or stay silent. See also *R v Lee* (1950) 82 CLR 133 at 149; [1950] HCA 25 at [22]. This broader approach could encompass cases of intimidation and undue pressure as well as threats and promises.

16.97 The classic statement of the narrow version of the voluntariness rule at common law is found in the decision of the House of Lords in *Ibrahim v R* [1914] AC 599 at 609:

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

This approach has been adopted in the Police Acts of Kiribati and Tuvalu: PPDA Ki s 113/Tu s 127(1). These simply provide:

> An officer who is questioning a suspect must not obtain a confession by threat or promise.

16.98 The broader approach to the voluntariness rule has been adopted in the Solomon Islands Evidence Act s 168. Section 168(2) states:

> Evidence of the confession is not admissible unless the court is satisfied beyond reasonable doubt that the admission was voluntary.

'Voluntariness' is not defined. However, s 168 provides examples, including but not limited to 'the nature of any threat, promise or other inducement made to the person questioned'. A court is also invited to take account of the conditions or characteristics of the person questioned including any disability, the role of the questioning in eliciting a response, and the nature of the questions and the manner of questioning.

16.99 On either of these approaches, the reliability of the confession is the principal concern in relation to voluntariness. This is, however, addressed with respect to the risks associated with types of behaviours and situations rather than with respect to the particular case. Thus, a confession may be held involuntary because it was induced by police conduct of a kind that could make a resulting confession unreliable, even though the reliability of the particular confession has been confirmed. It has also been said that the voluntariness rule may reflect additional rationales such as concern about the right against self-incrimination and also the propriety of police conduct.

16.100 On the broader approach, the power to exclude because of involuntariness overlaps with the power to exclude because of unfairness. Different judges have preferred different grounds of exclusion.

16.101 Although the 'fairness' discretion has been mainly used in relation to questions of reliability, it is potentially of broader application. It can be invoked in response to any violation of a suspect's procedural rights in obtaining a confession, even though there is no question about its reliability. See *R v Swaffield* (1998) 192 CLR 159; 151 ALR 98; [1998] HCA 1 at [78]. *Swaffield* concerned a conversation secretly recorded by an undercover police office in breach of the suspect's right to silence.

16.102 There are no clear-cut criteria for whether to admit or exclude evidence on the ground that it would be unfair to use it against the defendant. The Solomon Islands Evidence Act s 169 offers no guidance. Presumably, the criteria will vary according to the reason why it would be unfair to use the evidence.

- When the unfairness lies in the risk of a wrongful conviction, the exercise of discretion should turn only on the magnitude of the risk. In calculating the unfairness, it makes little if any difference how serious the alleged offence was and how serious the police misconduct was. In *Swaffield* at [77], it was suggested that an unreliable confession should never be admitted in evidence.
- A wider range of factors should come into play where the issue is the violation of an accused's procedural rights. In this context, the seriousness of the violation may have to be balanced against the seriousness of the offence in issue in the same way that it is when considerations of public policy are in issues: see

the discussion of unlawfuly obtained evidence at **16.28**-**16.35**.

Caution interviews

16.103 The right to silence incorporates the right to be cautioned, in a language which is understood, with respect to the existence of this right and to the consequences of not remaining silent. The traditional form of the caution has been in this form: 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.' It has long been regular practice for police officers in jurisdictions that draw upon principles of English common law to caution a suspect in this sort of way. An interview following a caution is called a 'caution interview'.

16.104 A distinctive version of the caution has been adopted in the Judges' Rules (Solomon Islands) 1982:

> If you want to remain silent you may do so. But if you want to tell your side you think carefully about what you say because I shall write what you say down and may tell a court what you say if you go to court. Do you understand?

A version of this caution in pidgin is also included in the Rules. The Rules are based on the English Judges' Rules: [1964] 1 WLR 152; 1 All ER 237. They constitute advice on when the courts will regard questioning as having been fair. The Solomon Islands version was promulgated by the then Chief Justice after independence. See *R v Talu*, Criminal Case No 402-04, 2005 (HC).

16.105 A caution about the right to remain silent is effectively a statutory requirement in Solomon Islands, Kiribati and Tuvalu.

- In Solomon Islands, a statement made during questioning is taken to have been obtained improperly if a caution was not administered: Evidence Act SI s 171. This applies to both initial questioning by an arresting office (s 171(1)) and subsequent questioning by another officer who has formed a belief that there is sufficient evidence to establish that the person committed an offence: s 171(2) The caution must be given in or translated into a language in which the suspect is able communicate with reasonable fluency.
- In Kiribati and Tuvalu, the Police Acts require a caution to be administered before questioning and reaffirmed or repeated after a suspension or delay in questioning: PPDA Ki s 123; Tu s 137. The caution must be given in or translated into a language

in which the suspect is able communicate with reasonable fluency and the officer must explain it if there are difficulties of comprehension.

16.106 In *Thugatia v R* [2013] SBCA 5 at [13], it was stressed that the caution needs to be not only delivered but also to be understood:

> …if the interview is to be fair, the requirement should not merely be reasonable fluency. What is necessary, if the caution is to have any value, is the person's understanding of the true meaning of the formal language of the caution…We have little doubt that any judge exercising his discretion to admit a challenged confession will take full cognisance of the need to be satisfied that the accused understood the words and meaning of the caution…

16.107 The point at which the caution about the right to silence must be administered has varied over time. When the caution requirement was originally articulated in the English Judges' Rules, the threshold for the caution to be given did not arise until a decision was made to charge the suspect or the suspect was taken into custody: see *R v Lee* (1950) 82 CLR 133 at 142–3; [1950] HCA 25. A similar threshold was adopted in the Solomon Islands Judges' Rules. The Rules provide that the caution is to be given when an interviewing officer has 'strong evidence' that the person committed an offence. 'Strong evidence' is defined as 'evidence that could prove before a court that the person is guilty', which is effectively the test for a formal charge: see **Chapter 17**. The rules also require another caution about the right to silence after a person has been charged by it being read to the suspect.

16.108 However, Solomon Islands, Kiribati and Tuvalu all now follow a model from the Australian Uniform Evidence Act which requires cautioning at what might be a significantly earlier point in time: Evidence Act SI s 171(5); PPDA Ki s 112(1); s 126(1).

- In Solomon Islands, the threshold for administering the caution is when a person is in the company of a police officer 'for the purpose of being questioned' if –

  (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or
  (b) the official would not allow the person to leave if the person wished to do so, or
  (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

- In Kiribati and Tuvalu, the threshold is when a person is in the company of a police officer 'for the purpose of being questioned as a suspect about his or her involvement in the commission of an offence.'

These formulations acknowledge that a person may be questioned for reasons which do not require a caution: for example, questioning a person as a potential witness.

16.109 In *R v Bennetts* [2018] QCA 99 at [15], Bowskill J stressed the distinction between questioning someone who may be able to assist an investigation and questioning a suspect:

> A person who is being questioned in the context of an investigation of a possible offence is not being questioned as a suspect. The word "suspect" requires a degree of conviction extending beyond speculation as to whether an offence has been committed and requires that it be based upon some factual foundation.

In that case, a trial judge had ruled that a person questioned for about six hours in a police station was being questioned as a witness, not as a suspect. The Court of Appeal dismissed the appeal.

Access to lawyers and others

16.110 The best protection for the unwary suspect during questioning may be the advice or presence of another person, especially a lawyer.

- The Police Acts of Kiribati and Tuvalu confer statutory rights to communicate with a relative, friend or lawyer before being questioned, to be informed of this right, and to have the person present and give advice during the questioning: PPDA Ki ss 114-115; Tus s 128-129. The police must delay questioning for reasonable time for contact to be made and for the friend, relative or lawyer to arrive.
- In Solomon Islands, however, there are no such rights: *Lele v R* [2014] SBCA 32 at [37], [41]. It might be argued that the presence of a lawyer or support person, if requested, is a requirement for questioning to be fair. However, the Solomon Islands Court of Appeal in *Lele* rejected this argument. This was despite the Court at [37], [41] conceding that giving suspects advice on entitlement to access legal advice was 'best practice for police officers':

> …from a practical point of view it would be sensible for police officers in every case to follow their training and advise suspects that they are entitled to obtain legal advice before, and during, interview.

Yet, although fairness might require such advice in some circumstances, the Court rejected the idea of any general rule:

> If the circumstances are such, after a careful evaluation of the facts, that the right to silence is compromised by the failure to give the additional advice regarding legal representation, then it may well follow that any confession contained in the statement will be tainted by unfairness and involuntariness. But that is an assessment to be made on a case by case basis, and not as a sweeping general rule in the absence of support from the legislation or the Judges Rules.

16.111 Even in Kiribati and Tuvalu, the general right to the advice of another person is a right to seek these supports rather than to have them provided. For example, if efforts to obtain legal advice are unsuccessful and a reasonable time has elapsed, the police can proceed with questioning. What is a reasonable time depends on the particular circumstances but delay of more than two hours is said to be unreasonable unless there are special circumstances: Ki s 114(4)-(5); Tu 128(4)-(5).

16.112 Some types of vulnerable person are given special protection under the Kiribati and Tuvalu Acts.

- A child under the age of 18 and also a person suffering from 'impaired capacity' may not be questioned unless a friend, relative or lawyer is present: Ki ss 117(2)(a)-118(2)(a); Tu ss 131(2)(a)-132(2)(a).
- Questioning of an intoxicated suspect must be delayed until:

> …the police officer is reasonably satisfied that the influence of the alcohol or drug no longer affects -
> (a) the suspect's ability to understand his or her rights; and
> (b) the suspect's ability to decide whether to answer questions.

See Ki s 121(2); Tu s 135(2).

Police can, however, dispense with these safeguards in some circumstances including the need to prevent an accomplice or accessory avoiding apprehension or the concealment, fabrication or destruction of evidence: Ki s 122; Tu s 136.

Modes of questioning

16.113 Improprieties in the manner of questioning may justify exclusion of a confessional statement under either the voluntariness rule or the fairness discretion.

16.114 In cases without threats or promises, exclusion is more likely to occur under the fairness discretion. Suggestions about the requirements of fairness in the manner of questioning have included:

- Limitations on prolonged questioning in custody: see the limit of four hours questioning of a detained person imposed by PPDA Ki s 108(6)(b); Tu 122(6)(b).
- Adequate breaks for rest and refreshment: see accompanying notes to the Judges' Rules, [1964] 1 WLR 152; 1 All ER 237 at 240. See also the requirement under PPDA Ki s 108(6)(b); Tu 122(6)(b) to provide food and drink to a person detained for six hours or more.
- Reasonably comfortable conditions: see accompanying notes to the Judges' Rules, [1964] 1 WLR 152; 1 All ER 237 at 240.
- Avoidance of prompting, so that suspects are able to tell their stories in their own words: Judges' Rule IV(b), (d), [1964] 1 WLR 152; 1 All ER 237 at 239;
- Avoidance of hectoring and cross-examination: see *Van der Meer v R* (1988) 35 A Crim R 232 at 24, 256, 261; (1988) 82 ALR 10; [1988] HCA 56.
- Avoidance of 'intimidation, persistent importunity or sustained or undue insistence or pressure', although mere persistence is not unfair: *R v Clarke* (1997) 97 A Crim R 414 at 419.
- Avoidance of deception and tricks, such as falsely suggesting that a witness has identified the suspect or an accomplice has confessed: see *R v Mason* (1988) 86 Cr App R 349; Evidence Act SI s 170(2).

6.115 In some instances, confessional statements that can be excluded on grounds of fairness can also be excluded on grounds of public policy. In Solomon Islands, the Evidence Act ss 170-171 details some circumstances under which evidence would be obtained improperly or unlawfully:

- The questioner doing or omitting to do something that they knew or ought to have known was 'likely to impair substantially the ability of the person being questioned to respond rationally to the questioning': s 170(2)(a);
- Making a false statement that was 'likely to cause the person who was being questioned to make an admission': s 170(2)(b);
- Enagaging in 'violent, oppressive or degrading' conduct: s 170(2)(c);
- Failing to caution a suspect about the right to silence and the use that could be made in evidence of anything that was said: s 171(1)-(2).

Each of these circumstances might also provide grounds for holding that it would be unfair to use the confessional statement.

16.116 There are no clear guidelines on how long questioning may continue. The practice of and the issues presented by prolonged questioning are clearly illustrated by *Osifelo v R* [1995] SBCA 11.

- The suspect in a murder investigation had been in police custody for several days before questioning began.
- An initial informal, 'general' questioning began one evening at 11.20 pm.
- The caution interview commenced five hours later, at 4.36 am.
- The caution interview finished almost seven hours later at 11.20 am.
- During the 12 hours of questioning, there were a number of breaks, during which smoking and using betel-nut were permitted and some food was provided.

A 2-1 majority of the Solomon Islands Court of Appeal held that the caution statement was admissible. Nevertheless, the judges expressed concern about the way the suspect had been questioned, referring to 'the undesirability of taking a statement over so long a time and starting at such an early hour of the morning as was the case here'. They concluded:

> While we are of the view that looked at overall the Chief Justice was justified in admitting the statement we add that it is a case very near that borderline over which it would be excluded. For passing we express the view that it would be desirable that the Solomon Islands Judges' Rules be reviewed and the position made clear as to when persons in custody may properly be interrogated, and the nature of such interrogation.

16.117 In dissent in *Osifelo*, Kirby P advocated introducing a requirement for corroboration of the making of a confessional statement to avoid any miscarriage of justice.

> Confirmation may be provided, in cases of contest, by sound and even video recording of such confessions, by the taking of such confessions before judicial officers or other independent persons or the corroboration of the confession by other independent evidence…But in the absence of such affirmative assurance of the voluntariness, fairness and accuracy of the alleged confession it will ordinarily be rejected, however apparently probative it might otherwise appear to be...The more serious the crime, and hence the longer the potential deprivation of liberty following conviction, the more scrupulous will courts of trial, and of appeal, be to exclude confessional evidence which does not meet the high standards laid down by the judges. A beneficial consequence of the line of authority to which I have

> referred has been an improvement in police practice, a diminished reliance on confessions and the increased use of mechanical or electronic recording of such material to put the voluntariness, fairness and accuracy of caution statements beyond doubt. The court must consider these developments in other countries in the context of the realities and possibilities of policing in the Solomon Islands with their many remote outpost and limited resources. However, improvements in police resources will not be encouraged if this court is less rigorous than other Commonwealth courts have been. The risk of an unsafe conviction is no more tolerable in the Solomon Islands than in any other jurisdiction of the common law.

16.118 The reforms urged by all the judges in *Osifelo* have not yet occurred in Solomon Islands. However, the provisions of the Kiribati and Tuvalu Police Acts mark limited advances in the regulation of questioning. Moreover, in light of the path of law reform in other common law jurisdictions, it may be questioned whether the outcome in *Osifelo* would the same if the case were argued today.