A KAHUI EXCEPTION?

EXAMINING THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS

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A dissertation submitted in partial fulfilment of the requirements
of the degree of Bachelor of Laws (Honours)

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October 2007

"Fools said I, you do not know

Silence like a cancer grows..."

Paul Simon & Art Garfunkel, 1966

Acknowledgements

To my immensely knowledgeable and patient supervisor, Associate Professor Kevin Dawkins, many thanks for all your time, help, and encouragement.

To my amazing family, I am so fortunate to have you and I appreciate all your love and support over the years.

To Sean, thank you for your love and support, and for your humour and sense of perspective when the task seemed so mammoth.

To Olivia, for always listening to me, for being so positive, and for generally being such a great friend.

To the Law Tutors and NZLSJ buddies, it has been wonderful getting to know you all a bit better this year. Having you around has made for a very enjoyable year.

Table of Contents

INTRODUCTION

In June 2006, New Zealand was gripped by the story of baby twins Chris and Cru Kahui. The three month old twins died at Starship Children's Hospital on June 18 2006 from multiple injuries. In October 2006, the twins' father Chris was charged with their murder. However, it was difficult for police to reach this point. In addition to outrage over the children's deaths, questions were raised over the behaviour of the twins' family in response to police inquiries. During the investigation, police made several statements to the media, accusing the family of closing ranks to "stonewall" police inquiries. The family's silence thus raised public debate over the value of the right to silence in criminal investigations. The majority of the legal community supported the status quo. By contrast, retiring QC Kevin Ryan and Police Association president Greg O'Conner felt it was time to readdress the right.[1]

The Kahui case provides an appropriate point of departure for taking stock of the right to silence in New Zealand's legal system. It is also apt that we are currently considering the scope of police powers.[2] This dissertation investigates the validity of the existing law relating to the right to silence in criminal investigations. In the Kahui case, those exercising the right to silence were merely being questioned by police. They had not been arrested or detained. This is the type of situation on which I will concentrate in this dissertation. Two main questions will be addressed. Firstly, do people in Kahui-type situations have too much "right to silence"? If so, what should be done to remedy the problem?

The first chapter will describe the Kahui case and examine how the right to silence would have applied to the Kahuis. In the second chapter, I will discuss whether any current legal measures could have been used to identify the culprit(s) or to facilitate prosecution. In Chapter Three, I will justify restricting the right to silence. In the final chapter, I will critically examine some new solutions to the Kahui problem. Ultimately, I will conclude on what, if anything, ought to be done to solve the Kahui problem.

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[1] Anon "Defence lawyer says right to silence should go", 19 October 2006, Available: http://www.radionz.co.nz/news/latest/200610191746/defence_lawyer_says_right_to_silence_should_go

[2] New Zealand Police, (2007) *Policing Directions in New Zealand for the 21st Century*, Available: http://www.policeact.govt.nz/pdf/policing-directions.pdf.

I. Factual and Legal Overview of the Kahui Case

INTRODUCTION

This dissertation examines the right to silence in situations such as the homicide investigation launched after the death of the Kahui twins last year. In this chapter I will set out the factual details of the Kahui case. Subsequently, I will provide an overview of the right to silence in Kahui-type situations.

A. WHAT HAPPENED IN THE KAHUI CASE?

1. "Stonewalling" the Police

In June 2006, three month old twins Chris and Cru Kahui died at Auckland's Starship Hospital.[3] On 13 June the twins were taken to hospital by their mother Macsyna King.[4] It appears that the twins were injured after King left them at home with their father and various members of the extended family for about twelve hours.[5] Five days after they arrived at hospital, the twins' life-support systems were switched off. Chris died early on 18 June, and his brother Cru that evening.[6] The police investigation was consequently upgraded from an assault to a double homicide inquiry.[7] Post mortem reports revealed that the babies had died from multiple injuries.[8] It was later discovered that the injuries were caused by the application of force to the babies' heads.[9]

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[3] "Chris Kahui Dies", 18 June 2006, Available: http://home.nzcity.co.nz/news/default.asp?id=63177
[4] The babies had only recently left hospital after being born prematurely.
[5] "Sunday: Silence Breaks in Kahui Case", 24 Jul 2006, Available: http://tvnz.co.nz/view/page/423466/794607.
[6] "Death of Twin Babies Investigated", 19 June 2006, Available: http://tvnz.co.nz/view/page/423466/752840.
[7] "Chris Kahui Dies", 18 June 2006, Available: http://home.nzcity.co.nz/news/default.asp?id=63177.
[8] When they arrived at hospital, the boys had a number of fresh injuries, including serious head injuries. One of the twins had a broken femur. In addition, both of the babies had historic rib fractures.
"Family Members Taken for Questioning", 27 June 2006 Available: http://tvnz.co.nz/view/page/425824/767023;
"Kahui Twins' Dad Makes Appearance in Court", 21 March 2007, Available: http://www.stuff.co.nz/4000572a10.html.
[9] "Twins Died from Blunt Force Trauma", 17 July 2006, Available: http://tvnz.co.nz/view/page/423466/789996.

The shocking nature of the crime was not the only controversial factor about the case. Widespread outcry was created by the reticence of the extended Kahui family in response to police questioning.[10] The police were mindful of the family's need to grieve.[11] Nonetheless, as time passed and the family remained silent, calls from both the public and the police for family members to speak to police grew louder.

The twins' bodies were released to the family on 21 June 2006.[12] The tangi was held three days later.[13] The day before the tangi, police expressed their frustration at the family's "stonewalling" and appealed for those with knowledge of the fatal events to come forward.[14] At that stage, police believed that the family had assembled while the babies were in hospital and had decided not to cooperate with any inquiry.[15] After the family failed to follow up on an agreement to talk,[16] police issued a statement saying that the truth was still missing from their investigation.[17] On 27 June, some family members were interviewed by police.[18] However, "several key" family members still had not spoken.[19] Throughout the following months, the family's cooperation increased, but police continued to be frustrated by a number of people who did not step forward for questioning.[20]

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[10] There were also adults from the twins' mother's (Macsyna King) side of the family involved. However, for ease of reference, I will use the term "Kahui family" to refer to any of the adults involved in the case.
[11] "Family Focus of Investigation", 21 June 2006, Available: http://tvnz.co.nz/view/page/423466/757616.
[12] "Kahui Twins Farewelled at Marae, 22 June 2006, Available: http://tvnz.co.nz/view/page/423466/761183.
[13] "Calls for Justice Follow Twins' Tangi", 24 June 2006, Available: http://tvnz.co.nz/view/page/423466/765096.
[14] "Family Accused of Stonewalling Inquiry", 23 June 2006, Available: http://tvnz.co.nz/view/page/423466/764093.
[15] "Family Accused of Stonewalling Inquiry", 23 June 2006, Available: http://tvnz.co.nz/view/page/423466/764093.
[16] During the tangi weekend, Maori Party leader Pita Sharples acted as an intermediary between police and the family. An agreement was reached that a representative of the family would talk to the police on the Monday after the tangi to reveal who was responsible for the deaths. However, that Monday came and went without the family fronting up.
"Sharples Confident Family Will Talk", 26 June 2006, Available: http://tvnz.co.nz/view/page/423466/765977.
[17] "Killers Clam Up", 26 June 2006, Available: http://tvnz.co.nz/view/page/423466/766917.
[18] "Family Members Taken for Questioning", 27 June 2006 Available: http://tvnz.co.nz/view/page/425824/767023.
[19] Cleave, Louisa "Key Kahui Whanau Still To Be Interviewed", 29 June 2006, Available: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10388871.
[20] "Police Close to Arrest in Kahui Case", September 26 2006, Available: http://tvnz.co.nz/view/page/423466/836227;
"Police Expect to Meet Kahui's Father", 2 October 2006, Available: http://tvnz.co.nz/view/page/423466/838707.

One of those identified as not cooperating with police was the twins' father, Chris Kahui Senior. Kahui had spoken to police several times after his sons' deaths, but had not given a full statement.[21] On 26 October 2006 Kahui was brought in for questioning. Later that night he was arrested and charged with the murder of his sons.[22] Following a depositions hearing in August, Kahui will face trial next year.

Now that the events of the murder inquiry have been set out, it is possible to describe the legal position in such a situation. In the following section, I will describe what the right to silence is in general, and how it applied to the Kahui family specifically.

B. THE RIGHT TO SILENCE

1. The General Principle

To understand what the right to silence is, it is useful to compare it to the privilege against self-incrimination. These legal concepts are similar, but not quite the same. Essentially, the right to silence means that a person need not answer questions at all. In contrast, the privilege only allows a person to refuse to provide information that would tend to incriminate them. All other questions must still be answered.[23]

The right to silence can apply in both criminal and civil proceedings. However, this discussion will be limited to the criminal process, because that is the context of the Kahui murder inquiry. In criminal proceedings, the right to silence can apply at four stages: before arrest, after arrest, after charging, and at trial. A common principle runs through each of these stages; in general, no-one can be forced to say anything to anyone, including to state officials.[24]

This general rule is modified by more specific rules at each of the four stages of the criminal process. In this dissertation, I will concentrate on the specific rules governing the right to

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[21] "Police Expect to Meet Kahui's Father", 2 October 2006, Available: http://tvnz.co.nz/view/page/423466/838707.
[22] "Murder Charges in Kahui Case", 26 October 2006, Available: http://tvnz.co.nz/view/page/423466/871240.
[23] Because of this, the privilege against self-incrimination has been described as a specific instance of the right to silence: Rishworth, Paul et al (2003) *The New Zealand Bill of Rights*, Oxford University Press, Auckland, p 647.
[24] This rule is well summed up in *Taylor v NZ Poultry Board* [1984] 1 NZLR 349 (CA) at 398. According to that case, "every citizen has in general a right to refuse to answer questions from anyone, including an official".

silence in the *first* stage of the criminal process.[25] Thus, I will examine how the right to silence would have applied to the Kahui family before Chris Kahui's arrest.[26]

2. The Right to Silence in the Kahui Case

Three aspects of the family's behaviour appeared particularly to frustrate police. Firstly, some family members refused to speak to police at all.[27] Secondly, when some of the family did speak to police, it was at the request of the police rather than at their own initiation.[28] Thirdly, some family members who spoke to police did not make complete statements or answer questions to the full satisfaction of police.[29] I will now describe how the law relates to each of these situations. This requires an examination of the common law, the rules regarding arrest and detention, the Judges' Rules and Supreme Court Practice Note, and the New Zealand Bill of Rights Act 1990 (NZBORA).

(a.) Refusal to Speak to Police

When someone who has been arrested or detained is questioned by police, they are free to refuse to answer questions.[30] Yet, the fact that they are under police control means that they are not free to avoid questioning altogether.[31] By contrast, apart from a few exceptions that

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[25] Clearly, there were no arrests in the Kahui homicide inquiry until 26 October. Consequently, for the four months after the deaths, but before Chris Kahui's arrest, all of the family members were being questioned in the first stage of the criminal process. The police were consistently tight lipped about who in the family might be a suspect. For example, three days after the twins died, the police were careful to describe the twins' parents as witnesses rather than suspects. The police's reluctance to name suspects continued for several months, despite intense media and public speculation about who might have been responsible for the deaths.
"Family focus of investigation", 21 June 2006, Available:
http://tvnz.co.nz/view/page/423466/757616;
Cook, Stephen & Savage, Jared "Kahui Twins' Parents Put Burgers Before Babies", 17 September 2006, Available: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10401655.

[26] Since the subject of this dissertation is *pre-arrest questioning*, and given that a lot has been written on someone in the position of the suspect, I will not look at the situation of Chris Kahui around the time of his arrest.

[27] Cleave, Louisa "Key Kahui Whanau Still To Be Interviewed", 29 June 2006, Available:
http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10388871.

[28] "Police Confident of Finding Killer", 28 June 2006, Available:
http://tvnz.co.nz/view/page/423466/768021.

[29] "Police Expect to Meet Kahui's Father", 2 October 2006, Available:
http://tvnz.co.nz/view/page/423466/838707.

[30] Section 23(4) of the New Zealand Bill of Rights Act 1990.

[31] Just because someone refuses to answer questions does not mean necessarily that police have to stop asking questions. There has been significant uncertainty on this point under the New Zealand Bill of Rights Act cases. Some cases found that questioning after an explicit desire to remain silence was a breach of section 23(4) of the New Zealand Bill of Rights Act 1990: *R v Kokiri* (2003) CRNZ 1016 (CA), *R v Kai Ji* [2004] 1 NZLR 59 (CA). Cases such as *R v Pinkerton* unreported, Court of Appeal, CA 342/92, 23 March 1993, Cooke P, and *R v Bennett* unreported, Court of Appeal, CA 32/04, 23 March 2004, Anderson P, on the other hand, found the opposite. However, the matter seems to have been cleared up in *R v Ormsby* unreported, Court of Appeal, CA 493/04, 8

do not apply to the Kahui situation, a person who has not been arrested or detained can refuse to be interviewed at all.[32] Not only can they refuse to answer questions, they need not face questioning in the first place. Without the authority of a statutory provision, no person can lawfully be arrested or detained.[33] Yet, there is no provision for arrest or detention simply for questioning.[34] Consequently, those who have not been arrested or detained (like the Kahuis) can simply walk away from police questions or requests for an interview.

Thus, if members of the Kahui family chose not to speak to police, they were within their rights to do so. They could refuse to be interviewed and could not legally have been forced to undergo questioning.

(b.) Reluctance to Approach Police

The police observed that when they finally spoke to some family members, it was the police who approached the family, rather than the other way around.[35] The family was criticised for

April 2005, Young J, paragraph 14. There, the Court of Appeal held that there was no absolute prohibition on questioning following an assertion of silence. Instead, the question to be determined is whether there has been an inappropriate undermining of the accused's right to silence, or unfairness in what transpired in the course of the subsequent continued questioning. This case has been followed by the Court of Appeal this year in *R v Wallace* unreported, Court of Appeal, CA191/07, 29 June 2007, Hammond, Randerson, Williams JJ.

[32] Some statutory provisions and common law rules override or cut into the right to silence. These will be discussed in Chapter Three.

[33] *Blundell v AG* [1968] NZLR 341 (CA) affirms the common law rule that a person cannot be detained by police unless the police are making a lawful arrest. New Zealand has no common law powers of arrest. Therefore, in order to detain someone, the police must use a power provided by statute.
Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 481.

[34] The general powers of arrest are provided by the Summary Proceedings Act 1957 and the Crimes Act 1961. Section 19 of the Summary Proceedings Act 1957 provides for arrests under warrant once an information has been laid against a person. The criteria for laying an information are set out in Forms 1 and 2 of the Schedule to the Summary Proceedings Act 1957. In order to lay an information, police must "have just cause to suspect...and do suspect" the person of having committed an offence. Section 315 of the Crimes Act 1961 provides for police to arrest without a warrant. In order to arrest under this provision, police must find the person "disturbing the public peace" or committing an offence punishable by imprisonment: section 315 (2) (a) of the Crimes Act 1961. Alternatively, a person can be arrested if police have "good cause to suspect" that the person has disturbed the public peace or committed an offence punishable by imprisonment: section 315 (2)(b) of the Crimes Act 1961. In addition, specific statutory provisions provide for arrest or detention in certain circumstances. For example, the Land Transport Act 1998 allows enforcement officers to arrest people who they have "good cause to suspect" have failed to comply with instructions or requirements under section 114 of the Act or have given false or misleading information: section 114(6) Land Transport Act 1998. Another example is section 114(3)(a) of the Land Transport Act 1998, under which police are able to stop and detain motorists in order to ascertain the driver's name and address and that of the owner of the vehicle, to inspect the vehicle's roadworthiness and to administer the blood alcohol provisions.

[35] "Police Confident of Finding Killer", 28 June 2006, Available: http://tvnz.co.nz/view/page/423466/768021.

not coming forward with information about the babies' deaths. Nonetheless, in New Zealand there is no legal obligation to approach police if you have knowledge of a crime.[36]

Thus, to the extent that the family had an obligation to come forward and tell police what had happened to the twins, it was a moral and not a legal obligation.

(c.) Failure to Answer Questions or Make Complete Statements

As described above, those family members who refused to speak to police at all were fully entitled to do so. Still, some family members did choose to be interviewed. The common law rule that citizens may remain silent applies to people helping police with their inquiries.[37] This means that people who voluntarily agree to be interviewed need not say anything in response to police questions.

Thus, under the common law, the Kahuis were under no legal obligation to answer police questions or to make complete statements. Nevertheless, when someone is interviewed by police, the Judges' Rules, the recent Supreme Court Practice Note, and NZBORA may also guide the right to silence. I will next examine how these provisions might have applied when members of the Kahui family were interviewed.

(i.) Judges' Rules

Before NZBORA, the Judges' Rules guided police questioning of suspects. The Judges' Rules are not rules of law.[38] Instead, they serve as a guide for police behaviour.[39] When faced with a breach of the Judges' Rules, Judges *may* exclude at trial evidence gained through the breach.[40]

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[36] "...though every citizen has a moral duty or ... a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority ...": *Rice v Connolly* [1966] 2 QB 414, 419. The duty to report crimes will be discussed further in Chapter Four.

[37] This sentiment was reinforced recently in *R v Haig* (2006) 22 CRNZ 814. In that case, Hammond J stated at paragraph 119 that, "The conventional answer is that right from the outset of a criminal investigation a suspect is not obliged to answer questions when interrogated by the police - or for that matter others - when charged with investigating offences. The burden remains on the Crown, from beginning to end".

[38] *R v Convery* [1968] NZLR 426 (CA) at p429, 433.

[39] The Judge's Rules only apply to police officers and not to other state officials who have an investigative role such as immigration and customs officers: *R v Handly* [1994] 2 NZLR 411 (CA). Nevertheless, Rules One and Two, while not directly applicable, may provide guidance as to what is fair in Serious Fraud Office investigations: *R v Franklin* unreported, DC Wellington, T981443, 28 April 1999, Keane DCJ.

[40] If the Judges' Rules are breached, there is no automatic exclusion of the evidence. Instead, the Court has a discretion as to whether to admit. However, where there has been a serious breach of the Rules, the Court should prima facie exclude the evidence unless there are circumstances allowing the court to admit the evidence:

Adams on Criminal Law suggests that the advent of NZBORA made the Judges' Rules less relevant.[41] In *R v Butcher and Burgess*[42] Cooke P claimed that the Rules were "in their literal form largely obsolescent".[43] Nevertheless, the Judges' Rules covered situations outside the parameters of NZBORA.[44] Accordingly, trial judges continued to apply the rules:[45] In *R v R*[46] the Court of Appeal held that the Judges' Rules survived the enactment of NZBORA and can "continue to inform in a broad way the exercise of the fairness jurisdiction in areas where the Bill of Rights does not apply".[47]

Therefore, a discussion of the Judges' Rules is useful in gaining a full picture of the rights of those being questioned in criminal investigations. Nonetheless, it must be borne in mind that the Supreme Court Practice Note has now superseded the Judges' Rules. The application of the Practice Note to future cases will be discussed shortly.

The Judges' Rules generally allow for questioning in the investigation of offences.[48] This means that police can question people in an investigation, as long as they do not detain the person for questioning.[49] So the police were entitled to attempt to question the Kahui family, even if the family had the right not to answer those questions.

However, while the police can legitimately question, there are some Rules that protect the right to silence of people being questioned. Rules Two, Three and Four require police to

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R v Taito unreported, HC Auckland, T111/91, 21 January 1991, Eichelbaum CJ. Earlier, courts have taken seriously breaches of the Judges' Rules. For example, the Court of Appeal in *R v Horsfall* [1981] 1 NZLR 116 (CA) at 122, stated that "breaches of [the Judges' Rules] are not lightly condoned". *Adams on Criminal Law*, however, observes that more recently the Court of Appeal has been more prepared to excuse breaches of the Judges' Rules.
Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 727.

41 Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 813.

42 [1992] 2 NZLR 257.

43 This opinion is still largely held by the Court of Appeal. In *R v Ritchie* unreported, Court of Appeal, CA284/04, 15 October 2004, Wild J, at paragraph 27 it was held that the Judges' Rules had "substantially been overtaken and rendered obsolescent by the New Zealand Bill of Rights Act."

44 For example, the New Zealand Bill of Rights Act 1990 does not cover making a written record of statements (Rule 9), cautions prior to arrest or detention (Rule 2), cross-examination of a person in custody (Rules 3 and 7), or taking statements from more than one person (Rule8).
Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 716.

45 See, for example *Lord v R* unreported, HC Wanganui, HC T971618, 3 December 1997, Gallen J, and *R v Hoko* unreported, HC Auckland, T015205, 2 October 2002, Harrison J.

46 (2003) 20 CRNZ 327 (CA).

47 This interpretation is consistent with section 28 of the New Zealand Bill of Rights Act 1990 which provides that the Act does not limit pre-existing rights through an absence of the right in the Act.

48 Rule One states that, "When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, *whether suspected or not*, from whom he thinks that useful information can be obtained [emphasis added]."

49 See discussion above as to arrest and detention.

caution people.[50] Additionally, Rules Three and Seven prohibit cross-examination.[51] These rules do not *extend* a person's right to silence. That is to say, they do not entitle people to say less than under the common law rule. Nevertheless, by having been made aware of the right not to say anything and the consequences of making a statement, the right to silence is enhanced *practically*. Additionally, the rule against persistent cross-examination enhances the right to silence by prohibiting questioning that would put undue pressure on a person to waive the right.

On the other hand, the Rules protecting the right to silence do not apply to people merely being questioned by police. Rule Two only applies to people police have decided to charge.[52] Moreover, Rule Three does not apply unless the person is "in custody".[53] Rules Four and Seven only apply when someone is a "prisoner".[54] The Kahui family, when talking with police, were not in custody. It is unclear when the police decided to charge Chris Kahui.[55] Nevertheless, it is clear that there were quite a few interviews with family members whom the police were not going to charge. Thus, on a straight reading of the Judges' Rules, the police were under no obligation to caution the Kahuis during those interviews about their right to silence.[56] Moreover, the Judges' Rules would not have prevented the police from using cross-examination.

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[50] Rule Five provides the caution to be administered. When a person is formally charged, they should be asked, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Cautions prior to charging should comprise the statement, "You are not obliged to say anything, but anything you say may be given in evidence".

[51] Some cross-examination of suspects is allowed, but it must not be "oppressive, overbearing, or unfair": *R v Dally* [1990] 2 NZLR 184 at 188.

[52] The obligation to caution someone under this rule arises when the police have evidence which would, when considered objectively, support a prima facie case against the person: *R v Goodwin* [1993] 2 NZLR 153.

[53] People are "in custody" when there is "conduct on the part of the police which caused the suspected person on reasonable grounds to think that he was in custody": *R v Convery* [1968] NZLR 426 (CA) at 435.

[54] As identified in the explanatory comments of 1930, "persons in custody" and "prisoners" are synonymous. Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington,p 720.

[55] Up until about 26 October, Chris Kahui was in the same position as the rest of the family. He had not been arrested or detained. However, it may be that when Chris Kahui was brought in for questioning on 26 October, the police had sufficient grounds to charge him. Purportedly, the media release that was issued by police about Chris Kahui's arrest and charging was written the day prior to when the arrest was made. It is unclear from the facts, but police behaviour towards Chris Kahui could also have been such that he was "in custody" when he went in for questioning on 26 October. These factors would mean that, unlike for the rest of the family, the Judges' Rules would have applied to Chris Kahui at that point. This would place Kahui in a different legal category to the rest of the family and outside the scope of this dissertation.
Savage, Jared "Kahui Twins' Paternity Questioned", 29 October 29 2006, Available: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&ObjectID=10408119.

[56] It should be noted, however, that cases such as *R v Maini* unreported, HC Auckland, T011088, 12 July 2001, Priestley J, show that considerations of general fairness may occasionally allow judges to find that a caution should be administered earlier than required by the Judges' Rules.
Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 705.

As described above, interviews given by the Kahuis would not strictly be governed by the Judges' Rules. In any case, the remedy for a breach of the Judges' Rules would have been useless for the Kahuis. Since only Chris Kahui is going to stand trial, the rest of the family had nothing personally to gain from an exclusion of evidence.

(ii.) Practice Note

While the Judges' Rules were in force during the Kahui investigation, the Chief Justice has recently issued a Practice Note on Police Questioning.[57] The Practice Note is not legally binding on police. All the same, Practice Notes are "virtually legislative in effect because they are made by the judges who preside over the courts where the matters will eventually arrive".[58] The Practice Note will replace the Judges' Rules where there is any change in content. Nevertheless, the preamble to the Practice Note indicates that it is "not intended to change existing case law on application of the Judges' Rules in New Zealand".

Parallel to Rule One of the Judges' Rules, Part One of the Practice Note authorises questioning of any person when police are investigating crimes. The Practice Note goes further towards acknowledging the right to silence than Rule One of the Judges' Rules in stating that police "must not suggest that it is compulsory for the person questioned to answer". However, this provision probably will not significantly affect people in Kahui–type situations, as it is a negative requirement, rather than a positive obligation to caution. Besides, as with the Judges' Rules, the remedy for a breach of this requirement would not be useful to the Kahuis.

Parts Two to Five of the Practice Note contain the substantive requirements. Like the Judges' Rules, these mainly concern cautioning and cross-examination.[59] Moreover, like the Judges' Rules, these protections will not apply to people in Kahui-type situations because they apply to people "in custody" or when there is "sufficient evidence to charge" that person. The Kahuis did not meet those criteria.

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[57] The Chief Justice issued the Practice Note in July 2007 in response to section 30(6) of the Evidence Act 2006. Section 30 (6) states: "Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice."

[58] Practice Notes are made by judges in their inherent jurisdiction: *Langley v North West Water Authority* [1991] 1 WLR 697 (CA), per Lord Donaldson of Lymington MR, at 709.
Beck, Andrew (2001) *Principles of Civil Procedure*, 2nd ed, Brookers, Wellington, p 6.

[59] The two main differences from the Judges' Rules are the reference to the right to a lawyer in the caution (Part 2(b)) and the preference for video recording statements set out in Part 5.

Having seen that the Judges' Rules and the Practice Note would not facilitate the right to silence of people in Kahui-type situations, I will now examine whether the Kahuis would have had greater protection under NZBORA.

(iii.) NZBORA

Section 14

NZBORA also provides guidance on treatment of those being questioned. A general affirmation of the right to silence is provided by section 14 which affirms the right to freedom of expression.[60] Overseas, freedom of expression has been found to include the freedom to *refrain* from expression.[61] Although no cases have been taken in New Zealand yet, the leading commentaries assume that the same interpretation would apply in New Zealand.[62] On the other hand, section 14 does not add anything to the right to silence than is already provided by the general common law rule discussed above.

Section 23(4)

Section 23(4) of NZBORA provides a more specific affirmation of the right to silence in the investigation stages. There are two parts to the right to silence in section 23(4): the right to silence itself and the right to be told about the right. In some ways, then, this can be seen as a synthesis of the common law right to say nothing and the right to be cautioned under the Judges' Rules and Practice Note.

Nonetheless, section 23(4) is even narrower in its application than the Judges' Rules and Practice Note because it only applies to people who have been "arrested or detained under any enactment". This requires consideration of the point at which arrest or detention occurs.

Arrest for the purposes of Section 23

Section 23(4) applies when someone has been arrested or detained under any enactment. Arrest is the more applicable concept in Kahui-type situations. The statutory requirements for arrest were summarised above. Nevertheless, the arrest and detention inquiry under

[60] Rishworth, Paul et al (2003) *The New Zealand Bill of Rights*, Oxford University Press, Auckland, p 649.
[61] *West Virginia State Board of Education v Barnett* 319 US 624 (1943); *Hearney v Ireland* [1996] 1 IR 580, 585 (IrSC).
[62] Butler, Andrew & Butler, Petra (2005) *The New Zealand Bill of Rights Act: a commentary*, LexisNexis, Wellington, p 699; Rishworth, Paul et al (2003) *The New Zealand Bill of Rights*, Oxford University Press, Auckland, p 649.

section 23 of NZBORA is not a lawfulness inquiry.[63] There are two main requirements for arrest under section 23.[64] Firstly, the police must objectively do something that makes the person think they are not free to go.[65] Secondly, the police must, expressly or impliedly, be purporting to act under authority granted by law. It is unlikely that the police would have fulfilled these criteria in relation to the Kahuis.[66]

Furthermore, the arrest or detention under section 23(4) must be "*for* any offence or suspected offence". In *Official Assignee v Murphy*[67] Thomas J found this meant that section 23(4) only applied to people themselves suspected of the offence.[68] Thus, people like the Kahuis who are voluntarily helping with police investigations are not strictly covered by section 23(4).[69]

This means that the Kahuis had no right to be told of their right to silence under NZBORA. And in any event, as under the Judges' Rules and Practice Note, the remedy for a breach of section 23(4) would not have assisted the Kahuis.

CONCLUSION

As people merely helping police with their inquiries, the Kahuis were technically outside the scope of the Judges' Rules, the Practice Note, and section 23(4) of NZBORA. Apparently, when interviewing such people, police need not caution as to the right to silence and can use cross-examination. On the surface, then, it appears that there is no guarantee that people

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63 The arrest or detention need not be lawful. This is inherent in the wording of section 23(1)(c) of the New Zealand Bill of Rights Act 1990.
Butler, Andrew & Butler, Petra (2005) *The New Zealand Bill of Rights Act: a commentary*, LexisNexis, Wellington, p 660.

64 These are set out in *R v P* [1996] 3 NZLR 132, 136 (CA). In that case, arrest was defined as: "a communication or manifestation by the police of an intention to apprehend and to hold the person concerned in the exercise of authority to do so; or, so long as the conduct of the arrester, seen to be acting or purporting to act under legal authority, has made it plain that the subject has been deprived of the liberty to go where he or she pleases".

65 See also *R v Fukushima* unreported, Court of Appeal, CA 128/04 130/04 134/04 170/04, 13 September 2004, O'Regan J, paragraphs 127-146.

66 Given that Chris Kahui's trial has not yet happened, all our knowledge about the inquiry comes from the media. Without the finer details of the investigation, it is impossible to say whether the police fulfilled these two criteria in relation to Chris Kahui himself around his final interview. As set out above, however, in this dissertation I am much more interested in those in the *first* stage of the criminal process.

67 [1993] 3 NZLR 62 (HC).

68 Butler, Andrew & Butler, Petra (2005) *The New Zealand Bill of Rights Act: a commentary*, LexisNexis, Wellington, p 664.

69 Nonetheless, the fact that section 23(4) of the New Zealand Bill of Rights Act 1990 does not apply to people like the Kahuis does not mean that their common law rights have been abrogated: section 28 of the New Zealand Bill of Rights Act 1990.

voluntarily helping police will know about, or be able to exercise, their common law right to silence.[70]

Nevertheless, the situation must be examined through a practical lens. In practice, police probably caution before arrest or detention.[71] Moreover, people in contact with police no longer tend to rely on police for information about their rights. The use of lawyers is increasing.[72] Only two days after the babies' died, up to twelve lawyers had been hired by the Kahui family.[73] The Kahuis would have been advised by their lawyers that they need not speak to police. In addition, if police attempted to question improperly, counsel would surely have requested that such questioning stop, or have advised their clients to walk away.[74] Consequently, such people may not be in as vulnerable a position as it might first appear.

The fact that people like the Kahuis are legally entitled not to speak with police, do not have to come forward with information, and are not legally required to complete statements can hinder police investigations. In the following chapters, I will identify the problems that Kahui-type situations cause and examine whether statutory changes are required to address these problems.

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[70] Lack of knowledge and understanding about a right reduces the effectiveness of that right. This principle has been recognised in relation to section 23 of the New Zealand Bill of Rights Act 1990. In *R v Mallinson* [1993] 1 NZLR 528 (CA), the Court held that a detainee cannot effectively waive his or her right if he or she did not fully understand the right that he or she is said to have waived.

[71] This was recognised in *R v Alo* [2007] NZCA 172 at paragraph 36. However, if the police are overly cautious and caution a person who has not been arrested or detained, this does not mean that a person who is voluntarily talking to police has been arrested or detained for the purposes of section 23(1) of the New Zealand Bill of Rights Act 1990: *R v Fukushima* unreported, Court of Appeal, CA 128/04 130/04 134/04 170/04, 13 September 2004, O'Regan J, paragraphs 137-138.
Butler, Andrew & Butler, Petra (2005) *The New Zealand Bill of Rights Act: a commentary*, LexisNexis, Wellington, p 662.

[72] Becroft, Andrew & O'Driscoll, Stephen (1998) *Advising Suspects at the Police Station: A Practical Guide for Lawyers*, Butterworths, Wellington, p vii.

[73] "Police Reveal Extent of Twins' Injuries", 20 June 2006, Available: http://tvnz.co.nz/view/page/423466/757032.

[74] Becroft, Andrew & O'Driscoll, Stephen (1998) *Advising Suspects at the Police Station: A Practical Guide for Lawyers*, Butterworths, Wellington, p 132.

II. Existing Solutions to the Kahui Problem?

INTRODUCTION

As was described in Chapter One, the Kahui family was legally within its rights not to give the police any information about the deaths of Chris and Cru. The well publicised difficulty police had in the Kahui case may indicate the absence of an effective solution. On the other hand, there should not be change for the sake of it. Therefore, if a solution to the Kahui problem already exists, it should be utilised. In this chapter, I will set out how the legal process would have been hindered had the family maintained its silence. I will then examine whether a solution to this problem currently exists in New Zealand law.

A. WHAT IS THE KAHUI PROBLEM?

The fact that both babies had been injured, combined with the nature of their injuries, left little doubt that the twins had been hurt deliberately. So, it would have been clear to police that *someone* had inflicted the babies' injuries. Nevertheless, it was uncertain *who* had inflicted the injuries. Early on in the case, police focused on the "tight twelve", those family members who had been in contact with the twins before their deaths.[75] Any, or some, of those people could have inflicted the twins' injuries.

The police carried out a full scene examination of the house where Chris and Cru were injured.[76] The pathologist's report could also explain what time and how the injuries had been inflicted.[77] However, while these would be useful for explaining *what* had happened, it still might not tell police *who* was responsible. For instance, even if bodily evidence were found on or around the twins, it might not be conclusive. In a crime committed by a stranger, bodily evidence found at the crime scene could be evidence of that person's involvement in the

[75] "Family Focus of Investigation", 21 June 2006, Available: http://tvnz.co.nz/view/page/423466/757616.
[76] "Methodical Gathering of Information Around Kahui Twins Continues", 3 July 2006, Available: http://www.police.govt.nz/news/release/2497.html.
[77] "Twins Died from Blunt Force Trauma", 17 July 2006, Available: http://tvnz.co.nz/view/page/423466/789996.

crime. In contrast, if hair or fingerprints from one of the "tight twelve" had been found on or around the babies, it would not necessarily be indicative of guilt. Instead, it could have got there through innocuous physical contact such as feeding or dressing the babies.

Thus, in the Kahui case, physical evidence may not have been very useful in identifying who was responsible. This meant that police required cooperation from the family to narrow the focus of the investigation. That cooperation was not forthcoming. Essentially then, the Kahui problem occurs when oral evidence[78] is needed to identify who, out of a number of people, is responsible for an offence, but that oral evidence is not forthcoming. Below I will assess the possibilities for addressing the Kahui problem under current New Zealand law.

B. ADDRESSING THE KAHUI PROBLEM

1. Using the Courts

(a.) Charge One Family Member in order to Adduce Evidence at Depositions

Unlike in police investigations, witnesses can be compelled to give evidence in court. Still, it would not be possible to proceed against a family member – picked at random to compel witness testimony – in the hope of discovering who was really responsible.[79] For a start, the reputation of police would be tarnished, and it would be a waste of resources. Costs could also be awarded against police. Furthermore, it may expose police to civil liability for malicious prosecution or misfeasance in public office. It is unsurprising, then, that the Crown Prosecution Guidelines would discourage such a course of action.[80]

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[78] In this dissertation I use the term "oral evidence" frequently. I do not mean evidence in the strictly legal sense of what can be admissible. Instead, for simplicity, I use it to refer to any information police could, or do, obtain through interviewing people.

[79] In an article in the *Weekend Herald*, Criminal Bar Association President Graeme Newell suggested using depositions hearings to compel reluctant witnesses to give evidence.
Cumming, Geoff "Under the Cover of Silence", *Weekend Herald*, 8 September 2007, p B4.

[80] Paragraph 3(1) of the Guidelines requires that there be "admissible and reliable evidence that an offence has been committed *by an identifiable person*" [Emphasis added]. The evidence should be sufficiently strong as to establish a prima facie case. Paragraph 3(2) requires consideration of the public interest. This paragraph states that "a dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction." Consequently, it is unlikely that such a decision to prosecute would comply with the Prosecution Guidelines.
Crown Law Office (1992) *Prosecution Guidelines*, Available:
http://www.crownlaw.govt.nz/uploads/ProsecutionGuidelines.PDF.

(b.) Charge The Whole Family

Where it is clear that a crime has been committed, but it is unclear what part various people have played, suspects can be charged as parties to the offence in the alternative.[81] The principal party is the person who actually carried out the offence.[82] A secondary party is someone who encouraged or helped the principal party.[83] When charging in the alternative, the prosecution need not show the exact part each person played in committing the offence. Instead, the case can be left to the jury on the basis that the accused was either a principal party or a secondary party.[84] The jury need not be unanimous about whether they find the accused a principal or a secondary party.[85]

Nevertheless, it is not enough just to show that one of the accused must have been a principal.[86] If that is all that can be proved, acquittal must ensue for all. When charging in the alternative, it must be shown that the offence was committed by one or more as a principal party, aided by or abetted by another or more, or that the offence was committed by the accused together as principal parties. Thus, in the Kahui case, it would not be enough to allege that, amongst the "tight twelve", someone had killed the babies. It would also have to be proved that others were secondary parties.

A secondary party must usually actively help or encourage the commission of the crime.[87] Mere presence at a crime scene is not usually enough.[88] Nonetheless, being present when a crime is committed can incur secondary liability when coupled with intent to encourage.[89] So, in the Kahui case, family members could have been liable if they stood by while the boys were being hurt "in circumstances intended to give and in fact giving the other encouragement to commit an assault".[90] Liability could also have ensued if they foresaw the assault on the twins and purposefully removed themselves from the scene to create an opportunity for it.[91]

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[81] Section 66 of the Crimes Act 1961.
[82] Section 66(1)(a) of the Crimes Act 1961.
[83] Sections 66(1)(b), (c), (d).of the Crimes Act 1961.
[84] *R v Witika* [1993] 2 NZLR 424.
[85] *R v Peters and Southon* unreported, Court of Appeal, CA276/06 364/06, 7 March 2007, William Young P, Robertson, Wilson JJ, paragraph 43.
[86] *R v Witika* (1991) 7 CRNZ 621 (CA).
[87] *R v Brough* unreported, Court of Appeal**,** CA507/96, 27 February 1997, Thomas, Tompkins, Heron JJ**.**
[88] *R v McCausland* unreported, Court of Appeal, CA210/06, 5 December 2006, Arnold, Baragwanath, Ronald Young JJ, paragraph 15.
[89] *R v Witika* (1991) 7 CRNZ 621, Cooke P at 622.
[90] *R v Witika* (1991) 7 CRNZ 621.
[91] *R v Witika* (1991) 7 CRNZ 621.

Alternatively, secondary liability can arise from an omission to perform a legal duty.[92] While the duty imposed by the Crimes Act 1961 to provide the necessaries of life[93] does not strictly apply, there is a common law duty to prevent harm by violence to a child in one's care.[94] So, if any member of the family who was in a caretaking role failed to take reasonable steps to prevent the babies from foreseeable violence they could be liable as a secondary party.

However, in the same way that it would be difficult to prove principal liability in a Kahui-type situation, establishing secondary liability also would be problematic. If physical evidence cannot show who the principal party was, it is also unlikely to show who gave a helping hand. Only those who were there could say what happened. If those people refuse to talk to police, there is unlikely to be evidence of secondary liability. As previously stated, without proof of secondary liability, a charge in the alternative must fail.

Thus, even if police did lay charges against all or any of the "tight twelve", the case would probably be dismissed at depositions, on the basis that a reasonable jury could not convict on the evidence.[95] Consequently, simply charging all of the "tight twelve" would not have been appropriate or successful.

2. Other Means of Gathering Evidence

Since police could not have charged any of the "tight twelve" without more evidence, it must be considered whether any evidence-gathering tools could have narrowed the list of suspects. Here I will discuss fingerprints, bodily samples, and covert surveillance.

(a.) Fingerprints

There is no general power for police to fingerprint citizens. A person may voluntarily be fingerprinted, but fingerprints can only be taken without a person's consent if that person is in

[92] The person must have a legal duty to act and a right or power of control over the principal party. An intention to encourage the principal party is not necessary: *R v Brough* unreported, Court of Appeal**,** CA507/96, 27 February 1997, Thomas, Tompkins, Heron JJ**.**

[93] Parents or others in loco parentis have a duty to provide the necessaries of life: Section 152 of the Crimes Act 1961.

[94] The common law duty requires a parent to protect their child from illegal violence that is foreseen or reasonably foreseeable. Though the court did not express a definitive opinion on the matter, it indicated that the duty applies to those in loco parentis as well as to parents: *R v Lunt* [2004] 1 NZLR 498 (CA).

[95] Section 347 of the Crimes Act 1961; *Parris v AG* [2004] 1 NZLR 519, paragraph 13.

"lawful custody on a charge of having committed an offence".[96] As discussed in Chapter One, none of the Kahui family was in custody during the investigation, so police could not fingerprint family members without their permission. If the family was refusing to talk to police, they may well also have refused to be fingerprinted. In any case, as described above, fingerprints would not necessarily be useful in narrowing the list of suspects in a Kahui-type situation.

(b.) DNA

In addition to fingerprinting, DNA evidence can be useful in identifying responsibility for the commission of crimes. There are two ways that police can get bodily samples from people: by consent and by court order.[97]

Police must satisfy a number of criteria to get bodily samples. The courts have interpreted these criteria very strictly, and are likely to exclude evidence of bodily samples gained in contravention of the Act.[98] Police can only obtain bodily samples in respect of "relevant offences" found in Schedule One of the Act. Murder is such an offence. So, bodily samples could, on the face of it, have been taken in the Kahui case.

Additionally, samples can only be taken from "suspects". A suspect is someone "whom it is believed has or may have" committed a relevant offence.[99] The person need not have been charged or meet the "good cause to suspect" criterion of arrest. Thus, the "suspect" threshold is fairly low. Consequently, as one of a limited number of people who had contact with the twins, any of the "tight twelve" could probably have met the suspect criteria. However, these are merely gateway criteria; additional criteria exist for the two means of obtaining bodily samples.

(i.) Sample By Consent

Police can ask a suspect to provide a bodily sample voluntarily.[100] But such a request can only be made when police have "reasonable grounds to believe that analysis of the sample would

[96] Section 57 (1) of the Police Act 1958.
[97] Sections 5 (b)(i), 5(b)(iii) of the Criminal Investigations (Bodily Samples) Act 1995.
[98] *R v T* [1999] 2 NZLR 602.
[99] Section 1 of the Criminal Investigations (Bodily Samples) Act 1995.
[100] Section 6(1) of the Criminal Investigations (Bodily Samples) Act 1995.

tend to confirm or disprove the suspect's involvement with the commission of the offence". In a Kahui-type situation, this may be difficult to make out. As discussed previously, DNA evidence is not necessarily helpful in crimes committed in the home, with a number of persons present. In such a situation, it is hard to differentiate between innocent and incriminating DNA findings. So, even if DNA evidence were found at the crime scene, it probably would not have confirmed or disproved a family member's involvement. Clearly, the situation might be different in a case of sexual offending. Thus, in a Kahui-type situation without a sexual element, police may not be able to obtain a voluntary bodily sample. As will be seen below, police are even less likely to get a compulsory bodily sample.

(ii.) Sample By Court Order

If a suspect does not consent to a bodily sample being taken, police can apply to the High Court for a Suspect Compulsion Order.[101] The Court must decide whether there is "good cause to suspect" that person of committing the offence.[102] Good cause to suspect requires more than a mere possibility; the proposition must be inherently likely.[103] Simply being one in twelve who might have been present when an offence was committed would be insufficient.

There must also be DNA evidence present in relation to the crime.[104] It is unclear whether this was so in the Kahui case. Once again, there must be reasonable grounds to believe that the sample will tend to confirm or disprove the suspect's involvement in the offence. But again, in a Kahui-type situation without sexual offending, it is unlikely that DNA evidence would confirm or disprove involvement. It is, therefore, unlikely that the thresholds for either voluntary or compulsory provision of bodily samples would be met.

(c.) Surveillance

As we have seen, bodily samples and fingerprints may not be useful in a Kahui-type situation, even if available to police. Another way of gaining evidence, without requiring the person's cooperation, is through interception surveillance. Police can apply for an interception warrant when there are reasonable grounds for believing (amongst other things) that a "serious violent

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[101] Section 13 of the Criminal Investigations (Bodily Samples) Act 1995.
[102] Sections 13(1)(a), 13(2)(a) and 16(1) of the Criminal Investigations (Bodily Samples) Act 1995; *Police v C* (1998) 16 CRNZ 139.
[103] *R v Sanders* [1994] 3 NZLR 450, per Fisher J.
[104] Section 16(1)(b) of the Criminal Investigations (Bodily Samples) Act 1995.

offence" has been committed.[105] The twins' homicide fits the "serious violent offence" criteria of being punishable by seven years or more imprisonment, and of involving loss of a person's life.[106]

There must also be reasonable grounds for believing that, without the interception warrant, the case is unlikely to be brought to a successful conclusion.[107] Police must also show that other investigative techniques have been tried but have failed, that other investigative techniques are unlikely to be successful, or that the matter is of great urgency.[108] It is likely that these criteria could be met in a Kahui-type situation. Fingerprinting and acquisition of bodily samples would be unlikely. Even if available, such evidence may not be useful in narrowing the list of suspects. Oral evidence would be the most useful evidence, yet oral evidence was not voluntarily forthcoming. Thus, in a Kahui-type situation, police may well be able to obtain an interception warrant. Indeed, it was reported that surveillance was used in the Kahui case.[109]

Nevertheless, the effectiveness of this evidence-gathering technique is doubtful. As will be discussed in more detail later, the Kahui problem occurs in a range of criminal contexts. One of those contexts is organised crime. Gangs and other people trying to conceal criminal activity are increasingly able to avoid police surveillance capabilities, whether by using other technologies or simply avoiding activity that is likely to be intercepted. Indeed, by remaining silent, people under investigation can make surveillance useless. While this might be inconvenient for people under investigation, it significantly decreases the likelihood that surveillance will be successful. As a result, an interception warrant will not always provide a reliable solution to the Kahui problem.

3. Punishing Silence

In the absence of effective alternative evidence-gathering methods, the significance of oral evidence in solving Kahui-type cases is reinforced. Clearly, when a number of people could have committed a crime but physical evidence is not present or is inconclusive, oral evidence

[105] Section 312CA(1)(a).of the Crimes Act 1961.
[106] Section 312A(1) of the Crimes Act 1961.
[107] Section 312CA(1)(c) of the Crimes Act 1961.
[108] Section 312CA(2)(e) of the Crimes Act 1961.
[109] Allegedly, telephone conversations between Chris Kahui and Macsyna King were bugged. Note, however, that this was not confirmed by police.
Savage, Jared "Kahui Twins' Paternity Questioned", 29 October 2006, Available: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&ObjectID=10408119.

is the only way of identifying who was responsible. In view of that, it would have been useful for police to have had a way of encouraging the family to talk.

Clearly, the state cannot *force* a citizen to answer questions. Nevertheless, adverse consequences are sometimes applied to those who refuse to answer questions.[110] Thus, while the family could not have been forced to talk, some or all of them might have incurred liability for not talking. The threat of punishment might have encouraged the Kahuis to disclose who had harmed the twins. Below I will discuss whether the Kahuis could have been charged with conspiring to defeat justice, attempting to pervert the course of justice, being accessories after the fact, or making a false allegation or report to police.

(a.) Conspiring to Defeat Justice

It could be argued that the Kahuis conspired to defeat justice under section 116 of the Crimes Act 1961. To be liable for this offence, conspirators must agree to try to stop or delay an individual's liability[111] or adversely influence the course of justice.[112] Section 116 covers interference with police investigations and is not confined to the court process itself.[113]

Conspiracy requires a common agreement.[114] Still, while police *believed* that the family had come together to decide not speak to police,[115] it would be difficult to prove this beyond reasonable doubt. Even if agreement could be proved, however, it is unlikely that the subject of that agreement would attract liability. *R v Clark (Mark)*[116] held that because a positive act is necessary for conspiracy to defeat justice, an omission to disclose information to police does not suffice. On that basis, the Kahui family would not have been liable under section 116.

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[110] This will be discussed further in Chapter Three in relation to exceptions to the right to silence.
[111] The relevant words of the provision are "obstruct", "prevent" and "defeat".
Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 227.
[112] The relevant part of the provision is "pervert": *R v Guess* (2000) 148 CCC (3d) 321 (BC CA).
Robertson, J. Bruce (ed) (2005) *Adams on Criminal Law*, Brookers, Wellington, p 227.
[113] *R v Kane* [1967] NZLR 60 (CA).
[114] *R v Gemmell* [1985] 2 NZLR 740.
[115] "Family Accused of Stonewalling Inquiry", 23 June 2006, Available:
http://tvnz.co.nz/view/page/423466/764093.
[116] [2003] 2 Cr App R 363.

(b.) Attempting to Pervert the Course of Justice

The offence set out in section 117(e) of the Crimes Act 1961 is aimed at similar behaviour to section 116, but liability is on an individual basis. Hence, agreement is not required. It need not be one's own liability that one is seeking to avoid.[117] So individual family members trying to prevent other family members being prosecuted could be covered by section 117(e).

Once again it is unlikely that the Kahuis could have been prosecuted under this section. It would be different if it was alleged that evidence had been actively tampered with or hidden. Merely refusing to speak to police, though, would probably not attract liability since individuals are entitled to exercise their legitimate rights.[118] This may include false denials of wrongdoing.[119] If people can lie to police and not be liable, remaining silent will not incur liability.

If any of the family had put pressure on other family members to remain silent, then section 117(e) of the Crimes Act 1961 may have applied. However, there was no evidence of this in the Kahui case.[120]

(c.) Accessory after the Fact

An accessory after the fact is someone who knows that an offence has been committed and who helps the offender to escape after having been arrested, or to avoid arrest or conviction.[121] The aspect most relevant here is the prohibition on tampering with or actively suppressing evidence. To be an accessory after the fact, a person must *actively* assist the offender. An omission is not enough.[122] This is reinforced by the word "actively" relating to the suppression of evidence. Tampering also has a connotation of activeness. Consequently, while giving false information to police[123] or altering, concealing, or destroying evidence[124] would be covered by section 71, the omission of the Kahuis to speak to police, without more,

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117 *Sullivan v Ministry of Fisheries* unreported, HC Christchurch, A197/00, 30 April 2001, Pankhurst J.
118 *R v Coneybear* [1966] NZLR 52 (CA), at 56.
119 *Cane v R* [1968] NZLR 787 (CA).
120 Even if there were such behaviour, it would be difficult to prove. Once again, oral evidence would probably be required to secure conviction.
121 Section 71(1) of the Crimes Act 1961.
122 *Sykes v DPP* [1962] AC 528.
123 *Morris v R* (1979) 99 DLR (3d) 420.
124 *R v Thomson* (1992) 9 CRNZ 108.

would not have made them accessories after the fact.[125] It is also necessary to prove that the accused knew, rather than merely suspected, that the person assisted was a party to the offence and that the accused acted with the specific intention of helping that person. This would be difficult to prove in a Kahui-type situation.

(d.) False Allegation or Report to Police

Section 24 of the Summary Offences Act 1981 is another tool for punishing those who hinder police investigations. However, this provision would not be appropriate in a Kahui-type situation because it is aimed at false allegations of offences, or potential offences, rather than silence in the face of police questioning.

4. Reward for disclosure

One further possibility requires consideration. Rather than punishing witnesses for staying silent, we could reward them for providing information. This is not a new concept[126] and it has been used at times by New Zealand police.[127] Still, this should probably remain a tool of occasional use rather than standard procedure in a Kahui-type situation. To solve the Kahui problem, we are trying to encourage disclosure. But somewhat perversely, the widespread use of rewards might actually have the opposite effect in that people might withhold information until a reward was offered. Thus, providing rewards for disclosure would not be an efficient or effective way of solving the Kahui problem.

CONCLUSION

In Kahui-type situations, it is clear that a crime has been committed. Nevertheless, it is not clear who has committed that crime, as several people could have been responsible. Those people choose, legally, to remain silent throughout the police investigation. A scene examination might tell police what happened, but not establish the identity of the offender.

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[125] There is no suggestion that the Kahuis gave the police false information or tampered with evidence.

[126] "It was the official practice, even as late as the first half of the nineteenth century , to "reward" witnesses for the prosecution by making payments to them if their evidence secured a conviction."
Williams, Glanville (1958) *The Proof of Guilt: a study of the English criminal trial*, Stevens, London, p 12.

[127] For example, the Police Website currently offers a $50,000 reward for information leading to the discovery of the body of Kaye Stewart (who disappeared in 2005) or for "material information or evidence which leads to the conviction of the person or persons responsible for her disappearance".
New Zealand Police "Operation Stewart –Kaye Stewart Disappearance", Police Operations Page, Available: http://www.police.govt.nz/operation/stewart/

Even if fingerprints or DNA are present, police may well be unable to obtain fingerprints or bodily samples from suspects for comparative purposes. In any case, in Kahui-type situations, such evidence may not be indicative of guilt. As a result, police struggle to identify who is responsible. Without sufficient evidence, it is not possible to lay a charge, let alone proceed to trial.

Current New Zealand law offers few solutions. Police cannot arbitrarily charge a person to obtain evidence at depositions. Moreover, it is difficult without oral evidence to prove secondary liability. Consequently, it may not be possible to simply charge all who might have been responsible. Additionally, if there is no active suppression of evidence, or agreement to do the same, there can be no liability for conspiracy to defeat justice, attempting to pervert the course of justice, or being an accessory after the fact. The offence of falsely alleging or reporting an offence would also be ineffective. Police could probably obtain an interception warrant, but the effectiveness of this investigation method is questionable. Furthermore, offering rewards for disclosure is likely to be counterproductive in the long-run.

In conclusion, New Zealand law cannot currently solve the Kahui problem. The remainder of this dissertation will explore what can and should be done about the Kahui problem. In the following chapter, I will begin this process by examining whether an abrogation of the right to silence could be justified in Kahui-type situations.

III. Justifying Change

INTRODUCTION

As will be recalled from the previous chapters, the Kahuis did not have to speak to police. This can be problematic when oral evidence is essential to a successful investigation. Addressing this problem might require some kind of abrogation of the right to silence. The first part of this chapter demonstrates that it is legitimate to *consider* limiting the right to silence. The second part argues that an abrogation of the right to silence can be *justified* in principle.

A. EXAMINING THE RIGHT TO SILENCE: IS THIS LEGITIMATE?

One would expect the "hallowed place" of the right to silence in our legal system to be justified by its pedigree.[128] However, I will demonstrate that, contrary to popular belief, the right to silence is actually relatively recent in origin. I will then illustrate that limits on so-called "fundamental" rights can be warranted and are not actually uncommon. Subsequently, I will show that the right to silence is in no way absolute. At the very least, an examination of the right to silence can be justified.

1. *Historical Perspective on the Right to Silence*

(a.) The Traditional View

According to the traditional account, the right to silence developed in the seventeenth century in response to the interrogative methods of the courts of the Star Chamber and the High Commission.[129] These bodies were abolished by statute in 1641.[130] Authors such as Wigmore

[128]Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 307.

[129] In addition to physical compulsion, the Star Chamber used the "ex officio oath" procedure, instructing accused to swear on oath to answer all the questions put to them. If the person did not swear the oath, they could be punished, for example, with contempt of court.
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, pp. 1047, 1073.

argue that, as a result, the concept of *nemo tenetur prodere seipsum* (no one shall be forced to betray himself) swept quickly into the common law system. Wigmore claimed that in the 1680s there was "no longer any doubt, in any court" about the application of the right to silence.[131] This view lead Leonard Levy to claim that the right to silence "prevailed supreme" in the seventeenth century.[132]

(b.) The Updated Theory

The downfall of the Star Chamber and High Commission did cause *nemo tenetur seipsum prodere* to come into vogue as a maxim "worthy of respect".[133] Nevertheless, in light of procedural history, the maxim could have had no *practical* effect on the common law.[134] In the seventeenth century, when the right to silence purportedly reigned, the entire criminal system was actually designed to encourage the accused to testify rather than to protect his silence. I will discuss four aspects of criminal procedure that put pressure on the accused to speak. These features contradict any claim of a right to silence in the seventeenth century.

(i.) Pre-Trial Procedure

That the right to silence did not exist until relatively recently is demonstrated by the inquisitorial nature of the pre-trial system in the sixteenth, seventeenth, and eighteenth

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130 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1075.

131 Wigmore, John Henry (1961) *Evidence in Trials at Common Law*, 8th Revised Ed, John McNaughton, 2250, at 290.
Cited in: Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1078.

132 However, while Wigmore allowed himself doubt about the extent to which the right to silence was accepted, his successor, Leonard Levy, demonstrated no such restraint.
Levy, Leonard W. (1968) *Origins of the Fifth Amendment: The Right Against Self-Incrimination*, Oxford University Press, New York, p 325.
Cited in: Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, pp. 1059, 1083.

133 It is also true that prior to the downfall of those courts, the common law courts issued writs of prohibition against some of the ex officio oath procedures. Nevertheless, this prohibition was often to defend their jurisdictional territory rather than on the basis of principle.
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, pp. 1073, 1081.

134 Langbein writes that, "The ancestry of the privilege has been mistakenly projected backwards upon the slogan." When the nature of the criminal process is examined, it is clear that the slogan did not make the right to silence. Instead, it is the right to silence which later absorbed the slogan.
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1083.

centuries.[135] The so-called "Marion pre-trial procedure" was intended to make people talk.[136] It was expected that questions would be answered. Failure to answer questions would be reported at trial.[137] There was certainly no notion that people should be advised that they did not have to say anything.[138] Thus, even Levy had to admit that, "For all practical purposes, the right against self-incrimination scarcely existed in the pre-trial stages of a criminal proceeding."[139]

(ii.) The Right to Silence at Trial

The right to silence was not recognised at trial either. Common law trials can be classified into two types: "the accused speaks" procedure and the "testing the prosecution" procedure.[140] In "the accused speaks" trials, the accused was not protected by a right to remain silent. Instead, the whole purpose of this kind of trial was to induce the accused to address the charges personally.[141] In the seventeenth century, "the accused speaks" trials were still the norm.[142] It was thought then that making the accused speak made for a better indication of guilt or innocence.[143]

135Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1062.

136 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1061.

137 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1061.

138 Morgan, E.M. (1949) "The Privilege Against Self-Incrimination", *Minnesota Law Review*, vol. 34, no. 1., p 14 & note 57.
Cited in: Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1061.

139 Levy, Leonard W. (1968) *Origins of the Fifth Amendment: The Right Against Self-Incrimination*, Oxford University Press, New York.
Cited in: Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1062.

140 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1048.

141 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1047.

142 "Accused speaks" type trials were well established in the 1550s, when evidence about trials becomes available.
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1049.

143 As described by a commentator of the time, Serjeant William Hawkins, "it requires no manner of Skill to make a plain and honest Defence, which in Cases of this Kind is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own." In contrast, Hawkins believed that, "the very Speech. Gesture and Countenance, and Manner of Defence of those who are Guilty, when they speak for themselves may often help to disclose the Truth which probably would not so well be discovered from the artificial Defense of others speaking for them." The dominance of capital punishment also reinforced the importance of testimony. Because the judge and jury could commute capital sentences, the accused had to participate in the trial to gain the court's sympathy.
Hawkins, William (1721) *A Treatise of the Pleas of the Crown*, vol. 2, London.

One of the main features of "accused speaks" trials was the absence of lawyers. Until the middle of the eighteenth century, defence counsel were excluded from felony trials.[144] As a result, accused could not remain silent. They had to speak for themselves.[145] As John Beattie observed, "If they [the accused] did not or could not defend themselves, no one would do it for them."[146] Refusing to speak would have meant a forfeiture of any defence.[147]

Access to defence witnesses was also limited.[148] Given that other evidence could not easily be called, the accused had to put his case himself.[149] The pressure on the accused to speak was also reinforced by uncertainty in the standard of proof.[150] Proof "beyond reasonable doubt" was not definitively established until the 1790s. Until then, the accused could not rely on the prosecution having to prove the charge. Instead, he had to play an active role in showing that the prosecution was wrong.[151]

Cited in: Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, pp. 1053, 1064.

144 This means that people facing charges of serious offences such as murder, rape, larceny and arson could not be represented by a lawyer. Purportedly, so the dogma went, defence lawyers were not necessary as the court was an advocate for the accused. However, several high profile cases illustrate that judges were not always reliable advocates. It cannot have helped that until 1701 judges held office at the pleasure of the monarch. This was amended by the Act of Settlement 1701.
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1050.

145 In order to be able to use the right of silence effectively, you have to have someone to speak for you: you have to be able to defend the case by proxy. Langbein puts it bluntly. According to that author, "The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that accused did not hasten to avail themselves of such a privilege."
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, pp. 1048, 1054.

146 Beattie, John M. (1991) "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", *Law and History Review*, vol. 9, no. 2, p 223.

147 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1048.

148 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1055.

149 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1055.

150 Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1054.

151 As observed by Beattie of the 18th century, "if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond a reasonable doubt, but that if he *were* innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor's evidence. That put emphasis on the prisoner's active role. He was very much in the position of having to prove that the prosecutor was mistaken."
Beattie, J. M. (1986) *Crime and the Courts in England, 1660- 1800*, Clarendon, Oxford, pp. 341, 349.
Cited in: Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1057.

These procedural factors meant that an accused could not remain silent before or during the trial. The accused had only "one practical means of defence": responding to the charges himself.[152] Therefore, it is wrong to assert that there was a right to silence in the eighteenth century.

(iii.) The Development of the Right to Silence

From the middle of the eighteenth century, however, restrictions on defence counsel eased.[153] Nevertheless, the right of the felon to be fully represented by a lawyer at trial did not come until 1836.[154] One consequence of the increased involvement of counsel was that the accused no longer had to answer the case personally. Accordingly, "the privilege against self-incrimination at common law was the work of defense counsel".[155]

Changes to the pre-trial process came somewhat later. The Sir John Jervis' Act of 1848 finally made statutory provision for cautioning those being questioned in criminal investigations.[156] Nevertheless, this Act did not provide "absolute protection".[157] In fact, pre-trial standards

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[152] Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1057.

[153] Nevertheless, there was still pressure on the accused to speak for himself, and the process was still designed to gain the accused's testimony. Although defence counsel were allowed to examine and cross examine witnesses, they were prohibited from "addressing the jury" until legislation in 1836. In the same way that when judges acted as advocates for the accused they routinely only dealt with matters of law, defence counsel were allowed to address matters of law but not fact. For example, in one case the judge commented to the accused, "Your counsel knows his duty very well, they may indeed speak for you in any matter of law that may arise on your trial, but cannot as to matter of fact, for you must manage your defense in the best manner you can yourself." : Derby, Surrey Assize Proceedings (Lent 1752), at 2-11.
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1054.

[154] Prisoner's Counsel Act 1836, 6 & 7 Will. 4, ch. 114 ("An Act for enabling Persons indicted of Felony to make their Defense by Counsel or Attorney").
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1054.

[155] Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1047.

[156] Prior to this time, judges did recognise cautions. Nevertheless, this recognition was not consistent. Case law shows that judges were prepared to admit statements made without a police caution, even when the accused faced the death penalty.
Farrar, S.A. (2001) "Myths and Legends: An Examination of the Historical Role of the Accused in Traditional Legal Scholarship; a Look at the 19th Century", *Oxford Journal of Legal Studies*, vol. 21, no. 2, p 339.

[157] It seems that cautions were used to facilitate rather than limit police questioning. Firstly, the legislation seems more like guidance to the magistrate than a binding legal requirement; the legislation did not set out exact words of caution to be used. Moreover, there was no general power to exclude evidence when there was no caution; even if the person being questioned was not cautioned, their statement could be admitted unless preceded by a threat or promise. Thus, it appears that the object of the legislation was really to protect the magistrate rather than the person being questioned. This view is supported by Parliamentary debates on the legislation.
Farrar, S.A. (2001) "Myths and Legends: An Examination of the Historical Role of the Accused in Traditional Legal Scholarship; a Look at the 19th Century", *Oxford Journal of Legal Studies*, vol. 21, no. 2, pp. 339, 340.

remained unsettled until the early part of the twentieth century. To dispel the confusion, the Judges' Rules were created in 1912 by the judges of the Queen's Bench Division.[158]

As we have seen, the right to silence we know today is a relatively modern phenomenon. Moreover, it was not created to fill some pressing need in the legal system. Rather than arising out of constitutional revolution, the right to silence had a much more practical origin, growing out of the rise of adversary criminal procedure at the end of the eighteenth century. Thus, even if it were true that legal principles may be protected from change because of their ancient status or the historical reason for their creation, this protection cannot shield the right to silence.[159]

2. Limitations on fundamental rights

Just as it is commonly thought that longstanding rights should be left well alone, some would raise questions over the validity of questioning such a "fundamental" right as the right to silence. Intuitively, and unsurprisingly, we tend to cling to those ideas that seem significant to us. Nevertheless, just because a right *seems* important, this does not mean it can never be open to scrutiny.

Things change quickly in criminal law, and rights are continually being limited. A prime example is the Criminal Procedure Bill currently before Parliament. This Bill proposes some radical changes to the way criminal trials are run in New Zealand. For example, jury trials are to be limited and preliminary hearings are to be largely abolished.

One part of the Criminal Procedure Bill that particularly parallels the present discussion is the "Moore exception" to the double jeopardy rule. As a consequence of the case of Kevin Moore,[160] who was acquitted of murder after intimidating a witness, the Criminal Procedure

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158 The Rules were established in response to a request from the Home Secretary after inquiries from the police as the correct treatment of people in pre-trial investigations. Four Rules were created in 1912 and another five in 1918. In 1930, an explanatory note was issued by the Queen's Bench judges to clear up issues of ambiguity surrounding the rules. The Rules were later adopted for use by New Zealand courts: *R v Convery* [1968] NZLR 426 (CA).
St. Johnston, T. E. (1966) "The Judges' Rules and Police Interrogation in England Today", *The Journal of Criminal Law, Criminology, and Police Science*, vol. 57, no. 1. P 85-92. P 85.

159 As Dean Wigmore observed, "I think that the history of the privilege shows us that in deciding these questions we may discard any sanction which its age would naturally carry."
Wigmore, J.H. (1891-92) "Nemo tenetur seipsum prodere", *Harvard Law Review*, vol. 5, no. 72, p 85.

160 In *R v Moore* unreported, HC Palmerston North, T 31/99, 3 August 1999, Doogue J, Kevin Moore was convicted of conspiring to pervert the course of justice. Moore appealed his sentence but the appeal was dismissed: *R v Moore* unreported, Court of Appeal, CA 399/99, 23 November 1999, Richardson P, Heron J, Robertson J.

Bill seeks to limit the rule against double jeopardy. Like the right to silence, the right not to stand trial twice for the same offence is a right that has been perceived as vital to our legal system.[161]

Similar policy considerations underscore both the Moore exception to double jeopardy and potential limits on the right to silence in Kahui-type situations. Moore's action, and the Kahui family's deliberate inaction, both created a potential barrier to prosecution or conviction through the concealment of relevant evidence. In both situations, therefore, the law must find a balance between the rights of the accused and the ability to investigate and prosecute efficiently and successfully. These policy considerations will be considered shortly.

That this "fundamental right" has been addressed and adjusted by the Moore exception demonstrates that so called "tenets" of our legal system can be challenged and reformed, should they no longer serve the interests of justice. Moreover, the "fundamental nature" of the right to silence has not, thus far, been a barrier to limiting the right to silence. I will now discuss the ways in which the right to silence has already been restricted.

3. Exceptions to the Right to Silence

The right to silence is not absolute.[162] It is already subject to a large number of exceptions and limitations.[163] Many statutory provisions require people to provide information to officials. Some require a person to give officials their personal details[164] while others go much further. A number of bodies can procure information from citizens in a broad range of matters.[165] Additionally, citizens can be subject to reporting duties.[166]

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161 Dyhrberg, Marie (2001) "Double Jeopardy: In Jeopardy", *New Zealand Lawyer*, Iss. 14, pp. 14-15.

162 As the New Zealand Law Commission observed in 1992, "The right to silence is at best a qualified right". New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, p 11.

163 In *R v Director of Serious Fraud Office ex p Smith* [1992] 3 WLR 66 (HL) at 83, Lord Mustill observed that, "statutory interference with the right is almost as old as the right itself".

164 Some examples of this type of provision are: sections 114 (3)(b)(i), (ii), (iii) of the Land Transport Act 1998; section 317AA(1)(a) of the Crimes Act 1961; section 22 of the Resource Management Act 1991; section 176 of the Sale of Liquor Act 1989; section 26ZZR of the Conservation Act 1987; section 19 of the Dog Control Act 1996; section 18 of the Food Act 1981.

165 For example, sections 165 and 177 of the Insolvency Act 2006 require bankrupts and others to answer all questions about the bankrupt's "conduct, dealings and property". Other examples are: section 125AD of the Immigration Act 1987 (Person to whom section 125AA applies must provide further information if requested, and must provide access to further information); sections 5(1)(b) and 9 of the Serious Fraud Office Act 1990 (Power to require production of documents, Power to require attendance before Director, production of documents, etc); sections 41 and 45 of the Sports Anti-Doping Act 2006 (Witness summons, Non-attendance or refusal to cooperate); section 51 of the Charities Act 2005 (Duty to assist); section 98 of the Commerce Act 1986 (Commission may require person to supply information or documents or give evidence); section 261 of the

The imposition of duties to report and to answer questions is mostly limited to the regulatory context.[167] Elsewhere, however, the right to silence is not immune from restriction. To begin with, the right to silence of witnesses in criminal trials is significantly restricted.[168] Generally, witnesses can be compelled to give evidence at trial.[169] If a witness refuses to answer questions they can be held in contempt of court. Nevertheless, the corollary is that a witness in a trial may claim the privilege against self-incrimination.[170]

The accused cannot be forced to testify at trial.[171] To be absolute, though, the right to silence would have to result in no adverse consequences for the accused. Nevertheless, in some circumstances, judges can comment on the failure to testify[172] and can place evidential weight on the decision of an accused not to testify.[173] Not testifying can also have adverse

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Companies Act 1993 (Power to obtain documents and information); sections 145, 145A and 146 of the Customs and Excise Act 1996 (Questioning persons [about goods and debt], Questioning persons about identity, address, travel movements and entitlement, and other matters, Questioning employees of airlines, shipping companies, owners or operators of certain vehicles, etc); section 19 of the Environment Act 1986 (Power to obtain information); section 47G of the Fair Trading Act 1986 (Commission may require person to supply information or documents); section 201 of the Fisheries Act 1996 (Power to question persons and require production of documents); sections 333 and 334 of the Gambling Act 2003 (Power of gambling inspector to require information or documents, Power of gambling inspector to enter and demand information).

166 For example: section 7 of the Fencing of Swimming Pools Act 1987 (Notification of existence of pool to territorial authority); sections 82, 90 and 93 of the Electoral Act 1993 (Compulsory registration of electors, Changes of address to be notified, Notification of marriages); section 5 of the Cancer Registry Act 1993 (Reporting of cancer), sections67, 139, 143, 144, 145 and 146 of the Insolvency Act 2006 (Bankrupt must file statement of affairs with Assignee, Bankrupt must disclose property acquired before discharge, Bankrupt must give Assignee information relating to property, Bankrupt must give Assignee information relating to income and expenditure, Bankrupt must notify Assignee of change in personal information, Bankrupt must give Assignee financial information); sections 44 and 46 of the Biosecurity Act 1993 (General duty to inform, Duty to report notifiable organisms).

167 New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, p 3.

168 The new Evidence Act restricts the right to silence of witnesses still further by removing the limits on spousal testimony. Section 5(1) of the 1908 Act provided that, "Except as provided by or under this or any other Act, neither the person charged with any offence *nor that person's spouse* shall be a competent or compellable witness for the prosecution or defence in any proceeding in connection with the offence."[Emphasis added] The comparable provision in the 2006 Act, section 73(1), provides that, "A defendant in a criminal proceeding is not a compellable witness for the prosecution or the defence in that proceeding."

169 Section 71(1) of the Evidence Act 2006 provides that "any person" is eligible to give evidence and section 71(2) states that a person who is eligible to give evidence can be compelled to do so.

170: Section 60 (1)(a)(i) of the Evidence Act 2006.

171 Section 25(d) of the New Zealand Bill Of Rights Act 1990; section 73(1) of the Evidence Act 2006. Nor can an accused incur a penalty for remaining silent prior to trial: section 32 of the Evidence Act 2006.

172 For example, there might be strong comment where an accused has been granted leave to cross examine a complainant as to credit but they do not themselves give evidence where they might be expected to do so. Comment might also be appropriate where the accused has not given evidence after having relied on an exculpatory statement, after having suggested that someone else was responsible for the offence, or after having put factual allegations to prosecution witnesses: *R v McRae* (1993) 10 CRNZ 61 (CA). Comment might also be made where co-accused blame each other but neither testifies on oath: *R v Dacombe* unreported, Court of Appeal, CA276/99 277/99, 23 November 1999, Anderson J.

173 The leading case in this area is *Trompert v Police* [1985] 1 NZLR 357. In that case, the Court of Appeal held that, "in summary proceedings where a prima facie case has been established, the failure of an accused to give an explanation when he might naturally be expected to do so may be taken into account in determining the weight

consequences on appeal.[174] These factors demonstrate that the accused's right to silence at trial is not absolute.[175]

Another limit on the right of silence in the criminal law is the doctrine of recent possession. A person found with recently stolen goods can be convicted of theft or receiving if they fail to provide an innocent explanation which might reasonably be true. To defend the charge, an accused must effectively forfeit the right to silence.[176]

As we have seen, the right to silence is limited in a range of ways. Existing limits on the right to silence do not automatically justify additional limits. The policy reasons for new limits should always be examined on their merits.[177] Besides, existing statutory limits on the right to silence should not be overstated. In almost all cases, persons answering questions who might be in danger of self-incrimination are able to exercise the privilege against self-incrimination.[178] No mention of the privilege against self-incrimination occurs when the scheme simply requires personal details to be given,[179] or does not relate to incriminatory material.[180] The schemes that do explicitly exclude the privilege against self-incrimination usually prohibit the use of the information against the person in other proceedings.[181]

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to be given to the evidence". This case has been followed consistently and was reaffirmed recently in *R v Haig* (2006) 22 CRNZ 814 at paragraph 101.

174 When deciding whether a jury's verdict was "unreasonable or cannot be supported having regard to the evidence", an appeal court can take into account the lack of testimony from the accused: *R v Mareo* (No. 3) [1946] NZLR 660 (CA) at 674-677; section 385 (1) (a) of the Crimes Act 1961. A similar situation can occur when on a summary conviction general appeal to the High Court: *McBurney v MOT* (1989) 5 CRNZ 384.

175 There are also non-legal consequences of remaining silent. In reality, there is nothing to stop juries putting as much weight as they like on the silence of the accused: *R v McCarthy* [1992] 2 NZLR 550.

176 This is done in order to discourage the accused from remaining silent before or during trial. The doctrine of recent possession is not altered by the enactment of the New Zealand Bill of Rights Act: *R v Clarke* unreported, Court of Appeal, CA417/93, 16 December 1993, Gallen J.

177 New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, p 15.

178 Section 44 of the Sports Anti-Doping Act 2006; section 51(2) of the Charities Act 2005; sections 145A(5), 146(5) of the Customs and Excise Act 1996, section 47G(2) of the Fair Trading Act 1986; sections 333(3) and 334(5) of the Gambling Act 2003; section 19 of the Environment Act 1986; section 216 of the Fisheries Act 1996.

179 There is no mention of the privilege of self incrimination in relation to: sections 114 (3)(b)(i), (ii), (iii) of the Land Transport Act 1998; section 317AA(1)(a) of the Crimes Act 1961; section 22 of the Resource Management Act 1991; section 176 of the Sale of Liquor Act 1989; section 26ZZR of the Conservation Act 1987; section 19 of the Dog Control Act 1996; or section 18 of the Food Act 1981.

180 Having to answer questions under the following provisions is unlikely to involve the possibility of self-incrimination: section 7 of the Fencing of Swimming Pools Act 1987 (Notification of existence of pool to territorial authority); sections 82, 90 and 93 of the Electoral Act 1993 (Compulsory registration of electors, Changes of address to be notified, Notification of marriages); section 5 of the Cancer Registry Act 1993 (Reporting of cancer); sections 44 and 46 of the Biosecurity Act 1993 (General duty to inform, Duty to report notifiable organisms.

181 Sections 184 and 185 of the Insolvency Act 2006; sections 27 and 28 of the Serious Fraud Office Act 1990; section 267 of the Companies Act 1993. The limit on use of the information does not apply if the person is prosecuted for perjury. The only provision that excludes the privilege against self-incrimination but does not

While the limits on the right to silence may not be as extensive as they first seem, the fact that the legislature and the courts have already seen fit to limit the right to silence undermines the view that the right to silence is somehow untouchable simply because of its place in our legal system. It allows us, therefore, to examine the merits or otherwise of limiting the right to silence.

B. ABROGATING THE RIGHT TO SILENCE: IS THIS LEGITIMATE?

As demonstrated above, the relatively recent origins of the right to silence, other changes in the criminal law, and existing limits on the right to silence, mean that the right to silence cannot be immune from scrutiny. In this part I will discuss whether the right to silence should in fact be abrogated to deal with Kahui-type situations.

1. Limited Support of the Right to Silence

When evaluating the value of a particular right, the real scope of the right (as opposed to its symbolic incorporation) should be considered. On undertaking this examination, it soon becomes apparent that despite emphasising the importance of the right to silence, the criminal system does not really support the right. Even when a person apparently has a right to silence, the criminal system does not facilitate the exercise of that right.[182] The caution before questioning is supposed to protect the right to silence but the wording of the caution does not truly encourage the exercise of the right.[183] Moreover, police can continue questioning a person even after the person has claimed the right to silence.[184] This can put pressure on the person to answer police questions and can undermine the right to silence. Furthermore, the

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contain this corollary is section 145 of the Customs and Excise Act 1996. This might be explained by the fact that the penalty is a maximum of $1000 for an individual. The Insolvency Act, Serious Fraud Office Act and Companies Act penalties all include imprisonment.

[182] Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 305.

[183] As Justice Thomas observed, "If the right was regarded seriously, the warning would first advise suspects that they could not be questioned without their consent, and then ask them whether or not they agree to be questioned. It is, of course, just because such a formula would be more effective in conveying the right to remain silent that it is unacceptable."
Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 305.

[184] *R v Wallace* unreported, Court of Appeal, CA191/07, 29 June 2007, Hammond, Randerson, Williams JJ.

courts recognise the right to silence "with less than wholehearted commitment."[185] Many decisions "decline to crimp the police's powers of investigation."[186] The incorporation of a balancing test for exclusion of evidence in section 30 of the Evidence Act 2006 recognises that a breach of rules relating to the right to silence may be overridden by other considerations. So, it seems that, in practice, our attachment to the right to silence is more talk than action.

On the face of it, there seems little value in upholding such a "crippled and slighted"[187] right. It must then be considered whether there are valid reasons to maintain our attachment to the right to silence. I will examine the claims that the right to silence is an important protective mechanism, that it upholds vital constitutional principles, and that it helps to create a free society.

2. The Right to Silence: A Protective Mechanism?

It is sometimes argued that the right to silence is necessary to protect the vulnerable and to control police behaviour. If we did not have the right to silence, it is contended, the weak would be at the mercy of the police, and the police could question without limit. If it were true that the right to silence had any bearing upon these matters, arguing for its abrogation might be more problematic. In practice, however, the right to silence does not fulfil these protective functions.

To begin with, it tends to be experienced criminals who remain silent.[188] "The compliant, the weak and the impulsive",[189] on the other hand, usually answer police questions, despite the right to silence. Thus, if protecting the vulnerable means shielding them from answering police questions, then the right to silence does not provide effective protection for such persons.

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185 Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 306.
186 Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 306.
187 Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 307.
188 Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 301;
Cumming, Geoff "Under the Cover of Silence", *Weekend Herald*, 8 September 2007, p B4.
189 Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 304.

Moreover, the right to silence does not address police behaviour. The two main concerns people tend to have about police behaviour are the manufacturing of oral evidence (verballing), and unacceptable interrogation techniques. It is thought that, "If you believed that violence or verballing were sometimes or often used by the police it would be most unlikely that you would agree to any alteration to the right to silence."[190]

On the other hand, to expect that the right to silence will remedy police misbehaviour is to bark up the wrong tree. The right to silence simply means that people being questioned by police do not have to answer questions. It certainly cannot stop police making up statements. The right to silence itself also has nothing to say about what kind of questioning techniques are appropriate. Controlling the way police question people requires direct action. Clear protocols and rules about questioning, the presence of lawyers, and videotaping interviews could be effective means of controlling police misbehaviour. But the right to silence is not.

3. The Right to Silence: Upholding Vital Constitutional Principles?

The second type of argument for the right to silence is that it upholds important constitutional principles. In particular, it is thought that the right to silence protects the right not to incriminate oneself and the right to have the prosecution prove the charge.[191] It will emerge, however, that in the context of this discussion, limiting the right to silence would not adversely affect these constitutional principles.

(a.) Self-Incrimination

It is thought that the right not to incriminate oneself "traditionally safeguarded citizens from coercive and arbitrary powers of the State".[192] However, the principle of self-incrimination is not so affected in the context of this discussion. This dissertation is primarily focussed on the

[190] Williamson, Tom (1994) "Reflections on Current Police Practice", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 108.
[191] Leng, Roger (1994) "The Right to Silence Debate", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 18.
[192] Morgan, David & Stephenson, Geoffrey (1994) "Introduction: the Right to Silence in Criminal Investigations", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 7.

ability of police to get *witnesses* to make statements. Because we are dealing with witnesses, rather than suspects, there is not the danger of *self*-incrimination.[193]

In any case, the strength of the self-incrimination argument is questionable. It is not clear that the principle of non self-incrimination is really valued in our system. As Justice Thomas has observed, "There is not at present anything remotely approaching a principle that a suspect may not be a source of evidence."[194] In some ways, compelling suspects to provide DNA samples or fingerprints is a form of self-incrimination. While the evidence does not come from the suspect's lips, it still comes from the suspect. Yet we consider it perfectly acceptable when DNA or fingerprint evidence is used to convict. It is also dubious whether there is any special harm done to those who incriminate themselves through a statement to police. As Bentham argued, if a person gives evidence against themselves and punishment ensues, then the only harm done to that person is the punishment.[195]

Moreover, with DNA samples and fingerprinting, we literally compel the suspect to incriminate themselves. Creating consequences for remaining silent would not go so far. While the person being questioned might be induced to speak by the knowledge of adverse consequences, they still cannot be *compelled* to orally incriminate themselves.

(b.) Burden of Proof

A guiding principle of our criminal system is that it is better that "ten guilty persons escape, than that one innocent suffer."[196] One of the ways we uphold this principle is through the notion that a person is innocent until proven guilty.[197] A practical application of the presumption of innocence is the burden of proof beyond reasonable doubt which lies with the prosecution. Where the right to silence is limited in an evidentiary manner (where evidence of silence can be admitted as evidence at trial), it is thought by some that the burden

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193 This will be discussed further in Chapter Four.
In relation to trial witnesses, see also, Covey, Russell Dean (1997) "Beating the Prisoner at Prisoner's Dilemma: The Evidentiary Value of A Witness's Refusal to Testify", *The American University Law Review*, vol. 47, no. 105, p 126.

194 Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 313.

195 Bentham, J. (1827) *Rationale of Judicial Evidence*, vol. VII, Hunt & Clarke, London, p 469. Cited in: Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 309.

196 Blackstone, Sir William, *Commentaries*, Book 4, pp. 349, 352.
Cited in: Beattie, John M. (1991) "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", *Law and History Review*, vol. 9, no. 2, p 248.

197 In *Woolmington v DPP* [1935] AC 462 at 481, Lord Sankey described the presumption of innocence as the "golden thread" running through English criminal justice.

of proof is shifted, upsetting the presumption of innocence.[198] With evidentiary limits on the right to silence also comes the difficult task of determining to what degree guilt can be inferred from silence.[199]

However, as will made clear in Chapter Four, I will not be recommending an evidentiary limit on the right to silence. I will be looking at options for punishing *the fact of silence itself*, rather than using silence to infer guilt. Thus, the burden of proof will not be affected and it will not be necessary to consider to what extent silence does amount to guilt.

4. The Right to Silence: Creating a Free Society?

The third front on which the right to silence is defended is its effect on the nature of our society. It is claimed that the right to silence upholds individual privacy and autonomy.[200] From this perspective, the right to silence is seen as "an expression of one of the fundamental decencies in the relationship we have developed between government and man..."[201]

(a.) Privacy

The first part of this argument is based on the right to silence as a protector of privacy. On the other hand, it would be very difficult to run a state effectively without imposing on citizens' privacy to some extent. We must then remember that we are already willing to accept the invasion of peoples' privacy to achieve wider goals. One cannot, for example, refuse to submit a tax return on the basis of privacy.[202] Moreover, the ability of police in a criminal investigation to search through one's intimate belongings and to take fingerprints and bodily samples must surely affect people's privacy.[203] In fact, to fully protect people's privacy, it

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[198] Morgan, David & Stephenson, Geoffrey (1994) "Introduction: the Right to Silence in Criminal Investigations", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 3.

[199] For a discussion on how far guilt can be inferred from silence, see New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, pp. 19-22.

[200] Easton, Susan (1991) *The Right to Silence*, Avebury, Aldershot..
Cited in: Morgan, David & Stephenson, Geoffrey (1994) "Introduction: the Right to Silence in Criminal Investigations", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 7.

[201] Griswald, Professor Erwin N. (1955) *The Fifth Amendment Today*, Harvard University Press, Cambridge.
Cited in: Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 314.

[202] Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 315.

[203] Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 315.

would be necessary to vastly *extend* the right to silence. Police questioning would have to be prohibited altogether.[204]

The real issue here is to what degree privacy can be impinged upon in the pursuit of criminal investigations. Galligan describes privacy as being "an expanding circle with individual personality at its centre so that the further a particular instance is from the centre the less weight it carries against competing considerations."[205] What silence proponents are really concerned about is protecting the *core* of privacy. In other words, it is thought that the right to silence protects a person's freedom of conscience.[206]

In reality, however, most criminal investigations do not touch on matters of personal conscience.[207] Even in the rare event of a freedom of conscience case, the person will not be compelled to reveal their conscience. Unlike other intrusions on privacy in criminal investigations, such as DNA sampling, fingerprinting, and surveillance, a person would still have a choice about whether or not to answer questions, even if not answering incurred a penalty. In short, limiting the right to silence in criminal investigations should not necessarily be equated with an unacceptable level of intrusion on individual privacy.[208]

(b.) Autonomy

The right to be left alone can be seen as "the most comprehensive of rights and the right most valued by civilized men."[209] On the other hand, this concept cannot be taken too far.

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[204] This is because "the investigator can never know when a question may impinge on the suspect's personal domain and thus be an invasion of his or her privacy."
Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 316.

[205] Galligan, D.J. (1988) "The Right to Silence Reconsidered", *Current Legal Problems*, vol. 41, no. 69.
Cited in: Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 316.

[206] Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 316.

[207] As Justice Thomas notes, "Neither the question nor the answer as to why a suspect was in the vicinity of the burgled house at 4 o'clock in the morning represents a deep intrusion upon his or her essential privacy".
Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 316.

[208] It should be noted that there is recognition of the right to privacy in Article 8 of the European Convention and Article 17 of the International Covenant on Civil and Political Rights. However, many of the signatories of these documents do not recognise a right to silence.
Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 316.

[209] *Olmstead v United States* 277 US 438, 478 (1928), Brandeis J (dissenting).
Cited in: New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, p 23.

Society cannot function without some personal responsibility and accountability.[210] If the right to be left alone were taken to its extreme, there could be no state and anarchy would prevail.

Accordingly, the right to be protected from state interference must always be balanced with the wider interests of the community. In this case, the wider interest is the facilitation of criminal investigations. That criminal prosecutions can be undertaken successfully is necessary to effective state function. Yet, without sufficient evidence, prosecution cannot ensue. As a result, justice cannot be done and the deterrent role of the criminal process is diminished. Clearly, then, it is necessary that the police have effective investigatory powers so that relevant evidence can come before the court.[211]

Since the right to be left alone can soon turn into a right to be uncooperative, we also need to consider what kind of society we desire.[212] Should we promote the shirking of responsibility for our actions? Or is a climate of accountability preferable? After all, "[W]hat is so morally fine, having done something criminally wrong, about avoiding responsibility for one's actions?"[213] This holds even more for witnesses: why would we wish to condone people covering for others when they themselves have nothing to fear from the outcome of the criminal investigation?

In some circumstances, therefore, the right to silence could be circumscribed. Obviously, limits would be necessary and the interests of persons being questioned would need to be safeguarded. Provisions for ensuring this are set out in the next chapter.

CONCLUSION

In this chapter I have argued that the right to silence is not beyond examination. After examining the merits of the right to silence, I conclude that, in principle, the right might be abrogated in a Kahui-type situation. The following chapter explores ways in which the right

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[210] "Our very involvement in society is conditioned by duties and responsibilities which must, of necessity, bear upon the rights and freedoms which we claim."
Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 317.

[211] Ashworth, Andrew & Redmayne, Mike (2005) *The Criminal Process*, 2nd ed, Oxford University Press, New York, p 22.

[212] Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 318.

[213] Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 318.

to silence might be adjusted in response to the Kahui problem and identifies the most desirable solution.

IV. New Solutions to the Kahui Problem

INTRODUCTION

In the previous chapter, I argued that limiting the right to silence might be justified in principle in a Kahui-type situation. This chapter assesses various options for doing so. I will begin by describing why an evidentiary limit on the right to silence would not be appropriate. Subsequently, I will consider the implementation of a duty to report, provision for detention for questioning without arrest, and the creation of a duty to cooperate with police investigations.

A. POSSIBLE SOLUTIONS

1. Evidentiary Limit on the Right to Silence

Britain and Northern Ireland have limited the right to silence by allowing courts to draw an inference from pre-trial silence.[214] However, this would not solve the Kahui problem. In Kahui-type situations, we do not have firm suspects but are primarily seeking information from those who might be witnesses. Consequently, the people being questioned may never stand trial for the offence under investigation. Since only someone who will face trial can be induced to speak through the threat of an adverse inference, a repeal of section 32 of the Evidence Act 2006 and the enactment of provisions similar to those in the United Kingdom would not solve the Kahui problem. This brings me to consider the usefulness and legitimacy of some non-evidentiary limits on the right to silence.

2. Duty to Report

One possible solution to the Kahui problem would be to reinstate the common law offence of misprision of felony. A person could be liable for misprision of felony if they knew about

[214] Sections 34, 36 and 37 of the Criminal Justice and Public Order Act 1994; Sections 3, 5, and 6 of the Criminal Evidence (Northern Ireland) Order 1988.

a felony yet did not report it. This offence was brought into prominence in the 1960s in the case of *Sykes*.[215] The offence was subsequently statutorily removed in England.[216]

Misprision of felony is not an offence in New Zealand.[217] Nevertheless, New Zealand could follow the lead of some other jurisdictions by implementing a statutory duty to report crimes. This has been done in New South Wales, in the United States, and in Israel. Civil law countries sometimes have a duty to report also. France is one such country. Some countries also have more limited reporting duties, but these fall outside the present enquiry.[218]

The reason for creating the duty to report will determine the scope of the duty and the way it is structured. There are two main reasons why a duty to report might be established.[219] The first is to stop future offences or offences as they are happening. The second reason is to facilitate prosecutions. In a Kahui-type situation, the offence has already happened. So, to solve the Kahui problem, any duty to report must be based on the prosecution rather than prevention of offences. Since the duties to report in France,[220] Israel,[221] Ohio,[222]

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[215] [1962] AC 528.
In *Sykes,* misprision of felony was presented as an offence with an ancient and indisputable pedigree. Lord Denning held at 560, "In the light of this history it is plain that there is and always has been an offence of misprision of felony and that it is not obsolete. It is true that until recently it has been rarely invoked, but that is no ground for denying its existence." However, despite references to misprision of felony in the works of commentators like Bracton, Coke, and Hale, there are significant doubts as to whether the offence ever really existed in England at common law. Lord Denning equates the origins of misprision of felony with the ancient requirement "to raise hue and cry" (to shout out to all the able bodied men to join the chase for the felon). However, Glazebrook argues that this is not the origin of the offence of misprision of felony. Instead, Glazebrook contends that the prevalence of misprision of felony in the commentaries arises from a simple mistake in Staunford's "Plees Del Corone". The passage in that text provides: "Misprision: this is properly when anyone learns or knows, that another has committed treason or felony, and he does not choose to denounce him to the King, or his Council, or to any magistrate, but conceals the offense": C.38 p.37C (1557). Glazebrook argues that instead of "treason or felony", the passage should read "treason *and* felony", a common way of referring to the offence of treason. Regardless of the true state of misprision of felony, however, it is certainly not an offence in New Zealand.
Glazebrook, P.R. (1964) "Misprision of Felony – Shadow or Phantom", *The American Journal of Legal History*, vol. 8, no. 4, pp. 289,290.
[216] Section 1 of the Criminal Law Act 1967 abolishes the difference between misdemeanours and felonies. Section 5 institutes a statutory duty. However, it is only an offence under this section to fail to report information after having accepted or having agreed to accept a benefit for the failure to disclose (section 5(1)), or to make a false report of crime (section 5(2).
[217] Section 9 of the Crimes Act 1961 removes common law offences from the scope of current criminal law.
[218] For example, in Britain it is an offence not to report terrorism: section 19 of the Terrorism Act 2000.
Stretch, Dr Rachael (2005) "Duties to Report and the Proceeds Of Crime Act 2002: A Comparison With Mandatory Reporting In France", *Web Journal of Current Legal Issues*, vol 4. Available: http://webjcli.ncl.ac.uk/2005/issue4/stretch4.html, Accessed 6 August 2007.
[219] Stretch, Dr Rachael (2005) "Duties to Report and the Proceeds Of Crime Act 2002: A Comparison With Mandatory Reporting In France", *Web Journal of Current Legal Issues*, vol 4. Available: http://webjcli.ncl.ac.uk/2005/issue4/stretch4.html, Accessed 6 August 2007.
[220] France has had a duty to report serious offences since 1941. This is contained in Article 434-1 of the Penal Code. However, the "identification and prosecution of those responsible is clearly excluded" from this provision.

Massachusetts,[223] and Washington[224] are all aimed at the prevention of crime rather than the facilitation of prosecutions, these jurisdictions do not provide an appropriate model for New Zealand.

Moreover, in a Kahui-type situation, the offence of non-reporting would need to include a mere failure to act.[225] Although in the United States the Federal Criminal Code contains a duty to report,[226] the Federal courts have consistently held that mere failure to report is insufficient – active concealment is required.[227] Such a duty would not address the Kahui problem.

Stretch, Dr Rachael (2005) "Duties to Report and the Proceeds Of Crime Act 2002: A Comparison With Mandatory Reporting In France", *Web Journal of Current Legal Issues*, vol 4. Available: http://webjcli.ncl.ac.uk/2005/issue4/stretch4.html, Accessed 6 August 2007.

221 Section 262 of Israel's Penal Law 1977 is not limited to notification of crimes, but notification is included. The provision states: "262 Failure to prevent a felony - A person who, knowing that a person designs to commit a felony, fails to use all reasonable means to prevent the commission or completion thereof is liable to imprisonment for two years."
Gur-Arye, Miriam (2001) "A Failure to Prevent Crime--Should it be Criminal?", *Criminal Justice Ethics*, vol. 20, no. 2.

222 Ohio Rev. Code. Ann. [section] 2921.22(A) provides: "No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities."
Wenik, Jack (1985) "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime", *The Yale Law Journal*, vol. 94, no. 7, p 1792.

223 Mass. Gen. Laws Ann. ch. 268, 5 40 (West Supp. 1985) provides: "Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars."
Wenik, Jack (1985) "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime", *The Yale Law Journal*, vol. 94, no. 7, p 1792.

224 Wash. Rev. Code Ann. 8 9.69.100 (1977) provides: "Whoever, having witnessed the actual commission of a felony involving violence or threat of violence or having witnessed preparations for the commission of a felony involving violence or threat of violence, does not as soon as reasonably possible make known his knowledge of such to the prosecuting attorney, police, or other public officials of the state of Washington having jurisdiction over the matter, shall be guilty of a gross misdemeanor: Pro*vided,* That nothing in this act shall be so construed to affect existing privileged relationships as provided by law."[emphasis in original]
Wenik, Jack (1985) "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime", *The Yale Law Journal*, vol. 94, no. 7, p 1792.

225 As we saw in Chapter Two, an active effort to conceal an offence can be addressed by sections 116, 117, or 71 of the Crimes Act 1961. In a Kahui-type situation, however, the omission to speak to police, without more, would not incur liability under these provisions.

226 18 U.S.C. 5 4 (1982) provides that: "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both."
Wenik, Jack (1985) "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime", *The Yale Law Journal*, vol. 94, no. 7, p 1792.

227 The way this provision is interpreted makes it much more like New Zealand's accessory after the fact offence than misprision of felony. For example, see, *United States v. Baez*, 732 F.2d 780, 782 (10th Cir. 1984); *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983); *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977).
Wenik, Jack (1985) "Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime", *The Yale Law Journal*, vol. 94, no. 7, p 1792.

(a.) Possible Provision

Of the jurisdictions identified above, only the New South Wales provision might address the Kahui problem.[228] Section 316(1) of the Crimes Act 1900 (NSW), essentially a statutory form of misprision of felony, provides:

> If a person has committed a serious offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

If a similar provision were enacted in New Zealand, we would need to consider carefully how much knowledge would be necessary for liability, what type of information must be disclosed,[229] and what type of offences should be reported.[230] These considerations are unnecessary here, however, as I do not recommend the enactment of a duty to report.

Firstly, a duty to report is unlikely to be the most effective way of dealing with Kahui-type situations. On the face of it, a duty to report informs police that a crime has been committed; it does not facilitate the gathering of information once a crime comes to light. In New South Wales, police have used section 316(1) to encourage cooperation once it is known that a crime has been committed.[231] Nevertheless, this may amount to little more than an idle threat because of the difficulty in achieving a successful prosecution. Liability requires proof of the relevant type of knowledge. Yet, in a Kahui-type situation where you do not know what they

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[228] In 1990, New South Wales enacted a package of public justice offences. The purpose of the package was to create a "comprehensive statement of the law" of public justice offences which had been "fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties".
New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 May 1990, the Hon JRA Dowd, Attorney General, Second Reading Speech at 3692.
Cited in: Law Reform Commission New South Wales (1999 *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report 93, Available: http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r93chp1.

[229] For example, if the duty to report were to be used as a solution to the Kahui problem, the identity of the offender would need to be disclosed.

[230] After all, "if a man is to be punished for not doing something, he ought to know precisely what is expected of him."
Glazebrook, P.R. (1962) "How Long, Then, Is the Arm of the Law to Be?: Sykes v. Director of Public Prosecutions Considered", *The Modern Law Review*, vol. 25, no. 3, p 316.

[231] The use of a charge under this provision as a threat has been criticised as improper by the New South Wales Law Reform Commission.
Law Reform Commission New South Wales (1999 *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report 93, Available: http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r93chp1.

know, the very problem is that you *want* to know what they know. Once people become aware of this prosecuting difficulty, the duty to report loses its ability to encourage disclosure.

Not only may this measure be ineffective, but it is also probably too wide a solution to a fairly narrow problem. In a Kahui-type situation, the people that should be targeted are those closely involved with, although not of course necessarily responsible for, offences. Yet enacting a provision like section 316(1) would place *all citizens* under a duty to report. Establishing a duty to report would, therefore, be out of proportion to the problem.[232] Placing a general duty on all citizens to report crimes is a rather clumsy way of ensuring that some individuals answer police questions. Accordingly, measures that more directly target the Kahui problem should be considered.

3. Pre-Arrest Detention

To target those who remain silent, we could institute a scheme of pre-arrest detention in certain circumstances. This would not be a direct limit on the right to silence. It might, however, indirectly limit the right to silence, as the psychological effect of detention can encourage people to talk.[233]

In 1994, the New Zealand Law Commission found that extra detention powers would run the risk of allowing arbitrary detention and "unjustifiably compromise individual liberty".[234] These misgivings might be circumvented by strict criteria for the use of extra powers of detention. But in any case, I do not consider this an effective way of addressing the Kahui problem.

For a start, somebody detained under a statutory extension of police detention powers would be "detained under any enactment". As a result, section 23(4) of NZBORA would apply and the person would have to be informed of their right to silence. As discussed in Chapter One, being told of the right to silence facilitates its exercise. Yet the purpose of addressing the Kahui problem is to get people to talk, rather than to encourage them to exercise the right to silence.

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232 As the famous observation goes, "A sledgehammer should not be used to crack a nut": *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, at paragraph 18.

233Morgan, David & Stephenson, Geoffrey (1994) "Introduction: the Right to Silence in Criminal Investigations", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 4.

234 New Zealand Law Commission (1994) *Police Questioning*, Report 31, Law Commission, Wellington, p 18, paragraph 46.

Even if the detention scheme explicitly excluded the effect of section 23(4) of NZBORA, it still may not be the most successful way of solving the Kahui problem. It is unlikely to be politically feasible to implement extra detention powers without time limits on detention.[235] A limited detention period, combined with restrictions on police questioning, is very unlikely to deter those determined to stay silent. Such a person would simply need to wait out the detention period. They would then be free to go without further adverse consequences. Ordinary citizens tend already to feel morally obligated to answer police questions and would not require detention. Of those who remain silent under police questioning, detention may be an incentive for some to speak. Nonetheless, the sort of people who are determined not to cooperate with police questioning are unlikely to be compliant when all they face as a consequence of silence is a limited period of detention. In trying to solve the Kahui problem, we are targeting those who are unlikely to be awed by detention alone. It seems, then, that specific sanctions might be required to encourage cooperation with police questioning.

4. Duty to Cooperate?

The next consideration is whether the social and moral duty to cooperate with police that has been recognised by the courts[236] should be translated into a legal duty and supplemented by an offence of non-cooperation. Although this kind of measure is not widespread in the common law world, it is fairly common in civil law jurisdictions.[237] All the same, common law jurisdictions routinely penalise people during other investigatory and judicial processes for a failure to cooperate. Below I will argue that this inconsistency is unjustified.

(a.) Justification for Creating a Duty to Cooperate

In attempting to differentiate between the pre-trial and trial processes, some commentators point to the enormous pressure that people are under during police interrogations.[238] However, this pressure is not limited to the pre-trial part of the process. At trial there is little

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[235] It is becoming increasingly common in other jurisdictions to limit the length of post-arrest detention. This will be discussed in more detail later in this chapter.

[236] See, for example, *Rice v Connolly* [1966] 2 QB 414, 419.

[237] For example, Article 434-12 of the French Penal Code.
Stretch, Dr Rachael (2005) "Duties to Report and the Proceeds Of Crime Act 2002: A Comparison With Mandatory Reporting In France", *Web Journal of Current Legal Issues*, vol 4. Available: http://webjcli.ncl.ac.uk/2005/issue4/stretch4.html, Accessed 6 August 2007.

[238] Morgan, David & Stephenson, Geoffrey (1994) "Introduction: the Right to Silence in Criminal Investigations", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 4.

limit on the type of questioning allowed. Indeed, witnesses are often subject to heavy cross examination. Pre-trial, the Judges' Rules at least claim to prevent cross examination,[239] even if this prohibition is not always upheld in practice. Moreover, while the police station can certainly be intimidating, courtrooms are also daunting. Those in favour of maintaining the right to silence also argue that the court is more controlled and open to scrutiny.[240] But if the kinds of protections suggested shortly are implemented, pre-trial questioning could be subject to as much scrutiny as at trial. So far, then, there is nothing to justify treating witnesses pre-trial more leniently than at trial.

I would suggest, moreover, that witness cooperation is especially important pre-trial. The common law system is particularly trial-centred.[241] On the other hand, the outcome of the trial depends on the pre-trial investigation.[242] Without witness cooperation, even reaching trial may be unlikely.[243] Since the trial is dependant on the pre-trial process, and since citizens' residual rights can be protected with procedural rules, I contend that at least as powerful tools should be available before trial as at trial.

The inconsistency goes beyond the trial and pre-trial processes. As indicated in Chapter Three, bodies like the Serious Fraud Office and the Commerce Commission have coercive powers. Even Gambling Inspectors, Fishery Officers, and the Sports Tribunal of New Zealand can make people talk. Without overstating the extent of the limits on the right to silence in such situations, it is still the case that these investigative bodies have greater powers than the police to ensure cooperation. When we think about the relative importance of investigations, the reason for differentiation does not seem clear. For instance, sports doping investigations do not seem to warrant greater investigatory powers than murder investigations. We accept limitations on individual liberties in relatively mundane situations whereas with serious crimes where much is at stake, individual liberties seem to be put on a pedestal.

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[239] See Part Three of the Practice Note on Police Questioning issued by the Supreme Court.
New Zealand Supreme Court, Practice Note on Police Questioning, 16 July 2007.

[240] As the New Zealand Law Commission observed in relation to the trial process, "There are rules to ensure that the conduct of the trial is fair and an impartial judge to see that the rules are observed." Later, the Commission stated that, "In the controlled setting of the courtroom many of the concerns motivating recognition of the right of silence at the pre-trial stage disappear."
New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, pp. 20, 48, paragraphs 28, 96.

[241] Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1059.

[242] Langbein argues that "the trial is mostly a pageant that confirms the results of the pretrial investigation".
Langbein, John H. (1994) "The Historical Origins of the Privilege against Self-Incrimination at Common Law", *Michigan Law Review*, vol. 92, no. 5, p 1059.

[243] This issue is discussed in more detail in Chapter Two.

And much *is* at stake in the investigation and prosecution of serious crimes. Police must be able to undertake prosecutions to keep the confidence of the public. Moreover, because they pay indirectly for investigations and prosecutions, citizens have an interest in efficient policing. For instance, it is difficult to argue that the lengthy investigation hindered by the absence of witness cooperation was an efficient use of police resources in the Kahui case. The interests of wider New Zealand should not be held to ransom by a few who insist on exerting their rights in an unconstructive manner. I would argue, therefore, that there ought to be a duty to cooperate with police questioning in certain, albeit limited, circumstances.

(b.) Will it Work?

We must then consider the extent to which such a measure might encourage cooperation. In relation to evidentiary limits on the right to silence, some argue that an adverse inference might seem a risk worth taking when compared to the consequences of answering police questions.[244] On the other hand, liability for an offence of non-cooperation is a much more certain proposition and so creates more incentive to talk. An adverse inference is only effective if a trial eventuates, the likelihood of which is lessened by continued silence. Furthermore, we cannot really know what effect silence has on juries' decisions. By contrast, if a person remains silent when faced with an offence of non-cooperation, they know a prosecution could follow. The situation is also different for witnesses, the primary focus of this measure, than for an accused. A witness is not facing a trade-off between two criminal penalties. They have less to gain from, and more to lose by, staying silent.

Of course, a person could outflank the duty by lying and saying that they know nothing. If it is discovered that they lied, however, they might be charged as an accessory after the fact.[245] Clearly this is not a perfect answer because, in the first instance, it does not stop those who are really intent on lying and, ultimately, it relies on discovery of the lies. In reality, there is no fool-proof way of ensuring that everyone tells the truth all the time. Instituting a scheme that punishes for both actively (lying) and passively (staying silent) disrupting police investigations is probably the best we can do to encourage cooperation. This is how courts deal with witness testimony. If a person refuses to answer questions in court, they can be held in

[244] Zander, Michael (1994) "Abolition of the Right to Silence, 1972 – 1994", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 148.
[245] Section 71(1) of the Crimes Act 1961.

contempt of court. If, on the other hand, they lie on the stand and that lie is discovered, they may be prosecuted for perjury. By establishing an offence of non-cooperation, we create a parallel between the trial and pre-trial processes. This creates consistency between the two parts of the justice system.

Proponents of the right to silence argue that imposing a penalty for remaining silent will actually cause *more* people to lie, adversely affecting the reliability of statements.[246] However, they provide no concrete evidence for this claim. Moreover, there is an inconsistency between the approach taken to police investigations and that taken to the court and other investigatory arenas. As described above, we give coercive tools to courts and various other bodies, and generally accept the reliability of resulting statements. If citizens' residual rights are protected and the penalties for non-cooperation are similar, there seems no reason why someone would give reliable evidence in court or to the Commerce Commission but lie in the pre-trial process. In any case, statements merely provide a platform for the investigation and, even without adverse consequences for remaining silent, police must determine the reliability of statements. So in the end, police are better off with some statements, from which they can sift the truth, than without any information at all.

B. APPLYING THE DUTY TO COOPERATE

New Zealand should implement a duty to cooperate with police investigations in some circumstances. The substantive provisions of the suggested scheme are included in Appendix One. This part of the chapter summarises some important features of the proposed scheme.

1. Limits on the Duty

The application of the proposed duty should not be unlimited. Otherwise, there would be too great a restriction on citizens' liberty when measured against the scope of the problem. At the threshold, the police ought to have to apply to the court for a warrant to question someone under these new powers. The criteria for obtaining interception warrants described in

[246] "The primary risk for a suspect who is induced to speak is that the transcript which is the evidential product of the interview will not be the account that he would have given unprompted and may seriously misrepresent his position."
Leng, Roger (1994) "The Right to Silence Debate", in: Morgan, David & Stephenson, Geoffrey (eds) *Suspicion and Silence*, Blackstone Press Ltd, London, p 32.

Chapter Two provide a plausible starting point for establishing appropriate parameters.[247] Like "warrants to question", interception warrants are designed to secure evidence in investigations where other forms of evidence are unavailable.[248] Basing the warrant to question on the interception warrant provisions also ensures that the courts are familiar with the range of relevant considerations.

Accordingly, it is proposed that warrants be available only in investigations into "serious violent offences" and "specified offences" in relation to organised crime, as currently defined by section 312A of the Crimes Act 1961.[249] Since the Kahui problem tends particularly to occur in child abuse cases and in organised crime cases,[250] limiting the duty in this way would be likely to cover the contexts in which investigative difficulties arise.

In addition, the police should be required to show that the use of the extra powers is necessary in the circumstances. The police would need to demonstrate that other investigatory techniques had been tried but had failed, and that relevant evidence was likely to be obtained from a warrant.

If we believe that there is some special harm caused to people who incriminate themselves, when applying the proposed duty, we might want to differentiate between those who are believed to be actually responsible for the crime ("suspects") and those who might simply have information ("witnesses"). Nonetheless, as discussed in Chapter Three, it is not clear that special harm *is* done to those who incriminate themselves, or that the current system truly recognises a citizen's right not to incriminate themselves.[251]

Furthermore, in reality, there is no way of differentiating between those two classes of people in Kahui-type situations. Indeed, the whole difficulty with Kahui-type situations is that we do not have enough evidence to differentiate between them. So, if we are to address the Kahui problem by way of a duty to cooperate, we must accept that sometimes a person who is actually responsible for the crime under investigation might fall within the scope of the duty.

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[247] See Appendix Two for the Crimes Act provisions relating to interception warrants.
[248] Indeed in Chapter Two, the use of interception warrants in a Kahui-type situation was discussed. Interception warrants could be useful in that type of case, but where such a warrant fails to generate the necessary evidence, questioning warrants would be the next step in the investigation.
[249] See Appendix Two for section 312A of the Crimes Act 1961.
[250] This will be discussed in more detail in the concluding summary.
[251] Indeed, many of the exceptions to the right to silence discussed in Chapter Three extend to those who are themselves under investigation.

Given that the surveillance provisions are also designed to address Kahui-type situations, it is particularly useful to examine how those provisions address this issue. That scheme does not attempt to exclude suspects. Indeed, several sections are specifically aimed at suspects.[252] The fact that these provisions have been implemented, despite an inability to differentiate between "suspects" and "witnesses", supports the implementation of a duty to cooperate on the same basis.

Staying with the theme of self-incrimination, we must consider the range of questions that people would be expected to answer. In Chapter Three, I described how statutory limits on the right to silence largely preserve the privilege against self-incrimination. That might be satisfactory in court or tribunal settings, where the legitimacy of the privilege can be examined.[253] In the context of a police investigation, though, legitimacy is hard to determine. As a result, the person being questioned could simply claim the privilege in order to stay silent. This would run counter to the purpose of the proposed scheme which is to facilitate cooperation with police questions. The best way to address this issue would be to follow the Serious Fraud Office Act 1990, the Companies Act 1933 and the Insolvency Act 2006, by explicitly excluding the privilege against self-incrimination but limiting use of the information in other proceedings. This would be the best of both worlds, as it would facilitate cooperation with police questioning to address the Kahui problem but effectively protect people being disadvantaged by their disclosures (for those firmly attached to the privilege). Limiting the use of information provided would also mean that the proposed scheme is not used in a wider manner than is intended. Thus, it would maintain the focus on witnesses (or at least those who are not firm suspects) and discourage police from using scheme as a means of gaining admissible confession evidence.

Another consideration is the length of time for which a person may be interviewed. Rather than basing the interview period on considerations of reasonableness,[254] a more certain way of

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[252] For example, section 312CA (2) (c) (i) of the Crimes Act 1961 provides that applications must include "The name and address, if known *of the suspect* the interception of whose private communications there are reasonable grounds for believing will assist the Police investigation of the case or, as the case may be, prevent the commission of a serious violent offence;"[Emphasis added]
See Appendix Two for 312CA (2) (c) (i) of the Crimes Act 1961.

[253] For example, section 60(2) of the Evidence Act 2006 provides that, "A person who claims a privilege against self-incrimination in a court proceeding must offer sufficient evidence to enable the Judge to assess whether self-incrimination is reasonably likely if the person provides the required information."

[254] New Zealand, and most Australian states, base the detention period of an arrested person upon reasonableness. In New Zealand, Section 316(5) of the Crimes Act provides that, "Every person who is arrested on a charge of any offence shall be brought before a Court, as soon as possible, to be dealt with according to law." The Court of Appeal in *R v Alexander* [1989] 3 NZLR 395 held that section 316(5) creates an obligation for

dealing with this matter is to follow South Australia, Queensland, and England in establishing a fixed maximum interview time, subject to extension.[255] In those jurisdictions, initial interview periods range from four to eight hours.[256] In 1994, the New Zealand Law Commission recommended an initial period of six hours in relation to people arrested.[257] Since it does not include the time taken to get to the police station or to ensure that the protective provisions are met, an initial six hour period is also probably sufficient in the context of a duty to cooperate. Adopting a modified version of the Law Commission's proposals, the police would have the opportunity to apply to the court[258] for an extension of a further six hours.

It will be recalled from Chapter Three that the right to silence cannot protect citizens from police abuses. Instead, procedural requirements should be established to ensure protection of citizens' residual rights. This would be a compromise between individual rights and the ability of police to facilitate prosecutions in serious cases. To that end, it is proposed that all interviews under warrants to question take place at the police station and be videotaped wherever possible. Where videotaping is not possible, interviews should be audio-taped.[259] As a further requirement, people should not be questioned under these powers without reasonable opportunity to have a lawyer present.[260] These factors could ensure that police

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an arrested person to be brought before a court as soon as is reasonably possible. This does not mean that the person cannot be questioned about the offence for which the person has been arrested or about other offences. On the other hand, the arrested person should not be detained any longer than is reasonably necessary to enable him or her to be brought before a court. The High Court of Australia in *Williams v The Queen* (1986) 161 CLR 278 held that an arrested person must come before a court "without reasonable delay". Additionally, three Australian states (Victoria, Tasmania, and the Northern Territory) allow an arrested person to be detained for a "reasonable time" before being brought before the court.
New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, p 11, paragraph 27.

255 These provisions are in relation to *detention* for questioning but are a possible model for the length of time in relation to an offence of non-cooperation.

256 In South Australia, the initial period is a maximum of 4 hours: section 78 of the Summary Offences Act 1953 (SA). In England, the first review of detention must occur "not later than six hours after the detention was first authorised": section 40(3)(a) of the Police and Criminal Evidence Act. In Queensland, the initial period is a maximum of eight hours: section 403 of the Police Powers and Responsibilities Act 2000 (Queensland).

257 See Appendix Two for sections 16 and 17 of the Law Commission's draft legislation.

258 The Law Commission's model actually provides for extensions to be granted by the District Court. However, because the initial warrant to question application is to be made to the High Court, it seems more appropriate for the High Court to grant extensions of warrants to question.

259 This requirement aligns with current standards for police questioning as set out in the Supreme Court Practice Note. Part Five of the Practice Note states that, "Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing."
New Zealand Supreme Court, Practice Note on Police Questioning, 16 July 2007.

260 This is one of the requirements of the parallel scheme under the Serious Fraud Act 1990. Section 9(5) of the Serious Fraud Act 1990 provides that "Any person who is required to attend before the Director under this

questioning remains appropriate, that statements are accurately recorded, that people questioned are not placed under improper pressure, and that time limits are adhered to. The way police question people should also be circumscribed. This holds for all police questioning and, although beyond the compass of the present inquiry, the police should have more detailed and consistent guidance about questioning.

It is also suggested that, to protect those who are vulnerable by reason of age, only those over the age of seventeen be subject to this duty.[261] By the same token, the questioning of persons who are temporarily incapacitated should be delayed.[262] Those who have language difficulties or physical or mental impairments that create comprehension problems would have the opportunity to have an interpreter, an appropriate person, or technical assistance to aid their comprehension of the process and the questions.[263] All persons would also have the opportunity to contact a friend, relative, or consular officer (in the case of non-New Zealand citizens) before questioning.[264]

Where exclusion of evidence is not an appropriate remedy,[265] a breach of any of the conditions presented above could be remedied by the courts through a *Baigent*-type[266] action. Recently, the courts have also demonstrated a willingness to extend the range of other remedies available.[267]

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section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her."

[261] The protection of the Youth Justice System ends at the age of seventeen: section 2(i) of the Children, Young Persons and their Families Act 1989.

[262] It is likely that this would be required infrequently in comparison to questioning upon arrest immediately following an offence. See Appendix One for more detailed discussion on incapacitation.

[263] This is based upon section 7 of the Law Commission's draft Police (Questioning of Suspects) Act set out in the 1994 Police Questioning Report.
New Zealand Law Commission (1994) *Police Questioning*, Report 31, Law Commission, Wellington, p 41. See Appendix Two for section 7 of the Law Commission's draft legislation.

[264] This is based upon section 10 of the Law Commission's draft Police (Questioning of Suspects) Act set out in the 1994 report on Police Questioning.
New Zealand Law Commission (1994) *Police Questioning*, Report 31, Law Commission, Wellington, p 43. See Appendix Two for section 10 of the Law Commission's draft legislation.

[265] As discussed above, an exclusion of evidence would not be an appropriate remedy when the person concerned does not end up facing trial. Additionally, it is unlikely that a breach of these conditions in relation to one person could lead to an exclusion of evidence at the trial of the third party. In relation to breaches of NZBORA, the courts have been loathe to extend remedies to third parties: *R v Williams* [2007] 3 NZLR 207 at paragraph 47.

[266] *Simpson v Attorney-General* [Baigent's case] [1994] 3 NZLR 667 (CA).

[267] In *R v Williams* [2007] 3 NZLR 207 at paragraph 153, the court discussed the possibility of three further remedies: declarations of breach, referring breaches to the Police Commissioner and, "in extreme cases", referring breaches to the Police Complaints Authority.

2. Ensuring Compliance

It is necessary to have some way of ensuring that persons served with a warrant to question submit to questioning. Otherwise, a person presented with a warrant could refuse to accompany the officer or could leave during the interview. One way of preventing this would be to institute extra powers of detention, combined with an offence of non-cooperation.[268] Alternatively, a less intrusive way to achieve compliance would be to make it an offence not to submit to questioning. This means that a person could choose not to be interviewed, or to walk away from the interview, but would incur liability for doing so. This is the way compliance is governed by the Serious Fraud Office Act 1990.[269]

Sanctions for non-compliance with the duty to cooperate must then be considered. The penalty for active disruption of police investigations is a maximum of seven years' imprisonment.[270] I have already noted that prohibiting passive as well as active disruption of police investigations may encourage cooperation. To ensure this is the case, people should face a similar penalty for both types of behaviour. On the other hand, the greater seriousness of active disruption should also be recognised. To achieve a balance between these considerations, a maximum penalty of five years' imprisonment is recommended for the offence of non-cooperation.

CONCLUSION

The most effective way of addressing the Kahui problem would be to institute an offence of non-cooperation with police investigations. This would also create greater consistency between the pre-trial process, the processes of other investigative bodies, and the trial process.

The duty to cooperate with police investigations should not be unlimited. Warrants ought only be available in serious cases where police have shown that a warrant is necessary in the circumstances. Moreover, procedural rules are required to ensure that citizens' rights are protected.

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[268] This would require an explicit abrogation of section 23(4) of the New Zealand Bill of Rights Act 1990, justified through reference to section 5 of the Act.

[269] Section 45 of the Serious Fraud Office Act 1990 provides that:"Every person commits an offence, and is liable on conviction on indictment,—...who, –...(d) Without lawful justification or excuse, refuses or fails to—(i) Attend before the Director; "

[270] Under sections 116, 117, and 71(1) of the Crimes Act 1961.

CONCLUSION

The Kahui family's "stonewalling" hampered the investigation into the deaths of three month old Chris and Cru. Yet, any obligations to assist the police were moral rather than legal. The family was legally entitled not to speak with police, they were not required by law to come forward with information, and those who did agree to be interviewed were not legally required to complete their statements.

The Kahui problem occurs when a number of people could be responsible for a crime and they stay silent during the police investigation. In such cases, there may be insufficient evidence to press charges. It might not be possible to obtain fingerprints, or DNA, or other real evidence. In any case, such evidence may not be conclusive of guilt. Interception warrants might be obtained but are unlikely to be effective. As a result, information from witnesses is crucial to discovering who committed the crime. However, there are no legal tools to punish people for simply remaining silent. On the other hand, consistently using rewards to encourage disclosure would not be productive in the long-run.

Since New Zealand law does not provide an effective and consistent solution to the Kahui problem, some adjustment to the right to silence might be appropriate. Excessive attachment to the right to silence cannot be justified on the basis of history, as the right is relatively modern. Moreover, we often limit "fundamental" rights and have indeed limited the right to silence in other spheres. These factors allow us to analyse the case for retaining the right to silence in its present form.

Upon examination, arguments for retaining the right do not stand up to scrutiny. Firstly, the right to silence is not a tool with which to protect citizens from police abuses. Appeals to the right against self-incrimination and the burden of proof are equally unpersuasive. It is unclear that special harm *is* done to those who incriminate themselves, or that the current system consistently recognises the citizen's right not to incriminate themselves. In addition, the burden of proof is unaffected by non-evidentiary limits on the right to silence.

Moreover, the right to silence is not integral to a free society. Most criminal investigations will not encroach on the core of peoples' privacy or impinge on their freedom of conscience. Furthermore, we should not expect to be able to exercise rights in an absolute way, as society

cannot function without some personal responsibility and accountability. Instead, individual rights must be balanced with wider considerations. In the investigation of serious criminal offences there is much at stake, and the interests of the wider community are served by an ability to achieve successful and efficient investigations and prosecutions. Accordingly, limiting the right to silence of certain individuals in Kahui-type situations may be justified.

The creation of a duty to cooperate could be a useful response to Kahui-type situations. It is likely to encourage disclosure, but is not too wide a tool for the scope of the problem. Establishing such a duty would also provide consistency between the pre-trial process, the processes of other investigative bodies, and the trial process. Nevertheless, the application of the duty should be limited to the most serious cases where police have shown it is necessary in the circumstances. The use of information gained through warrants to question should be circumscribed. Procedural conditions would also be required to ensure that residual rights are protected.

All the same, we must consider whether the scope of the problem justifies this change. As has been observed concerning the "Moore exception" to double jeopardy,[271] we should not make wholesale changes in response to a single incident.[272] However, while the Kahui case attracted widespread publicity, it was not an isolated event. Police faced similar problems when investigating the deaths of seven-month-old Staranise Waru in February 2006,[273] and Alyssa Wilson three years ago.[274] Added to these incidents, a recent child abuse case has reached a "static" stage because of uncooperative interviewees.[275] The Kahui problem also occurs with crimes allegedly committed by gang members. This was demonstrated earlier this year with the murder of Jhia Te Tua.[276] So, although the Kahui case is the best-known example, the problem may well be wider. Whenever a number of people could be responsible for a crime, and they all stay silent, police investigations can be hamstrung if there is no other evidence.

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[271] This was discussed in Chapter Three.
[272] New Zealand Law Society, (2004) "Submissions on the Criminal Procedure Bill", p 10, Available: www.lawyers.org.nz/general/submissions/CriminalProcedureBill.pdf, Accessed 9 July 2007.
[273] "Second Baby-death Case Sparks Right to Silence Debate", 17 October 2006, Available: http://subs.nzherald.co.nz/section/story.cfm?c_id=1&objectid=10406271.
[274] In that case, the family's lack of cooperation "clearly hampered police efforts to bring a successful prosecution." While Alyssa's stepfather was charged with manslaughter, two trials ended in hung juries. Cumming, Geoff "Under the Cover of Silence", *Weekend Herald*, 8 September 2007, p B4.
[275] According to police, it is unlikely that an arrest will be made in the foreseeable future. "Baby Injury Probe Reaches Stalemate", 17 September 2007, Available: http://www.stuff.co.nz/4204935a11.html.
[276] "Murdered Toddler's Dad Jeered by Mongrel Mob", 11 June 2007, Available: http://www.stuff.co.nz/4091397a12855.html.

On the other hand, several sources suggest that police investigations are not often disrupted by people remaining silent.[277] Then again, these sources are more than a decade old and do not seem to be based on rigorous empirical examination. We, therefore, have little information about the frequency with which the Kahui problem actually occurs. Certainly, the more publicity cases like the Kahuis receive, the more people will be aware of the disruptive effect their silence can have. This may increase the frequency of resort to silence in criminal investigations to deflect prosecutions. And not least of all, the two arenas in which the Kahui problem is most likely to arise – child abuse and gang cases – have become increasingly problematic.[278]

To determine whether action should be taken to remedy the Kahui problem, we ought to determine how widespread the problem really is.[279] If it is found that the problem extends beyond the prominent cases, then implementing duty to cooperate would be an appropriate and proportionate response.

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[277] Justice Thomas suggests that very few exercise the right to silence. Moreover, the New Zealand Law Commission stated in 1992 that they had "no evidence that the exercise of the right is unduly hampering the police or resulting with any frequency in the acquittal (or failure to charge) guilty people."
Thomas, Hon. Mr Justice E.W. (1991) "The So-Called Right to Silence", *New Zealand Universities Law Review*, vol. 24, p 301; New Zealand Law Commission (1992) *Criminal Evidence: Police Questioning*, Preliminary Paper 21, Law Commission, Wellington, p 40, paragraph 81.

[278] Earlier this year the Government announced plans to create a new agency to combat the increasingly sophisticated nature of organised crime. Child abuse is also a big problem in New Zealand. Indeed, in a 2003 UNICEF report, New Zealand ranked third worst for children's deaths from maltreatment out of 27 OECD countries. The report found that New Zealand's rate of child deaths from maltreatment (1.2 per 100,000 per year) is four to six times higher than the average for the leading OECD countries.
"Govt Announces Closure of Serious Fraud Office", 11 September 2007, Available: http://www.tv3.co.nz/News/NationalNews/tabid/184/Default.aspx?ArticleID=34484;
UNICEF (2003) *A League Table of Child Maltreatment Deaths in Rich Nations*, Innocenti Report Card No.5, UNICEF Innocenti Research Centre, Florence, pp. 2, 4.

[279] This type of research has been undertaken in England. See, for example, Moston, S., Stephenson, G.M. & Williamson, T. (1993) "The Incidence, Antecedents and Consequences of the Use of the Right to Silence during Police Questioning", *Criminal Behaviour and Mental Health*, vol. 3, pp. 30-47.; Leng, R. (1993) "The Right to Silence in Police Interrogation: A Study of Some of the Issues underlying the Debate", *Royal Commission on Criminal Justice Research Study No.10*, HMSO, London.

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Appendix One

Scheme of A Proposed Offence of Non-Cooperation

Section 1. Interpretation –

(1) In this Part, unless the context otherwise requires, –

"Organised criminal enterprise" means[280] a continuing association of 3 or more persons having as its object or as 1 of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct:

"Serious violent offence" means any offence[281] –

(a) That is punishable by a period of imprisonment for a term of 7 years or more; and

(b) Where the conduct constituting the offence involves –

(i) Loss of a person's life or serious risk of loss of a person's life; or

(ii) Serious injury to a person or serious risk of serious injury to a person; or

(iii) Serious damage to property in circumstances endangering the physical safety of any person; or

(iv) Perverting the course of justice, where the purpose of the conduct is to prevent, seriously hinder, or seriously obstruct the detection, investigation, or prosecution of any offence –

(A) That is punishable by a period of imprisonment for a term of 7 years or more; and

(B) That involved, involves, or would involve conduct of the kind referred to in any of subparagraphs (i) to (iv):

"Specified offence" means any of the following offences[282]:

(a) An offence punishable by a period of imprisonment for a term of 10 years or more:

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[280] The definition of "organised criminal enterprise" was taken verbatim from section 312A of the Crimes Act 1961 (See Appendix Two).

[281] The definition of "serious violent offence" was taken verbatim from section 312A of the Crimes Act 1961.

[282] The definition of "specified offence" was taken verbatim from section 312A of the Crimes Act 1961.

(b) An offence against section 116 (which relates to conspiring to defeat justice):[283]
(c) An offence against section 117 (which relates to corrupting juries and witnesses):
(d) An offence against section 227(ba) (theft of an object exceeding $300 in value):
(e) An offence against section 257A (which relates to money laundering):
(f) An offence against section 258 (which relates to receiving property dishonestly obtained).

Section 2. Offence of Failing to Cooperate with Police Investigation–

(1) Every person who is served with a warrant to question must cooperate with the police investigation.
(2) Every person is liable to imprisonment for a term not exceeding 5 years who, without reasonable excuse, fails to –
  (a) Accompany a police officer to a police station when presented with a warrant to question; or
  (b) Remain at the police station for the duration of the interview; or
  (c) Answer police questions during the interview.[284]
(3) A person is not excused from answering a question in the course of being examined under a warrant to question[285] on the ground that the answer may incriminate or tend to incriminate that person.
(4) The answers given in response to police questions by the person examined is not admissible as evidence in criminal proceedings against that person.[286]

[283] Note that all references to "sections" in this section refer to the Crimes Act 1961.
[284] Subsections (1) and (2) of this provision was drafted by the author. Subsections (3) and (4) are based upon section 267 of the Companies Act 1993. The Companies Act provision was used in preference to sections 184 and 185 of the Insolvency Act 2006 and sections 27 and 28 of the Serious Fraud Office Act 1990 because of its simplicity.
[285] "Warrant to question replaces reference to "section 261 or section 266 of this Act".
[286] Instead of "the answers given in response to police questions", section 267 referred to "testimony". This terminology is not appropriate for police questioning. Section 267 also referred to "a charge of perjury". However, since this is not a judicial body, perjury is not applicable. The reference to perjury has, therefore, been removed.

Section 3. Application by Police for Warrant to Question in Relation to Serious Violent offences[287] –

(1) An application may be made in accordance with this section to a Judge of the High Court for a warrant to question[288] where there are reasonable grounds for believing that –
   (a) A serious violent offence has been committed, or is being committed, or is about to be committed; and
   (b) Where that serious violent offence has yet to be committed, the use of the warrant to question is likely to prevent the commission of the offence; and
   (c) It is unlikely that the police investigation of the case could be brought to a successful conclusion or, as the case may be, the commission of the serious violent offence prevented, without the granting of such a warrant.

(2) Every application under subsection (1) shall be made by a commissioned officer of police, in writing, and on oath, and must set out the following particulars –
   (a) The facts relied on to show that there are reasonable grounds for believing that, –
      (i) A serious violent offence has been committed, or is being committed, or is about to be committed; and
      (ii) Where that serious violent offence has yet to be committed, the use of a warrant to question is likely to prevent the commission of the offence; and[289]
   (b) The name of the person who there are reasonable grounds for believing will be able to assist the police investigation of the case or, as the case may be, prevent the commission of a serious violent offence;[290] and[291]

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[287] This provision is based upon section 312CA of the Crimes Act 1961 (See Appendix Two).

[288] "Warrant to question" replaces reference to "warrant for any member of the police to intercept a private communication by means of a listening device".

[289] Section 312CA(2)(b) requires the application to include, "A description of the manner in which it is proposed to intercept communications". This is unnecessary for a warrant to question and so has been omitted.

[290] The original provision (section 312CA(2)(c)(i)) reads, "The name and address, if known of the suspect the interception of whose private communications there are reasonable grounds for believing will assist the Police investigation of the case or, as the case may be, prevent the commission of a serious violent offence". The proposed provision refers to the "person", rather than the "suspect", as the scheme is primarily designed to gather information from witnesses (for discussion on the difficulty of differentiating between "suspects" and "witnesses", see Chapter Four). The address of the person is required for a surveillance warrant, as that is where the surveillance will take place. The address of

(c) That the person who there are reasonable grounds for believing will be able to assist the police investigation of the case is over the age of seventeen years; and[292]

(d) The facts relied on to show that there are reasonable grounds for believing that evidence relevant to the investigation of the case or, as the case may be, the prevention of the offence, will be obtained through the use of the warrant to question; and[293]

(e) There are reasonable grounds for believing that it is unlikely that the police investigation of the case could be brought to a successful conclusion without the granting of such a warrant;[294] and

(f) The other investigative procedures and techniques that have been tried but have failed to facilitate the successful conclusion of the police investigation of the case, and the reasons why they have failed in that respect; and[295]

(g) The reasons why it appears that other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the police investigation of the case, or are likely to be too dangerous to adopt in the particular case; and

(h) Any other reasons why it is necessary to proceed under a warrant to question.[296]

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the person is not so relevant for a warrant to question, so this reference has been removed. Section 312CA(2)(c)(ii), which provides for situations where the name and address of the suspect are unknown, has also been omitted, as it is not necessary for a warrant to question.

[291] Section 312CA(2)(d), which refers to the period for which the warrant is requested, has been omitted.

[292] This section was drafted by the author and has been inserted to ensure the protection of those who are vulnerable by reason of age.

[293] This section does not exist in the original provision. However, in section 312CB of the Crimes Act 1961, the judge must be satisfied as to these matters before granting a warrant (see section 4(1)(b) of the proposed scheme below). It seems logical, therefore, that the police ought to have to provide evidence of this in the application.

[294] This section does not exist in the section 312CA of the Crimes Act 1961. Yet, section 312CA(1)(c) (section 3(1)(c) of the proposed scheme) provides that applications can be only made when there are reasonable grounds for believing that a warrant is necessary to the successful conclusion of the investigation or prevention of the offence. Since this is a requirement of applications for warrants, police ought to have to provide evidence of this in the application.

[295] The provisions upon which sections 3(2)(e) and (f) are based (sections 312CA(e)(i) and (ii)) are separated by "or". This has been replaced by "and" in the proposed scheme. Since warrants to question should be a last resort in an investigation, police ought to have to show that both these criteria are met.

[296] Section 312CA(e)(iii) of the Crimes Act which relates to urgency, has been omitted and replaced with this wider provision. It is anticipated that urgency of investigation would be a matter falling within the scope of this section.

Section 4. Matters on which Judge must be Satisfied in Respect of Applications Relating to Serious Violent Offences[297]–

(1) On an application made in accordance with section 3, the Judge may grant a warrant to question[298] if the Judge is satisfied that it would be in the best interests of the administration of justice to do so, and that –

(a) There are reasonable grounds for believing that, –

(i) A serious violent offence has been committed, or is being committed, or is about to be committed; and

(ii) Where that serious violent offence has yet to be committed, the use of a warrant to question is likely to prevent the commission of the offence; and

(b) There are reasonable grounds for believing that, –

(i) Evidence relevant to the investigation of the case will be obtained through the use of a warrant to question; or

(ii) Where the serious violent offence has yet to be committed, evidence relevant to the prevention of that offence will be obtained through the use of a warrant to question; and

(c) There are reasonable grounds for believing that it is unlikely that the police investigation of the case could be brought to a successful conclusion without the granting of such a warrant;[299] and

(d) That the person who there are reasonable grounds for believing will be able to assist the police investigation of the case is over the age of seventeen years;[300] and

(e) Other investigative procedures and techniques have been tried but have failed to facilitate the successful conclusion of the police investigation of the case, or as to case may be, to provide assistance in preventing the commission of a serious violent offence; and[301]

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297 This provision is based upon section 312CB of the Crimes Act 1961 (See Appendix Two).

298 "Interception warrant" has been replaced by "warrant to question".

299 This section has been inserted to ensure consistency with section 3(2)(e) of the proposed scheme (see discussion in note 294).

300 This section was drafted by the author and has been inserted to ensure the protection of those who are vulnerable by reason of age.

301 "And" has replaced "or" (see discussion in note 295).

(f) Other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the police investigation of the case, or are likely to be too dangerous to adopt in the particular case.[302]

Section 5. Application by Police for Warrant to Question in Relation to Specified Offences[303]–

(1) An application may be made in accordance with this section to a Judge of the High Court for a warrant to question where there are reasonable grounds for believing that –
   (g) Any member of an organised criminal enterprise is planning, participating in, or committing, or has planned, participated in, or committed, criminal offences of which at least one is a specified offence, as part of a continuing course of criminal conduct planned, organised, or undertaken by members of that enterprise; and
   (h) It is unlikely that the police investigation of the case could be brought to a successful conclusion without the granting of such a warrant.

(2) Every application under subsection (1) shall be made by a commissioned officer of police, in writing, and on oath, and must set out the following particulars –
   (a) The facts relied on to show that there are reasonable grounds for believing that –
      (i.) There is an organised criminal enterprise; and
      (ii.) Any member of an organised criminal enterprise is planning, participating in, or committing, or has planned, participated in, or committed, criminal offences of which at least one is a specified offence, as part of a continuing course of criminal conduct planned, organised, or undertaken by members of that enterprise.
   (b) The name of the person who there are reasonable grounds for believing will be able to assist the police investigation of the case; and
   (c) That the person who there are reasonable grounds for believing will be able to assist the police investigation of the case is over the age of seventeen years; and

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[302] Under section 312CB(1)(d) of the Crimes Act 1961 the Judge must be satisfied that privileged communications are not going to be intercepted. This is not relevant to warrants to question and so has been removed.

[303] This provision is based on section 312B of the Crimes Act 1961 (See Appendix Two). The amendments that have been made in section 3 of the proposed scheme also apply in relation to this provision (see notes 287-296).

(d) The facts relied on to show that there are reasonable grounds for believing that evidence relevant to the investigation of the case will be obtained through the use of the warrant to question; and
(e) There are reasonable grounds for believing that it is unlikely that the police investigation of the case could be brought to a successful conclusion without the granting of such a warrant; and
(f) The other investigative procedures and techniques that have been tried but have failed to facilitate the successful conclusion of the police investigation of the case, and the reasons why they have failed in that respect; and
(g) The reasons why it appears that other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the police investigation of the case; and
(h) Any other reasons why it is necessary to proceed using a warrant to question.

Section 6. Matters on which Judge must be Satisfied in Respect of Applications Relating to Specified Offences[304]–

(1) On an application made in accordance with section 5, the Judge may grant a warrant to question if the Judge is satisfied that it would be in the best interests of the administration of justice to do so, and that –
  (a) There are reasonable grounds for believing that, –
    (i) There is an organised criminal enterprise; and
    (j) Any member of an organised criminal enterprise is planning, participating in, or committing, or has planned, participated in, or committed, criminal offences of which at least one is a specified offence, as part of a continuing course of criminal conduct planned, organised, or undertaken by members of that enterprise; and
  (b) There are reasonable grounds for believing that, –
    (i) Evidence relevant to the investigation of the case will be obtained through the use of a warrant to question; or

[304] This provision is based upon section 312C of the Crimes Act 9161 (See Appendix Two). The same amendments that have been made in section 4 of the proposed scheme also apply in relation to this provision (see notes 297-302).

(ii) Where the specified offence has yet to be committed, evidence relevant to the prevention of that offence will be obtained through the use of a warrant to question; and

(c) There are reasonable grounds for believing that it is unlikely that the police investigation of the case could be brought to a successful conclusion without the granting of such a warrant; and

(d) That the person who there are reasonable grounds for believing will be able to assist the police investigation of the case is over the age of seventeen years; and

(e) There are reasonable grounds for believing that it is unlikely that the police investigation of the case could be brought to a successful conclusion without the granting of such a warrant; and

(f) Other investigative procedures and techniques have been tried but have failed to facilitate the successful conclusion of the police investigation of the case, or as to case may be, to provide assistance in preventing the commission of a specified offence; and

(g) Other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the police investigation of the case.

Section 7. General Conditions of Questioning[305] –

(1) In order to ensure the rights of persons questioned under warrants to question, the following conditions must be met –

(a) The interview must take place at a police station; and

(b) The interview must be videotaped unless it is not reasonably possible to do so. If videotaping is not possible, the interview must be audio-taped.

Section 8. Rights and Duties Concerning Communication with Lawyer[306]–

(1) As soon as practicable after presenting the subject of the warrant with a warrant to question,[307] a police officer must inform the person that –

[305] This provision was drafted by the author.

[306] This provision is based upon Section 10 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two). Section 10 of the draft provisions also covers communication with a friend, relative, or consular officer. For simplicity, this has been transferred to a separate section (section 9) in the proposed scheme.

(a) He or she may consult and instruct a lawyer in private without delay; and
(b) He or she may arrange, or attempt to arrange, for a lawyer of that person's choice to be present during the questioning; and
(c) If desired by that person, legal advice is available to the person free of charge.

(2) If a person was informed of his or her right to consult and instruct a lawyer more than one hour before questioning commences or recommences, a police officer must again inform the person of the right to do so in the manner required by subsection (1) before questioning commences or recommences.

(3) Before questioning a person under a warrant to question a police officer must enquire whether the person wishes to consult a lawyer.

(4) If the person wishes to consult a lawyer the police officer must defer the questioning for a reasonable time; and
(a) As soon as is practicable, give the person reasonable facilities, including the use of a telephone, to enable that person to carry out such consultation; and
(b) Allow the person to consult in private with the lawyer and provide reasonable facilities for that consultation.

(5) If the person wishes to consult a lawyer –
(a) But is unable to do so within a reasonable time; or
(b) A lawyer who has agreed to attend at a police station to advise the person fails to do so within a reasonable time; or
(c) The person does not wish to consult a lawyer,
the police officer may not question the person unless the person waives in writing or on a video recording his or her entitlement to consult and instruct a lawyer.

(6) If the person arranges for a lawyer to be present during the questioning, the police officer must –
(a) Allow the person to consult in private with the lawyer and provide reasonable facilities for that consultation, and

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[307] The protective mechanisms ("Questioning Safeguards") in the Law Commission's draft legislation are designed for those who have met or could meet the arrest criteria (see section 6 of the draft legislation in Appendix Two). This threshold is inappropriate for the warrant to question. The threshold for the protective mechanisms under warrant to question is met when the person is presented with the warrant. This applies to sections 8-10 of the proposed scheme.

(b) Allow the lawyer to be present during the questioning and to give advice to that person.

Section 9. Rights and Duties Concerning Communication with Friend, Relative and Consular Officer[308] –

(1) As soon as practicable after presenting the subject of the warrant with a warrant to question, a police officer must–
   (a) Inform that person that he or she may communicate with, or attempt to communicate with, a friend or relative (whose identity is disclosed to the police officer) to inform the friend or relative of the person's whereabouts and the reasons for the questioning, and enquire whether the person wishes to do so, and
   (b) In the case of a person who to the knowledge of the police officer is not a New Zealand citizen, inform that person that he or she may communicate with, or attempt to communicate with, a consular officer of the country of which the person is a citizen, and enquire whether the person wishes to do so.

(2) If the person wishes to communicate with a friend, relative or consular officer, the police officer must –
   (a) Defer the questioning for a reasonable time; and
   (b) As soon as is practicable, give the person reasonable facilities, including the use of a telephone, to enable that person to carry out such communication.

Section 10. Rights and Duties Concerning Interpreter or Assistance[309] –

(1) This section applies where a person questioned under a warrant to question[310]–
   (a) Does not have reasonable fluency in a language common to the person and the police officer; or

[308] This provision is based upon Section 10 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two). Section 10 of the draft provisions also covers communication with a lawyer. For simplicity, this has been transferred to a separate section (section 8) in the proposed scheme.
[309] This provision is based upon Section 7 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two).
[310] Section 7 of the draft legislation once again requires the arrest threshold to be met (see discussion in note 307). This threshold has been removed.

(b) Has impaired hearing or some[311] physical disability affecting his or her capacity to communicate orally; or

(c) Whom the police officer has grounds to suspect has a mental illness or mental handicap affecting his or her comprehension capacity.[312]

(2) As soon as practicable after a person to whom subsection (1) applies is presented with a warrant to question, a police officer must –

(a) Use his or her best endeavours to do whatever is necessary to inform that person that he or she has a right to have, free of charge, the assistance of an interpreter or of an appropriate person or technical assistance that is reasonably necessary to facilitate communication or comprehension; and

(b) If the circumstances require, arrange for the presence or availability of an interpreter, an appropriate person, or technical assistance and defer questioning until the interpreter, person or technical assistance is available.

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

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

[311] Section 7 of the draft legislation applies to "some apparent physical disability". The reference to "apparent" was removed so that latent disabilities are included.

[312] Section 7 of the draft legislation includes a section (s 7(2)) requiring cautions and other information to be given in a language appropriate to the person being questioned. The provision of the draft legislation that contains the caution about the right to silence has been omitted from the proposed scheme (since it would contradictory to the offence in proposed section 2) so section 7(2) of the draft legislation has also been omitted.

Section 11. Questioning of Intoxicated Persons – [313]

(1) This section applies if a police officer wants to question a person under a warrant to question[314] who is apparently under the influence of liquor or a drug.
(2) The police officer must delay the questioning until the police officer is reasonably satisfied that the person is no longer intoxicated.

Section 12. Initial Period of Investigation or Questioning[315] –

(1) The period for which a person may questioned by the police under a warrant to question[316] must not exceed[317] –
    (a) A period of 6 hours from the time that the warrant to question was served upon the person; or
    (b) If an extension is granted under section 14, the period authorised by the extension.
(2) The questioning[318] periods authorised by this section must be computed in accordance with section 13.

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313 This provision is based upon section 423 of Queensland's Police Powers and Responsibilities Act 2000 (see Appendix Two). The original provision prohibits questioning until the police officer is reasonably satisfied that the "influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to understand the questions being asked, and to decide whether or not to answer questions". This test has been replaced with a simpler test. This section has been inserted to protect the rights those who might otherwise be questioned while intoxicated. Nevertheless, it is not anticipated that the provision will be very often required. Since warrants to question would be used some way into the investigation, rather than immediately following a crime, there is less chance that the person would be intoxicated (see also discussion as to medical attention in note 323). In any case, the police would be advised to serve warrants only on those who are not intoxicated. If the police asked questions of an intoxicated person under a warrant to question, the reliability or admissibility of the information may be brought into question.
314 Reference to warrant to question has been inserted.
315 This provision is based upon section 13 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two). However, because the Law Commission's draft legislation is aimed at those who have or could be arrested, the marginal note of section 13 refers to detention ("Post-Arrest detention and questioning"). Since the marginal note from section 13 was not appropriate, the marginal note from section 403 of the Police Powers and Responsibilities Act 2000 (Queensland) has been used (after removing the reference to detention that was also in that marginal note).
316 Proposed section 12 applies when the police have a warrant to question. The legitimacy of questioning is addressed by the application to the court. Consequently, the threshold for legitimate questioning set out in section 13(1) of the Law Commission's draft legislation has been omitted.
317 Section 13 of the Law Commission's draft legislation also required that the period be "reasonable in the circumstances". However, for certainty of application this requirement has been omitted.
318 Reference to detention removed.

Section 13. Times Excluded from Questioning[319] Period[320] –

(1) In computing the period for which a person may be questioned[321] by the police under a warrant to question, each of the following times shall be disregarded:[322]

(a) Time reasonably taken to convey the person to a police station for questioning; and[323]

(b) Time during which questioning is deferred or suspended to allow the person to communicate with a lawyer, friend, relative or consular officer; and

(c) Time spent waiting for the arrival of a interpreter, appropriate person or technical assistance required under section 10; and

(d) Time spent waiting for the arrival of a consular officer under section 9; and

(e) Time spent waiting for the arrival of a lawyer required under section 8; and

(f) Time during which the person is engaged in consulting a lawyer or communicating with any person referred to in paragraph (b); and

(g) Time spent by the person receiving refreshment;[324] and

(h) Time when the person cannot be questioned because of his or her intoxication, illness or other physical condition; and

(i) Time reasonably taken to make and determine an application for an extension of a detention and questioning period under section 14.

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319 Reference to detention removed.

320 This provision is based upon section 15 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two).

321 Reference to detention removed.

322 Section 15(1) of the Law Commission's draft legislation reads "In computing the period for which a person may be questioned by the police under section 13, each of the following times shall be disregarded *if the person is not during those times asked any questions about the commission or possible commission of an offence by that person"*. The italicised part has been removed to discourage questioning outside of the formal interview.

323 Section 15(a) of the Law Commission's draft legislation reads "time reasonably taken to convey the person to an appropriate place for the purposes of questioning *or providing medical attention*". Detention of suspects in ordinary circumstances (not under a warrant to question) may need to be interrupted for medical attention to be provided. An envisaged scenario might see the police wanting to question a suspect who is injured following a fight. This is unlikely to be relevant in relation to the use of warrants to question, however, as these warrants would be used some way into the investigation rather than directly following the discovery of an offence. The italicised part has been removed accordingly. In addition, the reference to "an appropriate place for the purposes of questioning" has been replaced with reference to a police station to ensure consistency with proposed section 7(1)(a).

324 This part of the draft legislation also allows for time in which the person is receiving medical treatment. This reference has been removed to ensure consistency with proposed section 13(1)(a) (see discussion in note 323).

Section 14. Extension of Questioning[325] Period[326] –

(1) A police officer may, before the expiry of the initial questioning[327] period, apply to a High Court Judge [328] for an extension of that period.

(2) A High Court Judge may grant an extension of the initial questioning[329] period for a further period of 6 hours, if the High Court Judge is satisfied that–[330]

(a) The initial maximum questioning[331] period of 6 hours has not expired; and

(b) Further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence[332]; and

(c) The questioning is being conducted properly and without delay, and

(d) The total period of time taken for one or more of the purposes referred to in section 13 is not unreasonable in the circumstances; and

(e) The person has been informed that he or she, or a lawyer on his or her behalf, may make representations to the High Court Judge about the application.

(3) A questioning period may be extended once only under subsection (2)[333].

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325 Reference to detention removed.

326 This provision is based upon section 16 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two).

327 Reference to detention removed.

328 The Law Commission's draft legislation provides for District Court Judges to grant extensions. However, because the initial warrant to question application is to be made to the High Court, it seems more appropriate for the High Court to grant extensions of warrants to question.

329 Reference to detention removed.

330 The Law Commission's draft legislation requires the Judge to be satisfied that the offence for which the person is being detained and questioned is punishable by imprisonment. However, the threshold for the seriousness of offences is provided in applications for warrants to question. Consequently, section 16(2)(a) of the Law Commission's draft legislation has been omitted. Section 16(2)(b) of the Law Commission's draft legislation requires the Judge to be satisfied that "the initial detention and questioning period has not expired because the period of detention and questioning was unreasonable in the circumstances". This provision has been omitted to ensure consistency with proposed section 12(1).

331 Reference to detention removed.

332 Section 16(2)(d) of the Law Commission's draft legislation also allows extension of the questioning period to complete the investigation of "another offence punishable by imprisonment for which the police have lawful grounds to arrest the person" additional to the original offence under investigation. It is not anticipated that this situation will be applicable with warrants to question, so that part of the section has been omitted.

333 Sections 16(3) and 16(4) of the Law Commission's draft legislation allows for an extra extension of six hours. However, this subsequent extension is not considered necessary in relation to warrants to question.

Section 15. Application for Extension of Questioning[334] Period[335]–

(1) This section applies to all applications to a High Court Judge for an order extending a questioning[336] period.

(2) The police officer making the application to a High Court Judge may do so in writing or orally, either in person or by telephone.

(3) The police officer making the application to a High Court Judge must provide the High Court Judge with a statement as to – [337]

(a) The general nature of the evidence held by the police; and

(b) The nature and extent of the questioning of the person already undertaken by the police and the nature and extent of proposed further questioning; and

(c) The reasons for believing that further questioning of the person is necessary; and

(d) The time when the person was served with the warrant to question[338] and any subsequent periods of time during which any of the circumstances referred to in section 13(1) applied;

(e) Whether the person has instructed a lawyer; and [339]

(f) Whether one or more applications have already been made under section 16 for an extension of a detention and questioning period, and, if so, the decision on every application so made.[340]

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334 Reference to detention removed.

335 This provision is based upon section 17 of the draft legislation produced by the Law Commission in 1994 (See Appendix Two).

336 Reference to detention removed.

337 The Law Commission's draft legislation also requires police to provide the court with a statement regarding the nature of the offence the person is being questioned about. This part has been removed to ensure consistency with proposed section 14(2) (see discussion in note 330).

338 The Law Commission's draft legislation refers to "the time when the person was first cautioned". There is no cautioning system under the proposed scheme. Accordingly, this has been replaced by the reference to the time the warrant was served.

339 In the Law Commission's draft legislation, the police must also provide information about the deferral of the rights of communication with a lawyer, friend, relative or consular officer. In the case of the right to a lawyer, the right may be deferred in the draft legislation on the grounds of urgency in relation to physical harm: section 11 of the draft legislation. Communication with a friend, relative or consular officer may also be deferred on that ground, and also on the basis that an accomplice might take action to avoid apprehension, evidence might be interfered with, or a witness intimidated: section 12 of the draft legislation. Since the second ground upon which the rights can be deferred could occur in nearly all investigations, it is considered too low a threshold for the deferral of rights. If rights are to be deferred, it should only be in extreme circumstances. On the other hand, the danger of physical harm is not likely to be applicable to warrants to question since warrants to question would be used some way into the investigation period rather than immediately after the offence has been discovered. The provisions for deferring these rights have, therefore, been omitted in the proposed scheme. Since the ability to defer the rights has been removed, the requirement for police to inform the court on this matter has also been removed.

(4) The information referred to in subsection (3) must be provided to the person in respect of whom the application is made in sufficient time for that person, or a lawyer on his or her behalf, to make representations to the High Court Judge concerning that application.

(5) The person in respect of whom the application is made, or a lawyer on his or her behalf, must be given an opportunity to make representations to the High Court Judge concerning the application.

(6) If an oral application is made, the application and the statement required under subsection (3) must be confirmed in writing and provided to the High Court Judge within 24 hours after the application is made.

(7) Every application is to be determined as a matter of urgency and, so far as is practicable, is to be determined before the end of the detention and questioning period to which the application relates.[341]

(8) Where a High Court Judge grants an order extending a questioning period, he or she must –

(a) Make a record of –

(i) The time and date when the order is made, and

(ii) The grounds on which the order was made, and

(b) File the record referred to in paragraph (a) in the nearest High Court Registry, together with a copy of the application and police officer's statement referred to in subsection (3).

[340] Clearly, since the provision for a second extension of the time period has been removed (see note 333) this section would only apply to failed applications.

[341] The Law Commission's draft legislation provides for an adjournment of the application hearing for up to 18 hours. The draft legislation allows the person to be detained during this time: section 17(8). A power of detention is not envisaged under the proposed scheme. Moreover, since the warrant to question already impinges on individual liberties, applications for extending the questioning period should always be dealt with as quickly as possible in order to entail as little further restriction on individual liberties as possible. Therefore, provision for adjournment has been omitted.

Appendix Two

This Appendix contains the legislation and draft legislation referred to in Appendix One (in order of reference):

Section 312A of the Crimes Act 1961

312A Interpretation

(1) In this Part, unless the context otherwise requires,—

Facility means an electronic address, phone number, or similar facility that enables private communications to—

(a) Take place between individuals; or

(b) Be sent to or from an identified individual.

Intercept, in relation to a private communication, includes hear, listen to, record, monitor, acquire, or receive the communication either—

(a) While it is taking place; or

(b) While it is in transit.

Interception device—

(a) Means any electronic, mechanical, or electromagnetic instrument, apparatus, equipment, or other device that is used or is capable of being used to intercept a private communication; but

(b) Does not include a hearing aid or similar device used to correct subnormal hearing of the user to no better than normal hearing.

Organised criminal enterprise means a continuing association of 3 or more persons having as its object or as 1 of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct:

Private communication—

(a) Means a communication (whether in oral or written form or otherwise) made under circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication; but

(b) Does not include such a communication occurring in circumstances in which any party ought reasonably to expect that the communication may be intercepted by some other person not having the express or implied consent of any party to do so.

Serious violent offence means any offence—

(a) That is punishable by a period of imprisonment for a term of 7 years or more; and

(b) Where the conduct constituting the offence involves—

(i) Loss of a person's life or serious risk of loss of a person's life; or

(ii) Serious injury to a person or serious risk of serious injury to a person; or

(iii) Serious damage to property in circumstances endangering the physical safety of any person; or

(iv) Perverting the course of justice, where the purpose of the conduct is to prevent, seriously hinder, or seriously obstruct the detection, investigation, or prosecution of any offence—

(A) That is punishable by a period of imprisonment for a term of 7 years or more; and

(B) That involved, involves, or would involve conduct of the kind referred to in any of subparagraphs (i) to (iii):

Specified offence means any of the following offences:

(a) An offence punishable by a period of imprisonment for a term of 10 years or more:

(b) An offence against section 116 (which relates to conspiring to defeat justice):

(c) An offence against section 117 (which relates to corrupting juries and witnesses):

(d) An offence punishable under section 223(b) (theft of an object exceeding $1,000 in value):

(e) An offence against section 243 (which relates to money laundering):

(f) An offence punishable under section 247 (which relates to receiving property dishonestly obtained).

Terrorist offence means an offence against any of sections 7, 8, 9, 10, 12, 13, and 13A of the Terrorism Suppression Act 2002.

(2) A reference in this Part to a party to a private communication is a reference to—

(a) Any originator of the communication and any person intended by the originator to receive it; and

(b) A person who, with the express or implied consent of any originator of the communication or any person intended by the originator to receive it, intercepts the communication.

Section 267 of the Companies Act 1993

267 Self-incrimination

(1) A person is not excused from answering a question in the course of being examined under section 261 or section 266 of this Act on the ground that the answer may incriminate or tend to incriminate that person.

(2) The testimony of the person examined is not admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

Section 312CA of the Crimes Act 1961

312CA Application by Police for Warrant to Intercept Private Communications in relation to Serious Violent Offences

(1) An application may be made in accordance with this section to a Judge of the High Court for a warrant for any member of the Police to intercept a private communication

by means of an interception device in any case where there are reasonable grounds for believing that,—

(a) A serious violent offence has been committed, or is being committed, or is about to be committed; and

(b) Where that serious violent offence has yet to be committed, the use of an interception device to intercept private communications is likely to prevent the commission of the offence; and

(c) It is unlikely that the Police investigation of the case could be brought to a successful conclusion or, as the case may be, the commission of the serious violent offence prevented, without the granting of such a warrant.

(2) Every application under subsection (1) must be made by a commissioned officer of Police, in writing, and on oath, and must set out the following particulars:

(a) The facts relied on to show that there are reasonable grounds for believing that,—

(i) A serious violent offence has been committed, or is being committed, or is about to be committed; and

(ii) Where that serious violent offence has yet to be committed, the use of an interception device to intercept private communications is likely to prevent the commission of the offence; and

(b) A description of the manner in which it is proposed to intercept private communications; and

(c) Either,—

(i) The name and address, if known, of the suspect the interception of whose private communications there are reasonable grounds for believing will assist the Police investigation of the case or, as the case may be, prevent the commission of a serious violent offence; or

(ii) If the name and address of the suspect are not known, a general description of the premises, place, thing, or type of facility in respect of which it is proposed to intercept private communications, being premises or a place, thing, or type of facility believed to be used for any purpose by any person—

(A) Whom it is believed has committed or is committing or is about to commit a serious violent offence; or

(B) Whom it is believed was involved or is involved or will be involved in the commission of a serious violent offence; and

(d) The period for which a warrant is requested; and

(e) Whichever of the following is applicable:

(i) The other investigative procedures and techniques that have been tried but have failed to facilitate the successful conclusion of the Police investigation of the case or, as the case may be, to provide assistance in preventing the commission of a serious violent offence, and the reasons why they have failed in that respect; or

(ii) The reasons why it appears that other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the Police investigation of the case or, as the case may be, prevent the commission of

a serious violent offence, or are likely to be too dangerous to adopt in the particular case; or

(iii) The reasons why it is considered that the case is so urgent that it would be impractical to carry out the Police investigation using only investigative procedures and techniques other than the interception of private communications.

Section 312CB of the Crimes Act 1961

312CB Matters on which Judge must be Satisfied in respect of Applications relating to Serious Violent Offences

(1) On an application made in accordance with section 312CA, the Judge may grant an interception warrant if the Judge is satisfied that it would be in the best interests of the administration of justice to do so, and that—

(a) There are reasonable grounds for believing that,—

(i) A serious violent offence has been committed, or is being committed, or is about to be committed; and

(ii) Where that serious violent offence has yet to be committed, the use of an interception device to intercept private communications is likely to prevent the commission of the offence; and

(b) There are reasonable grounds for believing that,—

(i) Evidence relevant to the investigation of the case will be obtained through the use of an interception device to intercept private communications; or

(ii) Where the serious violent offence has yet to be committed, evidence relevant to the prevention of that offence will be obtained through the use of an interception device to intercept private communications; and

(c) Whichever of the following is applicable:

(i) Other investigative procedures and techniques have been tried but have failed to facilitate the successful conclusion of the Police investigation of the case or, as the case may be, to provide assistance in preventing the commission of a serious violent offence; or

(ii) Other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the Police investigation of the case or, as the case may be, prevent the commission of a serious violent offence, or are likely to be too dangerous to adopt in the particular case; or

(iii) The case is so urgent that it would be impractical to carry out the Police investigation using only investigative procedures and techniques other than the interception of private communications; and

(d) The private communications to be intercepted are not likely to be privileged in proceedings in a court of law by virtue of any of the provisions of Part 3 of the Evidence Amendment Act (No 2) 1980 or of any rule of law that confers privilege on communications of a professional character between a barrister or solicitor and a client.

(2) Without limiting subsection (1), in determining whether or not to issue an interception warrant under this section, the Judge must consider the extent to which the privacy of

any person or persons would be likely to be interfered with by the interception, under the warrant, of private communications.

Section 312B of the Crimes Act 1961

312B Application by Police for Warrant to Intercept Private Communications

(1) An application may be made in accordance with this section to a Judge of the High Court for a warrant for any member of the Police to intercept a private communication by means of an interception device in any case where there are reasonable grounds for believing that—

(a) Any member of an organised criminal enterprise is planning, participating in, or committing, or has planned, participated in, or committed, criminal offences of which at least one is a specified offence, as part of a continuing course of criminal conduct planned, organised, or undertaken by members of that enterprise; and

(b) It is unlikely that the Police investigation of the case could be brought to a successful conclusion without the grant of such a warrant.

(2) Every application under subsection (1) of this section shall be made by a commissioned officer of Police, in writing, and on oath, and shall set out the following particulars:

(a) The facts relied upon to show that there are reasonable grounds for believing that—

(i) There is an organised criminal enterprise; and

(ii) Any member of that enterprise is planning, participating in, or committing, or has planned, participated in, or committed, criminal offences of which at least one is a specified offence as part of a continuing course of criminal conduct planned, organised, or undertaken by members of that enterprise; and

(b) A description of the manner in which it is proposed to intercept private communications; and

(c) The name and address, if known, of the suspect whose private communications there are reasonable grounds for believing will assist the police investigation of the case, or, if the name and address of the suspect are not known, a general description of the premises, place, thing, or type of facility in respect of which it is proposed to intercept private communications, being premises or a place, thing, or type of facility believed to be used for any purpose by any member of the organised criminal enterprise; and

(d) The period for which a warrant is requested; and

(e) Whichever of the following is applicable:

(i) The other investigative procedures and techniques that have been tried but have failed to facilitate the successful conclusion of the Police investigation of the case, and the reasons why they have failed in that respect; or

(ii) The reasons why it appears that other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the Police investigation of the case, or are likely to be too dangerous to adopt in the particular case; or

(iv) The reasons why it is considered that the case is so urgent that it would be impractical to carry out the Police investigation using only

investigative procedures and techniques other than the interception of private communications.

Section 312C of the Crimes Act 1961

312C Matters on which Judge must be Satisfied in respect of Applications

(1) On an application made in accordance with section 312B of this Act, the Judge may grant an interception warrant if the Judge is satisfied that it would be in the best interests of the administration of justice to do so, and that—

(a) There are reasonable grounds for believing that—

(i) There is an organised criminal enterprise; and

(ii) Any member of that organised criminal enterprise is planning, participating in, or committing, or has planned, participated in, or committed, criminal offences of which at least one is a specified offence, as part of the continuing course of criminal conduct planned, organised, or undertaken by members of that enterprise; and

(b) There are reasonable grounds for believing that evidence relevant to the investigation of the case will be obtained through the use of an interception device to intercept private communications; and

(c) Whichever of the following is applicable:

(i) Other investigative procedures and techniques have been tried but have failed to facilitate the successful conclusion of the Police investigation of the case; or

(ii) Other investigative procedures and techniques are unlikely to facilitate the successful conclusion of the Police investigation of the case, or are likely to be too dangerous to adopt in the particular case; or

(iii) The case is so urgent that it would be impractical to carry out the Police investigation using only investigative procedures and techniques other than the interception of private communications; and

(d) The private communications to be intercepted are not likely to be privileged in proceedings in a Court of law by virtue of any of the provisions of Part 3 of the Evidence Amendment Act (No 2) 1980 or of any rule of law that confers privilege on communications of a professional character between a barrister or solicitor and a client.

(2) Without limiting subsection (1), in determining whether or not to issue an interception warrant under this section, the Judge must consider the extent to which the privacy of any person or persons would be likely to be interfered with by the interception, under the warrant, of private communications.

Section 10 of Law Commission Draft Legislation[342]

10 Rights and Duties Concerning Communication with Lawyer, Friend, Relative and Consular Officer

(1) As soon as practicable after a person is entitled to the questioning safeguards, a police officer must inform the person that
   (a) He or she may consult and instruct a lawyer in private without delay, and
   (b) He or she may arrange, or attempt to arrange, for a lawyer of that person's choice to be present during the questioning, and
   (c) If desired by that person, legal advice is available to the person free of charge.

(2) If a person was informed of his or her right to consult and instruct a lawyer more than one hour before questioning commences or recommences, a police officer must again inform the person of the right to do so in the manner required by subsection (1) before questioning commences or recommences.

(3) Before questioning a person who is entitled to the questioning safeguards, a police officer must enquire whether the person wishes to consult a lawyer.

(4) After cautioning and before questioning a person who is entitled to the questioning safeguards, a police officer must
   (a) Inform that person that he or she may communicate with, or attempt to communicate with, a friend or relative (whose identity is disclosed to the police officer) to inform the friend or relative of the person's whereabouts and the reasons for the questioning, and enquire whether the person wishes to do so, and
   (b) In the case of a person who to the knowledge of the police officer is not a New Zealand citizen, inform that person that he or she may communicate with, or attempt to communicate with, a consular officer of the country of which the person is a citizen, and enquire whether the person wishes to do so.

(5) If the person wishes to consult a lawyer or communicate with a friend, relative or consular officer, the police officer must defer the questioning for a reasonable time and
   (a) As soon as is practicable, give the person reasonable facilities, including the use of a telephone, to enable that person to carry out such consultation or communication, and
   (b) In the case of consultation with a lawyer, allow the person to consult in private with the lawyer and provide reasonable facilities for that consultation.

(6) If
   (a) The person wishes to consult a lawyer but is unable to do so within a reasonable time; or
   (b) A lawyer who has agreed to attend at a police station to advise the person fails to do so within a reasonable time; or
   (c) The person does not wish to consult a lawyer, the police officer may not question the person unless the person waives in writing or on a video recording his or her entitlement to consult and instruct a lawyer.

[342] New Zealand Law Commission (1994) *Police Questioning*, Report 31, Law Commission, Wellington, pp. 39-57.

In such a case, the police officer must, before questioning the person, again inform the person of the reasons for questioning and caution that person in the manner required by section 8.

(7) If the person arranges for a lawyer to be present during the questioning, the police officer must
   (a) Allow the person to consult in private with the lawyer and provide reasonable facilities for that consultation, and
   (b) Allow the lawyer to be present during the questioning and to give advice to that person.

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

Section 6 of the Law Commission Draft Legislation

6 Entitlement to Questioning Safeguards

(1) In this Act, a reference to the questioning safeguards is a reference to the rights and obligations conferred or imposed by
   (a) Section 7 (interpreter, appropriate person or technical assistance), and
   (b) Section 8 (caution), and
   (c) Section 9 (notification of reasons for questioning), and
   (d) Section 10 (communication with lawyer, friend, relative, consular officer), and
   (e) Section 11 (deferral of grant of right to consult lawyer), and
   (f) Section 12 (deferral of communication rights).

(2) A person is entitled to the questioning safeguards in respect of an offence, on the occurrence of any of the following circumstances:
   (a) The person is either arrested for the offence or could lawfully be arrested for the offence by a police officer; or
   (b) A police officer has grounds to suspect that that person has committed the offence and the person
      (i) Is at a police station; or
      (ii) Has reasonable grounds to believe that he or she is being detained.

(3) If a person is entitled to the questioning safeguards and prior to or during the questioning the police officer has grounds to suspect that the person has committed another offence, that person is also, in respect of that other offence, entitled to the safeguards (except those in section 10(4)) before the police officer questions the person about the other offence.

(4) The entitlement conferred by subsection (2) does not arise only because a person who has not been arrested
   (a) Is requested by a police officer to provide particulars of name and address for the purposes of laying an information for a summary offence under the *Summary Proceedings Act 1957*; or
   (b) Could lawfully be arrested for an offence by a police officer who is engaged in an undercover operation authorised by a commissioned officer of police.

Section 6 of the Law Commission Draft Legislation

6 Right to Interpreter or Assistance

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

(2) The caution, and all other information that a police officer is required to give to a person who becomes entitled to the questioning safeguards, must be given in or translated into a language in which the person is able to communicate with reasonable fluency and in a manner which assists the person to comprehend that caution and information.

(3) As soon as practicable after a person to whom this section applies is entitled to the questioning safeguards, a police officer must
   (a) Use his or her best endeavours to do whatever is necessary to inform that person that he or she has a right to have, free of charge, the assistance of an interpreter or of an appropriate person or technical assistance that is reasonably necessary to facilitate communication or comprehension, and
   (b) If the circumstances require, arrange for the presence or availability of an interpreter, an appropriate person, or technical assistance and defer questioning until the interpreter, person or technical assistance is available and any previous performance of the obligations in sections 8, 9 and 10 has been repeated with the assistance of the interpreter, person or technical assistance.

(4) In this section,

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

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

Section 423 of the Police Powers and Responsibilities Act 2000 (Queensland)

423 Questioning of Intoxicated Persons

(1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.

(2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions.

Section 13 of the Law Commission Draft Legislation

13 Post-Arrest Detention and Questioning

(1) A person lawfully arrested for an offence punishable by imprisonment may be detained and questioned if a police officer believes on reasonable grounds that questioning of that person is necessary to preserve or obtain evidence or to complete the investigation into the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person.

(2) The period for which a person may be detained and questioned by the police under this Act must not exceed a period that is reasonable in the circumstances, and must not exceed
   (a) A period of 6 hours from the time that the person was or should have been first cautioned; or
   (b) If an extension is granted under section 16(2) or (4), the period authorised by the extension.

(3) The detention and questioning periods authorised by this section must be computed in accordance with section 15.

Section 423 of the Police Powers and Responsibilities Act 2000 (Queensland)

403 Initial Period of Detention for Investigation or Questioning

(1) A police officer may detain a person for a reasonable time to investigate, or question the person about—
   (a) If the person is in custody following an arrest for an indictable offence--the offence for which the person was arrested; or
   (b) In any case--any indictable offence the person is suspected of having committed, whether or not the offence for which the person is in custody.

(2) However, the person must not be detained under this part for more than 8 hours, unless the detention period is extended under this division.

(3) If this part applies to the person because of section 398(b) or (c), the person must be returned to the watch-house or other place of custody as soon as reasonably practicable after the detention period ends.

(4) In the 8 hours mentioned in subsection (2) (the detention period)--
   (a) The person may be questioned for not more than 4 hours; and
   (b) The time out may be more than 4 hours.

(5) The detention period starts when the person is--
   (a) Arrested for the indictable offence; or
   (b) Taken into police custody under a removal order; or
   (c) Taken from a watch-house; or
   (d) Otherwise in the company of a police officer at a watch-house, prison, or detention centre, for the purpose of questioning the person.

Section 15 of the Law Commission Draft Legislation

15 Times Excluded from Detention and Questioning Period

(1) In computing the period for which a person may be detained and questioned by the police under section 13, each of the following times shall be disregarded if the person is not during those times asked any questions about the commission or possible commission of an offence by that person:
   (a) Time reasonably taken to convey the person to an appropriate place for the purposes of questioning or providing medical attention, and
   (b) Time during which questioning is deferred or suspended to allow the person to communicate with a lawyer, friend, relative or consular officer, and
   (c) Time spent waiting for the arrival of an interpreter, appropriate person or technical assistance required under section 7, or a lawyer or consular officer required under section 10, and
   (d) Time during which the person is engaged in consulting a lawyer or communicating with any person referred to in paragraph (b), and
   (e) Time spent by the person receiving medical attention or refreshment, and
   (f) Time when the person cannot be questioned because of his or her intoxication, illness or other physical condition, and
   (g) Time reasonably taken to make and determine an application for an extension of a detention and questioning period under section 16, including any period when such an application is adjourned under section 17(7).

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

Section 16 of the Law Commission Draft Legislation

16 Extension of Detention and Questioning Period

(1) A police officer may, before the expiry of the initial detention and questioning period authorised under section 13, apply to a District Court Judge for an extension of that period.

(2) A District Court Judge may grant an extension of the initial detention and questioning period for a further period of 6 hours, if the District Court Judge is satisfied that
   (a) The offence in respect of which the person is being detained and questioned is punishable by imprisonment, and
   (b) The initial detention and questioning period has not expired because the period of detention and questioning was unreasonable in the circumstances, and
   (c) The initial maximum detention and questioning period of 6 hours has not expired, and
   (d) Further questioning is necessary to preserve or obtain evidence, or to complete the investigation of the offence or another offence punishable by imprisonment for which the police have lawful grounds to arrest the person, and

(e) The questioning is being conducted properly and without delay, and
(f) The total period of time taken for one or more of the purposes referred to in section 15 is not unreasonable in the circumstances, and
(g) The person has been informed that he or she, or a lawyer on his or her behalf, may make representations to the District Court Judge about the application.

(3) A police officer may, before the expiry of a detention and questioning period authorised under subsection (2), apply to a District Court Judge for an extension of that period.

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

(5) Before questioning a person in respect of whom an extension of a detention and questioning period has been granted under subsection (2) or (4), a police officer must again inform the person of the reasons for the questioning and caution the person in the manner required by section 8.

(6) A detention and questioning period may be extended once only under subsection (2) and once only under subsection (4).

(7) If a question arises whether evidence obtained during a period alleged to be a detention and questioning period under this Act was improperly obtained, a purported extension of a preceding detention and questioning period under this section does not affect the question whether, before its purported extension, that period had expired.

Section 17 of the Law Commission Draft Legislation

17 Application for Extension of Detention and Questioning Period

(1) This section applies to all applications to a District Court Judge for an order extending a detention and questioning period.

(2) The police officer making the application to a District Court Judge may do so in writing or orally, either in person or by telephone.

(3) The police officer making the application to a District Court Judge must provide the District Court Judge with a statement as to
  (a) The nature of the offence concerning which the person is being or is to be questioned, and
  (b) The general nature of the evidence held by the police, and
  (c) The nature and extent of the questioning of the person already undertaken by the police and the nature and extent of proposed further questioning, and
  (d) The reasons for believing that further questioning of the person is necessary, and
  (e) The time when the person was first cautioned and any subsequent periods of time during which any of the circumstances referred to in section 15(1) applied, and
  (f) Whether the person has instructed a lawyer, and
  (g) Whether any deferral under section 11 or 12 has occurred, and
  (h) Whether one or more applications have already been made under section 16 for an extension of a detention and questioning period, and, if so, the decision on every application so made.

(4) The information referred to in subsection (3) must be provided to the person in respect of whom the application is made in sufficient time for that person, or a lawyer on his or her behalf, to make representations to the District Court Judge concerning that application.

(5) The person in respect of whom the application is made, or a lawyer on his or her behalf, must be given an opportunity to make representations to the District Court Judge concerning the application.

(6) If an oral application is made, the application and the statement required under subsection (3) must be confirmed in writing and provided to the District Court Judge within 24 hours after the application is made.

(7) A District Court Judge may adjourn the hearing of an application for not more than 18 hours if
  (a) The person in respect of whom the application is made is charged with a complex offence or offences or numerous offences, and
  (b) The adjournment would enable the application to be dealt with in court as soon as the period of adjournment has elapsed, and
  (c) The person in respect of whom the application is made, or a lawyer on his or her behalf, has been given an opportunity to make representations to the District Court Judge.

(8) During the period an application is adjourned, the police may, unless bail is granted under section 18, detain but not further question the person to whom the application relates.

(9) Every application is to be determined as a matter of urgency (unless adjourned under subsection (7)) and, so far as is practicable, is to be determined before the end of the detention and questioning period to which the application relates.

(10) Where a District Court Judge grants an order extending a detention and questioning period, he or she must
  (a) Make a record of
    (i) The time and date when the order is made, and
    (ii) The grounds on which the order was made, and

(c) File the record referred to in paragraph (a) in the nearest District Court Registry, together with a copy of the application and police officer's statement referred to in subsection (3).

Section 11 of the Law Commission Draft Legislation

11 Deferral of Grant of Right to Consult Lawyer

(1) The performance of the obligations imposed on a police officer by section 10(5) to provide facilities for communication and consultation with a lawyer may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that the questioning is so urgent, having regard to the danger of physical harm to some other person or persons, that it should not be delayed by compliance with those obligations.

(2) An exercise of the power to defer under subsection (1) does not imply that questioning must be deferred.

(3) If a commissioned officer of police permits deferral of the performance of an obligation under subsection (1),

(a) A police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and

(b) The commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.

Section 12 of the Law Commission Draft Legislation

12 Deferral of Grant of Communication Rights

(1) The performance of the obligation imposed on a police officer by section 10(5)(a) to give facilities for communication with a friend or relative may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that

(a) Immediate compliance with the obligation is likely to result in

(i) An accomplice of the person taking steps to avoid apprehension, or

(ii) The concealment, fabrication or destruction of evidence or the intimidation of a witness; or

(b) The questioning is so urgent, having regard to the danger of physical harm to some other person or persons, that it should not be delayed by compliance with that obligation.

(2) The performance of the obligation imposed on a police officer by section 10(5)(a) to give facilities for communication with a consular officer may be deferred if and for so long as a commissioned officer of police believes on reasonable grounds that the questioning is so urgent, having regard to the danger of physical harm to some other person or persons, that it should not be delayed by compliance with that obligation.

(3) An exercise of the power to defer under subsection (1) or (2) does not imply that questioning must be deferred.

(4) If a commissioned officer of police permits deferral of the performance of an obligation under this section,

(a) A police officer must perform the obligation as soon as possible after the grounds for deferral cease to apply and, before questioning the person, caution him or her again in the manner required by section 8, and

(b) The commissioned officer of police must make a record of the grounds on which the performance of the obligation is deferred.