CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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CHAPTER 3

ACTIVE LEARNING QUESTIONS

1. Do the police have sufficient powers to bring criminals to justice? If not, what additional powers are required?

This question goes to the balance in the criminal law between bringing criminals to justice and preventing the innocent from being wrongfully convicted. The presumption of innocence, the rules of evidence and the standard of proof of beyond reasonable doubt are bastions designed to prevent miscarriages of justice. Criminal procedure plays an integral role in this balancing process, albeit weighted in favour of protecting the individual person, particularly for serious offences, given the power and resources of the State.

One obvious balancing question relates to disputed confessions, especially where the police have gone undercover or used a person acting for the police who has been 'wired' with a recording device: see *R v Swaffield* (1998) 192 CLR 159, where the High Court held that the admissibility of confessional material turns first on the question of voluntariness, next on exclusion based on considerations of reliability, and finally on an overall discretion taking account of all the circumstances. These circumstances include the manner in which any admission was obtained, and whether an unfair forensic disadvantage resulted from admission of the evidence. The test is whether '[c[onvictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price': *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ.

A more recent example is the emerging practice of police setting up elaborate subterfuges where they act out fictitious criminal roles, in order to gain the confidence and ultimately the confession of

a suspect in a crime the police are making no progress in solving: see, for example, *R v Tofilau* [2003] VSC 188.

In *R v Tofilau*, Osborn J concluded as follows:

> The Overall Discretion
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> [87] … I am not satisfied that either the circumstances in which the confessional statements were elicited or the possibility of prejudice to the accused in the course of his trial taken individually justify the exercise of the Court's discretion to exclude such statements.
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> [88] Ultimately, the Court must exercise an overall discretion balancing the individual and public interest in protecting the rights of the accused against the public interest that serious crime be the subject of effective law enforcement. Having regard to all the circumstances I have enumerated, I am not satisfied that the confessional statements have been elicited in a manner which is unacceptable in light of prevailing community standards.
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> [89] In *R v Unger* (1993) 83 CCC (3d) 228 the Court referred to what Canadian authorities describe as 'the community shock test'.
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> "In *Rothman* v R (1981) 59 CCC (2d) 30, Lamer J, who agreed with the majority in the result, first referred to what has become widely known as the 'community shock' test. Specifically, he said (at p.74): 'It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.' This test was subsequently adopted in numerous decisions as the appropriate standard in matters of this kind. Commentators have referred to the distinction as being between mere tricks on the one hand, and dirty tricks on the other. For example, in *Collins*, Lamer J, writing for the majority, said (at p.21): 'I still am of the view that the resort to tricks that are not in the least unlawful let alone in violation of the Charter to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community. That is a very high threshold, higher, in my view, than that to be attained to bring the administration of justice into disrepute in the context of a violation of the Charter.' Courts should not be setting public policy on the parameters of undercover operations. The Crown's position, with which we agree, is that the public would endorse rather than be shocked by the efforts of the undercover agents in this case. Hewak C.J.Q.B. rightly concluded that the evidence in question was admissible. We agree with his comments when he said (at p.253): 'In my view, on the facts of this case, the undercover officers acted in a way consistent with the need to investigate a very brutal crime. Their actions were, without doubt, different from the standard procedures, but they had to be, given the various previous attempts made by them to investigate, bearing in mind the circumstances

> of case, and lack of hard evidence. They had information that pointed in the direction they should follow, and in the circumstances they devised and followed a plan that was appropriate to continue with their investigation. I find it difficult to accept that a reasonable dispassionate person, aware of the difficulties in the investigation of the case, would consider the undercover operation and use of tricks by the officers, as being unfair or so unacceptable, indecent, and outrageous, that the evidence that was derived from that operation, if admitted as evidence in the trial of the accused, could bring the administration of justice into disrepute.' The Crown did not engage in dirty tricks. Their conduct, viewed in totality and objectively, particularly in light of the fact that honesty was stressed by Tremblay and Forbes, would not shock the informed community. There was no unfair inducement in the circumstances; indeed, there is no evidence to substantiate this given the failure of Unger to testify on the *voir dire*."
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> [90] In my opinion there is much to be said for the above observations as to the reality of prevailing standards among what the Court refers to as the 'informed community'. In my opinion, prevailing community standards would not support the exclusion of the confessional statements in the circumstances of the present case. They do not lead to the conclusion that the behaviour of the police has brought the criminal justice system into disrepute (as submitted to me) or that the evidence was obtained at too high a price in terms of the rights of the accused. The appropriate course is that the statements be submitted to a jury to assess their probative value.
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> Conclusion
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> [91] For the above reasons I rule that the confessional statements of 17 March 2002 are admissible and that they should not be excluded in the exercise of the Court's discretion.

Note the use of 'the community shock test', and the reference to 'the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules'. Where the 'bar' should be is a matter for debate, with law enforcement authorities, particularly in the areas of terrorism and bikie gangs, seeking greater detection and prevention powers, while civil libertarians focus on appropriate protections and a transparent process.

An examination of Division 3 Special powers relating to terrorism offences in Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth), reveals the extent of ASIO's powers to issue questioning and detention warrants. For example, under s 34D(4)(a) a person can be arrested and detained for up to 168 hours (s 34S) on the broad ground that the warrant 'will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.

There are also trends to enhance investigative powers to fight white collar crime and organised crime, particularly in the areas of electronic data recording, surveillance and communication. For example, in the case of statutory provisions to enhance police investigations where computerised records are involved see ss 3K, 3L, 3LAA, 3LA, and 3LB of the *Crimes Act 1914* (Cth). Also, the

Surveillance Devices Act 2004 (Cth) increased the number of offences amenable to surveillance and expanded the range of surveillance devices.

There have been a variety of legislative responses to the problem of criminal activity associated with 'bikie gangs'. Queensland's response has been twofold: the *Criminal Organisation Act 2009* (Qld) and the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (the VLAD Act). The *Criminal Organisation Act 2009* (Qld) was upheld in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7. In *Condon v Pompano*, the High Court unanimously upheld the validity of provisions of the *Criminal Organisation Act 2009* (Qld) which relate to 'criminal intelligence' relied upon in support of applications to the Supreme Court of Queensland to have an organisation declared a 'criminal organisation'. The High Court held that the provisions were not inconsistent with the institutional integrity of the Supreme Court.

Section 3(1) sets out the objects of the *Criminal Organisation Act*.

> 3 Objects of Act
> (1) The objects of this Act are to disrupt and restrict the activities of—
> (a) organisations involved in serious criminal activity; and
> (b) the members and associates of the organisations.

Section 2 sets out the objects of the VLAD Act.

> 2 Objects
> (1) The objects of the Act are to—
> (a) disestablish associations that encourage, foster or support persons who commit serious offences; and
> (b) increase public safety and security by the disestablishment of the associations; and
> (c) deny to persons who commit serious offences the assistance and support gained from association with other persons who participate in the affairs of the associations.
> (2) The objects are to be achieved by—
> (a) imposing significant terms of imprisonment for vicious lawless associates who commit declared offences; and
> (b) removing the possibility of parole for vicious lawless associates serving terms of imprisonment except in limited circumstances; and
> (c) encouraging vicious lawless associates to cooperate with law enforcement agencies in the investigation and prosecution of serious criminal activity.

The validity of the VLAD Act was challenged in *Kuczborski v Queensland* [2014] HCA 46. French CJ gave the following assessment of the VLAD Act at [9]-[14].

The VLAD Act

[9] At the heart of the VLAD Act is the term "vicious lawless associate", which is defined in s 5(1) of the Act as a person who:

"(a) commits a declared offence; and

(b) at the time the offence is committed, or during the course of the commission of the offence, is a participant in the affairs of an association (***relevant association***); and

(c) did or omitted to do the act that constitutes the declared offence for the purposes of, or in the course of participating in the affairs of, the relevant association."

The status of "participant in the affairs of an association" attaches to a person who "asserts, declares or advertises his or her membership of, or association with, the association" (VLAD Act, s 4(a)), a person who "seeks to be a member of, or to be associated with, the association" (VLAD Act, s 4(b)) and a person who "has attended more than 1 meeting or gathering of persons who participate in the affairs of the association in any way" (VLAD Act, s 4(c)). It also includes a person who "has taken part on any 1 or more occasions in the affairs of the association in any other way" (VLAD Act, s 4(d)). The term "participating in the affairs of ... the relevant association" in s 5(1)(c) bears a corresponding meaning (*Acts Interpretation Act* 1954 (Qld), s 32). Participation does not necessarily involve any criminal act or purpose.

[10] The VLAD Act provides that a court sentencing a "vicious lawless associate" for a declared offence must impose a further sentence of 15 years imprisonment (VLAD Act, s 7(1)(b)). In the case of a "vicious lawless associate" who was, at the time of the commission of the declared offence, an office bearer of an association, there is a further mandated cumulative sentence of 10 years imprisonment (VLAD Act, s 7(1)(c)). The additional sentences cannot be mitigated or reduced under any other Act or law (VLAD Act, s 7(2)(a)). If the base sentence did not involve a term of imprisonment, the vicious lawless associate is to immediately begin to serve the further sentence provided for by s 7(1)(b) (VLAD Act, s 7(3)). There is no eligibility for parole during any period of imprisonment for a further sentence (VLAD Act, s 8(1)).

[11] It is not necessary, in order to attract those additional sentences, that the prosecution prove that the relevant association has a criminal purpose. There is, however, a caveat from the definition of "vicious lawless associate" by way of the defence in s 5(2), the burden of proving which rests upon the alleged associate:

"a person is not a vicious lawless associate if the person proves that the relevant association is not an association that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences."

[12] Declared offences are set out in Sched 1 to the VLAD Act. They may also be prescribed by regulation (VLAD Act, s 3, definition of "declared offence", s 10). The range of the declared offences in Sched 1 is wide in subject matter and gravity. They include offences punishable by a maximum sentence of one year's imprisonment (the offence of affray under s 72 of the Criminal Code is punishable by a maximum penalty of one year's imprisonment, although it attracts an enhanced penalty under the new s 72(2) of the Criminal Code if the person convicted is a participant in a criminal organisation) up to offences punishable by imprisonment for life (see eg Criminal Code, s 305). Under the VLAD Act, it is quite possible that a person who would not receive a custodial sentence for a declared offence in the lower range of seriousness would nevertheless, if an officer of a relevant association, be sentenced to a mandatory 25 years imprisonment.

> [13] Neither "vicious" nor "lawless" is a defined term. The class of persons designated by the VLAD Act as "vicious lawless associates" may include some who would attract the epithets "vicious" and "lawless" in ordinary parlance. It includes persons who would not. The class of declared offences includes offences which, according to the facts of a particular case, could be described as "vicious". It includes offences which would not.
> [14] The term "association" in the VLAD Act is defined as meaning any of a corporation, an unincorporated association, a club or league and any group of three or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal (VLAD Act, s 3, definition of "association"). Only a tiny minority of the range of the bodies or groups covered by the definition of "association" could conceivably attract the description "vicious" or "lawless". The term "vicious lawless association", which appears in the title to the VLAD Act, is not defined and appears nowhere in the body of the Act. It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law.

Despite the reservations as to the operation of the VLAD Act, the High Court dismissed the challenge. The plaintiff argued that the laws creating the new offences in the *Criminal Code* and the *Liquor Act* impermissibly enlisted the court to give effect to the Parliament's or the executive's intention to destroy criminal organisations. This argument was not accepted. The majority of the Court held that these laws did not require the courts to proceed otherwise than in accordance with the processes which are understood to characterise the exercise of judicial power.

The relevant legislation in Western Australia is the *Criminal Organisations Control Act 2012* (WA). Section 4 sets out the purposes of the Act.

> 4 Purposes of this Act
> (1) The purposes of this Act are —
> (a) to disrupt and restrict the activities of organisations involved in serious criminal activity, their members and associates so as to reduce their capacity to carry out activities that may facilitate serious criminal activity; and
> (b) to protect members of the public from violence associated with those organisations

Criticism of the 'anti-bikie' laws has been widespread amongst the legal profession and human rights groups. For example, the Law Council of Australia in a Briefing Note dated 28 April 2014 entitled 'Anti-bikie laws – Recent Developments' made this unfavourable assessment at [4]-[5].

> [4] The Law Council questions the necessity for the introduction of extraordinary and far reaching 'anti-bikie' laws in light of the extensive range of law enforcement and investigative powers already available to police in all jurisdictions and pre-existing criminal offences designed to combat the commission of crime by groups, such as extended liability offences of conspiracy. The Law Council considers that these pre-existing laws, that more closely reflect traditional criminal law principles, provide a more appropriate starting point to address the types of criminal activity engaged in by outlaw motorcycle groups.

> [5] The Law Council is also concerned that the so-called 'anti-bikie' laws have broader application than outlaw motorcycle gangs and have the potential to impact on other members of the community and their rights, particularly the freedom of association. A further overarching concern relates to the potential for such offences to allow for much wider and more extensive use of a range of intrusive police powers. Related to these concerns is the fact that by focusing on association, these laws seek to target certain categories of people – for example those who for socio-economic or familiar reasons may be more like to associate with others who may have a criminal background – and apply harsh penalties and intrusive investigative powers to this group, in a way that does not apply to the broader community. This approach, in contrast to traditional criminal offences based on conduct, undermines the principle of equality before the law that is central to the Australian legal system.

Conclusion

Where a person stands on the question of the sufficiency of police powers to bring criminals to justice is largely determined by the view taken on human rights and the rule of law. The thrust of the Law Council of Australia's criticisms of the 'anti-bikie' laws is that existing law enforcement and investigative powers are sufficient to combat group criminal activity. Other members of the community have fewer reservations, holding to the view that law abiding citizens have little to fear and that the 'anti-bikie' laws (and their ilk) are necessary to deal with sophisticated and organised criminal organisations.

2. Should there be a presumption against bail?

There is a presumption in favour of bail (see s 9 in Qld and ss 5 and 7 in WA), although this presumption is qualified by other sections of the Bail Acts. Thus, under s 16(1) in Qld, bail shall be refused if the court or police officer is satisfied:

> (a) that there is an unacceptable risk that the defendant if released on bail—
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> (i) would fail to appear and surrender into custody; or
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> (ii) would while released on bail—
>
> (A) commit an offence; or (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or (C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else; or
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> (b) that the defendant should remain in custody for the defendant's own protection.

Section 16(2) sets out the criteria to be considered in determining whether there is an unacceptable risk which include (a) the nature and seriousness of the offence; (b) the character, antecedents,

associations, home environment, employment and background of the defendant; (c) the history of any previous grants of bail to the defendant; (d) the strength of the evidence against the defendant.

Section 16(3) deals with types of offences where there is a presumption against bail.

> S 16(3) Where the defendant is charged—
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> (a) with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence; or
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> (b) with an offence to which section 13 applies [When only the Supreme Court may grant bail]; or
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> (c) with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance; or
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> (d) with an offence against this Act; or
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> (e) with an offence against the Criminal Organisation Act 2009, section 24 [Contravention of control order] or 38 [Contravention of public safety order]; or
>
> (f) with an offence against the Criminal Code, section 359 [Threats] with a circumstance of aggravation mentioned in section 359(2) [to a law enforcement officer when investigating the activities of a criminal organisation];
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> the court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified and, if bail is granted or the defendant is released under section 11A [Release of a person with an impairment of mind], must include in the order a statement of the reasons for granting bail or releasing the defendant.

Similar provisions apply in WA: see Schedule 1, Part C, Clauses 1(a) and (b), 3, 3A, and 3C of the *Bail Act 1982* (WA).

The question is inviting a reversal of the current presumption in favour of bail either by (1) requiring the applicant to show why he or she is an acceptable risk, or (2) by tightening the criteria to be considered in determining whether there is an unacceptable risk, or (3) by expanding the types of offences where there is a presumption against bail.

There are three main objections to such a presumption against bail. First, a person is innocent until proven guilty. Secondly, conditions can be applied to the granting of bail to minimise the risk. Thirdly, remand centres are already overcrowded, and a presumption against bail would require additional resources to be provided for prisoners on remand.

A better course may be to improve the targeting of bail refusals based on more cogent use of databases that contain relevant information such as prisoner records, types of offences committed while on bail or on parole, and bail outcomes assessed against a variety of risk factors.

3. Should Queensland and Western Australia follow England & Wales and New South Wales and abolish the right to silence?

Historically, the right to silence has been subject to considerable criticism. As far back as 1825, Bentham was of the view that innocence never takes advantage of the right to silence: 'Innocence claims the right of speaking, as guilt invokes the privilege of silence.' In England and Wales, the Criminal Justice and Public Order Act 1994 ss 34-39 allows for adverse inferences to be drawn from the exercise of the right to silence. The general caution is now: 'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'

At present, the only jurisdiction in Australia to have followed the English lead is New South Wales in 2013, with the insertion of s 89A into the *Evidence Act 1995* (NSW). It can be seen from s 89A(1)(a) and (b) below that an adverse inference can be drawn if the defendant failed or refused to mention a fact that the defendant could reasonably have been expected to mention at the time and later relied on in court.

Evidence Act 1995 (NSW)

89A Evidence of silence in criminal proceedings for serious indictable offences

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:

(a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and

(b) that is relied on in his or her defence in that proceeding.

(2) Subsection (1) does not apply unless:

(a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and

(b) the special caution was given before the failure or refusal to mention the fact, and

(c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and

(d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply:

(a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or

(b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

Note : See section 139 of this Act and section 122 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section:

"official questioning" of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

"special caution" means a caution given to a person that is to the effect that:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and

(b) anything the person does say or do may be used in evidence.

Note : The Commonwealth Act does not include this section.

However, as Eburn et al have pointed out (M. Eburn, R. Howie and P. Sattler, *Hayes and Eburn Criminal Law and Procedure in New South Wales* (LexisNexis, 4th ed, 2014) [12.141]), there are a number of pre-conditions which must be met before the inference can be drawn.

Section 89A only applies where the defendant is charged with a serious indictable offence (punishable by imprisonment for 5 years or more); the defendant must have been given a 'special caution' as defined in the section above; the special caution was given in the presence of an Australian legal practitioner acting for the defendant at the time; the defendant was given a reasonable opportunity to consult with his or her lawyer as to the effect of the caution; the inference cannot be drawn if the defendant was under 18 years of age or is incapable of understanding the nature of the caution; and the section does not apply 'if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence'.

The position as common law is summed up in *Azzopardi v R* (2001) 205 CLR 50, 64 [34] (Gaudron, Gummow, Kirby and Hayne JJ).

> The fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt. It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt.

The common law right to silence is enshrined in s 397 of the PPRA (Qld). The CIA (WA) does not specifically mention the right to silence, and the common law is imported by necessary intendment. However, by virtue of s 618 of the *Criminal Code* (Qld), whether the defendant is or is not going to give evidence is specifically drawn to the attention of the jury.

> 618 Evidence in defence
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> At the close of the evidence for the prosecution the proper officer of the court shall ask the accused person whether the person intends to adduce evidence in the person's defence.

Then, under s 620 of the *Criminal Code* (Qld) the trial judge is permitted to make such observations upon the evidence as the court thinks fit to make.

> 620 Summing up
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> (1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.

In *R v DAH* [2004] QCA 419 [11], McPherson JA described the trial judge's directions in this case on the onus of proof as 'exemplary'.

> [11] 'Let us go directly to the general directions. These must be given to every jury in every trial in this State. The first relates to the onus of proof. In our system of justice, it is for the prosecution to prove any criminal charge that has been brought. So, we say that the burden of proof rests on the prosecution to prove the guilt of the accused person.
>
> It follows logically that there is no onus on the accused person to prove his or her innocence. An accused person is presumed innocent and retains the benefit of that presumption until it is displaced by proof of guilt.
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> In this case the accused man has chosen not to give evidence. One consequence of the rule that the onus of proof rests on the prosecution is that an accused person is not under any legal obligation to give evidence.
>
> While you have not heard the accused man deny from the witness box that he committed either offence, the fact he has not given evidence in his trial does not by itself support an inference against him.
>
> The rule you have to apply is that no adverse inference should be drawn against him because he decided not to give evidence. It is a choice he is permitted to make by law. Equally, the fact that he chose not to give evidence does not strengthen the case, or supply additional proof of the case against him.'

The policy choice is a clear one between the position taken in New South Wales which, subject to certain pre-conditions, permits adverse inferences to be drawn, and the common law position where no adverse inference should be drawn from a defendant exercising his or her right to silence. It remains to be seen whether any other Australian jurisdiction follows NSW's lead, but until that time the law relating to the right to silence is that set down in *Azzopardi v R* (2001) 205 CLR 50.

4. Should leave be required for all appeals?

There is a distinction between Queensland and Western Australia which relates to the right of appeal. Under s 668D Right of Appeal of the *Criminal Code* (Qld), there is an as of right appeal against conviction on any ground involving solely a question of law. The leave of the Court of Appeal is required for questions of fact, or questions of mixed law and fact, or sentence.

However, in Western Australia leave is required for all appeals under s 27(1) of the *Criminal Appeals Act 2004* (WA). Section 27(2) states 'the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding'. The meaning of a reasonable prospect of succeeding was examined in *Samuels v Western Australia* [2005] WASCA 193, and was interpreted to mean that the appeal had a real prospect of success.

Western Australia is not the only jurisdiction to require leave to appeal against conviction on any ground of appeal: see s 274 of the *Criminal Procedure Act 2009* (Vic) below.

S 274 Right of appeal against conviction

A person convicted of an offence by an originating court may appeal to the Court of Appeal against the conviction on any ground of appeal if the Court of Appeal gives the person leave to appeal.

The purpose of s 27(2) of the *Criminal Appeals Act 2004* (WA) above is to make efficient use of the Court of Appeal's resources and to prevent fanciful or unrealistic appeals from being heard. In effect s 27(2) acts as a rationing device. Arguably, its very presence in the *Criminal Appeals Act 2004* (WA) serves as a deterrent to over- zealous lawyers combing through a trial judge's summing up seeking a scintilla of error upon which to build a ground for an appeal. Requiring leave for all appeals has on its face some merit.

5. Should there be broader exceptions to the double jeopardy rule?

The relevant Queensland legislation is found in Chapter 68 – Exceptions to double jeopardy rules of the *Criminal Code* (Qld). The note in s 17 of the *Criminal Code* (Qld) specifically addresses ss 678B and 678C, where the court may order a retrial for murder on fresh and compelling evidence or for a tainted acquittal for a 25 year offence respectively.

678B Court may order retrial for murder: fresh and compelling evidence

(1) The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for the offence of murder if satisfied that:

(a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and

(b) in all the circumstances it is in the interests of justice for the order to be made.

678C Court may order retrial for 25 year offence: tainted acquittal

(1) The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for a 25 year offence if satisfied that:

(a) the acquittal is a tainted acquittal; and

(b) in all the circumstances it is in the interests of justice for the order to be made.

In 2012, Western Australia, by inserting a new Part 5A Prosecuting acquitted accused into the *Criminal Appeals Act 2004* (WA), introduced similar legislation to Queensland in relation to 'fresh and compelling evidence' (defined in s 46I) concerning serious offences (s 46A defines serious offences as meaning offences carrying a term of life imprisonment or imprisonment of 14 years or more). This legislation allows authorised officers to apply to the Court of Appeal to retry a person following an acquittal on the same charge: see ss 46B(1), 46D and 46E.

Clearly, the Western Australian legislation has a far lower threshold of a 14 year offence than Queensland with a 25 year offence. The question is inviting discussion as to whether (1) a 14 year threshold is too broad, and that the appropriate threshold for an exception to the double jeopardy rule should be closer to a 25 year offence, or (2) a 14 year threshold is too high and the threshold should be even broader covering say a 10 year offence.

An appropriate starting point is to examine the types of offences that carry a possible maximum term of imprisonment of 14 years and 25 years respectively. Thus, for example, in the *Criminal Code* (WA), s 325 Sexual penetration without consent and s 392 Robbery both carry a term of imprisonment of 14 years where there are no circumstances of aggravation. However, using robbery as a further example, if there are circumstances of aggravation under s 392(d) or the offender was armed under s 392(c), the maximum term of imprisonment increases to 20 years or life imprisonment respectively. Similarly, while the maximum penalty for stealing under s 378 the *Criminal Code* (WA) is 7 years imprisonment, if the thing stolen falls under any of the circumstances listed in s 378(5), then the maximum penalty increases to 14 years imprisonment. Thus, it can be seen that potentially a broad sweep of offences would qualify under the 14 year threshold in the *Criminal Code* (WA).

The threshold in Queensland is much higher at 25 years. However, the penalties can also be more severe. Thus, the maximum penalty for rape under 349 of the *Criminal Code* (Qld) is life imprisonment, which applies irrespective of whether or not there are circumstances of aggravation. Similarly, under s 411(2) of the *Criminal Code* (Qld) which deals with the punishment for robbery, the offender is liable to imprisonment for life 'if the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with 1 or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person'. Thus, a life sentence for robbery is open under three alternative scenarios in Queensland.

The point being that the threshold for an exception to the double jeopardy rule needs to be assessed in the context of the sentencing regime for serious offences in the particular jurisdiction. Also, it should not be overlooked that there are significant pre-conditions to the triggering of the exceptions to the double jeopardy rule, namely (1) there is fresh and compelling evidence against the acquitted person in relation to the offence or the acquittal is tainted, and (2) in all the circumstances it is in the interests of justice for the order to be made.

On balance, it would appear that the respective thresholds for exceptions to the double jeopardy rule of 14 years in Western Australia and 25 years for Queensland are reasonably appropriate, given (a) the sentencing regimes in each State and (b) the pre-conditions to the triggering of the thresholds. However, given the broad sweep of offences covered under a 14 year threshold, it would seem inappropriate to reduce the threshold any further.

PROBLEM QUESTION

ASSUME THE FOLLOWING FACTS

Martha was born and raised in a remote Aboriginal community in far north Queensland. As a small child she spoke only the language of her community and learnt English at school. She suffered serious childhood diseases, had little schooling, and in her late teens drifted away from her community and came to live in various cheap boarding houses in Townsville. From time to time she came to the attention of police for property crimes. Recently, police had cause to investigate a homicide that appeared to have occurred after an intruder broke into the deceased's home.

Constable Rockett observed Martha walking through a shopping centre in Townsville with property he recognised as belonging to the deceased. He asked Martha for her name and address. When Martha shook her head, Rockett arrested her for failing to supply her name and address. Rockett drove her to the police station and in the police car asked Martha if she had 'fallen into her old bad habits' to which she replied 'yes'.

At the police station, Martha was left alone in an interview room for over an hour. Constable Rockett returned with Constable Baker. They showed Martha the property and asked her if she had stolen it. Martha replied 'yes'. The police officers then told her she was under arrest for stealing and murder. When they pressed her to answer further questions, Martha repeatedly said 'no'. Both officers left. Four hours later they returned with Martha's auntie Dora and asked Dora to talk to Martha about answering questions.

They left Martha and Dora alone with each other for twenty minutes. Upon the return of the police officers, Martha agreed to answer questions. The police cautioned Martha at the commencement of the interview and asked her if she understood the caution, to which she answered 'yes'.

During the interview, Martha made admissions to stealing from the deceased's home but denied killing her. The interview was recorded by one of the officers on a type-writer, read over to Martha and Martha signed the original as being true and correct. Although the officers usually recorded a confession on audio and video-tape, on this occasion the equipment at the police station was being repaired.

What issues would the court need to consider if the confession was disputed at trial?

ANSWER

The fact that Martha is an Aboriginal person immediately triggers s 420 of the *Police Powers and Responsibilities Act 2000* (Qld).

> 420 Questioning of Aboriginal people and Torres Strait Islanders

(1) This section applies if:

(a) a police officer wants to question a relevant person; and (b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait Islander.

(2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must: (a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and (b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

(3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.

(4) The police officer must not question the person unless:

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and (b) a support person is present while the person is being questioned.

(5) Subsection (4) does not apply if the person has, by a written or electronically recorded waiver, expressly and voluntarily waived his or her right to have a support person present.

(6) If the police officer considers the support person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

It can be seen that both s 420(2) which deals with a lawyer being present, and s 420(4) which covers a support person, are both qualified under s 420(3) and s 420(5) respectively. Section 420(3) allows a police officer to dispense with the need for a lawyer being present if the officer 'reasonably suspects' the indigenous person is not at a disadvantage compared to members of the Australian community generally. Section 420(5) allows the right to a support person to be waived provided the waiver is recorded. If a court concludes that the provisions of s 420 have not been complied with, any evidence so gathered will be deemed inadmissible.

In Western Australia, there is no equivalent provision for indigenous people in the *Criminal Investigation Act 2006* (WA) to s 420 PPRA. However, there is a general provision under s 137(3) covering the rights of arrested persons.

(3) The arrested person is entitled — (a) to any necessary medical treatment; and (b) to a reasonable degree of privacy from the mass media; and (c) to a reasonable opportunity to communicate or to attempt to communicate with a relative or friend to inform that person of his or her whereabouts; and (d) if he or she is for any reason unable to understand or communicate in spoken English sufficiently, to be assisted in doing so by an interpreter or other qualified person.

The key provision is s 137(3)(d) which provides for the provision of an interpreter. If the rights of a person are contravened under s 137(3), then s 154, which deals with evidence obtained improperly, provides that any evidence so derived is not admissible in any criminal proceedings against a person in a court unless —

> (c) the person does not object to the admission of the evidence; or (d) the court decides otherwise under section 155 [court may allow admission of inadmissible evidence]; or (e) if the power exercised was exercised in relation to a protected person (as that term is defined in section 73 [a child or an incapable person]), the court is of the opinion that the contravention arose out of a mistaken but reasonable belief as to whether the person was a protected person.

Western Australia is effectively relying on the fairness principle, and the court's general discretion to admit inadmissible evidence under s 155(2) of the *Criminal Investigation Act 2006* (WA).

For the purposes of answering the issues raised in the question, other relevant legislation in Queensland comprises:

Police Powers and Responsibilities Act 2000 (Qld) ss 431, 433 and 437.

Police Powers and Responsibilities Regulation 2012 (Qld) Schedule 9 Responsibilities Code: ss 25, 26 and 28.

> ***Police Powers and Responsibilities Act 2000* (Qld)**
>
> **431 Cautioning of persons**
>
> (1) A police officer must, before a relevant person is questioned, caution the person in the way required under the responsibilities code.
>
> (2) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person can not hear adequately.
>
> (3) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words.
>
> (4) If necessary, the police officer must further explain the caution.
>
> (5) This section does not apply if another Act requires the person to answer questions put by, or do things required by, the police officer.
>
> **433 Right to interpreter**

(1) This section applies if a police officer reasonably suspects a relevant person is unable, because of inadequate knowledge of the English language or a physical disability, to speak with reasonable fluency in English.

(2) Before starting to question the person, the police officer must arrange for the presence of an interpreter and delay the questioning or investigation until the interpreter is present.

(3) In this section--

investigation means the process of using investigative methodologies, other than fingerprinting, searching or taking photos of the person, that involve interaction by a police officer with the person, for example, an examination or the taking of samples from the person.

437 Requirements for written record of confession or admission

(1) This section applies if a record of a confession or admission is written.

(2) The way the written record of the confession or admission is made must comply with subsections (3) to (7).

(3) While questioning the relevant person, or as soon as reasonably practicable afterwards, a police officer must make a written record in English of the things said by or to the person during questioning, whether or not through an interpreter.

(4) As soon as practicable after making the record--

(a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and

(b) the person must be given a copy of the record.

(5) Before reading the record to the person, an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.

(6) The person must be given the opportunity, during and after the reading, to draw attention to any error in or omission from the record he or she claims were made in the written record.

(7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading, and anything else done to comply with this section.

Police Powers and Responsibilities Regulation 2012 **(Qld)**
Schedule 9

25 Questioning of Aboriginal people and Torres Strait Islanders

(1) A police officer who is about to question a relevant person the police officer reasonably suspects is an adult Aboriginal person or Torres Strait Islander must first ask questions necessary to establish the person's level of education and understanding.

(2) Subsection (1) does not apply if the police officer already knows the relevant person.

(3) The questions the police officer may ask include questions, not related to the relevant person's involvement in the offence, that may help the police officer decide if the person—

> (a) is capable of understanding the questions put to the person, what is happening to the person and the person's rights at law; and
>
> (b) is capable of effectively communicating answers to the questions; and
>
> (c) is aware of the reason the questions are being asked.

(4) If the police officer considers it is necessary to notify a representative of a legal aid organisation that the relevant person is about to be questioned in relation to an offence, the police officer must inform the relevant person of the intention to notify the legal aid organisation, in a way substantially complying with the following—

> 'As you have not arranged for a lawyer to be present, a legal aid organisation will be notified you are here to be questioned about your involvement in an indictable offence.'

(5) If the relevant person has indicated the person does not wish to telephone or speak to a support person or arrange for a support person to be present during questioning, the police officer conducting the questioning must inform the relevant person that the person may have a support person present during the questioning.

(6) The information given under subsection (5) must substantially comply with the following—

> 'Is there any reason why you don't want to telephone or speak to a support person and arrange for a person to be present during questioning?
>
> Do you understand that arrangements can be made for a support person to be present during the questioning?
>
> Do you also understand that you do not have to have a support person present during questioning?
>
> Do you want to have a support person present?'.

(7) If the police officer reasonably suspects the relevant person is at a disadvantage in comparison with members of the Australian community generally, and the person has not arranged for a support person to be present during the questioning, the police officer must arrange for a support person to be present.

26 Cautioning relevant persons about the right to silence

(1) A police officer must caution a relevant person about the person's right to silence in a way substantially complying with the following—

'Before I ask you any questions I must tell you that you have the right to remain silent.
This means you do not have to say anything, answer any question or make any statement unless you wish to do so.
However, if you do say something or make a statement, it may later be used as evidence.
Do you understand?'.

(2) If the police officer reasonably suspects the relevant person does not understand the caution, the police officer may ask the person to explain the meaning of the caution in his or her own words.

(3) If necessary, the police officer must further explain the caution.

(4) If questioning is suspended or delayed, the police officer must ensure the relevant person is aware he or she still has the right to remain silent and, if necessary, again caution the person when questioning resumes.

(5) If a police officer cautions a relevant person in the absence of someone else who is to be present during the questioning, the caution must be repeated in the other person's presence.

28 Right to interpreter

(1) This section applies, for section 433 of the Act, to a police officer for—
(a) forming a reasonable suspicion about whether a relevant person is able to speak with reasonable fluency in English; and
(b) arranging for the presence of an interpreter during questioning of a relevant person.

(2) The police officer may ask the relevant person questions, other than a question related to the person's involvement in the offence for which the person is to be questioned, that will help the police officer form the reasonable suspicion.

(3) In particular, the police officer may ask questions that may help the police officer decide whether or not the relevant person—
(a) is capable of understanding the questions; and
(b) is capable of understanding what is happening; and
(c) is capable of understanding the person's rights at law; and

(d) is capable of effectively communicating answers to the questions; and
(e) is aware of the reason the questions are being asked.

The issues raised by the question go to the compliance by the police with the above legislation, and whether there has been a breach of the legislation sufficient to warrant a court refusing to admit Martha's confession relating to stealing. Martha has consistently denied the murder allegation, but the Crown may well infer that Martha's confession to stealing the property puts her in the frame for the murder. Integral to such a decision on the admission of the confession is the degree to which Martha understands English.

The facts indicate that while Martha learnt English at school she had little schooling. She had serious childhood diseases and so (a) might have missed a lot of schooling, and (b) the diseases may have affected her ability to learn or understand English. It is not clear how old Martha is, nor the extent to which she has picked up English once she left her community. We are told Martha is known to police which implies she is familiar with the process of arrest, interrogation and charging her with an offence. However, this may not be the case.

The trigger for Martha's arrest is her failure to give the police her name and address. However, Martha simply shook her head when asked for this information, which could mean no more than she did not understand the question. Nevertheless, as Martha had stolen property in her possession, the police had a reasonable suspicion she might have been involved in the theft of the property sufficient to arrest her (*George v Rockett* (1990) 170 CLR 104). Even so, it is open to doubt as to whether Martha understood the reason for her arrest.

The next significant fact in the scenario is, in the absence of a caution contrary to s 431 of the PPRA and Reg 26 of Schedule 9 of the PPRR, Rockett's question if Martha had 'fallen into her old bad habits'. The phrasing of this question could be open to misinterpretation to someone who spoke good English, let alone someone with a limited understanding of English. Furthermore, there is the well-known tendency for Aboriginal people to engage in 'gratuitous concurrence' in order to please the questioner (*R v Anunga* 11 ALR 412), which Foster J explained in this way at 414:

> [M]ost Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman.

In any event, at this point the question is raised as to the need for an interpreter under s 433 of the PPRA and Reg 28 of Schedule 9 of the PPRR.

Then, Martha is left alone for an hour. There is apparently no offer of food and drink. When the two police return, again in the absence of a caution, Martha is asked whether she has stolen the property she is shown. There is also no prior attempt to assess Martha's level of understanding of English, which when Martha replies 'yes', again, as in the car, raises the issue of 'gratuitous concurrence'. Further questions are met with a 'no', and Martha is then left alone for a further 4 hours without any indication of sustenance being offered.

The arrival of Auntie Dora is not a neutral act of providing a support person, but instead has a single purpose of getting Dora to encourage Martha to answer questions, which raises the question of whether persons in authority (the police) are trying to overborne Martha's will using Dora as their instrument (*McDermott v The King* (1948) 76 CLR 501). The law on this point was summarised by Brennan CJ in *R v Swaffield* [1998] HCA 1 at [11]:

> Although unreliability has remained the raison d'être of this rule of exclusion, the nature and effect of the inducement became the touchstone of its application. In *McDermott v The King* (1948) 76 CLR 501, 511-512, Dixon J spelt out the rules by which voluntariness was determined. These rules were adopted by a unanimous Court in *R v Lee* (1950) 82 CLR 133 at 144:
>
> > 'These rules, stated in abbreviated form, are--(1) that such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed. These two "rules" ... seem to be not really two independent and co-ordinate rules. There seems to be really one rule, the rule that a statement must be voluntary in order to be admissible. Any one of a variety of elements, including a threat or promise by a person in authority, will suffice to deprive it of a voluntary character. It is implicit in the statement of the rule, and it is now well settled, that the Crown has the burden of satisfying the trial judge in every case as to the voluntary character of a statement before it becomes admissible.'

The involvement of Auntie Dora, who may not be someone Martha actually wanted to be present or filled the role of 'prisoner's friend', occurred in the absence of a legal representative, contrary to s 420(2) of the PPRA, 'unless a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally' (s 420(3) of the PPRA), which would appear unlikely on the facts. When the police return 20 minutes later (Martha has by now apparently been without sustenance for 5 hours and 20 minutes and may also be suffering from tiredness: see Anunga Rules 6 and 7), Martha has agreed to answer questions. Finally, Martha is cautioned, but again it is open as to whether she actually understood the caution. During the interview Martha admits to stealing but denies the murder. The interview is not electronically recorded, which does not comply with s 437(7) of the PPRA, which requires an electronic recording of the reading under s 437(4).

> (7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading, and anything else done to comply with this section.
>
> (4) As soon as practicable after making the record—
>
> > (a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and

(b) the person must be given a copy of the record.

The consequences of non-compliance are spelt out under s 436(3) of the PPRA.

> 436 Recording of questioning etc.
>
> (1) This section applies to the questioning of a relevant person.
>
> (2) The questioning must, if practicable, be electronically recorded.
>
> *Examples for subsection (2)—*
>
> *1 It may be impracticable to electronically record a confession or admission of a murderer who telephones police about the murder and immediately confesses to it when a police officer arrives at the scene of the murder.*
>
> *2 It may be impracticable to electronically record a confession or admission of someone who has committed an armed hold-up, is apprehended after pursuit, and makes a confession or admission immediately after being apprehended.*
>
> *3 Electronically recording a confession or admission may be impracticable because the confession or admission is made to a police officer when it is not reasonably practicable to use recording facilities.*
>
> (3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 437.
>
> (4) If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.

Thus, as none of the examples in s 436(2) above apply on the facts, s 436(3) excludes Martha's confession as neither s 436(4) or s 437 has been complied with by the police.

The only avenue left open to the Crown to have Martha's confession admitted is under s 439 of the PPRA.

> 439 Admissibility of records of questioning etc.
>
> (1) Despite sections 436 and 437, the court may admit a record of questioning or a record of a confession or admission (the record) in evidence even though the court considers this division has not been complied with or there is not enough evidence of compliance.
>
> (2) However, the court may admit the record only if, having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice.

Section 439 of the PPRA is designed as a residual provision to allow a confession to be admitted under special circumstances where it would be in the interests of justice to do so. This would not appear to be the case here for Martha, unless the Crown had other cogent evidence linking Martha to the murder. Otherwise, in the absence of the police being able to show that Martha is not at a disadvantage in comparison with members of the Australian community generally, then all the other non-compliances with the PPRA and the questionable role of Auntie Dora as an instrument of persons in authority to overbear Martha's will, combine to exclude Martha's confession.

The situation in Western Australia would be similar: see s 137(3) of the *Criminal Investigation Act 2006* (WA) above which covers the rights of arrested persons. In addition, the Anunga Rules as outlined in *R v Anunga* 11 ALR 412 would also apply.

> 1. When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding.
>
> 2. When an Aboriginal person is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent, or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. Combinations of persons in situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the 'prisoner's friend' be someone in whom the Aboriginal has confidence, by whom he will feel supported.
>
> 3. Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms.... Police officers, having explained the caution in simple terms, should ask the Aboriginal person to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the territory already do this. The problem of the caution is a difficult one but the presence of a 'prisoner's friend' or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.
>
> 4. Great care should be taken in formulating questions so that, so far as possible, the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question which may suggest the answer but also the manner and tone of voice which are used.
>
> 5. Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter and endeavour to obtain proof of the commission of the offence from other sources.
>
> 6. Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen, it is particularly important that they be offered a meal, if they are being interviewed in the police station, or in the company of police or in custody

when a meal time arrives. They should also be offered tea or coffee if the facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory, if they are in the company of police or are under arrest.

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

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

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