CHAPTER 16

POLICE POWERS

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

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

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

The scope of police powers

16.2 At common law, a police officer had few special powers relating to the investigation of crime. For example, there was no power to stop a suspect, to demand identification, or to require submission to a search. Law enforcement largely depended on the police using general liberties to look, listen and ask questions that are available to everyone and also exploiting opportunities to obtain consent for more intrusive action. However, the general principle of restraint on police powers has been substantially eroded by statute in most jurisdictions. A range of powers to act, and often to do so without warrant, has now been conferred upon the police. This Chapter will analyse only some of the most important powers, focusing on those respecting searches of persons and vehicles, search warrants, arrests, and caution interviews in custody.

16.3 In recent years, some Pacific jurisdictions have enacted enacted comprehensive statutes on police powers to investigate crime: see Solomon Islands Police Act 2013; Kiribati Police Powers and Duties Act 2008; Tuvalu Police Powers and Duties Act 2009. This has not yet happened in Vanuatu. Police powers in Vanuatu are found in a mélange of provisions in different statutes.

- The Criminal Procedure Code ss 4-23 cover warrantless searches of persons and vehicles for stolen items, warrantless arrests and related matters, refusals of suspects to provide their name and address, and prevention of offences and breaches of the peace. In addition, ss 45-70 deal with arrest warrants, search warrants, and the grant of bail.
- The Dangerous Drugs Act ss 10-12 make separate provision for searches and seizures relating to drugs offences.
- The Police Act deals primarily with the organisation of the Police Force but also creates various powers including powers to take photographs, fingerprints and other descriptive particulars, powers to erect barriers across roads or in other public places, powers to enter premises without warrant to deal with fires and other threats to life or property. It also authorises the use of reasonable force in the exercise of police powers
- The Police Powers Act 2017 introduces some modern powers to combat crime: to conduct undercover operations, to exercise surveillance warrants; to access computers and computer networks; and to conduct controlled deliveries of property.

In some respects, the coverage of these provisions is sparse, so that resort must be made to the common law.

16.4 There is a notable gap in the legislative scheme of specific powers. There is no power to stop, detain and search persons or vehicles without warrant except for stolen items or dangerous drugs. Powers to search for evidence of or the means of committing any offence have become commonplace in the legislation of other

jurisdictions. However, the gap may not be significant. It has been suggested that police powers may be derived not only from specific provisions but also by implication from general provisions respecting police duties to preserve the peace and prevent crime: see especially the judgment of the Supreme Court of Canada in *Knowlton v R* [1974 SCR 443. The court in *Knowlton* endorsed the following tests for the lawfulness of police action from the English Court of Appeal in *R v Waterfield* [1963] 3 All ER 659, 3 WLR 946 at 950:

(i) whether such conduct of the police falls within the general scope of any duty imposed by statute or recognized at common law and
(ii) whether such conduct, albeit within the general scope of such duty, involved an unjustifiable use of powers associated with the duty.

There are general duties in the Vanuatu Police Act, from which it may be possible to derive warrantless search powers as a corollary. The Police Act s 4(1) declares: 'It shall be an essential duty of the Force to maintain an unceasing vigilance for the prevention and suppression of crime.' This is reinforced by s 35(3), which states: 'It shall be the duty of every member … to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons that he is legally authorised to apprehend and for whose apprehension sufficient ground exists.' It can be argued that the imposition of such duties carries by implication the grant of powers that are reasonably necessary to discharge the duties.

16.5 The exercise of special police powers is potentially subject to rights conferred on suspects by Bill of Rights in Constitutions. The Vanuatu Constitution s 5(c) provides that 'everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged'. However, the Vanuatu Constitution focuses on court proceedings rather than police action. Some other constitutions pay more attention to the moment of arrest or detention, entrenching rights to be informed of the reasons and of the right to consult a lawyer, and to be brought without undue delay before a court. In Vanuatu, such rights would have to be recognised as matters of common law.

Investigating crime: general liberties and special powers

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

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

16.8 A key element in the law of investigative powers is the distinction between powers that can be exercised without a warrant and powers that can only be exercised with a warrant. In both cases, the law can prescribe grounds on which the power may be exercised. The distinction between them turns on who makes the primary decision about whether the grounds for the exercise of the power exist. Where a warrant is not required, the decision is made by the person who exercises the power (although it may be subject to subsequent review by superiors or by the courts). For powers that require a warrant, however, an independent determination of whether grounds exist for the issue of a warrant is made before the power is exercised. The warrant itself is an authorisation to exercise the power. A warrant is issued by a judicial officer such as a magistrate, following a complaint that establishes the justification for the warrant to be issued. The role of the process is to ensure that an independent agency, acting in a quasi-judicial manner, has determined that the relevant invasion of privacy is justifiable.

The relevance of consent

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

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

A person should not be prevented from invoking a lack of statutory or common law

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

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

16.11 A general principle that notification is required may therefore operate as part of common law doctrine on the meaning of consent. Moreover, even if appropriate advice has been provided, it may be unsafe to infer consent in the absence of a reply indicating that consent has been given. In Western Australia, a lack of reply signifies lack of consent to a search: Criminal Investigation Act 2006 (WA) s 23.

Exclusion of wrongfully obtained evidence

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

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

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

- Mandatory exclusion of 'involuntary' confessions: the 'voluntariness' rule.
- Discretionary exclusion of confessional evidence that it would be unfair to the

accused to admit: the 'fairness' discretion.

- Discretionary exclusion of any form of evidence that was unlawfully or improperly obtained and that it would be contrary to public policy to use: the 'public policy' discretion.

These three bases for excluding wrongfully obtained evidence should operate in Vanuatu as a matter of common law. There is no legislation in Vanuatu on the matter.

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

16.16 Where the voluntariness of a confession is in issue, it is established law that voluntariness must be proved by the prosecution beyond reasonable doubt: see, for example, *Public Prosecutor v Albert* [1975] VUNHJC 22. However, the burdens of proof and justification respecting discretionary exclusion are difficult matters. Factual allegations of wrongdoing must generally be proved by the party making them. However, the position is more complicated when it has been established that evidence was wrongfully obtained and the issue is whether it should therefore be excluded. It might be argued that the burden should still lie on the defendant to make a convincing argument in favour of exclusion but here is no established authority for this position.

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

Public policy

16.18 In modern times, courts have recognised a common law discretion to exclude evidence that was obtained unlawfully or otherwise improperly on grounds of public policy: see, for example, *Bunning v Cross* (1978) 141 CLR 54, [1978] HCA 22; *Ridgeway* (1995) 184 CLR 19, [1995] HCA 66. This is known as the 'public policy discretion'.

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

unlawfully detained at the time.

16.20 The rationale for the 'public policy' discretion is the protection of the public interest in appropriate police behaviour rather that the protection of the innocent accused. When evidence is excluded on public policy grounds, the accused is merely an incidental beneficiary of the way in which the public interest is pursued. For example, there may be no question about the reliability of evidence of items seized in an unlawful search. Yet, the public interest in maintenance of privacy interests may sometimes justify exclusion of that evidence. However, where confessional evidence is in issue, there are additional grounds for exclusion which focus on issues of reliability: see below **16.88**–**16.97**.

16.21 In *Ridgeway v R* (1995) 184 CLR 19; 129 ALR 41; [1995] HCA 66 at [15], Mason CJ, Deane and Dawson JJ said: 'The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes.' The focus of the discretion is on the societal impact of the investigative practice. Concerns may be that the police conduct flouts the law and therefore undermines the rule of law, or that it endangers societal expectations of privacy, or that the misconduct is of a kind which is generally likely to risk wrongful convictions, regardless of whether there was a risk with respect to the particular accused. Nettle J in *Police v Dunstall* (2015) 256 CLR 403; 322 ALR 440; [2015] HCA 26 at [63] explained the discretion in this way:

> [I]t is better that a possibly guilty accused be allowed to go free than that society or the courts sanction serious illegality or other serious impropriety on the part of officials in gathering the evidence with which to convict the accused. It has less if anything to do with fairness to the accused than with protecting societal norms.

16.22 Usually, the 'public policy' discretion is called into play when there has been unlawful conduct on the part of the police in collecting evidence. In *Ridgeway*, the High Court was presented with a somewhat different problem: that of entrapment, where unlawful police conduct induces or facilitates the commission of the offence. Entrapment is not a substantive defence. Instead, any remedy is procedural; in England and Canada, proceedings are liable to be stayed as an abuse of process; in Australia, all evidence of an offence brought about by improper entrapment is liable to be excluded in the exercise of the 'public policy' discretion. *Ridgeway* also contained some discussion at [22]-[25] of situations in which the police conduct is improper but not unlawful. It was held that these too can be subject to the public policy discretion. Entrapment by harassment was mentioned. Another example might be discrimination in investigative practices.

16.23 The exercise of the public policy discretion involves balancing the desirability of convicting an offender against the undesirability of condoning unlawful or improper action in law enforcement. As it was expressed in the leading case of *Bunning v Cross* (1978) 141 CLR 54, 19 ALR 64; [1978] HCA 22 at [27]:

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

In exercising the discretion, a court will need to weigh the seriousness of the official misconduct against the seriousness of the offence in issue: *Bunning v Cross*, at [42]. Thus, the High Court of Australia in *Ridgeway v R* (1995) 184 CLR 19 at 38; 129 ALR 41 [1995] HCA 66 at [26] viewed decisions on whether to admit or exclude evidence as turning primarily on 'the degree of criminality' in issue versus the gravity (more precisely 'the nature, seriousness and effect') of the police misconduct. The worse the criminality, the more likely the evidence will be admitted; while the worse the police misconduct, the more likely the evidence will be excluded.

16.24 The concept of 'degree of criminality' was not analysed closely in *Ridgeway*. There appear to be at least two dimensions. One is obviously the legal seriousness of the offence in issue, as reflected in the penal liability which has been prescribed; another may be the personal culpability of the individual under investigation. Therefore, it was indicated at [27] that a consideration in entrapment cases should be whether or not the target was 'an otherwise law-abiding person'.

16.25 In assessing the seriousness of the procedural violation, consideration needs to be given not only to the impact on the accused but also to the culpability of the officer. Was the violation deliberate, reckless or negligent, or the result of an innocent mistake? Moreover, a significant development in *Ridgeway* was the suggestion at [26], [28] that the police misconduct under scrutiny should include not only the conduct of the officer involved in the investigation, but also that of other officials. 'Entrenched' misconduct was viewed as particularly bad. It was also said that any illegality or impropriety would become more serious if it was encouraged or tolerated by a superior official.

16.26 A longer list of factors that may be taken into account was offered by the High Court of Australia in *Bunning v Cross*:

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

with the law: at [40];

- the seriousness of the offence charged: at [41];
- indications of legislative intent to narrowly restrict the exercise of the power in issue: at [42].

A difficulty with this list is that the relevance of some factors may vary, depending on features of particular cases.

- The cogency or probative value of the evidence was treated in *Bunning v Cross at* [38]-[39] as a factor favouring admission, but only where the illegality arose from a mistake. It was said at [38] that 'cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless'.
- Ease of compliance with the law was treated in *Bunning v Cross* at [40] as a factor favouring exclusion, but only where there was deliberate cutting of corners. It was said to be a 'wholly equivocal' factor in a case where the police were operating under a mistake. In *Kadir v R, Grech v R* (2020) 375 ALR 80; [2020] HCA 1 at [20], it was suggested that ease of compliance could even be a factor favouring admission in a case where 'action is taken in circumstances of urgency in order to preserve evidence from loss or destruction'. Thus, depending on the circumstances, ease of compliance can be a factor favouring admission, a neutral factor, or a factor favouring admission.

16.27 The High Court of Australia has applied the public interest discretion beyond the actions of police and other authorities. In *Kadir v R, Grech v R* [2020] HCA 1, animal rights activists illegally video recorded rabbits allegedly being used as live bait in greyhound training. The High Court held at [37] that the seriousness of the contravention was greater because it was made in deliberate contravention of the law with a view to assembling evidence which, it was believed, the proper authorities would be unable to obtain. The Court noted at [48]:

> The undesirability of admitting evidence obtained in consequence of the deliberate unlawful conduct of a private 'activist' entity is the effect of curial approval, or even encouragement, of vigilantism.

Exercising powers: reasonable suspicion and reasonable belief

16.28 The exercise of most investigative powers requires a justification in *reasonable suspicion* of (or, in alternative but synonymous phrases, *reason to suspect* or *reasonable grounds for suspecting*) the commission of an offence. See, for example, the power of a police officer to detain and search a person without warrant for unlawfully obtained property under the Criminal Procedure Code s 9, and the power

of a magistrate to issue a warrant to search a place under the Code s 55. Some other investigative powers can only be exercised on the basis of *reasonable belief* (or alternatively *reason to believe* or *reasonable grounds for believing*). See, for example, the power to issue an arrest warrant under the Criminal Procedure Code s 48 or a surveillance warrant under the Police Powers Act 2017 s 5(1)(ii).

16.29 Suspicion and belief are distinct.

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

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

- In contrast, the High Court in *George v Rockett* at [14] said of 'belief': 'Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition.' It was also said that something may be reasonably believed to be true even though it cannot be proved to be so. Even so, reasonable belief sets a higher standard than reasonable suspicion.

16.30 'Reasonable suspicion' and 'reasonable belief' incorporate objective standards. It is not sufficient that the officer honestly suspects or believes; the honest suspicion or belief must also be reasonable. A state of mind may be reasonable even though it is eventually found to have been based on a mistake. In the Australian case of *Ruddock v Taylor* (2005) 222 CLR 612; [2005] HCA 48, it was said, at [40]: '… what constitutes reasonable grounds for suspecting a person … must be judged against what was known or reasonably capable of being known at the relevant time'.

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

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

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

Warrantless searches and seizures

16.34 The Criminal Procedure Code s 9 authorises police officers to detain and search without warrant persons and means of transport on the basis of reasonable suspicion of finding anything unlawfully obtained:

> Any police officer may stop, search and detain any vessel, boat, vehicle or aircraft in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

The Dangerous Drugs Act s 11 creates a similar power with respect to any 'prohibited substance or material or any document or thing connected therewith. Curiously, this power is available simply when someone is 'suspected' rather than 'reasonably suspected. This may remove any objective check on an officer's suspicion. Nevertheless, the officer's state of mind must still meet the standard of 'suspicion' rather than 'mere idle wondering': see **16.29**. The Dangerous Drugs Act s 10 also provides for the seizure of prohibited substances. There is no equivalent provision in the Criminal Procedure Code. However, a power to seize may be implied as a corollary

of a power to search. In any event, the common law has recognised a general power to take possession of articles that are believed to provide evidence of an offence if they are found in a lawful way: *Ghani v Jones* [1970] 1 QB 693, [19690 3 All ER 1700.

16.35 It was argued earlier that similar search powers with respect to evidence of any offence may possibly be implied as a corollary of the statutory duties of police to prevent crime and detect offenders under the Police Act: see **16.4**.

16.36 The requirement for reasonable grounds to suspect what will be found applies only where a person is not already in lawful custody. The requirement disappears once a person has been arrested and a search may be conducted for reasons of security. An arrested person may be searched and anything in their possession other than necessary clothing may be seized. The Criminal Procedure Code s 8 provides:

> Whenever a person is arrested and detained in custody, the police officer making the arrest or, when the, arrest is made by a private person the police officer into whose custody he places the person arrested, may search such person and place in safe custody all articles other than necessary wearing apparel, found upon him.

16.37 Maintenance of dignity when searching is an important element of privacy. A search must be conducted by an officer of the same sex as the person searched: Criminal Procedure Code s 10. Some other jurisdictions impose general requirements that minimal embarrassment be caused and that reasonable care be taken to protect dignity. These can be particularly important in relation to strip searches. There are no express provisions to this effect in Vanuatu but they might be recognised as a matter of common law. An authorization to 'search' need not be interpreted as permitting any means of searching.

16.38 A power to search a person necessarily implies the right to use some degree of force for this purpose. In addition, the Police Act s 36 expressly authorises the use 'reasonably necessary' force for law enforcement:

> Any member of the Force may use all such force as may be reasonably necessary in order to prevent crime or to effect or assist in effecting a lawful arrest.

Search warrants

16.39 'Search warrants' are quasi-judicial authorisations to look for and take possession of things in ways that would otherwise be unlawful. Although searches of

persons and vehicles may often be conducted without warrant, warrants are generally required to enter and search places that are private property. The role of a person issuing a warrant is to make an independent assessment of whether the statutory grounds for the search are present. In the event that an application for a warrant is initially refused, it is possible for a police officer to apply to another judicial officer. However, careful scrutiny of a second or subsequent application would be justified.

16.40 The Criminal Procedure Code s 55 authorises a 'judicial officer' (a judge or magistrate) to issue a warrant to search a private place on the basis of reasonable suspicion of finding evidence of the commission of an offence:

> Where it is proved on oath to a judicial officer that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary for the conduct of an investigation into any offence is in any building, ship, aircraft, vehicle, box, receptacle or other place, the judicial officer may by the issue of a search warrant authorise a police officer or other person therein named to search the building, ship, aircraft, vehicle, box, receptacle or place named or described in the warrant for any such thing, and if anything searched for be found, to seize it and detain it for use in evidence.

Powers that may be exercised under the authority of a warrant include searching the place and anything or any person in it; opening anything that is locked; removing walls, ceilings or floors; and digging up land. Ordinarily, a warrant must be executed between the hours of sunrise and sunset but the judicial officer may authorise its execution at any time: s 56.

16.41 Although the common term is *search* warrant, a warrant also covers seizure of items found in the course of executing the warrant. Section 55 expressly authorises only seizure of items for which the search was conducted. However, if other evidence of offences is found in the course of a lawful search, it may also be seized under the common law power to take possession of articles that are believed to provide evidence of an offence: *Ghani v Jones* [1970] 1 QB 693, [19690 3 All ER 1700. Alternatively, application could subsequently be made for a separate warrant in respect of such evidence.

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

16.43 Some jurisdictions have introduced expedited procedures to obtain 'telewarrants' or dispensed altogether with the need for a warrant in particular

circumstances. In Vanuatu, however, a private place may be searched without a warrant only to make an arrest: Criminal Procedure Code s 5.

16.44 There are two main steps in the process of obtaining a search warrant: first, a police officer making an application for a warrant and, second, a judicial officer issuing the warrant. In Vanuatu, common law requirements attach to both stages. The main authority on the common law is the judgment of the High Court of Australia in *George v Rockett* (1990) 170 CLR 104; 93 ALR 383; [1990] HCA 26.

16.45 An application must state the grounds on which the warrant is sought. It must identify the place to be searched, the item(s) to be sought and the reason for the search (for example, the offence in respect of which evidence is sought). Otherwise, the resulting warrant cannot effectively perform its function of controlling the search and ensuring that the invasion of privacy is justifiable. The warrant must be consistent with the application and include a description of the place that may be entered, the offence to which the warrant relates, and what is to sought. However, there will be no need to disclose in the warrant the information or evidence relied on to support the application.

16.46 The application must be on oath. This is a common law requirement: *George v Rockett* at [9]. It is also a statutory requirement under the Code s 55. The application will usually be in writing. In *George v Rockett* at [11], the High Court of Australia indicated that a written application is desirable. However, the officer making the application is usually expected to be present in person and available for questioning by the justice.

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

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

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

16.50 The validity of warrants can be challenged in proceedings for judicial review of administrative action or in a civil action for trespass. Remedies may include return of any items that have been seized. Moreover, when evidence has been obtained by means of an invalid warrant or in breach of the terms of a valid warrant, it is potentially liable to be excluded at trial: see above at **16.18–16.27**.

Arrests

16.51 An arrest is a form of lawful restraint on a person's freedom of movement, often with force or threat of force being used to impose the restraint.

- Whether or not an arrest has been made or is in progress can be an issue in relation to liability for offences such as obstructing or assaulting a police officer in the performance of their public duties (Penal Code s 73A) or escaping or attempting to escape lawful custody: Penal Code s 83.
- Unless there is lawful authority for the use of force and the arrest is conducted in a lawful manner, adverse consequences can follow for the person purporting to make an arrest:
    - There is potential for tortious liability for false imprisonment and for both tortious and criminal liability for assault.
    - Evidence that is obtained in consequence, such as evidence of a confession by the detained person, is liable to be excluded from a trial: see above at **16.17–16.19**.

16.52 There are two forms of arrest. Although many arrests will involve actual physical restraint through the application of some force, an arrest can also be made by words accompanied by submission of the suspect to the authority of the person making the arrest. The Criminal Procedure Code s 4(1) provides:

> The police officer or other person making an arrest shall actually touch or confine the person to be arrested, unless there be a submission to custody by word or action.

Essentially, for a non-contact arrest, the suspect must accept that physical restraint will occur if there is any resistance. The words spoken by the person making the arrest must indicate that an arrest is being made and there must be some indication of submission by the suspect either by word or conduct.

16.53 At common law, 'arrest' has been traditionally conceived as detention for the purpose of bringing an accused before a court to face a charge: see *Williams v R* (1986) 161 CLR 278; [1986] HCA 88, Wilson and Dawson JJ at [8]-[9]; *NSW v Robinson* [2019] HCA 46 at [30], [63], [92]. Other terms, such as 'detention', have often been used to describe the use of physical restraint for other purposes relating to law enforcement, such as preventing offences or self-harm, or for conducting bodily searches. Usage does, however, vary.

16.54 In Vanuatu, an arrest can only be made to initiate criminal proceedings in a court. An arrest cannot be made merely to hold a person for questioning or other investigative purposes. An arrested person who is not subsequently released must therefore be taken before a court 'without unnecessary delay' (Code ss 15, 52) or 'as soon as practicable' (Code s 18(1): discussed below at **16.69-16.74**. The court will then determine whether to hold the person in custody for trial or to release the person either unconditionally or on bail. For lesser offences, the police are required to grant bail if it is not practicable to bring the person before a court within 24 hours. This does not apply where the offence 'appears to the officer to be of a serious nature': s 18(1). However, a person suspected of a serious offence must still be brought before a court 'as soon as practicable'. There is no definition of 'offence of a serious nature'.

16.55 The general principle respecting the use of force in an arrest is that as much force may be used as is reasonably necessary in the circumstances. The Police Act s 36 allows a police officer to 'use all such force as may be reasonably necessary …to effect or assist in effecting a lawful arrest'. This is supplemented by the Criminal Procedure Code s 7, which provides: 'A person arrested shall not be subject to more restraint than is necessary to prevent his escape'.

16.56 In Vanuatu, a person who is arrested or detained has no express constitutional or statutory rights to be informed of the reasons or the right to contact a lawyer. However, 'liberty' is guaranteed as a fundamental right by the Constitution s 5(b),

albeit subject to matters of legitimate public interest including public order, and s 5(d) guarantees the right to 'protection of the law'. It can be argued that the protection of liberty by the law requires that an arrested person be informed as soon as is reasonably practicable of the reasons for arrest and of the right to contact a lawyer.

16.57 As an incident of custody, police officers may search a person and take custody of all articles other than 'necessary wearing apparel': Criminal Procedure Code s 8. There is no requirement for reasonable suspicion that evidence or anything dangerous may be found.

16.58 Police may also take 'descriptions' including 'photographs, measurements, fingerprints and footprints' of a person in lawful custody: Police Act s 27.

16.59 In some jurisdictions, police may conduct intimate 'forensic procedures' on an arrested person's body, including searching orifices and taking samples of substances such as hair and saliva. There are no authorisations for such procedures in Vanuatu.

Arrest without warrant

16.60 The Criminal Procedure Code s 12 provides for arrests without warrant by police officers, generally on the basis of reasonable suspicion that a 'cognisable offence' has been committed:

> (1) Any police officer may, without an order from a judicial officer, or warrant, arrest any person whom he suspects upon reasonable grounds of having committed a cognisable offence
>
> (2) Without prejudice to the generality of subsection (1) a police officer may without a warrant arrest –
>
> > (a) any person who commits a breach of the peace in his presence;
> > (b) any person who wilfully obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;
> > (c) any person whom he suspects upon reasonable grounds of being a deserter from the police or defence forces;
> > (d) any person whom he finds lying or loitering in any highway, yard or garden or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit an offence or who has in his possession without lawful excuse any offensive weapon or housebreaking implement;

(e) any person for whom he has reasonable cause to believe a warrant of arrest has been issued.

16.61 Private persons also have powers of arrest without warrant under the Criminal Procedure Code s 16. However, these are more restrictive than the powers of police officers. A private person can generally make an arrest only when an offence has actually been committed or is being committed. It is not enough that there is a suspicion that an offence has been or is being committed.

> (1) Any private person may arrest any person who commits a cognisable offence, or whom he reasonably suspects of having committed an offence punishable by a term of imprisonment for more than 10 years.
> (2) Persons found committing any offence involving damage to property may be arrested without a warrant by the owner of the property or persons authorised by him.

A private person therefore risks acting unlawfully if there is a misapprehension about whether an offence has actually been or is being committed.

16.62 The general powers of arrest without warrant are confined to reasonable suspicion of the commission of a 'cognisable offence'. This archaic term has traditionally been used to describe an offence for which there may be an arrest without warrant. It scope is Vanuatu is defined by an interpretation provision in the Code s 1:

> "cognisable offence" means any offence for which a police officer may in accordance with the Schedule or under any law for the time being in force, arrest without warrant.

The Schedule to the Criminal Procedure Code lists only Penal Code offences as offences for which there can be an arrest without warrant. Most Penal Code offences are on the list. However, the exclusions include: most offences relating to misleading or obstructing the course of justice (ss 75-82(1)); offences relating to religion (ss 88-89); intentional assault (s 107) where no physical damage is caused and unintentional harm (s 108) where the harm is temporary; criminal nuisance (s 114) and criminal defamation (s 120); certain forms of fraud (ss 128-130); criminal trespass (s 144); and distributing obscene publications (s 147).

16.63 Cognisable offences outside the Penal Code may include those under the Dangerous Drugs Act. This Act does not deal expressly with arrests. However, the provision on searching persons states: 'It shall be lawful for any police or customs office to take cognizance of any offence under the Act…'. The meaning of this statement is

unclear, but arguably it indicates that the offences are to be classified as cognisable. Otherwise there would appear to be a legislative oversight.

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

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

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

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

Arrest warrants

16.66 The Criminal Procedure Code s 45(1) authorises a judicial officer (judge or magistrate) to issue a warrant for the arrest of an accused person whom there is reason to believe is unlikely to obey a summons or surrender into custody:

> Where a prosecution has been instituted and a judicial officer has reason to believe that the accused is avoiding service or that he is unlikely to obey the summons or surrender himself into custody or attend the resumed hearing, as the case may be, the judicial officer may issue a warrant for the arrest of the accused.

Application for an warrant may be made in writing by a public prosecutor or orally by a police officer or the complainant: s 45(2).

16.67 The existence of an arrest warrant removes the need for an officer making an

arrest to hold any personal suspicion about the person to be arrested. A warrant will usually be directed to all police officers of the State, so that any officer can execute it: Criminal Procedure Code s 49. In addition, s 12(2)(e) authorises a police officer to arrest 'any person for whom he has reasonable cause to believe a warrant of arrest has been issued'.

16.68 Arrest warrants operate in much the same way as do search warrants: see above, **16.39-16.50**. The justification for the warrant is generally provided through a complaint made on oath: Criminal Procedure Code ss 45(2), 46. A warrant must state the offence with which the person is charged, the name of the person against whom it is issued, and the person to whom it is directed: s 47(2). However, any irregularity or defect in the warrant, or variance between it and the complaint, will not affect the validity of any subsequent proceedings in the case: s 54.

Investigative arrest and court appearance

16.69 A person who is held under arrest must be brought before a court 'without unnecessary delay' (Code ss 15, 52) or as soon as 'practicable' (Code s 18(1)), unless the person is released because the reason for the arrest no longer applies or because bail is granted: Code ss 18, 48. This is also a common law principle: see *Williams v R* (1986) 161 CLR 278 at 283, 300; [1986] HCA 88, Mason and Brennan JJ at [10], Wilson and Dawson JJ at [2]; *NSW v Robinson* [2019] HCA 46 at [30], [63], [89], [92]. Unless the offence appears to 'of a serious nature', a court appearance must occur with 24 hours. If that is not practicable, the suspect must released by the police on bail: Code s 18(1).

16.70 In *Williams v R* (1986) 161 CLR 278 at 283, 300; [1986] HCA 88, Mason and Brennan JJ at [25] and Wilson and Dawson JJ at [23] interpreted similar phrases such as 'without delay', 'without undue delay' and as soon as is 'reasonably practicable' or 'reasonably possible' as all having the same meaning, namely that the accused must be taken before a court as soon as is reasonably practicable. This could require a prompt appearance if the arrest occurs during the day when a court is open and nearby. On the other hand, there could be a substantial delay if, for example, the accused is arrested at night or inter-island transportation is needed to bring the person before a court. Moreover, police workload can affect the determination of what is reasonably practicable in a particular case.

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

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

16.73 An example of the misuse of police powers is provided by *Tor v Public Prosecutor* [2003] VUCA 2. In that case, the Court of Appeal quashed a conviction on several grounds including that the accused was unlawfully detained when a confessional statement was made. The Court condemned the circumstances of the detention in this way:

> At about 2.00PM police officers arrived and required him to go to the police station. They apparently thought that having taken a man into custody like that, they could hold him overnight and interview him on the next day...
>
> Notwithstanding his insistence that he wanted to be interviewed he was simply kept there until 9.00PM complaining that he was not even given food. The first matter to be noted is that when police take someone in for questioning, they can do so only if the person on their own volition and free will wishes to go with them to the police station. When they arrest to get a person to the police station and they want an interview it is essential that it happens immediately. Holding someone for six or seven hours is unacceptable. It creates a real perception that the person is being disadvantaged in what for many people is a very alien situation until the interview. Holding them overnight prior to interview is intolerable.

16.74 Failing to take an accused before a court as soon as reasonably practicable may render a detention unlawful. However, the High Court of Australia has taken the view that the lawfulness of the detention may fluctuate back and forth with the circumstances: see *Michaels v R* (1995) 184 CLR 117; [1995] HCA 8. Thus, a detention that was originally lawful may become unlawful because of delay in proceeding to court but may then become lawful again when the decision to proceed to court is made.

Bail

16.75 Bail is a process whereby an arrested accused is released from custody while awaiting trial or during the course of a trial. Bail may be granted by a court or, under some circumstances, by a police officer: Criminal Procedure Code ss 18, 48, 60. A person released on bail must sign a recognisance. This is a promise to appear in court

at a named time and place. Release may be unconditional or on reasonable conditions. Financial sureties would rarely be appropriate in Vanuatu and are specifically prohibited by the Code s 62(3).

16.76 There are three main provisions in the Criminal Procedure Code authorising the grant of bail.

- Section 18 provides that. when a person has been taken into custody without warrant, the officer in charge of the police station may 'inquire into the case', and must do so if it appears impracticable to bring the person before a court within 24 hours. Following the inquiry:

  > Unless the offence appears to the officer to be of a serious nature the officer shall release the person on his signing a written undertaking to appear before a court at a time and place to be named in the undertaking;

  The phraseology is 'shall release', so that it is mandatory. Offences of intentional homicide and offences against the external security of the State are excluded. However, they would be classified as offences of a serious nature in any event.
- Section 48 authorises a judicial officer issuing a warrant of arrest to insert an endorsement on the warrant that, if the person 'enters into a recognizance … for his attendance before the court as a specified time', the officer making the arrest shall release the person. The endorsement is to state any conditions of the release. Offences of intentional homicide and offences against the external security of the State are excluded.
- Section 60 overlaps with s 18 in authorising the officer in charge of a police station to release a person arrested without warrant on entering into a bond in writing. However, it also authorises release of a person appearing before a court, presumably by the judicial officer:

  > When any person, other than a person accused of an offence punishable by life imprisonment, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to enter into a bond in writing, with or without conditions, for his subsequent appearance before the court, such person may be temporarily released from custody on bail.

  Offences punishable by life imprisonment are excluded. Conditions may be

attached to the release but these 'shall not be oppressive or unreasonable': s 60(2). In addition, the Supreme Court is given the power to override decisions of the Magistrates' Court or the police and direct a release on bail or amend conditions to be less onerous: s 60(3).

16.77 Decisions on bail applications are not appealable in the regular way: Code s 70. However, a refusal of bail by the police will not prevent an application to a Magistrates' Court. And a refusal by the Magistrates' Court will not prevent a fresh application to the Supreme Court. Section 66 provides:

> Upon the refusal by the Magistrates' Court of an application for bail, the magistrate shall state the grounds for such refusal and shall read aloud to the applicant in open court the following statement –
>
> "Your application for release from custody on bail having been refused by this Court, you now have the right to make a fresh application for bail to the Supreme Court. If you so desire, the matter will be referred immediately by this Court to the Supreme Court, which will review your application as soon as possible. You will remain in custody in the meantime but will suffer no disadvantage by reason of making a further application to the Supreme Court. Do you wish the Supreme Court to consider your application for release from custody on bail?"

16.78 In deciding whether to grant bail, the primary considerations are likely to be the seriousness of the charges, the likelihood of the accused person appearing in court to answer them, the risk of interference with witnesses, and the risk of re-offending. However, many considerations may be taken into account. The Vanuatu Criminal Procedure Code does not provide much guidance in this respect. However, there is a helpful, detailed list in the Fiji Bail Act s 19:

> (1) An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be —
> (a) the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;
> (b) the interests of the accused person will not be served through the granting of bail; or
> (c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.
> (2) In forming the opinion required by subsection (1) a police officer or court must have regard to all the relevant circumstances and in particular —
> (a) as regards the likelihood of surrender to custody —
> (i) the accused person's background and community ties (including residence,

employment, family situation, previous criminal history);

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

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

(iv) the strength of the prosecution case;

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

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

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

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

(ii) the conditions of that custody;

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

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

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

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

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

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

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

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

16.79 Conditions of bail are authorised by the Criminal Procedure Code s 62(2) in general terms:

> The conditions on which any person is released from custody on bail may include conditions appearing to the court to be likely to result in his appearance at the time and place required or to be necessary in the interests of justice or for the prevention of crime.

The conditions that may be attached to a grant of bail include agreeing to observe specified conduct and reporting requirements. Such conditions will usually be included in the written undertaking respecting the court appearance.

Questioning and confessions

16.80 There are no statutory provisions in Vanuatu governing the questioning of suspects and the admissibility of confessional evidence. The common law applies to these matters. Unfortunately, there is a dearth of local case authority on some crucial points. The following discussion therefore relies heavily on authorities from other Pacific jurisdictions and from Australia.

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

16.82 The common law has long recognised a right to remain silent, to be informed of this right, and to have no adverse inferences drawn from the exercise of this right. On the caution about the right to silence, see below **16.98-16.102**. The right to silence can afford little protection, however, when persons are questioned in custody. The suspect may feel intimidated by the custodial setting and inclined to comply with police requests for information. The police may also be able to break down resistance through sustained questioning over an extended period of time. There is a requirement to take an arrested or detained person before a court without unnecessary delay; see above at **16.69**-**16.74.** However, incidental questioning is permitted in the meantime and the meantime can sometimes be lengthy.

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

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

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

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

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

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

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

16.87 Recording interviews with suspects has not yet become standard practice in the Pacific but has been introduced in Fiji. It is now standard practice throughout Australia. Moreover, in several Australian jurisdictions, an audio or video recording has been made a statutory requirement for the admissibility of a confession or admission unless the case falls within certain exceptions: see, for example, Police Powers and Responsibilities Act 2000 (Qld) ss 436–439; Crimes Act 1914 (Cth) s 23V. There have not yet been such developments in Vanuatu. This is despite the complaint made by the Court of Appeal in *Tor v Public Prosecutor* [2003] VUCA 2:

It is beyond our comprehension why in 2003 when people are to be interviewed there is not a tape recording made of everything that is said by every person who is involved. In that way the Court can have evidence about which it can have a degree of confidence. It will disclose exactly what was being said and how it was said.

16.88 As discussed above **at 16.14-16.27**, there are three main bases on which evidence of an incriminating statement can be excluded at trial:

- on the ground that it was involuntary, in which case exclusion is mandatory;
- on the ground that its admission would be unfair to the accused, in which case exclusion is discretionary but likely to occur in any case where the unfairness makes the statement unreliable.
- on the ground that it was unlawfully or improperly obtained, in which case exclusion is discretionary.

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

1. An incriminating statement by a person in custody may have been unlawfully obtained because the arrest or detention was unlawful: either the conditions for a lawful arrest or detention were not met, or the arrest or detention was carried out in an unlawful manner, for example with excessive force, or a lawful arrest or detention became unlawful when the person was not taken before a court without unnecessary delay.
2. Police may have omitted to give required advice or warnings before questioning a suspect. For example, a caution about the right to silence may have been omitted or inadequately delivered.
3. The manner of questioning a suspect may have been improper or unfair. For example, it may have been oppressive or it may have involved deceit about the information already available to the police.

On unlawful detention, see **16.51-16.59**. The public policy discretion will be engaged by a claim for exclusion on this ground. All three grounds of exclusion can be in issue when allegations are made about inadequate advice or warnings or about the manner of questioning but the issues are usually addressed by reference to the voluntariness rule or the fairness discretion.

Voluntariness and fairness

16.90 The principal concern of the voluntariness rule and the fairness discretion is with the reliability of confessional evidence. In this context, a 'confession' means any admission by a person accused of an offence indicating that the person may have committed the offence. The admission may not be a full confession. It may even be a

denial of the offence but an admission of some element of it: for example, an admission of the conduct elements of an offence with a denial of the fault elements; or an admission of both the conduct elements and the fault elements with an assertion of an exculpatory defence such as self-defence or reasonable mistake of fact. The voluntariness rule and the fairness discretion are designed to protect innocent persons who may have been lured into making statements that risk a wrongful conviction.

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

1. There is a narrow rule excluding incriminating admissions induced by force or by a threat or promise held out by a person in authority. Some of the judges in *Tofilau* called this 'the inducement rule'. In *Tofilau*, the majority of the court agreed that, for the purposes of this rule, a 'person in authority' must be someone perceived to be wielding the coercive power of the state. Hence, the rule does not apply to the actions of police officers working undercover: *Tolifau* at [320].
2. There is a broader principle or rule (different judges have used different terminology) of 'basal involuntariness'. This requires the exclusion of any incriminating admission which is involuntary in the sense that it was not made in the exercise of the person's free choice of whether to speak or stay silent. See also *R v Lee* (1950) 82 CLR 133 at 149. This broader approach could encompass cases of intimidation and undue pressure as well as threats and promises.

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

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

> It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has

not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

For a Vanuatu example, see the pre-independence case of *Public Prosecutor v Albert* [1975] VUNHJC 22:

> The rule of common law as to the admissibility of an extrajudicial confession is set out in the 35th edition of Archbold's Criminal Pleading, Evidence and Practice in para. 1105, quoting Hale, as follows:-
>
> "In order to be admissible a confession must be free and voluntary, and unless it be shown affirmatively on the part of the prosecution that it was made without the prisoner's being induced to make it by any promise or favour, or by menaces or by undue terror, it shall not be received in evidence against him."

16.94 In *Pubic Prosecutor v Albert*, a confession was held to be involuntary on the ground of both threats and oppressive conditions:

> In our view the prosecution has not discharged the burden of proof upon it that the accused was not induced by menace or fear to make a confession. Weighing Const. Laban's account of his taking of the accused's statement against that of the accused, we are not satisfied beyond reasonable doubt that threats of the kind described by the accused were not held out to him. Such threats in our opinion would be sufficient to induce a youth of the accused's temperament to make a confession. Furthermore we are of the view that the conditions leading up to the taking of the accused's statement were sufficiently oppressive to frighten the accused into making a confession: that is to say, his removal with three other suspects to Police Headquarters early in the morning, his long wait at the C.I.D. office, his being taken to lunch at the prison and finally his being taken into the darkroom for his final questioning. The cumulative effect of these circumstances were sufficient in our view to induce a state of fear in the accused's mind causing him finally to make a confession which he would not otherwise have made.

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

16.96 Although the 'fairness' discretion has been mainly used in relation to questions of reliability, it is potentially of broader application. It can be invoked in response to any violation of a suspect's procedural rights in obtaining a confession, even though there is no question about its reliability. See *R v Swaffield* (1998) 192

CLR 159; 151 ALR 98; [1998] HCA 1 at [78]. *Swaffield* concerned a conversation secretly recorded by an undercover police office in breach of the suspect's right to silence.

16.97 There are no clear-cut criteria for whether to admit or exclude evidence on the ground that it would be unfair to use it against the defendant. Presumably, the criteria will vary according to the reason why it would be unfair to use the evidence.

- When the unfairness lies in the risk of a wrongful conviction, the exercise of discretion should turn only on the magnitude of the risk. In calculating the unfairness, it makes little if any difference how serious the alleged offence was and how serious the police misconduct was. In *Swaffield* at [77], it was suggested that an unreliable confession should never be admitted in evidence.
- A wider range of factors should come into play where the issue is the violation of an accused's procedural rights. In this context, the seriousness of the violation may have to be balanced against the seriousness of the offence in issue in the same way that it is when considerations of public policy are in issues: see the discussion of unlawfuly obtained evidence at **16.23**-**16.27**.

Caution interviews

16.98 The right to silence incorporates the right to be cautioned, in a language which is understood, with respect to the existence of this right and to the consequences of not remaining silent. An interview following a caution is called a 'caution interview'. The traditional form of the caution has been in this form: 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.' It has long been regular practice for police officers in jurisdictions that draw upon principles of English common law to caution a suspect in this sort of way. The origin of the caution is the English Judges' Rules which were first formulated in the early twentieth century. The Rules constituted advice on when the courts would regard questioning as having been fair.

16.99 A more colloquial version of the caution has been adopted in the Solomon Islands Judges' Rules, which state:

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

A version of this caution in pidgin is also included in the Solomon Islands Rules. Adoption of a similar form of caution with a Bislama version would be appropriate in Vanuatu.

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

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

16.101 The point at which the caution about the right to silence must be administered has varied over time.

- Under the 1930 version of the English Judges' Rules (which have sometimes been suggested to provide the present common law for Australia and New Zealand), the threshold for the caution to be given does not arise until a decision is made to charge the suspect or the suspect is taken into custody: see *R v Lee* (1950) 82 CLR 133 at 142–3; [1950] HCA 25.
- The 1964 version of the Judges' Rules ([1964] 1 WLR 152; 1 All ER 237) requires a caution to be given as soon as an officer has reasonable grounds for suspecting that a person has committed an offence.
- Under the Australian Uniform Evidence Act, a caution must generally be given whenever a police officer questions a person because of suspicions about that person's involvement in an offence. This approach, which could require a caution at a significantly earlier point in time, has been adopted in some modern Pacific legislation: see Solomon Islands Evidence Act s 171(5); Kiribati Police Powers and Duties Act s 112(1); Tuvalu Police Powers and Duties Act 126(1). Nevertheless, this formulation does acknowledge that a person may be questioned for reasons which do not require a caution: for example, questioning a person as a potential witness.

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

> A person who is being questioned in the context of an investigation of a possible offence is not being questioned as a suspect. The word 'suspect' requires a degree of conviction extending beyond speculation as to whether an

> offence has been committed and requires that it be based upon some factual foundation.

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

Access to lawyers and others

16.103 The best protection for the unwary suspect during questioning may be the advice or presence of another person, especially a lawyer. The right to at least consult a lawyer is protected by statute or the Constitution in many jurisdictions but not Vanuatu. Nevertheless, it might be argued that legal advice, if requested, is a fundamental requirement for questioning to be fair. The argument could even extend to the presence of a lawyer during the questioning. However, the Solomon Islands Court of Appeal in *Lele v R* [2014] SBCA 32 rejected such arguments. This was despite the Court at [37], [41] conceding that giving suspects advice on entitlement to access legal advice was 'best practice for police officers':

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

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

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

16.104 Any common law right to legal advice is a right to seek this support rather than to have it provided. For example, if efforts to obtain legal advice are unsuccessful and a reasonable time has elapsed, the police can proceed with questioning. What is a reasonable time depends on the particular circumstances. In Kiribati and Tuvalu, delay of more than two hours is said to be unreasonable unless there are special circumstances: Kiribati Police Powers and Duties Act s 114(4)-(5); Tuvalu Police Powers and Duties Act 128(4)-(5).

16.105 Some types of vulnerable person may need special protection. Under the Kiribati and Tuvalu Police Powers and Duties Acts:

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

> …the police officer is reasonably satisfied that the influence of the alcohol or drug no longer affects -
> (a) the suspect's ability to understand his or her rights; and
> (b) the suspect's ability to decide whether to answer questions: Kiribati s 121(2); Tuvalu s 135(2).

Modes of questioning

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

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

- Limitations on prolonged questioning in custody: see the limit of four hours questioning of a detained person imposed by the Police Powers and Duties Acts of Kiribati s 108(6)(b) and Tuvalu s 122(6)(b).
- Adequate breaks for rest and refreshment: see accompanying notes to the Judges' Rules, All ER at 240. See also the requirement under the Police Powers and Duties Acts of Kiribati s 108(6)(b) and Tuvalu s 122(6)(b) to provide food and drink to a person detained for six hours or more.
- Reasonably comfortable conditions: see accompanying notes to the Judges' Rules, [1964] 1 WLR 152; 1 All ER 237 at 240.
- Avoidance of prompting, so that suspects are able to tell their stories in their own words: Judges' Rule IV(b), (d), [1964] 1 WLR 152; 1 All ER 237 at 239.
- Avoidance of hectoring and cross-examination: see *Van der Meer v R* (1988) 35 A Crim R 232 at 254, 256, 261; (1988) 82 ALR 10; [1988] HCA 56.
- Avoidance of 'intimidation, persistent importunity or sustained or undue insistence or pressure', although mere persistence is not unfair: *R v Clarke* (1997) 97 A Crim R 414 at 419.
- Avoidance of deception and tricks, such as falsely suggesting that a witness has identified the suspect or an accomplice has confessed: see *R v Mason* (1988) 86 Cr App R 349; Solomon Islands Evidence Act s 170(2).

16.108 In *Tor v Public Prosecutor* [2003] VUCA 2, one of the reasons for quashing the conviction was the way in which the accused had been questioned, telling him that he had to answer police questions rather than allowing him to tell his own story:

> Mr. Tor ’s evidence was strong and insistent that he was not allowed to tell his story. He said he was consistently told he had to answer the questions of the police. The fact that is how the police do things is confirmed in a submission from the State. It is quite wrong. Interviews in these circumstances are not opportunities for police to cross examine people. It is an opportunity for the police to facilitate the accused telling their side of the story if that is what they want to do.

16.109 The practice of and the issues presented by prolonged questioning are clearly illustrated by the Solomon Islands case of *Osifelo v R* [1995] SBCA 6.

- The suspect in a murder investigation had been in police custody for several days before questioning began.
- An initial informal, ‘general’ questioning began one evening at 11.20 pm.
- The caution interview commenced five hours later, at 4 36 am.
- The caution interview finished almost seven hours later at 11.20 am.

During the period of 12 hours questioning, there were a number of breaks, during which smoking and using betel-nut were permitted and there was some food. A 2-1 majority of the Solomon Islands Court of Appeal held that the caution statement was admissible. Nevertheless, the judges expressed concern about the way the suspect had been questioned, referring to ‘the undesirability of taking a statement over so long a time and starting at such an early hour of the morning as was the case here’. They concluded:

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

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

> Confirmation may be provided, in cases of contest, by sound and even video recording of such confessions, by the taking of such confessions before judicial officers or other independent persons or the corroboration of the confession by other independent evidence…But in the absence of such affirmative assurance of the voluntariness, fairness and accuracy of the alleged confession

> it will ordinarily be rejected, however apparently probative it might otherwise appear to be...The more serious the crime, and hence the longer the potential deprivation of liberty following conviction, the more scrupulous will courts of trial, and of appeal, be to exclude confessional evidence which does not meet the high standards laid down by the judges. A beneficial consequence of the line of authority to which I have referred has been an improvement in police practice, a diminished reliance on confessions and the increased use of mechanical or electronic recording of such material to put the voluntariness, fairness and accuracy of caution statements beyond doubt. The court must consider these developments in other countries in the context of the realities and possibilities of policing in the Solomon Islands with their many remote outpost and limited resources. However, improvements in police resources will not be encouraged if this court is less rigorous than other Commonwealth courts have been. The risk of an unsafe conviction is no more tolerable in the Solomon Islands than in any other jurisdiction of the common law.

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