

History behind the changes

In 1986, the High Court decided the *Williams* case (161 CLR 278), in which the central issue was whether, after his arrest, the suspect was detained longer than was reasonably necessary to enable him to be brought before a magistrate.

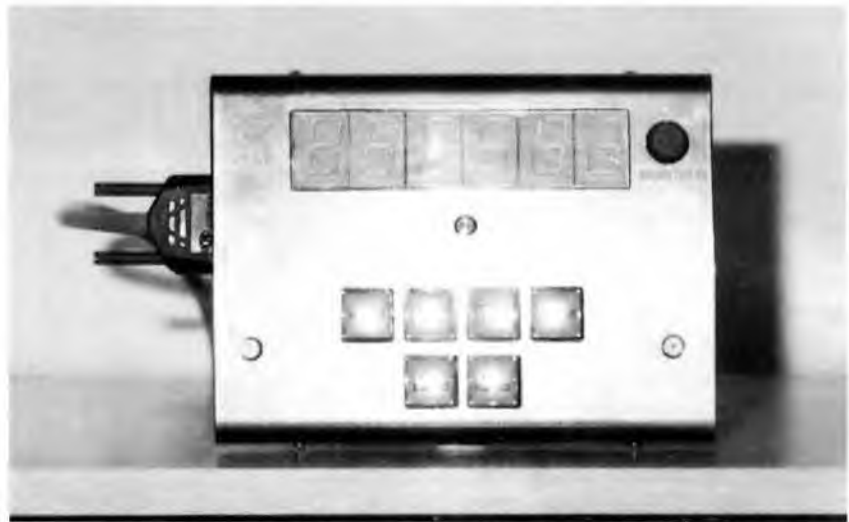
He was arrested early one morning. The police were satisfied that he was responsible for several burglaries in the northern area of Tasmania. The relevant State law provided that he should be taken before a justice as soon as practicable.

At the police station he was questioned both about the crimes in respect of which he was arrested and about a number of other crimes, and he made a number of admissions. He was eventually charged on 26 counts in relation to those other offences, as well as the crimes for which he was arrested. He was taken before a magistrate at 10am the following morning.

The trial Judge was satisfied that the confessions were voluntarily made, but in his discretion he rejected them. He held that Williams was wrongfully detained because he was subjected to lengthy questioning about matters other than those for which he was arrested.

The High Court, however, held on appeal that "as soon as practicable" gave no power to question an arrested person about the offence for which he had been arrested or other offences and did not make justifiable a delay which resulted only from the fact that the arresting officer wished to question him. It had previously been taken for granted that an arrested suspect could be questioned about an offence in the course of deciding upon a charge or charges before taking him or her before a magistrate.

This decision has created a real and serious dilemma for me. I come to the Parliament with two important competing responsibilities: my responsibility to maintain and defend the civil liberties which we have inherited through the centuries in our common law, and my responsibility to ensure that the laws made by the Parliament are able to be



The specially designed control panel used in the video and audio recording of interviews. It has inbuilt microphones and a digital tape time display.

properly enforced, so as to afford appropriate protection to the community.

Law enforcement agencies cannot be expected to function effectively with their hands tied behind their backs. Not only must they be able to investigate and prosecute offences effectively, but they need to ensure that they do not proceed to invoke the inexorable

machinery of prosecution against a suspect, with all the suffering and expense for the person that that entails, when an early period of questioning and investigation may disclose that prosecution is not justified.

The solution which satisfies me, and which I trust will satisfy the Parliament, appropriately balances these competing interests in a just and equitable manner. That solution, which I find most fair, balanced and workable, is to provide for a maximum period during which an arrested person may be held for questioning or investigation before being taken before a magistrate. Within that maximum is a defined "investigation period" which is a period of active audio/video-recorded questioning or investigation regarding the relevant offence or offences, reasonably appropriate in the circumstances of a particular case.

The specified period is a maximum period in which a person may, unless a longer period is

authorised by a magistrate, be held in custody before being brought before a magistrate. I emphasise the word maximum. It is not a period during which the police may simply hold the person; even within that period the time for which the person is held must be reasonable in the circumstances of the case. Any gaps in time apparent from the audio/video-recording would need to be stringently accounted for, even though occurring within the permitted maximum, though some provision may be made for 'dead time' which I will explain later. As well as the tape-recording, other safeguards are built in — communication with friend, relative and legal practitioner, a right to have the latter present during the investigation period, and special protection for vulnerable groups which I will go into later.

If an extension of the investigation period is required, which I would expect on the basis of experience in other jurisdictions to be rare, it may be granted for a further finite period up to eight hours by a magistrate, or, where a magistrate is unavailable, a justice of the peace, who must be satisfied that this is justified in the particular circumstances of the case. The suspect is entitled to make representations to the judicial officer. Where an extension application is made by telephone or other electronic means, procedural safe-

guards similar to the usual provisions relating to telephone applications for search warrants must be complied with.

Any periods of custody of the same person within any 48-hour period, whether for the same or different Commonwealth offences, must, in the aggregate, be within the relevant permissible investigation period.

Briefly, that is the outline of my proposal. In reaching the position I have just put before you, I surveyed, and will share with you, the background against which the issues dealt with in this Bill arise, the work already done in the area by others, and the efforts of other jurisdictions to solve the dilemma.

As you are aware, section 68 of the *Judiciary Act* 1903 applies the law of the particular State or Territory in respect of the arrest, custody, examination and trial of persons apprehended for Commonwealth offences. The laws of the States and Territories are becoming increasingly diverse and based on different approaches of principle. This is particularly apparent in the area of post-arrest procedures, where there is wide variation in the degree of safeguards provided by legislation extending the permissible period of pre-charge detention. Further divergence is likely to be created by the introduction of corresponding legislation in the remaining jurisdictions.

The various State and Territory legislative measures taken regarding pre-charge detention were mainly introduced, as is the present Bill, to deal with the problems crystallised in the *Williams* case. The result of that decision is that, subject to the exception I will mention later, where a confession is obtained from a suspect while he or she is in police custody after the time when it has become reasonably practicable to bring him or her before a magistrate, that confession is liable to be rejected in the discretion of the trial Judge as having been unlawfully or unfairly obtained. The exception is where legislation, either Commonwealth or applied State or Territory legislation, lays down a different rule.

Four of the five Judges in the *Williams* case refer to the need to strike a balance between the requirements of effective law enforcement and the long-standing



During the introduction of the *Crimes (Investigation of Commonwealth Offences) Amendment Act* 1991 into the Parliament, the Second Reading Speech was presented by **Commonwealth Attorney-General Michael Duffy**. The Speech provides a comprehensive overview of the origin, scope and intent of the new provisions and is reproduced in abridged form for the information of readers.

common law protection of personal freedom. They express awareness, too, of the difficulties presented by complex investigations. In this context, Mason and Brennan JJ in their joint judgment point out that "if the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able — as the courts are not — to prescribe some safeguards..." (at 296). Wilson and Dawson JJ also recognised that the policy issues involved were properly the province of this Parliament. They said: "If the law requires modification then it is better done... by legislation. For there must be safeguards, if necessary in the form of time limits, and they must be set with a particularity which cannot be achieved by judicial decision" (at 313).

The questions which I, and the Parliament, have to face are, firstly, whether we should move at all to alter the effect of the decision of the High Court in the *Williams* case, and, secondly, if we do so, what should be the manner of the intervention, best to balance the community's interest in effective law enforcement and the interest in maintaining high standards of criminal justice in which individual rights are given appropriate protection and respect.

Law and practice in this area have been uncertain and unsatisfactory since well before the *Williams* case. In 1975, the Aus-

tralian Law Reform Commission in its report on criminal investigation noted that, although the common law principle that an arrested person must be brought before a magistrate without unreasonable delay had been given statutory expression in most jurisdictions in Australia, the words used to delimit the permissible time period were variable and imprecise. Judicial interpretation of a permissible time ranged from holding 'forthwith' to mean exactly that in *Drymalik v Feldman* [1966] SASR 227 (that is, no time at all for interrogation, similar to the *Williams* position) to holding permissible a time which extended several hours after it became practicable to bring the person before a magistrate, in *R v Banner* [1970] VR 240.

Police practice was similarly variable, and the Law Reform Commission found that one of the most frequently voiced complaints against the police was unnecessarily prolonged custody, in some cases up to three days on minor public order charges. The Law Reform Commission recommended that there should be a precise time limit set for police custodial investigation. It set this at four hours with some provision for 'dead time'. 'Dead time means those periods of time which it is considered appropriate to exclude from the calculation of the investigation period, as they are all periods when investigations should not, in fairness, take place. They include direct travel time to the police station, time arranging communication with family, friend or lawyer, and time spent waiting for the attendance of a lawyer or prisoner's friend. They also recommended provision for extension of time, in appropriate circumstances, by application to a magistrate (by telephone if necessary), in no circumstances to exceed a further eight hours.

The Commission was well aware of, and gave careful consideration to, the objection that any acceptance of post-arrest investigation is undesirable because it is a retreat from the common law principle that arrest marks the point of executive commitment, when there should be a reduction, not an expansion, of police power, and when the judicial arm should take over as soon as possible.

Subject to the dissent of Mr F G

Brennan QC as he then was, who would have preferred to increase police powers prior to, rather than after, arrest, the Commission felt that this argument was outweighed by other considerations.

In September 1988 the Committee reviewing Commonwealth Criminal Law chaired by the former Chief Justice of the High Court, Sir Harry Gibbs, was asked to report specifically on the issue of detention of a suspect by investigating officers for the period necessary to complete an investigation, and on the issue of introducing a requirement that confessions be tape-recorded. The Committee's report was presented in February 1989.

In the course of its deliberations, the Committee considered the history of the responses to the problem in other jurisdictions.

There are essentially two approaches to defining a period of pre-charge detention. One involves providing a reasonable investigation period within a specified maximum period (with or without allowance for dead time), usually with provision for its extension by application to a magistrate in appropriate circumstances. The other allows a reasonable period of pre-charge detention and provides statutory criteria to define those matters which may be taken into account in deciding what constitutes a reasonable time in all the circumstances of a particular case.

Victoria provides an example of the actual operation of both approaches. The history of the Victorian legislation began in 1983, even before the High Court's decision in the *Williams* case, after confessional evidence had been held inadmissible in several cases as having been obtained during a period of unlawful detention.

A committee was appointed, chaired by the then State Director of Public Prosecutions, now Mr Justice Phillips, to address the problem. That committee recommended legislative amendments to provide for a maximum period of six hours, which could be extended on application to a magistrate with the consent of the arrested person. These recommendations were put into effect by amendments to section 460 of the Crimes Act 1953 (Vic) in 1984.

After a period of close monitoring, the police compiled a report detailing a number of deficiencies in the operation of the amend-

ments, and the consultative committee was reconvened under Mr Coldrey QC, Mr Phillips' successor as Director of Public Prosecutions, to examine the effectiveness of the amendments.

The Coldrey Committee recommended that a reasonable time be substituted for the specified maximum period, and that practical criteria be provided to guide the courts in assessing the conduct of the investigators. The maximum period was considered insufficient for major investigations into complex crimes and multiple offences.

It also required the interruption of the continuity of the interview or investigation to seek an application for extension of time, and, generally, lacked flexibility. The Committee's recommendations were enacted in 1988. It should be noted that the Victorian fixed time provision made no allowance for dead time.

The law as it stands at present, as is reflected in the conclusions of all the committees which have published reports on the issue, manifestly fails to take into ac-

"Questioning is not in itself an evil..."

count the legitimate needs of the police in their investigations of crime, particularly of complex and serious crime. It is necessary to make provision in the system for the realities of police investigatory requirements.

Both the Law Reform Commission and the Gibbs Committee were well aware of the concern that by providing for a lawful period of custodial detention there might be a tendency for the maximum permissible period to become the norm, thus endangering civil liberties.

Mr Coldrey QC, in his report of April 1986 on the Phillips amendment to section 460 of the Crimes Act 1958 (Vic), quoted research findings on a similar Scottish provision for a fixed maximum of six hours pre-charge detention, in operation since 1980. The findings were that the average time a suspect spent at the police station, despite the permissible six-hour maximum was 2 hours and 15

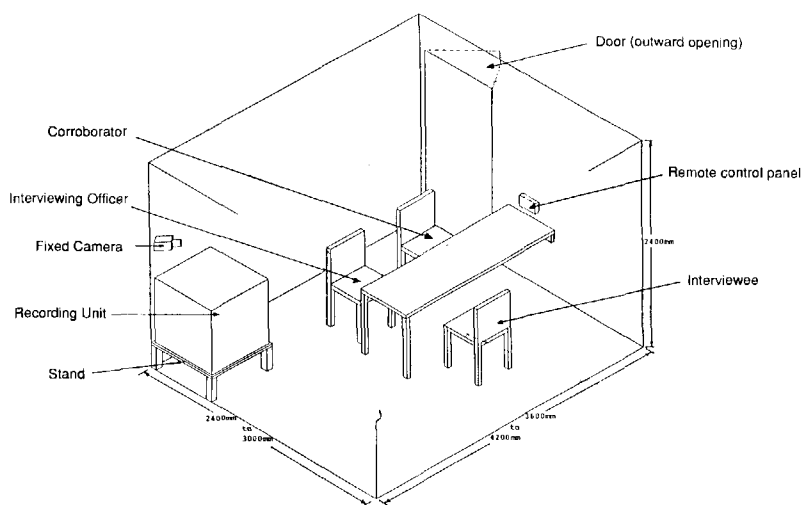
minutes, 20% spent less than one hour and 50% of all detentions lasted less than two hours.

Coldrey found that over 99.5% of investigations under the Victorian provisions took place within the six hours but no breakdown of figures within that period was available.

Having reviewed the legislative and case-law history of the pre-charge situation, the Gibbs Review Committee formed the clear opinion that the law should provide investigating officers with a reasonable opportunity to interrogate an arrested person, and conduct other necessary investigations, before taking the arrested person before a magistrate. It quoted Wilson and Dawson JJ in the *Williams* case as recognising that "the restrictions placed by the law on the purpose for which an arrested person may be kept in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime and the institution of proceedings for prosecution. And these are functions which are carried out by the police, not for some private end, but in the interests of the whole community" (at 312).

The Committee pointed out that the questioning of suspected persons is not in itself an evil, but a necessary and very important part of law enforcement. Objection can only be taken to the use of compulsion to answer questions and to unfair or oppressive methods of questioning, and it is these risks associated with extended pre-charge detention that the safeguards in the proposed legislation address.

Both the Law Reform Commission and the Gibbs Committee also recommended the incorporation of measures to control any possible tendency for police to allow the maximum to become the norm. The Commission favoured a formulation requiring police to take a person before a magistrate, or make a release or bail decision "as soon as reasonably practicable, and in no event longer than four hours" after the commencement of custody. The Gibbs Committee suggested a provision "that the 'investigation period' for which the person may be detained be defined as a period, not exceeding the specified maximum, during which that person is detained for the purpose of investigating whether he or she has committed an offence", that is, a period dur-



An artist's drawing of a typical layout for a video-tape interview room.

ing which active questioning or investigation is taking place directly related to an offence for which that person is being held.

The investigation period is not intended to provide time in which a person may be simply held in custody while police engage in other activities to which they accord a higher priority. The time is provided for active investigation with participation by the suspect on a voluntary basis, and if the permissible fixed time (after allowance for any dead time) is improperly used, evidence obtained even within that period may be inadmissible. In other words, even within the investigation period, the time for which the person is held must be reasonable in the circumstances of the case.

In addition, the usual civil damages remedy remains available, and an externally enforceable police discipline code may be invoked as provided by the *Complaints (Australian Federal Police) Act 1981*. If a person who is being held, being involved in active investigation or questioning, withdraws his or her voluntary co-operation in the investigation, this fact will be electronically recorded and if confessional material is later obtained, even within the permitted period, there is a real likelihood of its being held inadmissible if the prosecution is unable to discharge its onus of proving the voluntariness of the confession and the propriety of the "investigation period".

Indeed, the most potent safeguard against abuse of the custodial investigation period is the tape-recording requirement. The caution and any other information required

to be given to the person under the legislation also must be recorded, together with the person's response, if any, prior to the commencement of the interview. Subject to judicial discretion exercisable in the interests of justice, no confessional evidence will be admissible unless the tape-recording requirements are complied with.

The maximum periods in the Bill vary slightly from the Gibbs Committee recommendations. It is proposed that no distinction be made between summary and serious offences in relation to the maximum permissible period of detention, which is set at four hours. The Committee recommended a four-hour maximum in respect of summary offences and a six-hour maximum in respect of serious offences. The reason for not following that recommendation is that such a distinction may lead to evidentiary problems in situations where a person was arrested in respect of a serious offence but, in the final analysis, a charge of a summary offence may be more appropriate. It would be unfortunate in such a case if a more serious charge were adhered to in order to try to ensure that evidence would be admitted.

It is proposed also that the maximum period for which a young person, that is a person under 18 years of age, or an Aboriginal person or Torres Strait Islander, may be held for voluntary participation in questioning or investigation in relation to any Commonwealth offence, be two hours.

That questioning, of course, will

take place subject to the special provisions in the Bill for the protection of young persons and Aboriginal persons or Torres Strait Islanders which essentially involves a right to the presence during any questioning of an "interview friend" (specifically defined for each group), whether or not the person has been taken into custody in any of the ways defined. The two-hour maximum period also will be subject, as in all appropriate cases involving serious offences (that is, offences punishable by more than twelve months' imprisonment) to extension by a magistrate for a period not exceeding a further eight hours.

In summary, the whole emphasis of the proposed legislation is on achieving, with proper and adequate safeguards, that necessary balance between the reasonable requirements of law enforcement and the protection of the rights of individuals which the High Court, constrained to interpret and apply the existing law, acknowledged that it was for the legislature to determine.

The introduction of mandatory tape-recording of interviews with suspects is the best kind of safeguard against any possible abuse of the extended pre-charge period. Together with rights of communication with a friend or relative, (with special provision for the protection of young persons, foreign nationals, and Aboriginals and Torres Strait Islanders), and rights of consultation with, and the presence of, a legal practitioner, the uniform and mandatory tape-recording of interviews provides the best guarantee of fairness in investigatory procedures.

The Bill does not extend powers of arrest. The right to refuse to participate in questioning or investigation is preserved. The onus remains on the prosecution to prove the voluntariness of a confession and the court retains its discretion to exclude unfairly, illegally or improperly obtained evidence.

The only financial implications arising from the Bill concern the cost of electronic recording which will be required by proposed sections 23U and 23V. It is estimated that the costs involved will be \$2,625,000 in 1990-91 and \$804,000 in 1991-92. These costs relate to equipment, building alterations and transcription.