true: it is a sort of a passive role. I walk into Court and, whatever case comes before me, I do the best I can to decide. But deciding cases is only part of what judges do. There are a lot of other things going on in the Court. I am involved in a national seminar for the Court; there are all kinds of law reform initiatives happening within the Court.

Simon: Are you a different sort of judge for not having practised in the area?

Richard: Not very, I think. Experienced practitioners are very good at assembling facts and quickly getting on top of them. That is something where I have not had experience; it is a technique that I am in the process of learning. In other areas, to my surprise, lack of legal practice experience does not seem to have been much of a problem. I am very struck by what a close relationship there is between the ordinary rules of evidence and procedure as they are practised in law, and commonsense notions of what fair and sensible.

Simon: Do you miss aspects of being an academic?

Richard: It is too early to say really. At this stage I am revelling in the challenge of learning a new job which is extremely exciting, difficult, important. You are learning the job under the public spotlight, everybody looking at you, so at the moment I am just absolutely flat out doing the job. I am still writing, and there are lots of law reform activities going on. I am hoping to help establish a visiting speakers arrangement in this Court.

Simon: For the education of the judges.

Richard: Yes, and for court personnel, registrars and so on.

A teacher, and reformer, to the end!

Simon Rice is a Sydney lawyer and teaches law at the University of New South Wales.

POLICE POWERS

Detention for questioning

DAVID DIXON is critical of a NSW Bill which will benefit neither police nor suspects.

In *Williams v R* [1986] 161 CLR 278, the High Court confirmed Australian common law did not allow police to detain suspects between arrest and charge for investigative purposes and suggested that legislatures should provide such a power if it was thought necessary. Eight years later (and three years after the NSW Law Reform Commission reported on the matter),[1] the NSW Government has finally brought forward its *Crimes (Detention After Arrest) Amendment Bill.* Despite this long gestation and the possibility of learning from the experience of similar legislation elsewhere, the result is deeply unsatisfactory, misunderstanding or ignoring central aspects of this crucial issue.

The Bill gives police the power to detain suspects between arrest and charge. Objections to this must take account of current practice: NSW police already detain suspects for investigation by bending, finding loopholes in, or simply ignoring the law. Many suspects 'volunteer' to go with officers to stations. Some are arrested out of court hours, when magistrates are unavailable. Others are detained unlawfully by officers who can be confident NSW trial and appeal courts are unlikely to exclude any evidence obtained. While the tactics and gimmicks used by police to evade *Williams* are hardly creditable, they do not undermine the acceptability in principle of investigative detention: the real issue is the conditions under which it is permitted.

Voluntary attendance

A basic deficiency of the Bill is its failure to deal with the practice of 'voluntary attendance'. There is nothing here to prevent or even dissuade officers from relying on suspects' (usually largely fictional) 'consent'. The Bill merely notes it does not affect 'the right of a person to leave a police station or other police custody if the person is not under arrest'. Inadequate as the rights of detained suspects are (see following) they may encourage officers to rely on voluntary attendance rather than formal arrest and custody. 'Detention' has to be defined (as the NSW LRC recommended) to include 'voluntary attendance', so removing the incentive for evasion of the detention regime.

Detention length

The NSW LRC argued strongly for maximum periods of investigative detention to be specified. The Bill instead provides power to detain for 'a reasonable time'. In determining what is reasonable, 'all the relevant circumstances of the particular case must be taken into account', including, where relevant, 15 listed 'circumstances'. The assessment of 'reasonableness' is a matter for the investigating officer: there is no requirement for the involvement of supervisory officers or even the custody officer (see following). The fundamental objection to 'reasonable time' is the lack of certainty for police and suspects alike. Both should know how long detention can last. Instead, the Bill relies on the courts to determine what is reasonable. All the usual problems of courts are relevant: their determination is retrospective; in a system constructed around the guilty plea, challenges to evidence are an ineffective device; and the courts' record in protecting defendants and regulating police by evidentiary controls is weak.[2] The alternative is to specify detention limits: no case has been made (in NSW or elsewhere) against this except that the police consider it inconvenient.

Supervision and regulation

In England and Wales, the *Police and Criminal Evidence Act (PACE)* depends principally on three devices to supervise and regulate investigative detention – custody officers, custody records, and codes of practice.[3] While the Bill borrows these terms, it leaves elaboration of arrangements to police management and subordinate legislation. The Governor 'may' make regulations which 'may' provide a code of practice relating to arrested persons. Passing the Bill without seeing even a draft of regulations and a code would be unwise. Parliament needs to ensure that some of the *substance* as well as the terminology of *PACE* is adopted. This would mean appointing custody officers who will (where possible) be dedicated to the role for extended periods and will have specific responsibility for detained suspects, notably in supervising length of and welfare during detention.

Suspects' rights

The Bill purports to balance the new power with provisions for the rights of arrested suspects to contact family, friends, and legal advisers. This comment will concentrate on the crucial issue of access to legal advisers. Here, the Bill's promise of rights is a sham: the right has no substance because nothing has been done to provide public funding for legal advice at police stations or to organise a duty solicitor scheme. It is hypocrisy to claim a power is 'balanced' by a right which very few suspects will be able to exercise. Legal advice is not an optional extra: investigative detention is not acceptable unless accompanied by a substantial right of access to a lawyer. Experience clearly shows the dangers of lengthy custodial interrogation. Audo-visual recording is a step forward, but is not enough. Lawyers are able to offer several vital services. Their presence can ensure evidence is obtained fairly and reliably (so serving the interests of both suspects *and* police). This is not to ignore the deficiencies of legal advice scheme elsewhere.[4] The appropriate response is to learn from such precedents in constructing legal advice arrangements.

There is another major problem with the proposed suspects' rights: the duty to inform suspects of their rights rests with 'the police officer concerned', presumably the investigating officer. One lesson which should have been learnt from the experience of *PACE* is that the key to legal regulation of investigative detention is to divide responsibility between investigating officers and officers with specific duties relating to the suspects' detention and welfare.

The Bill, correctly, does not allow police to refuse legal advice (in contrast to access to family and others, which can be refused in specified circumstances). Lawyers are only given two hours to get to a station before the obligation to delay questioning or other investigation expires. This is likely to encourage officers arresting suspects thought likely to be able to employ a lawyer to do so at inconvenient times. Ironically, a principal argument against fixed detention lengths was that they would be impractical in rural areas but a short period is considered adequate for the arrival of legal advice.

Special groups are dealt with only in permissive sections on interpreters and by providing that a suspect's age, and physical, mental and intellectual conditions are to be taken into account in determining a 'reasonable' detention length. No reference is made to Aboriginality.

It is hard to avoid the conclusion that the 'rights' in this Bill are designed to do no more than legitimate the extension of formal police powers.

A missed opportunity

The faults of this Bill run deeper than the specific deficiencies noted. It is founded on the antagonistic dichotomy of police powers versus suspects' rights. Because police powers are prioritised, suspects' rights are insubstantial. This is to ignore a vital lesson from contemporary developments in criminal procedure elsewhere: legal regulation, combining powers and rights, can contribute to the production of more professional police practices in a way which benefits both police and suspects. The fundamental failing of this Bill is that it expresses a conception of criminal justice which is outdated and potentially dangerous and which serves the real interests of neither suspects nor police.

David Dixon teaches law at the University of New South Wales.

References

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3. On *PACE's* impact see Dixon, D., 'Legal Regulation and Policing Practice', (1992) 1 *Social and Legal Studies* 515-41.
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SOCIAL SECURITY

Madness or badness?

DOMINIQUE SAUNDERS, TOM HALL AND GARY MORRIS applaud a recent decision of the SSAT on the entitlement to a pension of two involuntary patients in a psychiatric hospital.

The Social Security Appeals Tribunal has determined a question of entitlement to a pension for two people detained under a hospital order pursuant to s.93(1)(d) of the *Sentencing Act 1991* (Vic.). Both applicants are involuntary patients detained at the Rosanna Forensic Psychiatry Centre. The issue before the Tribunal was whether the applicants are in gaol or in psychiatric confinement within the meaning of the *Social Security Act 1991* (Cth). Section 1158 says a pension is not payable to a person who is in gaol or undergoing psychiatric confinement because they have been charged with committing an offence.

The Department of Social Security (DSS) argued that as patients involuntarily detained in the psychiatric centre they were 'in gaol' within the meaning of the Act. The DSS relied on s.23(3) of the *Social Security Act* and submitted that the detention was 'in connection with a person's conviction for an offence'. Counsel for the applicants argued that the provisions did not apply because the effect of the section relating to people having been charged with an offence ceased once they had been found guilty and no conviction had been recorded.

The applicants are detained under a s.93(1)(d) *Sentencing Act* hospital order. The legislation says that if, after a trial, a person is found guilty, the court may make a hospital order instead of passing sentence if the court is satisfied on psychiatric evidence that:

- the person appears to be suffering a mental illness requiring treatment;