

for photocopy

NEW SOUTH WALES LAW REFORM COMMISSION



CRIMINAL PROCEDURE

POLICE POWERS OF ARREST AND DETENTION

DISCUSSION PAPER

**DP 16
August 1987**

Table of Contents

	Para	Page
Participants in this Report		iii
Terms of Reference		v
Preface		vii
Acknowledgments		ix
Summary of Tentative Proposals		xix
 Chapter 1: THE NEED FOR REFORM		
Footnotes		18
 Chapter 2: THE CURRENT LAW IN NEW SOUTH WALES		
I. Introduction	2.1	21
II. The Power of Arrest	2.6	23
A. Arrest Without Warrant: Common Law Powers	2.6	23
B. Arrest Without Warrant: Statutory Powers	2.10	24
C. The Distinction Between Felonies and Misdemeanours	2.14	28
D. The Requirement of a "Reasonable Suspicion"	2.15	28
E. Arrest Under Warrant: Common Law Powers	2.17	29
F. Arrest Under Warrant: Statutory Provisions for Indictable Offences	2.21	31
G. Arrest Under Warrant: Statutory Provisions for Summary Offences	2.22	32
H. The Act of Arrest	2.23	32
I. Communication of the Fact of Arrest	2.24	33
J. Notification of the Reason for Arrest	2.25	33

	Para	Page
K. The Use of Force in Effecting an Arrest	2.26	34
L. Entry into Premises to Effect Arrest	2.29	36
III. Police Powers of Search and Seizure Without Warrant	2.31	37
A. Common Law Powers	2.31	37
B. Statutory Powers	2.33	38
C. Personal Searches	2.35	39
D. Power to Take Fingerprints	2.37	41
E. Power to Take Photographs	2.38	41
IV. Powers in Relation to People Who Have Not Been Arrested	2.39	42
A. Power to Stop and Question	2.39	42
B. Powers Under the Motor Traffic Act 1909	2.41	43
C. Use of Summons Procedure	2.43	44
V. The Power to Charge with a Criminal Offence	2.47	46
Footnotes		48
 Chapter 3: CURRENT LAW AND PROPOSALS FOR REFORM IN OTHER JURISDICTIONS		
I. Introduction	3.1	53
II. Australia	3.2	53
A. The Australian Law Reform Commission	32	53
B. Royal Commission of Inquiry into Drug Trafficking	3.4	56
C. South Australia	3.7	57
D. Victoria	3.18	62

	Para	Page
III. Canada	3.26	66
IV. England	3.34	69
A. The Custody Officer and Review of Arrest and Detention	3.39	71
B. Consequences of a Breach of the Act	3.47	75
C. Response to the Police and Criminal Evidence Act 1984	3.49	75
V. Scotland	3.50	76
VI. United States of America	3.53	77
Footnotes		80

Chapter 4: TENTATIVE PROPOSALS FOR REFORM

I. General		87
1. An Integrated Collection of Rules		87
2. A Code of Arrest and Detention		87
3. Fundamental Principle of Legality		88
4. International Covenant on Civil and Political Rights		88
5. Obtaining Community Views on Policing		88
6. Definitions		89
II. Powers in Relation to People Who Have Not Been Arrested		90
7. Power to Stop and Search		90
8. Power to Demand Name and Address		90
9. Power to Set Up Road Checks		91
10. Use of Devices to Immobilise Vehicles		92
11. Detention Without Arrest Generally Prohibited		93
12. Questioning Before Arrest		93

	Page
13. Voluntary Attendance at a Police Station	94
14. Use of Summons Procedure	95
III. The Power to Arrest	95
15. Authority to Arrest Without Warrant	95
16. Obtaining a Warrant for Arrest	97
17. Issuing a Warrant for Arrest	98
18. The Means of Effecting an Arrest	99
19. The Use of Weapons and Restraining Devices	99
20. Entry Onto Premises to Effect an Arrest	100
21. The Power of Private Citizens to Arrest	101
22. Information to be Given to an Arrested Person	101
23. Power of Search on Arrest	101
IV. Procedure Following Arrest	96
24. Detention Following Arrest Permitted	103
25. Grounds for Detention Following Arrest	104
26. Transmission of the Arrested Person to a Police Station	105
27. Role of the Custody Review Officer	105
28. The Determination of a Reasonable Time for Detention	107
29. Caution Following Arrest	108
30. Grounds for Extension of Detention Period	109
V. Services Available to an Arrested Person	110
31. Right to have a Person Informed of an Arrest	110

	Page
32. Access to Legal Advice	111
33. Legal Aid for Accused People at Police Stations	111
34. Availability of Medical Treatment	112
35. Opportunity for Refreshment	112
VI. Investigative Procedures	113
36. Questioning Following Arrest	113
37. The Use of Electronic Recording Equipment	113
38. Power of Search at a Police Station	114
39. Personal Searches	115
40. Fingerprinting	116
41. Photographing	117
42. Obtaining Forensic Evidence	118
43. Conduct of Identification Parades	119
44. Use of Photographs for Identification	124
45. Involuntary Detention for Questioning Prohibited	126
46. Questioning by Undercover Police Officers	126
VII. Procedure at Conclusion of Detention	127
47. Unconditional Release	127
48. Release on Undertaking to Attend a Police Station	127
49. Release on Undertaking to Attend a Court	128
50. Release to Place of Apprehension	130
51. Constitution of the Court of First Appearance	130

	Page
52. The Role of the Court of First Appearance	130
53. The Power to Charge with a Criminal Offence	131
54. Court Attendance Notices	132
55. The Decision to Prosecute	133
VIII. Consequences of a Breach of Procedural Rules	133
56. The Admissibility of Evidence	133
57. The Liability of Offenders to Civil Prosecution	134
58. The Liability of Offenders to Criminal Prosecution	134
59. Breaches Occurring in Another Jurisdiction	135
60. Destruction of Fingerprints and Other Samples	136
IX. General Issues	136
61. Powers of Law Enforcement Agencies Other than Police	136
62. Special Rules for Children and Young People	137
63. Special Rules for Aboriginal Australians	137
64. The Provision of Interpreters	138
65. People Required as Witnesses	138
66. Publication of Police Codes of Practice	138
67. Police Detention to Count Towards Sentence	139
Appendix A: SELECT BIBLIOGRAPHY	141
Appendix B: TABLE OF CASES	145
Appendix C: TABLE OF STATUTES	147

Chapter 4**TENTATIVE PROPOSALS FOR REFORM****I. GENERAL****1. An Integrated Collection of Rules**

The proposals which follow represent a collection of individual rules, which is designed to create a comprehensive and integrated scheme. In formulating the rules, an attempt has been made to balance the interest of the community in securing the personal liberty of the individual and its interest in promoting effective law enforcement. In order that this balance is preserved, the rules proposed should not be dismantled into their individual parts.

2. A Code of Arrest and Detention

The rules governing powers of arrest and detention, and the relevant procedures to be followed in the exercise of those powers, should be specified by a single legislative enactment designed to clarify the existing law and practice and be expressed in a manner which is both understandable and easily accessible. These rules should define firstly, the circumstances in which the exercise of the powers is permissible; secondly, the procedure to be followed both before and after the arrest of a person and thirdly, the consequences of a breach of an applicable rule.

3. Fundamental Principle of Legality

It is fundamental that in a free society there should be no encroachment upon individual freedom and privacy except to the extent that this is authorised by law and is justified by the public interest.

4. International Covenant on Civil and Political Rights

It should be regarded as fundamental in a free society that:

(1) No person shall be subjected to torture or to cruel, inhuman or degrading treatment. (Article 7.)

(2) Any person deprived of his or her liberty shall be treated with humanity and with respect for the inherent dignity of the human person. (Article 10.)

These basic principles should be incorporated in legislation governing powers of arrest and detention.

5. Obtaining Community Views on Policing

There should be some effort made to ensure that there is adequate knowledge and understanding in the community of the manner in which these rules are intended to operate and continuing assessment made of the way they are actually used in practice.

Arrangements should be made in each police district for obtaining the views of people living in that area about matters concerning the policing of the area and for obtaining their co-operation with the police in preventing crime in the area.

The Commissioner of Police or his representative should consult local government authorities in each such district regarding the arrangements that would be most appropriate for the particular district.

6. Definitions

Where the expression "police officer" is used in these proposals, it should be taken to refer also to any other duly authorised person acting as an agent of the State.

The term "court" is used to mean a judge, magistrate or a justice of the peace employed by the Attorney General's Department.

In several of these proposals, provision is made for contacting a court by radio or telephone. The procedure envisaged is that a "court" should be available at all times of the day and night to receive applications of various kinds by radio or telephone. Depending on the need for its services, the "court" would be one or more magistrates or justices who would be on duty at a city location. The need to establish night and weekend courts is imperative if the detention of arrested people for substantial periods of time without being brought before a court is to be avoided.

A "serious offence" is one which carries a maximum penalty of 12 months imprisonment or more.

II. POWERS IN RELATION TO PEOPLE WHO HAVE NOT BEEN ARRESTED

7. Power to Stop and Search

A police officer may stop any person or vehicle and conduct a search for unlawfully obtained or prohibited articles if the police officer has reasonable grounds for suspecting that he or she will find evidence relevant to the commission of a criminal offence.

This power may only be exercised in a public place or in any other place to which members of the general public have ready access. It should not be exercised in a dwelling in which the suspected person lives or where he or she is lawfully entitled to be for the time being.

A person or vehicle may be detained for the purpose of conducting such a search only for so long as is reasonable and necessary for the conduct of the search.

Note: A general and unqualified power to stop and search for unlawfully obtained and prohibited articles is to be found in the Crimes Act 1900 s357E.

8. Power to Demand Name and Address

A police officer may require a person whose identity is unknown to give his or her name and address to the officer if the officer reasonably believes that the person may be able to assist his or her inquiries in relation to a criminal offence, irrespective of whether the person is suspected of being implicated in the offence or not.

When requesting a person to give his or her name and address, the police officer should specify the reason why the information is sought. There should also be a reciprocal right for a person of whom such a request is made to demand and receive from the police officer his or her name, rank and the station at which he or she is based.

Note 1: It should be an offence for a person to refuse a lawful and reasonable request to give his or her name and address or to give a false name or address.

Note 2: Under the Motor Traffic Act 1909 s5, the driver of a motor vehicle is obliged to disclose his name and place of address on request by a police officer.

Power to Set Up Road Checks .

Where a police officer of or above the rank of superintendent believes it necessary on reasonable grounds and in the interest of public safety, he or she may authorise in writing a police officer to make a search of any vehicle in a nominated area or passing a nominated location for the purpose of ascertaining whether the vehicle is carrying unlawfully obtained or prohibited articles or a person who:

- (1) has committed a serious offence;
- (2) is reasonably suspected of being about to commit a serious offence;
- (3) is the subject of an outstanding warrant issued by a court; or
- (4) is a prisoner unlawfully at large.

Authorisation to set up a road check may only be given where the police officer believes on reasonable grounds that a vehicle which satisfies the specified criteria is likely to be in the nominated area or location.

Authorisation may be obtained by telephone or radio if it is impracticable to obtain it in writing. The authorisation should be adequately recorded.

It should be an offence for a person to refuse to comply with a lawful and reasonable request made by a police officer at a road check. It is currently an offence under r62 of the Motor Traffic Regulations to disobey the reasonable directions of any member of the police force as to the regulation of traffic.

10. Use of Devices to Immobilise Vehicles

A police officer of or above the rank of Superintendent may authorise in writing the use of any prescribed device designed to immobilise a moving vehicle where he or she considers it necessary on reasonable grounds to be in the interests of public safety.

Authorisation may be obtained by radio or telephone where it is impracticable to obtain it in writing. The authorisation should be adequately recorded.

11. Detention Without Arrest Generally Prohibited

Apart from the powers created by paras 7, 8 and 9 above, a police officer should not have the power to detain any person against his or her will for any purpose unless that person is either arrested by a police officer or has been taken into custody by a police officer following his or her lawful arrest by a private citizen.

12. Questioning Before Arrest

Apart from the powers created by para 8 above, a person should not be required to answer any questions put to him or her by a police officer but may answer such questions voluntarily.

A police officer should not question a person whom he has reasonable grounds to believe may have committed a criminal offence nor seek to have that person attend voluntarily at a police station or anywhere else for the purpose of procuring evidence against him or her without previously cautioning the person in the terms contemplated by para 29.

Where a police officer questions a person who has not been arrested but is reasonably suspected of having committed an offence, the questioning should be electronically recorded in accordance with the guidelines set out in para 37.

13. Voluntary Attendance at a Police Station

Where a person who has not been arrested attends voluntarily at a police station or voluntarily accompanies a police officer to any place, the person should be free to leave the police station or the company of the police officer as the case may be unless he or she is arrested. A person who is in the voluntary company of a police officer should be informed that he or she is not under any form of restraint and has the right to leave the company of the police officer at will.

Where the status of a person who is in the voluntary company of a police officer changes to being that of a person who would be arrested if he or she attempted to leave, the person must be informed of the change in his or her position immediately it occurs.

A suspected person who has not been arrested shall not remain in police custody for more than four hours. Where a person is arrested after having been in the voluntary company of a police officer, the time periods prescribed by para 24 should run from the time at which that person commenced to be in the company of a police officer as a suspected person.

14. Use of Summons Procedure

Where a police officer has made a decision to bring a person before a court to be charged with a criminal offence, he or she may ask a court to issue a summons requiring the attendance of that person at a nominated court. The legislation should recognise the principle that either the summons procedure or the court attendance notice procedure (see para 53) should be used in all circumstances except those where the conditions justifying the use of the power of arrest exist (see para 5).

The use of summons procedure should not be mandatory in any particular class of offences. In some circumstances, notwithstanding the minor nature of the offence, the use of the power of arrest may be the only effective means of enforcing the law.

III. THE POWER TO ARREST

15. Authority to Arrest Without Warrant

A police officer may arrest a person without a warrant if he or she has a suspicion based on reasonable grounds that the person:

- (1) has committed a criminal offence;
- (2) is about to commit a criminal offence;
- (3) is the subject of an outstanding warrant issued by a court;
- (4) is a prisoner unlawfully at large.

The police officer must also believe that it is not practicable to obtain a warrant for arrest and that it is necessary to arrest the person:

- (1) to ensure that the person will appear in court;
- (2) to conduct investigative procedures authorised by statute;
- (3) to prevent interference with the administration of justice;
- (4) to prevent the continuation or repetition of a criminal offence;
- (5) to ensure the safety of any person or property; or
- (6) to establish the identity of the suspected person.

Note 1: This proposal is designed to ensure that police officers proceed by way of summons or court attendance notice if it is practicable to do so, or, putting this another way, to confirm that the power of arrest should only be used as a last resort. (See para 14.)

Note 2: The use of the broader term "suspicion" is intended to cover the situation where a police officer's state of mind goes beyond mere suspicion and includes a belief that the nominated circumstances exist.

Note 3: Current case law holds that the words "reasonable grounds for suspecting" require not only that the police officer in question has reasonable grounds for suspecting, but that he or she does actually suspect.

Note 4: The power of arrest should not be limited to a range of offences of a particular kind. The availability of the power should depend, not primarily on the seriousness of the offence, but on the necessity for arrest as a means of enforcing the law.

Note 5: The current law which provides that it is an offence for a person to resist or obstruct a police officer in the lawful exercise of his or her power of arrest should be preserved.

Note 6: The concept of a person "found committing" a criminal offence has been abandoned. A person who falls into that category, which has proved difficult for courts to define, must for all practical purposes also fall into the category of a person who "has committed a criminal offence".

16. Obtaining a Warrant for Arrest

A police officer may obtain a warrant for the arrest of a person by swearing an information before a court alleging that the person has committed a criminal offence, and setting out the relevant circumstances justifying the use of the power of arrest.

Where it is impracticable to swear an information before a court, an application for the issue of a warrant for arrest may be made to a court by means of a radio or telephone,

and may be made directly by the police officer seeking the issue of the warrant or by another police officer acting on his or her behalf.

Any proceedings relevant to an application for the issue of a warrant for arrest should be adequately recorded.

17. Issuing a Warrant for Arrest

A court may issue a warrant to authorise the arrest of a person where the court is satisfied that there are reasonable grounds for suspecting that the person named in an information has committed the offence therein alleged and that the arrest is necessary:

- (1) to ensure that the person will appear in court;
- (2) to conduct investigative procedures authorised by statute;
- (3) to prevent interference with the administration of justice;
- (4) to prevent the continuation or repetition of a criminal offence; or
- (5) to prevent personal injury or serious damage to property.

The failure of a person to comply with a summons (para 14) or court attendance notice (para 53) shall be a prima facie ground for justifying the issue of a warrant for arrest.

Any proceedings relevant to the issue of a warrant for arrest shall be adequately recorded.

This proposal alters the current law by providing that the court, not only the person making the application for a warrant, must consider whether there are reasonable grounds for its issue.

18. The Means of Effecting an Arrest

A police officer may arrest a person in his or her physical presence by:

- (1) informing the person that he or she is under arrest; or
- (2) physically taking a person into custody.

In effecting an arrest, the police officer is entitled to use as much force as he or she reasonably believes to be necessary in the circumstances.

Immediately upon arrest, or so soon afterwards as it is reasonably practicable to do so having regard to the condition of the arrested person and other relevant circumstances, the arresting police officer should give the arrested person the information prescribed by para 22 and caution the arrested person in the terms prescribed by para 29.

19. The Use of Weapons and Restraining Devices

A police officer is entitled to use restraining devices such as handcuffs in effecting an arrest only if he or she reasonably considers that their use is necessary to effect the arrest, to prevent the escape of the person from lawful custody or to secure the safety of the arresting officers.

Lethal or dangerous weapons should only be used where the person making the arrest reasonably believes that their use is necessary in the interest of public safety and is satisfied that no other means is available to effect the arrest or prevent an escape.

20. Entry Onto Premises to Effect an Arrest

A police officer may enter any premises without the consent of its owner or residents for the purpose of effecting an arrest where the police officer:

- (1) is in possession of a warrant for arrest; and
- (2) believes on reasonable grounds that the person who is the subject of the warrant is on the premises; and
- (3) has announced his or her presence and identity, has made a demand to enter and has either been refused entry or has waited a reasonable period of time to allow permission for entry to be granted.

A police officer need not comply with these requirements:

- (1) where it is impracticable to obtain a warrant for the purpose of the arrest; or
- (2) where there are reasonable grounds to believe that the person to be arrested has committed or is about to commit an offence likely to endanger life or cause serious injury; or
- (3) where the police officer is in pursuit of the person to be arrested and there is a likelihood that he or she will try to escape the dwelling; or
- (4) where there are reasonable grounds to believe that to do so would endanger the life or safety of any person.

This proposal does not materially alter the current law.

21. The Power of Private Citizens to Arrest

Any person who is not a police officer may arrest without warrant:

- (1) a person whom he or she believes on reasonable grounds has committed a "serious" criminal offence, that is an offence which carries a maximum penalty of 12 months imprisonment or more; or
- (2) a person whom he or she has been told by a police officer to arrest.

A private citizen who arrests another person should deliver the arrested person into the custody of a police officer or a court as soon as possible after the arrest is made.

In Canada there is a proposal that a private person may not arrest anyone under these provisions if a police officer present at the scene has, to the knowledge of that person, made a determination that an arrest should not be made. We invite comment as to the desirability of such a rule.

22. Information to be Given to an Arrested Person

When a person is arrested by a police officer, he or she must be informed:

- (1) of the fact of the arrest having been made;
- and
- (2) of the grounds for the arrest.

If the arrest is made pursuant to a warrant, the arrested person should be shown the warrant authorising the arrest. If it is not feasible for the arresting officer to be in possession of the warrant at the time of the arrest, he or she should inform the arrested person of the offence for which the arrest warrant has been issued.

Where compliance with these requirements is rendered impracticable by the conduct or condition of the arrested person or by other circumstances, these requirements should be complied with as soon as it is reasonably practicable to do so.

23. Power of Search on Arrest

A police officer may search a person who has been arrested if the police officer has reasonable grounds for believing that the arrested person:

- (1) may be in possession of anything which might present a danger to himself or herself or others;
- (2) may possess anything which might be evidence relating to the offence being investigated;
or
- (3) may possess anything which might be used to assist an escape from lawful custody.

The police officer should also have the power to search any premises or vehicle in which the arrested person was at the time of arrest where he or she has reasonable grounds to suspect that evidence relating to the offence for which the arrest was made may be found.

The power to search contained in this proposal should only be used to authorise a search reasonably required by the circumstances of the arrest and should not authorise a personal search involving an internal examination or the exposure of the person. (See para 39.)

IV. PROCEDURE FOLLOWING ARREST

24. Detention Following Arrest Permitted

Where a person has been arrested by a police officer exercising the power described in para 15, or by a private citizen in accordance with the procedure described in para 21, or by warrant, the person may, if any of the conditions in para 25 are satisfied, be detained in the custody of a police officer for such time as is reasonable in all the circumstances (see para 38), but for no more than four hours from the time of arrest. At the expiry of this period, the arrested person must be either:

- (1) released unconditionally;
- (2) released on condition that he or she undertakes to attend at a nominated police station at a specified time (see para 48);
- (3) released with or without bail having been informed of the nature of any offence with which he or she is to be charged and, where appropriate, on condition that he or she undertake to attend a nominated court at a specified time; or
- (4) brought before the nearest available court unless a court has authorised an extended period of detention in the manner described in para 30.

Where it is determined that a person should be brought before a court and this is impracticable because of the unavailability of a court at a reasonably convenient location to enable the specified time limits to be complied with, notice of the fact of the arrest and subsequent detention and of the intention to bring a person before a court should be given to a court by radio or telephone. The arrested person should be brought before a court as soon as is practicable thereafter unless the court to whom the notification is made orders that the person should be released unconditionally or otherwise.

25. Grounds for Detention Following Arrest

A person who has been arrested should only be detained by a police officer if it is necessary:

- (1) to enable the police officer who made the arrest to confirm or dispel the suspicion on which the arrest was based.
- (2) to ensure that the person will appear in court;
- (3) to conduct investigative procedures authorised by statute; (see Part VI, paras 37-47);
- (4) to prevent interference with the administration of justice;
- (5) to prevent the continuation or repetition of a criminal offence;
- (6) to protect the physical safety of any person or to prevent serious damage to property; or
- (7) to establish the identity of the arrested person.

26. Transmission of the Arrested Person to a Police Station

Where it has been determined by a police officer that an arrested person should be detained on any of the grounds specified in para 25, the person should be taken as soon as is reasonably practicable after his or her arrest to a police station unless the police officer who has the custody of the person decides that he or she should be released earlier. Upon arrival at the station, the arrested person should be brought immediately before a police officer who is for the time being exercising the function of the custody review officer as described in para 27.

27. Role of the Custody Review Officer

In each police station one or more police officers should be designated to be a "custody review officer". The officer should be of or above the rank of sergeant or the officer in charge of the station for the time being. The police officer who made the arrest should not act as the custody review officer unless there is no other person available to perform that function. When an arrested person is brought to a police station, he or she should be brought immediately before the custody review officer. It should then be that officer's duty to find out the grounds upon which the arrest has been made and the grounds on which it is determined that the arrested person should be detained in custody.

The custody review officer should be required to inform the accused person of the following, where applicable:

- (1) the grounds for his or her arrest;
- (2) the right to have access to a telephone to make a private telephone call;
- (3) caution the arrested person in the terms described in para 29;
- (4) the right to make and have recorded his or her own statement;
- (5) the right to have the assistance of an interpreter;
- (6) in the case of people under 18 years of age, the right to have a parent or guardian present during any questioning.

After considering all the relevant circumstances, the custody review officer should then decide whether it is reasonable for the accused person to be detained for any period of time prior to being taken before a court or release from custody, whether unconditionally or on bail. The custody review officer should make a determination as to what would be a reasonable time for carrying out those things that need to be done prior to bringing the arrested person before a court or releasing him or her. This decision should be made by reference to the factors specified in para 28 and should not be for a period in excess of four hours. The arrested person should be informed of the decision.

The custody review officer should, at the expiration of that period which has been determined to be a reasonable period, ensure that the arrested person is either released or that he or she is taken before a court for the purpose of being charged with an offence. If the period determined as reasonable is less than four hours, it may be extended by the custody review officer if there are reasonable grounds to do so, but not so as to extend the total period of detention beyond four hours.

All relevant communication between the custody review officer and the arrested person should be recorded, preferably on videotape, but in any event by some means which demonstrates whether the prescribed procedure has been complied with.

28. The Determination of a Reasonable Time for Detention

The time during which an arrested person may be detained following his or her arrest must be reasonable bearing in mind all the relevant circumstances including:

- (1) the number and complexity of the matters to be investigated;
- (2) whether the arrested person has indicated a willingness to answer questions;
- (3) whether a police officer reasonably requires time to prepare for any interview of the person in custody;
- (4) whether facilities are available to conduct an interview or other investigations;
- (5) the number of people apart from the arrested person who reasonably need to be questioned during the period of custody;

- (6) whether it is necessary to visit the place where the offence under investigation is believed to have been committed, or any other place reasonably connected with the investigation of the offence;
- (7) whether time is required to permit the arrested person to communicate with a lawyer, friend or relative;
- (8) the time required to allow a lawyer or an interpreter to arrive at a place where questioning or investigations are to take place;
- (9) whether the questioning of the arrested person should be delayed so that he or she may receive medical attention;
- (10) whether the questioning of the arrested person should be delayed to allow that person to rest;
- (11) the period of time during which the arrested person has been in the company of a police officer prior to and after his or her arrest; and
- (12) any other matters which are relevant to the investigation of the offence that the arrested person is reasonably suspected of having committed.

29. Caution Following Arrest

A police officer who arrests a person should, at the time of making the arrest, give that person a warning in the following or similar terms:

You have a right to remain silent and you are free to exercise that right at any time. If you wish to make a statement or answer questions, anything you say will be recorded and may be introduced as evidence in court. Before you make a statement or answer any questions you may contact a lawyer.

The police officer should ask the arrested person whether he or she understands the warning, and if there is any failure to do so, it should be repeated.

A warning in these terms should again be given to a person who has been arrested and who is presented before a custody review officer at a police station. The warning should be given by the custody review officer and be adequately recorded, preferably by way of videotape. Where there is a need for an interpreter, the warning should be given to the arrested person in his or her own language before any questioning or other investigative procedure is commenced.

30. Grounds for Extension of Detention Period

Where a police officer wishes to detain an arrested person in custody for a period extending beyond four hours after the time of arrest, the police officer must obtain the authorisation of a court. The application may relate to the investigation of the offence in respect of which the person was arrested or any other offence in respect of which a reasonable suspicion arises during the period between the time of arrest and the making of the application.

Where such an application is made to a court, both the police officer making it and the arrested person are entitled to be heard and may be represented by a lawyer. If the court refuses the application, the arrested person should either be released immediately or, where an information alleging an offence has been sworn, charged by the court with that offence. If this occurs the court should then determine the question of bail. If the court

grants the application for the time to be extended, it may authorise the detention of the arrested person for such period as it considers is warranted.

Where it is impracticable to make such an application by bringing the arrested person before a court, the application may be made and determined by telephone or radio. If the court refuses such an application and does not order the release of the arrested person, he or she should be brought before a court as soon as practicable after the refusal of the application.

Any proceedings relevant to such an application should be adequately recorded.

V. SERVICES AVAILABLE TO AN ARRESTED PERSON

31. Right to have a Person Informed of an Arrest

When a person has been arrested and is being held in custody in a police station, he or she should be entitled to have a relative, friend or someone who is likely to take an interest in his or her welfare informed of the fact of the arrest and the place of detention. This entitlement may be denied where a police officer has reasonable grounds for believing that informing the person of the fact of the arrest will lead to interference with evidence in the case or will alert other people suspected of having committed an offence or will hinder the recovery of any property relevant to the offence.

When an arrested person is moved from one police station to another, he or she should have the right to inform another of the new place of detention. The same conditions as above should apply.

32. Access to Legal Advice

The terms of the caution (see para 29) to be given to arrested people by both the arresting police officer and the custody review officer at a police station include informing the arrested person that he or she may contact a lawyer.

In order to give the right to contact a lawyer practical value, an arrested person should be given the means to exercise the right if it is desired to do so. This entails allowing the arrested person to contact a lawyer by telephone and to have a private telephone discussion and also the right to have a private conference if and when a lawyer arrives at the police station.

33. Legal Aid for Accused People at Police Stations

For accused people who are unable to afford the services of a lawyer, the duty solicitor scheme which presently operates in the Local Courts should be extended so that arrested people have access to a lawyer whilst they are at a police station. This scheme would need to be staffed on a 24 hour basis. We acknowledge the potential cost of such a scheme and suggest that the feasibility of both a publicly funded and a voluntary system be examined.

English legislation provides for a scheme of duty solicitors who are to be available to assist and advise people who have been arrested and held in custody and to exercise their right to consult a solicitor. The scheme that has been established gives arrested people access to legal advice at all hours of the day and night. A similar scheme has been established in Victoria on an experimental basis.

34. Availability of Medical Treatment

In accordance with the spirit of the provisions of the International Covenant on Civil and Political Rights (see para 4), medical treatment should be available for any arrested person who reasonably requests it or reasonably appears to need it. The cost of such treatment should be borne by the arrested person.

35. Opportunity for Refreshment

In accordance with the spirit of the provisions of the International Covenant on Civil and Political Rights (see para 4), people who have been arrested should be provided with reasonable toilet facilities, food and drink.

If a person is to be brought before a court following arrest and without having been released in the meantime, he or she should be given, where reasonably possible, the opportunity to wash or shower and obtain a change of clothes prior to his or her appearance in court.

VI. INVESTIGATIVE PROCEDURES

36. Questioning Following Arrest

When an arrested person is brought before a custody review officer following arrest, his or her rights and obligations regarding questioning by the police should be explained. If the police desire to question a person following his or her arrest, this must be made known to the custody review officer and the willingness of the arrested person to be questioned then determined.

Questioning may relate to the matter in respect of which the accused person was arrested or any other matter in respect of which a reasonable suspicion arises during the course of the investigation following arrest.

All questioning of an arrested person should be adequately recorded, preferably by videotape and in accordance with the procedural guidelines set out at para 37.

37. The Use of Electronic Recording Equipment

Police stations should be equipped with facilities to record interviews by electronic means, preferably videotape. All relevant oral communication between the arrested person and a police officer should be recorded. In particular, the meeting between the custody review officer and the arrested person should be electronically recorded as well as any subsequent questioning of the arrested person. The procedure for electronic recording should generally follow these guidelines:

- (1) prior to asking questions on the facts of the matter under investigation, there should be a series of standard questions to be recorded in the course of all interviews. These questions should establish that the arrested person understands his or her rights and obligations and consents to the questioning being recorded;
- (2) where a person who has been arrested has made an incriminating statement prior to the conduct of a recorded interview, the fact that that statement was made should be put to the person in the course of the recorded interview and the person asked whether or not he or she agrees that the statement was made;
- (3) the whole of the interview should be recorded and the arrested person should either be given a record of it or be told where he or she may have access to such a record;
- (4) a police officer should have the power to suspend the recording of an interview only where this has been requested by the person being interviewed;
- (5) either the equipment used to record the interview or the procedure adopted should include a means of verifying the time at which the interview was taken;
- (6) there should be safeguards designed to ensure that recordings are not tampered with or destroyed.

38. Power of Search at a Police Station

An arrested person may be searched at a police station where there are reasonable grounds for suspecting that he or she is in possession of anything:

- (1) which is material to the specific offence in relation to which he or she has been arrested;
- (2) which is material to some other criminal offence;

(3) which may be used to cause personal injury or damage to property; or

(4) which may be used to assist an escape.

Anything found on the arrested person, including clothing and personal effects, may be seized if the police officer has reasonable grounds for believing that they fall into any of the nominated categories.

When a person has been brought to a police station following arrest, the custody review officer shall make a record of everything which has been seized from an arrested person.

39. Personal Searches

In accordance with the current law, a personal search should only be conducted on the authority of an officer of the rank of sergeant or above. A search may be authorised if such an officer has reasonable grounds for suspecting that a person who has been arrested may have concealed on his or her person anything which might be a material item in the investigation of an offence or be used to cause physical injury while he or she is in police custody.

Searches involving the exposure of the person should be conducted by a police officer of the same sex as the person who is subjected to the search.

Personal searches involving an internal examination should be conducted by a suitably qualified person, that is, a registered medical practitioner or a registered nurse, and may only be conducted at a police station, a hospital, the surgery of a registered medical practitioner or at a place used for medical purposes.

In accordance with the current law, a police officer may use such force as is reasonably necessary to enable a medical practitioner to make the authorised examination.

A written record of the authorisation for the search and the reasons for it should be made. Where it is impracticable to obtain authorisation for the search in person, it may be obtained by means of a telephone or radio.

40. Fingerprinting

The fingerprints of any person may be taken by a police officer where the police officer has reasonable grounds to do so and the person consents to his or her fingerprints being taken.

A person who has been arrested may have his or her fingerprints taken where a police officer believes on reasonable grounds that it may help to confirm or disprove the involvement of the arrested person in an offence or where the police officer considers it necessary for the purpose of establishing the identity or previous criminal

history of the arrested person. If the arrested person does not consent to the taking of fingerprints, this may be authorised by the custody review officer and such reasonable force as is necessary used to take the fingerprints.

A person who has been convicted of a serious offence may be required by the court in which he or she has been convicted to attend at a police station for the purpose of having his or her fingerprints taken. This may only be done where the fingerprints of the person were not taken at the time when the offence was being investigated and should be done within a reasonably short time after the person has been convicted of the offence in question.

For proposals regarding the destruction of fingerprints see para 60.

41. Photographing

Any person may consent at any time to having his or her photograph taken by a police officer. A police officer may photograph a person without his or her consent:

- (1) if the person has been arrested;
- (2) if the taking of the photograph is considered reasonable for the purpose of effective investigation; or
- (3) where the person has been convicted of a serious offence, for the purpose of keeping a record of his or her appearance.

The photograph should be of so much of the arrested person as is considered reasonable having regard to the purpose for which it is taken and should not involve subjecting the arrested person to any indignity or embarrassment.

42. Obtaining Forensic Evidence

A police officer should be entitled to carry out certain investigative procedures on an arrested person where the police officer has reasonable grounds to believe that it would provide evidence relating to the offence for which the person has been arrested. In addition to those already provided for above, the following investigative procedures should be permitted:

- (1) taking of prints or impressions from any exterior part of the body;
- (2) taking of hair samples;
- (3) taking of samples from fingernails;
- (4) removal of other substances from the external body;
- (5) taking of saliva samples;
- (6) making dental impressions;
- (7) seizure of clothing;
- (8) recording the voice of the arrested person;
- (9) obtaining blood samples;
- (10) obtaining relevant measurements of the arrested person;
- (11) the scientific analysis of any material obtained through the exercise of these powers.

In each case, the arrested person should be informed of the intention to carry out such a procedure. Where the person does not consent, the police officer should be required to obtain the order of a court compelling the arrested person to submit to the investigation in question. Where it is considered necessary, such an order may be obtained from a court by radio or telephone.

Where the procedure in question involves the risk of injury being caused to the arrested person, or requires professional skills, it should be carried out by a qualified medical practitioner.

43. Conduct of Identification Parades

The conduct of identification parades should be strictly regulated by rules designed to ensure that the practice is fair. Precautions should be taken to ensure that the risk of erroneous identification through the attention of the witness being directed especially towards the suspected person is minimised. Participation in an identification parade must be voluntary, but refusal to participate may result in the use of identification procedures which offer less safeguards to the accused person against the risk of mistaken identification.

It is suggested that the terms of these rules should be in a form which resembles the relevant English rules. They are:

Rule 1

As soon as practicable after the officer in the case has made the decision that an identification parade may be required, the suspected person should be given written notice of the identification parade procedure including an explanation of his or her rights and obligations regarding the conduct of the parade. He or she should be asked to acknowledge in writing the fact that the terms of the notice are understood.

Rule 2

A suspected person has the right to have a solicitor or a friend present at the parade provided that this can be arranged without causing unreasonable delay or difficulty. His or her attention should be drawn to this when he or she is first served with the written notice of the parade.

Rule 3

Where the suspect is under 18 years of age, his or her parents or guardian should be informed of the holding of the parade and be invited to be present. The parade should not be held unless the juvenile's parent, guardian or solicitor or (if it is not practicable for one of these to attend) another adult not being a police officer is present.

Rule 4

Where a witness to the parade is under 18 years of age, arrangements should be made for him or her to be accompanied by an adult, a parent or guardian if practicable, who is not also a witness, but the adult should not be permitted to intervene and should be advised accordingly.

Rule 5

When a prison inmate is required for identification, he or she should normally be invited to go to a police station for an identification parade. If he or she refuses he or she should be deemed to have refused to attend a parade.

Rule 6

Where there is a serious security problem the parade may be held in a prison but must be conducted as far as possible under normal parade rules. Members of the public should make up the parade unless there are serious security objections to their admission to the prison establishment.

Rule 7

Immediately before the parade, the officer in charge of the parade should interview the suspected person and ensure that he or she has a copy of the written notification and explain the procedures governing the conduct of the parade to him or her. The Judges' Rules provide guidance on the cautioning of a suspect before he or she is asked questions relating to the offence. Whilst those Rules do not apply where the questioning relates solely to the conduct of the parade, the suspect should be told that he or she need not say anything at any stage during the parade, but that anything he or she does say will be recorded and may be given in evidence in any subsequent court proceedings.

Rule 8

The officer in charge of the parade should always be an officer of rank not lower than sergeant.

Rule 9

An officer concerned with the investigation of the case against the suspect shall take no part in the arrangements for or the conduct of the parade, and if present at the parade shall not intervene in any way and should be so positioned that he or she can at all times be seen by those forming the parade line.

Rule 10

Once the identification parade has been formed everything afterwards in respect of it, including any instruction to a witness attending it as to the procedure that they are to adopt, should take place in the presence and hearing of the suspect and of any person who is present in accordance with Rule 2 or 3.

Rule 11

All unauthorised persons should be strictly excluded from the place where the identification parade is held.

Rule 12

No information should be given to the witness of the identity of the suspect. The witnesses should be prevented from seeing any member of the parade before they are brought in for the purposes of making an identification, and in particular should not be allowed any opportunity of seeing the suspect in circumstances indicating that he or she is the suspect, before or after the parade. Witnesses should also be prevented from talking with each other while waiting to see the parade.

Rule 13

Witnesses who have previously seen a photograph or description of the suspect should not be led into identifying the suspect by reason of their recollection of the photograph or description as, for instance, by being shown the photograph or description shortly before the parade.

Rule 14

The suspect should be placed among persons (at least eight, or if practicable, more) who are as far as possible of the same age, height, general appearance, including standard of dress and grooming, as the suspect. Members of an homogeneous group such as the police or army should not normally be used as participants in an identification parade unless the suspect is a policeman or a soldier. One suspect only should be included in a parade unless there are two suspects of roughly similar appearance in which case they may be paraded together with at least 12 other persons. In no circumstances should more than two suspects be included in one parade and where there are separate parades they should be made up of different persons.

Rule 15

Occasionally all members of a group are possible suspects. In such circumstances, separate parades should be held for each of the people in question unless there are two suspects of similar appearance when they may appear on the same parade with at least 12 other people who were not implicated.

Rule 16

The suspect should be allowed to select his or her own position in the line and should be expressly asked if he or she has any objection to the other participants in the parade, or the arrangements. Any objection should be recorded and, where practicable, steps should be taken to remove the grounds for objection.

Rule 17

The witnesses should be brought in one by one. Witnesses waiting to see the persons paraded should not be allowed to communicate with or overhear a witness who has already seen the parade. The officer conducting a witness to a parade should not discuss the composition of the parade with the witness and, in particular, should not disclose whether any previous witness has made any identification.

Rule 18

The officer in charge of the parade should tell the witness expressly that the person he or she saw may or may not be in the parade. This should be done just before the witness inspects the parade. The witness should then be asked whether the person he or she has come to identify is on the parade. He or she should be told that if he or she cannot make a positive identification he or she should say so.

Rule 19

It may sometimes happen that a witness desires to see the suspect with a hat on or a hat off and there is no objection to the persons paraded thereupon being asked to wear or remove hats. If a witness asks to hear members of the parade speak or see them move, he or she should be asked whether he or she can first identify any persons on the parade on the basis of appearance only, and his or her reply should be noted. When the request is to hear members of the parade speak, he or she should be reminded that the participants in the parade have been chosen on the basis of physical appearance only. Members of the parade may then be asked to comply with the witness' request to hear them speak or see them move.

Rule 20

The parade should be formed in a manner which assigns to each of its members a clearly visible identity number. This may be best achieved by placing numbers on the floor in front of the members of the parade. Rather than being asked to touch a person whom he or she purports to identify, a witness should be asked to identify the person by the identity number. The exact words used by the witness should be adequately recorded.

Rule 21

After each witness has left the room the suspect should be informed that he or she may change his or her position in the line.

Rule 22

When the last witness has left, the suspect should be asked whether he or she wishes to make any comments on the conduct of the parade and his or her reply should be noted.

In order to preserve an adequate record of the composition of the parade and the statements made by the various participants in the identification parade procedure, consideration should also be given to the feasibility of recording the whole procedure on videotape.

44. Use of Photographs for Identification

The use of photographs by police for the purpose of obtaining identification of suspected persons should be regulated by specific rules. The purpose of these rules should be to ensure that the procedure is a reliable test of the witness' ability to identify the person whom the witness has said that he or she has seen on an earlier occasion. In order to minimise the risk of mistaken

identification and to remove so far as is possible the likelihood that evidence to be presented in a subsequent hearing may be unfairly prejudicial, the rules should resemble the English rules. They are:

Rule 1

Photographs should not be shown if the circumstances allow of personal identification. If there is already a suspect who is readily available, he or she should be asked to stand on an identification parade. Once a witness has made a positive identification from photographs, other witnesses should not be shown photographs but should be asked to attend an identification parade unless the person identified from photographs is eliminated from inquiries.

Rule 2

A police officer of rank not less than sergeant should be responsible for supervising and directing the showing of photographs, but the actual showing may be done by an officer of lesser rank.

Rule 3

Arrangements should be made to ensure that a witness being shown photographs is given as much privacy as practicable. The witness should not be allowed to communicate with or overhear any other witness in the case. A juvenile witness should be accompanied by an adult, a parent or guardian if possible, who is not also a witness, but the adult should not be permitted to intervene and should be advised accordingly.

Rule 4

A witness should be shown not less than 12 photographs at a time. The photographs used should as far as possible all be of a similar type, for example a snapshot should not be included in a selection of police photographs of previously convicted offenders. When a witness is being shown the photograph of a suspect it should be shown with not less than 11 photographs the subjects of which have as close a resemblance to the suspect as possible.

Rule 5

The witness should be told that the photograph of the person whom he or she has said he or she has seen previously on a specified occasion may or may not be amongst the photographs shown. He or she should then be left to make any selection without help.

Rule 6

All of the photographs shown to a witness should be kept intact for the purpose of any subsequent court proceedings and a precise record should be kept of the words used by the witnesses to whom photographs are shown.

45. Involuntary Detention for Questioning Prohibited

A custody review officer should not authorise the detention of an arrested person merely for the purpose of questioning him or her unless the person has indicated a willingness to answer questions. Questioning by a police officer may only take place with the consent of the person being questioned and, in the case of an arrested person, only after he or she has been given an appropriate warning regarding his or her rights and obligations. A police officer should not continue to question an arrested person after the person has indicated that he or she does not wish to answer any further questions.

46. Questioning by Undercover Police Officers

In order to permit the police to conduct undercover questioning in the investigation of serious offences, there should be an exception to the general rule providing that a suspected person must be "cautioned" before any questioning

takes place. A police officer who is working undercover should not be obliged to caution a suspected person who has not been arrested.

There should be administrative guidelines issued to police officers outlining the circumstances in which it is acceptable to engage in undercover questioning. Once a person has been arrested, undercover investigations in relation to the offence upon which the arrest is made should be prohibited.

VII. PROCEDURE AT CONCLUSION OF DETENTION

47. Unconditional Release

Where a police officer with authority to make a decision to prosecute decides that a person who has been arrested and who is detained in custody should not be prosecuted or should be charged with an offence which does not require a court appearance, the police officer should release that person immediately. Any property which has been taken from the arrested person should be returned unless it is required by a police officer for a legitimate purpose, such as for use as evidence in the prosecution of a related offence against another person.

48. Release on Undertaking to Attend a Police Station

The concept of conditional release from custody pending the completion of criminal proceedings should be expanded to permit both the police and a court to grant an arrested person bail on the condition that the person undertakes to

attend at a police station for the purpose of conducting an investigative procedure which is authorised by statute or one which is conducted with the consent of the arrested person.

In the case of a person who has been charged before a court with an offence, such an order may only be made by a court. Where a person has been arrested but a decision to bring the person before a court for the purpose of being charged has not been made by the police, an order admitting the arrested person to bail on condition that he or she undertake to attend a police station for further investigation may be made by a police officer where the reasonable suspicion upon which the arrest was based still exists and where there is an expressed willingness on the part of the arrested person to participate in further investigative procedures. The use of such a power should reduce the need to resort to detention as a means of conducting authorised investigations.

49. Release on Undertaking to Attend a Court

The provisions of the Bail Act which empower both a police officer and a court to release a person from custody pending the determination of a criminal offence charged against him or her should generally be preserved. There should, however, be a change in the current procedure to the extent that, for offences which require the appearance

of the person charged before a court, only a court has the power to charge the person with the offence alleged in the process initiated against him or her.

The suggested procedure should have these features:

- (1) If a person is arrested it is a matter for the police in the first instance, irrespective of the offence in question, to decide whether or not that person should be brought before a court to be charged with an offence.
- (2) In cases where the police have the power to make the decision to prosecute, a decision by the police that a person should be brought before a court to be charged with an offence should be regarded as the decision to prosecute.
- (3) In cases where the Director of Public Prosecutions must make the decision to prosecute, the criminal process may be initiated by a decision, for which a police officer should have the responsibility in the first instance, to bring a person before a court to be charged with an offence. In these cases that initiation of the process should be described as "a decision to lay a charge".

Whenever an arrested person is released on any form of bail conditioned upon an undertaking to attend a court, either a decision to prosecute or a decision to lay a charge must have been made by the police. In either case, a police officer must inform the arrested person by notification in writing of the nature of the allegation which will be the subject of a charge when the person appears in court.

50. Release to Place of Apprehension

Where a police officer makes a decision that an arrested person should not be brought before a court to be charged with an offence and that he or she should be released unconditionally, the police officer shall ensure, if the arrested person requires it, that he or she be returned to the place of arrest or some other place that may be reasonably nominated by the person arrested.

Where a police officer decides that an arrested person should be released on conditions of the kind contemplated by either para 47 or 48, then the police officer should make such arrangements as are reasonable in all the circumstances to ensure that the person released is not placed at risk of harm.

51. Constitution of the Court of First Appearance

Where an arrested person is not released from custody by a police officer, he or she should be brought before a court in accordance with the general rule set out in para 23. The court should be presided over by a judge, a magistrate or a justice employed by the Attorney General's Department.

52. The Role of the Court of First Appearance

Where a police officer wishes to make an application to a court for the continued detention in police custody of an arrested person, the court should hear and determine such an application as soon as reasonably practicable after

notice is given to the court of the intention to make it. Where such an application is unsuccessful and the police elect to have the person charged by the court with an offence, or where that decision has been made previously, then the court should observe the procedures described below:

- (1) satisfy himself or herself that there are circumstances justifying the initiation of a prosecution;
- (2) satisfy himself or herself that the offence with which the arrested person is to be charged is an offence known to the law and capable of being tried in the jurisdiction in which it is brought;
- (3) satisfy himself or herself that the person who appears before the court is the person named in the initiating process by which the matter is brought before the court;
- (4) ensure that the arrested person understands the nature of the charge;
- (5) ensure that the arrested person has been advised of his or her right to obtain legal advice and, where applicable, legal aid;
- (6) inquire of the arrested person whether he or she has any complaints about the manner of his or her treatment at the time of and following arrest;
- (7) formally charge the arrested person if the judicial officer is satisfied that the process is in order;
- (8) if necessary deal with the question of bail pending the determination of the case;
- (9) where necessary, fix a date for further hearing of the case.

53. The Power to Charge with a Criminal Offence

The police should have the initial responsibility for deciding whether a person is to be charged before a court with a criminal offence. They should advise a person in

respect of whom such a decision has been made of the nature of the charge to be brought irrespective of whether that person is released on bail pending his or her appearance in court, or brought before a court in the custody of a police officer. The actual process of charging the arrested person should be performed by the court before whom he or she first appears.

54. Court Attendance Notices

The current procedure of police to formally charge people with a criminal offence at a police station should be altered so that the police are empowered to issue a court attendance notice to a person in respect of whom they have made a decision to lay a charge but whom they consider should be released from custody pending an appearance in court. The court attendance notice should require the person to attend at a nominated court on a particular day to answer the charge set out in the notice. A similar procedure has been successfully instituted in New South Wales for juveniles and is provided for in the Justices (Penalties and Procedure) Amendment Act 1985.

The court attendance notice should include information advising the alleged offender of the right to defend the charge and the ability to give advance notice of an intention to do so. Through appropriate administrative arrangements and listing of contested cases, more rational use of court, police and legal resources may be made.

The failure to comply with the terms of a court attendance notice should be an offence and should be a ground for the issue of a warrant for arrest.

55. The Decision to Prosecute

Where a person has been charged before a court with a criminal offence, the agency responsible for deciding whether or not a prosecution should proceed should make that decision as soon as possible after the charge is laid. In the case of prosecutions in which the police bear responsibility for the decision to prosecute, the decision will already have effectively been made by requiring the person to appear before the court to be charged. In the case of prosecutions for which the Director of Public Prosecutions carries the responsibility, the relevant papers should be forwarded immediately to the Director so that a decision can be made as quickly as possible.

VIII. CONSEQUENCES OF A BREACH OF PROCEDURAL RULES

56. The Admissibility of Evidence

There should be a presumption of inadmissibility attaching to any evidence obtained in contravention of procedural rules prescribed for the exercise of powers of arrest and investigation. Since the rules themselves should define the manner in which police are expected to act in a way that is unambiguous and readily understandable, it should only be in unusual and exceptional circumstances that a breach can be seen as being other than conscious and deliberate.

There should be, however, exceptions based on a "rule of reason". A failure to comply with the rules may, bearing in mind all the circumstances, including the seriousness of the offence in question, be insignificant and comparatively harmless and in such a situation there should be a discretion to admit the evidence. We suggest that evidence obtained in consequence of a breach of the procedural rules should be inadmissible unless the person seeking to have it admitted can show that its admission in the proceedings would not be unfair nor contrary to the interests of justice.

57. The Liability of Offenders to Civil Prosecution

The current law allows a person who is wrongfully arrested or a person who is falsely imprisoned, whether by a police officer or by a private citizen, to sue for damages. We would propose no change to the law in this regard.

58. The Liability of Offenders to Criminal Prosecution

The scheme proposed by this Commission would create a number of obligations upon police and would define the way in which police are expected to exercise their powers of arrest and investigation. We do not propose that the breach of any of these rules should of itself result in any specific consequence apart from that in para 56 related to the admissibility of the evidence thereby obtained.

There are regulations within the police force which enable disciplinary proceedings to be commenced where a police officer has breached the rules governing the conduct of police officers. In extreme circumstances a police officer who breaches these rules may be liable for prosecution for serious offences such as attempting to pervert the course of justice. We consider that these provisions are together adequate to cope with the circumstances where breaches are sufficiently serious to justify action against the offending police officer.

59. Breaches Occurring in Another Jurisdiction

The current laws of evidence and procedure provide that a judge has a discretion to exclude any evidence whose admission would act unfairly against the accused person. We think that this rule of general application is adequate to cover the circumstances in which police operating in another jurisdiction, whether they be New South Wales police officers or not, exercise their powers in a manner which complies with the relevant law in that jurisdiction, but which would be a breach of the equivalent laws in New South Wales. We consider that the question whether or not such evidence should be admitted at the trial should be left to the discretion of the trial judge in the individual case.

60. Destruction of Fingerprints and Other Samples

Where a person who has been the subject of an investigation in relation to an offence has had his or her fingerprints or samples taken during the course of the investigation, those fingerprints or bodily samples should be destroyed as soon as is practicable after proceedings relating to that offence have concluded in a determination that the person is not guilty of the offence or where there is a decision not to prosecute for that offence.

Where fingerprints, photographs or bodily samples are taken from a person in the investigation of an offence and that person is not suspected of having committed the offence, then the fingerprints or other bodily samples should be destroyed as soon as they have fulfilled the purpose for which they were taken.

Any rule requiring destruction of fingerprints or samples should also require that any copies of fingerprints or samples should also be destroyed. A person should have a right to witness the destruction of his or her fingerprints or bodily samples.

IX. GENERAL ISSUES

61. Powers of Law Enforcement Agencies Other than Police

Whilst the proposals in this Part have expressly referred only to police officers and private citizens, a person who is authorised by the State to act in a capacity which requires them to enforce the law should by statute be given the same powers and duties as a police officer.

62. Special Rules for Children and Young People

The existing law contains certain provisions regarding the powers and duties of police in relation to the arrest of young people and the investigation of criminal offences which are suspected of having been committed by young people. In particular, people under 18 are generally required to have a parent, guardian, lawyer or other person present during questioning by a police officer. We consider that the existing rules should not be altered but that they should be supplemented by the rules proposed in these recommendations. That is to say, that the police should be bound primarily by the rules established under the general requirements regarding arrest and detention but that in the case of young people there will be additional procedural rules to be observed.

63. Special Rules for Aboriginal Australians

Investigations in which an Aboriginal Australian is suspected of committing a criminal offence may present special difficulties to police officers. We suggest that this issue should be the subject of further consideration and to this end we deliberately refrain from making any specific proposals pending the conclusion of the inquiry into Aborigines and the criminal justice system currently being conducted by the Human Rights Commission.

64. The Provision of Interpreters

Where an arrested person requests the services of an interpreter or where it is apparent to an investigating police officer that a person who has been arrested, or a person who is being questioned by police, is not capable of understanding the English language, the police officer should make such arrangements as are reasonable to ensure that the person has the services of an interpreter who is not a member of the police force.

65. People Required as Witnesses

Subject to the rules regarding the cautioning of people suspected of criminal offences, a police officer should be entitled to ask questions of any person he or she believes might assist in the investigation of an offence. To this end, the power of a police officer to require a person to give his or her name and address (see para 8) should be able to be exercised to discover the identity of people who might be required to give evidence.

66. Publication of Police Codes of Practice

In order to clarify the manner in which the procedural rules of arrest are to be applied, the Police Commissioner may consider it necessary from time to time to issue instructions to police officers. Where this is done, these instructions should be publicly announced and contained in a code of police practice to which the public should have access.

67. Police Detention to Count Towards Sentence

The time during which an arrested person has been detained in police custody in respect of a particular offence should be taken into account in the assessment of an appropriate penalty and credited towards any sentence of imprisonment imposed by a court upon conviction for that offence.

Appendix A

SELECT BIBLIOGRAPHY

I. REPORTS

- | | |
|--|---|
| Australian Law Reform Commission | <u>Criminal Investigation (ALRC 2 "Interim" (AGPS Canberra, 1975).</u> |
| Australian Law Reform Commission | <u>Evidence (ALRC 26 "Interim") (AGPS Canberra, 1985).</u> |
| Australian Law Reform Commission | <u>Evidence (ALRC 38) (AGPS Canberra, 1987).</u> |
| Consultative Committee on Police Powers of Investigation | <u>Custody and Investigation: Report on s460 of the Crimes Act 1958 Victoria (1986).</u> |
| Criminal Law and Penal Methods Reform Committee of South Australia | <u>Criminal Investigation (Second Report, Adelaide 1974).</u> |
| Criminal Law Review Division, Attorney General's Department, New South Wales | <u>A Proposed System of Electronically Recording Police Interviews with Suspected Persons (October 1986).</u> |
| Criminal Law Review Division, Attorney General's Department, New South Wales | <u>Tape Recording Police Interviews: Summary of Findings and Recommendations (June 1984).</u> |
| Criminal Law Revision Committee | <u>Evidence (General) (Eleventh Report, HMSO Cmnd 4991, London 1972).</u> |
| Human Rights Commission | <u>Civil Disobedience and the Use of Arrest as Punishment: Some Rights Issues (Report No 21) (AGPS, Canberra 1986).</u> |
| Law Reform Commission of Canada | <u>Arrest (Working Paper 41, 1985).</u> |
| Law Reform Commission of Canada | <u>Arrest (Report 29, 1986).</u> |
| Law Reform Commission of Canada | <u>Obtaining Forensic Evidence (Report 25, 1985).</u> |
| Law Reform Commission of Canada | <u>Questioning Suspects (Working Paper 32, 1984).</u> |

- Law Reform Commission of Canada Questioning Suspects (Report 23, 1984).
- Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) Report (Cmnd 9021 HMSO London 1981).
- Royal Commission of Inquiry into Drug Trafficking (Chairman: The Hon Mr Justice D G Stewart) Report (AGPS Canberra, 1985).

II. BOOKS AND ARTICLES

- Anonymous "Canadian Charter of Rights and Freedoms - Right on Arrest or Detention to Retain and Instruct Counsel and to be Informed of Such Right" (1985) 60 Australian Law Journal 188.
- Anonymous "Entry into Force of the Police and Criminal Evidence Act 1984 (UK)" (1986) 59 Australian Law Journal 195.
- Anonymous "Third Time Lucky" [1985] Reform 8.
- Baxter, J et al "Police Bill: Arrest" (1984) 148 Justice of the Peace 186, 215.
- Birch, D J "Powers of Arrest and Detention" [1985] Criminal Law Review 545.
- Bowen, J K "Suspects' Rights and Police Duties - s460" Law Institute Journal, December 1986, 1344.
- Brayne, H "Detention Under the Police and Criminal Evidence Act 1984" The Law Society's Gazette, 7 January 1987, 28.
- Campbell, E and Whitmore, H Freedom in Australia (Sydney University Press, 1973).
- Chappell, D and Wilson, P The Australian Criminal Justice System (Butterworths, 1972).
- Editorial "The Section 460 Controversy in Victoria" (1984) 17 Australian and New Zealand Journal of Criminology 129.

- Eggleston, D J "Impaired Driving - Random Stops: Dedman v The Queen" (1986) 20 University of British Columbia Law Review 297.
- Flick, G Civil Liberties in Australia (The Law Book Company Limited, 1981).
- Freeman, M D A "Law and Order in 1984" (1984) Current Legal Problems 175.
- Galardi, J C "Criminal Procedure" (1982) 2 Annual Survey of American Law 253.
- Gibbons, T G "The Conditions of Detention and Questioning by the Police" [1985] Criminal Law Review 558.
- Gillies, P The Law of Criminal Investigation (The Law Book Company Limited, 1982).
- Harding, R W "The Law of Arrest in Australia" in Chappell D and Wilson P (eds) The Australian Criminal Justice System (Butterworths, 1972).
- Lansdowne, R "Domestic Violence and the New South Wales Legislation" (1985) 8 University of New South Wales Law Journal 80.
- Leigh, L H "Search, Entry and Seizure" [1985] Criminal Law Review 535.
- Leigh, L H "The Police and Criminal Evidence Act 1984" [1985] Criminal Law Review 535.
- Lidstone, K W and Early, T L "Questioning Freedom: Detention for Questioning in France, Scotland and England" (1982) 81 International & Comparative Law Quarterly 488.
- Little, M and Crocker, A "Custodial Investigations: Recent Developments" [1987] Law Society Bulletin (SA) 145.
- Maxwell, C "The Admissibility of Confessions Obtained During Unlawful Detention" Law Society Journal, October 1986, 34.
- Mirfield, P "The Evidence Provisions" [1985] Criminal Law Review 569.

- Munro, C "The Accountability of the Police" [1985] Criminal Law Review 581.
- Murdoch, J L "Police Powers and the Scottish Criminal Justice Bill" New Law Journal, 20 March 1980, 285.
- Reidinger, P "Viva Miranda" American Bar Association Journal, 1 October 1986, 88.
- Sanders, A "Arrest and Charge: Its Meaning and Significance" New Law Journal, 31 August 1984, 741.
- Sanders, A "Arrest, Charge and Prosecution" (1986) Legal Studies 257.
- Sargant, T "Police Powers - I: A General View" [1966] Criminal Law Review 583.
- Thomas, D A "Arrest: A General View" [1966] Criminal Law Review 639.
- Thomas, D A "The Theft Bill - III: Arrest and Search" [1966] Criminal Law Review 481.
- Todd, S "Recent Developments in the Law of Arrest" New Zealand Law Journal, November 1984, 37.
- Watson R S and Purnell, H F Criminal Law in New South Wales (2nd ed) (Law Book Company Limited, 1981).
- Williams, G "Arrest for Breach of the Peace" [1954] Criminal Law Review 578.
- Williams, G "Arrest for Felony at Common Law" [1954] Criminal Law Review 408.
- Williams, G "Requisites of a Valid Arrest" [1954] Criminal Law Review 7.
- Williams, G "The Interpretation of Statutory Powers of Arrest Without Warrant" [1958] Criminal Law Review 73.

Appendix B

TABLE OF CASES

- Bales v Parmeter (1935) 35 SR (NSW) 182.
- Baynes v Brewster (1891) 2 QB 375.
- Callis v Gunn [1964] 1 QB 495.
- Chic Fashions (West Wales) Ltd v Jones [1968] 1 All ER 229.
- Christie v Leachinsky [1947] 1 All ER 567.
- Clarke v Bailey (1933) 33 SR (NSW) 303.
- Dallison v Caffery [1965] 1 QB 348.
- Dobie v Pinkler [1983] WAR 48.
- Donaldson v Broomby (1985) 40 ALR 525.
- Drymalik v Feldman [1966] SASR 227.
- Fullerton v Commissioner of Police [1984] 1 NSWLR 159.
- Glinski v McIver [1962] AC 726.
- Hazell v Parramatta City Council (1967) 87 WN (Pt 1) (NSW) 229.
- Holgate-Mohammed v Duke [1984] 1 AC 437.
- Hussien v Chong Fook Kam [1970] AC 942.
- John Lewis v Tims [1952] AC 676.
- Kennedy v Pagura [1977] 2 NSWLR 810.
- Mitchell v John Heine & Son Ltd (1938) 38 SR (NSW) 466.
- Nakudda Ali v Jarantyne [1951] AC 666.
- R v Banks [1916] 2 KB 621.
- R v Carr [1972] 1 NSWLR 608.
- R v Curry (Unreported, Supreme Court of New South Wales, Wood J, 13 February 1987).
- R v Hardeo (Unreported, Supreme Court of New South Wales, 26 March 1987).

R v Harrison [1938] 3 All ER 134.

R v Holmes [1981] 2 All ER 612.

R v Howell [1981] 3 All ER 383.

R v Inwood [1973] 2 All ER 645.

R v Iorlano (1983) 151 CLR 678.

R v Ireland (1970) 126 CLR 321.

R v Jeffries (1946) 47 SR (NSW) 284.

R v Kushkarian (Unreported, Court of Criminal Appeal of New South Wales, 4 July 1984).

R v Miller (1980) 25 SASR 170.

R v Pearcey (1984) 81 FLR 389.

R v Salameh [1985] 4 NSWLR 368.

R v Smith (1876) 14 SCR (NSW) 419.

R v Weir (1823) 1 B & C 288; 107 ER 108.

Spilsbury v Micklethwaite (1808) 1 Taunton 146.

Trobridge v Hardy (1955) 94 CLR 147.

Walters v W H Smith & Son Ltd [1914] 1 KB 595.

Webster v Watts (1897) 11 QB 311.

Wheatley v Lodge [1971] 1 All ER 173.

Williams v The Queen (1986) 60 ALJR 636.

Zecevic v DPP (Victoria) (Unreported, High Court of Australia, 1 July 1987).

Appendix C

TABLE OF STATUTES

Australia

New South Wales

Bail Act 1978

ss17-21

Crimes Act 1900

s352
s352AA
s352A
s353
s353A
s353B
s353C
s357A
s357B
s357C
s357D
s357E

Justices Act 1902

ss21-31
ss52-66
ss100I-P
ss153-153B

Motor Traffic Act 1909

s4E
s5
s5C

Australian Capital Territory

Court of Petty Sessions Ordinance 1930

s50

Crimes Act 1914

s8A

Northern Territory

Bail Act 1972

s16

Western Australia

Justices Act 1902

s64

Queensland

Justices Act 1886

s69

Victoria

Crimes Act 1958

s460

Tasmania

Justices Act 1959

s34A

South Australia

Police Offences Act 1953

s78

Summary Offences Act 1953

ss79-80

England

Police and Criminal Evidence Act 1984

Scotland

Criminal Justice (Scotland) Act 1980