

TASMANIA
LAW REFORM
INSTITUTE

**Consolidation of Arrest Laws in
Tasmania**

ISSUES PAPER NO 10

JULY 2006

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How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this issues paper. Questions are contained within the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by 29 September 2006.

If possible, responses should be sent by email to: **law.reform@utas.edu.au**

Alternately, responses may be sent to the Institute by mail or fax:

address: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS 7001
fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Rebecca Bradfield, on the above contacts, or by telephoning (03) 62262069.

This issues paper is also available on the Institute's web page at: www.law.utas.edu.au/reform or can be sent to you by mail or email.

Terms of Reference

The Institute received the terms of reference for this law reform project on 23 March 2005. They request the Institute “to undertake the necessary research, conduct a review of the laws and provide a Report including any recommendations on powers of arrest.” The terms of reference specify that the project undertake the following matters:

1. Identifying the powers of arrest currently available to Tasmanian law enforcement authorities;
2. Comparing the powers of arrest in the various pieces of Tasmanian legislation including terminology, prerequisites and other criteria relevant to the exercise of the powers;
3. Considering whether the powers are best covered in the individual Acts covering the crimes or offences in respect of which powers of arrest might be exercised or whether all or some of those powers should be consolidated into one (or more) Acts dealing centrally with powers of arrest capable of being exercised under a variety of other pieces of legislation;
4. Considering whether, if the powers of arrest are kept in the various Acts, there should be greater consistency or uniformity between the provisions;
5. Considering whether there should be a modernisation or simplification of arrest powers and whether greater uniformity or consistency with Commonwealth or interstate laws is desirable;
6. Making recommendations for any necessary legislative change.

Acknowledgments

This issues paper was prepared by Victor Stojcevski, Terese Henning and Jenny Rudolf.

The Institute would like to acknowledge and thank Justice Blow for his assistance with the preparation of this issues paper.

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

List of proposals

- Proposal 1:** That arrest powers contained in Tasmanian statutes be consolidated into one statute.
- Proposal 2:** That the consolidation of arrest laws should take the form of a new act known as the Arrest Act.
- Proposal 3:** That the arrest powers in the *Family Violence Act 2004* (Tas), the *Parliamentary Privilege Act 1858* (Tas) and *Supreme Court Rules 2000* (Tas) be located in the proposed Arrest Act as exceptions to the general consolidating provisions in that Act.
- Proposal 4:** That the arrest powers contained in the *Debtors Act 1870* (Tas) be reviewed with a view to their possible repeal.
- Proposal 5:** That the law of arrest relating to powers of arrest be reformed to eliminate the distinction between arrestable and non-arrestable offences; that the broadened power to arrest be circumscribed by statutorily specified limiting circumstances; that this reform be accompanied by reform of the law relating to alternatives to arrest.
- Proposal 6:** That a consolidated power of arrest without warrant provide that –
- A police officer has a power to arrest without warrant a person whom he or she believes on reasonable grounds to have committed or be committing an offence. (This power should be subject to statutorily specified limiting circumstances as suggested in Proposal 5).
- Proposal 7:** That laws concerning how an arrest should be executed be located in legislation consolidating powers of arrest.
- Proposal 8:** That the consolidation of arrest laws provide that –
- It is the duty of a person arresting another, whether with or without warrant, to inform the other person, at the time of the arrest, of the process or warrant under which he or she is acting, or of the offence for which the other person is being arrested.
- (a) It is sufficient if the other person is informed of the substance of the offence, and it is not necessary that this be done in language of a precise or technical nature.
 - (b) This subsection does not apply to the arrest of the other person if:
 - (i) the condition or duties of the person making the arrest make it impracticable to perform this duty; or
 - (ii) the other person's actions or condition make it impracticable for the person making the arrest to perform this duty.

A failure to fulfil either of the aforesaid duties –

- (a) shall make the arrest or the execution of the process or warrant unlawful;

- (b) but shall not of itself deprive the person executing the process of warrant or making the arrest, or his assistants, of protection from criminal responsibility, but shall be relevant to the question whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.

Proposal 9: That the present Tasmanian Criminal Code provisions concerning the use of force in relation to arrests (ss 26, 30, 31 and 32) be relocated to consolidating arrest legislation; that they be unified and that they be reformed to enact the principle of proportionality along the lines of s 3ZC of the *Crimes Act 1914* (Cth).

Proposal 10: The police should have power to enter premises (which expression should include any land, building, structure, motor vehicle, vessel and aircraft) –

- (a) To arrest a person named in a warrant and reasonably believed to be on those premises; and
- (b) In the absence of a warrant, to arrest a person reasonably believed to have committed an offence and to be there.

Proposal 11: That forcible entry be permitted only where proper announcement has been made, that is, where the police have called upon the person/occupier to permit the entry, have stated the grounds of the authority to enter and have given the occupier reasonable opportunity to allow the entry.

Proposal 12: That the proposed *Arrest Act* contain provision that the issuing of an arrest warrant requires that –

- (a) information be provided on oath or affidavit stating the reasons for seeking the arrest warrant;
- (b) the justice satisfy him or herself that the stated reasons establish reasonable grounds for issuing the warrant, or that there are other such grounds; and
- (c) the judicial officer endorse the affidavit stating the reasons on which s/he relies to issue the warrant.
- (d) criteria for the issue of the warrant be specified in the legislation and that those criteria be consistent with those provided for the making of an arrest without a warrant.

Proposal 13: That the power of arrest pursuant to an arrest warrant currently set down in s 21(2) and (3) of the *Criminal Code* be relocated to the legislation consolidating powers of arrest.

Proposal 14: That the arrest powers without warrant of authorised persons be included in the Act consolidating arrest powers. It is suggested that those powers be made exercisable on the same grounds as those specified for police (along with the same restrictions) but that they be limited to the specified offences for which the authorised persons currently have the power to arrest. These offences and the relevant authorised persons should be set out in a schedule to the consolidating Act.

Proposal 15: That private citizens' current powers of arrest be incorporated into legislation consolidating arrest powers. That the duty of private citizens to make an arrest be

limited to the situation where a police officer calls upon them to provide assistance in the making of an arrest.

Proposal 16: That the consolidated power of arrest without warrant be restricted to situations where the police officer has reasonable grounds to believe that proceeding by way of summons would not be appropriate in the circumstances.

Proposal 17: That a process for the police to issue on-the-spot attendance notices be enacted similar to that contained in Part 5 of the *Police Powers and Responsibilities Act 2000* (Qld).

List of questions

1. Are the exceptions nominated by the Institute to the general, consolidating approach justified?
2. Are there other subject-specific arrest powers that should also remain intact and not be transposed into general consolidating provisions?
3. Should the approach to consolidation aim to include all arrest powers in a general statute, or should exceptions to a general statute exist independently and separately from the statute? Which approach is preferable? Why?
4. Should the current approach to arrest without warrant which distinguishes between arrestable and non-arrestable offences be retained?
5. If the current position is to be retained, should certain offences currently classified as non-arrestable be classified as arrestable and should certain offences now classified as arrestable be classified as non-arrestable?
6. Should all offences in Tasmania be classified as prima facie arrestable? If all offences in Tasmania were to become prima facie arrestable, should criteria limiting the exercise of the arrest power be specified in the legislation? If so, what should be included in these criteria?
7. If criteria for arrest are specified in the legislation should a proscriptive approach to the application of those criteria like that enacted in s 99 of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* be adopted?
8. Should the police or other persons executing an arrest have a higher duty of care when arresting persons belonging to identified vulnerable groups?
9. What sort of protective rules or measures, regulating the arrest of persons belonging to identified vulnerable groups, ought to be considered for inclusion in a Consolidated Act?
10. Should the principle of proportionality be enacted in the law regulating the use of force during arrest?
11. Should any additional limitations be placed on the force used by police or private citizens to effect an arrest?
12. Should provision for the use of force in arrest be relocated to legislation consolidating powers of arrest?

13. Should the separate provisions relating to force in arrest in the Tasmanian *Criminal Code* be unified in the manner achieved in s 3ZC of the *Crimes Act 1914* (Cth)?
14. Should the law of arrest be reformed to grant police power to enter private premises without the consent of the occupier to effect and arrest?
15. Should this power extend to all arrestable offences or should it be limited to particular offences? If so, which offences?
16. Should this power be subject to safeguards such as those contained in the *Police Powers and Responsibilities Act 2000* (Qld)?
17. Should the procedure suggested here for the issue of warrants be set out in legislation?
18. Should telephone warrants or warrants by other electronic means be introduced and made available in certain sorts of cases?
19. To what extent are arrest powers used by authorised officers (other than police)?
20. To what extent are the arrest powers of such authorised officers viewed as necessary to government agencies?
21. Should the proposals for including arrest powers of authorised persons in consolidating legislation and standardising those powers be adopted?
22. Should the present position with respect to the power of private citizens to arrest be altered as proposed?
23. Should citizens' powers of arrest be rationalised and standardised in order to reduce uncertainty and inconsistency and to achieve greater accessibility? If so what form should this take?
24. Do you think the current summons procedure in Tasmania warrants reform? Should a process like the attendance notice system be implemented as an alternative method of securing the attendance of a defendant in court?

Part 1

Introduction

1.1 Scope of this Issues Paper

1.1.1 This Issues Paper considers a number of matters relating to the law of arrest in Tasmania, specifically:

1. whether powers of arrest in Tasmania should be consolidated into one statute, Parts 2 and 3;
2. whether the power to arrest should extend to all offences or whether it should be limited to particular offences, Part 4;
3. whether the law relating to when an arrest can be made, that is the grounds of arrest, should be rationalised to provide a single, uniform ground of arrest for all arrestable offences, Part 5;
4. particular issues relating to the execution of a lawful arrest, namely:
 - a. the obligation to inform the arrestee of the reasons for the arrest, Part 6.2;
 - b. how much force may be used in effecting an arrest, Part 6.3;
 - c. where an arrest may take place, that is, whether the police should have the power to enter private premises without the consent of the owner or occupier to effect an arrest, Part 6.4;
5. the process for the issue of arrest warrants and the power of arrest pursuant to an arrest warrant, Part 7;
6. whether powers of arrest should be conferred on persons other than the police, Part 8; and
7. alternatives to arrest and whether the summons process should be simplified or supplemented by enabling the police to issue on the spot attendance notices, Part 9.

This paper does not consider other police powers and responsibilities in relation to arrestees such as the power to detain arrestees for interrogation and the attendant responsibilities in relation to such detainees now set down in the *Criminal Law (Detention and Interrogation) Act 1995* (Tas). Nor does it deal with the question of what constitutes or should be considered to constitute an arrest for the purpose of those powers and responsibilities. That issue was dealt with in the Tasmanian Law Reform Institute's first report, *Custody, Arrest and Police Bail*. Finally, this paper does not deal with powers of personal search or search of premises pursuant to an arrest.

Part 2

Arrest Powers: The Current Law and Need for Reform

2.1 Introduction

2.1.1 Powers to arrest fall into two categories, arrest with and arrest without a warrant. This Issues Paper focuses primarily on the law in Tasmania relating to arrest without a warrant. Part 7 deals with the law of arrest pursuant to a warrant. In conceptual terms, an arrest involves the involuntary deprivation of a person's liberty to go where he or she pleases: "A person who is lawfully arrested is required to submit to the authority of the arrestor and is not entitled to resist the reasonable coercion of the arrestor."¹ The common law recognises, at least in rhetorical terms, that personal liberty is the most fundamental of all individual rights.² Consequently, the common law places a general proscription on detention by the police in the absence of a lawful arrest.³ Determining, in any given circumstances, whether an arrest has occurred can be quite difficult. The difficulty arises principally in relation to the question whether a person is under arrest or voluntarily 'assisting the police in their enquiries'. A number of jurisdictions in Australia have attempted to resolve this problem by enacting definitions of arrest that remove uncertainties in the detention status and rights of suspects. This issue was dealt with in the Tasmanian Law Reform Institute's first report, *Custody, Arrest and Police Bail* and will not be revisited here.

2.1.2 The law relating to arrest can have central significance in the pre-trial criminal investigative process. Hunter, Cameron and Henning note that, when effected by the police an arrest can activate a number of coercive investigative powers including powers of detention for interrogation and powers of search and seizure.⁴ An arrest also imposes certain obligations upon the police, including the duty to inform arrestees of their right to silence and duties relating to bail. The circumstances of an arrest and the conduct of the arrestor in making the arrest and discharging the obligations it activates, can have implications for the admissibility at trial of evidence obtained during the subsistence of the arrest and for suspects' rights including the right to resist the arrest.⁵ For the individual arrestee, arrest constitutes not only a withdrawal of liberty but also a process that is inherently shaming, punitive and frightening.⁶

¹ J Hunter, C Cameron & T Henning (2005) *Litigation II: Evidence and Criminal Process*, 7th ed, LexisNexis Butterworths p 427.

² *Michaels v R* (1995) 184 CLR 117 at 129 per Gaudron J.

³ This position has been considerably modified by legislation. For example, a number of statutory provisions empower the police to stop and search members of the public in specified circumstances and to detain people for the purpose of subjecting them to drug and alcohol detection and other forensic tests.

⁴ J Hunter, C Cameron & T Henning (2005) *Litigation II: Evidence and Criminal Process*, 7th ed, LexisNexis Butterworths, p 421.

⁵ *Ibid.*

⁶ *Ibid.*, referring to *Lake v Dobson* (1981) 5 PS Rev 2221; *Donaldson v Broomby* (1981) 60 FLR 124 at 126 and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

2.1.3 Given the significance of arrest in the criminal justice process and for the individual arrestee, the law of arrest should be clear and readily ascertainable. Currently, in Tasmania however, the opposite is the case – the law is complex, uncertain and difficult to discover. Primarily this is because it is located in a multiplicity of statutes as well as in the common law. Over thirty different Tasmanian statutory instruments contain over seventy powers of arrest; these powers were created at different times, are framed in a varying terms and cover different situations. The grounds of arrest they prescribe, (when an arrest may be made), are often differently formulated and even within key statutory arrest provisions (such as those contained in the Tasmanian *Criminal Code 1924* and the *Police Offences Act 1935* (Tas)) there are anomalies, inconsistencies and uncertainties.

2.2 Statutory powers of arrest without warrant

2.2.1 The police have powers of arrest in relation to all indictable offences although those powers may be formulated in differing terms for different crimes. In Tasmania, the primary source of powers to arrest without warrant in relation to indictable offences is s 27 of the *Criminal Code 1924* (Tas). Powers of arrest in relation to summary offences are more limited and for many summary offences there is no power of arrest. Where there is a power of arrest for summary offences, that power is provided in the legislation creating the offences. For example, s 55 of the *Police Offences Act 1935* (Tas) creates powers of arrest for a range of summary offences in that Act. This section is supplemented by other provisions in that Act, which attach powers of arrest to particular offences in the Act, (see, for example, ss 34B(3) and 55A(2)).

As noted above, in Tasmania, in addition to the arrest powers in the Code and *Police Offences Act*, there are more than 70 legislative powers of arrest without warrant in over 30 different statutes. These powers relate chiefly to criminal offences, but also include provision for arrest in civil law situations and in circumstances involving environmental protection and gaming and racing. Generally, though by no means universally, exercise of the powers of arrest in these provisions depends upon the arrestee being found committing an offence or on there being reasonable grounds for believing that he or she has committed an offence.

2.2.2. Table 1 below lists the different Tasmanian statutory arrest powers without a warrant with the exception of the powers of arrest in s 27 of the *Criminal Code* and s 55 of the *Police Offences Act*.⁷ These key provisions are discussed separately at paras 2.2.5-2.2.16 below. The left-hand column of Table 1 sets out the Acts and section(s) in those Acts creating powers of arrest, the middle column outlines the conduct for which a person may be arrested under those provisions and the right-hand column summarises the grounds of arrest, that is, the arrestor's requisite state of mind in making an arrest.

Police officers have the power to arrest under all the legislative provisions in Table 1. Statutes identified with an asterisk (*) also confer powers of arrest on other 'authorised' persons, as defined by the legislation.

⁷ Powers of arrest without warrant under Commonwealth statutes are not included in the Table. The Institute recognises that many Commonwealth arrest provisions are applicable in Tasmania (see, for example, those in Part 1AA, Division 4 of the *Crimes Act 1914* (Cth)), but that an analogous exploration of Commonwealth statutes is beyond the legislative power of the Tasmanian Parliament.

Table 1: Powers of Arrest Without Warrant:

Act Name and section	Power to arrest for	Test
<i>Aboriginal Relics Act 1975</i> s 18(7)*	Offending against a provision of this Act and failing or refusing, on demand, to give correct name and address; or does not deliver up, on demand, any object in their possession or under their control that is entitled to be seized under this Act.	Found offending and fails or refuses to provide personal details or there are reasonable grounds for believing the details are false. Note s 18(8) provides that the authorised officer can only arrest where they have reasonable grounds for believing that the purpose of this Act will not be adequately served by proceeding against the offender by summons.
<i>Animal Welfare Act 1993</i> s 15(1)	Committing or has committed an offence under this Act.	Reasonably believes.
<i>Animal Welfare Act 1993</i> s 15(3)	Refuses or fails to provide a correct name, address and date of birth when requested pursuant to s 15(2).	Actually failing to provide these details or police officer reasonably believes the details are false.
<i>Bail Act 1994</i> s 5A	A person who was admitted to bail has contravened, or is about to contravene, a notice referred to in s 5(1)(a) or a condition of the notice.	Reasonable grounds to believe they have contravened or are about to.
<i>Bail Act 1994</i> s 10(1)	Contravening (i) a requirement of s 7(2); or (ii) the condition specified in s 7(3); or (iii) any condition of an order for bail that has effect after the release of that person from custody; or is about to contravene any such requirement or condition.	Reasonable grounds to believe they have contravened or are about to.
<i>Bail Act 1994</i> s 26(1) and (5)*	A person admitted to bail has or is about to contravene a condition of bail.	Believes on reasonable grounds that they have contravened or are about to contravene.
<i>Children, Young Persons and Their Families Act 1997</i> s 100(2)	Hindering or obstructing the Secretary of the Department, a police officer or another person in the performance or exercise of a function or power under this Act.	Has reasonable grounds for believing the person is hindering etc.
<i>Corrections Act 1997</i> s 24(3)	Contravening s 24(1) which relates to bringing an article or thing into a prison without the authorisation of the Director.	Reasonably believes.
<i>Crime (Confiscation of Profits) Act 1993</i> s 43(b)	Having committed an offence in respect of property seized pursuant to s 42 and being found on premises subject to a search warrant issued under s 40.	Reasonably suspects of having committed an offence and actually being found on property.
<i>Criminal Code 1924</i> s 302	If an accusation of committing a crime for which they can be arrested without warrant has been made.	Where an accusation has actually been made, then there is a duty to arrest unless there are reasonable grounds for believing the accusation to be false.
<i>Criminal Justice (Mental Impairment) Act 1999</i> s 41(1)*	Escaping from detention or being absent from detention without proper authority after being committed to detention by a restriction order made under this Act or under the <i>Sentencing Act 1997</i> .	Actually escaped or absent without authority.
<i>Debtors Act 1870</i> ⁸ s 3	Making default in payment of a sum of money in the terms outlined in (a) –(g).	Defaulted on judgment or order of any court for payment of money.

⁸ It is unclear whether the power to arrest under the Act extends to persons beyond police officers.

Part 2: Arrest Powers

Act Name and section	Power to arrest for	Test
<i>Debtors Act 1870</i> s 5(2)	Defendant about to quit Tasmania, where the plaintiff in any action in the Supreme Court proves at any time before final judgment that the plaintiff has good cause of action against the defendant and there is probable cause for believing that the defendant is about to quit Tasmania.	A judge may order a defendant be arrested where a plaintiff has good cause of action against the defendant and there is probable cause for believing that the defendant is about to quit Tasmania unless apprehended, and the absence of the defendant from Tasmania will materially prejudice the plaintiff in the prosecution of their action.
<i>Electoral Act 2004</i> s 119(3)	Committing or having committed or attempting to commit an offence under this Act at or in the immediate vicinity of a polling place or a place where ballot material is being sorted, checked or counted.	Believes on reasonable grounds they are committing an offence.
<i>Family Violence Act 2004</i> s 10(2)	Being on certain premises entered by a police officer under subsection (1), that is, premises entered to prevent family violence.	Police officer has entered the premises at the request of a person who apparently resides on the premises; or if the officer reasonably suspects that family violence is being, has been or is likely to be committed on those premises, and arrest facilitates the issue of a Police Family Violence order, or the making of an application for a Family Violence Order, in respect of that person.
<i>Family Violence Act 2004</i> s 10(4)	Being on certain premises entered by a police officer to find and retrieve an object used in committing family violence.	Reasonably suspects that a person has committed family violence and it facilitates the issue of a Police Family Violence order, or the making of an application for a Family Violence Order, in respect of that person.
<i>Family Violence Act 2004</i> s 10(7)	Committed family violence (as defined by s 7 of the Act) and is on premises where the officer reasonably suspects the offender may be found.	Reasonably suspects.
<i>Family Violence Act 2004</i> s 11(1)	Committing family violence (as defined by s 7 of the Act).	Reasonably suspects while 'giving priority to the safety, wellbeing and interests of any affected person or affected child.'(s 11(5))
<i>Firearms Act 1996</i> s 135(1)(d)	Having committed, committing or about to commit, an offence under this Act and being found to be in possession of a firearm or ammunition.	Reasonable grounds to believe.
<i>Firearms Act 1996</i> s 138(3)	Having committed, committing or about to commit, an offence under this act and there has been a refusal or failure to provide a correct name, address and date of birth when requested under s 138 (1).	Reasonable grounds to believe that an offence is being committed, has been committed or is about to be committed and there has been a failure to provide personal details or the police officer reasonably believes the details are false.

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Act Name and section	Power to arrest for	Test
<i>Firearms Act 1996</i> s 140	Has committed or is committing an offence under ss 111(1) (possessing a loaded firearm in public), 112 (discharging firearm in public), 113 (recklessly discharging firearm), 114(1) (carrying firearm with criminal intent), 120(1) (handling under influence of alcohol or drugs) or 128(a) (obstructing police).	Reasonably believes.
<i>Fire Service Act 1979</i> s 125(1)	Committing a prescribed offence, which are outlined in ss 125(2) as s 68(2), ss 69, 71, 120, 128(2)(g) and s 128(2)(h).	Finds committing or has reasonable grounds to believe such an offence has been committed.
<i>Forensic Procedures Act 2000</i> s 28(3)(a)	Contravening or failing to comply with an order under s 28(1)(b). This section relates to ordering a prescribed offender to a police station or other place to carry out a non-intimate forensic procedure.	The offender can be arrested for the purposes of carrying out a non-intimate forensic procedure if they actually refuse or fail to comply with the order.
<i>Gaming Control Act 1993</i> s 119(4)	Contravening s 119(2), which relates to stating and proving correct name, address and age.	Actually contravenes s 119(2).
<i>Inland Fisheries Act 1995</i> s 103*	Failing to provide the correct information required under s 102 (name, address, and/or details of a license or registration); or committing an offence against this Act and the offence is likely to continue or any other procedure would be ineffective.	Where the person actually refuses to provide the information; or where the officer reasonably believes that the information is false; where the officer reasonably believes an offence has been committed.
<i>Justices Act 1959</i> s 106I(2)	Committing an offence contrary to s 106I(1), which relates to contravening or failing to comply with restraint orders.	Reasonable cause to suspect.
<i>Land Acquisition Act 1993</i> s 69(4)	Contravening s 69(1), which relates to obstructing, hindering, delaying, threatening or assaulting a person authorised to enter land pursuant to ss 54, 54A, 55 or 56.	Reasonably believes they have contravened s 69(1).
<i>Liquor Licensing Act 1990</i> s 80(3)	Committing, or having committed, an offence under s 80(1) or (2), which compels a person to leave licensed premises when required to do so by the licensee or a police officer.	Reasonably believes they are committing or have committed an offence under s 80(1) or (2).
<i>Liquor Licensing Act 1990</i> s 80A(2)	Committing, or having committed, an offence under s 80A(1), which compels a person to leave a permit area when required.	Reasonably believes they are committing or have committed an offence under s 80A(1).
<i>Liquor Licensing Act 1990</i> s 92(2)	Refusing to provide correct name, address or date of birth following a request for such details under s 92(1)	Reasonable grounds for believing an offence has been or is being committed under this act and suspect refuse to provide personal details, or the police officer reasonably believes the information to be false.
<i>Liquor Licensing Act 1990</i> s 94(2)	Failing to leave a licensed or permit area when required to do so under s 94(1).	Actually refusing to comply with the requirement.
<i>Living Marine Resources Management Act 1995</i> s 199*	Failing to provide the correct details required by s 196; or having committed an offence under this Act where the offence is likely to re occur or there are no alternative procedures; or contravening a control order.	Actually failing to provide the details or the officer reasonably believes the details to be false; or the officer reasonably believes that an offence or contravention of a control order has been committed.
<i>Local Government Act 1993</i> s 152(2)	Offending on land owned by, or under the control of, the council.	Reasonably believes is offending against a by-law.

Part 2: Arrest Powers

Act Name and section	Power to arrest for	Test
<i>Local Government (Highways) Act 1982</i> s 122(4)	Committed an offence against s 122(3), which relates to failing or refusing to provide a correct name and address when requested.	Has reason to believe the offence under s 122(3) has been committed. For the police officer to have the power to demand a name and address they must find the person committing an offence under this Act – s 122(2).
<i>Misuse of Drugs Act 2001</i> s 29(4)	Having committed an offence under this Act.	Reasonably believes they have committed an offence. This power of arrest can only be exercised where the police officer has searched or is empowered to search the person pursuant to s 29(2). Section 29(2) requires the police officer to have a ‘prescribed belief’ which is defined in s 29(1) as a reasonable belief that a controlled substance or other thing is in possession of the person.
<i>Misuse of Drugs Act 2001</i> s 31(3)	Failing to comply with a requirement made under s 31(1) which relates to providing a correct name and address and/or information about where they obtained a controlled substance or thing.	Actually failing to provide the details (or the police officer reasonably believes the information to be false or misleading). The police officer must have searched or be empowered to search the person under a search warrant or s 29 of this Act.
<i>Misuse of Drugs Act 2001</i> s 33(a)	Has committed an offence under this Act.	The police officer must be executing a search warrant and they can arrest any person found at that place who they reasonably believe has committed an offence.
<i>National Parks and Reserves Management Act 2002</i> s 66*	Found offending and failing or refusing to provide a correct name and address or fails to deliver anything in their possession which is entitled to be seized.	Found offending and fails to provide personal details or there are reasonable grounds for believing the details are false.
<i>National Parks and Reserves Management Act 2002</i> s 71(2)(a)*	Committing an offence under s 69(3)(c), which relates to orders prohibiting the possession or control of hunting equipment.	Reasonable grounds for believing the person committed an offence against s 69(3)(c).
<i>Nature Conservation Act 2002</i> s 53*	Found offending and refusing or failing, on demand, to provide a correct name and address; or failing to deliver up items entitled to be seized.	Found offending and refuses or fails to provide personal details or there are reasonable grounds for believing the information is false.
<i>Nature Conservation Act 2002</i> s 58(2)*	Committing an offence under s 58(1), which relates to contravention or failing to comply with a s 56(3)(c) order, which prohibits the possession or control of hunting equipment.	Reasonable grounds for believing.
<i>Parliamentary Privilege Act 1858</i> s 6*	Creating, or joining in, any disturbance in the House, or in its immediate vicinity, during its actual sitting, on the verbal order of the President or Speaker. An offender may be kept in custody until a warrant can be made out for the imprisonment of such person.	Person has been adjudged by the House guilty of any of the contempts enumerated in the Act (see s 10).

Consolidation of Arrest Laws in Tasmania

Act Name and section	Power to arrest for	Test
<i>Parliament House Act 1962</i> s 8*	Committed an offence under this Act and refusing to state correct name and address. Offences are contained in s 6.	Believes or suspects to have committed an offence and refuses to provide personal details or, in the opinion of the Controlling Officer (or person acting under their orders), provides false details.
<i>Poisons Act 1971</i> s 90A(1)(a)	Committing or committed an offence under this Act and being on premises subject to a search warrant issued under the <i>Search Warrants Act 1997</i> .	Believes on reasonable grounds that they are committing or have committed an offence.
<i>Poisons Act 1971</i> s 90B(2)	Committing or committed an offence under this Act in relation to a raw narcotic, a narcotic substance, a prohibited substance, a s 36 substance, or a prohibited plant.	Where a person has been searched or they are subject to a search power pursuant to s 90B(1) and it is believed on reasonable grounds that they are or have committed an offence.
<i>Poisons Act 1971</i> s 90D(3)	Failing to provide a correct name and address and/or the place and name of the person they obtained a seized substance, plant or article from, where such a person has had property seized pursuant to s 90B or where they are subject to a search warrant under the <i>Search Warrants Act 1997</i> .	Actually failing to provide these details.
<i>Police Offences Act 1935</i> s 19A(1A)	Failing to leave the reserved area of a sports ground when requested to do so by a police officer – see s 19A(2) for the definitions of ‘sports ground’ and ‘reserved area’.	Actually failing to leave the sports ground. This power is subject to s 19A(1B) which requires the police officer to reasonably believe that a sport will be interrupted or delayed by the person.
<i>Police Offences Act 1935</i> s 34B(3)	Committing an offence against s 34B(1) or (2)(a), which relate to assaulting, resisting or wilfully obstructing a police officer in the course of their duty.	Actually assaulting, resisting or wilfully obstructing a police officer.
<i>Police Offences Act 1935</i> s 38A(4)*	Committing or attempting to commit an offence under this section, which prohibits making off without payment when payment is required on the spot.	With reasonable cause, they suspect there is an offence.
<i>Police Offences Act 1935</i> s 55A(2)	Failing or refusing to provide a correct name and address when required under s 55A(1).	Actually failing to provide the details (or the police officer has reason to believe they are false) when the police officer has become aware or has reasonable grounds for believing the person has or is committing an offence against this Act.
<i>Police Offences Act 1935</i> s 58(2)	Failing to provide a correct name and address once requested by a police officer once the person is found to be in possession of a poisonous thing – as under s 58(1).	Actually failing to provide the details after the police officer has had reasonable grounds for believing the person possesses a poisonous thing.
<i>Police Powers (Public Safety) Act 2005</i> s 17(4)	Fails or refuses to comply with a request from a police officer to disclose their identity under s 17(1) or gives a name or address that is false.	After being requested to do so, the suspect actually refuses or fails to disclose their identity, or the police officer has reason to believe that the name and address disclosed are false.

Part 2: Arrest Powers

Act Name and section	Power to arrest for	Test
<i>Police Powers (Public Safety) Act 2005</i> s 21(9)	Being an unauthorised person who enters a cordoned-off area or disturbs any thing in a cordoned-off area.	Not being authorised by a police officer in attendance at the area, and without reasonable excuse (the onus of proving which is on the person) entering a cordoned-off area or disturbing anything in that area.
<i>Police Powers (Public Safety) Act 2005</i> s 29(2)	Failing or refusing to comply with an order given under the Act.	Actually fails or refuses to obey the order.
<i>Police Service Act 2003</i> s 80(3)	Failure or refusal to comply with the requirement to state name and address, or giving a name or address that the police officer reasonably believes is false.	Actually failing to provide the details (or the police officer has reason to believe they are false) when the police officer has become aware or has reasonable grounds for believing the person has or is committing an offence under ss 77(1) (bribery), 78 (impersonation), or 79 (failing to assist police officer) of the Act.
<i>Racing (Totalizator Betting) Act 1952</i> s 57ZQ(7)	Contravening s 57ZQ(4) or (5), which relates respectively to, not leaving the premises of a totalizator when requested to do so or re-entering the premises of a totalizator during the day on which s/he has been ejected from the premises of a totalizator.	Actually contravening s 57ZQ(4) or (5).
<i>Racing Regulation Act 2004</i> s 54(30)	Contravening the provisions of s 54 (8) or (9) which relate to non-compliance with a warning-off notice issued, or entering or attempting to re-enter the racecourse on the same day after leaving or being removed from the racecourse pursuant to the warning-off notice issued.	Actually contravening s 54(8) or (9).
<i>Racing Regulation Act 2004</i> s 97(3)	Failing or refusing to provide a correct name and address when required under s 97(1) or it is reasonably believed that the name or address stated under s 97(1) is false.	Reasonably believes that a person has committed, is committing or is about to commit an offence against this Act and the person actually fails or refuses to provide these personal details, or it is reasonably believed that the name or address stated by the person is false.
<i>Racing Regulation Act 2004</i> s 98(1)	Engaging in unauthorised betting in a public place, or being in a public place for the purpose of engaging in unauthorised betting.	Reasonable believes that a person is or has recently been engaged in unauthorised betting.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 5(1)(a)	Committed an offence against s 4, which relates to failing to comply with various directions given by a police officer under the Act.	Reasonable grounds to suspect.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 5(1A)	Committed an offence against s 6, which relates to driving with excessive blood alcohol levels.	As a result of a breath analysis, has a reasonable ground for believing.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 5(1AA)	Refuses or fails (without reasonable excuse) to comply with a direction or requirement made by a police officer under s 10(4) or s 10A(1).	Actually refusing or failing to comply with a direction or order.

Consolidation of Arrest Laws in Tasmania

Act Name and section	Power to arrest for	Test
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 15(3)	Refusing or failing to state correct name and address following a request under s 15(1).	Actually refusing or failing to provide the details, or the police officer reasonably believes the information is false. Before an officer can request this information, they must have reasonable grounds for believing the person has committed an offence under this Act or the person has been given a direction under the Act.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 19A(2)(a)	Committed an offence against s 19A(1), which relates to driving a vehicle while disqualified.	Reasonable grounds to suspect.
<i>Second-hand Dealers and Pawnbrokers Act 1994</i> s 15(1)(b)*	Offering for sale, as a pawn or in some other kind of commercial transaction, stolen goods to a second-hand dealer or pawnbroker.	Reasonable cause to suspect that the goods are stolen goods.
<i>Second-hand Dealers and Pawnbrokers Act 1994</i> s 17(5)	Having committed, or committing, an offence against this Act in the place of business of a second-hand dealer or pawnbroker, and, in response to a request made by the police officer, the person (a) refuses to give his or her full name and address; or (b) gives a name or an address that the officer has reasonable grounds for believing is false or misleading.	Reasonable grounds for believing that the person has committed, or is committing, an offence and, in response to a request made by the police officer, the person (a) refuses to give his or her full name and address; or (b) gives a name or an address that the officer has reasonable grounds for believing is false or misleading.
<i>Security and Investigations Agents Act 2002</i> s 27B(3)	Failing to comply with the request of a police officer to provide a name, residential address, date of birth and age.	Police officer or authorised person (under the Act) reasonably suspect that a person is the holder of an agent licence or an employee licence issued by the Commissioner for Corporate Affairs, and after being requested to do so, the suspected holder of the licence actually fails to provide these personal details.
<i>Security and Investigations Agents Act 2002</i> s 27C(4)	Failing or refusing to comply with a requirement made by a police officer or authorised person that the licence holder cease undertaking certain activity and leave the premises or place in which, or in respect of which, that activity is being undertaken.	Police officer or an authorised person (under the Act) reasonably suspect that the holder of a licence is undertaking an activity in contravention of s 27C(1), that is, activity under the influence of alcohol, a drug or both to such an extent that he or she is incapable of properly undertaking that activity.
<i>Sentencing Act 1997</i> s 71(5)	Breaching an area restriction order.	Believes on reasonable grounds
<i>Sex Industry Offences Act 2005</i> s 13(1)	Committing, or having committed or being likely to commit an offence against ss 4, 7, 8, 9 or 14 of the Act.	Reasonably believes that a person has committed, is committing or is likely to commit an offence against this Act.

Act Name and section	Power to arrest for	Test
<i>Sex Industry Offences Act 2005</i> s 13(3)	Refuses to give full name, address or date of birth after being requested to do so under s 13(2) or it is reasonably believed that the name, address or date of birth given is false or incomplete.	Refuses to give full name, address or date of birth after being requested to do so under s 13(2) or it is reasonably believed that the name, address or date of birth given is false or incomplete.
<i>Supreme Court Rules 2000</i> ⁹ r 941(1)(a)*	Contempt of court committed in the face of the Court. The Court may by oral order direct that the respondent be arrested.	It is alleged or appears to the Court that a person is actually guilty of contempt of court.
<i>Traffic Act 1925</i> s 41(3)	Refuses to provide a correct name or address following a request for these details made by a police officer under s 41(1)(a).	Actually failing to provide the details or the officer has reasonable grounds for believing the details are false or misleading.
<i>Vehicle and Traffic Act 1999</i> s 13(3)	Committed an offence against s 13(1), which relates to driving while disqualified.	Reasonable grounds to suspect.
<i>Wellington Park Act 1993</i> s 67(2)*	Being 'found offending' and failing or refusing to state a correct name and address or does not deliver over items that are entitled to be seized.	Found offending and failure to provide details, or there are reasonable grounds for believing the information is false. Pursuant to s 67(1), 'found offending' has the same meaning as in s 55(5) of the <i>Police Offences Act 1935</i> .
<i>Wellington Park Act 1993</i> s 69(2)(a)*	Contravening or failing to comply with an order made under s 68(2)(c). This section relates to prohibiting a person from being in possession of hunting equipment.	Reasonable grounds for believing the person has contravened or failed to comply with the order.
<i>Whales Protection Act 1988</i> s 22*	Failing or refusing, on demand, to give a correct name and address, if a person referred to in s 18(1), or not delivering up, on demand, anything in one's possession or under one's control entitled to be seized under the Act, if a person referred to in s 20(5).	Actually failing to provide a name and address or there are reasonable grounds for believing the name and address are false.
<i>Youth Justice Act 1997</i> s 130(5)	Failing to return, without reasonable excuse, to a detention centre by the end of a period of leave of absence granted under s 130.	Reasonable grounds for believing.

Inconsistency, complexity and uncertainty

2.2.3 Table 1 demonstrates not only that arrest powers are scattered across a wide variety of legislative instruments but also that they feature a range of operative standards. Of course, the sheer number and variety of the statutory arrest powers makes it difficult for anyone, police officer, judicial officer or lay citizen, to be fully conversant with the law in this area. When the practical circumstances in which the law of arrest operates are remembered the problematic nature of its volume becomes even more apparent. Arrests are not made in situations that permit a quick glance through the statute books to determine the legitimacy of what is occurring or proposed to be done. They may involve exigent circumstances and the need for instant decisions. Even where this is not the case, the diversity of arrest powers may still create uncertainty in any given situation about the precisely applicable power and the validity of its exercise. It goes without saying that difficulties of knowledge and understanding are greatest for the lay citizen. The volume of the law makes it inaccessible to most members of the public. This begs the question whether citizens and the police may not, in many arrest situations, be

⁹ This is not an Act of Parliament but rather Statutory Rules made by the Court under the *Supreme Court Civil Procedure Act 1932*.

acting in ignorance and relying on ignorance in complying with and achieving compliance with arrest directives.

2.2.4 It is not apparent why the wide variation in arrest powers and, particularly, in the grounds of arrest, has been enacted. In some cases variation appears to have occurred because particular powers were created without regard to existing powers governing analogous situations. For example, as Table 1 shows, a number of statutes provide for the arrest of people who, in prescribed situations, fail to provide their personal details when requested to do so. However, the information required to be given varies across different statutes, without apparent reason, even where that information is sought in similar situations. For instance, under the *Liquor Licensing Act 1990*, *Animal Welfare Act 1993*, *Gaming Control Act 1993* and *Firearms Act 1996*, persons who refuse or fail to provide their correct name, address and age or date of birth after a request to do so are liable to be arrested. However, under the *Traffic Act 1925*, *Police Offences Act 1935*, *Road Safety (Alcohol and Drugs) Act 1970*, *Poisons Act 1971*, *Local Government (Highways) Act 1982*, *Whales Protection Act 1988*, *Wellington Park Act 1993*, *Second-hand Dealers and Pawnbrokers Act 1994*, *Misuse of Drugs Act 2001*, *National Parks and Reserves Management Act 2002*, *Nature Conservation Act 2002*, *Police Service Act 2003* and *Racing Regulation Act 2004* persons who refuse or fail to provide their correct name and address only (age or date of birth are not specified) after a request to do so are liable to be arrested. Under the *Inland Fisheries Act 1995*, persons can be arrested for failing to provide their name, residential address and/or details of license and registration, and under the *Living Marine Resources Management Act 1995*, as well as providing a ‘full name and residential address’ persons are required to provide ‘details of (their) function.’¹⁰ Such variations are a potential source of confusion.

The different statutory provisions also prescribe, as grounds for arrest, a variety of levels of belief or suspicion about the commission of an offence. For example the prescribed tests include: ‘reasonable grounds for believing’; ‘reasonably believes’; ‘reasonable ground to believe’; ‘believes on reasonable grounds’; ‘reasonably suspects’; ‘probable cause for believing’; ‘reasonable cause to suspect’; ‘believes or suspects’; ‘with reasonable cause, they suspect’ and ‘reasonable grounds to suspect’. This problem, and a proposed solution, is discussed in greater detail in Part 5.

Some of the variations in the framing of arrest powers may be explicable on policy grounds, see for example the powers to arrest conferred by s 11 of the *Family Violence Act 2004* (Tas), s 6 of the *Parliamentary Privilege Act 1858* (Tas) and ss 3 and 5(2) of the *Debtors Act 1870* (Tas). These will be discussed more fully paras 3.3.2-3.3.4. However, most of the different formulations do not appear to be explicable on this basis. It is a basic principle of criminal justice that like cases should be treated alike. The existence of inconsistencies in the law has the potential to violate this principle and to result in unfairness in the operation of the law.

Key statutory provisions

2.2.5 The key statutory arrest provisions in the Tasmanian *Criminal Code 1924* and *Police Offences Act 1935* (Tas) are also problematic and exhibit a number of oddities and inconsistencies. They are also complicated and difficult to work out.

¹⁰ A detailed catalogue of all these provisions appears in the powers of arrest identification table on pp. 10-17 of the Issues Paper.

The Criminal Code

2.2.6 As noted above, the principal statutory source of arrest powers in relation to indictable offences is s 27 of the *Criminal Code 1924* (Tas). It provides:

- S 27 (1) It is lawful for a police officer to arrest without warrant any person whom he finds committing a crime.¹¹
- (2) In any case where any of the crimes specified in Appendix A¹² has been committed it is lawful for a police officer to arrest without warrant any person whom he believes on reasonable grounds to have committed such crime.
 - (3) In any case where a police officer believes on reasonable grounds that any of the crimes specified in Appendix A has been committed it is lawful for him to arrest without warrant any person whom he believes on reasonable grounds to have committed such crime.
 - (4) It is the duty of every person to arrest without warrant any person whom he finds committing any of the crimes in Appendix A.
 - (5) In any case where any of the crimes specified in Appendix B¹³ has been committed it is lawful for any person to arrest without warrant any person whom he believes on reasonable grounds to have committed such crime.
 - (6) It is lawful for any person to arrest without warrant any person whom he sees committing a breach of the peace or whom he believes on reasonable grounds to be about to commit or renew a breach of the peace.
 - (7) It is lawful for any person who finds another lying or loitering in any place by night under such circumstances as to afford reasonable grounds for believing that he has committed, or is about to commit, a crime, and who does in fact so believe, to arrest him without warrant.
 - (8) It is lawful for any person to arrest without warrant any person whom he believes on reasonable grounds to have committed a crime, and to be escaping from, and to be freshly pursued by, some person whom he believes on reasonable grounds to have authority to arrest him for that offence.
 - (9) In every case under this section in which it is lawful for a police officer to arrest any person it is his duty to do so.
 - (10) It is lawful for a police officer or the person in command of an aircraft to arrest without warrant on board that aircraft a person whom he finds committing, or attempting to commit, or whom he

¹¹ Section 1 of the Code defines 'crime' as an offence punishable on indictment.

¹² Appendix A - Crimes for which Offender may be Arrested without Warrant: Assault. Aggravated assault. Any crime under Chapter V. Piracy and offences deemed to be piracy. Rioting. Opposing the making of a riot proclamation. Escape. Unnatural sexual intercourse. Murder. Manslaughter. Threatening to murder. Instigating [or aiding] suicide. Disabling with intent to facilitate the commission of an offence [or flight of an offender]. Administering a drug with intent to facilitate the commission of an offence [or flight of an offender]. Committing an unlawful act intended to cause bodily harm. Preventing escape from a wreck. Wounding or causing grievous bodily harm. Intentionally endangering persons on a railway. Wantonly endangering persons on a railway. Causing injury by poison. Rape. Aggravated sexual assault. Forcible abduction. Stealing, other than stealing under sections 228 to 231 or under section 233. Killing an animal with intent to steal. Severing with intent to steal. Aggravated Robbery. Robbery. Armed Robbery. Aggravated Armed Robbery. Demanding property with menaces with intent to steal. Any crime under Chapter XXVII. Receiving stolen property. Arson or any other crime under Chapter XXXI, except under sections 272 to 276. Attempting to commit any of such crimes as aforesaid.

¹³ Appendix B - Crimes Referred to in Sections 27 (5) and 30 (3): Treason. Piracy and offences deemed to be Piracy. Murder. Burglary and Aggravated Burglary. Rape. Unlawfully setting fire to vegetation, in any case where serious danger shall have been caused to the life of any person. Arson, in any case where serious danger shall have been caused to the life of any person. Intentionally endangering persons on a railway. Any crime in the commission whereof serious danger shall have been caused to the life of any person. Attempting to commit any such crimes aforesaid.

believes on reasonable grounds to have committed, or to have attempted to commit, a crime under Chapter XXXIA.

- (11) It is lawful for any person to assist the person in command of an aircraft to arrest without warrant any other person on board the aircraft unless he knows the arrest to be illegal.
- (12) The power of a police officer to arrest a person under this section is subject to the limits imposed on the power to arrest by section 24 of the *Youth Justice Act 1997*.

Criticisms of section 27

2.2.7 The following criticisms can be made of section 27:

- It is arguable that subsection (2) is redundant in the light of the wider power conferred in subsection (3).
- Subsections (2) and (5) create powers to arrest where certain crimes have been ‘committed’. The use of the term ‘committed’ is problematic. It is the role of a court to determine whether a crime has been ‘committed’. Accordingly, subsections (2) and (5), if interpreted literally, would limit the scope of the arrest powers they create to situations where there has been a determination of guilt. This is absurd.
- Subsection (4) characterises a citizens’ arrest power as a ‘duty’, which is a formulation out-of-step with contemporary attitudes and practices in both good citizenry and law enforcement. It is far more acceptable in contemporary society, especially given the nature of modern crime, for a citizen to inform the police if they reasonably believe that a person is committing a crime, rather than be subject to a duty to execute an arrest him or herself.

2.2.8 The powers of arrest granted to private citizens by section 27 will be discussed in greater detail in Part 8.

The Police Offences Act

2.2.9 Section 55 of the *Police Offences Act 1935* (Tas) creates powers of arrest without warrant for many but not all of the summary offences¹⁴ contained in that Act. Section 55 provides:

- (1) Any police officer may arrest, without warrant, any person found offending against any of the provisions of –
 - (a) Division I of Part II;
 - (b) Parts III to V; or
 - (c) section 15B, 15C or 15D; or
 - (d) section 37J(1).
 - (2) Where a police officer is empowered to arrest any such person, it is the duty of such officer to exercise such power unless he has reasonable grounds for believing that the purposes of this Act, or of the Act conferring such power, as the case may be, will be adequately served by proceeding against the offender by summons.
- (2A) A police officer may arrest, without warrant, any person found offending against section 14A.

¹⁴ Summary offences are offences that can be tried in the Magistrates Court. They are considered to be less serious than the crimes contained in the Criminal Code.

Part 2: Arrest Powers

- (2B) Subject to subsection (2C), a police officer may arrest, without warrant, any person whom he believes on reasonable grounds to be on any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner, occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.
- (2C) The power of arrest conferred by subsection (2B) is not exercisable –
- (a) unless the police officer has previously requested the person in relation to whom he seeks to exercise the power to leave the land, building, structure, premises, aircraft, vehicle or vessel concerned and that person has refused or failed to comply with the request; or
 - (b) if the police officer has reasonable grounds for believing that that person has some reasonable or lawful excuse for being on that land, building, structure, premises, aircraft, vehicle or vessel.
- (2D) A police officer may, without warrant, arrest any person whom the police officer has reasonable grounds for believing has committed an offence under section 35.
- (2E) A police officer may, without warrant, arrest a person to facilitate the making of an application for a restraint order under Part XA of the Justices Act 1959, if the police officer has reasonable grounds for believing –
- (a) that the person has intimidated another person; and
 - (b) that the intimidation is likely to continue and give rise to an assault.
- (2F) For the purposes of subsection (2E), intimidation may be verbal, physical or both verbal and physical.
- (2G) A police officer, without warrant, may arrest any person the police officer has reasonable grounds for believing has committed an offence under section 37B.
- (3) Any person may arrest, without warrant, any person found offending against any provision of this Act if such offence involves –
- (a) substantial injury to the person of another;
 - (b) serious danger of such injury;
 - (c) loss of any property of the person so arresting, or of any person by whom he is authorized to effect the arrest; or loss of any property of which the person arresting has charge;
 - (d) serious injury to any property; or
 - (e) injury to the property of a public authority.
- (3A) The power of a police officer to arrest a person under this section is subject to the limits imposed on the power of arrest by section 24 of the Youth Justice Act 1997.
- (4) For the purposes of this section, an offence shall be deemed to involve any of the matters specified in subsection (3) if the person arresting has reasonable grounds for believing that such matter has been, or will be, the consequence of any act of the offender in committing such offence.
- (5) For the purposes of this section, a person is said to be "found offending" if he does any act, or makes any omission, or conducts or behaves himself, and thereby causes a person who finds him reasonable grounds for believing that he has, in respect of such act, omission, or conduct, committed an offence against this Act.

Criticisms of section 55

2.2.10 Identifying the scope of the application of section 55 is not easily done. It involves checking and crosschecking different Parts, Divisions and sections of the Act and also relevant provisions in the *Justices Act 1959* (Tas) and the *Youth Justice Act 1997* (Tas). The application of s 55 is further complicated by subsections (3) and (5). Working out to which offences subsection (3) might apply is a complicated business. It authorises arrest for *any* offence in the Act provided one or other of the conditions in (3)(a)–(e) apply. The conditions in (3)(a) – (e) are only likely to arise where certain kinds of offences are concerned. Further, it is logical that resort will only be had to s 55(3) if no other arrest

power is available. Consequently, s 55(3) is likely to have application in respect of contraventions of ss 15, 15A, 16, 17, 19, 19AA, 20, 20AA, 25, 44, 44A, 48 and 49AB of the Act. Subsection (3) also needs to be read in light of subsection (4), which affects the determination of whether the conditions in subsection (3)(a)-(e) are present.

Subsection (5) is designed to assist in the interpretation of the term ‘found offending’, which appears in subsections (1), (2A) and (3). Subsection (5) is a difficult provision but its intent appears to be to broaden the powers of arrest in subsections (1), (2A) and (3) beyond situations where a person is found presently committing an offence or is reasonably believed¹⁵ to be presently committing an offence to situations where it is believed that he or she has previously committed an offence. Section 55(5) may be criticised because it takes the definition of ‘found offending’ well beyond its natural and ordinarily understood meaning. Additionally, it potentially transforms the standard of certainty required for an arrest under the Act into a perplexing abstraction. The aim appears to be to make the operation of the arrest provisions in subsections (1), (2A) and (3) as broad as possible. However, the definition used to achieve this is clumsy and opaque.

2.2.11 There is authority to suggest that judicial interpretation of the expression ‘found offending’ in s 55(1), (2A), (3) and (5) may place limits on the powers of arrest they confer and require at least some nexus between the time and place of the arrest and the conduct alleged to constitute the offence for which the arrest is made. In *White v Tunks*,¹⁶ a case involving a citizen’s power of arrest under s 55(3) of the Act, the expression ‘found offending’ was construed narrowly with reference to time and place. Crawford J, observed that, on the facts of the case before him, the offender ‘could not be said to have been “found offending” ... in circumstances where the alleged offence was committed one to one and a half hours earlier at a different place’.¹⁷

2.2.12 In addition to the powers of arrest in section 55, powers of arrest without warrant are also specifically attached to the offences created in sections 19A, 34B, 38A, 55A and 58 of the *Police Offences Act*. These are included in Table 1.

Comparison of section 27 Criminal Code and section 55 Police Offences Act

2.2.13 Comparison of s 27 of the *Criminal Code* and s 55 of the *Police Offences Act* reveals other anomalies in their operation. For example, the arrest powers for the crimes of destruction or injury to property in the *Criminal Code* are substantially different to those in the *Police Offences Act*. Under the *Criminal Code*, there is no power to arrest without a warrant in respect of the following offences; unlawfully injuring a public utility (s 272), unlawfully injuring property (s 273), unlawfully killing [or maiming] [or wounding] cattle (s 274), and interfering with a boundary mark (s 275). Therefore, for these Code offences, an arrest warrant is required. In contrast, for offences involving injury to property under the *Police Offences Act*, s 55(3) of that Act may authorise arrest without warrant if the injury to property is of a kind enumerated in subparagraphs (c)-(e) of s 55(3). That is, if the offence involves:

- (c) loss of any property of the person so arresting, or of any person by whom he is authorized to effect the arrest; or loss of any property of which the person arresting has charge;
- (d) serious injury to any property; or

¹⁵ In *Hibble v Phegan & Ors* 20 May 1997 Tas unreported 50/97, Zeeman J interpreted the term ‘committing’ an offence in s 34B(3) of the *Police Offences Act 1935* (Tas) as encompassing the situation where the arresting officer believes on reasonable grounds that the arrestee is committing an offence under s 34B(1). His Honour used the terms ‘is committing’, ‘found offending’ and ‘offending’ interchangeably. Accordingly, it is possible that the same interpretation will apply to the words ‘found offending’ in s 55.

¹⁶ [2003] TASSC 109.

¹⁷ *Ibid*, para.14.

- (e) injury to the property of a public authority.

Consequently, the arrest powers for damage to property offences in these two statutory instruments are, on the face of it, inconsistent. It is not apparent why the *Police Offences Act* authorises arrest without a warrant for these offences while the *Criminal Code* does not. While there may be valid policy reasons for the distinction, they are not obvious.

The Common Law

2.2.14 At common law, a police officer or other ‘peace officer’ may arrest without warrant –

- to prevent the commission of a felony,
- where a person is found committing a felony or is reasonably suspected of having committed a felony (regardless of whether or not it has actually occurred), and
- where a breach of the peace is occurring: *R v Ryan* (1890) 11 LR (NSW) 171.¹⁸

2.2.15 A police officer has no power at common law to arrest a person without a warrant in relation to a misdemeanour or summary offence with the exception of cases involving a breach of the peace. In Tasmania, while common law powers of arrest still exist, they have been made largely redundant by the broad range of arrest powers provided by statute. The obsolete distinction between felonies and misdemeanours also virtually erases the continued relevance of common law arrest powers. In Victoria, the common law powers of arrest have been abolished.¹⁹ The value of their continued existence in Tasmania is questionable, given their obscurity and general obsolescence. They seem rather to constitute yet another instance of arrest law ‘overload.’

2.2.16 Although the common law powers of arrest have become essentially obsolete in the light of statutory arrest powers, the common law relating to how an arrest may be lawfully carried out remains relevant. This is discussed in Part 6.

2.3 A Previous Recommendation to Reform the Law

2.3.1 In 1977 the Law Reform Commission of Tasmania prepared and published a report on the consolidation of powers of arrest, search and bail.²⁰ In making the reference to the Law Reform Commission, the Attorney-General of the day sought an inquiry and report ‘as a matter of urgency’.²¹ The Report reviewed the existing law in Tasmania, which even then, scattered the powers of arrest amongst various acts, regulations and by-laws. The report recommended that the law in relation to arrest and search be codified in a new statute. While the report proposed some minor modifications to the law of arrest as it stood,²² its main goal was to enact the relevant provisions under the *Criminal Code*, the *Police Offences Act*, the *Justices Act* and any other Acts into a new code.²³ The report included draft legislation for the Parliament to consider. This is reproduced in Appendix A of this

¹⁸ Hunter, Cameron and Henning, p 437.

¹⁹ *Crimes Act 1958* (Vic), s 357.

²⁰ Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977.

²¹ *Ibid*, at 3.

²² See, for example, recommendations 7 (applications for arrest warrants), 10 (conditions necessary for forcible entry) and 14 (rights of persons in custody).

²³ *Ibid*, at 12.

issues paper. Despite the ‘urgency’ for reform expressed at the time of the Report, the recommendations for codification were never adopted.

2.4 Proliferation of Statutory Arrest Powers

2.4.1 Since 1977 (the year of the previous Tasmanian law reform inquiry into arrest powers) thirty - two Acts conferring powers of arrest in Tasmania have been passed compared to only fourteen Acts in the previous 119 years. These Acts are listed in the table below.

Acts granting powers of arrest prior to 1977	Acts granting powers of arrest after 1977
<i>Parliamentary Privilege Act 1858</i>	<i>Fire Service Act 1979</i>
<i>Debtors Act 1870</i>	<i>Local Government (Highways) Act 1982</i>
<i>Influx of Criminals Prevention Act 1909</i>	<i>Whales Protection Act 1988</i>
<i>Criminal Code 1924</i>	<i>Liquor Licensing Act 1990</i>
<i>Traffic Act 1925</i>	<i>Animal Welfare Act 1993</i>
<i>Police Offences Act 1935</i>	<i>Crime (Confiscation of Profits) Act 1993</i>
<i>Racing Regulation Act 1952²⁴</i>	<i>Gaming Control Act 1993</i>
<i>Coroners Act 1957</i>	<i>Land Acquisition Act 1993</i>
<i>Justices Act 1959</i>	<i>Local Government Act 1993</i>
<i>Child Welfare Act 1960</i>	<i>Wellington Park Act 1993</i>
<i>Parliament House Act 1962</i>	<i>Bail Act 1994</i>
<i>Road Safety (Alcohol and Drugs) Act 1970</i>	<i>Second-hand Dealers and Pawnbrokers Act 1994</i>
<i>Poisons Act 1971</i>	<i>Inland Fisheries Act 1995</i>
<i>Aboriginal Relics Act 1975</i>	<i>Living Marine Resources Management Act 1995</i>
	<i>Firearms Act 1996</i>
	<i>Children, Young Persons and Their Families Act 1997</i>
	<i>Corrections Act 1997</i>
	<i>Sentencing Act 1997</i>
	<i>Youth Justice Act 1997</i>
	<i>Criminal Justice (Mental Impairment) Act 1999</i>
	<i>Vehicle and Traffic Act 1999</i>
	<i>Forensic Procedures Act 2000</i>
	<i>Supreme Court Rules 2000</i>
	<i>Misuse of Drugs Act 2001</i>
	<i>National Parks and Reserves Management Act 2002</i>
	<i>Nature Conservation Act 2002</i>
	<i>Security and Investigating Agents Act 2002</i>
	<i>Police Service Act 2003</i>
	<i>Electoral Act 2004</i>
	<i>Family Violence Act 2004</i>
	<i>Police Powers (Public Safety) Act 2005</i>
	<i>Sex Industry Offences Act 2005</i>

²⁴ On 1 January 2005 the *Racing Regulation Act 2004* commenced. This Act amends but largely implements the thinking behind the arrest provisions that were contained in the *Racing Regulation Act 1952*, which were repealed by the *Racing Regulation (Transitional and Consequential Provisions) Act 2004*.

The proliferation in arrest powers since 1977 can be attributed partly to an increase in specialist legislation, which, in dealing with a particular issue, (one that may affect only a small percentage of the population), creates powers of arrest specific to that matter. It is also attributable to the fact that arrest powers in existing statutory instruments, including those in the *Criminal Code*, are limited in their application and cannot extend to the conduct covered by new legislation. Unfortunately, of course, the proliferation of statutory arrest powers has had the effect of complicating and decreasing the accessibility of this area of law. Inevitably, as noted above, this creates difficulties for arrestors in knowing when they have a valid power of arrest and for arrestees in knowing whether they are required to submit to the authority of the arrestor.

2.5 Conclusion and Recommendation

2.5.1 It is clear from the discussion here that there is significant inconsistency, incoherence and unnecessary complexity in the law of arrest in Tasmania. Uncertainties and inconsistencies are not only undesirable because they make the law inaccessible (as does its complexity), they may also lead to significant increases in the costs of delivering justice – particularly if the lawfulness of an arrest must later be argued in court. Such arguments arise because the lawfulness of an arrest can be critical in determining the admissibility of evidence obtained in the course of the arrest. If the evidence in question is important in the case then this matter will have clear implications for its outcome.

2.5.2 The Institute has formed the preliminary view that problems with the current law relating to powers of arrest in Tasmania require reform. Problems of accessibility arising from the disparate locations of arrest powers and the multiplicity of those powers suggest that such reform should aim to collect powers of arrest in a single legislative instrument. The confusion and complexity in the current law arising from the different, often inconsistent, formulations of the various arrest powers suggest that reform should also aim to rationalise and simplify the law by providing a unified basis for arrest. While it may be theoretically possible to remedy current problems in the law by separately amending the many statutes dealing with arrest, the proliferation of those powers and their complexity, inconsistency and uncertainty suggest that reform should preferably take the form of consolidation. Further, separate amendment of existing statutory provisions cannot guard against the re-emergence of current problems in the event that future legislation is enacted containing additional and divergent arrest powers. To paraphrase Kirby J, the argument for collecting, rationalising, simplifying and clarifying arrest powers is highly compelling.²⁵

Proposal 1

- 1. That arrest powers contained in Tasmanian statutes be consolidated into one statute.**

The principles that should guide consolidation and the form that the consolidation should take are considered in Part 3.

²⁵ M D Kirby, “Controls Over Investigation of Offences and Pre-trial Treatment of Suspects” (1979) 53 ALJ 626, at 632 quoted in New South Wales Law Reform Commission, *Criminal Procedure, Police Powers of Arrest and Detention: Report*, (December 1990), p 56.

Part 3

Consolidation

3.1.1 This Part considers the principles that should guide any consolidation of the laws of arrest. It also looks at the appropriate form that the consolidation should take.

3.2 Principles of consolidation

3.2.1 The aim of consolidation of arrest laws in Tasmania is to rationalise and simplify the law in order to increase its certainty, consistency and clarity. A concurrent aim is to make the law more accessible to arrestors, arrestees and those trying to assess the lawfulness of any particular arrest. Ideally, all laws should be able to be applied simply, predictably and with certainty. This is particularly the case with arrest laws because they should be able to be applied by a police officer, authorised person or private citizen acting under conditions that may be stressful or volatile and which may involve instantaneous decision-making. The consolidated laws should also aim to minimise misunderstanding:

The law (of arrest) should be constructed so that a police officer should not be compelled to make difficult determinations on fine questions of law. To this end, the law should be expressed in simple and straightforward terms and be sufficiently flexible to take account of the possibility of legitimate mistakes.²⁶

It is important, however, that the public interest in simplicity and consistency not be purely a formalist goal ignorant of the practicalities of the criminal justice system. Arrest powers must be sufficient to enable the police to perform their function effectively while also being subject to constraints, which ensure that they are not used unnecessarily or unreasonably. To that end, important principles guiding consolidation must be efficiency and fairness.

Efficiency

3.2.2 The law of arrest should be able to be applied with minimum waste of time, effort, or skill. In other words, the law of arrest should be efficient. Consolidation and clarification of all arrest powers has major efficiency benefits for the criminal justice system. The expense and the delay caused by trial proceedings regarding the admissibility of evidence where there is confusion over the lawfulness of an arrest are costs borne ultimately by the community as a whole. When the law is clearly organised in one reference point, a desirable consequence may be a reduction in disputes over the source and legitimacy of an arrest power.

3.2.3 Arrest powers and procedures need to be executed efficiently. In the context of the criminal justice system, efficiency is relevant to the:

²⁶ D.A. Thomas, 'Arrest: A General View' [1966] *Criminal Law Review* 639 at 659.

- Accountability of individual agents or institutions (the police and courts, for example) in the justice system who are required, in a straightforward and uncomplicated manner, to execute and determine the legality of arrests; and
- Broader public interest goals of adherence to the rule of law, fairness and timeliness.

3.2.4 When analysing the large number of statutes relevant to the project of consolidation and reaching the preliminary reform proposals contained in this Issues Paper, the Institute was guided by the following legislative principles or efficiency devices:²⁷

A. *One 'general' statute should deal as far as possible with arrest in Tasmania*

It is the Institute's preliminary view that to ensure the efficient and effective operation of the criminal justice system in Tasmania, there should be only one 'general' criminal law statute dealing with arrest powers for both indictable and summary offences. The arrest provisions in that statute should as far as possible provide a simple, uniform approach that applies to all arrestable offences. There should be only limited exceptions to this approach arising on the basis of compelling policy grounds.

B. *In rare circumstances only may subject-specific arrest provisions be created*

Where a statute aims to regulate a specific and unusual set of conditions or circumstances that are clearly unable to be dealt with by the general arrest provisions, specific provision may be made in a strictly limited manner. There should, however, be a presumption against dealing with specific situations by the enactment of new arrest provisions that overlap with the general provisions.

Fairness

3.2.5 Questions of fairness relate to both fair outcomes and (due) process. Fairness is a by-word of our criminal justice system. It is a quality that prevents prejudice, bias, and arbitrariness from contaminating the system.

3.2.6 The determination of whether a particular provision, power or action is fair often depends on balancing the public interest in law enforcement with the need to protect the civil liberties of citizens. Individuals in a free, democratic society need to be confident that they can go about their business protected from 'arbitrary, irregular, illegal or excessive invasion of their liberties by police, prosecuting authorities, or judicial procedures.'²⁸

International human rights instruments provide important perspectives on fairness and arrest. The International Covenant on Civil and Political Rights (ICCPR) includes a protection against arbitrary or unlawful arrest, as well as protections against unlawful detention.²⁹ Although not directly enforceable in Australia, the ICCPR provides a strong human rights constraint upon indiscriminate and unlawful exercises of the power of arrest by the state and its agents. Similarly, the European Convention on

²⁷ These legislative principles have been adapted from Scrutiny of Acts and Regulations Committee (Victorian Parliamentary Committee), *Inquiry into the Vagrancy Act 1966, Final Report* (September 2002).

²⁸ Richard Fox, *On-the-Spot Fines and Civic Compliance* (2003) Volume 2, 49, quoted in Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures: Discussion Paper* (2004), 20.

²⁸ E W. Thomas, *Fairness and certainty in adjudication: formalism v substantialism*, *Otago Law Review* 9(3), 459.

²⁹ *International Covenant on Civil and Political Rights* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 Article 9(1). The ICCPR also guarantees equality before the law and freedom from discrimination, torture or cruel, inhumane or degrading treatment or punishment.

Human Rights³⁰ also expresses a prohibition against unlawful arrest. Article 5.1.c of the Convention (Right to Liberty and Security) states that an arrest may take place for the purpose of bringing a person ‘before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’, but this rule operates as an exception to the universal right of not being deprived of one’s liberty. In 1998 the Parliament of the United Kingdom passed the *Human Rights Act 1998* (UK), which ratified and made enforceable the Convention within their domestic law.

3.2.7 Clarity of the law is a hallmark of fairness. If the law of arrest is not clear and comprehensible there is a real risk that arrest powers may be used unlawfully. Statutory arrest provisions that are unnecessarily unclear or complex frustrate the expectation of clarity. As mentioned previously, the principle of equality or like cases being treated in a like manner is also central to criminal justice and it is anticipated that a new consolidation will achieve a greater level of fairness with respect to this equality principle.

3.3 Form of consolidation

3.3.1 A consolidation of arrest laws may take a number of different forms. First, and perhaps most obviously, it could simply comprise a separate statute, for example an *Arrest Act* that deals solely with arrest powers in the way that the *Bail Act 1994* (Tas) deals with bail. Another possibility is for the consolidation to be located in an existing piece of legislation, the *Criminal Code* being perhaps the most obvious choice, given that it is presently the primary source of arrest powers for indictable offences. The Institute is of the preliminary view that a separate Act is preferable because it is more likely to achieve accessibility of the law. Creation of a separate statutory instrument dealing with powers of arrest provides an easily identifiable location for the law in this area and accordingly complies with the guiding principles of efficiency and fairness.

Proposal 2

2. The consolidation of arrest laws should take the form of a new act known as the *Arrest Act*.

Exceptions to the proposed Arrest Act

3.3.2 Should there be any exceptions to the proposed transposition of all arrest powers into one Act? There may be legitimate policy reasons for certain subject-specific arrest powers to operate either:

- outside and as exceptions to any general statute, or
- as separate and distinct provisions inside a general statute.

3.3.3 It is the Institute’s preliminary view that the following legislative instruments containing powers of arrest without warrant may merit treatment in either of these ways:

³⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*, Council of Europe. For other constitutional protections or limitations on the power of arrest see also sections 9 and 10 of the Canadian Charter of Rights.

- *Family Violence Act 2004* (Tas), ss 10 and 11. The arrest provisions in this Act are designed to serve particular practical and policy purposes. For example, the arrest powers in s 10 are granted to facilitate the issue of a Police Family Violence Order or the making of an application for a Family Violence Order. Section 11 empowers a police officer who reasonably suspects that a person has committed family violence to arrest that person. This arrest power was purposively formulated differently from those found in other legislative instruments to serve the overall objects of the Act set down in s 3. Section 3 makes ‘the safety, psychological wellbeing and interests of people affected by family violence ... paramount considerations’ in the administration of the Act. Accordingly, in s 11 the grounds of arrest (the required state of mind of the arrestor for making an arrest) are set at the lower threshold of ‘reasonably suspects’ rather than the higher standard of ‘reasonably believes’. Further, subsection (5) states that, in deciding whether to arrest a person, the police officer is to give priority to ‘the safety, wellbeing and interests’ of those subjected to suspected family violence. Thus s 11 operates on a different policy basis to other arrest provisions. Its primary objective is the protection of victims of domestic violence. The orthodox purpose of arrest is to initiate the prosecutorial process and to bring the arrestee before a court.³¹ Given that the purposes and policy behind ss 10 and 11 are different to those underlying other arrest provisions, it is legitimate that they should continue to stand apart from those provisions and comprise exceptions to the general approach to arrest in any consolidating legislation.
- *Parliamentary Privilege Act 1858* (Tas), s 6 - This Act permits arrest initiated by the verbal order of the President or Speaker of the Houses of Parliament, where the Houses have adjudged a person guilty of any of the contempts enumerated in the legislation. As the power depends on the judgement of a House of Parliament and a verbal order of the President or Speaker, as the case may be, and as any person can effect the arrest on such an order, this arrest power is distinguishable from other Tasmanian statutory arrest powers.
- *Supreme Court Rules 2000* (Tas), r 941(1)(a) - The Court may by oral order direct that a respondent be arrested for contempt of court committed in the face of the Court in any civil proceedings commenced in the Court. Any person who is ordered to do so by the Court may effect the arrest. This power of arrest derives from judicial authority to make an order for arrest rather than from a test of ‘reasonable belief’ and is therefore, distinguishable from other statutory arrest powers.
- *Debtors Act 1870* (Tas), ss 3 and 5(2) permit arrest without warrant for default in payment of a sum of money, although it is unclear from the terms of the legislation whether the arrest power is conferred on police officers or officers of the court only or extends to private citizens. The Act contains a codification of the law in relation to the procedure to be followed in respect of civil debt and reflects a fundamental separation of the civil law and criminal law in our justice system. While it is arguable that the arrest provisions in the *Debtors Act 1870* should be treated as an exception to the general principle of consolidation, consideration might also be given to the removal of this arrest provision altogether as being anachronistic and out-of-step with the modern trend to limit arrest powers to the criminal context and to minimise the use of those powers within that context.

3.3.5 There are some reasons to support a view that the *Parliament House Act 1962* (Tas) and the *Youth Justice Act 1997* (Tas) should also stand outside the general principle of consolidation.

- Section 8 of the *Parliament House Act 1962* (Tas) permits arrest where an offence under s 6 of the Act has occurred and the alleged offender refuses to state a correct name and address. It is arguable that this arrest power resides essentially in the Parliament as distinct from a police officer. However, in this case it is the ‘controlling officer’ (appointed under s 3 of the Act) or a person acting under his or her orders who can initiate an arrest rather than members of the Parliament, as is the case with the *Parliamentary Privilege Act 1858* (Tas).
- Section 130(5) of the *Youth Justice Act 1997* (Tas) permits arrest where a detainee has failed to return, without reasonable excuse, to a detention centre by the end of a period of leave of absence. As this Act aims ‘to provide for the treatment and punishment of young persons who have

³¹ *Williams* (1986) 161 CLR 278.

committed offences and for related purposes' and the Act's main objectives under s 4 are (a) to provide for the administration of youth justice and (b) to provide how a youth who has committed, or is alleged to have committed, an offence is to be dealt with, it is arguable that there is a desire on the part of the legislature for juveniles to be excluded from the general criminal justice regime.

- In many respects, however, the arrest powers in these two Acts are of a similar nature to other basic arrest powers without warrant, namely, the power to arrest for failing to provide name and address on request where a person is believed to have committed an offence and power to arrest in cases of escape. Therefore, the arrest powers in these two Acts can be accommodated in a general consolidating provision.

3.3.6 As stated above, there are two basic options for the location of these exceptions –

- outside and as stated exceptions to the consolidating statute, or
- as separate and distinct parts within the consolidating statute.

The Institute is of the preliminary view that the second option is preferable. This is because it accords with the general aims of consolidation – the achievement of certainty, clarity, ease of location, rationalisation and as much uniformity for arrest powers as possible. If all arrest powers are located in one Act, this is likely to ensure that any new, exceptional arrest powers that are created conform as much as possible with existing powers and that the formulation of those powers is undertaken with regard to existing provisions and in a manner that ensures that new inconsistencies and anomalies are not introduced into the law. Further, location of all arrest powers in one Act reduces the possibility of future ad hoc proliferation of non-uniform powers. Principally, however, the location of all arrest powers in one Act promotes accessibility. If it is thought desirable, it might be noted in the *Family Violence Act*, the *Parliamentary Privilege Act*, the *Debtors Act 1870* and the *Supreme Court Rules 2000* that relevant arrest powers are located in the consolidating Act.

Proposals 3 and 4

- 3. That the arrest powers in the *Family Violence Act 2004 (Tas)*, the *Parliamentary Privilege Act 1858 (Tas)* and *Supreme Court Rules 2000 (Tas)* be located in the proposed Arrest Act as exceptions to the general consolidating provisions in that Act.**
- 4. That the arrest powers contained in the *Debtors Act 1870 (Tas)* be reviewed with a view to their possible repeal.**

Questions

1. Are the exceptions nominated by the Institute to the general, consolidating approach justified?
2. Are there other subject-specific arrest powers that should also remain intact and not be transposed into general consolidating provisions?
3. Should the approach to consolidation aim to include all arrest powers in a general statute, or should exceptions to a general statute exist independently and separately from the statute? Which approach is preferable? Why?

Part 4

Extent of Arrest Powers

4.1 Classifying offences as arrestable or non-arrestable

4.1.1 Presently, in Tasmania there are powers of arrest without a warrant for only certain classes or categories of offences. There are many offences for which there is no power of arrest, for example, virtually all traffic and road safety offences, offences against municipal by-laws and many summary offences.

4.1.2 When considering reform of the law relating to arrest powers, it is useful and desirable to pose a series of questions:

- Should all offences be classified as prima facie arrestable?
- Should all offences be classified as prima facie non-arrestable?
- Should certain offences be classified as prima facie arrestable and all others as non-arrestable?

4.1.3 The Australian Law Reform Commission (ALRC) considered the problems relating to the classification of offences as arrestable, non-arrestable, or otherwise in its report, *Criminal Investigation*.³² It ultimately recommended that the best approach to the classification of (Commonwealth and Territorial) offences should be to make them all prima facie arrestable:

This conclusion is reached not because of any belief that there are no offences which should not under any circumstances be arrestable. It would be difficult to accept, for example, that there ever could be justification for arresting someone for riding a bicycle without a light. The difficulty is to fix upon any system of classification that divides offences into 'arrestable' and 'non-arrestable', which does not create more problems than it solves.³³

4.1.4 The ALRC observed that the traditional basis for the power of arrest without warrant at common law was the distinction between *felonies* and *misdemeanours*. However, as has been noted, the criminal law is not presently built on such a distinction and it is now anachronistic. While the distinction between *indictable* and *summary* offences is sometimes considered an appropriate ground for distinguishing arrestable from non-arrestable offences, the ALRC noted that a "major difficulty in employing this comparatively well-known distinction . . . is the erratic and complex way it is applied."³⁴ Further difficulties arise as to the proper classification of the hybrid class of 'indictable offences triable summarily', a significant offence class in Tasmania. A classification based on a distinction between 'serious' and 'less serious' offences was also considered but it was rejected because there are many 'less serious' offences that will justify arrest in certain circumstances (e.g. public order offences such as offensive behaviour). The option that the power of arrest without warrant be confined only to certain designated groups of offences was also considered and viewed as too

³² Law Reform Commission (Cth) Report No 2 (Interim) *Criminal Investigation* (1975).

³³ *Ibid*, para. 30.

³⁴ *Ibid*, para. 32.

complex for the demands of law enforcement. In the interests of simplicity and certainty, the ALRC took the view that ‘the power to arrest should depend not primarily on the character of the offence at all, but on the necessity of arrest as a means of enforcement in the particular situation.’³⁵ If the power to arrest was taken for granted in respect of any kind of offence, the focus would be placed on the criteria specified for making a lawful arrest in a particular situation and these criteria should be stated in the legislation.

4.1.5 The ALRC placed very important caveats on its recommendation that all offences should be prima facie arrestable. First, arrest should normally be a matter of last resort. Second, safeguards should be created and directed at the exercise of a police officer’s discretion to arrest in any case, and third, the powers of arrest without warrant should not be made available in respect of any offence proclaimed by Parliament to be non-arrestable. It was argued that the ‘occasional piecemeal proclamation of particular offences to be non-arrestable should not unduly complicate the working policeman’s task’.³⁶

4.1.6 All Commonwealth offences are made prima facie arrestable by s 3W of the *Crimes Act 1914* (Cth). The *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth), which inserted s 3W into the *Crimes Act 1914*, was based, in part, on the 1975 ALRC report. Section 3W provides:

- (1) A constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that:
 - (a) the person has committed or is committing the offence; and
 - (b) proceedings by summons against the person would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before a court in respect of the offence;
 - (ii) preventing a repetition or continuation of the offence or the commission of another offence;
 - (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
 - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - (v) preventing the fabrication of evidence in respect of the offence;
 - (vi) preserving the safety or welfare of the person.

4.1.7 The ‘purposes’ set out in s 3W(1)(b) (i)-(vi) attempt to control the exercise of a police officer’s discretion by specifying criteria by which the necessity for arrest is to be judged. They aim to limit the making of arrests to situations where they are clearly necessary – where there is a risk that the suspect may abscond or interfere with witnesses or evidence; to prevent the possible continuation of offences and where there is danger to the safety or welfare of the suspect. The subsection also provides implicit encouragement to police officers to proceed by way of summons rather than arrest. Alternatives to arrest without warrant will be discussed in greater detail in Part 9.

4.1.8 The simplicity and clarity achieved by the ALRC approach as enacted in s 3W of the *Crimes Act* is compelling. It obviates the need for long schedules of arrestable offences like those contained in Appendices A and B of the *Criminal Code*. Regular legislative amendments to schedules to introduce new offences or repeal obsolete offences are also unnecessary. It also simplifies the operation of the law and law enforcers’ and courts’ inquiry into the source of arrest powers when considering the

³⁵ Ibid, para. 34

³⁶ Ibid.

lawfulness of an arrest. For example, in applying the law, courts and police officers are not required to assess whether a specific offence, amongst a countless number of offences, is arrestable or non-arrestable. Instead, the enquiry focuses on the factors set down as relevant to the decision whether to arrest or not. An additional factor favouring the elimination of the distinction between arrestable and non-arrestable offences is that Tasmanian police already operate under one legislative regime that makes no such distinction – the *Crimes Act 1914* (Cth). Consequently, it seems sensible to homogenise the totality of their arrest powers in this regard.

4.1.9 The Queensland Parliament, in the *Police Powers and Responsibilities Act 2000* (Qld) has enacted a similar approach to arrest to that found in the Commonwealth *Crimes Act*. Section 198(1) of the Queensland Act gives police officers the power, without warrant, ‘to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary’ for one or more of the reasons listed in subparas (a)-(l) of that section. The reasons in (1)(a)-(l) are more expansive than those provided in other legislative schemes. Section 198 of the *Police Powers and Responsibilities Act 2000* (Qld) provides:

- (1) It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons--
 - (a) to prevent the continuation or repetition of an offence or the commission of another offence;
 - (b) to make inquiries to establish the person's identity;
 - (c) to ensure the person's appearance before a court;
 - (d) to obtain or preserve evidence relating to the offence;
 - (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;
 - (f) to prevent the fabrication of evidence;
 - (g) to preserve the safety or welfare of any person, including the person arrested;
 - (h) to prevent a person fleeing from a police officer or the location of an offence;
 - (i) because the offence is an offence against section 444 or 445;
 - (j) because the offence is an offence against the Domestic and Family Violence Protection Act 1989, section 80;
 - (k) because of the nature and seriousness of the offence;
 - (l) because the offence is--
 - (i) an offence against the Corrective Services Act 2000, section 103(3); or
 - (ii) an offence to which the Corrective Services Act 2000, section 104 applies.
- (2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 7.

It is worth remembering, however, that the operation of the Queensland legislation is subject to on-going and regular review by the Queensland Crime and Misconduct Commission (CMC), an independent authority created to monitor, review, coordinate and initiate reform of the administration of criminal justice in Queensland. Its powers include overseeing and monitoring Queensland police and receiving and investigating complaints about police. This institution can act as a significant restraint on excessive or improper use of police power, including arrest powers.

4.1.10 Similarly, in New South Wales no distinction is made between arrestable and non-arrestable offences. Police officers have the power under s 99 of the *Law Enforcement (Powers and*

Responsibilities) Act 2002 (NSW) to arrest without warrant where it is believed that an offence is being or has been committed. The New South Wales Act provides slightly tighter safeguards on the exercise of the discretion to arrest than the Commonwealth legislation by specifying that an arrest *must not be made* unless the police officer suspects on reasonable grounds that the circumstances set down as justifying an arrest are present. Those circumstances are the same as those set down in s 3W (1)(b)(i)-(vi) of the Commonwealth *Crimes Act 1914*, (see 4.1.6 above). Victoria has adopted a slightly less expansive approach and draws a temporal distinction between arrest powers for summary and indictable offences. Section 458 of the *Crimes Act 1958* (Vic) empowers anyone to arrest a person *found committing* an offence, whether summary or indictable. Section 459 then provides that police officers may arrest a person whom they believe on reasonable grounds to *have committed an indictable* offence. While the Victorian legislation maintains a distinction between summary and indictable offences, the Victorian approach is vastly less complicated and varied than that currently operating in Tasmania.

4.1.11 Although the approach adopted in Queensland, New South Wales and by the Commonwealth is attractive in its simplicity, there are counter arguments to its adoption in Tasmania. It would constitute a major departure from the law as it is presently framed and would require significant legislative change and retraining of police officers to ensure that the redefinition of police arrest powers and the effect of the rules governing their exercise are understood. There is also the concern that police may use their broadened powers of arrest inappropriately and arrest for minor offences in respect of which they should properly proceed by way of summons. There is evidence that despite legislative and curial exhortations to proceed by way of summons in preference to arrest, police remain reluctant to do so.³⁷ One of the reasons that police are reluctant to use the summons process is because it is time consuming and unwieldy. Generally, a summons is issued on application to a justice of the peace who must be satisfied that there are reasonable grounds for its issue. In a number of jurisdictions a simplified process has been introduced enabling the police to issue on-the-spot attendance notices or notices to appear.³⁸

An arrest involves a significant abrogation of the liberty of the citizen and, accordingly, should only be made where there are compelling reasons for doing so. There is concern that if police arrest powers are broadened, there will be little real check upon their inappropriate use. In the absence of a similar institution to the Queensland Crime and Misconduct Commission, only the courts are in a position to provide independent review of the exercise of police powers. However, curial oversight is only ever likely to occur spasmodically when an accused challenges the legitimacy of an arrest at trial. If there is no prosecution or the accused pleads guilty there can be no judicial scrutiny unless the arrestee institutes civil proceedings. Given that the majority of defendants plead guilty³⁹ and that civil proceedings for unlawful arrest are rare, clearly judicial oversight can provide very limited supervision of police conduct.⁴⁰

4.1.12 Despite these concerns, the preliminary view of the Institute is that the objectives of clarity, simplicity and accessibility warrant reform of the law of arrest in Tasmania to remove the distinction between arrestable and non-arrestable offences. However, the broadened arrest powers should be

³⁷ See the discussion on this issue and the research referred to in Hunter, Cameron and Henning at p.426.

³⁸ See for example, the *Police Powers and Responsibilities Act 2000* (Qld) ss 214-221; the *Criminal Procedure Act 1986* (NSW) ss 47-52 & ss 172-17 and the *Police Administration Act 1978* (NT), s 133B.

³⁹ Over 90% of defendants in higher courts plead guilty to the charges laid against them, (Australian Bureau of Statistics 2005, *Criminal Courts 2003-04*, www.abs.gov.au).

⁴⁰ For an example of judicial disapproval where police arrested an offender rather than proceeding by way of summons, see *DPP v Carr* [2002] NSWSC 194 where Smart J held that it was improper for powers of arrest to be used for minor offences where the police know the name and address of the accused, there is no risk that he will abscond and no reason to believe that a summons will not secure his attendance at court. His Honour held that it was appropriate to exclude evidence of offences obtained in these circumstances.

subject to limitations that clearly define the circumstances when an arrest may be made. In this regard the proscriptive approach in the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* provides a useful precedent. It proscribes the making of an arrest unless the specified circumstances justifying an arrest are present. In this respect it is a shade more stringent than the Commonwealth, Queensland and Victorian legislative regimes.

4.1.13 There is existing precedent in Tasmania for the subjection of arrest powers to limiting criteria. The *Youth Justice Act 1997* (Tas) limits the power of arrest without warrant in relation to young people by providing in section 24 that:

A police officer may only arrest a youth in relation to an offence if the arresting officer believes the offence is serious enough to warrant an arrest and also believes, on reasonable grounds, that –

- (a) the arrest is necessary to prevent a continuation or repetition of the offence; or
- (b) the arrest is necessary to facilitate the making of an application for a restraint order under Part XA of the *Justices Act 1959*; or
- (c) the arrest is necessary to prevent concealment, loss or destruction of evidence relating to the offence; or
- (d) the youth is unlikely to appear before the Court in response to a complaint and summons.

Thus a police officer only has the power to arrest a young person without warrant if the suspected offence is serious *and* one of the conditions in (a) – (d) are met.⁴¹ This limitation on arrest powers recognises that young people may be particularly vulnerable when under arrest, and therefore it is desirable to minimise the arrest of young people.

4.1.14 It is also proposed that reform be accompanied by an overhaul of the law relating to alternatives to arrest without warrant. In fact, potentially the most effective approach to reform may be achieved by focusing on the provision of practical alternatives to arrest. This matter is discussed more fully in Part 9.

Proposal 5

5. That the law of arrest relating to powers of arrest be reformed to eliminate the distinction between arrestable and non-arrestable offences; that the broadened power to arrest be circumscribed by statutorily specified limiting circumstances; that this reform be accompanied by reform of the law relating to alternatives to arrest.

Questions

4. Should the current approach to arrest without warrant which distinguishes between arrestable and non-arrestable offences be retained?
5. If the current position is to be retained, should certain offences currently classified as non-arrestable be classified as arrestable and should certain offences now classified as arrestable be classified as non-arrestable?

⁴¹ This section is also specifically referred to by the Code, s 27(12), and the *Police Offences Act 1935*, s 55(3A).

6. Should all offences in Tasmania be classified as prima facie arrestable? If all offences in Tasmania were to become prima facie arrestable, should criteria limiting the exercise of the arrest power be specified in the legislation? If so, what should be included in these criteria?
7. If criteria for arrest are specified in the legislation should a proscriptive approach to the application of those criteria like that enacted in s 99 of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* be adopted?

Part 5

When an Arrest May be Made

5.1 Grounds for arrest – standard of belief

5.1.1 In Tasmania, there are a variety of formulations of the grounds of arrest. Most commonly the power to arrest is based on the arrestor ‘reasonably believing’ or ‘believing on reasonable grounds’ that the arrestee is committing or has committed an arrestable offence. Ten separate arrest provisions, however, use the formulation ‘reasonable grounds *to suspect*’ or a similar formulation rather than ‘reasonable *belief*’ –

- *Police Offences Act 1935*: s 38A(4);
- *Justices Act 1959*: s 106I(2);
- *Parliament House Act 1962*: s 8;42
- *Road Safety (Alcohol and Drugs) Act 1970*: s 5(1)(a) and s 19A(2)(a);
- *Crime (Confiscation of Profits) Act 1993*: s 43(b);
- *Second-hand Dealers and Pawnbrokers Act 1994*: s 15;
- *Vehicle and Traffic Act 1999*: s 13(3);
- *Security and Investigations Agents Act 2002*: s 27B and s 27C; and
- *Family Violence Act 2004*, s 11.⁴³

5.1.2 In fact, there is great variation in the language used across the legislation: ‘reasonable grounds for believing’; ‘reasonably believes’; ‘reasonable ground to believe’; ‘believes on reasonable grounds’; ‘reasonably suspects’; ‘probable cause for believing’; ‘reasonable cause to suspect’; ‘believes or suspects’; ‘with reasonable cause, they suspect’ and ‘reasonable grounds to suspect’. It is not clear why different legislative regimes use different formulations.

5.1.3 The varying formulations of the grounds of arrest in the Tasmanian legislation create difficulties in its application and interpretation. The difference between the standards of ‘reasonable belief’ and ‘reasonable suspicion’ was considered by the High Court in *George v Rockett*,⁴⁴ where it was held that the standard of ‘reasonable belief’ requires a higher level of certainty than a ‘reasonable suspicion’:

⁴² Section 8(1) of this Act uses both standards simultaneously: ‘A person whom the controlling officer or a person acting under his or her orders believes or suspects to have committed an offence under this Act and...’

⁴³ For discussion of this provision and its possible retention see part 3.3.3.

⁴⁴ (1990) 170 CLR 104.

Suspicion, as Lord Devlin, said in *Hussien v Chong Fook Kam* [1970] AC 942, at 948, “in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’”. The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief.⁴⁵

5.1.4 The High Court observed that suspicion and belief are different states of mind and that the existence of facts which are sufficient to induce these states of mind in a reasonable person are likely also to be different.⁴⁶ There appears to be no recognition of this proposition in the Tasmanian legislation. It would advance the aims of clarity and consistency if a single, uniform standard of certainty as a prerequisite to arrest were settled on. The preliminary view of the Institute is that the higher standard, that is, a ‘reasonable belief’, should be adopted. This is because this standard is currently used in the majority of statutory provisions and also because it sets a higher threshold for the application of coercive powers.

Proposal 6

6. That a consolidated power of arrest without warrant provide that –

A police officer has a power to arrest without warrant a person whom he or she believes on reasonable grounds to have committed or be committing an arrestable offence. (This power should be subject to statutorily specified limiting circumstances as suggested in Proposal 5).

5.2 Special rules regarding vulnerable groups

5.2.1 The Institute recognises that there are certain groups in the community that are especially vulnerable to arrest and may be at particular risk when involved in the process of arrest. The Institute identifies the following as groups that may require special protection during an arrest:

- (a) Children and young people;
- (b) Aborigines and Torres Strait Islanders;
- (c) Mentally ill or mentally disordered persons, and persons with developmental disabilities;
- (d) Persons from non-English speaking backgrounds; and
- (e) Other persons, who by reason of some disability, are unable to communicate properly with the police (such as the seriously visually or aurally impaired, persons who cannot speak, and so on).⁴⁷

5.2.2 To varying degrees, the criminal justice system already recognises that there are categories of persons who are particularly vulnerable when in police custody and require special consideration and treatment in the criminal investigation process. For example, sections 27(12) and 55(3A) of the *Criminal Code* and *Police Offences Act* respectively recognise that children and young people (persons under the age of seventeen) should be considered in a different light during the process of

⁴⁵ Ibid, at 115.

⁴⁶ Ibid. Irrespective of the state of mind required under the various legislative provisions, however, arrestors are not required to assess the legal admissibility of evidence or take into account other considerations relevant to determining the likelihood of a successful conviction. The common law establishes that the level of certainty necessary to justify arrest is lower than that necessary to justify the laying of a charge (see *Williams* (1986) 161 CLR 278 at 300) and far lower than the level necessary to found a conviction - beyond reasonable doubt (*Hussien v Chong Fook Kam* [1970] AC 942 (PC)). An arrestee who contends that there was not a reasonable belief or suspicion bears the evidential burden in relation to the issue (*R v King* [1970] SASR 503).

⁴⁷ New South Wales Law Reform Commission, *Criminal Procedure, Police Powers of Arrest and Detention: Report*, (December 1990), p 131.

criminal investigation. Accordingly, the *Youth Justice Act 1997* (Tas) and, to a lesser extent, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) institute special rules for young people. Moreover, s 18(1) of the *Criminal Code* provides that ‘no act or omission done or made by a person under 10 years of age is an offence’. Persons under the age of 10 years are incapable of committing an offence and, therefore, are unable to be arrested. The Police Commissioner’s Instructions also contain specific protective provisions dealing with the arrest, questioning and treatment of children,⁴⁸ non-Australian citizens,⁴⁹ Aborigines⁵⁰ and mentally ill persons.⁵¹

5.2.3 The problems and special difficulties of Aborigines and Torres Strait Islanders, children, young people and mentally and physically disabled persons during and post-arrest have been highlighted by a number of reports.⁵² The problems of vulnerability and susceptibility both for group members and for police suggests that the interests of vulnerable groups, the police and the wider community would be served with the advent of some pragmatic solutions or rules related to vulnerable groups in a code of arrest.

5.2.4 The Institute invites comments on whether special rules or protections ought to be developed as part of a general legislative code for arrest powers to regulate the arrests of persons in these categories. Alternatively, protections may be instituted in a form of subordinate legislation (such as a Code of Practice) that carries with it appropriate and sufficient accountability mechanisms.

Questions

8. Should the police or other persons executing an arrest have a higher duty of care when arresting persons belonging to identified vulnerable groups?
9. What sort of protective rules or measures, regulating the arrest of persons belonging to identified vulnerable groups, ought to be considered for inclusion in a Consolidated Act?

⁴⁸ Clause 7.1.4. See Appendix B.

⁴⁹ Clause 7.1.14.

⁵⁰ Clause 7.1.2.

⁵¹ Clause 7.1.12.

⁵² New South Wales Law Reform Commission, *Criminal Procedure, Police Powers of Arrest and Detention: Report*, (December 1990), p 132.

Part 6

Executing a Lawful Arrest

6.1 Introduction

6.1.1 An arrest will only be lawful if the arrestor has a power to arrest and the arrest is lawfully executed. So far this paper has focused on arrest powers. This Part considers how the law requires an arrest to be executed, in particular it considers:

- Informing the arrestee of the reasons for the arrest.
- The use of force in making an arrest.
- The place of arrest.

6.1.2 It is logical that any reforms relating to the execution of an arrest be included in the proposed consolidating arrest legislation.

Proposal 7

7. That laws concerning how an arrest should be executed be located in legislation consolidating powers of arrest.

6.2 Informing of the reason for arrest

6.2.1 At common law a person must be informed of the reason for their arrest at the time of the arrest unless it is not practicable to do so (for example because the arrestee is attempting to flee or is unconscious) or unless the reasons are obvious (the gunman at the scene of a bank robbery).⁵³ Section 301(2) of the Code is to *similar* effect.⁵⁴

It is the duty of a person arresting another, whether with or without warrant, to give notice, if practicable, of the process or warrant under which he is acting or the cause of the arrest.

6.2.2 The Tasmania Law Reform Institute has observed previously that s 301(2) could be improved if it was specified that the duty to give reasons exists ‘at the time of the arrest’ and not at some vague time after an arrest.⁵⁵ In contrast to the common law the Code does not provide that it is not necessary to give reasons for an arrest where those reasons are obvious. The Institute has previously expressed support for the Code position, because reasons should be stated even where they may seem obvious.

⁵³ *Christie v Leachinsky* [1947] AC 573.

⁵⁴ Section 301(2) of the Criminal Code applies to indictable offences and the duty at common law applies to summary offences *Gow v Davies* [1992] 1 Tas R 1; *Criminal Code* s 4(3).

⁵⁵ Tasmania Law Reform Institute, *Custody, Arrest and Police Bail, Issues Paper No. 1* (March 2002) and *Custody, Arrest and Police Bail, Final Report No. 1* (March 2003). Both publications are available at http://www.law.utas.edu.au/reform/report_publications.html

Doing so is not an onerous obligation and even though the reasons may seem obvious to the arrestor, they may not be obvious to the arrestee.

6.2.3 Another problem with the Code duty to give reasons is that, unlike the position at common law where a failure to provide reasons makes an arrest unlawful, the effect of a failure to give reasons for arrest under the Code is unclear. Section 301(3) of the *Code* only states that the failure to fulfil the duty of notification ‘shall not of itself deprive the person executing the process or warrant or making the arrest, or his assistants, of protection from criminal responsibility, but shall be relevant to the question whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.’ The Institute has closely reviewed the meaning and significance of this provision⁵⁶ and has recommended that amendments be made to subsections 301(2) and (3). This recommendation is largely reproduced in Proposal 8 below. However, in the light of the proposal that arrest laws be consolidated, it is also proposed that this duty form part of that consolidation.⁵⁷

Proposal 8

8. That the consolidation of arrest laws provide that –

It is the duty of a person arresting another, whether with or without warrant, to inform the other person, at the time of the arrest, of the process or warrant under which he or she is acting, or of the offence for which the other person is being arrested.

- (a) It is sufficient if the other person is informed of the substance of the offence, and it is not necessary that this be done in language of a precise or technical nature.**
- (b) This subsection does not apply to the arrest of the other person if:**
 - (i) the condition or duties of the person making the arrest make it impracticable to perform this duty; or**
 - (ii) the other person’s actions or condition make it impracticable for the person making the arrest to perform this duty.**

A failure to fulfil either of the aforesaid duties -

- (c) Shall make the arrest or the execution of the process or warrant unlawful;**
- (d) But shall not of itself deprive the person executing the process of warrant or making the arrest, or his assistants, of protection from criminal responsibility, but shall be relevant to the question whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.**

6.3 The use of force in making an arrest

6.3.1 The common law concerning the use of force in making an arrest has been summarised in a recent Victorian Parliamentary discussion paper, *Warrant Powers and Procedures: Discussion Paper*:⁵⁸

⁵⁶ Ibid.

⁵⁷ A full discussion of this recommendation can be found in Tasmania Law Reform Institute, *Custody, Arrest and Police Bail, Final Report No. 1*, 2003, available at <www.law.utas.edu.au/reform/report_publications>

⁵⁸ Richard Fox, “Executing an Arrest”, *Victorian Criminal Procedure 2002* (2002), 106–07 quoted in Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures: Discussion Paper* (2004), 52 (footnotes from original).

Reasonable force may be used to execute an arrest, although “all necessary and reasonable force” can be used to prevent an unlawful arrest.⁵⁹ A person who resists arrest does not commit an offence if he or she reasonably believes that the person executing the arrest is not a police officer.⁶⁰

6.3.2 The Code substantially codifies the common law position in sections 26 (force used in executing an arrest), 30 (police officer preventing escape from arrest), 31 (other cases involving any person preventing escape from arrest) and 32 (any person preventing escape or rescue after arrest). One of the immediately obvious deficiencies of the Code provisions is that they spread the law relating to force in arrest across three provisions. This seems unnecessarily complicated when other statutory regimes such as the Commonwealth *Crimes Act 1914* and the Victorian *Crimes Act 1958* manage to limit the law relating to this matter to one provision (see ss 3ZC and 462A respectively).

In determining the reasonableness of or the necessity for the force used to make an arrest the common law places limits on the circumstances where force can be applied which is likely or intended to cause death or grievous bodily harm. In *R v Turner*⁶¹ O’Byrne, Dean and Hudson JJ held, when considering the lawfulness of a citizen’s arrest that had resulted in the death of the arrestee,

What is reasonable depends on two factors. He [the arrestor] is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (ie the commission of the felony or the escape of the felon).

To some extent this is reflected in the Code. Section 30 permits a police officer to use such force as is reasonably necessary (s 30(1)) or as he or she believes on reasonable grounds to be necessary (s 30(2)) to prevent the escape of the arrestee. However, s 30(3) prohibits the use of ‘force which is intended or is likely to cause death or grievous bodily harm’ unless the arrest relates to the commission of an Appendix B crime and the person sought to be arrested has been called upon to surrender. In contrast, ss 31 and 32 do not authorise the ‘use of force which is intended or is likely to cause death or grievous bodily harm’ in cases where any person (as opposed to a police officer) is preventing escape from arrest or preventing a rescue after an arrest. In other words, for private citizens, the use of force likely to cause death or grievous bodily harm is unlawful. However, it is unclear whether the principle of proportionality applies to the use of force by police officers under s 30(3).

Principle of proportionality

6.3.3 The principle of proportionality requires that no more force be used in effecting an arrest than is reasonably proportional to averting the mischief that might result if the suspect were not apprehended. This requires the reasonableness of the use of force and the amount of force used to be judged according to the seriousness of the offence for which the suspect is sought to be apprehended and other factors justifying the arrest. Sections 3ZC of the *Crimes Act 1914* (Cth)⁶² and 462A of the

⁵⁹ Ibid.

⁶⁰ *Reynhoudt* (1962) 107 CLR 381; *Kenlin v Gardiner* [1967] 2 QB 510.

⁶¹ (1962) VR 30.

⁶² S 3ZC –

- (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:

Crimes Act 1958 (Vic)⁶³ apply the principle of proportionality with respect to the use of force in effecting an arrest in those jurisdictions where they operate. In contrast, the Tasmanian legislation does not limit the use of force in accordance with this principle. Accordingly, both the Commonwealth and Victorian legislation, (influenced in part by the ALRC report on *Criminal Investigation*⁶⁴), expressly place greater limits on the use of force in making an arrest than the Tasmanian legislation. The ALRC recommended that lethal or dangerous force should not be used by either police officers or private citizens ‘except where the person making the arrest believes on reasonable grounds that such force is necessary to protect the life of or prevent serious injury to some person, and is satisfied that no other means is available to effect the arrest.’⁶⁵ Section 3ZC of the Commonwealth *Crimes Act 1914* provides:

- (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:
 - (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or
 - (b) if the person is attempting to escape arrest by fleeing - do such a thing unless:
 - (i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and
 - (ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.

Some commentators suggest that the principle of proportionality has also been recognised at common law:

The . . . common law's permission to use enough force as is “reasonably necessary” to effect the arrest remains, but in a modified form. There may be reasonable alternatives. In addition, no more force may be used than is reasonably *proportional* to preventing the mischief which might arise if the suspect were allowed to escape; this is a principle of proportionality.⁶⁶

6.3.4 The law relating to force in arrest developed at a time when police had limited powers of arrest for serious offences (felonies). These offences were punishable by death. The means to effect arrests were comparatively unsophisticated. Today the police have advanced technology and weaponry at their disposal in apprehending suspects. Moreover, their arrest powers extend to many minor offences. The principle of proportionality has a potentially significant role to play in this milieu. If the

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- (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or
 - (b) if the person is attempting to escape arrest by fleeing – do such a thing unless:
 - (i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and
 - (ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.

⁶³ S 462A – A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

⁶⁴ Law Reform Commission (Cth) Report No 2 (Interim) *Criminal Investigation* (1975), paras 51-54.

⁶⁵ Ibid.

⁶⁶ Hunter, Cameron and Henning, p. 471. See *R v Turner*[1962] VR 30, *Lippl v Haines*(1989) 18 NSWLR 620 (NSW CA).

distinction between arrestable and non-arrestable offences is removed it becomes particularly important to judge the use of force in effecting an arrest according to this principle. Accordingly, it is the Institute's view that this principle should receive legislative imprimatur along the lines presently contained in s 3ZC of the *Crimes Act 1914* (Cth).

Proposal 9

9. That the present Tasmanian *Criminal Code* provisions concerning the use of force in relation to arrests (ss 26, 30, 31 and 32) be relocated to consolidating arrest legislation; that they be unified and that they be reformed to enact the principle of proportionality along the lines of s 3ZC of the *Crimes Act 1914* (Cth).

Questions

10. Should the principle of proportionality be enacted in the law regulating the use of force during arrest?
11. Should any additional limitations be placed on the force used by police or private citizens to effect an arrest?
12. Should provision for the use of force in arrest be relocated to legislation consolidating powers of arrest?
13. Should the separate provisions relating to force in arrest in the Tasmanian *Criminal Code* be unified in the manner achieved in s 3ZC of the *Crimes Act 1914* (Cth)?

6.4 The place of arrest

6.4.1 Unlike the situation in most other Australian jurisdictions,⁶⁷ in Tasmania the police have not been given general statutory powers to enter premises to effect an arrest. The Commonwealth provision is set out below.

Crimes Act 1914 (Cth)

S 3ZB (1) Subject to subsection (3), if:

- (a) a constable has, under a warrant, power to arrest a person for an offence; and
- (b) the constable believes on reasonable grounds that the person is on any premises;

the constable may enter the premises using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

(2) Subject to subsection (3), if:

- (a) a constable may, under section 3W, arrest a person without warrant for an offence; and
- (b) the offence is an indictable offence; and
- (c) the constable believes on reasonable grounds that the person is on any premises;

⁶⁷ See *Crimes Act 1914* (Cth), s 3ZB; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 10; *Crimes Act 1900* (ACT), s 349ZE; *Police Powers and Responsibilities Act 2000* (Qld), s 19; *Crimes Act 1958* (Vic), s 459A; *Criminal Code* (WA), s 564(5) and *Police Administration Act* (NT), s 126(2).

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the constable may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

- (3) A constable must not enter a dwelling house under subsection (1) or (2) at any time during the period commencing at 9 pm on a day and ending at 6 am on the following day unless the constable believes on reasonable grounds that:
 - (a) it would not be practicable to arrest the person, either at the dwelling house or elsewhere, at another time; or
 - (b) it is necessary to do so in order to prevent the concealment, loss or destruction of evidence relating to the offence.

Notably the power of entry contained in the Commonwealth provision is limited to entries pursuant to a search warrant or to effect an arrest for an indictable offence. There is no power of entry to effect an arrest for a summary offence. However, legislative provisions in other jurisdictions do extend powers of entry pursuant to an arrest for summary offences. For example, s 19 of the *Police Powers and Responsibilities Act 2000* (Qld) grants the police a general power to enter to effect an arrest without warrant. It provides:

- (1) A Police officer may enter a place and stay for a reasonable time on the place –
 - (a) to arrest a person without a warrant;

That power is, however, subject to safeguards set out in subsection (2), which provides that the police may only enter a dwelling house without the consent of the occupier if they reasonably suspect that the person to be arrested is at the dwelling. Further, before a forcible entry can be made the police officer must, if reasonably practicable, ask the occupier to permit the entry and give the occupier reasonable opportunity to allow the entry, (s 392). Other statutory safeguards also apply including those in s 394 which require the police to supply their details where they arrest or search a person or place. The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 10 is in similar terms. It also grants police the power to enter to effect an arrest in respect of any offence. The advantage of these provisions is that they achieve clarity and certainty in the law by eliminating distinctions in relation to offences in respect of which the police may enter to effect an arrest. Essentially, they reproduce the law as stated in *Lippl v Haines* (1989) 18 NSWLR 620 (see below at 6.4.2).

6.4.2 While in Tasmania the *Search Warrants Act 1997* (Tas) provides extensive powers to police to enter premises to execute search warrants, and while persons may be arrested in the execution of a search warrant, there is nothing in the Act that empowers police to enter premises to arrest in the absence of a search warrant. The *Misuse of Drugs Act 2001* (Tas), s 33 empowers the police to pursue suspected drug offenders onto private premises. However, this power is limited to situations of hot pursuit and only applies to suspected drug offenders. Therefore, the common law remains important in relation to where an arrest can be made and an occupier's right to exclude others from land or premises. At common law, the circumstances in which any person may enter private property or premises are:

- where effecting an arrest or where other execution of the King's process justifies entry: *Semayne's case* (1604) 5 Co Rep 91a; 77 ER 194; *Lippl v Haines* (1989) 18 NSWLR 620;
- to prevent a breach of the peace: *Thomas v Sawkins* [1935] 2 KB 249, *Albert v Lavin* [1982] AC 546;
- where the occupant or owner consents: *Halliday v Nevill* (1985) 155 CLR 1;
- if a felony is about to be committed and would be committed, unless prevented *Dowling v Higgins* [1944] Tas SR 31;

- if a felony has been committed and the felon is followed into the premises.⁶⁸

Notwithstanding the common law position, the lack of legislative expression on the subject makes the power to enter to effect an arrest not entirely clear in Tasmania.⁶⁹

6.4.2 Although not binding authority in Tasmania the New South Wales Court of Appeal decision in *Lippl v Haines*⁷⁰ is instructive. In this case the court considered the power of the police to enter premises to effect an arrest pursuant to a statutory arrest power where the statute was silent on the police powers of forcible entry, as is the case in Tasmania. The Court concluded that:⁷¹

unless the power of entry was expressly or impliedly removed by the statute, a person exercising a statutory power to arrest had a power to enter a house against the will of the householder but only if:

- (a) there were reasonable and probable grounds for the belief that the person sought was within the premises; and
- (b) proper announcement was made prior to entry.

6.4.3 The case of *O'Neill*,⁷² which relies heavily on the judgments in *Lippl v Haines*, considered what is a 'proper announcement made prior to entry.' It held that such an announcement is one in which the occupier of the premises is made aware that a police officer claims authority to enter, what that authority is and the occupier is given an opportunity to permit entry without force. Such a notification of 'cause' or 'purpose' that is rejected by the occupier provides the basis for lawful entry without permission to effect an arrest.

6.4.4 In its consideration of where an arrest can be made, the Law Reform Commission of Tasmania recommended in 1977 that:⁷³

... a forcible entry should be permitted where there are reasonable grounds for believing that an offender has committed a serious offence and has taken refuge in premises and entry has been refused after any occupant has been called upon to permit entry. This will give the occupant the opportunity to permit entry without the use of force and, at the same time, will not mean any substantial delay in effecting entry.

Such a statutory power to enter premises to make an arrest would bring Tasmania into line with other Australian jurisdictions. The primary issue to be considered in this regard is whether the police power to enter to effect an arrest should be granted in respect of all arrestable offences as is the case in New South Wales and Queensland or whether it should be limited to serious or indictable offences as is the case under the Commonwealth *Crimes Act*. The New South Wales and Queensland approach has the advantage of certainty, clarity and simplicity. In fact, it has all those advantages that are set out in Part

⁶⁸ Hunter, Cameron and Henning, p. 474-75.

⁶⁹ See *Dowling v Higgins* [1944] Tas SR 32 and *Garwood v Schulz* [1982] Tas R 120. It is also worth noting the case of *Riley v Brooks* [1998] TASSC 7. Although the legislation considered in this case is no longer relevant, the judgment reflected on a police officer's implied licence to enter premises, as distinct from an express licence or consent from an owner or occupant:

'In the absence of a locked gate or some other notice, the occupier of a dwelling house is regarded as having given an implied licence to any member of the public, including a police officer, who has any lawful reason for doing so, to go through the gate and up to the door of the house in order to inquire whether he may be admitted to that house or perform some act on the land. .. That implied licence, in the usual case, to go as far as the door to seek the permission of the occupier to enter, ought not be regarded as having been excluded unless that clearly appears.'

⁷⁰ (1989) 18 NSWLR 620. The court considered the arrest power in s 352 *Crimes Act 1900* (NSW) which has been replaced by the arrest provisions of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

⁷¹ Hunter, Cameron and Henning, p. 475.

⁷² [2001] NSWCCA 193; BC 200102586.

⁷³ Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977, p 9.

4 as accruing to the extinguishment of the distinction between arrestable and non-arrestable offences in defining the scope of police arrest powers. Nevertheless, entry onto private premises without the consent of the occupier constitutes a significant invasion of privacy and occupancy rights. Accordingly, it should only be sanctioned by law where there are compelling reasons for doing so. This consideration has added force if police are granted power of arrest in relation to all offences. However, the Institute is of the preliminary view that the achievement of clarity, certainty and accessibility may constitute such a compelling reason. However, if a broad power of entry is granted wherever the police have power to effect an arrest, this should be accompanied by safeguards like those contained in the Queensland legislation, (see 6.4.1).

Proposals 10 and 11

- 10. The police should have power to enter premises (which expression should include any land, building, structure, motor vehicle, vessel and aircraft) –**
- a) To arrest a person named in a warrant and reasonably believed to be on those premises; and**
 - b) In the absence of a warrant, to arrest a person reasonably believed to have committed an offence and to be there.**
- 11. Forcible entry should be permitted only where proper announcement has been made, that is, where the police have called upon the person/occupier to permit the entry, have stated the grounds of the authority to enter and have given the occupier reasonable opportunity to allow the entry.**

Questions

14. Should the law of arrest be reformed to grant police power to enter private premises without the consent of the occupier to effect an arrest?
15. Should this power extend to all arrestable offences or should it be limited to particular offences? If so, which offences?
16. Should this power be subject to safeguards such as those contained in the *Police Powers and Responsibilities Act 2000* (Qld)?

Part 7

Arrest Warrants

7.1.1 This paper considers three aspects of arrest warrants:

1. the issuing of an arrest warrant;
2. the power of arrest pursuant to a warrant of arrest; and
3. how an arrest pursuant to a warrant of arrest must be executed.

The first aspect, the law relating to the issuing of arrest warrants, is the primary focus of this Part. The second aspect, the power of arrest pursuant to a warrant of arrest, is fairly straightforward, and will be briefly considered at the end of this Part. The third aspect, how an arrest by warrant should be executed, gives rise to the same issues considered in Part 6 and in respect of those matters, reference should be had to that Part of this paper.

Although not as common as arrest without warrant, arrest with warrant is an important aspect of arrest law. In *R v Inland Revenue Commissioners: Ex parte Rossminster Ltd* [1980] AC 952 at 1000, Lord Wilberforce said,

There is no mystery about the word ‘warrant’: it simply means a document issued by a person in authority under power conferred in that behalf authorising the doing of an act which would otherwise be illegal.

The principal purpose of the warrant system is to interpose an independent judicial officer between the actions of investigating officials and the individual citizen. It acts as a protective device. Before any person can be arrested pursuant to a warrant of arrest a warrant must be issued specifically in relation to that person, there being no such thing as a general arrest warrant.

7.2 Issuing arrest warrants

7.2.1 The most common reason for issuing a warrant of arrest is to initiate a criminal prosecution against the arrestee (i.e. because they are suspected of having committed an offence); The primary statutory provision relating to arrest warrants is s 32 of the *Justices Act 1959* (Tas). However, arrest warrants may also be issued for other purposes, for example in order to secure a person’s presence at a court hearing (for example if the person is the subject of a sentencing order or a witness).

7.2.2 Section 32 of the *Justices Act* provides:

When complaint is made to a justice he may –

...

(b) where the complaint is –

- (i) that a person has committed or is accessory to having committed an indictable offence within the State;

- (ii) that a person charged with having committed or with being suspected of having committed an indictable offence on the high seas or in any creek, harbour, haven, or other place in which the Admiralty of England has and claims to have jurisdiction or on land outside the State, of which offence cognizance may be taken by the Supreme Court, is suspected of being within the State; or
- (iii) that a person has committed a simple offence the matter whereof is substantiated before him on oath –

issue his warrant for the apprehension of the person complained against;

...

7.2.3 Arrest warrants are generally issued upon application to a justice of the peace or magistrate. This process has the potential to import a level of transparency, objectivity and independence into the decision to arrest that may sometimes be lacking where a police officer arrests without warrant.

Despite the advantages of arrest pursuant to arrest warrant, anecdotal evidence suggests that arrests without warrant are far more common. This no doubt reflects the practical realities of everyday policing and the nature of investigative processes. It also reflects the fact that police powers to arrest without warrant have been extended to a wide range of offences for which there would be no power of arrest at common law.

7.2.4 The law with respect to arrest warrants in Tasmania is uncertain. In contrast, for search warrants, the *Search Warrants Act 1997* (Tas) acts as a code for the use of search warrants by police. There is also a body of judicial authority dealing with the issue and execution of search warrants (see for example, *MacLeod*,⁷⁴ *George v Rockett*,⁷⁵ *Alister*,⁷⁶ *Stankovich*⁷⁷ and *Hart v Commissioner, Australian Federal Police*.⁷⁸) It is uncertain to what extent the approach adopted in relation to search warrants in these cases applies to arrest warrants. They may, nevertheless, provide persuasive authority on some issues. For example, the role of a justice of the peace in issuing warrants was considered in *MacLeod* and *George v Rockett*. In *MacLeod*, Slicer J held that a justice ‘is exercising both an administrative and judicial function at the time he [sic] is being asked to issue a warrant. . . . His judicial function requires him to exercise his own judgment on the basis of the material placed before him.’⁷⁹ Although His Honour made reference in this case to ‘common law warrants of apprehension (which also require the holding of a belief and suspicion),’⁸⁰ arrest warrants were not considered in any detail. The nature of the ‘judicial function’ in relation to search warrants was elaborated upon by the High Court in *George v Rockett*,⁸¹ which, in turn, adopted comments from the judgment of Burchett J in *Parker v Churchill*:

The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.⁸²

⁷⁴ (1991) Tas R 144.

⁷⁵ (1990) 170 CLR 104.

⁷⁶ (1984) 154 CLR 404.

⁷⁷ (2004) ACTSC 93.

⁷⁸ (2002) 196 ALR 1.

⁷⁹ (1991) Tas R 144 at para 22.

⁸⁰ *Ibid* at para. 24.

⁸¹ (1990) 170 CLR 104.

⁸² (1985) 9 FCR 316 at 322.

7.2.5 While it may be possible to conclude from these cases that it is necessary for the informant to produce to the justice sufficient material to justify the issue of a warrant, s 32 of the *Justices Act* does not explicitly impose this requirement. Similarly, there is no legislative imperative for a justice 'to exercise his own judgment on the basis of the material placed before him'. In comparison, s 3ZA(1) of the *Crimes Act 1914* (Cth) requires that the 'issuing officer' receive information on oath and an affidavit from the informant setting out the reasons why the warrant is sought, including:

- (b)(i) the reasons why it is believed that the person committed the offence; and
- (ii) the reasons why it is claimed that proceedings by summons would not achieve one or more of the purposes set out in paragraph 3W(1)(b).

Further, the 'issuing officer' is required to satisfy him or herself that there are reasonable grounds for the issue of the warrant and must also specify or record the reasons relied on as justifying its issue. In addition, section 3ZA(1)(b)(ii) requires that the need to issue the warrant be judged according to the same criteria that apply to the making of arrests without a warrant under s 3W of the Act. These criteria include whether proceeding by way of summons would be more appropriate.

7.2.6 In Queensland, under s 203(2) of the *Police Powers and Responsibilities Act 2000* (Qld), an arrest warrant application must be sworn and state the grounds on which the warrant is sought. Under subsection (3) the justice may refuse to consider the application until the police officer gives the justice all the information the justice requires about the application in the way the justice requires. Section 204 states,

the justice may issue an arrest warrant only if satisfied there are reasonable grounds for suspecting--

- (a) that the person has committed the offence; and
- (b) for an offence other than an indictable offence, proceedings by way of complaint and summons or notice to appear for the offence would be ineffective.

7.2.7 The legislation in Tasmania does not set thresholds or standards that police or justices should meet in applying for and issuing arrest warrants. It does not even require that the information provided in order to obtain an arrest warrant be supplied on oath. Accordingly, it would seem to require less accountability and provide fewer safeguards than legislation operating elsewhere, for example, in the Commonwealth and Queensland jurisdictions.

7.2.8 A more rigorous statutory regime for arrest warrants would offer greater accountability and bring Tasmanian law in this regard into line with Commonwealth legislation already operating here. It is also suggested that, like the s 3W of the Commonwealth *Crimes Act 1914*, Tasmanian legislation should specify the criteria that should apply to the issue of an arrest warrant. The desirability of certainty and clarity suggest that the criteria should be the same as those applying to arrest without a warrant. For example, the need to issue an arrest warrant might be judged according to whether it is necessary to:

- Ensure that the person will appear in court;
- Conduct investigative procedures authorized by statute;
- Prevent interference with witnesses;
- Prevent the continuation or repetition of a criminal offence;
- Prevent personal injury or serious damage to property;

- Prevent the fabrication, concealment, loss or destruction of evidence relating to the offence for which the warrant is sought.

7.2.9 The Institute is, therefore, of the preliminary view that legislation dealing with the issue of arrest warrants should specify that the issuing official must satisfy him or herself that there are reasonable grounds for issuing the warrant. The legislation should also require that sufficient information be provided by evidence on oath or affidavit to establish the necessity for the warrant. Further, the criteria for judging the necessity for the warrant should also be set down in the legislation. Finally, the requirements of accessibility and certainty suggest that provisions relating to arrest warrants should be located in the legislation consolidating arrest powers.

7.2.10 A key reason for encouraging arrests under warrants is that such arrests may reduce justiciable disputes downstream regarding wrongful imprisonment or issues of illegally obtained evidence. However, if the process for obtaining arrest warrants is cumbersome or time-consuming, it will act as a disincentive to their use. It may encourage an increase in their use if telephone warrants or warrants issued by other electronic means were available, particularly in urgent cases.

Proposal 12

- 12. That the proposed *Arrest Act* contain provision that the issuing of an arrest warrant requires that –**
- (a) information be provided on oath or affidavit stating the reasons for seeking the arrest warrant;**
 - (b) the justice satisfy him or herself that the stated reasons establish reasonable grounds for issuing the warrant, or that there are other such grounds; and**
 - (c) the judicial officer endorse the affidavit stating the reasons on which s/he relies to issue the warrant.**
 - (d) criteria for the issue of the warrant be specified in the legislation and that those criteria be consistent with those provided for the making of an arrest without a warrant.**

Questions

17. Should the procedure suggested here for the issue of warrants be set out in legislation?
18. Should telephone warrants or warrants by other electronic means be introduced and made available in certain sorts of cases?

7.3 Power of arrest with warrant

In contrast to the proliferation of statutory powers of arrest without warrant, provision concerning the power to arrest pursuant to a warrant of arrest exists only in s 21(2) and (3) of the *Criminal Code*.⁸³

⁸³ Subsections 21(2) and (3) of the Code provide:

- (2) It is lawful for a person who is charged by law with the duty of executing the lawful process of a court, and who is required to arrest or detain another person under such process, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the terms of the process.'
- (3) It is lawful for a person who is charged by law with the duty of executing a lawful warrant issued by any court or justice or other person having jurisdiction to issue it, and who is required to arrest or detain another

The Institute does not propose any changes to the substance of this provision, but does propose that it be relocated to the proposed consolidation of arrest laws.

Proposal 13

13. That the power of arrest pursuant to an arrest warrant currently set down in s 21(2) and (3) of the *Criminal Code* be relocated to the legislation consolidating powers of arrest.

person under such warrant, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the directions of the warrant.

Part 8

Arrest Powers Conferred on Persons Other than the Police

8.1.1 Police have the power to arrest under all current arrest powers in Tasmania. In addition, many arrest powers specifically extend to other nominated people and some extend to any person (ie ordinary citizens). This Part considers how these powers should be accommodated in the proposed consolidating legislation.

8.2 Authorised persons

8.2.1 ‘Authorised’ persons of various agencies have powers of arrest under a number of Acts including:

- Wardens as defined by s 15 of the *Aboriginal Relics Act 1975* (Tas);
- Rangers appointed under s 10 of the *National Parks and Reserves Management Act 2002*(Tas) or under s 8 of the *Nature Conservation Act 2002* (Tas);
- Authorised officers appointed under s 13 of the *Wellington Park Act 1993* (Tas);
- An officer appointed under s 20 of the *Inland Fisheries Act 1995* (Tas);
- Fisheries officers or persons appointed under s 164 of the *Living Marine Resources Management Act 1995* (Tas);
- Naval officers in command of an Australian Defence Force vessel under s 171 of the *Living Marine Resources Management Act 1995* (Tas); and
- Authorised persons defined by s 3 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

Additionally, s 21(2) and (3) of the *Criminal Code* confer arrest powers on anyone lawfully charged by a justice with executing any lawful process or warrant.

The Institute is not aware of the extent to which these arrest powers are used, or to what extent they are viewed as necessary by these agencies. Feedback relating to these two issues would be helpful in considering the necessity for possible reform of this area of the law.

Questions

19. To what extent are arrest powers used by authorised officers (other than police)?
20. To what extent are the arrest powers of such authorised officers viewed as necessary to government agencies?

8.2.2 In the absence of any suggestion or evidence to the contrary, it must be assumed that the arrest powers of authorised persons of government agencies are necessary and so should not be taken away. However, to best realise the potential benefits of consolidation, it is proposed that the arrest powers of authorised persons be included in the consolidation of arrest powers. It is suggested that this be achieved by granting them the power of arrest without warrant on the same grounds as those specified for police (along with the same restrictions) but that those powers be limited to the specified offences for which they currently have the power to arrest. These offences and the relevant authorised persons should be set out in a schedule to the consolidating Act. While this cannot achieve, and it is not desirable that it should achieve, complete uniformity with police powers of arrest, it has the benefit of locating all arrest powers in one statute and providing a uniform basis for their exercise.

Proposal 14

14. That the arrest powers without warrant of authorised persons be included in the Act consolidating arrest powers. It is suggested that those powers be made exercisable on the same grounds as those specified for police (along with the same restrictions) but that they be limited to the specified offences for which the authorised persons currently have the power to arrest. These offences and the relevant authorised persons should be set out in a schedule to the consolidating Act.

Question

21. Should the proposals for including arrest powers of authorised persons in consolidating legislation and standardising those powers be adopted?

8.3 Powers of private citizens to arrest

8.3.1 The *Criminal Code* and the *Police Offences Act* are the principle sources of the powers of arrest of ordinary citizens. Section 27(4)-(8) of the *Code* indicates the circumstances when any person may lawfully arrest someone without a warrant:

- When any person is found committing any crime listed in Appendix A;
- When a crime listed in Appendix B has been committed, and it is believed on reasonable grounds that the person has committed such crime;
- Cases involving breaches of the peace;
- Cases involving loitering by night; and
- When it is believed on reasonable grounds that a person has committed a crime and the offender is escaping from lawful arrest.

Additionally, s 28 of the *Code* establishes a ‘duty’ on a citizen to assist a police officer ‘in any case where any person is called upon by a police officer to assist him in making an arrest’.

8.3.2 Section 55(3) of the *Police Offences Act* empowers any person to arrest someone found offending against any provision of the *Police Offences Act* if such offence involves:

- Substantial injury to the person of another;
- Serious danger of such injury;
- Loss of any property of the person so arresting, or of any person by whom he or she is authorised to affect the arrest, or loss of any property of which the person arresting has charge;
- Serious injury to any property; or
- Injury to the property of a public authority.⁸⁴

8.3.3 Other legislation also confers powers of arrest on special categories of private citizens in specific situations. The following persons have special arrest powers:

- Persons acting as a surety for a person on bail and bound by a recognisance pursuant to s 7(5) of the *Bail Act 1994* (Tas);
- Persons in command of an aircraft within the meaning of s 27(10) and (11) of the *Criminal Code*;
- A second-hand dealer, pawnbroker or an employee of such person to whom any stolen goods are offered for sale under s 15 of the *Second-hand Dealers and Pawnbrokers Act 1994* (Tas); and
- Plaintiffs owed a sum of money by order or judgment of a Court within the meaning of the *Debtors' Act 1870* (Tas).

8.3.4 Citizens' powers of arrest derive from common law rights of self-protection and protection of property and while such powers are infrequently used, there appear to be no compelling reasons for extinguishing them. However, as the discussion here shows, at present those powers are constituted according to a variety of formulations. As with police powers of arrest, this reduces the clarity, certainty and comprehensibility of the law. Accordingly, it may be argued that they should be rationalised and standardised. However, such standardisation may have the affect of expanding citizens' powers of arrest. In Victoria, for example, s 548 of the *Crimes Act 1958* (Vic) permits any person, whether a police officer or not, to arrest someone he or she *finds committing* an offence where he or she believes that it is necessary to do so to ensure the appearance of the person before a court; to preserve public order; to prevent the continuation or repetition of the offence; or for the safety and welfare of a member of the public or the offender. Private citizens are not granted powers of arrest co-extensive with police powers, which permit arrest where a person is reasonably believed to *have committed* an offence but their powers of arrest do extend to all offences. A different approach is taken by the Commonwealth *Crimes Act 1914*, s 3Z, which limits the powers of arrest of private individuals to indictable offences and then only to circumstances where the arrestor believes on reasonable grounds that proceeding by way of summons would not achieve one of the purposes set out in s 3W(1)(b) of the Act. The Institute has presently no firm view concerning whether citizens' powers of arrest should be standardised or, if so, according to which model. Both the legislative models considered here limit private citizens' powers of arrest in some way. Under the Victorian model, that power has a temporal limitation – the arrestor must find the arrestee *committing* an offence. The Commonwealth model limits the power to indictable offences. There are sound reasons for arguing that the Commonwealth model might be legitimately deployed in relation to State offences because that Act (and accordingly, that model) already operates here. The Institute would welcome contributions on this issue – whether citizens' powers of arrest should be rationalised and placed on a standardised footing and if so what form that standardisation should take.

⁸⁴ Section 38A(4) of the *Police Offences Act 1935* also gives any person a power to arrest when a person is making off or attempting to make off without payment when payment is required on the spot.

Duty to arrest

8.3.5 Section 27(4) of the *Criminal Code* provides that it is the *duty of any person* to arrest without warrant any person found committing an Appendix A crime. A further duty is imposed by s 28 on private citizens to arrest where they are called upon by a police officer to assist him or her in making an arrest. The duty of private citizens to arrest is more limited than that of police officers. Section 27(9) of the Code provides that in *every case* where it is lawful for a police officer to arrest any person it is his or her duty to do so. In reality, however, the duty imposed by s 27(9) is, in the words of Lord Diplock, one of ‘imperfect obligation’.⁸⁵ It is well recognised that the police have a broad discretion in the exercise of their arrest powers.⁸⁶ It may be for this reason that most modern legislative provisions relating to general police powers of arrest do not impose a duty on police to exercise those powers.⁸⁷ Further, as detailed in Part 4, many modern statutory regimes seek to limit the exercise of police arrest powers by stipulating criteria for their use and specifically or impliedly encouraging the use of alternative measures to gain an offenders’ attendance at court.

In 1977 the Law Reform Commission of Tasmania considered the question of whether citizens should have a duty to arrest and concluded that such a duty should only be imposed on private citizens in the circumstances like those set down in s 28 of the Code. The Commission made the following comments about this matter:

We think that it should be ‘lawful’ for a private citizen to arrest a person without a warrant under certain circumstances but that it should not be made his ‘duty’ to do so unless called upon by a police officer to assist him in making an arrest. Having regard to the present social conditions and the low incidence of private arrests, it seems to us to be unrealistic to impose a ‘duty’ of arrest upon a private citizen where he is not asked by a police officer to assist.⁸⁸

8.3.6 The preliminary view of the Institute is that it supports this view. The Institute, for reasons of greater consistency and understanding amongst citizens, is also of the view that the powers of arrest of private citizens should be set out in the proposed legislation consolidating powers of arrest. It is also recommended that those powers be rationalised and standardised.

Proposal 15

15. That private citizens’ current powers of arrest be incorporated into legislation consolidating arrest powers. That the duty of private citizens to make an arrest be limited to the situation where a police officer calls upon them to provide assistance in the making of an arrest.

Question

22. Should the present position with respect to the power of private citizens to arrest be altered as proposed?
23. Should citizens’ powers of arrest be rationalised and standardised in order to reduce uncertainty and inconsistency and to achieve greater accessibility? If so what form should this take?

⁸⁵ *Albert v Lavin* [1982] AC 546 at 565.

⁸⁶ See for example, *Wright v McQualter* [1970] 17 F.L.R. 305; *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118; *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 3)* [1973] 2 W.L.R. 43; *R. v. McAulay* (1979) 41 F.L.R. 267; *Innes v. Weate* [1984] Tas. S.R. 14.

⁸⁷ See for example, the arrest provisions in the *Police Powers and Responsibilities Act 2000* (Qld); the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the *Crimes Act 1958* (Vic) and the *Crimes Act 1914* (Cth).

⁸⁸ Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977, p 8.

Part 9

Alternatives to Arrest

9.1 Introduction

9.1.1 In Tasmania, it is open to the police to proceed by summons rather than arrest. A summons is a court order requiring a person to appear in court on a specified date and at a specified time.⁸⁹

9.1.2 Arrest and summons constitute two separate ways to initiate criminal proceedings against a suspect. The two processes are suited to different circumstances, though they may overlap. Arrest is an intrusive and relatively expensive procedure. However where it is imperative that the suspect be apprehended immediately, or where the suspect may be unlikely to appear in court of their own volition, arrest may be the most appropriate way to initiate criminal proceedings. In contrast, proceeding by way of summons, though currently more time consuming for investigating officials, is less intrusive to the suspect. Thus, proceeding by way of summons may be the more appropriate course where time is not a paramount consideration and there is no reason to think the suspect will not appear in court in accordance with a summons.

9.2 Current law and procedure

9.2.1 The process⁹⁰ for obtaining a summons is relatively cumbersome. It requires that a complaint (the formal document commencing all criminal proceedings) be laid before a justice accompanied by an application for a summons. The justice may only issue a summons if satisfied that there are reasonable grounds for doing so. The time expended in the administrative process of making a complaint and the judicial process of determining the application, makes the summons procedure far less attractive to police officers than arrests, which can be effected in an instant.

Current Policy

9.2.2 The Tasmania Police Service Manual⁹¹ states that ‘it is the policy of Tasmania Police that members should only arrest in cases where proceedings by summons would not be an appropriate means of ensuring a person’s appearance before a court’. To some extent this policy is supported by s 55(2) of the *Police Offences Act 1935* (Tas), which requires a police officer to effect an arrest in the circumstances there stipulated ‘*unless* he [sic] has reasonable grounds for believing that the purposes of this Act, or of the Act conferring such power, as the case may be, will be adequately served by

⁸⁹ A summons may also be issued as a means of ensuring witnesses appear in court.

⁹⁰ See s 32 *Justices Act 1959* (Tas).

⁹¹ This document indicates police policy and training but has no legislative force (see Appendix B).

proceeding against the offender by summons.⁹² However, the Institute is of the view that encouraging the use of alternatives to arrest requires stronger measures than s 55 provides.

9.2.3 In Part 4 of this Issues Paper it was suggested that greater encouragement to use alternatives to arrest might be achieved if exercise of the power to arrest were restricted by the provision of statutory criteria defining when an arrest may be made and expressly excluding the making of an arrest unless one or more of those criteria are satisfied. These criteria should include exclusion of the possibility of proceeding in an alternative manner to arrest. Thus, in situations where a summons is more appropriate than an arrest, any arrest made may be considered unlawful as not fulfilling the legislative criteria.

Proposal 16

16. That the consolidated power of arrest without warrant be restricted to situations where the police officer has reasonable grounds to believe that proceeding by way of summons would not be appropriate in the circumstances.

9.3 Attendance notices or notices to appear

9.3.1 In recognition of the fact that the summons process is currently cumbersome and that this operates as a disincentive to its use, the Institute proposes that a faster and easier process be introduced, which, like arrest, can be carried out on-the-spot. This process would be based on the 'notice to appear' system that has been introduced in other Australian jurisdictions (see for example, the *Criminal Procedure Act 1986* (NSW), Part 2, Chapters 3 & 4, ss 47- 52 and ss 172-177; the *Police Powers and Responsibilities Act 2000* (Qld), ss 214-221 and the *Police Administration Act* (NT), s 133B). There is evidence that these simplified procedures are having an impact on police practices.⁹³

9.3.2 Accordingly, where a police officer finds someone committing or believes on reasonable grounds that a person has committed an offence and there are no reasons to believe that that person will not appear at court to answer a charge, the officer should have the power to issue an on-the-spot attendance notice to that person to appear at court at the time and place specified in the notice. Such a procedure is similar to that involved in the issuing of on-the-spot infringement notices by the police for some traffic offences.⁹⁴ It would eliminate the delays and paperwork involved in applying for a summons and would also eliminate the need for obtaining the services of a justice in the initiating process. It also obviates separate service of the summons. The procedure provided in Part 5 of the *Police Powers and Responsibilities Act 2000* (Qld) is illustrative. Section 214(2) of that Act empowers

⁹² [emphasis added].

⁹³ The Queensland Criminal Justice Commission report, *Police Powers in Queensland: Notices to Appear* (1999) found that before the introduction of notices to appear, 86% of criminal proceedings in Queensland were initiated by way of arrest, with only 14% being initiated by way of summons. In contrast, in the six months after the introduction of notices to appear as many as 50% of all proceedings were commenced by notice to appear, with 45% being initiated by arrest and 5% by summons. However, the Queensland Criminal Justice Commission, *Police Powers in Queensland; Findings from the 1999 Defendants Survey* (2000) also found that a large proportion (21%-27%) of those issued with notices to appear had also been arrested suggesting that notices to appear are not necessarily being used as an alternative to arrest to reduce the arrest rate of suspects. See Hunter, Cameron and Henning, p. 426-27.

⁹⁴ See for example s 43H *Traffic Act 1925* (Tas).

a police officer to issue and serve a notice to appear on a person whom the officer reasonably suspects has committed or is committing an offence. Under s 215(1), a notice to appear form must--

- (a) state the substance of the offence alleged to have been committed; and
- (b) state the name of the person alleged to have committed the offence; and
- (c) clearly state whether the person was, at the time of the alleged offence, an adult or a child; and
- (d) require the person to appear before a court of summary jurisdiction in relation to the offence at a stated time and place; and
- (e) be signed by the police officer serving the notice to appear.

Before the defendant is required to appear at court under the notice, the notice must be lodged with the clerk of the court. The legislation gives a notice to appear equivalent status to a summons. Of course, this procedure will only be suitable in those circumstances where proceeding by summons would also be appropriate. It will not apply, for example, where the offence in question is of a serious nature or involves injury to a person or serious injury to property or the likelihood of such injury.

9.4 Conclusion

9.4.1 While the policy framework within which the police currently operate requires them to employ arrest as a method of last resort to achieve the attendance of a defendant at court, the present, alternative process of the summons cannot be characterised as offering incentives to comply with this policy. Accordingly, the preliminary view of the Institute is that a simplified process be made available to the police: that they be empowered to issue on-the-spot attendance notices where appropriate in preference to proceeding by summons or arrest.

Proposal 17

17. That a process for the police to issue on-the-spot attendance notices be enacted similar to that contained in Part 5 of the *Police Powers and Responsibilities Act 2000 (Qld)*.

Questions

25. Do you think the current summons procedure in Tasmania warrants reform? Should a process like the attendance notice system be implemented as an alternative method of securing the attendance of a defendant in court?

Appendix A –

Tasmania Law Reform Commission (Proposed) Arrest and Search Act (1977), Parts I and II

PART I - PRELIMINARY

1. (1) This Act may be cited as the *Arrest and Search Act 1977*.

(2) This Act shall commence on a date to be fixed by proclamation.
2. The Acts that are specified in the First Schedule are repealed to the extent indicated therein.

Interpretation

3.

"arrest" means to detain and keep in custody for the purpose of bringing the arrested person before a court;

"indictable offence" means an offence which may be prosecuted upon indictment before the Supreme Court;

"offence" means any breach of the law for which a person may be punished summarily or otherwise and includes an indictable offence;

"premises" includes land, buildings, vehicles, vessels, or aircraft;

"simple offence" means any offence (indictable or not) punishable, on summary conviction before justices, by fine, imprisonment, or otherwise, etc.

PART II - ARREST

4. Any person may arrest, without warrant, any person—
 - (a) whom he finds committing any offence which involves—
 - (i) substantial injury to the person of another;
 - (ii) serious danger of such injury;
 - (iii) loss of, or serious injury to, any property; or
 - (iv) forcible and unlawful entry to any premises;
 - (b) whom he sees committing a breach of the peace;
 - (c) whom he finds lying or loitering in any place by night under such circumstances as to afford reasonable grounds for believing that he has committed or is about to commit a crime;
 - (d) whom he believes on reasonable grounds to have committed a crime and to be escaping from, and to be freshly pursued by, some person whom he believes on reasonable grounds to have authority to arrest him for that offence.

(Cf. section 27 *Criminal Code* and section 55(3) *Police Offences Act*)

5.

- (1) Subject to this section, any police officer may arrest, without warrant, any person—
 - (a) whom he finds committing an offence specified in the Second Schedule;
 - (b) whom he believes on reasonable grounds to have committed such an offence.
- (2) Notwithstanding subsection (1), a police officer shall arrest a person only if he believes on reasonable grounds that it is not appropriate to proceed against such person by way of summons.
- (3) Any police officer who believes on reasonable grounds that a person has committed an offence, other than an offence specified in the Second Schedule, may call upon that person to stop and give his name and address. If such person fails to do so, such officer may then arrest him without warrant.
- (4) In this section, an attempt to commit an offence is itself an offence.
(Cf. section 27 *Criminal Code* and sections 55 and 55A *Police Offences Act*)

6.

- (1) Where a person other than a police officer arrests a person without warrant, such arresting person shall take the arrested person before a police officer or a justice without delay to be dealt with according to law.
- (2) Where the arrested person is taken before a police officer, such police officer shall receive him into his custody and may thereupon—
 - (a) release him conditionally or unconditionally; or
 - (b) retain him in custody and take him before a justice as soon as reasonably practicable to be dealt with according to law.
(Cf. section 56 *Police Offences Act* and section 303 *Criminal Code*)

7.

- (1) When complaint is made to a justice he may—
 - (a) issue a summons to the person complained against;
 - (b) where the complaint is—
 - (i) that a person has committed or is accessory to having committed an indictable offence within the State;
 - (ii) that a person charged with having committed or with being suspected of having committed an indictable offence on the high seas or in any creek, harbour, haven, or other place in which the Admiralty of England has and claims to have jurisdiction or on land outside the State, of which offence cognizance may be taken by the Supreme Court, is suspected of being within the State; or
 - (iii) that a person has committed a simple offence the matter whereof is substantiated before him on oath, issue his warrant for the apprehension of the person complained against; or
 - (c) where the person complained against is imprisoned for any other cause, issue his warrant to the gaoler to bring up the body of that person as often as is required for the proceedings upon the complaint, and the gaoler shall obey the warrant.
- (2) A justice shall not issue a warrant under subsection (1) unless—
 - (a) the complaint is supported by statutory declaration by or on behalf of the complainant specifying the reasons for seeking the warrant; and

(b) he is satisfied that there are reasonable grounds for issuing the warrant.

(Cf. section 32 *Justices Act*)

8. A person has a duty to assist a police officer in making an arrest, when called upon to do so, unless he knows the arrest to be unlawful.

(Cf. section 28 *Criminal Code*)

9.

(1) It is lawful for a police officer or the person in command of an aircraft to arrest without warrant on board that aircraft a person whom he finds committing, or attempting to commit, or whom he believes on reasonable grounds to have committed, or to have attempted to commit, a crime under Chapter XXXIA of the Criminal Code.

(2) It is lawful for any person to assist the person in command of an aircraft to arrest without warrant any other person on board the aircraft unless he knows the arrest to be illegal.

(Cf. section 27 *Criminal Code*)

10.

(1) Where a police officer is proceeding lawfully to arrest a person, with or without warrant, and the person sought to be arrested takes to flight in order to avoid arrest, it is lawful for the police officer, and for any person lawfully assisting him, to use such force as may be reasonably necessary to prevent the escape of the person sought to be arrested.

(2) Where a police officer has lawfully arrested any person, it is lawful for him to use such force as he believes on reasonable grounds to be necessary to prevent the escape or rescue of the person so arrested.

(3) This section shall not authorize the use of force which is intended or is likely to cause death or grievous bodily harm, except in a case where the person sought to be arrested is suspected on reasonable grounds of having committed any of the offences specified in the Third Schedule, nor until the person sought to be arrested has been called upon to surrender.

(Cf. section 30 *Criminal Code*)

11.

(1) It is lawful for any person who is proceeding lawfully to arrest another person to use such force as may be reasonably necessary to prevent his escape.

(2) This section shall not authorize the use of force which is intended or is likely to cause death or grievous bodily harm.

(Cf. section 31 *Criminal Code*)

12.

(1) Where any person has lawfully arrested another person it is lawful for him to use such force as he believes on reasonable grounds to be necessary to prevent the escape or rescue of the person arrested.

(2) This section shall not authorize the use of force which is intended or is likely to cause death or grievous bodily harm.

(Cf. section 32 *Criminal Code*)

13.

- (1) A warrant of arrest issued by a justice shall remain in force until it is executed or withdrawn.
- (2) A warrant to arrest a person charged with an offence may be executed by a police officer notwithstanding that it is not in his possession at the time, but the warrant shall, on the demand of the person arrested, be shown to him as soon as reasonably practicable.
- (3) It is the duty of the person arresting another, whether with or without a warrant, to give notice, if practicable, of the process or warrant under which he is acting or of the cause of the arrest.
- (4) A failure to fulfil either of the aforesaid duties shall not of itself deprive the person executing the process or warrant or making the arrest, or his assistants, of protection from criminal responsibility, but shall be relevant to the question whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.

(Cf. section 301 *Criminal Code*)

14. It is the duty of every police officer to arrest any person against whom an accusation has been made to him of having committed an indictable offence for which he may be arrested without warrant, unless he has reasonable grounds for believing such accusation to be without foundation.

(Cf. section 302 *Criminal Code*)

15.

- (1) Subject to this section, a police officer may, without warrant, stop any vehicle, vessel or aircraft or enter any premises for the purpose of—
 - (a) arresting any person named in a warrant of arrest and reasonably believed to be there; or
 - (b) in the absence of a warrant, accomplishing the lawful arrest of a person reasonably believed to be there and to have committed an offence specified in the Second Schedule for which a summons is inappropriate.
- (2) Force shall not be used to enter premises until any occupant has been called upon to permit entry and such entry has been refused.

Appendix B –

Part 7.1 of the Tasmania Police Service Manual

The Tasmania Police Service Manual (including Standing Orders and Instructions) is issued pursuant to Reg. 9 of the *Police Regulations 1974*. The Manual was issued on 10 December 1999. This part of the Manual was amended on 1 June 2001. It has been in force since 14 June 2001.

7.1 ARREST - AMENDED

This section contains the following topics:

7.1.1 General - AMENDED

7.1.2 Aborigines

7.1.3 Arrest for Extradition

7.1.4 Children

7.1.5 Commonwealth Offences

7.1.6 Defence Force Personnel

7.1.7 Diplomatic Immunity

7.1.8 Search Procedures on Arrest - AMENDED

7.1.9 Identification

7.1.10 Operational Information Services Checks

7.1.11 Married Persons in Property Disputes

7.1.12 Mentally Disturbed Persons

7.1.13 Mistaken Cases

7.1.14 Non-Australian Citizens

7.1.15 Offensive Language

7.1.16 Persons

7.1.17 Restraint Order Breaches

7.1.18 Suspects Under Surveillance

7.1.19 Unconscious Persons

7.1.20 Uncorroborated Statements of Persons in Custody

7.1.1 GENERAL

POLICY

It is the policy of Tasmania Police that members should only arrest in cases where proceedings by summons would not be an appropriate means of ensuring a person's appearance before a court.

7.1.1.1 DEFINITION

(1) An 'arrest' is the act of taking another person into lawful custody for some specified offence (indictable or not), or pursuant to a warrant issued by a justice.

7.1.1.2 DISCRETION

(1) In many cases, members will have discretion whether or not to effect an arrest. As a general rule, an arrest may be appropriate in the following circumstances:

- for serious offences;
- to prevent the continuation or repetition of the offence, or the commission of another offence;
- to preserve the safety or welfare of any person, or the harassment of witnesses;
- to prevent the fabrication, concealment, loss or destruction of evidence; and
- to enable forensic material to be obtained if in accordance with the *Forensic Procedures Act 2000*.

7.1.1.3 DUTY OF CARE

(1) A member involved in the arrest, incarceration or supervision of a person in custody has a legal duty of care to that person and may be held responsible for the death or injury of the person caused, or contributed to, by a breach of that duty.

(2) A legal duty of care applies at all times from the time a person first comes into police custody until the time of that persons safe discharge.

7.1.1.4 ARREST WITHOUT WARRANT

(1) Powers of police to arrest without warrant are contained in a variety of legislation.

(2) Members should be conversant with these powers and:

- be able to justify their actions;
- know the nature and legal aspects of the offence involved; and
- ensure the legal ingredients are present to justify the charge.

7.1.1.5 ARREST ON WARRANT

(1) A warrant for arrest is an order made by a Justice which police are bound to obey.

(2) Members should exercise discretion in relation to the proper time, place and manner of execution.

[refer also 8.8.2 - ARREST WARRANTS]

7.1.1.6 METHOD OF ARREST

(1) Members effecting an arrest should:

- use an absolute minimum of force;

[refer 10.7 - USE OF FORCE]

- identify themselves as a police officer (if in plain clothes);
- lay hands on or touch the arrested person;
- advise the arrested person that they are under arrest, and of the grounds of arrest, and
- produce a warrant if applicable;

[refer also 8.8 . WARRANTS]

- be as inconspicuous as possible, and not unnecessarily delay the decision to arrest; and
- treat persons under arrest with courtesy, and afford no justification for allegations that their treatment was anything other than civil and reasonable.

(2) The power of arrest applies to police officers at all times, irrespective of whether a member is on or off duty, or the nature of the duty being performed.

(3) When members approach or arrest a person, they should be aware of the possibility that the person may be carrying a knife, syringe or other dangerous weapon and that a danger of being injured exists to the arresting officer and other members involved.

ORDER

A member who:

- arrests a person and conveys that person to a police station; or
- arrests a person at a police station;

shall bring that person before a Custody Officer as soon as practicable and place them into the custody of the Custody Officer.

[refer *Criminal Law (Detention & Interrogation) Act*, & Procedural Guidelines for Custody Officers (issued from Commissioner's Office)].

7.1.1.7 ASSISTANCE FROM THE PUBLIC

(1) Members of the public can be legally obliged to assist police to arrest an offender if called upon and requested to do so.

[refer *Criminal Code*, ss. 28 & 117, & *Police Regulation Act*, s. 37]

(2) No particular form of words is required, but the requesting officer should:

- identify themselves as a police officer (even if in uniform);
- advise the person from whom assistance is sought that they are acting in the lawful execution of their duty; and
- if necessary, inform the person it is an offence for them to refuse to assist.

7.1.1.8 ARRESTS BY PRIVATE PERSONS

(1) Members have a duty to receive into custody any person arrested by a private person and charged with an offence, unless:

- proceedings by summons would be more appropriate; or
- the offence is of a trifling nature.

(2) The person who made the arrest should be requested to accompany the receiving member to a police station and, where appropriate, to sign the Charge Book.

(3) Should such person refuse to accompany the member or sign the Charge Book, the receiving member should:

- obtain sufficient details to proceed by summons; and
- not detain the arrested person unless there are reasonable grounds for doing so. [refer *Police Offences Act*, s. 56(2), & *Criminal Code*, s. 303].

7.1.2 ABORIGINES

POLICY

It is the policy of Tasmania Police that, unless exceptional circumstances exist or statutory requirements require otherwise, Aborigines should be admitted to bail at the first opportunity and not be placed in cells.

7.1.2.1 SPECIAL VIGILANCE AND PRECAUTIONS

(1) It is believed that some Aborigines affected by alcohol, drugs or incarceration have a predisposition to suicide or self injury. Members should exercise special vigilance and precautions to ensure the safety and well being of Aborigines should there be a need to detain them in police custody.

7.1.2.2 DETENTION AND INTERROGATION

(1) In the event that it becomes necessary to detain and/or interview an Aborigine, members should make every effort to:

- notify a relative or friend and the Aboriginal Legal Service (ALS);
- if attendance of any of those notified is requested, take all reasonable steps to make the necessary arrangements; and
- advise the District Aboriginal Liaison Officer or Tasmania Police Aboriginal Liaison Co-ordinator of significant matters.

(2) Members should not hesitate to seek the advice or assistance of the Aboriginal Legal Service. The Service can be expected to respond positively and helpfully. Contact telephone numbers should be displayed in all stations, Charge Rooms and Watch-Houses.

(3) If an Aborigine requests that the ALS not be provided with their personal details, members should respect that request, subject to the requirements of paragraph (4), and make an appropriate record thereof. The Aborigine should be requested to sign the record.

(4) In cases referred to in paragraph (3), members should, as soon as practicable, advise the ALS that an Aborigine has been arrested and detained, and that the Aborigine has requested non-intervention by the ALS. The ALS should be provided with details of the Aborigine's sex, age, physical condition and offence/s.

7.1.2.3 ABORIGINAL IDENTITY

(1) Members should not assume the aboriginality of a person. A person in custody should be asked specifically of their Aboriginality.

7.1.2.4 OFFENSIVE LANGUAGE OFFENCES

[refer 7.1.15 . OFFENSIVE LANGUAGE]

7.1.2.5 MULTIPLE CHARGE SYNDROME

(1) The Royal Commission into Aboriginal Deaths in Custody recommended that the Attorneys-General of each State monitor the charging of Aboriginal people with multiple charge syndrome, ie, indecent, abusive language or similar, coupled with assault, obstruct or resist police.

(2) Inspectors and Supervisors are directed to monitor the arresting and charging of persons for that sequence of offences or similar offences within their span of control.

(3) Whenever a person is charged with those offences, a sergeant of police is to be notified and should where practicable be present at the charging to ensure the propriety of the charging procedures in relation to the offences.

7.1.2.6 CULTURAL EVENTS

(1) The Royal Commission into Aboriginal Deaths in custody recommended that the practice of warrant checks at cultural gatherings cease.

(2) Accordingly, members are directed not to conduct warrant checks at cultural events, including activities such as Aboriginal sporting days, except in certain circumstances.

(3) The arrest on warrant of persons attending cultural gatherings is not to occur unless the warrant to be executed relates to a crime, is not of a trivial nature and cannot reasonably be delayed to a more appropriate time or place.

7.1.3 ARREST FOR EXTRADITION

[refer 8.4 . EXTRADITION]

7.1.4 CHILDREN

POLICY

It is the policy of Tasmania Police that members should only arrest children in situations where it is believed that proceedings against the child by way of caution, diversionary conferencing or summons would be ineffective, or where necessary to comply with legislative requirements.

7.1.4.1 DEFINITION

(1) A 'child' means a person who has not attained the age of seventeen (17) years.

[refer *Child Welfare Act*, s. 3]

7.1.4.2 NOTIFICATION

ORDER

Members who arrest a child shall immediately advise their supervisor, Divisional Inspector or Duty Officer, of the circumstances

[refer 7.2.1 . CHILDREN IN CUSTODY and 9.1 - CHILDREN]

7.1.5 COMMONWEALTH OFFENCES

(1) Under the Commonwealth *Crimes Act*, police may arrest any person without warrant if they have reasonable grounds to believe that the person has committed, or is committing an offence under the *Crimes Act*, and that proceedings against the persons by summons would not be effective.

7.1.6 DEFENCE FORCE PERSONNEL

(1) When a member of any defence force, including any sailor, soldier or airman of a Visiting Force, is arrested, the Officer in Charge of the police station or office concerned should immediately cause the member's unit or ship to be informed of the circumstances.

[refer also 17.3.2 - OFFENCES ON DEFENCE ESTABLISHMENTS]

7.1.7 DIPLOMATIC IMMUNITY

7.1.7.1 GENERAL

(1) Under Australasian law and international conventions, members of foreign diplomatic missions, consular posts and international organisations, must be accorded certain rights, privileges and immunities by police and the courts.

(2) Only such officials who have been officially accredited by the Department of Foreign Affairs and Trade (DFAT) are entitled to privileges and immunities. Accreditation is evidenced by the issue of coloured identification cards signifying varying degrees of diplomatic immunity.

(3) Immunity is a legal barrier which precludes Australian Courts from exercising jurisdiction over cases involving persons who enjoy it. This is not, however, a blanket authority or excuse to disregard the law or lawful directions of a police officer.

(4) It is essential that all diplomats, their families and staff are treated with the highest respect and members should ensure their freedom and dignity are not impinged upon.

ORDER

Members shall not arrest or detain any person who enjoys full diplomatic immunity.

[refer also 7.1.7.7. RANDOM BREATH TESTING]

{Parts 7.1.7.2 - 7.1.7.10 has not been reproduced for the purposes of this appendix.}

7.1.8 SEARCH PROCEDURES ON ARREST

7.1.8.1 GENERAL

(1) Section 588 of the *Police Offences Act 1935* permits the searching of persons arrested where it is believed on reasonable grounds that it is necessary.

(2) It also allows the retention of weapons and clothing under certain circumstances.

(3) A police officer may only use such force as is reasonably necessary for these purposes.
[refer *Police Offences Act 1935*]

7.1.8.2 FORENSIC PROCEDURES ON CHARGING

(1) When a person aged 15 years or older is charged with a "Serious Offence" contained in the *Forensic Procedures Act 2000*, Non-Intimate samples can be ordered by any Police Officer.

(2) Apart from those procedures which are required for an investigation, members should obtain fingerprints, photographs and a DNA sample from the person.

(3) The primary method for DNA sampling is the buccal swab.

(4) Samples can be obtained from persons under 15 years with the consent of the person and parent, or on the authorisation of a Magistrate.

(5) Further details can be obtained by referring to the Forensic Procedures Act Resource Guide.

[refer *Forensic Procedures Act 2000* & Forensic Procedures Act 2000 Resource Guide]

7.1.8.3 DESTRUCTION OF RECORDS

(1) The *Forensic Procedures Act 2000* requires that material taken, and information derived from forensic material is to be destroyed in certain circumstances.

(2) When the provisions of the Act require this, the material and information are to be destroyed as soon as practicable.

(3) In certain cases, the Act only requires that material and information to be destroyed, if it's only use is for the identification of that person.

7.1.9 IDENTIFICATION

(1) Members should exercise caution when arresting a person:

- whose identity is not personally known; or
- where there is a doubt as to the identity of such person.

(2) All claims of mistaken identity should be thoroughly investigated.

[refer also 7.1.2.3 . ABORIGINAL IDENTITY]

7.1.10 OPERATIONAL INFORMATION SERVICES CHECKS

(1) Prior to releasing a person from custody, members are to ascertain from Operational Information Services System whether:

- there is an outstanding warrant for their arrest; or
- they are otherwise wanted or enquired after.

(2) Prior to a person being placed in a cell, members are to check in the Operational Information Services System for any warnings recorded in respect of that person.

[refer also 12.1.8 . ARRESTED PERSONS CHECK]

7.1.11 MARRIED PERSONS IN PROPERTY DISPUTES

(1) Members should avoid arresting married persons on a charge of stealing, receiving, or injuring the property of their spouse.

(2) If advice is required, members should consult their Supervisor and, where necessary, contact their Divisional Inspector or Duty Officer.

7.1.12 MENTALLY DISTURBED PERSONS

(1) Where there is any reason to believe that a person arrested for any offence is suffering from a mental disorder, particulars should be brought to the notice of the court so that appropriate action may be taken to have the person remanded for medical observation.

(2) In appropriate cases, members should take action or seek medical advice or assistance prior to an arrested person being taken to court.

[refer also 7.2.9 . MENTALLY DISTURBED PERSONS (CUSTODY AND TRANSPORT)]

7.1.13 MISTAKEN CASES

(1) In the event of a person establishing their innocence after being taken into custody, such person should be released unconditionally.

[refer *Criminal Law (Detention and Interrogation) Act*, s. 4(1)]

(2) Members should do everything possible to allay any sense of grievance, and inform their Supervisor of the circumstances as soon as practicable.

(3) A report outlining the circumstances of the incident should also be submitted.

7.1.14 NON-AUSTRALIAN CITIZENS

7.1.14.1 GENERAL

(1) Members have the power to arrest non-Australian persons for any offence committed against any State or Federal Act for which such a power would normally exist. Once an arrested person has been identified as a non-Australian citizen, the Protective Services (PS)

should be immediately notified. PS will then notify the Department of Immigration and Multicultural Affairs.

[refer also 7.1.7 . DIPLOMATIC IMMUNITY]

(2) When a non-Australian citizen is arrested, the appropriate consular representative should be allowed access to the arrested person.

(3) The right of access and communication may be temporarily denied if the provisions of the *Criminal Law (Detention and Interrogation) Act* are applied.

[refer Criminal Law (Detention and Interrogation) Act, s. 6(3)]

ORDER

Members shall not make direct contact with Embassies or Consular Offices.

7.1.14.2 FINGERPRINTING OF NON-AUSTRALIAN CITIZENS

(1) Where a person is in custody as an unlawful non-Australian citizen or held for removal or deportation under the provisions of the Migration Act, they are to be fingerprinted only at the express request of an officer of the Department of Immigration and Multicultural Affairs.

[refer *Migration Act* s. 258]

7.1.15 OFFENSIVE LANGUAGE

(1) The Royal Commission into Aboriginal Deaths in Custody recommended, in part, that the use of offensive language in circumstances of intervention by police should not normally be occasion for arrest or charge.

(2) Members are reminded that in the exercise of their discretion, they should not arrest or charge members of the public for offensive language type offences except when the intervention was not initiated by them, and except when the exchange in which the language is clearly open to having been heard by members of the public.

(3) Supervisors are directed to monitor the arresting and charging of persons by police officers to ensure adherence to the above principle.

[refer also 7.1.2.5. MULTIPLE CHARGE SYNDROME]

7.1.16 PERSONS BOUND BY RECOGNISANCE

(1) A person acting as surety for a person on bail, and bound by a recognisance pursuant to section 7 of the *Bail Act*, may arrest their principal if they believe on reasonable grounds that the person admitted to bail has contravened, or is about to contravene, a condition of bail.

(2) When requested, members are legally obliged to assist persons bound by a recognisance to arrest their principal.

[refer *Bail Act*, s. 26(5)]

7.1.17 RESTRAINT ORDER BREACHES

[refer 2.8 - DOMESTIC VIOLENCE, & 2.31 - RESTRAINT ORDERS]

7.1.18 SUSPECTS UNDER SURVEILLANCE

(1) The arrest of suspects under surveillance should be delayed until there is sufficient available evidence to justify a charge.

(2) Unless urgent or immediate action is required, general duties police should not undertake surveillance of suspects.

(3) If physical or technical surveillance is required, a request for assistance in the prescribed form is to be made to the Detective Inspector, Investigation Support Services, Operations Support, Hobart.

[refer 5.9.2 - PHYSICAL SURVEILLANCE UNIT, & 5.9.3 - TECHNICAL SUPPORT UNIT]

7.1.19 UNCONSCIOUS PERSONS

ORDER

Members who find a person:

- unconscious; or
- not easily aroused;

shall immediately convey, or cause that person to be conveyed, to a hospital or otherwise afford them appropriate medical assistance before they are detained.

Note: This order is to be complied with regardless of whether the person smells of intoxicating liquor and is believed to be drunk and incapable of taking care of themselves.

7.1.20 UNCORROBORATED STATEMENTS OF PERSONS IN CUSTODY

(1) Members should exercise caution before effecting an arrest on the uncorroborated statement of a person in custody.

(2) If possible, the arrest should be delayed until corroboration is available. Members should consult their supervisor or a senior officer for advice.