

TASMANIA
LAW REFORM
INSTITUTE

Custody, Arrest and Police Bail

FINAL REPORT NO 1

MARCH 2003

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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 Law Faculty. 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), Paul Turner (appointed by the Attorney-General), Philip Jackson (appointed by the Law Society), Terese Henning (appointed by the Council of the University) and Mr Mathew Wilkins (nominated by the Tasmanian Bar Association).

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Background to this report

The publication of this final report is made following consultation with the public and participants in the Criminal Justice System. The consultation was performed by the release of an issues paper on this topic in March 2002. The issues paper discussed:

- Part 1: the definition of being in custody under the *Criminal Law (Detention and Interrogation) Act* 1995;
- Part 2: the effect of failing to give reasons for arrest under s 301 of the *Criminal Code*, 1924; and
- Part 3: the granting of police bail under the *Criminal Law (Detention and Interrogation) Act* 1995.

The following people responded to the issues paper:

- | | | |
|----|---------------------------------|---|
| 1. | The Hon Mr Justice Crawford | Supreme Court Judge |
| 2. | Director of Public Prosecutions | Mr Tim Ellis, SC |
| 3. | Mr Craig Mackie | Legal Aid Commission |
| 4. | Mr Peter Maloney | Director of the Office of Legislation Development and Review,
Department of Justice and Industrial Relations |
| 5. | Tasmania Police | Mr Mark Miller
Senior Legal Officer, Legal Services |
| 6. | The Hon Mr Justice Underwood | Supreme Court Judge |

In the writing of this final report we have given detailed consideration to all responses and included many of the suggestions made in our final recommendations.

We again thank these people for taking the time and effort to respond.

This report is also available on the Institute's web page at:

www.law.utas.edu.au/reform

or can be sent to you by mail, fax or email.

A note on Bail:

This paper deals with a very limited aspect of bail – the ability for police to grant bail for indictable offences. The Institute is currently undertaking a separate law reform project looking at the issue of **offending while on bail**. It is intended that a research paper will be released on this topic within the first half of this year. Please contact the Institute if you would like to receive a copy of this research paper.

List of recommendations

Recommendation 1:

That the term 'in custody' in the *Criminal Law (Detention and Interrogation) Act 1995* be extended to include suspects in the company or control of the police who are being or are to be questioned or are otherwise being investigated and:

- (a) who would be arrested if they attempted to leave; or
- (b) in respect of whom there is sufficient evidence to justify a lawful arrest.

Recommendation 2:

That a person being questioned as a suspect about their involvement in the commission of an indictable offence be afforded the following protections regardless of whether they are in custody or not:

- being cautioned;
- being informed of the right to communicate with a friend, relative or lawyer and have questioning delayed for such a person to be present during questioning; and
- being provided with an interpreter when required.

Recommendation 3:

That s 301 of the Criminal Code be amended to make it clear that failure to give reasons for arrest makes that arrest unlawful.

Part 1

Custody and Arrest

Recommendation 1:

That the term 'in custody' in the *Criminal Law (Detention and Interrogation) Act 1995* be extended to include suspects in the company or control of the police who are being or are to be questioned or are otherwise being investigated and:

- (a) who would be arrested if they attempted to leave; or
- (b) in respect of whom there is sufficient evidence to justify a lawful arrest.

Introduction

The *Criminal Law (Detention and Interrogation) Act 1995* (Tas) was enacted to enable the police to detain lawfully arrested persons for a reasonable time following arrest to conduct investigations into the arrestee's involvement in an offence. The Act represents a substantial modification of the common law which does not permit the police to detain suspects for questioning or other investigative purposes. The Act trades off suspects' common law right not to be detained for questioning in exchange for enhanced protections whilst in police custody. These protections had hitherto received various levels of recognition and protection at common law. They include the right to silence and to be informed thereof, the right to communicate with a friend or relative and a lawyer and the right, where necessary, to an interpreter.

However, the Act is deficient in that the scope and application of the protections it provides are uncertain and inadequate. This is because they are confined to a narrowly defined category of detainee – a person under lawful arrest by warrant or under s 27 Criminal Code or a provision of some other Act (s 3(2)). Suspects who are in police custody for questioning but who are not under arrest as so defined have none of the protections of the Act.

The problem defined

Protections provided by the Act

The rights of citizens who have been arrested are safeguarded by a number of statutory and common law protections. In Tasmania, the majority of these protections are contained in the *Criminal Law (Detention and Interrogation) Act 1995* (Tas). They include:

- The requirement that the arrestee be taken before a magistrate or justice as soon as practicable after arrest unless released unconditionally or released on police bail: s 4(1);
- The requirement that the arrestee be informed of the right to silence prior to questioning: s 4(5);
- The requirement that the arrestee be informed of the right to communicate with a friend or relative and a legal practitioner prior to questioning: s 6(1);

- The requirement (subject to s 6(3) and (6)) that the police defer any questioning and investigation to enable the arrestee to make or attempt to make the communication: s 6(2);
- The requirement (subject to s 6(3) and (6)) that the police afford the arrestee reasonable facilities to make the communication: s 6(7);
- The provision of an interpreter when needed: s 5;
- The requirement that the arrestee be questioned only for a *reasonable* time: s 4(2)(a); reasonableness in this context is determined by the considerations set out in s 4(4);
- The requirement that the arrestee be taken before a custody officer without delay and placed in the custody of the custody officer: s 15(1);
- The requirement that the custody officer perform the duties in relation to the arrestee imposed by s 15(2) and (4); and
- The requirement that the custody officer ensure that the arrestee is treated in accordance with the Act: s 16 (1).

These provisions recognise the relatively vulnerable position of those detained in police custody. Their vulnerability arises from the power imbalance that exists between detainees and the police. Findlay, Odgers and Yeo describe the situation in the following way: ‘[w]ith the full resources of the state behind them the police are usually in a position of enormous physical, psychological, emotional and legal superiority over the suspect’.¹

To whom do the Act’s protections apply?

‘In custody’ under the Criminal Law (Detention and Interrogation) Act

The *Criminal Law (Detention and Interrogation) Act* affords the protections contained in sections 4-6, 15 and 16 to people who are ‘in custody’. Section 3(2) provides that a person is ‘in custody’ for the purposes of the Act if he or she is:

- (a) under lawful arrest by warrant; or
- (b) under lawful arrest under section 27 of the *Criminal Code* or a provision of any other Act.

Because the application of the Act depends upon whether a person is under lawful arrest, it is critically important to determine what exactly is meant by the term, ‘under lawful arrest’. The term ‘arrest’ is not defined in the Act. In practice, it can often be difficult to ascertain a suspect’s precise custodial status. The case law has distinguished three major custodial categories: (a) persons who are “voluntarily assisting the police with their enquiries”, (b) persons who are under arrest and, (c) in Tasmania, since the decision of the Tasmanian Court of Criminal Appeal in *Sammak*² (followed in *Reid and Swan*³) persons who are in the custody of the police though not under arrest.

1. Volunteers

A person who is “voluntarily assisting the police with their inquiries” is not under arrest, either at common law or under the Act. In fact, such a person is, in the eyes of the law, not detained at all and is at liberty to leave. Accordingly, it was felt, at the time that the Act was enacted, that volunteers did not need the protections afforded by sections 4-6 of the Act and, therefore, those protections were not applied to them.

¹ Findlay M, Odgers S & Yeo S, *Australian Criminal Justice* (2nd ed), 1999, Oxford University Press, Victoria, at 35.

² (1993) 2 Tas R 339.

³ [2000] TASSC 36.

2. Under lawful arrest

In contrast, a person who is under arrest is not free to leave and, where the arrest is lawful, must submit to the authority of the arrestor. For an arrest to be lawful there must be a power to arrest and an arrest in fact. Essentially, the latter requires that the police make it clear to the suspect that he or she is no longer free.⁴ There is no set formula for what must be said and done to effect a lawful arrest. Any form of words may be used which, in the circumstances of the case, make it clear to the arrestee that he or she is under compulsion. Where there has been a formal, lawful arrest the protections provided by the Act will clearly apply to the arrestee. However, at common law, a person may also be found to be under arrest, even if there has been no formal arrest, if the police behave in such a way as to give him or her reasonable grounds for believing that he or she is not free to leave.⁵ It is not clear whether the protections provided by the Act apply to a person who is under informal arrest in this sense although since the decisions of the Court of Criminal Appeal in *Sammak* and of Slicer J in *Reid and Swan*, there is real doubt that they do.

3. A third category - in police custody though not under arrest?

The orthodox position at common law is that a suspect cannot lawfully be detained by the police unless he or she is under lawful arrest. However, in 1993 the Tasmanian Court of Criminal Appeal in *Sammak*⁶ held that a person might be in police custody and yet not be under arrest or entitled to all the protections afforded to arrestees. In so holding the Court appears to have created a hybrid form of lawful detention somewhere between arrest and liberty where the rights of detainees remain uncertain. In 2000, in *Reid and Swan*,⁷ Slicer J applied the hybrid form of detention recognised in *Sammak*. The accused in this case were said to be ‘under “*de facto*” arrest’. His Honour found that the suspects were ‘in law, free to leave’, though in *fact* not at all free to leave as it had been made clear to them that if they attempted to do so they would be arrested.⁸ He summarised their situation by saying:

Each accused was effectively in the custody of a police officer. Their status was tantamount to that of a person subject to a “*de facto*” arrest in the sense discussed by the Full Court of the Supreme Court in *R v Harris* (1995) 64 SASR 85 and considered in general terms in *Sammak*.⁹

What are the rights of a suspect who is under such “*de facto* arrest”? In *Sammak*, the custodial situation of the accused was defined as being ‘in custody for the purposes of the Judge’s Rules’.¹⁰ While *Sammak*, the accused, was found not to have been arrested (formally or otherwise), it was held that there was sufficient evidence that he was ‘in custody for the purposes of the Judge’s Rules’, with the result that he should have been cautioned in accordance with those rules. The Court did not consider what other rights a person in such a custodial situation might have other than to decide that the right under the *Justices Act 1959* (Tas) and the Criminal Code to be brought before a magistrate as soon as practicable¹¹ did not apply. In *Reid and Swan*, Slicer J did not indicate with certainty whether the protections of the *Criminal Law (Detention and Interrogation) Act* applied to suspects under “*de facto* arrest”. Somewhat ambiguously His Honour stated, having described the suspects’ position,

It follows that effect ought be given to either the terms or spirit of the Act. It is not necessary for the purpose of this ruling to decide whether the circumstances creating an effective custody require the application of the Act, s3 and s15.¹²

⁴ *O’Donoghue* (1988) 34 A Crim R 397.

⁵ *Smith* (1957) 97 CLR 101; *Alderson v Booth* [1969] 2 QB 216; *Trotter* (1992) 58 SASR 223; *Conley* (1982) 30 SASR 226.

⁶ (1993) 2 Tas R 339.

⁷ [2000] TASSC 36.

⁸ *Ibid*, at 2.

⁹ *Ibid*, at 2.

¹⁰ *Supra* n 2, Cox J at 352 and Zeeman J (with whom Crawford J agreed) at 358-359. The Judge’s Rules set out that ‘Persons in custody should not be questioned without the usual caution being first administered’, r (3), reprinted in *The Tasmania Police Manual*, 1999, 4.7.5.

¹¹ This right was then in s 34A of the *Justices Act 1959* and s 301(1) of the *Criminal Code 1924*.

¹² *Supra* n 3, at 2; s 15 requires that a person in custody at a police station be brought before a custody officer without delay. The custody officer then has a number of responsibilities such as recording the time of the person’s arrival, informing the person of

In the authors' view it is difficult to see how the protections in the Act for those who are "in custody" within the meaning of the Act can apply to a person who is under "de facto" arrest or "in custody for the purpose of the Judges' Rules". Because being 'in custody' for the purposes of the Act is defined narrowly as being 'under lawful arrest', logic decrees that a person who is 'in custody for the purpose of the Judges' Rules' but *not under arrest* as in *Sammak's* case or under *de facto arrest* as in *Reid and Swan*, cannot qualify for the application of the Act by being under lawful arrest. Accordingly, the possibility of detention outside the protection of the Act exists.

Should the Act's protections for those under lawful arrest apply more broadly?

Determining whether a person is a genuine volunteer or is in reality under restraint and what type of restraint (formal or informal) can be quite difficult. Not surprisingly many arrestees are uncertain about their custodial status. Two Queensland Criminal Justice Commission reports, *Defendants' Perceptions of the Investigation and Arrest Process* 1996 and *Police Powers in Queensland; Findings from the 1999 Defendants Survey* 2000¹³ indicate persistent confusion amongst defendants regarding this matter. For many involved in encounters with the police, the distinction between being under arrest and voluntarily assisting them with their enquiries is, in reality, largely illusory. Their 'voluntary cooperation' is dictated by their assessment of the likely consequences of non-cooperation. For example, the 1999 Queensland CJC study found that of the entire group of respondents who reported that they had not been arrested (541), over half (303) said that they attended the police station because they 'thought they had to'. This situation has been criticised as providing the police with a judicially sanctioned loophole that may be exploited to avoid the obligations imposed by the law of arrest.¹⁴ Additionally, the point has been made that because a volunteer has none of the rights of an arrestee, he or she is actually at a disadvantage in comparison to an arrestee.¹⁵

It has been argued by Henning that the decision in *Sammak* marks a departure from the orthodox approach to police detention and arrest. She argues that the differentiation drawn by the Tasmanian Court of Criminal Appeal between 'custody for the purposes of the Judge's Rules' and arrest is, in fact, the distinction that has been drawn in other cases and other jurisdictions between informal and formal arrest.¹⁶ In these cases,¹⁷ it has also been held, in contrast to the approach of the Court in *Sammak*, that the same rights and the same police obligations apply to those under informal arrest as apply to those under formal arrest. In so deciding the courts have made it clear that the police cannot evade their obligations to arrestees by relying on a failure to formally arrest where the suspect is to all intents and purposes under arrest because there is no genuine liberty to leave.

Consequences of the limited application of the Act

The rights of suspects who are under informal arrest and of suspects who are in police custody but not under arrest as described in *Sammak* and *Reid and Swan* remain uncertain, as do the obligations of custodial officers in relation to them. It is doubtful that the protections for arrestees created by the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) apply to them. Consequently, the protections

the reason for their detention, recording whether the person is questioned and for how long, and if a person is denied the rights under s 6, recording the reasons why.

¹³ Queensland Criminal Justice Commission, *Defendants' Perceptions of the Investigation and Arrest Process* 1996; Queensland Criminal Justice Commission, *Police Powers in Queensland; Findings from the 1999 Defendants Survey* 2000.

¹⁴ see for example, New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66, 1990 paras 27-37; The Law Reform Commission (Tas), Interim Report, *Criminal Investigation*, Report No 2, 1975, paras 64-78.

¹⁵ *Ibid.*

¹⁶ Henning T, 'A Little Knowledge is a Dangerous Thing or When is an Arrest Not an Arrest?' (1994) 6 *Current Issues in Criminal Justice* 90, at 98-101.

¹⁷ *Spicer v Holt* [1976] 3 All ER 71 at 79; *Smith* (1957) 97 CLR 101 at 129; *Williams* (1986) 161 CLR 278.

contained in s 4(5), (the requirement of a caution before questioning), s 5 (the right to an interpreter), s 6 (the right to communicate with a friend or relative and a lawyer) and ss 15 and 16 (requirements relating to the duties of custody officers), have doubtful application to them. Likewise and crucially, the requirements that apply to arrestees that they be detained only for a “reasonable time” (s 4(2)(a)) and that they thereafter be taken before a magistrate as soon as practicable (s 4(1)) if not released on police bail appear not to apply to them. This means that their “de facto arrest” and detention in custody might continue indefinitely and even for an “unreasonable time” without being subject to judicial scrutiny. The situation of those in such a custodial position has been described as a “very barren place”.¹⁸ In addition, this legislative lacuna can be exploited by the police to extend the period of investigative custody for as long as possible and to postpone or avoid compliance with their statutory obligations towards suspects. It is now well documented that the police regularly resort to such tactics.¹⁹

The protections created by the Act for arrestees *should* be afforded to all suspects who are effectively under the control of the police regardless of whether a formal arrest has been effected. The grey area between arrest and liberty potentially allows the police to apply the Act on a discretionary basis, and, by not effecting a formal arrest, to evade their statutory obligations, even though the suspect may not be truly free to leave. This creates the potential for injustice because, in the majority of cases, a plea of guilty is entered and there is no judicial consideration of the validity of the suspect’s treatment by the police. The position in Tasmania runs counter to the orthodox position at common law where, as noted earlier, suspects detained by the police and not at liberty to leave are deemed to be under arrest even though there has been no formal arrest and, accordingly, they are entitled to the legal protections afforded to arrestees.²⁰

It is important that laws relating to such significant matters as detention of citizens by agents of the state have clarity, certainty and that they not be open to opportunistic evasion by those agents. The *Criminal Law (Detention and Interrogation) Act 1995 (Tas)* is deficient on all three counts and, therefore, requires reform.

In a number of Australian jurisdictions,²¹ legislation has been enacted that applies protective regimes broadly to detainees. This has been achieved in different ways. In New South Wales and Victoria the legislation, (the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the *Crimes Act 1958* (Vic)), broadens the definitions of ‘arrest’ (NSW) and ‘custody’ (Vic) to encompass volunteers whose liberty is, in reality, curtailed. The Acts then confer upon those who fall within these extended definitions all the protections, including limitations on the duration of detention that would formerly have applied only to those under formal arrest. In contrast, the Commonwealth and Queensland legislation, (the *Crimes Act 1914* (Cth) and the *Police Powers and Responsibilities Act 2001* (Qd)), distinguish between volunteers and those under arrest. They provide communication, cautioning and interview recording rights to specified volunteers and to arrestees but confine the detention for questioning powers and limitations to suspects under lawful arrest. To apply the relevant protections to volunteers and arrestees the Commonwealth Act creates a category of suspect called a “protected suspect”: s 23B(2). The definition of “protected suspect” is largely the same as the extended definition of arrestee given in s 110(2) *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) with the important difference that the Commonwealth definition of “protected suspect” specifically excludes persons who have been arrested: s 23B(2)(b).

¹⁸ The authors are indebted to a former student of the Faculty of Law, University of Tasmania, Jeffrey Stanley, for this description.

¹⁹ Dixon D, *Law In Policing: Legal Regulation and Police Practices*, Clarendon Press, 1997 and see generally, Aronson M and Hunter J, *Litigation: Evidence and Procedure*, 6th ed. Butterworths, 1998, chapters 7 and 8. Two responses suggested that there is no problem in practice – both *Sammak* and *Read and Swan* and the aforementioned commentators demonstrate that there is.

²⁰ *Spicer v Holt* [1976] 3 All ER 71 at 79; *Smith* (1957) 97 CLR 101 at 129; Henning T, ‘A Little Knowledge is a Dangerous Thing or When is and Arrest Not an Arrest?’ (1994) 6 *Current Issues in Criminal Justice* 90.

²¹ Victoria: *Crimes Act 1958*, s 464(1)(c); New South Wales: *Crimes Act 1900*, s 355; Commonwealth: *Crimes Act 1914*, s 23B. These sections are largely reproduced in the Appendix.

In Queensland, the *Police Powers and Responsibilities Act 2000* (Qd), uses the simple expedient of extending particular rights to all suspects who are “in the company of a police officer for the purpose of being questioned” ...about their “involvement in the commission of an indictable offence”: s 246. These rights apply regardless of whether the suspect being questioned is a genuine volunteer or is under formal or informal arrest. The rights in question are the right to communicate with a friend, relative and a lawyer, the right to an interpreter where necessary, the right to be cautioned before questioning and the right to have any questioning electronically recorded. However, they only apply where the suspect is being questioned about his or her involvement in the commission of an *indictable* offence. Like the Commonwealth legislation, the Queensland Act confines powers of detention for questioning and time limitations on such detention to persons under lawful arrest or otherwise in lawful custody: s 229 (see Appendix for legislation).

Recommended legislative amendment

It is recommended that the definition of the term, ‘in custody’ in the *Criminal Law (Detention and Interrogation) Act* be amended for the following reasons:

1. the scope and application of the Act is presently uncertain;
2. the statutory safeguards attached to arrest should be extended to all suspects who are detained for questioning and who are effectively under the control of the police;
3. those involved in the interrogation process should be able to identify their rights and obligations with certainty.

It is recommended that the term ‘in custody’ in the *Criminal Law (Detention and Interrogation) Act 1995* be extended to include suspects in the company or control of the police who are being or are to be questioned or are otherwise being investigated and:

- (a) in respect of whom there is sufficient evidence to justify a lawful arrest; or
- (b) who would be arrested if they attempted to leave.

This proposal is not intended to achieve the undesirable result of permitting the police to detain for a reasonable time a person who has not been and who could not be lawfully arrested. It simply extends the protections of the Act, (including the requirement that arrestees be taken before a Magistrate as soon as practicable), that apply to those under formal arrest to those who are either effectively under arrest (under ‘defacto arrest’ in Slicer J’s words) or who are in police custody for questioning and investigation and whom the police have grounds to lawfully arrest. As has already been stated it is appropriate that people under de facto arrest be afforded the protections provided by the Act because they are in reality under compulsion to remain – they have no real liberty to depart. When it is remembered that in situations like that in *Reid and Swan* suspects are being detained for questioning and would not be permitted to leave if they wished to do so, it becomes obvious that the provisions of the Act relating to detention for a reasonable time should apply to them. If the ‘reasonable time’ constraints do not apply, then such suspects are in the unenviable situation where they might be detained indefinitely without the necessity for their detention being subject to the judicial scrutiny of a magistrate and without the benefit of the Act’s other protections applying to them.

The current s 3(2) of the *Criminal Law (Detention and Interrogation) Act* provides:

For the purposes of this Act, a person is in custody if he or she is –

- (a) under lawful arrest by warrant; or
- (b) under lawful arrest under section 27 of the *Criminal Code* or a provision of any other Act.

It is recommended that the definition of a person in custody be extended by inserting the following paragraph:

- (c) in the company or control of a police officer and is to be or is being questioned or investigated and -
 - (i) the police officer is in possession of sufficient information to justify the lawful arrest of the person for the offence that is the subject of the questioning or investigation; or
 - (ii) the police officer would arrest the person if the person wished to leave that company or control;
- However a person is not in custody for the purposes of this Act if the police officer is merely exercising any of the following powers –
- (a) power conferred under any Act or law to detain the person for search;
 - (b) power conferred under any Act to require the person to give information, supply samples or answer questions.

Sub-paragraph (i) of this proposal is based on s 464(1)(c) of the Victorian *Crimes Act 1958*, which was inserted in 1988. Section 464(1)(a) and (b) of the Victorian *Crimes Act* are essentially the same as s 3(2)(a) and (b) of the *Criminal Law (Detention and Interrogation) Act*. Section 464(1) provides:

- (1) For the purposes of this Subdivision a person is in custody if he or she is -
 - (a) under lawful arrest by warrant; or
 - (b) under lawful arrest under section 458 or 459 or a provision of any other Act; or
 - (c) in the company of an investigation official and is –
 - (i) being questioned; or
 - (ii) to be questioned; or
 - (iii) otherwise being investigated –
- to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.

The proposed subparagraph (i) is based on the Victorian provision rather than similar provisions in the Commonwealth and New South Wales Acts (s 23B(2)(c)(i) and s 110(2)(a) respectively) which provide:

the official (police officer) believes that there is sufficient evidence to establish that the person has committed the offence that is to be the subject of the questioning (investigation).

The situation described by the wording in the Victorian Act was preferred as it resulted in a broader and simpler extension of the meaning of ‘in custody’: first, it is based on objective rather than subjective grounds – it refers to the information the police officer actually possesses, rather than his ‘belief’ as to the ‘evidence’ that ‘exists’ (which would be harder to review at a later date); and secondly, the information should be sufficient to justify *arrest*, rather than being able to actually establish that the offence has been committed, which is possibly a much higher standard and one that a police officer is less qualified to judge.

Subparagraph (ii) of the proposed s 3(2)(c) goes further than the Victorian legislation. It is based on s 110(2)(b) of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* (see Appendix). Subparagraph (ii) provides a separate and distinct basis for the application of the Act, the situation of a person who is being questioned by the police and who would be arrested if he or she attempted to leave.

The recommended amendment has the advantage over the Commonwealth and Queensland models of extending time limitations on detention to suspects who, though not under formal arrest, are in reality under restraint and who could be legitimately arrested. It avoids the problems that have been identified with the New South Wales model by confining the time limitations on detention to those who have been or could be lawfully arrested. The difficulty with the New South Wales model is that it appears to grant the police power to detain for the statutorily defined investigation period suspects who could not lawfully be arrested. Additionally, it appears to extend bail rights and obligations to suspects who might not be able lawfully to be arrested and, who, therefore, could not lawfully be bailed. To overcome these problems New South Wales legislation utilises the expedient of stating that the police do not have power to arrest a person or to detain a person who has not been lawfully arrested: s 113(1)(a) NSW Act.

However, Adam J in *DPP v Nicholls* (2001) 123 A Crim R 66 at 71 suggests that s 113(1)(a) (then s 356B(1)(a) *Crimes Act 1900* (NSW)) may increase rather than dispel difficulties in interpreting the Act because it is “not altogether easy to reconcile [s 113] with the other provisions of Pt [9]”.

The last addition to the proposed s 3(2)(c), namely that a person is not in custody for the purposes of the Act if the police officer is merely exercising powers conferred under any Act or law to detain a person for search or to require a person to give information, supply samples or answer questions, is based on s 246(2) of the *Queensland Police Powers and Responsibilities Act 2000*. This was thought to be clearer than the wording used in the proposal which appeared in the issues paper:

but a person is not in custody for the purposes of this Act where they have been lawfully detained under a provision of any other Act.

It is included to ensure that the police do not have to apply the *Criminal Law (Detention and Interrogation) Act* when detaining people for the purposes of supplying a breath analysis under the *Road Safety (Alcohol and Drugs) Act 1970* s 7A, or for the purposes of carrying out a search or questioning under the *Misuse of Drugs Act 2001* or for the purpose of carrying out procedures which do not require arrest under the *Forensic Procedures Act 2000*.

The relevant sections of the Victorian, New South Wales, Queensland and Commonwealth legislation are set out in the Appendix.

Four further changes have been made to the proposed subsection (c) that appeared in the issues paper following the suggestions of some respondents.

First, the words “or control” have been added to the opening phrase of (c). This follows the suggesting of Mr Craig Mackie of the Legal Aid Commission who stated:

A person will often be in a holding cell or interview room in circumstances that would not be deemed to be “in the company of a police officer”, but for all intents and purposes is nevertheless “in custody”.

Secondly, the opening phrase of (c) no longer refers to being in the company of a police officer “for the purpose of questioning or investigation”. The phrase has been changed to more closely reflect the Victorian provision. This follows the suggestion of Crawford J who stated in his response:

Whose purpose is it to be? Is it to be the purpose of the police officer in whose company the person is or of any police officer? What about the purpose of the person who is in the company of a police officer? By adopting the Victorian drafting the question of whose purpose it may be will be removed.

Thirdly, the words “or investigation” have been added to the end of (i) to bring the subclause in line with the opening words of (c). This change was also suggested by Mr Mackie of the Legal Aid Commission.

Fourthly, the word “leave” in (ii) and (iii) was thought by Mr Mackie to be:

ambiguous and in need of qualification. It could mean, for instance, “to leave” the police officer’s company or “to leave” the place where the person is being kept, ie the police station.

For the sake of complete clarity, the words “that company or control” have been added to the word “leave”.

Finally, it is reiterated that the recommended amendment to the definition of a person in custody for the purposes of the *Criminal Law (Detention and Interrogation) Act* in no way changes the meaning of arrest or the police powers of arrest or the requirements of a lawful arrest. The recommended change in legislation does not legitimise an unlawful arrest or the keeping of a person in unlawful custody – it simply affords fairer and fuller protection to people in police custody.

Extension of protections in Act to suspects who are volunteers

Recommendation 2:

That a person being questioned as a suspect about their involvement in the commission of an indictable offence be afforded the following protections regardless of whether they are in custody or not:

- being cautioned;
- being informed of the right to communicate with a friend, relative or lawyer and have questioning delayed for such a person to be present during questioning; and
- being provided with an interpreter when required.

Why afford these protections to suspects who are volunteers?

This proposal would extend a number of the protections in the Act to suspects who are voluntarily co-operating in police inquiries. Many of the protections afforded to arrestees exist to assist them in deciding whether it is in their best interests to answer police questions or make a statement to the police or to remain silent. This is clearly the case with protections such as being informed of the right to silence, being cautioned, having the right to communicate with a friend or relative and a legal practitioner, being provided with an interpreter. Other protections are aimed at ensuring procedures are followed fairly and correctly and that suspects are treated properly – such as the videotaping of interviews.

A suspect being questioned as a volunteer for an indictable offence has not had their liberty circumscribed as an arrested person has – they are free to leave at any time. Nevertheless, like an arrested person, they are being questioned about their involvement in a crime and, therefore, they are also in need of the protections that can help them decide whether it is in their best interests to answer and that ensure that procedures are followed fairly and correctly.

Current law and policy

The need to protect volunteers being questioned about their involvement in indictable offences is already partly recognised by current law and policy.

First, under the current law, on the trial of an accused person for a serious offence,²² evidence of any confession or admission by the accused person at a time when they were, or ought reasonably to have been, suspected by an investigating official of having committed the offence,²³ is not admissible unless it has been videotaped or there is a reasonable explanation as to why it has not been videotaped.²⁴

Secondly, the Police Commissioner's Standing Orders setting out the procedure for the making of records of interview (which includes videotaped records) instruct that the suspect should be cautioned before questioning commences. This recognises the importance of the giving of the caution.

²² Defined in *Evidence Act 2001* s 3(1) as:

(a) in the case of a defendant of or over the age of 18 years, an indictable offence that cannot be dealt with summarily without the consent of the defendant; and

(b) in the case of a defendant under the age of 18 years, any indictable offence for which the defendant has been detained.

²³ *Evidence Act 2001* s 85(2).

²⁴ *Evidence Act 2001* s 85(1).

The problems

The current law is deficient in the following respects:

- There is no legislative requirement that a suspect who is a volunteer be cautioned.
- There is no legislative requirement or policy directive that a suspect who is a volunteer and who is being questioned be informed of the right to communicate with a friend, relative and/or legal practitioner and be afforded the opportunity and facilities to do so.
- There is no legislative requirement or policy directive that a suspect who is a volunteer and who is being questioned be provided with an interpreter when required.

Cautions

While current directives such as the Judges Rules and the Police Commissioner's Standing Orders clearly encourage the giving of cautions, alone these are insufficient because:

- they do not have the force of law;
- the Judges Rules apply an indeterminate test as to when it is appropriate to warn.

Informing of the right to communicate with a friend, relative and/or legal practitioner

Before any questioning or investigation, arrestees are informed that they may communicate with a friend or relative or a legal practitioner and the police are required to facilitate such communication. Suspects who are volunteers should also have this right to be informed when they are participating in investigations about their involvement in indictable offences.

Providing an interpreter

The extension of this protection to volunteers questioned about their involvement in indictable offences is justifiable on the basis that being unable to communicate clearly is fraught with potential injustice.

Recommended legislative amendment

It is recommended that the protections contained in ss 5 and 6 (1), (2) and (7) of the Act be extended to suspects who are in the company of a police officer and are being questioned about their involvement in the commission of indictable offences.

Precedent for this reform is found in the Queensland *Police Powers and Responsibilities Act 2000*, Chapter 7, Part 3 (see Appendix). Prior to the enactment of this Act the same protections were provided by the *Police Powers and Responsibilities Act 1997* (Qld). The provision of these protections has not proved to be problematic in Queensland, and in fact the opposition in that State²⁵ and the Chairman of the Queensland Law Society²⁶ have suggested that the protections be extended to apply to people being questioned by the police in relation to any offence and that they not be limited, as they currently are, to indictable offences.

²⁵ Queensland Parliamentary debate, Legislative Assembly, Mr Horan, 16 March 2000, at 547.

²⁶ See Ministerial Statement by Mr Barton (Minister for Police and Corrective Services) Queensland Parliamentary debate, Legislative Assembly, 5 September 2000, at 2862-3.

Part 2

Reasons for Arrest

Recommendation 3

That s 301 of the Criminal Code be amended to make it clear that failure to give reasons for arrest makes that arrest unlawful.

Introduction

The common law and Criminal Code clearly state that a person being arrested should be informed of the reason for the arrest. Under the common law failing to do so makes the arrest unlawful. However the effect of failing to do so is unclear under the Code. It is proposed that the Code be amended to clarify the effect of a failure to give reasons for arrest.

The principle at stake

The duty to give reasons for arrest

When making an arrest a police officer has a duty to inform the person being arrested of the reasons for that arrest. This duty exists at both common law²⁷ (which applies to summary offences²⁸) and under s 301(2) of the Criminal Code (which applies to indictable offences). This section of the Code provides:

(2) 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.

As can be seen from s 301(2), where it is not ‘practicable’, there is no duty to inform of the reasons for arrest. Examples of when it might be impracticable to give the reasons for arrest are if the arrestee is blind drunk, if the arrestee is deaf and cannot lip-read²⁹ or if the arrestee responds with an immediate counter-attack or by running away.³⁰

Another exception to the rule under the common law is that where the reason for the arrest is obvious, for example if a robber is caught red-handed, it may not be necessary to give the reason for arrest.³¹ This exception is not mentioned in the Code provision.

*Christie v Leachinsky*³² is the principal common law authority explaining this duty. This case discusses the history of the duty, dating it back to at least 1755,³³ and details the two justifications for the duty. The first justification is that being arrested is such a substantial interference with a person’s liberty, that it must be justified and that the person being arrested should be informed of that justification.³⁴ Secondly,

²⁷ *Christie v Leachinsky* [1947] AC 573.

²⁸ *Gow v Davies* [1992] 1 Tas R 1; *Criminal Code Act* s 4(3).

²⁹ *Wheatley v Lodge* [1971] 1 WLR 29; [1971] 1 All ER 173.

³⁰ *Christie v Leachinsky* [1947] AC 573, per Viscount Simon at 588.

³¹ *Christie v Leachinsky* [1947] AC 573, at 587.

³² *Ibid.*

³³ *Ibid.*, at 586.

³⁴ *Ibid.*, at 587-588.

informing the arrestee of the reasons for the arrest gives the person the opportunity to offer an explanation to clear themselves and be released as soon as possible.³⁵

The effect of failing to provide reasons

At common law, failure to inform an arrestee of the reasons for arrest makes the arrest unlawful, although the arrest can be made lawful subsequently if the reasons are given.³⁶

Whether an arrest is lawful or unlawful can be of critical importance. For example, the lawfulness of an arrest is highly relevant to whether evidence of admissions made after arrest should be admitted at trial. Another instance when the lawfulness of arrest is crucial is when a person is charged with escape because escape from *unlawful* custody is not an offence. Similarly, actions or force taken to defend oneself or another from an *unlawful* arrest would not constitute the offence of assaulting, resisting or wilfully obstructing a person *lawfully* arresting another person,³⁷ or assaulting a police officer in the due execution of his duty³⁸ (as it is not a police officer's duty to make unlawful arrests). The lawfulness of an arrest will also be in issue when an arrestee sues an arrestor for false imprisonment. The issue of lawfulness of an arrest without reasons for the purposes of the applicability of protections to the arrestee would be dealt with by the proposed amendment at page 13.

The problem defined

The Criminal Code is unclear

Under the Code the effect of a failure to give reasons for arrest is not clearly expressed. Section 301(3) provides:

(3) A failure to fulfil either of the aforesaid duties 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.

This subsection means that if a police officer fails to give reasons he or she is still protected from criminal responsibility – ie he cannot be prosecuted for assault. However, failure to give reasons is relevant to the issue of reasonable force and may lead to the conclusion that excessive force was used, in which case the arresting police officer will be criminally responsible. Whether a failure to give reasons for an arrest makes the arrest unlawful for other purposes is not specifically addressed by the subsection. This question has not been judicially considered in Tasmania.

History of the provision

Section 301 is an almost exact reproduction of s 42 of Sir James Fitzjames Stephen's Draft Criminal Code of 1879. Section 42 provides:

It is the duty of every one executing any process or warrant to have it with him and to produce it if required.

It is the duty of every one arresting another, whether with or without a warrant, to give notice where practicable of the process or warrant under which he acts, or the cause of the arrest.

A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants or the person arresting of protection from criminal responsibility, but

³⁵ *Ibid*, at 588.

³⁶ *Kulynycz* [1971] 1 QB 367 (CA).

³⁷ Criminal Code, s 114(2), *Police Offences Act 1935*, s 34B(a)(iii).

³⁸ Criminal Code, s 114(1), *Police Offences Act 1935*, s 34B(a)(i).

shall be relevant to the inquiry whether the process or warrant might not have been executed or the arrest effected by reasonable means in a less violent manner.

In this work the final paragraph (which is s 301(3) in our Code) is marked with a margin note that states ‘this is believed to alter the common law’. However what aspect of the common law is affected is unclear – for example does it alter the common law merely with regard to the police officer’s criminal responsibility or does it intend to alter the common law by making the arrest lawful for other purposes?

Professor Glanville Williams has discussed this section of the Draft Code. He states:

If the rule in *Christie v Leachinsky* is not complied with, the whole arrest is unlawful. The Commissioners who prepared the Draft Code of 1879 proposed to change this by declaring (in section 42) that failure to notify the cause of arrest does not make the arrest *ipso facto* unlawful, but is merely relevant to the inquiry whether the arrest might have been effected by reasonable means in a less violent manner.³⁹

Thus Professor Glanville Williams interprets s 42 as abrogating the common law principle in *Christie v Leachinsky*. It is difficult to agree with this interpretation.

Preferred interpretation

Our view is that the common law is only altered in so far as the arrestor (usually a police officer) is protected from criminal responsibility if he or she fails to give reasons. Our reasoning is that s 301(3) does not state the effect of a failure to give reasons for other purposes and therefore, as the matter is not covered by the Code, the common law applies.⁴⁰ An alternative argument, which is not dependent on the common law, is that the implication of stating that failure to give reasons does not necessarily deprive the arrestor of protection from criminal responsibility is that for other purposes the arrest will be unlawful. This interpretation is supported by the fact that if subsection (3) reverses the common law, failure to fulfil the duty would have no consequence, effectively taking away the protection the section offers. If it were intended that this subsection take away this protection, this should have been done clearly.

This is also the interpretation given to the former s 40 (now slightly modified in s 29) of the Canadian Criminal Code. The former s 40 of the Canadian Criminal Code was, like our s 301, identical to s 42 of Stephen’s Draft Code. In *R v George*⁴¹ the origin and effect of the section are given detailed consideration by the British Columbia Court of Appeal. All the members of the court clearly held that a failure to give notice of the reasons for arrest when it is practicable to do so renders the arrest unlawful.⁴² Subsection (3) was noted only to say that it was irrelevant to this point.⁴³

It is also our view that s 301 applies to arrest for crimes which are also summary offences even if the person arrested is subsequently charged with the summary version of the offence.

Other interpretations

On the other hand the Law Reform Commission of Tasmania, in its report on powers of arrest, search and bail,⁴⁴ suggests s 301(3) means that failing to give reasons for arrest does not make the arrest unlawful. The report states (after setting out all of s 301):

³⁹ ‘Requisites of a Valid Arrest’ (1954) *Criminal Law Review* 6, at 19.

⁴⁰ There are many examples of resort to the common law when the matter is not dealt with by the Code, eg the general rule as to burden of proof: *Packett* (1937) 58 CLR 190; the meaning of consent: *Schell* [1964] Tas SR 184.

⁴¹ [1935] 2 DLR 516; (1934) 63 CCC 225.

⁴² *R v George* [1935] 2 DLR 516, per Macdonald CJBC at 519; per Martin JA at 525-526; per McPhillips JA at 531. See also *R v Broughton* (1976) 23 CCC (2nd) 395, where it is clearly indicated in the Alberta Supreme Court (Appellate Division) by Allen JA that failing to notify a suspect of the reasons for arrest makes the arrest unlawful: ‘[the accused] was in fact informed of at least the general nature of the charge upon which the arrest was made. The arrest, in my opinion, was entirely lawful.’ at 398.

⁴³ *R v George* [1935] 2 DLR 516, per Martin JA at 523.

⁴⁴ Law Reform Commission, Report on Powers of Arrest, Search and Bail, 1977.

‘Such section also makes it clear that a failure by a police officer to have the warrant with him does not have the effect of preventing a lawful arrest from being made.’⁴⁵

The Law Reform Commission specifically refers only to the situation where a police officer failed to have a warrant with him. However, s 301(3) refers to ‘either of the aforesaid duties’. Therefore, the interpretation that a failure by a police officer to have the warrant with him does not prevent a lawful arrest from being made would equally mean that a failure by a police officer to state the reasons for arrest does not prevent any arrest made from being lawful.⁴⁶

The Queensland Criminal Code

Section 301 is similar to s 255 of the Queensland Criminal Code, but is not identical. The Queensland provision provides:

s 255(3) A failure to fulfil either of the aforesaid duties does not of itself make the execution of the process or warrant or the arrest *unlawful*, but is relevant to the inquiry whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner. [emphasis added]

The Queensland provision was considered in *Wornes v Rankmore*.⁴⁷ The majority of the Court (Wanstell SPJ and Williams J) held that failure to inform an arrestee of the cause of arrest did not render the arrest unlawful. This interpretation is clearly correct on the wording of section 255(3) which specifies that failure to give reasons does not make the arrest unlawful. The Tasmanian provision contains no such provision.

Despite the significant difference between the Tasmanian and Queensland provisions, Aronson et al state, after discussing the Queensland provision and *Wornes v Rankmore*, ‘[p]resumably the phrase “deprive the person ... of protection from criminal responsibility” in s 301(3) of the Tasmanian Criminal Code has the same effect as “not making the arrest unlawful” in s 255 and s 232 [*Criminal Code*, Western Australia].’⁴⁸ An explanation for this presumption is not given. In our view it is wrong. The Queensland provision states clearly that failure to give reasons does not make the arrest *unlawful*, whereas the Tasmanian provision states that that failure does not deprive the person making the arrest from protection from criminal responsibility. It is submitted that actions that are protected from *criminal* responsibility should not be presumed to be lawful for all other purposes.

Recommended legislative amendment

Where reasons are not given for an arrest the arrest should be unlawful unless it is impracticable for reasons to be given. It is therefore recommended that the existing s 301(2) and (3) be repealed and the following subparagraphs be inserted:

- (2) It is the duty of a person arresting another, whether with or without warrant, to inform the other person, if practicable, 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.
- (3) A failure to fulfil either of the aforesaid duties -
 - (a) shall make the arrest or the execution of the process or warrant unlawful;

⁴⁵ *Ibid*, at 9.

⁴⁶ It should be noted that this is contrary to the position at common law, where ‘the execution of the warrant will be unlawful if the arresting officer does not have the warrant with him, ready to be produced if required’: *Smith v Marshall* Serial No 24/1994.

⁴⁷ [1976] Qd R 85.

⁴⁸ Aronson MI, Hunter JB, Weinberg MS, *Litigation, Evidence and Procedure* (4th ed), 1988, Butterworths, at 357; note that there is no mention of the Tasmanian provision in Aronson and Hunter’s latest edition (6th).

- (b) 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.

The recommended subparagraph (2) is based on the current subsection (2) and is intended to clarify that subsection. The subparagraph (2) which appeared in the issues paper has been simplified.

The proposed s (3)(a) is intended to make it clear that where the duty to give reasons for arrest is not exercised the arrest itself is unlawful.

The proposed s (3)(b) is a reproduction of the existing subsection (3). Thus the current protection of arrestors from criminal responsibility is maintained.

Only two respondents commented on this part of the issues paper. Both agreed that failure to give reasons for arrest should make the arrest unlawful. In addition, both made suggestions to improve the proposed amendment to s 301.

First, Underwood J felt that the inclusion of the proposed s 301(2)(b)(i) was unnecessary. This provided that there is no duty to give reasons where ‘the other person should, in the circumstances, know the substance of the offence for which he or she is being arrested’. Underwood J said:

I can see great difficulties arising from the use of the word “should”. The common law requires the arrested person to be advised of the state of mind of the arresting person at the time of the arrest. It seems to me a little difficult to establish that an arrested person should have known the state of another’s mind. I suppose that there are many cases where this would appear to be obvious namely, an arrest made during the course of the commission of a crime. However why not simply provide that the reason for the arrest must be stated at the time of the arrest unless the circumstances specified in par(b)(ii) persist? Even if a person is arrested *flagrante delicto*, there is no reason why the arresting person should not state the reason for the arrest. If he or she omits to do so in circumstances where the reason for the arrest is perfectly obvious, even though the arrest is unlawful, it would not affect the course of justice as the discretion would almost certainly be exercised in favour of the admission of tainted evidence.

We agree entirely with these comments and have removed the proposed para (b)(i) from the recommended section. It is our intention that the amended Code provision will differ from the common law in this regard (ie there will still be a duty to give reasons even if the reason is apparently obvious).

Secondly, Mr Mark Miller of Tasmania Police stated:

Tasmania Police is of the view that the qualifications to the duty imposed [by s 301(2)] should be broader than those contained in the proposed paragraph (b). There may be other circumstances where a police officer is unable to immediately inform an offender of the reason for his or her arrest. For example, the officer may be busy dealing with other offenders. The arrest of an offender should not be rendered unlawful in such circumstances.

The new subparagraph (2) that we have recommended will alleviate this problem as it states that the duty applies only “if practicable”. The examples which Mr Miller gives could be judged to be situations in which it was not practicable for reasons to be given.

Part 3

Admission to Bail under s 4

Withdrawal of proposal

In our issues paper we proposed that s 4(3) of the *Criminal Law (Detention and Interrogation) Act 1995* be repealed. This section extended the police power to grant bail from the power to grant bail for simple offences only, to the power to grant bail for any offence for which a person in custody had been questioned for a 'reasonable time'. It appeared to us that this extension of police powers was unintended by Parliament.

Two respondents pointed out that we were erroneous in stating that Parliament did not intend to extend the police power to grant bail to indictable offences. It is clear from the Attorney-General's second reading speech on the Bail Amendment Bill, 1995 that the extension was intentional:

There are two restrictions on the police granting bail which are contained in that section [s 34 of the *Justices Act*]. The first of these is that the police cannot release someone on bail who has been arrested for a crime which must be dealt with in the Supreme Court. This will be overcome by clause 4(3) of the *Criminal Law (Detention and Interrogation) Bill, 1995* which will enable police for the first time to release an arrested person on bail after questioning and interrogation has concluded.

This appears to have been the only Parliamentary discussion of the matter. Certainly, it was not mentioned in the second reading speech of the Criminal Law (Detention and Interrogation) Bill which actually contained the extension of the power.

We remain uncertain of the justifications for this extension. Possibly convenience for the police and offenders were the major considerations, although these reasons were not referred to in parliament and possible objections to the extension (eg by victims who do not want convenience to determine whether an alleged offender is released) were not discussed. The rationale for extending the power to grant police bail to indictable offences only where the 'reasonable time' for questioning and investigation has expired is particularly unclear.

It appears to us that the rationale for and consideration and debate of this extension of police powers were less than adequate. Nevertheless we accept that it was the clear intention of Parliament and we accordingly withdraw our proposal that s 4(3) be omitted from the *Criminal Law (Detention and Interrogation) Act*.

Appendix

New South Wales:

Law Enforcement (Powers and Responsibilities) Act 2002:

s 110:

(2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in a investigative procedure, if:

- (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or
- (b) the police officer would arrest the person if the person attempted to leave, or
- (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.

(3) A person is not taken to be under arrest because of subsection (2) merely because the police officer is exercising a power under a law to detain and search the person or to require the person to provide information or answer questions.

(4) For the purposes of this Part, a person ceases to be under arrest for an offence if the person is remanded in respect of the offence.

s 113:

(1) This Part does not:

- (a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested, or
- (b) prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do (for example, the power to require a person to submit to a breath analysis under Division 3 of Part 2 of the Road Transport (Safety and Traffic Management) Act 1999), or
- (c) independently confer power to carry out an investigative procedure.

(2) Nothing in this Part affects:

- (a) the operation of:
 - (i) the following provisions of the *Evidence Act 1995*: section 84 (Exclusion of admissions influenced by violence and certain other conduct); section 85 (Criminal proceedings: reliability of admissions by defendants); section 90 (Discretion to exclude admissions); section 138 (Exclusion of improperly or illegally obtained evidence); section 139 (Cautioning of persons), or
 - (ii) any other provision of that Act, or
- (b) any law that permits or requires a person to be present at the questioning of another person who is under arrest (for example, the presence of a parent at the questioning by a police officer of the parent's child), or
- (c) the right of a person to refuse to participate in any questioning of the person or any other investigative procedure unless the person is required by law to do so, or
- (d) the right of a person to leave police custody if the person is not under arrest, or
- (e) the rights of a person under the *Bail Act 1978*.

Commonwealth:

Crimes Act 1914:

s 23B:

(2) A person is a *protected suspect* if:

- (a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and

- (b) the person has not been arrested for the offence; and
- (c) one or more of the following applies in relation to the person:
 - (i) the official believes that there is sufficient evidence to establish that the person has committed the offence;
 - (ii) the official would not allow the person to leave if the person wished to do so;
 - (iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so; and
- (d) none of the following applies in relation to the person:
 - (i) the official is performing functions in relation to persons or goods entering Australia, and the official does not believe that the person has committed a Commonwealth offence;
 - (ii) the official is performing functions in relation to persons or goods leaving Australia, and the official does not believe that the person has committed a Commonwealth offence;
 - (iii) the official is exercising a power under a law of the Commonwealth to detain and search the person;
 - (iv) the official is exercising a power under a law of the Commonwealth to require the person to provide information or to answer questions; and
- (e) the person has not ceased to be a suspect under subsection (4).

...

Division 2—Powers of detention

Note: The powers in this Division only apply in relation to people under arrest. They do not apply in relation to protected suspects.

23C Period of arrest

- (1) If a person is arrested for a Commonwealth offence, the following provisions apply.
- (2) The person may be detained for the purpose of investigating either or both of the following:
 - (a) whether the person committed the offence;
 - (b) whether the person committed another Commonwealth offence that an investigating official reasonably suspects the person to have committed;

but must not be detained for that purpose, or for purposes that include that purpose, after the end of the investigation period prescribed by this section.

- (3) The person must be:
 - (a) released (whether unconditionally or on bail) within the investigation period; or
 - (b) brought before a judicial officer within that period or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

Note: For *judicial officer*, see subsection (9).

- (4) For the purposes of this section, but subject to subsections (6) and (7), the investigation period begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances, but does not extend beyond:
 - (a) if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander—2 hours; or
 - (b) in any other case—4 hours;

after the arrest, unless the period is extended under section 23D.

[subsections (5)-(7) go on to set out how the time period should be ascertained]

23D Extension of investigation period

- (1) If a person is under arrest for a serious offence, an investigating official may, at or before the end of the investigation period, apply for an extension of the investigation period.
- [subsections (2)-(6) and s 23E set out the procedure etc for this]

Division 3—Obligations of investigating officials

Note: These obligations apply in relation to protected suspects as well as to people under arrest.

23F Cautioning persons who are under arrest or protected suspects

- (1) Subject to subsection (3), if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.
- (2) The investigating official must inform the person of the caution in accordance with subsection (1), but need only do so in writing if that is the most appropriate means of informing the person.
- (3) Subsections (1) and (2) do not apply so far as another law of the Commonwealth requires the person to answer questions put by, or do things required by, the investigating official.

[Sections 23G – 23W deal with other obligations the police have in relation to protected suspects and arrestees and the rights of such persons, such as:

- s 23G: informing of the right to communicate with a friend, relative and legal practitioner;
- s 23H: special obligations in relation to Aboriginal persons and Torres Strait Islanders;

- s 23K: special obligations in relation to persons under 18;
- s 23N: arranging for an interpreter when required
- s 23U: tape recording of the giving of the caution, etc if practicable]

Victoria:

Crimes Act 1958

s 464(1):

- (1) For the purposes of this Subdivision a person is in custody if he or she is -
- (a) under lawful arrest by warrant; or
 - (b) under lawful arrest under section 458 or 459 or a provision of any other Act; or
 - (c) in the company of an investigation official and is –
 - (i) being questioned; or
 - (ii) to be questioned; or
 - (iii) otherwise being investigated –to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.

Queensland:

Police Powers and Responsibilities Act 2000:

PART 3—SAFEGUARDS ENSURING RIGHTS OF AND FAIRNESS TO PERSONS QUESTIONED FOR INDICTABLE OFFENCES

Division 1—Preliminary

245 Part applies only to indictable offences

This part applies only to indictable offences.

246 When does this part apply to a person

- (1) This part applies to a person (“relevant person”) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence.
- (2) However, this part does not apply to a person only if the police officer is exercising any of the following powers—
- (a) power conferred under any Act or law to detain the person for a search;
 - (b) power conferred under any Act to require the person to give information or answer questions.

...

Division 2—Other persons may be present during questioning

249 Right to communicate with friend, relative or lawyer

- (1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may—
- (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
 - (b) telephone or speak to a lawyer of the person’s choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.
- (2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).
- (3) If the person arranges for someone to be present, the police officer must delay the questioning for a reasonable time to allow the other person to arrive.
- (4) What is a reasonable time to delay questioning to allow a friend, relative or lawyer to arrive at the place of questioning will depend on the particular circumstances, including, for example—

- (a) how far the person has to travel to the place; and
- (b) when the person indicated he or she would arrive at the place.
- (5) What is a reasonable time to delay questioning to allow the relevant person to speak to a friend, relative or lawyer will depend on the particular circumstances, including, for example, the number and complexity of the matters under investigation.
- (6) Unless special circumstances exist, a delay of more than 2 hours may be unreasonable.

250 Speaking to and presence of friend, relative or lawyer

- (1) If the relevant person asks to speak to a friend, relative or lawyer, the investigating police officer must—
 - (a) as soon as practicable, provide reasonable facilities to enable the person to speak to the other person; and
 - (b) if the other person is a lawyer and it is reasonably practicable—allow the relevant person to speak to the lawyer in circumstances in which the conversation can not be overheard.
- (2) If the relevant person arranges for another person to be present during questioning, the investigating police officer must also allow the other person to be present and give advice to the relevant person during the questioning.
- (3) If the police officer considers the other person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

...

258 Cautioning of persons

- (1) A police officer must, before a relevant person is questioned, caution the person in the way required under the responsibilities code.
- (2) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person can not hear adequately.
- (3) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words.
- (4) If necessary, the police officer must further explain the caution.
- (5) This section does not apply if another Act requires the person to answer questions put by, or do things required by, the police officer.

...

260 Right to interpreter

- (1) This section applies if a police officer reasonably suspects a relevant person is unable, because of inadequate knowledge of the English language or a physical disability, to speak with reasonable fluency in English.
- (2) Before starting to question the person, the police officer must arrange for the presence of an interpreter and delay the questioning or investigation until the interpreter is present.
- (3) In this section—
 - “investigation” means the process of using investigative methodologies, other than fingerprinting, searching or taking photos of the person, that involve interaction by a police officer with the person, for example, an examination or the taking of samples from the person.

...

262 Rights of a person to be electronically recorded

A police officer who is required under this division to give to a relevant person information (including a caution) must, if practicable, electronically record the giving of the information to the person and the person’s response.

Division 5—Recording of questioning

263 Recording of questioning etc.

- (1) This section applies to the questioning of a relevant person.
- (2) The questioning must, if practicable, be electronically recorded.

Examples for subsection (2)—

1. It may be impracticable to electronically record a confession or admission of a murderer who telephones police about the murder and immediately confesses to it when a police officer arrives at the scene of the murder.
 2. It may be impracticable to electronically record a confession or admission of someone who has committed an armed hold-up, is apprehended after pursuit, and makes a confession or admission immediately after being apprehended.
 3. Electronically recording a confession or admission may be impracticable because the confession or admission is made to a police officer when it is not reasonably practicable to use recording facilities.
- (3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 264.
 - (4) If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.

264 Requirements for written record of confession or admission

- (1) This section applies if a record of a confession or admission is written.
- (2) The way the written record of the confession or admission is made must comply with subsections (3) to (7).
- (3) While questioning the relevant person, or as soon as reasonably practicable afterwards, a police officer must make a written record in English of the things said by or to the person during questioning, whether or not through an interpreter.
- (4) As soon as practicable after making the record—
 - (a) it must be read to the person in English and, if the person used another language during questioning, the language the person used; and
 - (b) the person must be given a copy of the record.
- (5) Before reading the record to the person, an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.
- (6) The person must be given the opportunity, during and after the reading, to draw attention to any error in or omission from the record he or she claims were made in the written record.
- (7) An electronic recording must be made of the reading mentioned in subsection (4) and everything said by or to the person during the reading, and anything else done to comply with this section.

265 Access to electronic recordings of questioning etc.

- (1) This section applies to the electronic record of the questioning, confession or admission, or confirmation of a confession or admission, of a relevant person that is made under section 263 or 264(7).
- (2) A police officer must, without charge—
 - (a) if the recording is—
 - (i) an audio recording only—make a copy of the recording available to the person or the person’s lawyer within 7 days after making the recording; or
 - (ii) a video recording only—make a copy of the recording available to the person or the person’s lawyer within 14 days after making the recording; or
 - (b) if both audio and video recordings were made—
 - (i) make a copy of the audio recording available to the person or the person’s lawyer within 7 days after making the recording; and
 - (ii) notify the person or the person’s lawyer that, if the person asks, an opportunity will be provided to view the video recording; or
 - (c) if a transcript of an audio recording is made—on request, give to the person or the person’s lawyer a copy of the transcript.
- (3) Subsection (2) applies subject to any other Act.

266 Admissibility of records of questioning etc.

- (1) Despite sections 263 and 264, the court may admit a record of questioning or a record of a confession or admission (the “record”) in evidence even though the court considers this division has not been complied with or there is not enough evidence of compliance.
- (2) However, the court may admit the record only if, having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice.