for PHOTOCOPY

NEW SOUTH WALES LAW REFORM COMMISSION

CRIMINAL PROCEDURE

POLICE POWERS OF ARREST AND DETENTION

DISCUSSION PAPER

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Terms of Reference

On 17 January 1982, the Attorney General of New South Wales, the Honourable F J Walker QC, MP, made the following reference to the Commission:

> To inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto; and in particular, without affecting the generality of the foregoing, to consider -
>
> (a) the means of instituting criminal proceedings;
>
> (b) the role and conduct of committal proceedings;
>
> (c) pre-trial procedures in criminal proceedings;
>
> (d) trial procedures in matters dealt with summarily or on indictment;
>
> (e) practices and procedures relating to juries in criminal proceedings;
>
> (f) procedures followed in the sentencing of convicted persons;
>
> (g) appeals in criminal proceedings;
>
> (h) the classification of criminal offences;
>
> (i) the desirability and feasibility of codifying the law relating to criminal procedure.

Preface

The Commission was asked by the Attorney General, the Honourable Terry Sheahan BA, LLB, MP, to give priority under its current reference on criminal procedure to a review of the law relating to police powers of arrest and detention . Following a preliminary review of the issues involved, the Commission published a short consultative document which invited submissions on the matters under consideration.. The response to this document was most encouraging and this has been particularly helpful in the preparation of this Discussinn Paper. No other issue which we have considered under the Criminal Procedure reference has generated more interest. The Commission wishes to formally record its appreciation to those people who are acknowledged in the following pages.

Among many who deserve special mention, I would like to thank John Kable, barrister and solicitor of the Supreme Court of Tasmania, for his generous assistance with this project.

At an early stage of its work on this project, the Commission determined that before reporting to the Attorney General with specific recommendations, it should publish a Discussion Paper containing tentative proposals for reform so as to give those people interested the opportunity to comment on our proposals and to allow a period for public debate of the issues canvassed by this Paper. It was also decided that this work should cover not only the central question of police powers of arrest, but also those matters which are, for practical purposes, inseparable from it. The proposals in Chapter 4 are accordingly submitted for consideration and comment.

Paul Byrne

August 1987

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The Commission would like to thank the following for the assistance, suggestions and comments they provided in the course of preparing this Discussion Paper and for their response to the consultative document:

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Meredith Wilkie
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George Zdenkowski

The Commission invites submissions on the issues raised in this Discussion Paper. Submissions and comments should reach us by 20 November 1987 when it is intended that the Commission will begin the preparation of the final Report to the Attorney General on the issues raised in this Discussion Paper. All inquiries and comments should be directed to:

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Secretary
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Table of Contents

Summary of Tentative Proposals

* There should be a single code of procedure governing powers of arrest and detention expressed in understandable terms.

* A police officer should have the power to stop and search, where reasonable grounds exist, a person or vehicle in a public place.

* A police officer should have the power, where reasonable grounds exist, to require a person to disclose his or her name and address.

* Involuntary detention without arrest should generally be prohibited.

* The power of arrest should only be used where the use of a summons or court attendance notice procedure is not practicable.

* The power of private citizens to make an arrest should be restricted to offences which carry a maximum penalty of 12 months imprisonment or more.

* An arrested person must be brought as soon as possible after arrest before a custody review officer at the nearest police station.

* All relevant communication at a police station between a police officer and an arrested person should be recorded by means of electronic equipment.

* An arrested person should be informed of the right and be entitled to have access to a lawyer at a police station.

* An arrested person may be detained at a police station for so long as is reasonable but for no more than four hours before either being released or brought before a court.

* The period during which an arrested person may be detained can be extended on the order of a court for such time as the court considers reasonable.

* Wherever the procedure relating to arrest and detention requires the involvement of a court, the court should be constituted by a judge, magistrate or a justice employed by the Attorney General's Department.

* To ensure that applications for authorisation of prescribed procedures may be heard at any time, a "court" should be available for contact by telephone outside normal court sitting times.

* Investigative procedures authorised by statute may be conducted at a police station after arrest.

* A police officer may take the fingerprints or photograph of an arrested person where there are reasonable grounds to do so.

* A police officer or, where appropriate, a qualified medical practitioner, should be entitled to obtain forensic evidence from an arrested person without his or her consent.

* An arrested person may be released unconditionally, or on condition that he or she attends either at a police station or at a court.

* Evidence obtained in breach of procedural rules should generally be inadmissible unless the party seeking to have it admitted can show its admission would not be unfair or contrary to the interests of justice.

Chapter 1

THE NEED FOR REFORM

1.1 By letter dated 21 January 1987, the Attorney General, the Honourable T W Sheahan, requested the Commission to examine, as a matter of priority within the terms of its reference on criminal procedure, the subject of police powers of arrest and detention.[1] The Attorney General's letter expressly drew the attention of the Commission to the decision of the High Court of Australia in Williams v The Queen.[2] Accompanying correspondence included a letter from the Minister for Police and Emergency Services, the Honourable George Paciullo MP, which referred to the prospect that the effect of applying the law as it was held to be in the joint judgments in Williams v The Queen would be to "severely inhibit the ability of police to carry out adequate criminal investigations".[3]

1.2 In Williams v The Queen, the High Court held that under the law of Tasmania, which for present purposes is the same as the law in New South Wales, it is unlawful for a police officer to delay taking an arrested person before a justice solely for the purpose of investigating his or her complicity in the offence for which the arrest has been made or any other offence. In our view, the decision does not change the law in any relevant sense. The various judgments in the case do, however, draw attention to certain problems which are perceived to apply in the law of arrest.

1.3 Firstly, it raises the issue whether the common law rule, which has been incorporated by judicial interpretation in the relevant legislation in New South Wales,[4] requiring an arrested person to be brought before a justice as soon as reasonably possible, should be modified to take account of the fact that the roles of the person effecting the arrest and the justice have changed significantly since the rule was established.

1.4 The second issue raised is whether the introduction of the Bail Act 1978, which gives police officers wide discretionary powers to release arrested people either on bail or not, and if on bail to prescribe conditions of release, has affected the application of the common law rule.

1.5 The third issue is whether there is a need in New South Wales to resolve the apparent conflict between the relevant statutory provision in New South Wales which enables an arrest to be made if reasonable grounds for suspicion exist[5] and the requirement of more substantial grounds before the commencement of a prosecution is justified. The question arises whether this conflict might be resolved by permitting a period of time between the time of arrest and presentation before a justice so that the suspicion on which the arrest is based can be substantiated so as to establish grounds for a prosecution or dispelled so as to require the release of the arrested person.

1.6 The fourth matter of significance is whether, having regard to conventional practice within the criminal justice system, the requirement for an arrested person to be taken before a "justice", which means a justice of the peace who may have no legal qualifications or experience, should be modified so as to require that the arrested person be brought before a judicial officer who is for the time being in charge of a court.

1.7 Whilst the impact of Williams v The Queen is current, it must be recognised that calls for the reform of the law of arrest are not necessarily of recent origin. Some 21 years ago, a distinguished English lawyer declared that

> There are many areas of criminal law and procedure which are in need of revision but none more so than the law relating to criminal investigation in general and to arrest in particular.[6]

The reasons put forward for the need for reform included the growth of new patterns of criminal behaviour in a modern urbanised society and the creation of a professional police service which rendered obsolete traditional practices based, for example, on an assumption that the police knew by name all of the inhabitants of the village whose welfare they were bound to protect.

1.8 There is no body of rules (whether of the common law or created by statute) which clearly states the principles upon which the law governing police powers of arrest is based. The length of time during which this uncertainty has prevailed is illustrated by the following statement made by an English

judge. "I think we are bound to take care that the law relating to the duty of constables shall rest upon broad, plain, intelligible principles."[7] This statement is not a judicial recognition of the need for reform of the contemporary law of arrest but part of a judgment delivered in a criminal case in 1823.

1.9 The impression should not be conveyed that this problem has remained unrecognised. Constructive proposals to remedy the position have been put forward from time to time, but they have only occasionally been implemented and often only in piecemeal fashion. There remains, in our view, a clear need for legislative response to the problems which are apparent under the current law.

1.10 In 1975, the newly established Australian Law Reform Commission published its interim report Criminal Investigation[8] in which it recommended fundamental changes to the law of arrest as one part of a set of proposals whose main purpose was to simplify and clarify the existing law so that its application could be made more certain and more relevant to the needs of a modern community. Although some progress was made towards implementation of the Commission's proposals at a Federal level (for which they were primarily designed), only relatively minor and isolated parts of the Commission's proposals have found their way into the statute books.[9]

1.11 There has also been a considerable amount of work done on areas indirectly related to the subject of arrest. In particular, the recent enactment in New South Wales of the Search Warrants Act 1985 followed a major review of the law and procedure relating to the issue and execution of search warrants.[10] In addition, there has been research on the use that might be made of electronic equipment for the purpose of recording interviews conducted between investigating police and people suspected of having committed criminal offences.[11]

1.12 Whilst the attention of law reform agencies and special commissions of inquiry has from time to time been directed towards the issue of police powers of arrest and investigation, there has been no really significant change in the law of arrest which police in New South Wales are required to follow. As a result, uncertainty and unreliability remain features of some of the fundamental aspects of criminal investigation. Whilst there have been useful discussions and valuable suggestions made by people taking various points of view, these have not altered the manner in which the system operates. The Commission's work on powers of arrest will inevitably cover some of the ground so usefully canvassed in specific areas. In this project, however, the Commission has undertaken a more general examination of the overall subject of police powers of arrest and sought to formulate proposals which deal with the complete range of issues relevant to the subject of police powers of arrest and detention.

1.13 The Commission's work on this project was commenced after police officers in New South Wales had been given some time to experience the impact of the judgment of the High Court in the case of Williams v The Queen[12] in which the Court was called upon to consider the common law of Australia relating to police powers of arrest and detention following arrest.[13] Whilst some would argue, in our view correctly, that the judgments in that case did not change the law in any significant way, they did serve the purpose of underlining the practical difficulties which police might encounter in the first place in determining the law and secondly in adhering to its strict requirements in the investigation of criminal offences in a "modern urbanised society". These difficulties were brought home to police officers by the manner in which courts of first instance trying criminal cases applied the law. It must be noted that each of the judgments in Williams itself acknowledged the problems which the current law was likely to create for police. For example, Wilson and Dawson JJ observed in their joint judgment:

> It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their investigation of crime. And these are functions which are carried out by police, not for some private end, but in the interest of the whole community.[14]

1.14 Elsewhere in Williams' case, there is an acknowledgment that if implied invitation for the law is changed, this should be done by legislation rather than by judicial development as has occurred in England:

> The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. King C.J. in Reg. v. Miller (1980) S.A.S.R. 170, in a passage with which we would respectfully agree (at 203) pointed out the problems which the law presents to investigating police officers, the stringency of the law's requirements and the duty of police officers to comply with those requirements - a duty which is by no means incompatible with efficient investigation. Nevertheless, the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck: see, for example, the Australian Law Reform Commission Interim Report on "Criminal Investigation", Report No. ALRC 2, Ch. 4. But the striking of a different balance is a function for the legislature, not the courts. The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement. It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation. If the legislature thinks it right to enhance the armoury of law enforcement at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.[15]

It should also be noted that in his judgment in Williams, the Chief Justice, Sir Harry Gibbs, when discussing the requirement to bring an arrested person before a justice as soon as practicable, said:

> ... what is reasonably practicable in a particular case is a question of fact. The answer to that question will depend on, amongst other things, the time when, the place in which and the conditions under which the arrest was made. It will be necessary to consider when and where a justice could have been found, whether police officers and transport were available and how long it would reasonably have taken for the necessary paperwork to be completed. Those, however, are not the only considerations. A

> police officer who has arrested a person reasonably suspected of having committed a crime must be allowed time to make such inquiries as are reasonably necessary either to confirm or dispel the suspicion upon which the arrest was based. It will not be improper to question the arrested person (Hough v. Ah Sam (1912) 15 C.L.R. 452) and it may be only fair to do so, although it will be improper to persist in questioning such a person after he has indicated that he does not wish to answer any more questions: Reg. v. Ireland (1970) 126 C.L.R. 321 at 333. The investigation necessary to be made before an arrested person can be brought before a justice may include searching his house, taking him to persons who may support or disprove an alibi and conducting an identification parade ...[16]

1.15 In discussions that we have had with police officers,[17] the single most important cause for complaint about the operation of the current law is its uncertainty. There are difficulties in interpretation of the law which make it difficult for police officers to apply the law in a manner which they can be certain will result in the material obtained as a result of their investigation being accepted by a court as being legitimately obtained and therefore admissible as part of the body of evidence presented in court in a criminal case.

1.16 Police officers have also expressed the view that the technicalities of the current law are such that the effectiveness of police as investigators is frustrated and therefore that their role in protecting the community against illegal activity is less effective. It is contended by some police officers that the mere clarification of currently existing powers would be inadequate and that increased powers are required. In support of their claim, police officers point

to generally increasing rates of criminal activity in most countries and to the fact that there are fundamental inconsistencies in the law which applies to closely analogous situations. For example, the rules regarding powers over passengers on aircraft are much different from those which apply to people who are in motor vehicles. The powers available in those circumstances are again fundamentally different from those which apply in relation to people who are, for the time being, in a public place. Different rules again apply where a person is in his or her place of residence. Some of these variations and apparent inconsistencies are explicable on policy grounds. However, complaints about the inconsistency of the law are justified where, as a matter of principle, like cases are not in fact treated in a like manner. The same rules should apply, and the same approach to law enforcement be taken, where the circumstances are substantially the same.

1.17 Some of the confusion in the current law may be attributed to an increase in specialist legislation which, in dealing with a specific problem, often one which is likely to affect only a very small percentage of the population, creates powers of arrest or grants certain rights peculiar to investigations of the kind specifically covered by the legislation. As a result, there are different rules to be applied in similar circumstances. Because these rules have been developed at different times, sometimes in apparent ignorance of earlier provisions which govern an analogous

situation, there are significant differences in the way in which police are required to conduct an investigation, even though the task which they are performing is largely the same.

1.18 In the course of this Commission's project on police powers of arrest and detention, three significant issues have emerged from the research we have conducted as the principal problems to be addressed. The first of these concerns whether a police officer should have the right to detain a person following arrest and before bringing that person before a justice to be dealt with according to law. The second concerns the right or otherwise of police to question a person following his or her arrest. The third is what might be called the issue of "reasonable time" during which detention might be permitted.

1.19 An examination of the development of powers of arrest and investigation following arrest under the common law reveals that the current procedure is significantly different from that which was followed centuries ago.[18] Under ancient procedure, at least following legislation passed in 1554, justices had the power to examine prisoners brought before them.[19] It was not until 1848 that the current procedure was put on a clear statutory basis.[20] Before that time, the procedure required the person who made the arrest to bring the arrested person before a justice as soon as reasonably practicable. Since the justice was not necessarily a legally qualified person, justices were readily available. Once before the justice, the

procedure was very different from that which obtains today. The justice was entitled to examine the arrested person and any witnesses to the matter which was the subject of the information. In many senses the examination conducted by the magistrate was of an inquisitorial nature.[21] The arrested person was closely examined by the justice in the manner which is familiar in the current system of criminal procedure in Continental Europe. With the growth of publicly funded police forces, the role of the justices as examiners of the facts gradually disappeared and it became the responsibility of the police to conduct inquiries to determine whether or not a person should be charged. The terms of the 1848 legislation confined the role of the justice to conducting committal proceedings in a manner which closely resembles the current procedure in New South Wales.

1.20 When the police acquired responsibility for much of the work previously done by justices, they did not acquire that part of the justices' powers which entitled them to examine the arrested person. To put this development in short terms, the old procedure was that a police officer had to arrest a person and bring him or her immediately before a justice, where he or she would be questioned and the circumstances of the alleged offence investigated. Under current procedure the requirement for police to bring an arrested person before a justice remains, but the justice does not exercise those ancient powers of examination of the arrested person. Under the old system, the involvement of the suspected person in the offence was

closely examined by a justice soon after the arrest was made. Under the current system, neither the police nor a judicial officer has a formal or extensive power to examine the arrested person after the arrest is made. Such power as the police have is subject to the obligation to bring an arrested person before a justice without delay.

1.21 Moreover, it is said that the need for detention following arrest is in some factual circumstances clear. The current law permits an arrest upon the ground that there is a reasonable suspicion that a person has committed a criminal offence, but the current procedure does not envisage a person being brought before a justice on the basis that he or she is "reasonably suspected" of having committed an offence. It requires that a person be brought before a justice upon a sworn information alleging the commission of an offence. In other words, this requires that a person is "charged" with an offence. If the basis on which a charge is laid must be something more than reasonable suspicion, it will clearly be necessary for a police officer who has arrested a person on the basis of a reasonable suspicion to obtain further information before the suspicion is either dispelled or confirmed. The process of acquiring this additional information will usually take some time. The argument is therefore made that the current procedure is inherently flawed because, although there are two different standards justifying an arrest on the one hand and a charge on the other, there is a universal

requirement that a person arrested must be brought before a justice, presumably for the purpose of answering a criminal charge, immediately following his or her arrest.

1.22 There is among all of this an element of confusion as to who is responsible for actually charging a person with an offence. The ancient procedure apparently required the court to charge a person and this was done after a preliminary inquiry of the witnesses. This is reflected in the current procedure of courts reading the "charge" to an accused person. The practice has since developed for police to charge a person with an offence but the authority for this development and the legal status of this practice is uncertain.

1.23 If the case for a period of detention following arrest for the purpose of undertaking further investigation is made out, the question would then arise whether any limit should be placed upon the time during which a police officer is given the opportunity to confirm or dispel the reasonable suspicion upon which an arrest is based before making a decision whether or not to charge the person arrested with a criminal offence. We consider that there must be some limits in relation to the time during which arrested people may be held in custody before being brought before a court. The major policy question is whether this should be a "reasonable period" bearing in mind all the circumstances or whether there should be a specified maximum period.

1.24 There are two general objections to the implementation of a rule such as that in force in South Australia (specifying a maximum period of four hours)[22], Victoria (six hours)[23] and England (72 hours).[24] Most importantly, the specification of any time period for all offences must be an arbitrary exercise. In some cases four hours will be too long, in other exceptional cases 72 hours may not be long enough. This, it is argued, is the main reason why a standard of "reasonableness" rather than a specified maximum period should be applied. If a particular period is specified, it may well become the practice of police to consider that they have that amount of time in every case and that any period of detention for less than the specified maximum will always be regarded by the courts as being reasonable.

1.25 We believe that there are three major arguments in favour of a specified maximum time period. Firstly, if the police were able to detain a person for a "reasonable" period, there would be, in virtually every case, scope for argument as to whether the period for which the accused person was held was "reasonable". Some of these arguments may be dismissed as without substance but the point is that nearly every case has the potential for such an argument. The specification of a period of time will, particularly if it is reasonably long, eliminate those arguments in the vast majority of cases. The Victorian experience so far has been that in 99.5% of cases the police have not required more than six hours detention following arrest for an adequate investigation of a suspected offence.[25]

1.26 Secondly, the specification of a nominated period allows a ceiling to be put on the intrusion upon personal liberty constituted by detention following arrest. It also ensures, if the period is reasonably short, that the conduct of the police in detaining people who have been arrested is subject to review by a court at an early stage.

1.27 Thirdly, the specification of a nominated period removes the subjective nature of the decision as to whether a certain course of conduct is "reasonable". Both the police and the arrested person know precisely, presuming they are aware of their respective rights and duties, what is permissible and what is unlawful.

1.28 In many of the submissions made to the Commission, the point has been strongly made that there is a clearly demonstrated need for a new code to govern the law and practice regarding police investigation generally and police powers of arrest and detention in particular. It has been recognised in England that there are certain formidable problems to be faced in attempting to formulate a code of arrest. In the first place, there is the need to balance the community interest in effective law enforcement with the protection of individual liberty. In the second place, there is the goal of making such a code clear so that it may be applied more predictably and with greater certainty. The code must be sufficiently clear to enable its provisions to be applied by a police officer or

private citizen acting, usually under conditions of great emotional stress, without the luxury of being able to refer to any minute details that the code may contain.

1.29 One English commentator has suggested that the task of developing a new code of arrest should follow a course which is guided by the following general principles:

(1) The law of arrest governing decisions made by a police officer in the exercise of his or her duty should be contained in a single, simple code covering all offences.

(2) The law should permit the power of arrest to be used in relation to any offence, however trivial it may seem to be, where the only effective means of enforcement of the law is to resort to the power of arrest. If certain legislation might be unenforceable without the existence of the power of arrest, then the power of arrest should be available.

(3) The existence of the power to arrest should depend primarily on the necessity of arrest as a means of enforcement of the law in the particular circumstances. The power should depend (in cases of offences not in the first rank of seriousness) on the refusal of the alleged offender to identify himself or herself or on the existence of a reasonable belief that, unless arrested, the person could not be made to answer for his or her alleged wrongdoing.

(4) Since the exercise of the power of arrest will be made in circumstances where the relevant facts and conditions may change by the minute, the power to detain should expire when the factor which has been the justification for the arrest disappears. For example, a person who has been arrested because he or she has failed to identify himself or herself should be entitled to be released as soon as identification is made unless there is some other factor which justifies continuing detention.

(5) The exercise of these powers by police must be made on the basis of a reasonable belief in the existence of facts justifying the arrest. Reasonable actions should not be rendered unlawful if it is subsequently established that the situation was not as it appeared to be.

(6) The law 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]

1.30 Whilst it is clear that in the interests of individual liberty there must be limitations on the power of a police officer to arrest or detain a person, the existing legal situation is unsatisfactory because it hinders the effective investigation of criminal offences and fails, through its complexity, to safeguard the freedom of the individual. In developing the tentative proposals set out in Chapter 4 of this Discussion Paper, we have tried to ensure that both respect for the personal liberty of the individual and the opportunity for effective law enforcement should be features of the administration of criminal justice in New South Wales. We have sought to clarify a number of aspects of the law which are currently confused, and to provide a practical and realistic basis on which police powers might be exercised. Those powers must be sufficient to enable the police to perform their function effectively, but they must be subject to constraints which ensure that they are not used unnecessarily or unreasonably.

Footnotes

1. The Hon T W Sheahan, letter to the Commission, 21 January 1987.

2. (1986) 60 ALJR 636.

3. The Hon G Paciullo MP, letter to the Attorney General, 2 December 1986.

4. Crimes Act 1900 s352. See also Bales v Parmeter (1935) 35 SR (NSW) 182; Clarke v Bailey (1933) 33 SR (NSW) 303. The New South Wales legislation is notable in that it does not contain words which expressly limit the time within which the requirement of taking an arrested person before a justice must be complied with. Compare Police Offences Act 1953 (SA) s78 ("forthwith"); Crimes Act 1958 (Vic) s460(1) and Justices Act 1959 (Tas) s34A(1) ("as soon as practicable").

5. Crimes Act 1900 s352.

6. D A Thomas "Arrest: A General View" [1966] Criminal Law Review 639.

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

8. Australian Law Reform Commission Criminal Investigation Interim Report (ALRC 2, 1975).

9. See eg Summary Offences Act 1953 (SA) ss78, 79.

10. Criminal Law Review Division, Attorney General's Department, New South Wales Search Warrants - Proposals for Reform in NSW (May 1983).

11. Criminal Law Review Division, Attorney General's Department, New South Wales Tape Recording Police Interviews: Summary of Findings and Recommendations (June 1984); Criminal Law Review Division, Attorney General's Department, New South Wales A Proposed System of Electronically Recording Police Interviews with Suspected Persons (October 1986).

12. (1986) 60 ALJR 636.

13. Iorlano (1983) 151 CLR 678 did not consider the common law.

14. Williams v The Queen (1986) 60 ALJR 636 at 650.

15. Id at 643 per Mason and Brennan JJ.

16. Id at 638.

17. Private conferences and submission to the Commission by the Commissioner of Police, 25 May 1987.

18. See generally Holdsworth's History of English Law Vol 1 at 294-298.

19. 1, 2 Philip and Mary c 13.

20. 11, 12 Victoria c 42.

21. Holdsworth's History of English Law Vol 1 at 296.

22. Summary Offences Act 1953 (SA) s78.

23. Crimes Act 1958 (Vic) s460.

24. Police and Criminal Evidence Act 1984 (UK) ss41-44.

25. Consultative Committee on Police Powers of Investigation: Custody and Investigation: Report on s460 of the Crimes Act 1958 Victoria (1986) at vii.

26. D A Thomas, note 6 at 658-659.

Chapter 2

THE CURRENT LAW IN NEW SOUTH WALES

I. INTRODUCTION

2.1 This chapter contains a discussion of the current law and practice in New South Wales with respect to police powers of arrest and detention. Before embarking upon a detailed examination of these powers, it is important to consider their purpose.

2.2 In contemporary society, it is the police force which bears the principal responsibility for the process of criminal law enforcement in its early stages. A major aspect of this responsibility is the investigation of criminal activity. Another is the apprehension of people who have apparently breached the criminal law. The powers of arrest and detention which have been conferred upon police officers are designed to assist them in the performance of these tasks.

2.3 The primary purpose of an arrest is the apprehension of a person for the suspected commission of a criminal offence. However, an arrest should also be seen in context as a preliminary step in the process of the prosecution of the suspected offender. Accordingly, the ultimate purpose of an arrest is to ensure the subsequent attendance of the arrested person before a court should a prosecution be commenced. The exercise of the power of arrest is not, of course, the only

procedure available to achieve this purpose. At para 2.46 we deal with the alternative procedure of issuing a summons to a person requiring his or her attendance at a court.

2.4 It must be emphasised that the power of arrest has traditionally been regarded by the common law as a part of the process of prosecution rather than as an investigative power. It does not in itself permit the detention of a person for the purpose of questioning or otherwise investigating the possible commission of a criminal offence. Nevertheless, an arrest does result in the detention of a suspected criminal offender and a police officer will often wish to use this period of detention to question an arrested person or to involve him or her in the process of investigation with a view to obtaining material that may be used as evidence in a criminal prosecution. This chapter includes a discussion of the nature and extent of the investigative powers available to the police during the period of detention which follows an arrest.

2.5 Legislation supplementing powers available under the common law has altered the emphasis of the common law by giving police officers certain powers of detention which permit them, for example, to stop a person for a particular purpose and to search that person or his or her vehicle for certain property.[1] These powers have as their immediate purpose the investigation of suspected criminal activity and the collection of evidence that may be used in a future criminal prosecution.

II. THE POWER OF ARREST

A. Arrest Without Warrant: Common Law Powers

2.6 The usual distinction made in relation to powers of arrest is between those powers which may be exercised without the need for a warrant and those which may only be exercised on the basis of a warrant.[2] The common law confers powers of arrest without warrant upon both "officers of the peace" and private citizens. In practical and contemporary terms, "officers of the peace" are people acting as agents of the State and will usually be police officers. Accordingly, that term will be used in the following discussion.

Arrest for the Commission of a Felony

2.7 The common law empowers both police officers and private citizens to arrest a person without warrant for the commission of a felony. However, the power of a police officer in this regard is broader than that of a private citizen. A police officer may arrest without warrant a person whom the officer reasonably suspects has committed a felony. Provided that the officer has the requisite suspicion, the arrest will be lawful notwithstanding that the arrested person has not committed a felony. At common law the power of a private citizen to arrest without warrant is limited to cases where a felony or a breach of the peace has actually been committed or is reasonably apprehended.[3] The onus of proving the felony or its reasonable apprehension is on the person making the arrest.[4]

Arrest for a Breach of the Peace

2.8 Both police officers and private citizens may arrest without warrant a person who commits a breach of the peace in their presence, provided that they act promptly. They may also arrest without warrant a person whom they reasonably believe will, if not restrained, shortly thereafter commit a breach of the peace. A breach of the peace sufficient to justify an arrest is committed where there is an actual assault,[5] or where public alarm is created by wrongful conduct,[6] or when a person obstructs a public officer in the execution of his or her duty.[7] A person who sees a group of people fighting may arrest any one or more of them and is not bound to inquire who started the fight.[8] Mere annoyance, disturbance or abusive language without personal violence are not generally sufficient to establish a breach of the peace.[9]

Arrest for the Commission of a Misdemeanour

2.9 Neither a police officer nor a private citizen has any power to arrest a person without warrant for the commission of a misdemeanour, other than the misdemeanour constituted by an attempt to commit a felony[10] or where the misdemeanour in question is also an actual or reasonably apprehended breach of the peace.[11]

B. Arrest Without Warrant: Statutory Powers

2.10 In New South Wales, various statutory provisions supplement, but do not displace, the relevant common law. The most important of these provisions is s352 of the Crimes Act 1900 which provides:

(1) Any constable or other person may without warrant apprehend,

(a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,

(b) any person who has committed a felony for which he has not been tried,

and take him, and any property found upon him, before a Justice to be dealt with according to law.

(2) Any constable may without warrant apprehend,

(a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime,

(b) any person lying or loitering, in any highway, yard, or other place during the night, whom he, with reasonable cause, suspects of being about to commit any felony,

and take him, and any property found upon him, before a Justice to be dealt with according to law.

There are certain features of this section which should be noted. Section 352(1) confers certain powers of arrest without warrant upon both police officers and private citizens, while s352(2) confers powers of arrest only upon police officers. The power of arrest conferred by s352(1) is lawfully exercised only if the person arrested has in fact committed an offence. The power of arrest under s352(2) is lawfully exercised notwithstanding that the person arrested has not in fact committed an offence, since the police officer's reasonable suspicion as to the commission of an offence by the arrested person is sufficient to justify the arrest. The powers of arrest conferred on a police officer by s352(1)(a) and (2)(a)

are broader than those conferred by the common law, since an arrest may be made not only for felonies but also for misdemeanours not amounting to a breach of the peace. However, the misdemeanour in question must be one created by statute and not the common law. Under s352(1), the private citizen's power to arrest also extends to all statutory offences but is limited in that it must be exercised during or immediately after the commission of the offence in question. There is no provision for a private citizen to arrest on the basis of a reasonably held suspicion. The power of arrest conferred by s352(2)(b) is broader than that conferred by the common law under which a police officer could arrest without warrant where the officer reasonably suspected a person of attempting to commit a felony. However, the power is limited by the circumstances stipulated in the paragraph.

2.11 There are other provisions in the Crimes Act which confer powers of arrest without warrant. Section 352AA permits a police officer to arrest without warrant a person whom the officer reasonably suspects is a prisoner unlawfully at large. Section 352A empowers a police officer to arrest without warrant a person whom the officer reasonably suspects of having committed an offence against the law of another State or a Territory of the Commonwealth, provided that the offence in question also consists of an act or omission which, if it occurred in New South Wales, would constitute an indictable offence or an offence punishable by imprisonment for two years or more.

2.12 Section 353 provides that a person to whom any property is offered to be sold, pawned or delivered, and who has reasonable cause to suspect that an offence has been committed with respect to such property, may, and in some circumstances must, arrest the person offering the property. This is a curious section which has apparently not been the subject of judicial interpretation[12] and does not appear to have been used with any frequency. It does not expressly require a belief to be formed that the person offering the property is in any way implicated in the offence.

2.13 Finally, s353C(1), which gives a special power of arrest to people who are in command of an aircraft, is noteworthy in that it empowers them to act on the basis of a reasonable suspicion. Furthermore, s353C(2) authorises the person in command of the aircraft to place a person "under restraint or in custody" or to remove a person from the aircraft in certain specified circumstances. The powers conferred by s353C(2) are not solely dependent upon the anticipated commission of an offence, but may also be exercised "to avoid danger to the safety of the aircraft or of persons on board the aircraft". The section also empowers the removal of a person from the aircraft, but expressly provides that this power should not be exercised "in the course of a flight".[13]

C. The Distinction Between Felonies and Misdemeanours

2.14 It can be seen that some of the powers of arrest without warrant at common law and under s352 of the Crimes Act, depend upon the distinction between a "felony" and a "misdemeanour". This distinction has ceased to be of any relevance in a practical sense. At common law, felonies are those crimes punishable by death or penal servitude, while misdemeanours are those punishable by imprisonment or fine.[14] The Crimes Act contains its own definitions of the terms "felony" and "misdemeanour" which conform to the distinction made by the common law.[15] It must be said that the division of offences into felonies and misdemeanours is arbitrary.[16] Whilst the classification of an offence depends to a large extent upon the nature of the penalty a convicted person might receive, there is no practical distinction in prison discipline between people subject to a sentence of penal servitude and those subject to imprisonment.

D. The Requirement of a "Reasonable Suspicion"

2.15 Some of the powers of arrest without warrant both at common law and under statute require a police officer (since the concept is applicable to them alone) making the arrest to have a "reasonable suspicion". The suspicion may be based on material which would not be admissible in evidence, such as the arrested person's criminal record, his or her failure to answer questions posed by the person making the arrest, and upon information given by others.[17] The fact that police powers of arrest without warrant must be exercised on the basis of a

reasonable suspicion suggests that the officer making the arrest must indeed have a suspicion with respect to the commission of a crime by the arrested person in order for the arrest to be lawful.[18]

The Meaning of "Reasonable" Suspicion

2.16 The power of arrest without warrant cannot be exercised merely on the basis of a suspicion honestly held by the police officer making the arrest. The suspicion must also be "reasonable". This requirement means that the circumstances within the knowledge of the officer making the arrest render the suspicion an objectively reasonable one. If that person is mistaken as to the facts, and the mistake is a reasonable mistake of fact, and if the misapprehended facts would, if true, establish reasonable grounds for the suspicion, the suspicion is reasonable.[19] Whether a suspicion is reasonable must be assessed in the light of the circumstances known to the person making the arrest at the time when the arrest is made.

E. Arrest Under Warrant: Common Law Powers

2.17 At common law, a judicial officer may issue a warrant for the arrest of a person for the commission or suspected commission of a felony or misdemeanour. The warrant may be issued to a private citizen or a police officer. In order to obtain such a warrant, the person who seeks its issue (the informant) must swear an information alleging that he or she knows or reasonably suspects that the person in respect of whom the warrant is sought has committed an offence. The judicial

officer must be satisfied that a "prima facie" case has been made out for the grant of the warrant before it will be issued, although he or she need not be personally satisfied that the informant's suspicion is objectively reasonable.[20]

2.18 Two observations should be made about arrest under warrant at common law. Firstly, an arrest made under a common law warrant is lawful notwithstanding that the person arrested has not committed the alleged offence or that the relevant facts did not constitute reasonable grounds for suspecting the commission of the alleged offence by the arrested person.[21] Secondly, the arrest is not lawful if the judicial officer who issued the warrant did not have jurisdiction to do so. A person making such an arrest would be liable for false imprisonment notwithstanding that he or she was unaware of this lack of jurisdiction.[22] This liability, at least for police officers, has been expunged by statute in New South Wales.[23]

2.19 The warrant must name or adequately describe the alleged offender and must also specify the offence or offences in respect of which the alleged offender is to be arrested. A warrant which fails to comply with either or both of these requirements is known as a "general" warrant and an arrest made under such a warrant is unlawful.[24]

Execution of Warrant

2.20 Generally speaking, a warrant continues in force until it is executed and may be executed at any time.[25] In order to effect a lawful arrest pursuant to a warrant, the person making the arrest must have the warrant in his or her possession at the time of the arrest. However, the concept of "possession" in this context has been given a liberal interpretation, in that the person making the arrest need not have the warrant on his or her person but "must be sufficiently near to and in control of the warrant as to be able to more or less instantly produce it".[26] At common law, the failure to comply with any of the requirements governing the procedure of arrest under warrant renders the arrest unlawful. There are, however, a number of statutory provisions which are designed to protect the person making the arrest from such liability.[27]

F. Arrest Under Warrant: Statutory Provisions for Indictable Offences

2.21 Where an information alleging the commission of an indictable offence has been sworn before a justice, the justice may issue a warrant for the arrest of the person named in the information if the person is not already in custody.[28] The warrant must comply with certain formal requirements. It must "name or otherwise describe" the alleged offender[29] and "state shortly the matter of the information".[30] It must also:

> order the police constable or person to whom it is directed to apprehend the person whose appearance is required, and cause him to be brought before such Justice, or any other Justice to answer to the information and be dealt with according to law ...[31]

The arrest of the person specified in the warrant may be effected at any place in New South Wales.[32]

G. Arrest Under Warrant: Statutory Provisions for Summary Offences

2.22 The procedure to obtain a warrant for the arrest of a person who has committed or is suspected of having committed a summary offence is similar to that for warrants issued in respect of indictable offences. However, there are certain variations in the procedure relating to the information:

* The information may be laid not only by the informant but by his or her "counsel, attorney, or other person authorised in that behalf".[33]

* The information must be laid within six months from the time of the alleged offence unless some other time limit is specified by a statute dealing with the offence.[34]

* The information must be "for one offence only, and not for two or more or offences".[35]

H. The Act of Arrest

2.23 An act which effectively amounts to a deprivation of the arrested person's liberty, such as a physical seizure of the arrested person, will constitute an act of arrest.[36] However, the act of arrest need not be in so extreme a form. Accordingly, there will be an arrest if the person seeking to make the arrest merely touches the arrested person or advises the arrested person that he or she is under arrest, although in the latter case the person sought to be arrested must submit to the authority of the person making the arrest before mere words will constitute an act of arrest. The requirement of submission means that, if a person accompanies a police officer

who has purported to make an arrest in the belief that he or she has a choice in the matter, that person is not actually under arrest. It has been suggested that an arrest made pursuant to a statute must be "effected in good faith, and for the purposes contemplated by the enactment" before an arrest will be lawful.[37]

I. Communication of the Fact of Arrest

2.24 The arrested person must know that he or she is under compulsion to accompany the person making the arrest. Accordingly, the person making the arrest must communicate the fact of such compulsion to the arrested person. Where the arrested person is effectively deprived of his or her liberty, it is unnecessary for the person making the arrest to confirm the arrest orally. However, where the arrest is sought to be effected by mere touch or words, the person making the arrest must communicate to the arrested person that he or she is under compulsion. If the person seeking to make the arrest has done all that is reasonable to communicate the fact of arrest to the person sought to be arrested, but the person arrested has failed to understand that fact because of some disabling condition, such as intoxication, deafness or an inability to speak English, the arrest will be lawful.[38]

J. Notification of the Reason for Arrest

2.25 The person making an arrest must inform the person arrested of the reason for the arrest in order for the arrest to be lawful.[39] However, there is no need for a specification of the precise offence: it is sufficient to advise the arrested

person of the facts upon which the suspicion justifying the arrest is based. Furthermore, there are a number of situations in which an arrest will be lawful notwithstanding that the person arrested was not notified of the reason for the arrest. For example, the person to be arrested may be arrested in the act of committing the offence for which he or she is arrested and the reason for the arrest is so obvious as to preclude the need for its notification. Again, it may not be reasonably practicable to notify the arrested person of the reason for the arrest where the arrested person resists arrest. Finally, it may not be reasonably possible to make the required notification if the arrested person is for some reason unable to understand the notification.

K. The Use of Force in Effecting an Arrest

2.26 The person making the arrest is entitled to use a degree of force in order to effect the arrest if the person to be arrested seeks to avoid arrest by resistance or escape. The amount of force permissible in this respect is that which is reasonable and necessary in the circumstances. This requirement must be assessed both subjectively and objectively. Accordingly, the person making the arrest must have honestly believed, on the basis of the facts as they appeared to him or her, that the force actually used to effect the arrest was required by, and proportionate to, the circumstances in question. However, such a belief will not be sufficient to justify the use or degree of force. It is also

necessary that a reasonable person, placed in the situation of the person making the arrest, would have come to the same conclusion.[40]

2.27 A person making an arrest by the use of force will not be liable, in either a civil or criminal action, if the force employed in making the arrest, judged both subjectively and objectively, was reasonable and necessary. Where the person arrested has been injured as the result of force which is considered unreasonable on either a subjective or objective basis, the person making the arrest may be guilty of an assault. The question of criminal liability in the situation where the arrested person has been killed as the result of unreasonable force is more complicated.[41] If the force was unreasonable because the person making the arrest did not believe it to be reasonable, he or she will be guilty of manslaughter at the least and, indeed, will be guilty of murder if his or her state of mind also constitutes the mens rea of murder. If the force was employed in good faith but was nevertheless unreasonable on an objective assessment, the person making the arrest will be guilty of manslaughter.

2.28 This discussion of the force which may be used to effect an arrest has assumed throughout that the arrest itself is lawful. However, if an arrest is unlawful, this would appear to remove the very basis upon which the use of force to make an arrest may be justified and thereby render the person purporting to make the arrest both civilly and criminally

liable for any force employed against the person sought to be arrested. The problem of such liability is particularly acute where the arrest is unlawful because of a minor or technical failure to comply with the relevant law. One commentator has made the following observation on this problem:

> It would be odd if a police officer was to incur criminal liability for an assault, or worse, where, but for an oversight of this type, his arrest, and the force used in its accomplishment, would be sanctioned by the law; but if his mistake was one of law as distinct from one of fact (and ignorance of the need to have the warrant with him would represent an error of law) it would not, prima facie at least, exonerate him from liability. Such a situation has yet to be considered by the courts. It may be that at the appropriate time a court might allow that an honest and reasonable, or at the very least, honest mistake as to the law would excuse the arrester from liability in this situation, or at least mitigate his liability.[42]

L. Entry into Premises to Effect Arrest

2.29 Where a police officer seeks to arrest a person, either with or without a warrant, the officer is entitled to enter private premises in order to effect the arrest. The premises in question need not be those of the person sought to be arrested. If necessary, the entry may be forced. Before an entry is forced, the police officer should give due notice of his or her desire to enter the premises.[43]

2.30 Where a statutory provision such as s352 of the Crimes Act confers a power of arrest without warrant, there is an implied power to enter private premises without the consent of the occupier in order to effect an arrest if such entry is necessary.[44] In particular, a statutory power to arrest

without warrant a person who is reasonably suspected of having committed a crime carries with it a power to enter private premises in which it is reasonably suspected the person will be found.

III. POLICE POWERS OF SEARCH AND SEIZURE WITHOUT WARRANT

A. Common Law Powers

2.31 At common law, the police do not have any general power to stop a person and search him or her for evidence relevant to the commission of a crime, nor to enter and search a person's premises and take such items found upon the premises. If the police have arrested a person, they may search that person and his or her premises (and presumably a vehicle) and seize:

* items relevant to the crime for which the person was arrested;
* items possessed by the arrested person with which that person might seek to harm himself or herself or other persons; and
* items possessed by the arrested person with which he or she might seek to effect an escape from custody.

When searching premises as an incident of arrest, the police must be motivated by a desire to obtain evidence in relation to the offence for which the arrest was made, not by the mere desire to search for evidence relating to the commission of some other offence. The police conducting a search may use reasonable force if a person unlawfully resists the search.[45]

2.32 The police may take property relevant to the commission of a crime from a public place without the consent of the owner of the property provided the following conditions are fulfilled:

> First: The police officers must have reasonable grounds for believing that a serious offence has been committed - so serious that it is of the first importance that the offenders should be caught and brought to justice.
>
> Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime, or is the instrument by which the crime was committed, or is material evidence to prove the commission of the crime.
>
> Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.
>
> Fourth: The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.
>
> Finally: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.

B. Statutory Powers

2.33 A number of statutory provisions confer powers of search and seizure. There is a general power to search a person who is "in lawful custody upon a charge of committing a crime", although the meaning of that phrase is uncertain and ambiguous.[46] Other statutory powers may be used against people who have not been arrested or charged. The most

important of these permits a member of the police force to stop, search and detain any person or vehicle whom he or she reasonably suspects of having or conveying anything stolen or otherwise unlawfully obtained or anything used or intended to be used in the commission of an indictable offence.[47] This power is one of recent origin and has not apparently been considered in a reported judgment.[48]

2.34 If a police officer is conducting a lawful search for specific items of property under the authority of a search warrant, the police officer may seize any property which he or she has reasonable grounds for believing is connected with any offence.[49] The power to seize a thing entitles the police officer to remove it from the premises where it is found or to secure it on the premises.[50]

C. Personal Searches

2.35 Where an arrested person does not consent to some form of bodily examination, a police officer who believes on reasonable grounds that it will afford evidence as to the commission of a crime, has a limited power to compel such an examination. This power is conferred by s353A(2) of the Crimes Act 1900 and is directed to the situation where the police wish to go beyond the search of a person for items in his or her possession and conduct a "medical" examination of that person's body.[51] The provision imposes various conditions upon the conduct of such an examination which are not applicable to the conduct of a mere search.[52] Before a person can be examined,

there must be "reasonable grounds for believing" that an examination will provide evidence as to the commission of the crime with which the person has been charged. It would appear that the belief as to the need for an examination must be held by the police officer requesting the examination. The requirement that this belief be held on "reasonable grounds" calls for an objective assessment of the need for an examination which must include a consideration of the nature of the crime in question and the circumstances in which it is alleged to have been committed. Any examination must be directed towards obtaining evidence as to the commission of the crime. Furthermore, it must be "reasonable" for that purpose, a requirement which again calls for an objective assessment of the nature of the examination. Further safeguards upon the exercise of this power of compulsory medical examination are that the examination can only be requested by a police officer of or above the rank of sergeant and that the examination must be conducted by or under the supervision of a qualified medical practitioner.

2.36 Section 353A(2) stipulates that the power of the police to request the conduct of a medical examination can only be exercised when the person sought to be examined "is in lawful custody upon a charge of committing any crime or offence". This requirement gives rise to some difficulties of interpretation and application. For example, the use of the term "charge" suggests that it is not sufficient that the person in question has been arrested but that a charge has been

laid against that person. However, the meaning of the term "charge" is itself unclear. It is not defined by the Crimes Act or any other legislation.[53]

D. Power to Take Fingerprints

2.37 Legislation of long standing provides that the officer in charge of a police station where a person is "in lawful custody for any offence punishable on indictment or summary conviction"[54] may take or cause to be taken the fingerprints of the person.[55] It does not appear that there is any need for a caution to be given before fingerprints are taken[56] nor does it appear that the fingerprinting must be done at any particular stage after arrest.[57] The circumstances in which fingerprints may be taken from a person in custody are, however, strictly limited by the terms of the legislation to situations where it is "necessary for the identification of" the person.

E. Power to Take Photographs

2.38 The same section of the Crimes Act which empowers a police officer to take the fingerprints of an arrested person also authorises the taking of photographs of such a person.[58] Again this can only be done in circumstances where the taking of the photograph is considered necessary "for the identification of" the person. It has been held that this does not authorise a police officer to take a photograph for some reason other than to identify the arrested person and that such photographs, being unlawfully obtained, may not be admitted as

evidence in a subsequent trial.[59] It has been held that the power to take a photograph may only be used where it is necessary for the purpose of identification to the court trying the offence upon which the arrested person is to be prosecuted.[60] It would therefore appear that the power to take photographs should not be used unless and until there has been a decision by a police officer to charge the arrested person. It is clear that the power to photograph may be exercised without the consent of the person in custody.

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

A. Power to Stop and Question

2.39 At common law a police officer did not have any power to stop or detain a person unless the police officer was exercising the power of arrest. Legislation now provides that a police officer may stop, search and detain any person whom he or she suspects of having or conveying anything stolen or otherwise unlawfully obtained, or anything used or intended to be used in the commission of an offence.[61]

2.40 It is particularly important, however, to note that the police cannot exercise their powers of arrest merely in order to detain and question a person.[62] There is no power to compel the person to stop, or to go to some other place, such as a police station, for the purpose of questioning. The purpose of an arrest is to apprehend a person for the actual or reasonably suspected commission of a crime or for a present or reasonably anticipated breach of the peace. While there may be

some scope for the police to question a person following arrest, the mere fact that the police wish to question the person cannot justify an arrest. If a person is questioned by the police, he or she is generally not obliged to answer. Although there is no general power under either common law or statute to stop and question a person, there are a number of legislative provisions which do confer limited powers of questioning in specific circumstances and for particular purposes.[63] The most commonly used powers relate to the use of motor vehicles. These powers demonstrate the vast distinction between the position of a person in a public place and a person who is for the time being in a motor vehicle.

B. Powers Under the Motor Traffic Act 1909

2.41 The Motor Traffic Act contains a number of provisions which empower a police officer to demand certain information for the purpose of enforcing the Act and oblige the person questioned to provide that information.[64] The Act also permits a police officer to detain a person while an investigation is conducted.[65]

2.42 By way of example, the Motor Traffic Act creates a number of offences where a person drives, or attempts to drive, a motor vehicle while there is present in that person's blood a prescribed concentration of alcohol.[66] Where a police officer carries out a "breath test" on a person and the device used for the test indicates that there may be present in that person's

blood a prescribed concentration of alcohol, a police officer may arrest the person without warrant and cause the person to be detained for the purposes of a "breath analysis".[67]

C. Use of Summons Procedure

2.43 The procedure leading to the criminal prosecution of a person need not be commenced by the arrest of that person. It can also be initiated by the issue of a summons. If a person knows or suspects that a person has committed an offence, he or she may lay an information before a justice of the peace.[68] The justice may then issue a summons for the appearance of the alleged offender.[69] Such a summons must state "the matter of the information" and require the alleged offender "to appear at a certain time and place before such justice as shall then be there to answer to the information and be dealt with according to law".[70] The summons must be served in a prescribed manner upon the alleged offender.[71] If the alleged offender is served with the summons but fails to appear as required, a warrant may be issued for his or her arrest.[72]

2.44 A summons may also be issued to require the appearance of a person to provide relevant evidence.[73] Such a summons may be issued where an information alleging the commission of an offence has been laid and a time and place appointed for the hearing of the information. In order to obtain the issue of a summons, it must be demonstrated to a justice that a person "is likely to be able to give material evidence, or to have in his possession or power any document or writing required for the

purposes of evidence" and "will not appear voluntarily to be examined as a witness, or to produce such document or writing" at the hearing of the information.[74] If these matters are established, the justice must issue a summons for the appearance of the person in question.

2.45 Although a summons has been the traditional method by which a criminal prosecution has been instituted without the prior arrest of the accused person, a similar but more modern procedure is the issue of an "attendance notice". Where a person is suspected of the commission of a criminal offence, certain members of the police force may authorise the issue of a notice for the attendance of a suspected person before the Local Court.[75] The notice, which must include the nature and particulars of the alleged offence, requires the accused person to appear at a specified time and place before a Local Court "to be dealt with according to law".[76] The notice must state that the failure of the accused person to appear as stipulated may result in his or her arrest or, if appropriate, in the matter being dealt with by the court in the absence of that person. The notice must be served personally upon the accused person by a police officer who must explain at the time of service the consequences of a failure to comply with the notice. The notice must be signed by the accused person, presumably as an acknowledgment of service.

2.46 The tender of an attendance notice to a Local Court is deemed to be an information for the purposes of the initiation of criminal proceedings before the Court. If the accused person does not appear in answer to the notice, the Local Court may, upon proof of the service of the notice upon the accused person "at a reasonable time before"[77] the hearing, issue or authorise the issue of a warrant for the arrest of the accused person.

V. THE POWER TO CHARGE WITH A CRIMINAL OFFENCE

2.47 The prosecution of a person is formally commenced by the laying of a "charge" against that person. In the following discussion, we consider the basis upon which a charge may properly be made and the process which results in the making of a charge.

2.48 The usual term employed to describe the proper basis for the making of a charge is "reasonable and probable cause". The meaning of this term has been discussed in a number of cases, often in the context of an action for malicious prosecution by a person charged with a criminal offence against the person responsible for bringing the charge. Against the background of our discussion on powers of arrest, it is particularly important to observe that the basis upon which an arrest may be justified, namely, that there is a "reasonable suspicion" as to the commission of a crime by the person arrested, is not sufficient to constitute "reasonable and probable cause" for the making of a charge against the arrested person. In

Williams v The Queen, Mason and Brennan JJ briefly discussed the meaning of the term "reasonable and probable cause" and the distinction between that concept and the notion of "reasonable suspicion" which justified arrest:

> In the ordinary case of an arrest on suspicion, the arresting officer must have satisfied himself at the time of the arrest that there are reasonable grounds for suspecting the guilt of the person arrested ..., although the grounds of suspicion need not consist of admissible evidence ... If the arresting officer believes the information in his possession to be true, if the information reasonably points to the guilt of the arrested person and if the arresting officer thus believes that the arrested person is so likely to be guilty of the offence for which he has been arrested that on general grounds of justice a charge is warranted, he has reasonable and probable cause for commencing a prosecution ...[78]

This brief discussion may be expanded by referring to two of the authorities cited in this passage. Thus, in Brain's case, Dixon J observed:

> Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment.[79]

and, in Glinski v McIver, Lord Devlin remarked:

> Reasonable and probable cause ... means that there must be ... sufficient grounds ... for thinking that the plaintiff was probably guilty of the crime imputed ... This does not mean that the prosecutor has to believe in the probability of conviction ... The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried.[80]

Footnotes

1. Crimes Act 1900 s357E.

2. See R W Harding "The Law of Arrest in Australia" in D Chappell and P Wilson (eds) The Australian Criminal Justice System (1972) at 334-341.

3. 2 Hawkins Pleas of the Crown c 12; 2 Hale's Pleas of the Crown 78. See also Christie v Leachinsky [1947] 1 All ER 567 at 572, 575-6, 577-8.

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

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

6. Webster v Watts (1897) 11 QB 311.

7. Spilsbury v Micklethwaite (1808) 1 Taunton 146.

8. Baynes v Brewster (1891) 2 QB 375.

9. See generally cases quoted in R S Watson and H F Purnell Criminal Law in New South Wales para 1021, notes 17-19.

10. Harding at 337.

11. R v Howell [1981] 3 All ER 383.

12. R S Watson and H F Purnell, note 9 at para 1024. See also Chic Fashions (West Wales) Ltd v Jones [1968] 1 All ER 229 at 241 per Salmon LJ.

13. Crimes Act 1900 s353C(1).

14. Bates, Buddin and Meure The System of Criminal Law (1979) at 76-77.

15. Crimes Act 1900 ss9, 10.

16. See generally R S Watson and H F Purnell, note 9 at paras 28-31.

17. Id at 162-163. R S Watson and H F Purnell, note 9 at para 1022.

18. R v Banks [1916] 2 KB 621; R v Harrison [1938] 3 All ER 134; Nakudda Ali v Jayaratne [1951] AC 666.

19. P Gillies The Law of Criminal Investigation (1982) at 161 citing Walker v Lovell [1975] 3 All ER 271.

20. Id at 153.

21. Id at 154. As to the meaning of "reasonable suspicion", see paras 2.15-2.17.

22. P Gillies, note 19 at 154.

23. Police Regulation Act 1899 s26.

24. P Gillies, note 19 at 155.

25. Ibid.

26. Id at 156-157.

27. Justices Act 1902 ss30(1), 30(2), 65(1), 65(3). See also Police Regulation Act 1899 s26.

28. Justices Act 1902 s23.

29. Justices Act 1902 s29(1)(c).

30. Justices Act 1902 s29(1)(d).

31. Justices Act 1902 s29(1)(e). Compare Justices Act 1959 (Tas) and see Williams v The Queen (1986) 60 ALJR 636.

32. Justices Act 1902 s29(3).

33. Justices Act 1902 s54.

34. Justices Act 1902 s56.

35. Justices Act 1902 s57.

36. See generally R S Watson and H F Purnell, note 9 at para 1020.

37. Drymalik v Feldman [1966] SASR 227.

38. See R v Inwood [1973] 1 WLR 647, 2 All ER 645; Wheatley v Lodge [1971] 1 WLR 29, 1 All ER 173.

39. P Gillies, note 19 at 149 referring to Christie v Leachinksy [1947] 1 All ER 567.

40. See generally P Gillies, note 19 at 197ff.

41. See discussion of use of unlawful force in context of self defence in the judgment of Brennan J in Zecevic v DPP (Victoria) (Unreported, High Court of Australia, 1 July 1987).

42. P Gillies, note 19 at 199.

43. See generally R S Watson and H F Purnell, note 9 at para 1023 and cases cited there.

44. Kennedy v Pagura [1977] 2 NSWLR 810; Dobie v Pinkler [1983] WAR 48.

45. This rule is preserved in relation to property in the Search Warrants Act 1985 s17.

46. Crimes Act 1900 s353A(1).

47. Crimes Act 1900 s357E.

48. R S Watson and H F Purnell, note 9 at para 1037. The section was introduced in 1979.

49. Search Warrants Act 1985 s7(1)(b)(ii).

50. Search Warrants Act 1985 s7(2).

51. Section 353A draws a distinction between the "search" of an individual and an "examination" of an individual's "person". Section 353A(1) is concerned with the power to "search" and, in empowering the police to "take from the person anything found upon that search", suggests that a search must be directed only to discovering items carried by the person. Section 353A(2) is concerned with "examination" of the individual's "person", terms which suggest some form of bodily examination. This interpretation is reinforced by the fact that the "examination" is not for items, but "to ascertain the facts" as to evidence of the crime, and that the examination must be carried out by or under the supervision of a medical practitioner.

52. Compare Crimes Act 1900 s353A(1)).

53. See discussion at para 1.15 above.

54. Crimes Act 1900 s353A, added to the Act in 1924.

55. See generally R S Watson and H F Purnell, note 9 at para 1025.

56. Callis v Gunn [1964] 1 QB 495.

57. Hazell v Parramatta City Council (1967) 87 WN (Pt 1) (NSW) 229 at 241.

58. Crimes Act 1900 s353A.

59. The Queen v Ireland (1971) 126 CLR 321.

60. R v Carr [1972] 1 NSWLR 608.

61. Crimes Act 1900 s357E.

62. Williams v The Queen (1986) 60 ALJR 636 applying Bales v Parmeter (1935) 35 SR (NSW) 182.

63. E Campbell and H Whitmore Freedom in Australia (2nd ed 1973) at 89ff.

64. See eg Motor Traffic Act 1909 s5.

65. Motor Traffic Act 1909 s5C(4).

66. Motor Traffic Act 1909 s4E(1D), (1E), (1F), (1G).

67. Motor Traffic Act 1909 s4E(3).

68. Justices Act 1902 ss21, 52.

69. Justices Act 1902 ss24, 60.

70. Justices Act 1902 ss27, 62.

71. Justices Act 1902 ss28, 63.

72. Justices Act 1902 ss31, 66.

73. Justices Act 1902 ss26, 61.

74. Justices Act 1902 ss26, 61.

75. Justices Act 1902 s100AA, 100AB.

76. Justices Act 1902 s100AC.

77. Justices Act 1902 s100AG.

78. (1986) 60 ALJR 636 at 645 referrring to Mitchell v John Heine & Son Ltd (1938) 38 SR (NSW) 466 at 469; Commonwealth Life Assurance Society Ltd v Brain (1935) 53 CLR 343 at 382; Glinski v McIver [1962] AC 726 at 766-767.

79. (1935) 53 CLR 343 at 382.

80. [1962] AC 726 at 766-767.

Chapter 3

CURRENT LAW AND PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

I. INTRODUCTION

3.1 This chapter examines the position in various jurisdictions, including a detailed consideration of proposals for reform made in relatively recent times. In the first part we examine the relevant procedure in Victoria and South Australia, as well as the work of the Australian Law Reform Commission and law reform agencies in both Victoria and South Australia. Although many of the proposals made by these agencies have not yet been implemented, they nevertheless represent an important part of the development of the law in this area. It should be noted that the reason we have not dealt with the current law in Queensland, Western Australia and Tasmania is that the law in those States closely resembles the law in New South Wales. In the later parts of this chapter we examine in detail the position in Canada and England and then more briefly the relevant procedure in Scotland and the United States of America.

II. AUSTRALIA

A. The Australian Law Reform Commission

3.2 The Australian Law Reform Commission's interim report on Criminal Investigation,[1] which was published in 1975, recommended sweeping reform of police powers of arrest and detention. Some of the Commission's more significant proposals included:

* Police should proceed by way of summons rather than by arrest. The methods of obtaining a summons should be simplified taking modern forms of communication into account.[2]

* There should be clear statutory definitions of the states of "lawful custody", "restraint" and "arrest" so that the attendant rights and duties of police and suspects are clear.[3]

* Police should be required either to bring the detained person before a justice or to release the person unconditionally or on bail "as soon as reasonably practicable" and in any event no longer than four hours after custody begins.[4]

* Should four hours prove insufficient, the police could apply to a magistrate for another four hour detention period. At the extension application, the suspect would have the right to be heard, either personally or through a legal representative. A further extension in the detention period could be authorised only by a Federal, Territorial or State Supreme Court judge.[5]

* The police should have power to enter premises to arrest a person named in a warrant of arrest whom they reasonably believe to be on the premises.

* Where police have no such warrant, they should have the power to enter premises to arrest a person whom they reasonably believe to have committed a "serious offence" (that is, one punishable by more than six months imprisonment). This power should not enable the police to enter premises at night where it would be possible to make the arrest during the day.[6]

* Police should have statutory power to compel a person to furnish his or her name and address where the police have reasonable grounds to believe that a person could assist their investigation of an offence. The citizen should have a reciprocal right to know the identity of the officer.[7]

* Legislative provision should be made for the right to contact a friend, relative or legal adviser.[8]

* The right to have access to a legal adviser should be clearly stated in any proposed legislation. Arrested people should be clearly informed of their rights before any questioning or other investigative procedure.[9]

* Legislative provision should be made to establish a basic standard of treatment of persons held in custody.[10]

* The right to silence should be maintained. Arrested people should be notified of the existence of this right and be given such professional or other assistance as is necessary to allow them to exercise the right.[11]

* The judicial discretion to exclude evidence should be changed to a "reverse onus discretion" (discussed below) so that it is a real discouragement to police using improper means to gather evidence.[12]

* New procedures should be introduced to increase the reliability of police interviews. One such procedure canvassed was the electronic recording of interviews.[13]

3.3 In its recent report on Evidence, the Australian Law Reform Commission advocated that evidence gained in breach of the law should generally be inadmissible.[14] This would be subject to a judicial discretion arising where the party seeking to have the evidence admitted, which would generally be the prosecution, could show that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained. This reverse onus would provide a strong incentive to the police to comply with the rules governing investigation procedures since a failure to do so would generally result in the court excluding evidence obtained in breach of the procedural rules.[15]

B. Royal Commission of Inquiry into Drug Trafficking

3.4 On 30 June 1981 the Federal Government and the States of New South Wales, Victoria and Queensland jointly established a Royal Commission to investigate the activities of a notorious syndicate involved in trafficking prohibited drugs. In its report the Commission examined various aspects of the Australian criminal justice system and made certain recommendations on police powers of arrest and detention. These included:[16]

* There should be a a greater level of judicial review of police investigation. Where a person is detained by the police, and also where a person is voluntarily assisting the police, the person should be taken immediately before a magistrate who should be empowered to make various orders regarding the investigation of an alleged offence.

* Any police interrogation conducted prior to bringing the person before a magistrate should be inadmissible as evidence.

* The magistrate should be able to fix the time during which a person may be detained by the police for questioning.

* Should the police require further time they must seek an extension from a magistrate.

* A person should be required to give his or her name and address to the police.

* A police officer should have limited powers to detain a person without arrest for the purpose of questioning where the police officer has a reasonable suspicion that the person may have committed or be about to commit an indictable offence.

3.5 The Royal Commission report suggested that prompt and comprehensive judicial review would act as a powerful check on police harassment of suspects. It contended that from an arrested person's point of view, it is preferable to have swift

judicial review rather that leaving redress to an indefinite later date where the remedies available would be relatively clumsy. Judicial review of this kind would also protect the police against malicious complaints and have the further advantage that it would render unnecessary a great deal of litigation that currently takes place regarding the events which allegedly occur while a person was in police custody.

3.6 The Royal Commission rejected the argument that judicial review would be unworkable because of the shortage of magistrates, pointing out that many European countries have much greater judicial review of investigations. The Commission recommended that the system should initially be restricted to indictable offences. If it were found to be effective, then it should be extended to summary offences.

C. South Australia

3.7 The law in South Australia before 1985 followed the common law. A person arrested without a warrant had to be "delivered [forthwith] into the custody of the member of the police force who is in charge of the nearest police station".[17] That officer would then be required to release the person unconditionally or on bail or arrange for the appearance of the person before a justice as soon as was reasonably possible. The South Australian police had no power to detain a person for interrogation.

3.8 The South Australian Government established the Criminal Law and Penal Methods Reform Committee which, under the Chairmanship of Dame Roma Mitchell, issued a report on criminal investigation in July 1974.[18] This report contained a study of the structure and functions of the police force and pre-trial criminal procedure and made a wide range of recommendations for reform.

3.9 The Committee's proposals included the following:[19]

* The police should be given a power to detain both those reasonably suspected of committing serious crimes and those whom they reasonably believe may be able to assist them in their inquiries into a serious crime.

* This power of detention should not be regarded as an arrest.

* The police should be able to detain such persons for a period not exceeding two hours.

* At the expiry of two hours the police should be able to seek an extension of time by applying to a special magistrate.

* The magistrate should have a discretion to refuse the application or to grant it for such time as he or she thinks appropriate.

* The detained person should, at all times, be entitled to have a legal adviser present during the detention and should be told of this right before the detention commences.

* The detained person should be entitled to legal representation at any application by the police for an extension of the detention.

* Consideration should be given to establishing a system of duty lawyers who could be present at interrogations. However, recognising the present impracticality of the requirement that a solicitor be present at every interrogation, the Committee recommended that the detained person be allowed to have a "prisoner's friend" present at the interrogation. Where the police have reason to believe that the "friend" is connected with

the matter under investigation, they should be allowed to refuse to have that person present at the questioning.

* Courts should be able to take into account the failure of an accused person to answer any question properly put to him or her by the police.

3.10 The basis of this final recommendation was twofold. Firstly, the Committee argued that if a detained person is entitled to have a solicitor or friend present at his or her questioning, the adviser would be likely to counsel silence. Consequently, police investigations "might be seriously hampered" because of the suspect's "failure to answer questions properly put to him". The second reason for varying the existing law was the Committee's belief that it was probable that juries do take into account the accused person's failure to answer questions put by the police. In the opinion of the Committee, any exonerating factor, such as a failure to properly understand the question, could be raised at the trial.

3.11 Eleven years after the Committee's report was published, the powers of South Australian police for the investigation of "serious crimes" were substantially amended.[20] A "serious crime" is defined as "an indictable offence or an offence punishable by imprisonment for two years or more".[21] If a person is arrested, without warrant, on suspicion of having committed such an offence, a police officer has a limited power to detain that person for investigating the offence "prior to delivering him into custody at the nearest police station".[22]

3.12 The detention may last for so long as may be necessary to complete the investigation of the suspected offence or for the prescribed period, whichever is the lesser.[23] The prescribed period begins at the time of the arrest and means a period "of four hours or such longer period (not exceeding eight hours) as may be authorized by a magistrate".[24]

3.13 The police must give notice to the arrested person as soon as practicable after apprehension of the following rights:

* to make one telephone call to a relative or friend in the presence of a police officer;
* to have a solicitor, relative or friend present during any interrogation;
* to be assisted by an interpreter, if necessary; and
* to refrain from answering any questions.[25]

The person must also be warned that anything he or she says may be taken down and used in evidence.[26]

3.14 The officer in charge of an investigation may decline to allow the arrested person to make a telephone call or to have a person present at any interrogation. This may occur when the officer has a reasonable suspicion that such communication would allow an accomplice to escape or would result in evidence being tampered with.[27]

3.15 Once the arrested person has been charged by the police with the commission of an offence, that person then becomes eligible to apply for release on bail.[28] If the decision is

made not to charge the person, then the police must return the person to the place of apprehension or to any other place reasonably nominated by the person.[29]

3.16 It should be noted that the new South Australian law adopts the time limits for detention after arrest recommended several years before by the Australian Law Reform Commission.[30] The South Australian Supreme Court has considered the new provisions and the following issues have arisen:[31]

* When is a person entitled to be alerted to his or her rights? In R v Leecroft,[32] it was held that, as the statute only requires notice of rights to be given "as soon as is reasonably practicable after the apprehension of a person", the police are not obliged to give notice to a person who voluntarily assists the police.

* What is the meaning of "custody" and when is it necessary for the police to obtain authorisation from a magistrate to temporarily remove someone from the custody of the officer in charge of the police station? This has caused some controversy. In R v Carrion and Santos,[33] an accused person was questioned and charged with an offence and then delivered into custody. The investigating police wished to question him further and did so with the permission of the station sergeant. A further charge resulted from this interview. Legoe J ruled that as the accused person was still in the custody of the station sergeant, it was not necessary to get a magistrate's authorisation for the interview. This ruling conflicts with the later decision of White J in R v Wilson, Wanganeen, Weetra and Kartiniyeri[34] who held that a magistrate's authorisation was necessary whether the further investigations were to be carried out in the police station or elsewhere. His Honour pointed out that the officer in charge of a station "is neither trained nor sufficiently detached to weigh the competing interests of the arrested person and of the investigating officers".

* In R v Bennett and Clark,[35] the accused person was arrested for summary matters and charged. An investigating officer sought a magistrate's approval for a further period of detention for investigation which was granted. The accused person declined to assist until his solicitor arrived. He was taken to an interview room in which he remained for two and a quarter hours with two detectives. No record was kept of what happened during that time but at the end of it the accused person agreed to make a statement even though his solicitor was not present. Johnston J declined to admit the statement because he was not satisfied that pressure had not been brought to bear upon the accused person or an inducement held out. His Honour was also of the view that the investigating officers had "misused the temporary custody they had obtained."[36]

3.17 Uncertainties in the interpretation of the South Australian legislation have led, at least initially, to a flurry of litigation. It is not clear precisely when a person arrested on suspicion of having committed a serious offence would have the opportunity to test the validity of the arrest in a court. The Bail Act states that a person who has been charged but not released must be:

> brought before a justice on the charge in relation to which he was arrested as soon as reasonably practicable on the next working day following the day of his arrest but in any event not later than 12 noon on that day.[37]

At the worst, this would allow the best part of a day and a half to elapse before the arrested person could seek judicial review of arrest and detention.

D. Victoria

3.18 The common law requirement that an arrested person be brought before a justice without delay was incorporated in s460 of the Crimes Act 1958.[38] Perhaps following the reasoning of

Dallison v Caffery,[39] it was apparently the general practice of police to complete necessary and reasonable investigations before bringing an arrested person before a justice.[40]

3.19 This practice continued until 1983 when, in a number of cases before the County Court, it was successfully argued by the accused person that, as he or she had not been brought before a justice as soon as was reasonably practicable after being taken into custody, the detention was illegal. In several cases the court exercised its discretion to reject otherwise admissible evidence on the ground that evidence was obtained during a period of unlawful detention.[41]

3.20 As a result of some dissatisfaction with the result of these decisions, s460 was amended in 1984 to require the police to present an arrested person before a justice within six hours of the time of arrest unless they have either released that person on bail or unconditionally.[42] Any evidence obtained during that time is admissible subject to the overriding discretion of the judge to exclude it on conventional grounds. With the consent of the person, the police may apply to a justice, within the six hour period, for an extension of the time of detention. The Act does not specify any time limit on the extension.

3.21 After some dissatisfaction with the operation of the section was expressed, principally by police officers, the Victorian Attorney General, the Hon Jim Kennan, directed the Victorian Director of Public Prosecutions, Mr John Coldrey QC,

to chair a Consultative Committee on Police Powers of Investigation and to report on the effectiveness of the new s460. This Committee published its report in April 1986.

3.22 The Coldrey Committee considered the results of a police survey of the effects of the new s460. This survey concluded that in only 0.5% of cases examined during the survey period were the police not able to conclude their investigations within the six hour period permitted by s460.[43] Nonetheless some police officers believed that the time prescribed by s460 was not sufficient to deal with some complex cases, generally those which cause the greatest concern to the public. These police officers urged that the requirement that an arrest be subject to independent judicial review within six hours of the commencement of custody be extended to 24 hours. They also wanted to remove the necessity for obtaining the consent of the arrested person to an extension of the period of detention.[44]

3.23 The Coldrey Committee concluded that the six hour period prescribed by s460 might well be inadequate in the following circumstances:[45]

* where investigations are being made into complex crimes and multiple offences;
* where there are delays occasioned by travelling time, medical treatment, obtaining legal advice, arranging interpreters, rest periods and refreshment breaks;
* where people are held in custody in prison or on remand; and
* where it is not practicable to bring people before a court.

Consequently, the Consultative Committee proposed the enactment of a rule which, whilst it would retain some of the important features of the common law requirement, substantially alters it. It recommended that the police should be required to take an arrested person before a justice "within a reasonable time"[46] of the commencement of custody if they have not previously released the person either on bail or unconditionally.

3.24 The recommendation of the Committee would modify the common law in five principal ways:[47]

* There would be a clear statutory definition of custody enacted to overcome the ambiguity in practice of people being invited to assist the police and being detained by them.

* A police officer should be able to continue investigating an offence or proceed with questioning during the time between the arrest and the presentation of the person before a justice if the arrested person agrees to that course.

* A non-exhaustive list of factors that may be relevant to establishing what is a reasonable time should be prescribed by statute.

* The requirement that the suspect be informed of his or her rights should be provided for by statute.[48]

* Interviews between police and suspects should be tape-recorded.[49]

3.25 The Committee recommended that the right of an arrested person to remain silent should be maintained, together with the well established rules of evidence that require confessional evidence to be made voluntarily. It also proposed that the judicial discretion to exclude evidence illegally obtained should be preserved.[50]

III. CANADA

3.26 The Canadian Criminal Code and the relevant case law requires that an arrested person be taken before a justice without unreasonable delay. Where a justice is available, the Code states that the police must present the person before a justice within 24 hours. However, if no justice is available, it must be done as soon as possible.[51] It has also been held that the common law in Canada permits the detention of an arrested person for a reasonable time for the purpose of interrogation.[52]

3.27 The Law Reform Commission of Canada has made an extensive study of pre-trial criminal investigation and procedure[53] and made recommendations with a view to modernising this area of law. In its report on arrest, the Commission identifies three legal purposes for arresting a person:[54]

* compelling an arrested person to appear for trial;
* preventing interference with the administration of justice; and
* preventing the continuation or repetition of a crime.

3.28 The Canadian Commission concluded that this area should be dealt with by comprehensive legislation.[55] The Commission argued that the imposition of pre-trial procedural requirements by informal guidelines which would be legally unenforceable would trivialize their importance. On the other hand, clear, straightforward legislative provisions would protect both the police and arrested persons.[56]

3.29 Under the proposals for a new law of arrest, it would be mandatory for the police to release the arrested person as soon as possible after arrest unless detention is necessary to:[57]

* compel the appearance of the arrested person in court;
* establish the identity of the arrested person;
* conduct legally authorised investigations;
* prevent interference with the administration of justice;
* prevent the continuance or repetition of an offence;
* ensure the protection of the public.

As can be seen, the criteria for detention of an arrested person are closely related to the lawful purposes of arrest identified by the Commission. The major difference is that the detention of an arrested person may be justified in order to conduct authorised investigations.

3.30 The Canadian Commission had earlier proposed that the common law requirement for a confession to be given voluntarily should be supplemented by certain procedural safeguards. The Commission proposed that where there is a breach of either the requirement of voluntariness or the relevant procedural rules, any evidence obtained as a result of the breach should generally be inadmissible.

3.31 The Canadian Commission recommended that legislation should require police to:[58]

* inform the suspect of his or her right to remain silent and of the right to contact a lawyer;

* warn the suspect that anything he or she says may be taken down and used in evidence; and

* maintain a detailed record (preferably tape recorded) of any interview with the suspect.

The Canadian Charter of Rights and Freedoms[59] and the Canadian Bill of Rights contain a number of broad principles which form an important background to the Canadian Law Reform Commission's proposals for reform of the law of arrest and detention.[60] While the courts may strike down any federal or provincial law which is contrary to the Charter, nevertheless the Federal Parliament or the legislature of a State can expressly override the Charter.[61] The Charter expressly recognises the following rights of a Canadian citizen:

* to life, liberty and security of the person (Charter s7);

* to freedom from unreasonable search and seizure (Charter s8);

* not to be arbitrarily detained or imprisoned (Charter s8);

* to be promptly told of the reasons for arrest (Charter s10(a));

* to retain and instruct counsel without delay and to be informed of this right (Charter s10(b));

* not to be subjected to any cruel and unusual treatment and punishment (Article s12).

3.32 The Canadian Commission proposed that the prosecution should not be able to use any evidence gained in breach of its proposed reforms unless it could show that the admission of the evidence "would not bring the administration of justice into disrepute". Under this proposal the courts would retain a discretion to admit the evidence where the breach was trivial.[62]

3.33 The Canadian Commission also recommended the exemption of police undercover agents from the procedural requirements. It contended that to regulate their work in this way would render it impracticable.[63] However, while it recognised the necessity for undercover work, the Commission also acknowledged the risk that a blanket exemption of undercover work could enable police to avoid the normal requirements of the law.[64]

IV. ENGLAND

3.34 The Royal Commission on Criminal Procedure chaired by Sir Cyril Phillips published its report in January 1981.[65] Many of its recommendations have since been incorporated in the Police and Criminal Evidence Act 1984. A review of criminal procedure was considered necessary because it was believed that existing investigative procedures often hampered rather than assisted criminal investigation. It was claimed that these procedures had developed haphazardly over time and could no longer deal with the increased volume and different nature of crime in contemporary society. It was also felt that the existing procedures were open to abuse by the police.

3.35 The Report of the Royal Commission argued that a prerequisite of effective policing is co-operation between the public and the police. For this co-operation to be forthcoming, the public must have confidence in the integrity of the police. In other words, if the police are to have powers greater than the general public to carry out those responsibilities peculiar to their role, then the police must

be trustworthy and be perceived as such by the public. The Royal Commission sought to establish a procedure which would enable the police to carry out effective criminal investigation and at the same time be sufficiently accountable and open to public scrutiny to gain public confidence.[66] The Commission used three criteria to assess the validity of its recommended procedure, namely whether it was fair, open and workable.

3.36 Fairness requires that both an arrested person and the police should know their legal position and be able to act on it and that rights should be accorded equally to all and without "unjustifiable variation". This requirement is a reflection of the traditional rule that every person is entitled to an equal measure of justice before the law.

3.37 The nature of criminal investigation necessitates that much of the procedure takes place "behind closed doors". The feature of "openness" requires that there is a practical means of ensuring that the use of investigative procedures is properly supervised. To be "workable", it was felt that the procedures should permit the police sufficient scope to deal with sophisticated criminals and complex crimes. On the other hand, many arrested persons are far from being professional or dangerous criminals and the crimes of which they are suspected may be both minor and straightforward. A workable system should allow the police to deal with both the simple and complex situations. At the same time, it should ensure that arrested people are treated with the dignity to which all human beings are entitled.

3.38 The Police and Criminal Evidence Act 1984 greatly extends the power of police to arrest and detain a suspect for questioning and investigation.[67] The courts had previously allowed police a "reasonable time" to collect sufficient evidence to prefer charges before an arrested person had to be brought before a justice.[68] Under the new legislation, the vague and "elastic" criteria of the common law have been replaced by the power to detain for specific time periods.

A. The Custody Officer and Review of Arrest and Detention

3.39 One of the most important features of the Act is the creation of the position of the custody officer, a police officer who must generally be of the rank of sergeant or above,[69] and whose primary function is to provide an independent review of the need for detention.[70] The custody officer must ensure that those arrested are treated in accordance with the Act and the codes of practice made under the Act.[71] He or she must also ensure that a custody record, detailing all that happens to a person who is detained in accordance with the Act or codes, is maintained.[72] As soon as practicable after the arrested person is brought to the police station, the custody officer must make a decision to detain or release the person. At a later stage, it is for the custody officer to decide whether there is sufficient evidence to charge the arrested person.[73]

3.40 Where a charge is laid, the custody officer is to order the accused person's release unless:[74]

* the name and address of the person cannot be surely established;
* detention is necessary to protect the person or to protect others; or
* there is a threat that the person will not attend a court as required or will attempt to pervert the course of justice.

If a person who has been charged is not released, the police must generally bring the person before a magistrates' court "as soon as is practicable and in any event not longer than the first sitting after he is charged".[75]

3.41 If no charge is laid, then the arrested person must be released unless the custody officer has reasonable grounds to believe that his or her release may result in the destruction of evidence or that continued detention is necessary to obtain evidence relevant to the offence for which he or she was arrested.[76]

3.42 The Act further provides that there is to be regular review of the justification for detention.[77] At specified times continued detention must be authorised either by the custody officer or by another police officer independent from the investigation.[78] The first review of detention should take place not more than six hours after detention was first authorised. Subsequent reviews must occur at nine hour intervals. At these reviews the arrested person is generally entitled to be legally represented. The review is carried out

by the custody officer in the case of a person who has been arrested and charged. If the person has not been charged, the review officer must be a police officer of the rank of inspector or above who has not been directly involved in the investigation.

3.43 The general limit on the period of detention for a person who has not been charged is 24 hours.[78] However, where a person has not been charged, an officer of the rank of superintendent or above may authorise detention for a period of 36 hours if:[79]

(a) the detention is necessary to protect or gather evidence relevant to the offence for which the person was arrested;

(b) the person was arrested for a "serious arrestable offence" as defined in s116; and

(c) the investigation is being carried out in a diligent and expeditious manner.

At the conclusion of the 36 hour period, an officer of this rank may authorise a further 36 hours of detention if all these three requirements continue to apply. This means that a police officer of suitable rank can authorise detention of a person who has not been charged for a maximum period of 72 hours.

3.44 The magistrates' courts provide another avenue for securing detention of a person suspected of "committing a serious arrestable offence" who has not been charged. If a police officer makes an application to a magistrate for a period of detention to be authorised, then the arrested person must be present and may be legally represented at the

application for detention and furnished with the details of the police application.[80] An application will only be granted if the detention is necessary to secure or gain evidence and the investigation is being conducted in a diligent and expeditious manner. The magistrate can issue a warrant for a further 36 hours of detention and may extend the warrant authorising detention, provided that the total period of detention is no longer than 96 hours.[81]

3.45 Generally, where the police application to a magistrate is refused, the person must be either charged or released (either on bail or unconditionally).[82] However, even if the police application has been refused, the person may continue to be detained by an authorised police officer for a maximum period of 72 hours.[83] Should that period of extra detention bring new evidence to light, the police may reapply to a magistrate for an extension of the detention.[84] The Act gives the police added protection by providing:[85]

> Any reference in ... (this Act) ... to a period of time or a time of day is to be treated as approximate only.

3.46 The principal safeguards of the rights and interests of the arrested person are the institution of the custody officer's position, the provision for frequent review of detention, the maintenance of a custody record, the definition of the power of police to search[86] and the rights of the suspect to inform a friend[87] and consult a solicitor.[88] The common law right of the suspect to remain silent when questioned by a police officer has been maintained.

B. Consequences of a Breach of the Act

3.47 The Police and Criminal Evidence Act does not set out the consequences of a breach of its provisions with respect to detention after arrest.[89] The recent establishment of the Police Complaints Authority may give an arrested suspect some form of redress.[90] The Act generally provides that a court may reject evidence that would have an "adverse effect on the fairness of the proceedings". In the exercise of this discretionary power, the court has to take into account "all the circumstances, including the circumstances in which the evidence was obtained" in making such a ruling.[91]

3.48 The admissibility of confessions is more specifically dealt with. The Act provides that if it is represented to the court that a confession was obtained by oppression or anything said or done which was likely to render the confession unreliable, then the Court shall not admit the confession unless the prosecution proves beyond reasonable doubt that neither of these circumstances existed.[92]

C. Response to the Police and Criminal Evidence Act 1984

3.49 The work of the Royal Commission and the resulting legislation has been controversial.[93] Police have argued that the legislation has resulted in a bureaucratisation of criminal investigation and that the provision for the arrested person to obtain legal advice will also impede investigation. Lawyers have pointed out that a number of obscurities in the Act leave the door open for long and costly litigation. Legal historians

have argued that the Act is a political response to community alarm at the rising crime rate.[94] Others see the increase in powers available to the police as representing a fundamental change in the role of the criminal law:

> The "new policing" is a crucial part of the shift from a society based on the "rule of law" to one based on "law and order". In the former, due process and civil liberties are protected (at least to some extent). But in a law and order society they are redefined as causes of disorder, since any attempt to exercise due process or civil liberties is seen as creating disorder.[95]

V. SCOTLAND

3.50 The Criminal Justice (Scotland) Act 1980 significantly altered the law in Scotland. Prior to the Act, the police were required to complete their investigations before arresting the suspect.[96] Police had traditionally tried to circumvent the difficulties that this requirement imposed on their investigations by "inviting" suspects to assist the police.

3.51 The Act permits detention for up to six hours following arrest for investigation of the offence for which the suspect was arrested. Once this time has elapsed, the suspect must be either released or charged. The purpose of this detention is to allow a police officer sufficient time to determine whether a prosecution should be commenced. Lidstone and Early[97] have observed that the six hour period is more than enough to deal with most arrested people but is hardly adequate for more difficult and complicated cases.

3.52 The Act seeks to clarify the rights and duties of an arrested person by providing that he or she:[98]

* must be told of the offence for which he or she is arrested and why he or she is detained;
* must give his or her name and address;
* may decline to answer any questions;
* must be informed of his or her right to silence;
* must be taken to a police station as soon as is "reasonably practicable";
* has the right to inform a friend or relative of his arrest; and
* has no right to have a solicitor present at the interrogation.

An official record of the detention must be kept by the police.

VI. UNITED STATES OF AMERICA

3.53 There are two important differences which distinguish the American federal law of police powers of arrest and detention from the Australian law. In the first place, American federal law allows the police a limited power to detain people for investigation without arresting them. Secondly, the United States Constitution has important implications for police powers of arrest and the investigation of a suspect.

3.54 The Federal Rules of Criminal Procedure require a police officer to take an arrested person "without unnecessary delay" before the nearest available authorised judicial officer.[99] The United States Supreme Court has said that the purpose of

this law is to protect arrested persons against being subjected to the "third degree" by police investigators. That Court has also observed, with respect to this provision, that:

> The history of liberty has largely been the history of observance of procedural safeguards.[100]

3.55 The police have a limited power under the American common law to detain a person briefly to verify that person's identity or to obtain information.[101] For this power to be lawfully exercised the courts have not required a police officer to have the same level of reasonable suspicion that would justify an arrest. Even where such a practice is authorised by legislation, however, there must be some justification for the intrusion upon the liberty and privacy of the citizen. If not, the provisions of the Fourth Amendment to the Constitution, which establishes the right of the people to be secure in their person against unreasonable searches, will be breached.

3.56 A police officer cannot require a person so detained to attend a police station. Should the officer desire that a person attend a police station, the officer must inform the person that he or she is not under arrest and is not bound to comply with the request to attend the station. In limited circumstances, that is, where a reasonably prudent person would realise that his or her safety or that of others was in danger, the police may search the detained person for weapons. It has

also been held that the Fourth Amendment requires that the police present an arrested person before a judicial officer without unnecessary delay.[102]

3.57 The Fifth Amendment to the Constitution provides, amongst other things, that no person:

> shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

It was considered by the Supreme Court in Miranda v Arizona.[103] The majority of the Court expressed concern at the long history of brutality used in the investigation of crime and observed that physical brutality and psychological intimidation was still, on occasion, used by the police. The majority argued that an individual's right to refrain from making statements which may tend to incriminate him or her must be protected by effective safeguards.[104] Consequently they required that before any interrogation of a person held in custody, the person must be alerted to his or her rights to:

* remain silent and be warned that anything said by the person may be used as evidence in court;
* consult a lawyer and have a lawyer present at any interrogation; and
* have an attorney appointed if the person cannot afford one.

These rights may be waived by the person but waiver must be made "voluntarily, knowingly and intelligently".[105] Furthermore, a person may decide to exercise these rights at any stage during the investigation even after a valid waiver. The concern of the majority judgment was to ensure that the protection afforded the arrested person by the Fifth Amendment

was effective. Failure to issue this warning or to permit the exercise of the rights in question will result in the exclusion from evidence of any statements made by the arrested person after he or she should have been warned.[106]

3.58 The Miranda decision has been criticised by those who regard it as according no aid to the innocent but protection for the guilty. However, research carried out by the Australian Law Reform Commission indicated that the Miranda rules had not affected the detection and conviction of criminals.[107] On the other hand, some commentators believe that the decision has made little impact on police practice.[108]

Footnotes

1. Australian Law Reform Commission Criminal Investigation ALRC 2 Interim Report (1975).
2. Id para 29 at 13.
3. Id para 82 at 37.
4. Id para 329 at 148.
5. Id para 92 at 40-41; para 94 at 42 and para 95 at 42.
6. Id para 60 at 26 and para 35 at 16.
7. Id para 79 at 34. The limitations on this power are suggested in para 80 at 37.
8. Id para 103 at 45.
9. Id paras 107-8 at 47-48, 110-111 at 48-49, para 100 at 44.
10. Id para 135 at 59; para 343 at 149.
11. Id para 142 at 63.
12. Id para 143 at 63.
13. Id para 145 at 64.

14. See Australian Law Reform Commission Evidence (ALRC 38, 1987) para 154 at 86, para 158 at 89, para 164 at 94.

15. Australian Law Reform Commission Evidence Interim Report Vol 1 (ALRC 26, 1985) Vol 1 para 471 at 261.

16. Royal Commission of Inquiry into Drug Trafficking (1983) at 612-613. For a summary of the Commission's recommendations, see 836-838.

17. Police Offences Act 1953 (SA) s78(1).

18. Criminal Law and Penal Methods Reform Committee of South Australia Criminal Investigation (Second Report 1974).

19. Id at 74-75, 97-99, 103-107.

20. The Police Offences Act Amendment Act 1985, s3 renamed the principal Act the Summary Offences Act 1953.

21. Summary Offences Act 1953 (SA) s78(6).

22. Summary Offences Act 1953 (SA) s78(2).

23. Summary Offences Act 1953 (SA) s78(2)(a).

24. Summary Offences Act 1953 (SA) s78(6).

25. Summary Offences Act 1953 (SA) s79(a)(3) and (1).

26. Summary Offences Act 1953 (SA) s79(a)(3).

27. Summary Offences Act 1953 (SA) s79(a)(2).

28. Bail Act 1985 s13.

29. Summary Offences Act 1953 (SA) s78(5).

30. See paras 3.1-3.2 above.

31. The discussion of these unreported cases on which this passage is based is to be found in an article by M Little and A Crocker "Custodial Investigation - Recent Developments" [1987] Law Society Bulletin (SA) 145.

32. (Unreported) 16 January 1987 Supreme Court of South Australia.

33. (Unreported) 11 September 1986 Supreme Court of South Australia.

34. (Unreported) 6 March 1987 Supreme Court of South Australia.

35. (Unreported) 24 October 1986 Supreme Court of South Australia.

36. M Little and A Crocker, note 31 at 150.

37. Bail Act 1985 s13(3).

38. The Crimes Act 1985 s460 originally provided that police must bring an arrested person before a justice "as soon as is practicable after he is ... taken into custody".

39. [1965] 1 QB 348.

40. This notwithstanding the judgment of the Full Court in R v Banner [1970] VR 240 at 249-50 and that of McGarvie J in R v Clune [1982] VR 1 at 18. See Consultative Committee on Police Powers of Investigation: Custody and Investigation: Report on s460 of the Crimes Act 1958 Victoria (1986) at 9.

41. Id at 21-24. See also Director of Public Prosecutions Reference No 1 of 1984 [1984] VLR 727 at 730-731.

42. Crimes Act 1958 (Vic) s460(1) as amended by the Crimes (Criminal Investigation) Act 1984 (Vic) s4. This amendment was a result of the recommendations of a committee formed by Mr John Phillips QC, as he then was, at the request of the Victorian Attorney General. The Phillips Committee's Report was published in February 1984.

43. Report on s460, note 40 at vii.

44. Id at vi.

45. Id at 52.

46. Id at 111.

47. Id at 102-106.

48. Id at 88.

49. Id at 86, especially if the person is arrested in connection with an indictable offence.

50. Id at 105.

51. Canadian Criminal Code s454(1). E G Ewaschuk Criminal Pleadings & Practice in Canada (1st ed 1983) at 112. R E Salhany Criminal Procedure (4th ed 1984) at 56-7.

52. R v Koszulap (1974) 20 CCC (2d) 193 at 202.

53. See generally the following publications of the Law Reform Commission of Canada:

    Questioning Suspects, Working Paper 32, 1984.

    Questioning Suspects, Report 23, 1984.

    Obtaining Forensic Evidence, Report 25, 1985.

Arrest, Working Paper 41, 1985.

Arrest, Report 29, 1986.

54. Arrest, Report 29 at 7.

55. Questioning Suspects, Report 23 at 9.

56. Arrest, Report 29 at 22.

57. Id at 21 and 24.

58. Id at 5, 12.

59. Arrest, Working Paper 41 at 51 citing the Charter of Rights and Freedoms (Canada) ss10 and 12.

60. Arrest, Working Paper 41 at 8-15.

61. Charter of Rights and Freedoms (Canada) s33.

62. Arrest, Report 23 at 13.

63. Id at 16.

64. In Rothman v R [1981] 1 SCR 640, the accused person was arrested, alerted to his rights and refused to make a statement to investigating police. A police officer in a dishevelled state was put into the same cell as the accused person and, pretending to be an arrested person, succeeded in obtaining his confidence. The accused person admitted involvement in trafficking drugs and this confession was the basis of his conviction. On appeal, it was argued that the circumstances in which the admission was made had effectively deprived him of his right to silence. The Canadian Supreme Court dismissed appeal by a majority of seven to two. This case illustrates that by subterfuge, a police officer may be able to exploit the "plain clothes exception" and avoid giving an arrested person the benefit of his or her legal rights. The case is discussed in detail in Working Paper 32 at 25ff.

65. The Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips) Report (HMSO Cmnd 8092, London, 1981).

66. Id at para 2.20.

67. For a commentary on Part IV of the Act dealing with the power of police to detain a suspect: see D J Birch "Powers of Arrest and Detention" [1985] Criminal Law Review 545 and for a commentary on Part V of the Act dealing with conditions of detention, see T G Gibbons "The Conditions of Detention and Questioning by the Police" [1985] Criminal Law Review 558. The search, entry and seizure provisions are discussed in L H Leigh "Search, Entry and Seizure" [1985] Criminal Law Review 535.

68. Dallison v Caffery [1965] 1 QB 348; Holgate-Mohammed v Duke [1984] 1 AC 437 at 443.

69. If the arrested person is detained in a police station which does not have a nominated custody officer, the duties of the officer are to be performed preferably by an officer who is not involved in the investigation of the offence for which the person is detained. Where no such officer is readily available, these duties may be performed by any police officer: see s36(7)(a-b).

70. Section 37(1), s38(1).

71. Section 39(1)(a). Part VI of the Act enables the Secretary of State to issue codes of practice further regulating police powers of detention and investigation of arrested persons (ss66-67).

72. Section 39(1)(b).

73. Section 37(1), (10).

74. Section 38(1), (2).

75. Section 46(1), (2).

76. Section 37(2).

77. Section 40(3)(b-c).

78. Section 41(2).

79. Section 42.

80. Section 43.

81. Section 44(3)(b). This is only an approximation because the "detention clock" generally begins when the person is actually brought to the police station (s41(2)(a)).

82. Section 43(15). The United Kingdom legislation allows the police to release on bail a person whom they have arrested and not charged on the condition that the person return to the police station, presumably for the purpose of further investigation (s47(3)(b)). The Bail Act 1978 makes no provision for the granting of bail to a person who has not been charged because bail, in New South Wales, is directed towards compelling appearance before a court and not towards facilitating police investigation.

83. Section 43(16).

84. Section 45(17).

85. Section 45(2).

86. Sections 54 and 55.

87. Section 56.

88. Section 58.

89. D J Birch, note 67 at 551-555.

90. An analysis of the new Police Complaints Authority may be found in C Munro "The Accountability of the Police" [1985] Criminal Law Review 581.

91. Section 78. For an analysis of the new evidential provisions see P Mirfield "The Evidence Provisions" [1985] Criminal Law Review 569.

92. Section 76.

93. "Entry into Force of the Police and Criminal Evidence Act 1984 (UK)" (1986) 59 Australian Law Journal at 195-196.

94. M D A Freeman "Law and Order in 1984" (1984) Current Legal Problems 175 at 177, 191.

95. M Fitzgerald and J Muncie Systems of Justice (1983) at 77.

96. This passage is based on the article K W Lidstone and T L Early "Questioning Freedom: Detention for Questioning in France, Scotland & England" (1982) 81 International & Comparative Law Quarterly, 488 at 496-499.

97. Id at 499.

98. Criminal Justice (Scotland) Act 1980. See generally ss1-3.

99. Federal Rules of Criminal Procedure Rule 5(a), 18 USCA 196; G S Gulick and R T Kimbrough (eds) American Jurisprudence Vol 5 (2nd ed 1962) paras 76-77; see generally Corpus Juris Secundum Vol 6A (1st ed 1975) paras 61-64.

100. McNabb v US 318 US 332 (1943) at 347.

101. See generally Corpus Juris Secundum Vol 6A (1st ed 1975) paras 38-42.

102. Maclin v Paulson (1980, CA7 Ind) 627F 2d 83 cited in American Jurisprudence (2nd ed 1962) Vol 5 para 76 at 282.

103. 334 US 436 (1966).

104. Id at 444-458.

105. Id at 444.

106. For a survey of recent case laws on the Miranda warnings see J C Galardi "Criminal Procedure" (1982) 2 Annual Survey of American Law 253.

107. ALRC 2, note 1, para 149 at 66 and fn 242.

108. M Shapiro "The Supreme Court: From Warren to Burger" in A Kind (ed) The New American Political Systems (1st ed 1978) 179 at 185.