

**CRIMINAL LAW  
SUMMARY  
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## Pre-Trial Procedures

### ***Discretion to arrest***

The police have the discretion to either arrest or proceed by way of a summons or a Field Court Attendance Notice (FCAN). This power is derived from section 138 of the *Evidence Act 1995* (NSW). In addition, the discretion to arrest is also controlled through internal police guidelines.

*DPP v Carr*:<sup>1</sup>

In this case, the Magistrate had to decide whether the police had misused their discretion to arrest. In this case, whether a police had acted 'improperly' by arresting instead of issuing a summons was determined through factors such as police knowledge of Carr's address, and the fact that they arrested him because it was quicker than issuing a process later on.<sup>2</sup>

The Magistrate emphasised that in relation to less serious matters, arrest is a measure of last resort.

### **Internal police guidelines**

The NSW police have a code of practice called C.R.I.M.E..<sup>3</sup> Under these guidelines, before a police officer is to arrest someone, they are to consider various factors.

These factors include:

- the seriousness of the offence;
- the need for medical examination, fingerprints, identification parades;
- the likelihood the offender would if not apprehended:
  - abscond;
  - offend again;
  - interfere with the evidence;
  - intimidate witnesses;
  - hinder the police investigation; and or
  - jeopardise the safety and protection of the victim.

### ***legality of arrest***

In order for an arrest to be lawful, the police must inform the person of the grounds of arrest: *Adams v Kennedy*.<sup>4</sup> This requirement to inform needs only that the grounds be stated in general terms, and no precise charge needs to be formulated at the time of the arrest.

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<sup>1</sup> [2002] NSWSC 1994.

<sup>2</sup> K Adams, 'Pushing the boundaries of Public Order Law: A Commentary on *DPP v Carr* [2002] NSWSC 194' (2003) *Criminal Law Journal* 277.

<sup>3</sup> NSW Police Service, *Code of Practice for CRIME (Custody, rights, investigation, management, and evidence)* August, 2002. <http://www.police.nsw.gov.au/campaigns/legislations.cfm>

<sup>4</sup> (2000) 49 NSWLR 78.

The police also have to be mindful that arrest has to be executed with minimum force. They then need to be taken to the nearest police station. Only in exceptional circumstances can the police take them on a longer route. The police must endeavour to charge them under their real name.

The courts have held that there are four situations where the grounds for arrest do not have to be communicated to the suspect: *Christie v Leachinsky*.

1. The police may arrest them for one felony (for example, murder), then later charge them with another (manslaughter).
2. The police do not need to communicate the grounds of arrest if the suspect has been caught red-handed.
3. The police do not need to communicate the grounds for arrest where it is important to secure a possibly violent criminal.
4. It is permitted to arrest the suspect for a charge (for example, reasonably suspected of murder), with the view to investigate a second charge.

The consequences of an arrest being conducted illegally are that the police may be liable to civil action (for false imprisonment etc), or the offence may fall over if the arrest was unlawful. If the arrest is found to be unlawful, this will jeopardise the criminal proceedings.

## ***Police interview in custody***

### **Detention**

CRIME Guidelines:

A suspect may be detained for the purpose of investigating whether they have committed the offence, for a reasonable period which is not to exceed four hours: s 356C of the *Crimes Act 1900* (NSW).

Note however, under Part 10A Crimes Act 1900 (NSW), the four hour period is extendable under section 356C. The police are to provide refreshments and facilities under section 356U.

There are special guidelines the police must follow in relation to the detention of 'vulnerable persons' as defined in clause 5 of the *Crimes (Detention After Arrest) Regulation*.<sup>5</sup> Vulnerable persons include indigenous Australians, the mentally disabled, physically disabled, those from a non-English speaking background, and children.

In relation to vulnerable persons, clause 29 stipulates that vulnerable persons need to be cautioned, and appropriate steps must be taken to ensure the person understands the caution. If the vulnerable person is cautioned in absence of a support person, they need to be cautioned again when the support person is present.

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<sup>5</sup> 1998 (NSW).

Clause 27 deals with a child or impaired physical or intellectual functioning – the police need to find the person who is most responsible for their welfare.

Clause 28 sets out the rights of indigenous Australians. An Aboriginal legal representative must be brought in as a support person.

### **Admissibility of evidence**

Failure to follow these guidelines may result in the court refusing to admit evidence if having regard to the circumstances, it would be unfair to the defendant to use the evidence: section 90 *Evidence Act*.<sup>6</sup>

Note however that evidence that has been improperly obtained may still be admissible. Such evidence is only admissible if the desirability of admitting the evidence outweighs the undesirability of admitting the evidence: s 138(1) *Evidence Act*.

**SAMPLE ONLY**  
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**If you have any queries regarding the criminal law summary please  
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<sup>6</sup> 1995 (NSW).