

CRIMINAL LAW SUMMARY



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Pre-Trial Procedures

DISCRETION TO ARREST

Arrest involves depriving a person's liberty. It may be the physical seizure of the arrested person or advising the person the fact of arrest.¹ The police have the discretion to either arrest; proceed by way of a summons² or a Field Court Attendance Notice (FCAN)³. This power is derived from s 138 of the *Evidence Act 1995* (NSW). In addition, the discretion to arrest is also controlled through internal police guidelines.

In *DPP v Carr*,⁴ the issue was whether the police had misused their discretion to arrest. It was held that 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.⁵

The Magistrate emphasised that in relation to less serious matters, arrest is a measure of last resort.⁶

Internal police guidelines

The NSW police have a code of practice called *CRIME*⁷, which is regulated by LEPR.⁸ 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;

¹ Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4th ed, 2010) 47.

² This is prepared by the police to bring a person before the court.

³ This is a notice which the arrested person signs to acknowledge that he or she will attend court.

⁴ [2002] NSWSC 1994.

⁵ Kenneth Adams, 'Pushing the boundaries of Public Order Law: A Commentary on *DPP v Carr* [2002] NSWSC 194' (2003) *Criminal Law Journal* 277.

⁶ *DPP v Carr* [2002] NSWSC 194, [14].

⁷ NSW Police Service, *Code of Practice for CRIME* (Custody, rights, investigation, management, and evidence) (21 June 2011) NSW Police Force < http://www.police.nsw.gov.au/data/assets/pdf_file/0007/108808/Code_CRIME.pdf>.

⁸ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA').

- 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*.⁹ 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.

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*¹⁰.

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.

⁹ (2000) 49 NSWLR 78.

¹⁰ [1947] AC 573.

POLICE INTERVIEW IN CUSTODY

Detention

A suspect may be detained for the purpose of investigating whether he or she has committed the offence for a reasonable period which is not to exceed four hours.¹¹ Determining what is a reasonable time period depends on various factors. These include: the person's age, mental capacity and physical capacity; whether the presence of the person is necessary for the investigation; whether the person is willing to make a statement or answer any questions; and the need to visit the place of the offence connected with the investigation.¹²

Note however, that the four hour period is extendable under s 118.¹³

The detained person has rights to communicate with his or her friend, relative, guardian and Australian legal practitioner¹⁴ unless the custody manager believes on reasonable grounds that doing so is likely to result in accomplice, tampering of evidence or bodily injury caused to another person.¹⁵

There are special guidelines the police must follow in relation to the detention of 'vulnerable persons' as defined in clause 24 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW). 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 34 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.

¹¹ *LEPRA* s 115(2).

¹² *Ibid* s 116(2). Note: There are many other factors that need to be taken into account but not listed here so make sure you read them if need be.

¹³ There are a number of requirements to be satisfied in order for the authorised officer to issue a warrant to extend the maximum investigation period.

¹⁴ *LEPRA* s 123.

¹⁵ *Ibid* s 125(1).

Clause 32 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 33 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.¹⁶⁾

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.¹⁷⁾

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¹⁶ *Evidence Act 1995* (NSW) s 90.

¹⁷ *Ibid* s 138.