

# Legal Studies

## The Criminal Investigation Process – Lesson 2

Presented by Natasha Isbel

### Syllabus Dot Points:

- Arrest and charge, summons and warrants
- Bail or remand
- Detention and interrogation, rights of suspects

# Arrest, Charge, Summons and Warrants



<http://www.criminallaw.com.au/blog/criminal/general/understanding-the-scope-of-police-powers-of-arrest-nsw/28408>

# Media = The Importance of Arrests

'The marginal effect of arrest and imprisonment on crime'  
Wai-Yin Wan, Steve Moffatt, Craig Jones and Don  
Weatherburn 2011 article states that:

1. The criminal justice system plays a **significant** role in **preventing crime**. Some criminal justice variables, however, exert much stronger effects than others. **Increasing arrest** rates is likely to have the **largest impact**, followed by **increasing the likelihood** of receiving a **prison sentence**.
2. **Increasing the length of stay in prison** beyond current levels does **not** appear to **impact** on the **crime rate** after accounting for increases in arrest and imprisonment likelihood.

# Media = The Importance of Arrests

3. Policy makers should **focus more attention** on **strategies** that **increase the risk of arrest** and less on strategies that increase the severity of punishment.
4. Australia currently spends more than \$11.5 billion annually on law and order (SCRGSP, 2011).
5. The bulk of this money goes to **police** (\$8.2 billion) and **prisons** (\$2.2 billion), with the remainder being spent on the **administration of the criminal courts** (\$673 million) and **community corrections** (\$383 million).

# Arrest, Charge, Summons and Warrants

- Arrest = **critical step** in the criminal justice process
- The police **cannot detain** a person **unless** they have a **good reason** = *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* is the principle Act
- Are **3 ways** police can bring an **alleged** offender to court **after** an investigation:
  1. Arrest
  2. Court Attendance Notice (previously a summons)
  3. Warrant

# 1. Arrest & 2. Charge

- Arrest is **lawful detention** of a person by police
- Police can **use reasonable force** to make an arrest but held accountable if not/assault charges e.g. Roberto Curti
- Police must caution a suspect when arrested:
- Police can use their **power to arrest** a person if:
  - they reasonably believe that a **person has or is about to commit** a crime;
  - they **witness** a person committing a crime; or
  - they have an **arrest warrant** for the person.
- The process of obtaining an arrest warrant is a **mechanism** embedded within the investigation process **protecting** the accused's rights because police are required **justify their suspicions** based on **reasonable** evidence to the authorised officer issuing the warrant = prevents an abuse of power by police

# Arrest

- The offender **must** be **informed**:
  - of the **grounds for the arrest** unless obvious and
  - to **resist arrest** is itself an **offence**
- If other sensible **alternatives** exist for minor offences, police should not arrest (use **discretion**):
  - A caution or warning
  - An infringement or penalty notice
  - Court attendance notice
- Once arrested, suspect is photographed and fingerprinted (**'processed'**).
- The *Crimes (Forensic Procedures) Act 2000* allows other evidence to be collected e.g. blood, DNA samples
- Under *Law Enforcement (Police Powers and Responsibilities) Act 2006*, an **arrested person** can be **held by police** for an investigation period of **up to 4 hours**, which can be extended by warrant to a **maximum of 12 hours**.



[http://cache.gawkerassets.com/assets/images/4/2010/06/500x\\_gunssspolice.jpg](http://cache.gawkerassets.com/assets/images/4/2010/06/500x_gunssspolice.jpg)

# Charge

- Formal process
  - suspect charged with particular offence(s) (police use their **discretion** to determine charges);
  - **receives notification** of their first Court date.
- Other than providing a correct name and address, suspects can exercise their right to silence = **no obligation** to participate in **police interview**.
- If arrested for breaching **driving laws**, then must tell police your name and take a breath test if asked to do so.



# Case Study – Recent Evidence of Silence Reforms NSW

- **Recent** NSW legislative **reforms**, the *Evidence Amendment (Evidence of Silence) Act 2013* focuses on tackling the 'wall of silence' which frustrates police investigations of drive by shootings and organised crime violence = **community standards**
- **Modifies the right to silence** when questioned by police for **serious indictable offences** (5 years+ prison) if a person remains silent in the presence of their lawyer.
- New **special caution** *"You are not obliged to say or do anything unless you wish to do so. But it may harm your defence if you do not mention when questioned something you rely on in court."*
- The **effect of the amendment** = a judge may allow the jury to draw an 'unfavourable inference' if the accused does not mention when questioned by police, something they later rely on for their defence. i.e. they can infer that the accused made up a story after being questioned.
- There is a **tension** between **rights** of the accused to be treated fairly and **society to be safe**

# Case Study – Recent Evidence of Silence Reforms NSW

- **Controversial reforms** = damages the fundamental human rights of the accused which underpin the criminal justice system = to be **presumed innocent until proven guilty** by the prosecution and limits their right to silence.
- **Nicholas Cowdery** has criticised the reforms, stating:  
*This amendment to the law represents a significant deviation from the gold standard of criminal justice. It was contrary to views expressed in the past by the NSW Law Reform Commission. There was no demonstrated need for the curtailment of the right to silence and the “silent witness” basis was false. There was no evidence that the proposed amendments would affect the rate at which accused persons plead guilty or are convicted.*

Source: Legal Studies Assist – Legal Studies Lifeline Vol 8 Ed 5, 2015

# Cautions

- Other than for strict liability offences, **must** be issued by **police** when they **arrest** someone and be given **prior to an interview**
- If not issued, a **court** may rule that information given in an interrogation is **inadmissible** as evidence i.e. can't be used in court
- The police must also ensure that the person has **understood the caution** e.g. interpreter
- **Caution** given (unless serious indictable offence of 5+ years prison):

*'I am going to ask you some questions. You are not obliged to say or do anything unless you wish to do so. But it may harm your defence if you do not mention when questioned something you later rely on in court. Anything you do say and do may be given in evidence. Do you understand?'*

# Concept Explorer

A police officer issues a caution instead of an on-the-spot fine to a person whose car is illegally parked.

What is the police officer's action an example of?

- A. Discretion
- B. Corruption
- C. A breach of criminal law
- D. A breach of the rule of law

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# Concept Explorer

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# 3. Summons (now ‘Court Attendance Notice’)

- Rather than arresting a person, for minor and summary offences police can issue a **court attendance notice**
- **Legal document** requiring a person to **attend court**.
- Gives **details of the charge**, when and where the charge is to be heard and outlines the consequences of failing to attend.
- **Witnesses** may also receive a summons to appear in court



<http://insightbyseymour.com/2015/04/27/a-summons-to-appear/>

# Concept Explorer (Answer)

Alice has received an official legal document in relation to an offence she has allegedly committed. She is required to attend the local court on a certain date.

What is this legal document known as?

- A. An indictment
- B. An injunction
- C. A summons
- D. A warrant

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# 4. Warrants

- Order issued by the court (usually a magistrate) authorising a law enforcement agency **to do something** (e.g. to police) authorising them to:
  1. **arrest a person** = if court is convinced is evidence an offence may have been committed;
  2. **conduct a search** of premises = looking for evidence (police must show that there are **substantial grounds** for believing that they will find evidence);
  3. **phone tap**
- The **granting of a warrant** does not = guilt of offence but is a **prima facie case** against them i.e. on first examination of the evidence it **appears** the person has **committed** an offence.
- Trial process = **test the evidence** more thoroughly.

# Bail and Remand

(T & C – discretion, law reform, balancing rights and effectiveness)



<http://www.massachusettscriminaldefenseattorneyblog.com/files/2014/11/BailBonds.jpg>

# Bail

- Conditional release of a person until trial
- Important protection = defendant presumed innocent until proven guilty
- Police and courts exercise their discretion about whether or not to grant bail but must be within *Bail Act 2013 (NSW)*
- Bail conditions include:
  - report to the police on a regular basis
  - Forfeit passport
  - restrictions on where can go/who they can associate with
  - Provide a surety/ bond (\$) that court keeps if bail conditions are breached
- Bail may be granted by the court or by an authorised police officer, this will be the officer in charge of the police station. If police refuse bail then the Act allows for an application for bail to be made to the court.
- Remand = remain in custody as bail has been refused

# Conditions giving rise to need for bail reform

- Previous *Bail Act 1978 (NSW)* = used an **offence based test**, overly complex and confusing; difficult to implement leading to inconsistent bail decisions; unduly harsh impact on young offenders (*could only apply for bail once – circumstances may change*) = all conditions giving rise to need for reform
- NSW high **rates of remand** – NSW = 47.3/100,000 people, Victoria = 19.3/100,000. Government like to be seen to be **tough on crime**
- Multiple amendments designed to make it **harder to get bail** = intended to **contribute to the safety of the community**
- BOSCAR = **declines in crimes rates** generally in NSW since 2000 across most violent and property crimes (except sexual assault and assault) were **NOT** been shown to be **connected** with **changes in bail laws**
- **Law reform** was **needed** to ensure that the law remained **effective** and adequately **balanced** the rights of victims, offenders and society

# Recent Bail Reform – 2013 Act

- Following **NSW Law Reform Commission inquiry** and wide spread public consultation = new ***Bail Act 2013(NSW)*** , in force 2104
- New '**unacceptable risk**' test used to determine bail applications = does the accused pose an unacceptable risk to society if released of:
  - Endangering the safety of victims, witnesses or the community;
  - Interfering with witnesses or evidence
  - Committing another serious offence
  - Failing to appear in court
- If so, can the **risks be mitigated by posing strict bail conditions**? If yes, then bail could be granted
- **Young offenders** can make a second bail application
- A right to bail for **fine-only** and **most summary offences**

# Three controversial bail decisions

Bail was granted = community outcry because under *Bail Act 1978 (NSW)* a presumption against bail would have applied

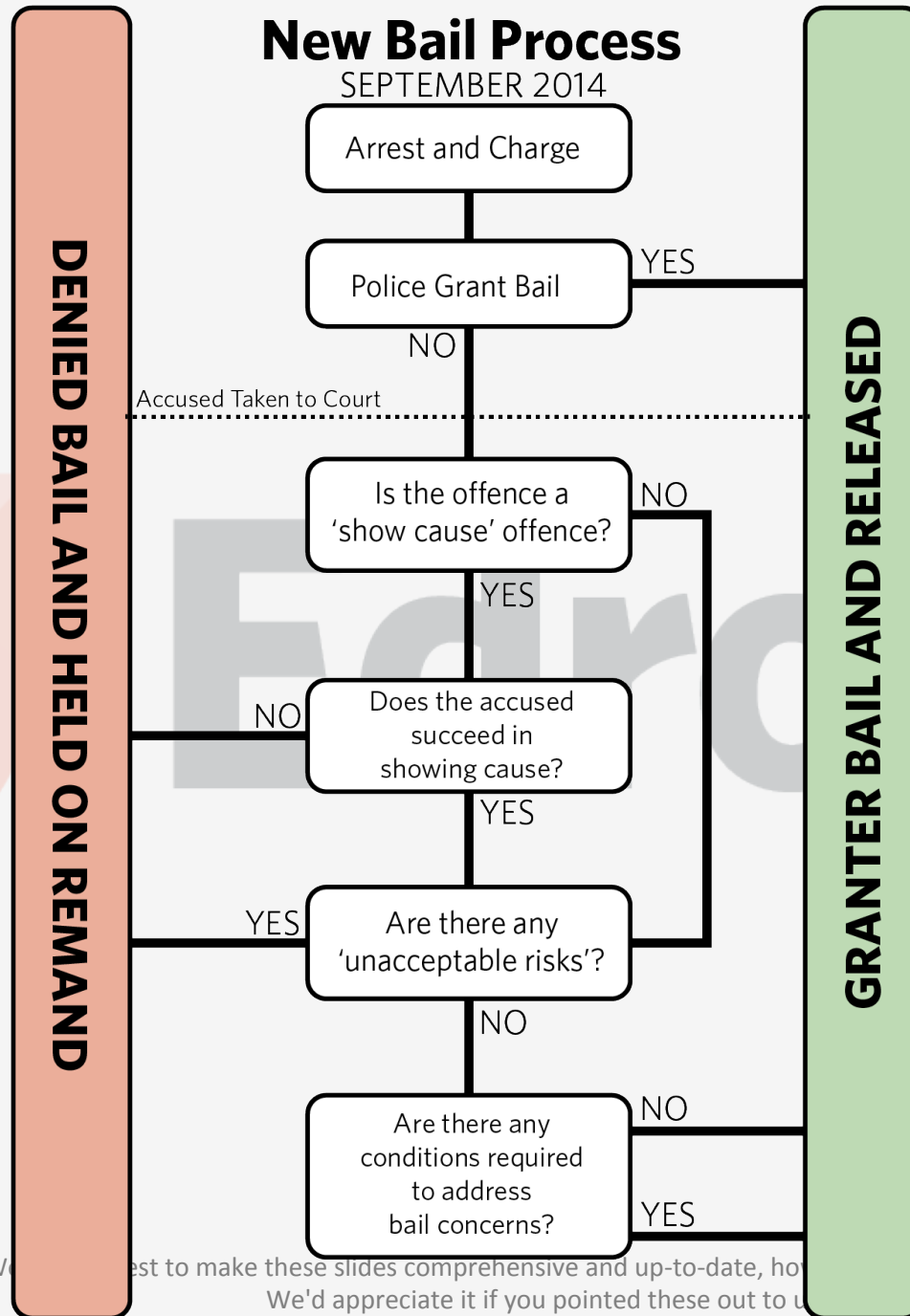
1. Central **Central Coast child bride case** – father accused of arranging a marriage for his 12 year old daughter; had a history of interfering with witnesses but under new Act, the risk to the community could be mitigated by imposing strict conditions
2. **Hawi** = out on bail pending retrial of Sydney airport murder charge; judge in granting bail felt that some of the unacceptable risks could be mitigated by the imposition of strict conditions
3. **R v Fesus** 2014 – charge relating to murder of girlfriend; granted bail

# Further Reform – 2014 amendment

- 38 days after the commencement of Bail Act 2013, reformed due to controversial cases and media/public criticism
- Amendments = altered the unacceptable risk test and introduced new provisions in which certain alleged offenders will need to show cause as to why they ought be granted bail (reversed onus of proof)
- Knee-jerk reaction by government has been criticised by legal experts:
  - BOSCAR in SMH: *new laws to be baseless and the cases referred to as an unsatisfactory basis for judging the effectiveness of the laws*
  - Nicholas Cowdery in SMH: *“political grandstanding that denies the opportunity for the act to be given proper effect and for assessment to be made of any changes under the new act in rates of bail refusal, the likelihood of being granted bail and absconding or offending on bail”*
  - Rule of Law Institute: *Reactive decision-making in response to perceived public outcry is not a sound basis for hasty changes.*

# New Bail Process

SEPTEMBER 2014





# Remand



<http://www.adaderana.lk/news.php?nid=23817>

- Special type of detention = allows accused to be held between charge and trial
- Not convicted criminals = imperative that time on remand short as possible = fair but sometimes can be over 1 year
- Harsh impact on juvenile and indigenous
- Accused subsequently found guilty, time on remand usually taken off the total sentence

# Concept Explorer

An accused is considered innocent until proven guilty.

Which of the following best reflects this principle?

- A. Bail
- B. Remand
- C. Suspended sentence
- D. No conviction recorded

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# Concept Explorer

Melanie has been arrested and a magistrate has determined that the case will proceed to trial. The magistrate has decided not to release her while waiting for the trial to be held.

Which of the following correctly describes Melanie's situation?

- A. She is on bail.
- B. She is in custody.
- C. She is on remand.
- D. She is in detention.

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- B. She is in custody.
- C. *She is on remand.***
- D. She is in detention.

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# Detention & Interrogation, rights of suspects

(T & C – discretion, law reform, moral and ethics, balancing rights and effectiveness)

- *Law Enforcement (Police Powers and Responsibilities) Act 2002 (NSW)* outlines powers of police in treating and interrogating suspects
- **Common law rights** of accused to refuse to
  - **answer questions** put by people in authority; and
  - **accompany** those in authority to any particular place unless arrested
- Rights have (can can be further) **eroded by statute** e.g. NSW Evidence of Silence legislation

# Rights of Suspects

- A suspect can only be **detained** by police:
  - **4 hours** for investigation without charges being laid;
  - A further **8 hours** with Magistrate's approval.
  - Maximum detention without charge period = 12 hours (not include rest breaks etc).
- Suspects are **given rights** because:
  - many of their rights have been **taken away on arrest** e.g. liberty
  - the effect of the charges and the trial can have **serious consequences** for them
  - Helps to prevent abuses of power by the state

# Interrogation

- Before interrogation (**questioning and interviews**), suspect must be **cautioned**
- **Interrogation** = may be **recorded** (video/audio) but the suspect must be given a copy.
- The **suspect** has the **right to**:
  - **Silence** = as amended e.g. diminished for terrorist related offences
  - A **responsible adult** being present **if under 18**
  - Informed of **reason for arrest**
  - **Time limit** on investigation period and the possible **extension** of it
  - **Contact a support person** e.g. friend, relative, guardian, independent person or legal practitioner.
- If charged, the suspect will be brought before a magistrate for a bail hearing



# Exception to 6 Hour Detention Rule - Terrorism

- **Exception** to general 6 hour detention rule - a person suspected of engaging in terrorist activity can be **detained in prison for 48 hours** without being charged but extensions can be granted if the police investigation is ongoing - *Anti-Terrorism Act (No. 2), 2005 (Cwth)*
- Federal government inquiry (**Clarke Inquiry**) in 2008 to investigate the circumstances of the arrest and detention of Dr Haneef
- Found that Dr Haneef was wrongly charged and **criticised** the various bodies involved with the case, particularly the **lack of a cap of the amount of time which police could detain a suspect without charging him**



<http://www.couriermail.com.au/news/queensland/dr-mohamed-haneef-seeking-significant-amount-in-compensation-for-wrongful-imprisonment/story-e6freoof-1225958784862>

# Case Study - Australia's Terrorism Laws

Good examples of:

1. the **balancing of protecting the community's rights** on the one hand and **safeguarding individual rights and freedoms** on the other;
2. Issues of **natural justice**;
3. The exercise of police powers and discretion – **human rights issues** associated with preventative detention. The law allows **detention without a judicial hearing**, based on a **low standard of proof**. Judicial review may be difficult due to the **lack of access** to full reasons for decisions

# Concept Explorer

25-year-old Jordan and 23-year-old Darcy stole cigarettes from a shop. As they were leaving the shop, Jordan and Darcy forced 18-year-old Ariel to hide the cigarettes under her shirt. They were then apprehended by police, taken to the local police station and charged.

To what legal right are Jordan, Darcy and Ariel entitled while being questioned at the police station?

- A. The right to remain silent
- B. The right to apply for bail
- C. The right to make a phone call
- D. The right to be questioned together

# Concept Explorer (Answer)

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- B. The right to apply for bail
- C. The right to make a phone call
- D. The right to be questioned together

# Recap – should should know how to:

- **Discuss** the powers of police in the criminal process
- **Examine** the reporting and investigation of crime
- **Assess** the effectiveness of the criminal investigation process as a means of achieving justice

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