

The criminal investigation process – Police Powers

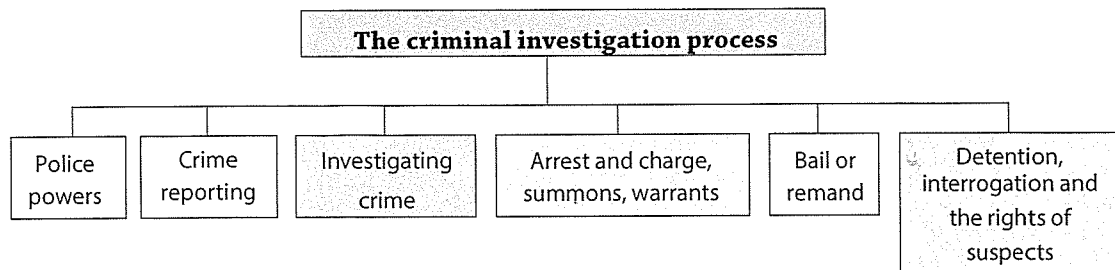


Figure 4 – An overview of the criminal investigation process

Police Powers

The police are a part of the executive arm of government. The police have an obligation to uphold and enforce criminal laws such that the purpose of the laws can be achieved – to create social order, to regulate, to keep society safe and to investigate and prosecute criminal breaches of the law.

The police have power by virtue of their enforcement role and thus they should be subject to stringent rules that limit the chance that they might abuse their power. The main law that regulates the conduct of law enforcement officials such as police officers is the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*. This Act is also referred to as “LEPRA”.

The Act details the powers of police in carrying out their duties. Such powers include the following rights:

- To effect an arrest
- To request a person to disclose their identity
- To search for and seize dangerous items – such as knives
- To search motor vehicles
- To investigate crime or suspected criminal activity and
- To question

Each of the legal powers given to police by the Act is subject to restrictions. For example, the rules around the power to arrest are listed in section 99 of the Act (see below). These rules include that an arrest can be made if there is ‘reasonable suspicion’ that a person committed an offence, or if the police know that a person has committed an offence or is in the act of actually committing the offence. Reading carefully through the 6 grounds listed in s99(3) reveals that the police *cannot* arrest for the purpose of questioning. The police can question suspects, but they cannot arrest for the purpose of questioning.

The Act also prescribes that a decision about whether to hold the person in custody (remand) or grant bail (freedom on the condition the person attend court at a later date) needs to be made as soon as possible. This is because to do otherwise would give the police too much power and that power could be abused.

Law Enforcement (Powers and Responsibilities) Act 2002 - s99 - Power of police officers to arrest without warrant

1. A police officer may, without a warrant, arrest a person if:
 - a. the person is in the act of committing an offence under any Act or statutory instrument, or
 - b. the person has just committed any such offence, or
 - c. the person has committed a serious indictable offence for which the person has not been tried.
2. A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.
3. A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:
 - a. to ensure the appearance of the person before a court in respect of the offence,
 - b. to prevent a repetition or continuation of the offence or the commission of another offence,
 - c. to prevent the concealment, loss or destruction of evidence relating to the offence,
 - d. to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,
 - e. to prevent the fabrication of evidence in respect of the offence,
 - f. to preserve the safety or welfare of the person.

g. A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/s99.html

The use of force during arrest

Law Enforcement (Powers and Responsibilities) Act 2002 - s230 - Use of force generally by police officers

It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/s230.html

The use of force whilst effecting an arrest is a controversial area of police powers. This is because the Act uses the term ‘reasonably necessary’ but does not define what level of force is reasonable. There are many cases where there have been allegations of the misuse of force by the police. Excessive force can extend to the incorrect use of weapons such as tasers. Two case studies below highlight example of the incorrect application of force by police officers.

Case Study 1 Cory Barker's arrest

Corey Barker was arrested in Ballina after he tried to assist two friends who were involved in a confrontation on the street. Following his arrest Mr Barker was slammed into a bin and a chair, swung into a machine and then forced to the ground where he was kicked in the head and kneed in the side. He was then handcuffed and dragged along the ground on his stomach to a cell where he was left handcuffed on the ground for ninety minutes.

When he complained about his treatment the police officers charged Mr Barker with assault. The six officers involved said that Mr Barker had punched a police officer in the face while being led to a cell. Mr Barker said that this was not true and requested the video footage. The police initially said it was 'damaged' but when it was found it showed that the police officers had lied.

The Police Integrity Commission (PIC) investigated the matter and found that constables David Hill, Lee Walmsley, Ryan Eckersley and Luke Mewing used excessive force against Mr Barker. They were also found to have lied about the arrest, along with Senior Constable Mark Woolven and former sergeant Robert McCubben, who was medically discharged from the force in December 2012.

The PIC Commissioner, Bruce James recommended all six officers engaged in misconduct and should be considered for prosecution under the *Crimes Act*. His report stated:

"The degree of force to which Barker was subjected was not reasonably required in order for the police to maintain full control...The degree of force was excessive."

The PIC also found Mr Barker did not assault Constable Hill *"and, in particular, did not punch, or even attempt to punch, Hill on the nose or face"*.

Reference: Tracker, *NSW police recommended for charges over Aboriginal arrest*, from <http://tracker.org.au/2013/09/nsw-police-recommended-for-charges-over-aboriginal-arrest/> 11.09.13

Case Study 2 The death of Roberto Laudisio Curti

Roberto Curti died in Sydney after he was set upon by seven police officers investigating the theft of two packets of biscuits from a convenience store in the city. At the time of his arrest, Curti was still having a psychotic episode brought on by the use of LSD. He was unarmed.

Curti was chased by the officers and tackled to the ground. Thereafter he was tasered nine times, even though he could not move because he was face down, handcuffed and being restrained by up to five police officers. The cause of his death was uncertain but the Coroner said the most likely cause was choking to death.

The NSW Coroner Ms Jerran, who held an inquest, said that none of the Taser stuns after Mr Curti was brought to the ground were justified and police had been *"reckless, careless, dangerous and excessively forceful"*.

She did not however recommend charges be brought against any of the officers, even though she held that their behaviour was 'thuggish' and some tried to obscure proceedings.

Reference: <http://www.news.com.au/national/officers-used-excessive-force-and-showed-appalling-judgement-says-nsw-coroner/story-fncynjr2-1226516466143>

Review Activities – Police Powers

Read through the contents of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). It can be found at the following URL:

http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/

1. What does Part 2 of the Act allow?
2. Read Part 3. Summarise the power that police have in regards to establishing a person's identity.
3. Read through Part 4:
 - a. What is a warrant?
 - b. When can the police detain property and conduct a search without a warrant?
4. Are children under the age of 10 allowed to be strip searched by the police? Why would there be rules regarding this?
5. Why are the police allowed to stop moving vehicles?
6. What can the police use in order to stop moving vehicles?
7. Read Part 6A. Describe the general effect of this clause.
8. Read Part 7. Explain what it appears to be about.
9.
 - a. What issues does Part 8 address?
 - b. What is Part 8A about?
10. Read Part 9 – Why would there be special rules in regards to Investigations and Questioning?
11. Read Part 11 and describe what police powers it details.
12. Read Part 12. Summarise the powers listed in this Part.
13. Read Part 13. Outline the powers listed and provide a reason for rules regarding these powers.

Crime reporting

The detection of crime and the reporting of crime are done by two different groups of people. Detection is the role of law enforcement officials. These officials might actually witness crimes occurring as well. However, the reporting of crime and of criminal activity is usually done by members of the public.

Report Crime

In NSW, there are four ways for a person to report a crime:

1. In a life threatening or time critical emergency, call **Triple Zero (000)**.
2. For non-urgent crime, phone the Police Assistance Line on **131 444** who will take a police report and if necessary, arrange for police to attend.
3. Crime Stoppers on **1800 333 000** operates 24hrs a day, 7 days a week and allows members of the community to anonymously report criminal or suspicious behaviour or activity. It's a free call and rewards of up to \$1,000 are offered for information that leads to an arrest.
4. You can visit your local Police Station to report a crime.

Source: <http://www.police.nsw.gov.au/services>

It is common for a 'Triple 0' call to be made in response to an emergency and for that call to create a police response. For example, a person witnesses an armed robbery or an assault may call the police via an emergency call. Since such calls are both recorded and traced they can assist with helping to find the location of a crime and later can be used to as witness reports of what happened. Another crime reporting response is created by Crime Stoppers. People calling Crime Stoppers can do so anonymously.

When should I call Crime Stoppers? 1800 333 000

Crime Stoppers operates 24hrs a day, 7 days a week and allows members of the community to anonymously report criminal or suspicious behaviour or activity. You can contact Crime Stoppers using one of the following methods:

Telephone 1800 333 000

Internet Inquiries www.police.nsw.gov.au/contact_us

Internet Reporting https://www.police.nsw.gov.au/crime_report

Email csu@police.nsw.gov.au

Facsimile 02 4353 4948

Letter Crime Stoppers, PO Box 3427, TUGGERAH NSW 2259

Your information may be the vital missing piece the Police need to solve a crime.

Source: http://www.police.nsw.gov.au/can_you_help_us/crime_stoppers/when_do_i_call_crime_stoppers_1800_333_000

Why do people NOT report crimes...?

People sometimes do not report crimes. This can occur for many reasons including:

- They do not want to expose their own criminal behaviour
- They may be afraid of repercussions
- They might not think that what they saw or heard is important
- They do not want to get involved or think it is not their business
- They might be afraid of the police and other enforcement officials

If a person is involved with those that commit crimes then they may be very reluctant to report the crimes. Recent criminal activity by outlaw motorcycle gangs (OMCG) has revealed that even those who have been shot will not cooperate with the police and will not disclose who shot them. The code of silence means that crime is hard to solve.

This is a real problem for the criminal justice system in trying to address crimes of violence. Should people be compelled to disclose and should silence be an offence?

When would you report a situation of domestic violence...?

If you heard a situation of domestic violence at what point would it be right to get involved? Suppose the perpetrator is a neighbour who you know well. Would this make the situation more difficult?

If you knew that you would have to be a witness in a subsequent trial would that affect how and if you report the situation?

Review Activities – Crime Reporting

1. Define the term 'crime reporting'.
2. How can people report crimes?
3. Research the use of rewards by Crime Stoppers.
4.
 - a. How much has been paid out in rewards since the scheme started?
 - b. Do you think the use of rewards is a good incentive for crime reporting?
5. Outline THREE (3) reasons as to why people may not report crimes.

Investigating crime

The *Evidence Act 1995* (NSW) guides how evidence can be used in a criminal trial. When investigating a crime the police are seeking to gather enough evidence in order to charge and prosecute. They also aim to provide the evidence required to convince a court that the accused or defendant is guilty to the standard of ‘beyond reasonable doubt’. The purpose of crime investigation is to find out the facts about what happened when a crime occurred and to gather the evidence required to prove the existence of the facts.

Gathering evidence

There are different types of evidence. Evidence may come in the following forms:

- Documents (hard copy and electronic)
- Witness statements
- Electronic records such as financial transactions, mobile phone records and surveillance footage
- Video or sound recording (s48 *Evidence Act*)

Evidence can be gathered a number of ways. The police can conduct surveillance operations and from these they can record the movements of suspects and this can be tendered as evidence to the court.

Use of technology

The police use various technologies to investigate crime including the use of covert surveillance devices such as listening devices. The use of CCTV recordings can help in both crime investigation and in the provision of evidence to a court at a future trial or hearing.

Technology allows for the creation of databases that can be used for storing evidence such as fingerprints, DNA samples and the like. These can later be used for matching purposes.

Search and seizure

The *Law Enforcement (Powers and Responsibilities) Act 2002* gives the police various powers including the power to search and seize items without a warrant. There are also powers that allow the police to approach a judge (‘authorised officer’) in order to be granted authorisation to search premises with a warrant. A warrant is an authority from the judiciary allowing the police to do certain things – such as enter private property and to place covert listening devices.

Law Enforcement (Powers and Responsibilities) Act 2002 - SECT 21 - Power to search persons and seize and detain things without warrant

1. A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:
 - a. the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,
 - b. the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,
 - c. the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,
 - d. the person has in his or her possession or under his or her control, in contravention of the *Drug Misuse and Trafficking Act 1985*, a prohibited plant or a prohibited drug.
2. A police officer may seize and detain:
 - a. all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and
 - b. all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and
 - c. any dangerous article, and
 - d. any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the *Drug Misuse and Trafficking Act 1985*

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/s21.html

Section 23A allows a police officer to request a detained person open their mouth or shake their hair, if they suspect the person has concealed something

Section 26 is the power to search for, and confiscate knives and other dangerous implements. The police are allowed to do a frisk search (body pat down).

Section 33 provides the rules for strip searches, which are very detailed particularly when a person under the age of 18-years-old is involved (but over the age of 10-years).

Search and seize powers also extend to domestic violence offences. The police can search for firearms (guns) and can search for and seize dangerous weapons and dangerous implements (ss86-87).

Types of Searches

The police must conduct the least invasive type of search practicable in the circumstances. The types of searches in order from least invasive to most invasive are:

1. Ordinary search - A search of a person or of articles in their possession and an examination of those articles. It may require the removal of an overcoat, coat or jacket, gloves, shoes, socks and hat.
2. Frisk search - A search of a person conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over the person's outer clothing. It includes an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person, including examination by passing an electronic metal detection device over those things.
3. Strip search - These may only be conducted if the police suspect on reasonable grounds that it is necessary for the purposes of the search and that the seriousness and urgency of the circumstances require a strip search. The person may be required to remove all of his or her clothes and be subject to an examination of the person's body (but not body cavities) and their clothes.

Source: <http://www.armstronglegal.com.au/criminal-law/police-powers/search>

Use of warrants

There are different types of warrants used by law enforcement officials. For the purposes of investigating crime the following types of warrants are useful:

- Search warrant
- Crime scene warrant
- Covert search warrant
- Criminal organisation search warrant

Law Enforcement (Powers and Responsibilities) Act 2002 - s94 - Crime scene warrants

1. A police officer may apply to an authorised officer for a crime scene warrant if the police officer suspects on reasonable grounds that it is necessary for the police officer or another police officer to exercise crime scene powers at specified premises for the purpose of preserving, or searching for and gathering, evidence of the commission of:
 - a. a serious indictable offence, or
 - b. an offence that is being, or was, or may have been, committed in connection with a traffic accident that has resulted in the death of or serious injury to a person.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/s94.html

Review Activities – Crime investigation

1. What is the purpose of crime investigation?
2. How can the police investigate crime?
3. Describe the sorts of things that constitute evidence.
4. Explain why the police are granted powers to search and seize.
5. Define the term 'warrant'.
6. Why are the police authorised to seize some things without a warrant but are required to have a warrant for other searches?
7. What is an 'authorised officer' and why is the reference to an authorised officer important?
8. Outline the purpose for specific powers related to domestic violence offences.
9. Read s33 of LEPR. Summarise its importance.

Arrest and charge, summons, warrants

Arrest

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) outlines the circumstances under which an arrest can be effected. Section 99 gives specific circumstances. When the police make an arrest they are depriving a person of their liberty to be free. It is very important that an arrest be lawful. Though a person cannot be arrested for the purposes of questioning, they can be interrogated following their arrest.

A person who has been arrested will be detained until the police decide whether to release, charge or remand the person in custody until a bail decision is made.

An arrest can be made with or without a warrant; however a warrant is only issued under specific circumstances. For example, a person who has been bailed to attend court must attend at the appointed time. If the person fails to show up then the magistrate or judge may issue a warrant for the arrest of the person.

Arrest warrants can be issued in accordance with ss101-103 of LEPRA.

Charge

A charge is a formal complaint or allegation that a person has breached the criminal law and therefore has a question to answer before a court. The police bring the charges for matters in the Local Court. The charges in intermediate and higher courts are usually brought by the DPP and very occasionally by the Attorney General (AG).

The police need to be careful to choose the correct charge that is consistent with the evidence. They also need to be able to prove any charges beyond reasonable doubt. To sustain a charge in court (for it to be proven) the evidence must be compelling.

Summons

A summons is a legal notice that is served on a person requesting their attendance at a court. A summons is no longer used in NSW as the means of getting a person to a court. They have been replaced with a range of Court Attendance Notices (CANs).

Summonses are still used in NSW for the following purposes:

- to advise prospective jurors of their need to attend court for jury service
- by the Administrative Decisions Tribunal (ADT) to request a person provide evidence or produce documents

Instructions for the defence... Find out when your court date is

The court date and the address of the court that you MUST attend are detailed on your Court Attendance Notice (CAN) or bail form. Make sure you come to the Local Court on this day. If you don't have your papers and you are not sure about the court date, ring the police station where you were charged. If the matter has been to court before, ring the Local Court and ask them to check the date for you. If the date is within the next few days you may be able to check it on the court website at: www.lawlink.nsw.gov.au/lc

If you are unable to attend court for a very good reason you should telephone the court and tell them what the problem is. They will tell you what you should do. If you are sick you should send in a medical certificate. Ask your doctor to write on the certificate why you are not able to go to court. You should try to fax this certificate to the court before the matter is due to be heard.

Warning: *If you don't turn up at court, and you are required to do so, your case might be decided without you and/or a warrant for your arrest could be issued.*

Source: <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/going-to-court-guide-to-the-local-court-for-defendants>

Warrants

A warrant, as seen previously, provides law enforcement officials with the authority to do something. Typically warrants are used for entering and searching premises, planting surveillance devices (such as listening devices) and to arrest a person who is unlawfully at large (in the community).

In NSW there are six different types of warrants that law enforcement officials can be granted:

- **Arrest warrant:** authorises the arrest of a person
- **Detention warrant:** authorises that a person can be detained for an extended period (up to 8 hours) for the purposes of investigating a criminal matter
- **Search warrant:** this authorises the police to search premises for the purpose of investigating crime or suspected criminal activity
- **Covert search warrant:** Allows the police to search a premises for up to three years after the issue of the warrant without notifying the owners/occupiers
- **Crime scene warrant:** This warrant must be obtained if the police need to investigate the scene of crime for longer than 3 hours
- **Criminal organisation search warrant:** In NSW the police can conduct covert surveillance, or controlled operations, when investigating sophisticated organised crime and criminal groups. The details about the controlled operations are provided below.

Can the NSW Police search my home or car?

In NSW the police may enter a home or other premises if they have a search warrant, and may also enter without a warrant if they believe someone there has suffered a significant physical injury, or is in imminent danger of significant physical injury, or that entry into the premises is necessary to prevent a breach of the peace.

If they have a search warrant, Police must produce and serve an “occupier’s notice” on the occupier of the premises. That notice sets out the details contained in the warrant. If requested by an occupier, they must also show the warrant to that occupier. If an occupier, having been served with the occupier’s notice, and having had the opportunity to see the warrant, then obstructs the search, he or she can be charged with hindering or delaying the execution of the warrant, or resisting a police officer in the execution of their duty. If, having demanded entry pursuant to a search warrant, police are refused access, they may use force to enter the premises.

Police must comply with the terms of a search warrant, and a warrant (other than a covert search warrant) cannot be executed at night unless it expressly authorises a search between the hours of 9pm on one day and 6am on the next. Once inside the premises, Police with a search warrant may search all of the premises described in the warrant, and may remove any item mentioned in the warrant, or any other item believed to be connected with any offence.

Source: <http://www.turnbullhill.com.au/articles/do-the-police-have-right-to-search-my-home----.html?articleStart=5>

Controlled Operations and the use of covert search warrants

The NSW Police Force (NSWPF), the NSW Crime Commission (NSWCC), the Independent Commission Against Corruption (ICAC) and the Police Integrity Commission (PIC) can intercept telephone conversations and plant devices to listen to, photograph or video conversations and track the position of objects. The Australian Crime Commission (ACC), the Australian Federal Police (AFP) and the Australian Customs and Border Protection Service (ACBPS) are also authorised to conduct controlled operations under the NSW legislation.

These kinds of operations involve significant intrusions into people’s private lives and so agencies must follow the approval procedures and accountability provisions set out in the relevant legislation. Reviewing the compliance of the agencies with these requirements is an important function of the Ombudsman.

Controlled operations are an important investigation tool. They allow law enforcement agencies to obtain evidence to prosecute criminal offences or expose corrupt conduct by infiltrating criminal groups – particularly those engaged in drug trafficking and organised crime.

At least once every 12 months the NSW Ombudsman inspects the records of each agency to ensure they are complying with the requirements of the legislation. During 2012–2013, they inspected 388 files about controlled operations.

Adapted from source: https://www.ombo.nsw.gov.au/annual_report/law-and-justice/compliance-and-inspections

Stronger stop and search powers...

NSW police will be given greater powers to stop and search people, cars, workplaces, bikie club houses and "criminal hangouts" without a warrant. The legislation will apply to people who have been banned from owning guns. At present, police need strong evidence and a judge's signature before searching a premises or vehicle for guns. Under the changes, police will be able to search without a warrant, even if there is no cause for suspicion, Premier Barry O'Farrell said.

Fewer than 70 people in NSW are subject to a firearm ban. The new laws will make it easier to increase that number, Mr O'Farrell said. The penalty for possessing or supplying illegal weapons will rise from 10 to 14 years' imprisonment.

Police Minister Michael Gallacher said police will be able to target known people.

"The existence of the banning order will be in itself the ability that police will need to pull them over, search their cars ... simply walk in the door," he said.

The tougher measures follow consultation with NSW Police Commissioner Andrew Scipione and a greater focus by the NSW government on tackling gun crime.

Civil libertarians have concerns about the measures and the implications for police accountability. NSW Council for Civil Liberties (CCL) president Cameron Murphy stressed the importance of a warrant.

"What a search warrant does is confine the police's activities, so we know why they're searching, and ensures there's a legitimate reason for them to do so," he said. "By removing that level of accountability, all we do is set up the scene ... for perhaps police corruption, because there's no accountability over their actions."

Adapted from source: G Khaicy, Police to get greater stop-search powers

<http://www.smh.com.au/nsw/police-to-get-greater-stopsearch-powers-20130915-2tsr3.html#ixzz2jofKGOxq>; 16.09.13

Review Activities – Arrest and charge, summons, warrants

1. Define the term arrest.
2. Why might a person be placed under arrest?
3. What can happen if a person does not attend a court when they should have?
4. In your own words, define the term 'charge'.
5. Explain the purpose of the prosecutors laying the correct charges.
6. Explain the purpose of a Court Attendance Notice (CAN).
7. Define the term warrant.
8. Distinguish between a search warrant and a covert search warrant.
9. Outline the purpose of the following warrants:
 - a. Detention warrant
 - b. Criminal organisation search warrant

Bail or remand

Once a person has been arrested they should be given a caution. The details about a caution are below.

Do I have to answer questions if I am under arrest?

In general you have a right to silence. However, if the arrest concerns a motor vehicle, you are required to give your name and address and particulars of the incident to the police.

Police should caution you, before questioning, that no questions need be answered but that any answer given may be used in evidence. The police may want you to answer questions in what is known as a "record of interview". This may be recorded on video and audio tape. Give the police your name, address and date of birth, but do not answer any other questions unless you have your solicitor present.

Do not sign any document other than a bail form!

Source: <http://www.lawsociety.com.au/community/publicationsandfaqs/legalquestions/Underarrest/index.htm>

One of the first decisions that must be made is whether a person shall be granted bail or whether they shall be held on remand.

Bail

The conditions of bail are governed by the *Bail Act 1978* (NSW). Bail is release from custody granted on condition that a person attends court at a later date. This is usually the only condition on bail. Nevertheless, if this type of bail is granted it is called 'unconditional bail'. However bail is commonly understood to have further conditions such as:

- The posting of surety
- The handing in of a passport
- An agreement to attend a police station regularly – for example every two days

These further conditions are imposed if a person presents a flight risk. This means that there is a danger they will flee and not attend court later

The current law divides offences into those for which bail is presumed and those offences for which bail will be denied (there is a presumption against bail). The new law, coming into effect next year is detail below.

Remand

Remand occurs when a person is bail refused. This means that the defendant shall be held in custody until the time of the court hearing. Remand is a significant breach of rights and may be against the entitlement to be presumed innocent. Nevertheless, a person held on remand and given a custodial sentence later will have the time taken off the sentence if it has already been served in remand.

Bail

Bail is an agreement by an accused person to attend court at a later date in order to answer a criminal charge. This is the primary bail condition. For many years the approach to bail had divided offences into those that attract a *presumption of bail* (which would favour release into the community prior to court attendance) and those for which there is a *presumption against bail* (which would favour remand). The new Act focuses on a risk management approach. This approach considers the safety of the community as the most important consideration when making the bail decision.

Bail Act 2013 - s3 - Purpose of Act

1. The purpose of this Act is to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions.
2. A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/ba201341/s3.html

The new law

The new *Bail Act* 2013 should commence in 2014 and has the following features: A bail authority is required to consider whether there is an 'unacceptable risk' that the accused person will:

- fail to appear at any proceedings for the offence, or
- commit a serious offence, or
- endanger the safety of victims, individuals or the community,
- or interfere with witnesses or evidence.

In determining whether there is an unacceptable risk, the bail authority must consider matters including:

- the person's background, circumstances and community ties
- the strength of the prosecution case
- the nature and seriousness of the offence and
- any special vulnerability or needs the person has, for example, due to youth.

If the identified risks cannot be sufficiently mitigated by imposing bail conditions on the accused person, bail will be refused and the person will be held in custody.

Safeguards

Prosecutors may apply to have an accused person's bail refused, revoked or the conditions strengthened, to ensure adequate protection of the victim or the community. If accused persons fail to comply with a bail condition, police will have a range of options including arresting them, without first needing to obtain a warrant from the court. Where the accused person is brought before the court, bail may be revoked or bail conditions strengthened.

Source: http://www.communityrelations.lawlink.nsw.gov.au/agdbasev7wr/_assets/cru/m40730112/bailfactsheet.pdf

Review Activities – Bail or remand

1. Define the term bail and state the law that governs the use of bail.
2. Distinguish between conditional and unconditional bail.
3. Why would the law divide offences into those for which bail is presumed and those for which there is a presumption against bail?
4. List THREE (3) conditions that may be attached to bail.
5. Detail the effect of the changes to the *Bail Act*.
6. Why might a person be remanded in custody?

Detention and interrogation, rights of suspects

Detention

The term 'detention' means that a person is detained or held. The main purposes of detention are to stop a person from conducting an offence, continuing an offence, for investigation of a crime or because they are wanted in respect of an unlawful act(s).

There are strict rules in LEPPRA as to how long a person can be held for – usually the length of time is 4 hours, but it can be extended through the use of a detention warrant. Such a warrant can authorise the extension by up to 8 hours.

A person is allowed to take breaks during questioning. Particular rules are in place in regards to juvenile and young offenders, aimed at protecting their rights.

Interrogation

Whilst the police cannot arrest for the purpose of questioning, once an arrest has been effected then the police can investigate a crime or alleged crime. This will require that persons be questioned (interrogated).

Note however, that prior to any questioning a person should be given a caution. The *Evidence Act* states that evidence that is gathered without a proper caution is unlawful, however unlawful evidence (including admissions made by an accused) can be admitted and accepted as evidence under some circumstances.

Evidence Act 1995 - s139 - Cautioning of persons

1. Evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:
 - a. the person was under arrest for an offence at the time, and
 - b. the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and
 - c. before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/ea199580/s139.html

Following a period of interrogation the police may seek that the person signs a record of interview. The person can however refuse to do so. Once a person has been questioned, charges may be laid and the person then should be released, bailed or held on remand.

Rights of suspects

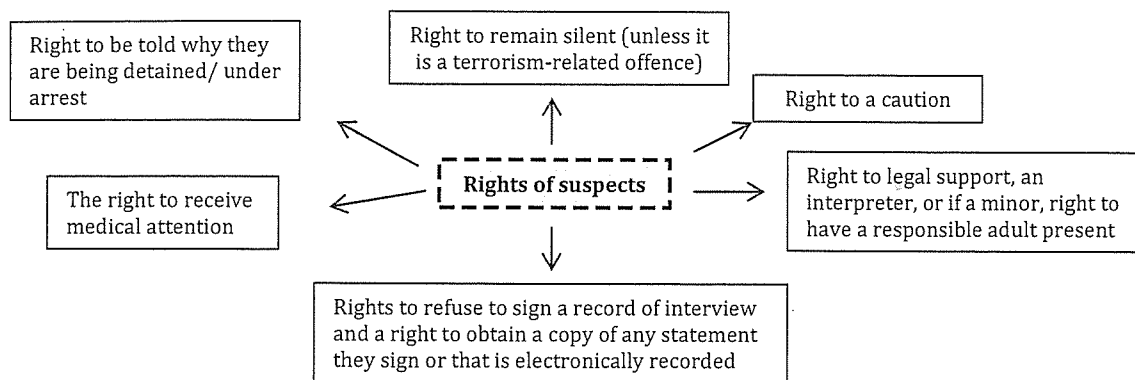


Figure 5 – A summary of the rights of suspects

Figure 5 above outlines six rights that suspects have. The rights are necessary because the suspect has rights taken away when arrested. Moreover, the effect of charges and a subsequent trial can have grave consequences on an individual. Thus individuals need to be protected from the power of the state. People can feel intimidated by officials and need to have certain basic protections.

The effect of a criminal record on a person can affect their employment and their quality of life. Thus the law must articulate the exact powers of law enforcement officials and must also limit those powers so that suspects have rights upheld.

The right to silence

All suspects have a right to silence for most offences (terrorism offences are an exception). However they must disclose their name and address. The right to silence extends right through any subsequent trial. However, if a person exercises their right to silence a judge must enter a 'not guilty plea' on behalf of the accused and also tell the jury that the presumption of innocence applies.

Right to refuse to sign a record of interview

A suspect has a right to refuse to sign a record of interview. This might be because they believe they have been misrepresented or because they feel pressured to make statements.

Do suspects have too many rights...?

The criminal justice system is often criticised for according suspects too many rights and thus reducing the rights of the public (society) and the victim. The legal system needs to find a balance between the rights of each of these parties to criminal justice processes.

Review Activities – Detention and interrogation, rights of suspects

1. Define the terms detention, interrogation and suspects.
2. Why might persons be detained?
3. Outline the purpose of interrogation.
4. For how long can suspects be interrogated?
5. Detail six rights that are accorded to suspects
6. Assess the effectiveness of the criminal investigation process as a means of achieving justice