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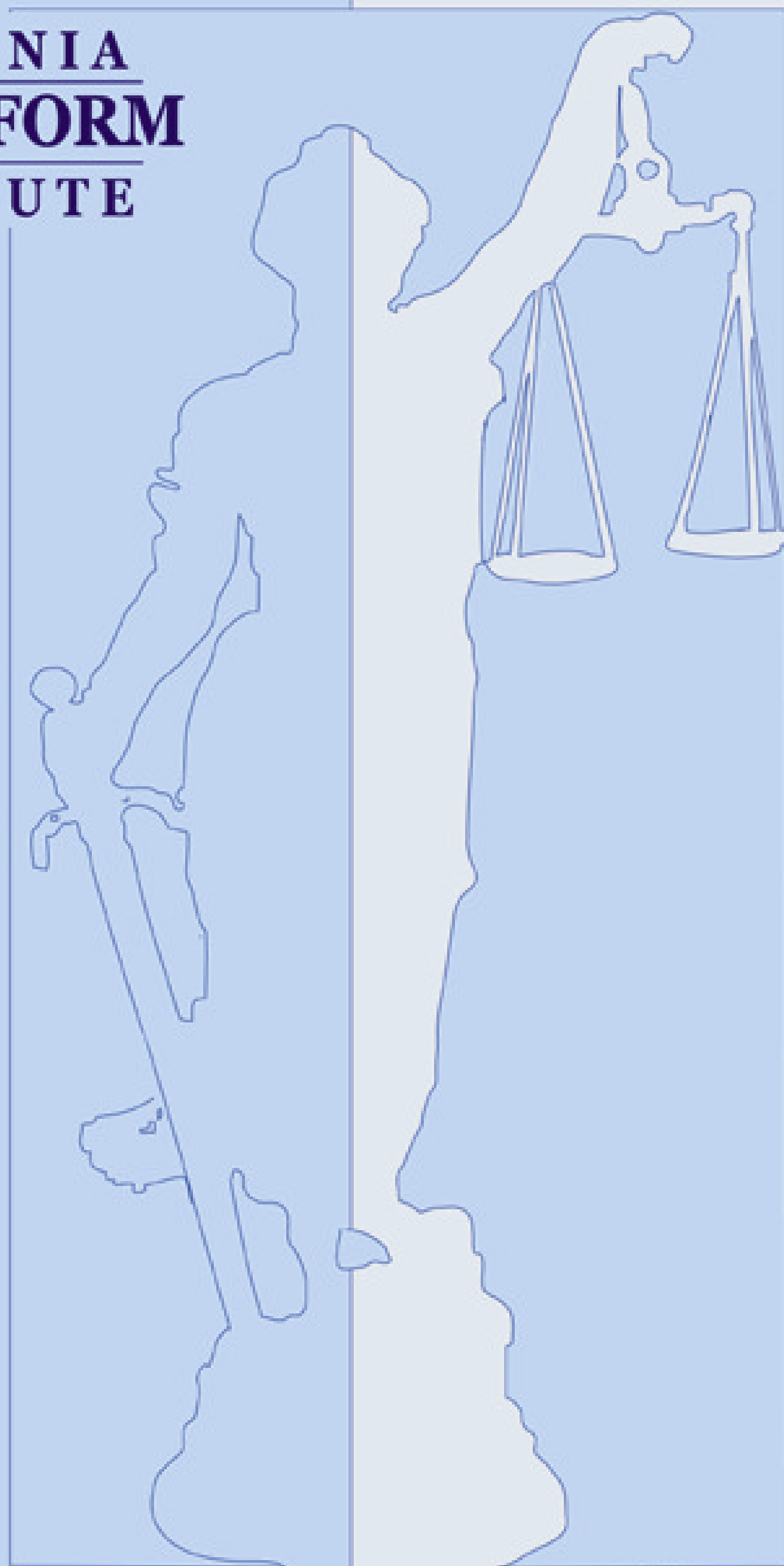

Custody, Arrest and Police Bail

ISSUES PAPER NO 1

March 2002

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Custody, Arrest and Police Bail

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How to respond to this issues paper

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. At the end of each part there are questions which may be useful in responding to this issues paper. The questions are intended as a guide only – you may chose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. If you would like your views and/or the fact that you made a response to this paper to be kept confidential, simply say so, and the Institute will respect that wish.

Responses should be made in writing by June 31 2002.

Responses may be sent to the Institute by mail, fax or email.

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Inquires should be directed to Jenny Gawlik, on the above contacts, or by phoning (03) 62262069.

This issues paper is also available on the Institute's web page at:

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Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Paul Turner (appointed by the Attorney-General), Phillip Jackson (appointed by the Law Society) and Terese Henning (appointed by the Council of the University).

About this issues paper

This issues paper discusses:

- Part 1: the definition of being in custody under the *Criminal Law (Detention and Interrogation) Act*, 1995;
- Part 2: the effect of failing to give reasons for arrest under s 301 of the *Criminal Code*, 1924; and
- Part 3: the granting of police bail under the *Criminal Law (Detention and Interrogation) Act*, 1995.

Part 1 and 3 of this law reform project were proposed to the Board of the Tasmania Law Reform Institute in October 2001.

A call was made for proposals as to any other problems with the *Criminal Law (Detention and Interrogation) Act*, which might be included in this project.

After considering a draft issues paper, Part 2 of the project was included.

Part 1

Custody and Arrest

Introduction

The *Criminal Law Detention and Interrogation Act*, 1995 (Tas) is deficient in two principal respects. First, the scope and application of the protections it provides to suspects who have been detained in police custody for questioning is uncertain. Secondly, to the extent that s 4(3) of the Act extends police power to grant bail in respect of all offences, it is questionable whether it represents Parliamentary intent. This second problem is dealt with in Part 3 of this paper.

The first problem arises because in 1993 the Tasmanian Court of Criminal Appeal in *Sammak*[1] held that a person could be detained in lawful police custody and yet not be under arrest or entitled to all the protections afforded to arrestees. In so holding the Court created a hybrid form of detention somewhere between arrest and liberty where the rights of detainees remain uncertain. The introduction of the *Criminal Law (Detention and Interrogation) Act* in 1995 did not affect this decision as it applies only to those people who are 'in custody'. 'In custody' is defined narrowly as being 'under lawful arrest'. Accordingly, its protections may not extend to suspects who are 'in custody but not under arrest'. In 2000 the hybrid form of detention discussed in *Sammak* was recognised by Slicer J in *Reid and Swan*.[2] The accused in this case were said to be in ' "*de facto*" ' custody – 'in law, each was free to leave the police station but if either attempted to do so he would have been arrested'. Slicer J left undecided whether the protections of the *Criminal Law Detention and Interrogation Act* applied to suspects in this position. The orthodox position at common law is that suspects cannot be lawfully detained unless they are, in fact, under arrest. All detainees, whether formally arrested or not, are entitled to the legal protections afforded to arrestees. The current interpretation of the law in Tasmania creates the opportunity for the police to evade their statutory obligations and enables suspects' involvement in the investigative process to proceed on a potentially unregulated and unfettered basis.

[1] (1993) 2 Tas R 339.
[2] [2000] TASSC 36.

The principle at stake

The public interest in law enforcement is not limitless. It must always be balanced against the need to protect the civil liberties of citizens. Clearly, the police require adequate powers to conduct criminal investigations effectively and efficiently. However, the rights of suspects should not be compromised in the pursuit of convictions. Common law principles have evolved and legislation has been enacted in an attempt to ensure that this balance is maintained. These include:

(a) the laws against unlawful imprisonment; and
(b) the *Criminal Law (Detention and Interrogation) Act*, which designates how the police must treat arrestees.

The right not to be imprisoned unlawfully is protected by the civil law (by the tort of false imprisonment) and by the criminal law (by the offence of assault, which includes unlawful deprivation of liberty[3]). Imprisonment is used here in the general sense of being deprived of one's liberty. This right is subject to exceptions. The most prominent of these is that the police may *lawfully* arrest people. Another exception is the police power to detain people for the purpose of undertaking a breath analysis.[4]

Arrest

For an arrest to be lawful there must be a power of arrest and an arrest in fact. There is no set formula for exactly what must be said and done to effect a lawful arrest. However, it must be made clear to the suspect/arrestee that he/she is no longer free[5] and reasons for the arrest must be given.[6] Any form of words may be used which in the circumstances of the case make it clear to the arrestee that he/she is under compulsion; there does not need to be any touching, provided there is submission by the suspect.[7] Further, if the police behave in such a way as to give the suspect reasonable grounds to believe that he or she is not free to leave, then he or she will be under arrest regardless of whether a formal arrest has been effected.[8]

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[3] *Police Offences Act* 1935, s 35; *Criminal Code* 1924, ss 182 and 184.
[4] *Road Safety (Alcohol and Drugs) Act* 1970, s 7A.
[5] *O'Donoghue* (1988) 34 A Crim R 397.
[6] *Christie v Leachinsky* [1947] AC 573; *Criminal Code* s 301(2).
[7] *Alderson v Booth* [1969] 2 QB 216.
[8] *Smith* (1957) 97 CLR 101; *Alderson v Booth* [1969] 2 QB 216. However this does depend on why the lawfulness of the arrest is in issue. If it is in issue because the arrestee is suing the arrestor for false imprisonment or the arrestee has been charged with escape, there may be no lawful arrest where the formalities have not been complied with: *Christie v Leachinsky* [1947] AC 573; see also Part 2.

Protections for those under arrest

The rights of citizens who have been arrested are safeguarded by a number of statutory and common law protections. In Tasmania, the majority of these protections are contained in the *Criminal Law Detention and Interrogation Act* 1995. They include:

- The requirement that the arrestee be taken before a magistrate or justice as soon as practicable after arrest unless released unconditionally or released on police bail: s 4(1);
- The requirement that the arrestee be informed of the right to silence prior to questioning: s 4(5);
- The requirement that the arrestee be informed of the right to communicate with a friend or relative and a legal practitioner (except in certain specified situations) prior to questioning: s 6(1);
- The provision of an interpreter when needed: s 5; and
- The imposition of time limits on the questioning of arrestees so that they may only be questioned for a *reasonable* time: s 4(2)(a); reasonableness in this context is determined by the considerations set out in s 4(4).

These provisions recognize the relatively vulnerable position of those detained in police custody. Their vulnerability arises from the power imbalance that exists between detainees and the police. Findlay et al describe the situation in the following way: '[w]ith the full resources of the state behind them the police are usually in a position of enormous physical, psychological, emotional and legal superiority over the suspect'.[9]

The problem defined

It is recommended that the definition of the term, 'in custody' in the *Criminal Law Detention and Interrogation Act* be amended for the following reasons:

1. the scope and application of the Act is presently uncertain;
2. the statutory safeguards attached to arrest should be extended to all suspects who are detained for questioning and are effectively under the control of the police;
3. those involved in the interrogation process should be able to identify their rights and obligations with certainty.

'In custody' under the **Criminal Law Detention and Interrogation Act**

The *Criminal Law Detention and Interrogation Act* affords the protections in sections 4-6 to people 'in custody'. Section 3(2) provides that a person is 'in custody' if he or she is under lawful arrest:

> For the purposes of this Act, a person is in custody if he or she is -
> (a) under lawful arrest by warrant; or

[9] Findlay M, Odgers S & Yeo S, *Australian Criminal Justice* (2nd ed), 1999, Oxford University Press, Victoria, at 35.

(b) under lawful arrest under section 27 of the *Criminal Code* or a provision of any other Act.

The term 'arrest' is not defined in the Act.

Volunteers

People, including those suspected by the police of involvement in an offence, may co-operate with the police when they are not under arrest. They may voluntarily assist the police with their enquires. In this situation suspects are not in detention or under compulsion as they are free to leave at any time. Because they are free to leave they do not need the protections afforded by sections 4-6 of the Act and those protections do not apply to them.

The circumstances of and the rights and obligations that attach to volunteers and lawful arrestees are clearly distinguishable and ascertainable. A volunteer can readily clarify his or her position by asking whether he or she is under arrest or free to leave.

Another type of custody with the police?

In *Sammak*[10], the Tasmanian Court of Criminal Appeal held that a person could be in a third form of custody somewhere between being a volunteer and an arrestee. This position arises when a person is not under arrest but 'in custody for the purposes of the Judge's Rules'.[11] In reaching this conclusion the Court of Criminal Appeal purported to rely upon *Smith v The Queen* where it was held:

> Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. . . if the police act so as to make him think that they can detain him he is in their custody.[12]

The Court in *Sammak* held that the accused had not been arrested (formally or otherwise) though there was sufficient evidence that he was 'in custody for the purposes of the Judge's Rules', with the result that he should have been cautioned in accordance with those rules. The Court did not consider what other rights a person in such a custodial situation might have other than to decide that the right to be brought before a magistrate as soon as practicable[13] did not apply.

It is unclear what specific evidence was relied on by the court to make the finding that the accused was 'in custody for the purposes of the Judge's Rules' but not under arrest. It appears to have been based on the following findings of fact: after being approached by the first police officer he was asked "Could you please remain here"; he was soon

[10] (1993) 2 Tas R 339.
[11] *Ibid*, Cox J at 352 and Zeeman J (with whom Crawford J agreed) at 358-359. The Judge's Rules set out that 'Persons in custody should not be questioned without the usual caution being first administered', r (3), reprinted in The Tasmania Police Manual, 1999, 4.7.5.
[12] (1957) 97 CLR 100 at 129, cited at 359.
[13] This right was then in s 34A of the *Justices Act* 1959 and s 301(1) of the *Criminal Code* 1924.

after asked to go to the police station, which he did; a video taped interview was performed; and at all these times if he had attempted to depart he would have been arrested.

The description relied upon by Zeeman J from *Smith* of a person 'in custody for the purposes of the Judge's Rules' bears all the hallmarks of a person under arrest – ie under compulsion. The following statement in *Smith* reinforces this conclusion:

> He was in the control of the police from the moment he entered the police station. He was not told he could not leave because he made no attempt to do so but it is unbelievable that he would have just sat there if he had thought he could leave.[14]

It has been argued by Henning that the Tasmanian Court of Criminal Appeal in *Sammak* misinterpreted *Smith* and was, therefore, wrong to find that Sammak had not been arrested. She argues that the differentiation drawn by the Tasmanian court between 'custody for the purposes of the Judge's Rules' and arrest is, in fact, the distinction that has been drawn in other cases between informal and formal arrest.[15] In her consideration of the decision in *Sammak* Henning dismisses the possibility that the accused was a mere volunteer: '[f]or part of his detention, he was kept in police cells. It beggars belief that a person would remain in such a location if he or she thought they could go.'[16] However Zeeman J did state that '[t]here was no evidence that thereafter he formed any belief at the relevant time that he would not have been permitted to leave should he have attempted to do so.'[17]

Sammak was decided before the *Criminal Law (Detention and Interrogation) Act* was enacted. The decision could be viewed as an over-reaction to the constraints placed on the police by the High Court decision in *Williams*[18] where it was held that there was no power to arrest or detain a person or to delay in taking an arrestee before a magistrate or justice for the purpose of interrogation. If concern about the limits on police powers did provide the basis for the decision in *Sammak*, then the introduction of the *Criminal Law (Detention and Interrogation) Act* in 1995 provided both the opportunity and rationale for abolishing any legitimate form of custody short of arrest. However, because the protections in the Act apply to people 'in custody', and this term is defined narrowly as being under lawful arrest, the possibility of some other form of custody still exists.

In a more recent case, *Reid and Swan*,[19] Slicer J held, relying on *Sammak*, that a person could be in police custody but not under arrest. Slicer J found that the suspects were 'in law, free to leave', though in *fact* not at all free to leave as it had been made clear to them that if they attempted to do so they would be arrested.[20] Slicer J summarised their situation by saying:

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[14] (1957) 97 CLR 100 at 129.
[15] Henning T, 'A Little Knowledge is a Dangerous Thing or When is and Arrest Not an Arrest?' (1994) 6 *Current Issues in Criminal Justice* 90, at 98-101.
[16] *Ibid*, at 98.
[17] *Sammak* (1993) 2 Tas R 339 at 360 (it is noted that Crawford J agreed with Zeeman J and Cox J adopted Zeeman J's statement of the facts).
[18] (1986) 161 CLR 278.
[19] [2000] TASSC 36.
[20] *Ibid*, at 2.

> Each accused was effectively in the custody of a police officer. Their status was tantamount to that of a person subject to a "*de facto*" arrest in the sense discussed by the Full Court of the Supreme Court in *R v Harris* (1995) 64 SASR 85 and considered in general terms in *Sammak*.[21]

His Honour went on to say:

> It follows that effect ought be given to either the terms or spirit of the Act. It is not necessary for the purpose of this ruling to decide whether the circumstances creating an effective custody require the application of the Act, s3 and s15.[22]

In deciding whether evidence obtained in these circumstances should have been excluded Slicer J focussed on whether, in the circumstances of the case, there was any unfairness in the treatment of the accused. It was held that there was no unfairness despite the fact that the accused were not informed of their right to communicate with a legal practitioner, as required by s 6(1)(b) or brought before a custody officer, as required by s 15.

Consequently, the rights of a person who is in police custody but not under arrest remain uncertain, as do the obligations of custodial officers. The protections created by sections 4-6, and indeed the whole of the Act, *should* be afforded to all suspects who are effectively under the control of the police regardless of whether a formal arrest has been effected. The grey area between arrest and liberty potentially allows the police to apply the Act on a discretionary basis, leaving judges and magistrates to decide whether evidence obtained in these circumstances should be excluded. This creates the potential for injustice because, in the majority of cases, a plea of guilty is entered and there is no judicial consideration of the validity of the suspect's treatment by the police.

The position in Tasmania runs counter to the orthodox position at common law where, as noted earlier, suspects detained by the police and not at liberty to leave are deemed to be under arrest and entitled to the legal protections afforded to arrestees.[23] In a number of Australian jurisdictions,[24] any possible doubt that might exist at common law has been removed by legislation that applies protective regimes broadly to detainees. This is achieved by defining arrest broadly to include situations where people are in the company of a police officer for the purposes of questioning and –

- the police officer possesses sufficient information to justify the arrest of the person;
- would arrest the person if they wished to leave; or
- has given the person reasonable grounds to believe that they would not be allowed to leave if they wished to do so.

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[21] *Ibid*, at 2.
[22] *Ibid*, at 2; s 15 requires that a person in custody at a police station be brought before a custody officer without delay. The custody officer then has a number of responsibilities such as recording the time of the person's arrival, informing the person of the reason for their detention, recording whether the person is questioned and for how long, and if a person is denied the rights under s 6, recording the reasons why.
[23] *Spicer v Holt* [1976] 3 All ER 71 at 79; *Smith* (1957) 97 CLR 101 at 129; Henning T, 'A Little Knowledge is a Dangerous Thing or When is and Arrest Not an Arrest?' (1994) 6 *Current Issues in Criminal Justice* 90.
[24] Victoria: *Crimes Act* 1958, s 464(1)(c); New South Wales: *Crimes Act* 1900, s 355; Commonwealth: *Crimes Act* 1914, s 23B.

The application of the law's protective measures should be clear and uniform for all citizens whose liberty has been encroached upon for the purposes of criminal investigation.

Proposal

It is proposed that the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas) be amended to broaden the definition of being 'in custody' contained in s 3(2). This would clarify the law in this area and extend the protections provided by the Act to all people whose liberty has been encroached upon for the purposes of criminal investigation. Such amendments have already been undertaken in Victoria and New South Wales and by the Commonwealth.

The current s 3(2) of the *Criminal Law (Detention and Interrogation) Act* provides:

> For the purposes of this Act, a person is in custody if he or she is –
> (a) under lawful arrest by warrant; or
> (b) under lawful arrest under section 27 of the *Criminal Code* or a provision of any other Act.

It is proposed that the definition of a person in custody be extended by inserting the following clause:

> (c) in the company of a police officer for the purpose of questioning or investigation and -
> (i) the police officer is in possession of sufficient information to justify the lawful arrest of the person for the offence that is to be the subject of the questioning; or
> (ii) the police officer would not allow the person to leave if the person wished to do so; or
> (iii) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so;
> but a person is not in custody for the purposes of this Act where they have been lawfully detained under a provision of any other Act.

Sub-clause (i) of this proposal is based on s 464(1)(c) of the Victorian *Crimes Act*, 1958, which was inserted in 1988. Section 464(1)(a) and (b) of the Victorian *Crimes Act* are essentially the same as s 3(2)(a) and (b) of the *Criminal Law (Detention and Interrogation) Act*. Section 464(1) provides:

> (1) For the purposes of this Subdivision a person is in custody if he or she is -
> (a) under lawful arrest by warrant; or
> (b) under lawful arrest under section 458 or 459 or a provision of any other Act; or
> (c) in the company of an investigation official and is –
> (i) being questioned; or
> (ii) to be questioned; or
> (iii) otherwise being investigated –

> to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence.

The proposed subclause (i) is based on the Victorian provision rather than similar provisions in the Commonwealth and New South Wales Crimes Acts (s 23B(2)(a) and s 355(2)(a) respectively) which provide:

> (a) the official (police officer) believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence (an offence) that is to be the subject of the questioning (investigation).

The situation described by the wording in the Victorian Act was preferred as it resulted in a broader and simpler extension of the meaning of 'in custody': first, it is based on objective rather than subjective grounds – it refers to the information the police officer actually possesses, rather than his 'belief' as to the 'evidence' that 'exists' (which would be harder to review at a later date); and secondly, the information should be sufficient to justify *arrest*, rather than being able to actually establish that the offence has been committed, which is possibly a much higher standard and one that a police officer is less qualified to judge.

Subclauses (ii) and (iii) of the proposed s 3(2)(c) go further than the Victorian legislation. These subclauses are based on s 23B(2)(b) and (c) of the Commonwealth *Crimes Act*, 1914, which is in very similar terms to s 355(2)(b) and (c) of the New South Wales *Crimes Act*, 1900 (see Appendix A). These subclauses were included in the proposal because they describe a situation where the detainee is in the company and control of the police and so should be afforded the protections designed for people in that situation.

The last addition to the proposed s 3(2)(c), namely that a person is not in police custody if they are being lawfully detained under a provision of any other Act, is based on the Commonwealth and New South Wales provisions (s 23B(2)(d) and (e), and s 355(3) respectively). It is included to insure that the police do not have to apply the *Criminal Law (Detention and Interrogation) Act* when detaining people for the purposes of supplying a breath analysis under the *Road Safety (Alcohol and Drugs) Act* 1970 s 7A, or for the purposes of carrying out a search or questioning under the *Poisons Act* 1971, s 90A(1)(b), s 90D(1) (see Part VI Division 3 generally) or for the purpose of carrying out procedures which do not require arrest under the *Forensic Procedures Act*, 2000.

The relevant sections of the New South Wales and Commonwealth Crimes Acts are set out in full in Appendix A.

Finally, it should be noted that the proposed amendment to the definition of a person in custody for the purposes of the *Criminal Law (Detention and Interrogation) Act* in no way changes the meaning of arrest or the police powers of arrest or the requirements of a lawful arrest. This proposal in no way legitimises an unlawful arrest or the keeping of a person in unlawful custody. The aim and effect of this proposal is simply to protect people in the custody of police more fully and fairly.

Questions

These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.

1.1 Do you agree with this analysis of the current law regarding the different forms of custody and the different protections provided to people in each of the forms of custody?

1.2 Do you agree that the protections provided for those under arrest should be available to all suspects who are effectively under the control of the police?

1.3 Do you think that the proposed amendments solve the problem as intended?

Part 2

Reasons for Arrest

Introduction

The common law and Criminal Code clearly state that a person being arrested should be informed of the reason for the arrest. Under the common law failing to do so makes the arrest unlawful, however the effect of failing to do so is unclear under the Code. It is proposed that the Code be amended to clarify the effect of a failure to give reasons for arrest.

The principle at stake

The duty to give reasons for arrest

When making an arrest a police officer has a duty to inform the person being arrested of the reasons for that arrest. This duty exists at both common law[25] (which applies to summary offences for which there is no Code parallel[26]) and under s 301(2) of the Criminal Code (which applies to indictable offences and arguably to summary offences with a Code parallel). This section of the Code provides:

> (2) It is the duty of a person arresting another, whether with or without warrant, to give notice, if practicable, of the process or warrant under which he is acting or the cause of the arrest.

As can be seen from s 301(2), where it is not 'practicable', there is no duty to inform of the reasons for arrest. Examples of when it might be impracticable to give the reasons for arrest are if the arrestee is blind drunk, if the arrestee is deaf and cannot lip-read[27] or if the arrestee responds with an immediate counter-attack or by running away.[28]

Another exception to the rule under the common law is that where the reason for the arrest is obvious, for example if a robber is caught red-handed, it is not necessary to give the reason for arrest.[29] This exception is not mentioned in the Code provision.

Christie v Leachinsky[30] is the principal common law authority explaining this duty. This case discusses the history of the duty, dating it back to at least 1755,[31] and details the two

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[25] *Christie v Leachinsky* [1947] AC 573.
[26] *Gow v Davies* [1992] 1 Tas R 1.
[27] *Wheatley v Lodge* [1971] 1 WLR 29; [1971] 1 All ER 173.
[28] *Christie v Leachinsky* [1947] AC 573, per Viscount Simon at 588.
[29] *Christie v Leachinsky* [1947] AC 573, at 587.

justifications for the duty. The first justification is that being arrested is such a substantial interference with a person's liberty that it must be justified and the person being arrested should be informed of that justification.[32] Secondly, informing the arrestee of the reasons for the arrest gives the person the opportunity to offer an explanation to clear themselves and be released as soon as possible.[33]

The effect of failing to provide reasons

At common law, failure to inform an arrestee of the reasons for arrest makes the arrest unlawful, although the arrest can be made lawful subsequently if the reasons are given.[34]

Whether an arrest is lawful or unlawful can be of critical importance. For example, the lawfulness of an arrest is highly relevant to whether evidence of admissions made after arrest should be admitted at trial. Another instance when the lawfulness of arrest is crucial is when a person is charged with escape because escape from *unlawful* custody is not an offence. Similarly, actions or force taken to defend oneself or another from an *unlawful* arrest would not constitute the offence of assaulting, resisting or wilfully obstructing a person *lawfully* arresting another person,[35] or assaulting a police officer in the due execution of his duty[36] (as it is not a police officer's duty to make unlawful arrests). The lawfulness of an arrest will also be in issue when an arrestee sues an arrestor for false imprisonment. The issue of lawfulness of an arrest without reasons for the purposes of the applicability of protections to the arrestee would be dealt with by the proposed amendment at page 11.

The problem defined

The Criminal Code is unclear

Under the Code the effect of a failure to give reasons for arrest is not clearly expressed. Section 301(3) provides:

> (3) A failure to fulfil either of the aforesaid duties shall not of itself deprive the person executing the process of warrant or making the arrest, or his assistants, of protection from criminal responsibility, but shall be relevant to the question whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.

This subsection means that if a police officer fails to give reasons he or she is still protected from criminal responsibility – ie he cannot be prosecuted for assault. However,

[30] *Ibid.*
[31] *Ibid*, at 586.
[32] *Ibid*, at 587-588.
[33] *Ibid*, at 588.
[34] *Kulynycz* [1971] 1 QB 367 (CA).
[35] Criminal Code, s114(2), *Police Offences Act* 1935, s 34B(a)(iii).
[36] Criminal Code, s114(1), *Police Offences Act* 1935, s 34B(a)(i).

failure to give reasons is relevant to the issue of reasonable force and may lead to the conclusion that excessive force was used, in which case the arresting police officer will be criminally responsible. Whether a failure to give reasons for an arrest makes the arrest unlawful for other purposes is not specifically addressed by the subsection. This question has not been judicially considered in Tasmania.

History of the provision

Section 301 is almost an exact reproduction of s 42 of Sir James Fitzjames Stephen's Draft Criminal Code of 1879. Section 42 provides:

> It is the duty of every one executing any process or warrant to have it with him and to produce it if required.
>
> It is the duty of every one arresting another, whether with or without a warrant, to give notice where practicable of the process or warrant under which he acts, or the cause of the arrest.
>
> A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants or the person arresting of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed or the arrest effected by reasonable means in a less violent manner.

In this work the final paragraph (which is s 301(3) in our Code) is marked with a marginal note which states 'this is believed to alter the common law'. However what aspect of the common law is affected is unclear – for example does it alter the common law merely with regard to the police officer's criminal responsibility or does it intend to alter the common law by making the arrest lawful for other purposes?

Professor Glanville Williams has discussed this section of the Draft Code. He states:

> If the rule in *Christie v Leachinsky* is not complied with, the whole arrest is unlawful. The Commissioners who prepared the Draft Code of 1879 proposed to change this by declaring (in section 42) that failure to notify the cause of arrest does not make the arrest *ipso facto* unlawful, but is merely relevant to the inquiry whether the arrest might have been effected by reasonable means in a less violent manner.'[37]

Thus Professor Glanville Williams interprets s 42 as abrogating the common law principle in *Christie v Leachinsky*. It is difficult to agree with this interpretation.

[37] 'Requisites of a Valid Arrest' (1954) *Criminal Law Review* 6, at 19.

Preferred interpretation

Our view is that the common law is only altered in so far as the arrestor (usually a police officer) is protected from criminal responsibility if he or she fails to give reasons. Our reasoning is that s 301(3) does not state the effect of a failure to give reasons for other purposes and therefore, as the matter is not covered by the Code, the common law applies.[38] An alternative argument, which is not dependent on the common law, is that the implication of stating that failure to give reasons does not necessarily deprive the arrestor of protection from criminal responsibility, is that for other purposes the arrest will be unlawful. This interpretation is supported by the fact that if subsection (3) abrogates the common law, failure to fulfil the duty would have no consequence, effectively taking away the protection the section offers. If it were intended that this subsection take away this protection, this should have been done so clearly.

This is also the interpretation given to the former s 40 (now slightly modified in s 29) of the Canadian Criminal Code. The former s 40 of the Canadian Criminal Code was, like our s 301, identical to s 42 of Stephen's Draft Code. In *R v George*[39] the origin and effect of the section is given detailed consideration. All the members of the court clearly held that a failure to give notice of the reasons for arrest when it is practicable to do so renders the arrest unlawful.[40] Subsection (3) was noted only to say that it was irrelevant to this point.[41]

Other interpretations

On the other hand the Law Reform Commission of Tasmania, in its report on powers of arrest, search and bail,[42] suggests s 301(3) means that failing to give reasons for arrest does not make the arrest unlawful. The report states (after setting out all of s 301):

> 'Such section also makes it clear that a failure by a police officer to have the warrant with him does not have the effect of preventing a lawful arrest from being made.'[43]

The Law Reform Commission specifically refers only to the situation where a police officer failed to have a warrant him. However, s 301(3) refers to 'either of the aforesaid duties'. Therefore, the interpretation that a failure by a police officer to have the warrant with him does not prevent a lawful arrest from being made, means that a failure by a police officer to state the reasons for the arrest also does not prevent a lawful arrest from being made.[44]

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[38] There are many examples of resort to the common law when the matter is not dealt with by the Code, eg the general rule as to burden of proof: *Packett* (1937) 58 CLR 190; the meaning of consent: *Schell* [1964] Tas SR 184.

[39] [1935] 2 DLR 516; (1934) 63 CCC 225.

[40] *R v George* [1935] 2 DLR 516, per Macdonald CJBC at 519; per Martin JA at 525-526; per McPhillips JA at 531. See also *R v Broughton* (1976) 23 CCC (2nd) 395, where it is clearly indicated by Allen JA that failing to notify a suspect of the reasons for arrest makes the arrest unlawful: '[the accused] was in fact informed of at least the general nature of the charge upon which the arrest was made. The arrest, in my opinion, was entirely lawful.' at 398.

[41] *R v George* [1935] 2 DLR 516, per Martin JA at 523.

[42] Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977.

[43] *Ibid*, at 9.

[44] It should be noted that this is contrary to the position at common law, where 'the execution of the warrant will be unlawful if the arresting officer does not have the warrant with him, ready to be produced if required': *Smith v Marshall* Serial No 24/1994.

The Queensland Criminal Code

Section 301 is similar to s 255 of the Queensland Criminal Code, but is by no means identical. The Queensland provision provides:

> s 255(3) A failure to fulfil either of the aforesaid duties does not of itself make the execution of the process or warrant or the arrest *unlawful*, but is relevant to the inquiry whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.
>
> [emphasis added]

The Queensland provision was considered in *Wornes v Rankmore*.[45] The majority of the Court (Wanstall SPJ and Williams J) held that failure to inform an arrestee of the cause of arrest did not render the arrest unlawful. It is difficult to disagree with this interpretation of section 255(3) given the clear use of the word 'unlawful' in this subsection.

Despite the significant difference in the Tasmanian and Queensland provisions Aronson et al state, after discussing the Queensland provision and *Wornes v Rankmore*, '[p]resumably the phrase "deprive the person … of protection from criminal responsibility" in s 301(3) of the Tasmanian Criminal Code has the same effect as "not making the arrest unlawful" in s 255 and s 232 [*Criminal Code*, Western Australia].'[46] An explanation for this presumption is not given. In our view it is wrong. The Queensland provision states clearly that failure to give reasons does not make the arrest *unlawful*, whereas the Tasmanian provision states that the failure does not deprive the person making the arrest from protection from criminal responsibility. It is submitted that actions that are protected from criminal responsibility should not be presumed to be lawful for all other purposes.

Proposal

It is proposed that s 301(2) and (3) be amended to make the section clearer and to enact the common law on this point – ie where reasons are not given for an arrest the arrest is unlawful unless it is impracticable to do so or the reason is obvious.

This could be achieved by repealing the existing s 301(2) and (3) and inserting the following subsections:

> (2) It is the duty of a person arresting another, whether with or without a warrant, to inform the other person, at the time of the arrest, of the process or warrant under which he or she is acting, or of the offence for which the other person is being arrested.

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45 [1976] Qd R 85.

46 Aronson MI, Hunter JB, Weinberg MS, *Litigation, Evidence and Procedure* (4th ed), 1988, Butterworths, at 357; note that there is no mention of the Tasmanian provision in Aronson and Hunter's latest edition (6th).

(a) It is sufficient if the other person is informed of the substance of the offence, and it is not necessary that this be done in language of a precise or technical nature.
(b) This subsection does not apply to the arrest of the other person if:
(i) the other person should, in the circumstances, know the substance of the offence for which he or she is being arrested; or
(ii) the other person's actions or condition make it impracticable for the person making the arrest to perform this duty.

(3) A failure to fulfil either of the aforesaid duties -
(a) shall make the arrest or the execution of the process or warrant unlawful;
(b) but shall not of itself deprive the person executing the process of warrant or making the arrest, or his assistants, of protection from criminal responsibility, but shall be relevant to the question whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.

The proposed subsection (2) is based on the Commonwealth *Crimes Act*, 1914, s 3ZD, which provides:

(1) A person who arrests another person for an offence must inform the other person, at the time of the arrest, of the offence for which the other person is being arrested.
(2) It is sufficient if the other person is informed of the substance of the offence, and it is not necessary that this be done in language of a precise or technical nature.
(3) Subsection (1) does not apply to the arrest of the other person if:
(a) the other person should, in the circumstances, know the substance of the offence for which he or she is being arrested; or
(b) the other person's actions make it impracticable for the person making the arrest to inform the other person of the offence for which he or she is being arrested.

This section of the Commonwealth *Crimes Act* has been altered in the proposed subsection (2) by inserting the words 'or condition' after the word 'actions' in the last limb of the section. This alteration was made to make it clear that, as under the common law, where a person's condition makes it impracticable to inform the arrestee of the reasons for the arrest (such as where the arrestee is blind drunk or is deaf and unable to lip-read), there is no duty to do so.

The proposed (3)(a) is intended to make it clear that where the duty to give reasons for arrest is not exercised the arrest itself is unlawful.

The proposed (3)(b) is a reproduction of the existing subsection (3). Thus the current protection of arrestors from criminal responsibility is maintained.

Questions

These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.

2.1 Do you agree with our interpretation of s 301(3)?

2.2 Do you agree that an arrest *should* be unlawful if the duty to give reasons is not fulfilled?

2.3 Do you think that the proposed amendment of s 301 achieves its goal of clarifying this section and enacting the common law position on this point?

Part 3

Admission to Bail under s 4

Introduction

The introduction of the *Criminal Law (Detention and Interrogation) Act*, s 4(1)-(3), extended the police power to grant bail from the power to grant bail for simple offences only, to the power to grant bail for any offence for which a person in custody had been questioned for a 'reasonable time'. This extension of police powers appears to have been unintended and, arguably, should be withdrawn.

The current law

Prior to the enactment of the *Criminal Law (Detention and Interrogation) Act* the police power to admit detainees to bail was clearly limited to people who had been charged with a 'simple' offence.[47] The police had no power to admit to bail anyone who had been charged with an indictable offence triable only in the Supreme Court.

Section 4(1) – (3) of the *Criminal Law (Detention and Interrogation) Act* provides:

(1) Subject to subsection (2), every person taken into custody must be brought before a magistrate or a justice as soon as practicable after being taken into custody unless released unconditionally or released under subsection (3) or under section 34 of the *Justices Act 1959*.

(2) Every person who has been taken into custody may be detained by a police officer-

(a) for a reasonable time after being taken into custody for the purposes of questioning the person, or carrying out investigations in which the person participates, in order to determine his or her involvement, if any, in relation to an offence; and

(b) during the period reasonably required to arrange to bring the person before a magistrate or justice and to transport the person to a magistrate or justice.

(3) Where the reasonable time referred to in subsection (2)(a) expires, the person in custody may be admitted to bail by a person mentioned in section 34 of the *Justices Act 1959*.

As can be seen subsection (1) presents the options for dealing with a person who has been taken into custody. The last of these options is release under s 34 of the *Justices Act* – ie

[47] *Justices Act* 1959 s 34.

on police bail. However, release 'under subsection (3)' is presented as an alternative to release under s 34 of the *Justices Act*.

Subsection (3) grants a general power to the police to admit to bail any person who has been detained for questioning under s 4(2). There are no offence category limitations placed on police bail under s 4(3). While s 34 of the *Justices Act* relates to the granting of police bail for *simple* offences, this limitation does not appear to apply to police bail granted under s 4(3) of the *Criminal Law (Detention and Interrogation) Act* because this subsection refers to the *Justices Act* only to define the person who may admit the person in custody to bail. This also appears to be the interpretation of this section given by the Police Commissioner, whose standing orders state that '[a]n authorised officer may release from custody, persons: arrested for a simple offence;…[or] in custody whose 'reasonable time' has expired…'[48] though it is later stated that 'a person charged with a serious offence should not be bailed but taken before a justice as soon as practicable'.[49]

This paper suggests that it was not the intention of Parliament in enacting subsection 4(3) to extend the power of the police to grant bail to all offences. It is clear from the *Justices Act* s 34 that police bail is intended under that Act to be available only for simple offences. The inclusion of the power to grant police bail in broader terms in s 4(1) of the *Criminal Law (Detention and Interrogation) Act* introduces a legislative inconsistency in the extent of police powers. There was no suggestion made in Parliament that the limitations on police bail would be changed by the enactment of the *Criminal Law (Detention and Interrogation) Act*.[50] Nor is there any evidence of a need to extend police power to grant bail. The rationale for extending the power to grant police bail to indictable offences only where the 'reasonable time' for questioning and investigation has expired is unclear. It is suggested here that any extension of police powers should be done only following Parliamentary consideration and debate.

Unless Parliament *did* intend to create a new general power for police to grant bail, subsection (3) is unnecessary because it is already clear from s 4(1) that police bail, along with the other alternatives for dealing with a person in custody, may be granted following the questioning of such a person for a reasonable time under s 4(2).

Proposal

It is proposed that s 4(3) be omitted and the reference to this subsection be removed from section 4(1). This should be done because s 4(3) is unnecessary and serves only as a possible source of confusion and inconsistency in the law.

[48] The Tasmania Police Manual, 1999, 7.3.2(1).
[49] The Tasmania Police Manual, 1999, 7.3.9(2).
[50] See Criminal Law (Detention and Interrogation) Bill 1995, Second Reading Speech, Parliamentary Debates, 4 May 1995.

Questions

These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.

3.1 Do you agree with our interpretation of the current law?

3.2 Do you think police should be able to grant bail for serious/indictable offences (such as robbery, serious assaults or rape)?

3.3 Do you think the proposal solves the problem as intended?

Appendix A

New South Wales: *Crimes Act* 1900, s 355:

(2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participation in a investigative procedure, if:

- (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or
- (b) the police officer would arrest the person if the person attempted to leave, or
- (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.

(3) A person is not taken to be under arrest because of subsection (2) merely because the police officer is exercising a power under a law to detain and search the person or to require the person to provide information or answer questions.
(4) For the purposes of this Part, a person ceases to be under arrest for an offence if the person is remanded by a justice, Magistrate or court in respect of the offence.

Commonwealth: *Crimes Act* 1914, s 23B:

(2) Subject of subsections (3) and (4), a reference in this Part to a person who is arrested includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

- (a) the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence that is to be the subject of the questioning; or
- (b) the official would not allow the person to leave if the person wished to do so; or
- (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so:

but a person is not treated as being arrested only because of this subsection if:

- (d) the official is performing functions in relation to persons or goods entering Australia and the official does not believe that the person has committed a Commonwealth offence; or
- (e) the official is exercising a power under a law of the Commonwealth to:
  - (i) detain and search the person; or
  - (ii) to require the person to provide information or to answer questions.

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