

TASMANIA
LAW REFORM
INSTITUTE

**Consolidation of Arrest Laws in
Tasmania**

FINAL REPORT NO 15

MAY 2011

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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 Faculty of Law. 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 Margaret Otlowski (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), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association) and Ms Ann Hughes (community representative).

Acknowledgments

This report was prepared by Victor Stojcevski, Terese Henning, Brittany Quayle and Bruce Newey.

Background to this Report

On 23 March 2005, the Attorney-General referred to the Institute a law reform project 'to undertake the necessary research, conduct a review of the laws and provide a Report including any recommendations on powers of arrest.' The terms of reference specify that the project include the following matters:

1. Identifying the powers of arrest currently available to Tasmanian law enforcement authorities;
2. Comparing the powers of arrest in the various pieces of Tasmanian legislation including terminology, prerequisites and other criteria relevant to the exercise of the powers;
3. Considering whether the powers are best covered in the individual Acts covering the crimes or offences in respect of which powers of arrest might be exercised or whether all or some of those powers should be consolidated into one (or more) Acts dealing centrally with powers of arrest capable of being exercised under a variety of other pieces of legislation;
4. Considering whether, if the powers of arrest are kept in the various Acts, there should be greater consistency or uniformity between the provisions;
5. Considering whether there should be a modernisation or simplification of arrest powers and whether greater uniformity or consistency with Commonwealth or interstate laws is desirable; and
6. Making recommendations for any necessary legislative change.

The publication of this Final Report follows consultation with the public and with key stakeholders in the criminal justice system. The consultation involved the release of an Issues Paper on the topic in July 2006. Adhering to the terms of reference, the Issues Paper identified the powers of arrest currently available in Tasmania and the arrest laws that frame such powers. The Issues Paper

compared the powers of arrest in the various pieces of Tasmanian legislation, and compared the Tasmanian legislation with the arrest powers in other jurisdictions. The Issues Paper found that there has been a proliferation of statutory arrest powers in recent decades and that this growth has contributed to arrest laws in Tasmania being unnecessarily complex, inconsistent and uncertain. The Issues Paper argued that there are compelling reasons for consolidating arrest laws. That is, collecting, rationalising, clarifying and simplifying the laws by repealing and then re-enacting them within one Act dealing centrally with powers of arrest capable of being exercised under a variety of other pieces of legislation. Additionally, the Issues Paper opened debate on: abandoning the distinction between arrestable and non-arrestable offences in favour of making all offences prima facie arrestable; the powers and procedures associated with arrest warrants; and alternatives to arrest, such as attendance notices or notices to appear. A large number of recommendations were made in the Issues Paper and the Institute invited responses be made to the proposals and the questions associated with the proposals.

The following people responded to the Issues Paper:

Mr Scott Tilyard – Tasmania Police

Mr Randolph Wierenga – Police Association of Tasmania

Ms Kim Baumeler – Criminal Law Sub-Committee of the Law Society of Tasmania

Mr Kim Evans – Department of Primary Industries and Water

Dr Sue Jenkins – Interim Commissioner for Children

We thank these people and the organisations they represent for taking the time and effort to respond to the Issues Paper. In the preparation of this Final Report, the Institute has given detailed consideration to all the responses received.

The Final Report is available at the Institute's web page at www.law.utas.edu.au/reform or can be sent to you by mail or email.

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Summary of Recommendations

Recommendation 1:	That arrest powers contained in Tasmanian statutes be consolidated into one statute.
Recommendation 2:	That the consolidation of arrest laws should take the form of a new Act to be known as the <i>Arrest Act</i> .
Recommendation 3:	That the arrest powers in the <i>Family Violence Act 2004</i> (Tas), s 106L(1)(a) the <i>Justices Act 1959</i> (Tas), s 55(2E) of the <i>Police Offences Act 1935</i> (Tas), the <i>Parliamentary Privilege Act 1858</i> (Tas) and <i>Supreme Court Rules 2000</i> (Tas) be located in the proposed <i>Arrest Act</i> as exceptions to the general consolidating provisions in that Act.
Recommendation 4:	That the arrest powers contained in the <i>Debtors Act 1870</i> (Tas) be reviewed with a view to their possible repeal.
Recommendation 5:	<p>That:</p> <ol style="list-style-type: none"> (1) The law of arrest relating to powers of arrest be reformed to eliminate the distinction between arrestable and non-arrestable offences; (2) The broadened power to arrest be circumscribed by: <ol style="list-style-type: none"> (a) the statutorily specified requirement that an arrest is to be made only as a matter of last resort; and (b) provision that an arrest must not be made unless the police officer believes on reasonable grounds that specified limiting circumstances exist. In this regard the Institute recommends that the approach in s 99 of the New South Wales <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> be adopted in preference to other models currently in operation in Australia; (3) The legislation establish a system of safeguards such as those provided in s 637(2) and (3) of the <i>Police Powers and Responsibilities Act 2000</i> (Qld) to apply to a police officer's exercise of the power to effect an arrest in any given case; (4) That this reform be accompanied by reform of the law relating to alternatives to arrest.
Recommendation 6:	<p>That a consolidated general power of arrest without warrant be set down in the <i>Arrest Act</i> and that it provide that:</p> <ol style="list-style-type: none"> (1) A police officer has a power to arrest without warrant a person whom he or she believes on reasonable grounds to have committed or be committing an offence. (2) This power should be subject to statutorily specified limiting circumstances as suggested in Recommendation 5.

<p>Recommendation 7:</p>	<p>That the proposed <i>Arrest Act</i> should include protective provisions for vulnerable persons. A vulnerable person should be defined as a person who falls into one or more of the following categories:</p> <ul style="list-style-type: none"> • Young persons; • Persons who have impaired intellectual functioning; • Persons who have impaired physical functioning; • Aborigines and Torres Strait Islanders; • Persons who are of non-English speaking background. <p>The protective provisions for vulnerable people should stipulate:</p> <ol style="list-style-type: none"> (1) That the arresting officer must record in writing the reason for effecting an arrest rather than employing an alternative to arrest; (2) That a vulnerable person must be informed <i>at the time of the arrest</i> of his or her right to communicate with a friend, relative, parent/guardian, responsible person, legal practitioner and/or interpreter (relevant person) as is appropriate; (3) That when a vulnerable person is arrested there should be an obligation to inform a relevant person of the arrest: <ol style="list-style-type: none"> (a) When a young person is arrested, there should be an obligation upon the police to inform a parent/guardian, responsible person or other relevant person of the arrest. (b) When an Aborigine or Torres Strait Islander is arrested the Aboriginal Legal Service should be notified via the on-call Field Officer in accordance with Tasmania Police requirements (Aboriginal Strategic Plan). (c) If a person with impaired intellectual or physical functioning is arrested, there should be an obligation upon police to notify a relevant person or responsible person as appropriate. (4) That the police must assist an arrestee who is a vulnerable person in communicating with a relevant person and the relevant person should be present during any interview. (5) That when a person from a non-English speaking background is arrested the police officer conducting the investigation must defer any questioning until an interpreter is present.
<p>Recommendation 8:</p>	<p>That laws concerning how an arrest should be executed be located in legislation consolidating powers of arrest.</p>

Recommendation 9:

That the consolidating legislation provide that:

- (1) It is the duty of a person arresting another, whether with or without 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.
- (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) This subsection does not apply to the arrest of the other person if:
 - (a) the condition or duties of the person making the arrest make it impracticable to perform this duty; or
 - (b) the other person's actions or condition make it impracticable for the person making the arrest to perform this duty.
- (4) A failure to fulfill either of the aforesaid duties:
 - (a) Will make the arrest or the execution of the process or warrant unlawful; but
 - (b) Shall not of itself deprive the person executing the process or warrant or making the arrest, or his or her 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.

<p>Recommendation 10:</p>	<p>That the present Tasmanian <i>Criminal Code</i> provisions concerning the use of force in relation to arrests (ss 26, 30, 31 and 32) be repealed and reformed to enact the principle of proportionality as follows:</p> <ol style="list-style-type: none"> (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest. (2) Without limiting the operation of subsection (1), a person, in the course of arresting another person for an offence, may cause such damage to property that is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest. (3) Without limiting the operation of subsections (1) and (2), a police officer must not, in the course of arresting a person for an offence: <ol style="list-style-type: none"> (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); or (b) if the person is attempting to escape arrest by fleeing – do such a thing unless: <ol style="list-style-type: none"> (i) the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); and (ii) the person has, if practicable, been called on to surrender and the police officer believes on reasonable grounds that the person cannot be apprehended in any other manner.
<p>Recommendation 11:</p>	<p>That the recently legislated s 26A of the <i>Criminal Code Act 1924</i> (Tas) be relocated to legislation consolidating the powers of arrest.</p> <p>The expression ‘premises’ should be defined as including any land, building, structure, motor vehicle, vessel or aircraft.</p> <p>The power of entry should be subject to additional safeguards such as those contained in the <i>Police Powers and Responsibilities Act 2000</i> (Qld), the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW) and the Commonwealth <i>Crimes Act 1914</i> including:</p> <ol style="list-style-type: none"> (1) A requirement that the police must have reasonable grounds for believing that the person to be arrested is on the premises; (2) A requirement that the police supply their details to the occupants and remain on the premises to effect the arrest for only such time as is reasonably necessary in the circumstances; and (3) That the police not exercise their powers of entry between the hours of 9.00 pm and 6.00 am unless they have reasonable grounds to believe that it would not be practicable to arrest the person at another time or it is necessary to do so in order to prevent the concealment, loss or destruction of evidence.

<p>Recommendation 12:</p>	<p>That the proposed <i>Arrest Act</i> contain a codified model for the issuing and execution of arrest warrants in a framework similar to that which applies currently to search warrants.</p> <p>That the Act specify the criteria for the issue of the warrant, consistent with those provided for the making of an arrest without a warrant.</p> <p>Further, that the Act require that –</p> <ol style="list-style-type: none"> (1) Information be provided on oath or affidavit stating the reasons for seeking the arrest warrant; (2) The judicial officer satisfy him or herself that the stated reasons establish reasonable grounds for issuing the warrant, or that there are other such grounds; and (3) The judicial officer endorses the affidavit stating the reasons on which she or he relies to issue the warrant.
<p>Recommendation 13:</p>	<p>That the power of arrest pursuant to an arrest warrant currently set down in s 21(2), (3) and (4) of the <i>Criminal Code</i> be relocated to the legislation consolidating powers of arrest.</p>
<p>Recommendation 14:</p>	<p>That all arrest powers without warrant of authorised persons be included in the Act consolidating arrest powers. It is suggested that those powers be made exercisable on the same grounds as those specified for police (along with the same restrictions) but that they be limited to the specified offences for which the authorised persons currently have the power to arrest. These offences and the relevant authorised persons should be set out in a schedule to the consolidating Act.</p>
<p>Recommendation 15:</p>	<p>That government departments and agencies that empower authorised persons to arrest under legislation that they administer, begin to record and disclose publicly data on the number of arrests executed by their authorised officers and the outcome of those arrests.</p>
<p>Recommendation 16:</p>	<p>That private citizens’ powers of arrest be consolidated in legislation consolidating arrest powers.</p> <p>That private citizens’ powers of arrest be limited to persons found offending where the offence involves –</p> <ol style="list-style-type: none"> (1) Substantial injury to the person of another; (2) Serious danger of such injury; (3) Loss of any property of the person so arresting, or of any person by whom he or she is authorised to effect the arrest; or loss of any property of which the person arresting has charge; (4) Serious injury to any property; (5) Injury to the property of a public authority; or (6) Escape from some person reasonably believed to have authority to arrest the escapee.
<p>Recommendation 17:</p>	<p>That the duty of private citizens to make an arrest be incorporated into legislation consolidating arrest powers but be limited to the situation where a police officer calls upon them to provide assistance in the making of an arrest.</p>

Recommendation 18:	That the powers of arrest granted to private citizens under the <i>Bail Act 1994</i> (Tas), <i>Second-hand Dealers and Pawnbrokers Act 1994</i> (Tas), and s 27(10) and (11) of the <i>Criminal Code Act 1924</i> (Tas) be repealed and incorporated into the new consolidating legislation.
Recommendation 19:	To promote further alternatives to arrest and to enhance arrest as a measure of last resort, a statutory regime, similar to that contained in the <i>Police Powers and Responsibilities Act 2000</i> (Qld), ss 382-390, should be enacted enabling the police to issue on-the-spot attendance notices.

Part 1

Arrest

1.1 Introduction

1.1.1 This Report considers a number of matters relating to the law of arrest in Tasmania, specifically:

1. Whether powers of arrest in Tasmania should be consolidated into one statute (Parts 2 and 3);
2. Whether the power to arrest should extend to all offences or whether it should be limited to particular offences (Part 4);
3. Whether the law relating to when an arrest can be made, that is the grounds of arrest, should be rationalised to provide a single, uniform ground of arrest for all arrestable offences (Part 5);
4. Particular issues relating to the execution of a lawful arrest, namely:
 - (a) the obligation to inform the arrestee of the reasons for the arrest (Part 6.2);
 - (b) how much force may be used in effecting an arrest (Part 6.3);
 - (c) whether the police power to enter private premises without the consent of the owner or occupier to effect an arrest contained in s 26A of the *Criminal Code 1924* (Tas) should be subject to further safeguards (Part 6.4);
5. The process for the issue of arrest warrants and the power of arrest pursuant to an arrest warrant (Part 7);
6. Whether powers of arrest should be conferred on persons other than the police (Part 8); and
7. Alternatives to arrest and whether the summons process should be simplified or supplemented by enabling the police to issue on-the-spot attendance notices (Part 9).

1.1.2 This Report does not consider other police powers and responsibilities in relation to arrestees such as the power to detain arrestees for interrogation and the attendant responsibilities in relation to such detainees, which are set down in the *Criminal Law (Detention and Interrogation) Act 1995* (Tas). Nor does it deal with the question of what constitutes or should be considered to constitute an arrest for the purpose of those powers and responsibilities. That issue was dealt with in the Tasmanian Law Reform Institute's first report, *Custody, Arrest and Police Bail 2003*. Finally, this Report does not deal with powers of personal search or search of premises pursuant to an arrest.

Part 2

Arrest Powers: The Current Law and Need for Reform

2.1 Introduction

2.1.1 Powers to arrest fall into two categories; arrest with and arrest without a warrant. This Report focuses primarily upon the law in Tasmania relating to arrest without a warrant. Part 7 deals with the law of arrest pursuant to a warrant. In conceptual terms, an arrest involves the involuntary deprivation of a person's liberty to go where he or she pleases: 'A person who is lawfully arrested is required to submit to the authority of the arrestor and is not entitled to resist the reasonable coercion of the arrestor.'¹ The common law recognises, at least in rhetorical terms, that personal liberty is the most fundamental of all individual rights.² Similarly, international human rights courts have stated that the right to liberty is fundamental to a just society and that state interference with this right must conform strictly to the rule of law.³ Consequently, the common law places a general proscription on detention by the police in the absence of a lawful arrest.⁴ Determining, in any given circumstances, whether an arrest has occurred can be quite difficult. The difficulty arises principally in relation to the question whether a person is under arrest or voluntarily 'assisting the police in their enquiries'. A number of jurisdictions in Australia have attempted to resolve this problem by enacting definitions of arrest that remove uncertainties in the detention status and rights of suspects. This issue was dealt with in the Tasmanian Law Reform Institute's first report, *Custody, Arrest and Police Bail 2003*, and will not be revisited here.

2.1.2 The law relating to arrest can have central significance in the pre-trial criminal investigative process. Hunter, Cameron and Henning note that, when effected by the police, an arrest can activate a number of coercive investigative powers, including powers of detention for interrogation and powers of search and seizure.⁵ An arrest also imposes certain obligations upon the police, including the duty to inform arrestees of their right to silence and duties relating to bail. The circumstances of an arrest, and the conduct of the arrestor in making the arrest and discharging the obligations it activates, can have implications for the admissibility at trial of evidence obtained during the subsistence of the arrest and for suspects' rights including the right to resist the arrest.⁶ For the individual arrestee, arrest constitutes

¹ J Hunter, C Cameron and T Henning *Litigation II: Evidence and Criminal Process* (7th ed, 2005) 427.

² *Michaels v R* (1995) 184 CLR 117, 129 (Gaudron J).

³ *Brogan v the United Kingdom* (1989) EHRR 117 [58]; *Engel v Netherlands* (1979-8) 1 EHRR 647, [69]; *A v Australia* No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997).

⁴ In international law this principle is set down in Article 9 of the *International Covenant on Civil and Political Rights*. This position has been considerably modified by legislation. For example, a number of statutory provisions empower the police to stop and search members of the public in specified circumstances and to detain people for the purpose of subjecting them to drug and alcohol detection and other forensic tests.

⁵ Hunter, Cameron and Henning, above n 1, 421.

⁶ *Ibid.*

not only a withdrawal of liberty but also a process that is inherently shaming, punitive and frightening.⁷

2.1.3 Given the significance of arrest in the criminal justice process and for the individual arrestee, the law of arrest should be clear and readily ascertainable. Currently, in Tasmania however, the opposite is the case – the law is complex, uncertain and difficult to discover. Primarily this is because it is located in a multiplicity of statutes as well as in the common law. Fifty different Tasmanian statutory instruments contain over 90 powers of arrest. These powers were created at different times, are framed in a varying terms and cover different situations. The grounds of arrest they prescribe, that is, when an arrest may be made, are often formulated differently and even within key statutory arrest provisions, such as those contained in the *Criminal Code 1924* (Tas) and the *Police Offences Act 1935* (Tas), there are anomalies, inconsistencies and uncertainties.

2.2 Statutory powers of arrest without warrant

2.2.1 The police have powers of arrest in relation to all indictable offences although those powers may be formulated in differing terms for different crimes. In Tasmania, the primary source of powers to arrest without warrant in relation to indictable offences is s 27 of the *Criminal Code 1924* (Tas). Powers of arrest in relation to summary offences are more limited and for many summary offences there is no power of arrest. Where there is a power of arrest for summary offences, that power is provided in the legislation creating the offences. For example, s 55 of the *Police Offences Act 1935* (Tas) creates powers of arrest for a range of summary offences in that Act. This section is supplemented by other provisions in that Act, which attach powers of arrest to particular offences in the Act, see for example, ss 34B(3) and 55A(2).

2.2.2 As noted above, in Tasmania, in addition to the arrest powers in the *Criminal Code* and *Police Offences Act*, there are 95 legislative powers of arrest without warrant (an increase of nearly 20 since the release of the Issues Paper) in 50 different statutes (being an increase of 20 since the release of the Issues Paper). These powers relate chiefly to criminal offences, but also include provision for arrest in civil law situations and in circumstances involving environmental protection and gaming and racing. Generally, though by no means universally, exercise of the powers of arrest in these provisions depends upon the arrestee being found committing an offence or upon there being reasonable grounds for believing that he or she has committed an offence.

2.2.3 Table 1 below lists the different Tasmanian statutory arrest powers without a warrant, with the exception of the powers of arrest in s 27 of the *Criminal Code* and s 55 of the *Police Offences Act*.⁸ These key provisions are discussed separately at paras 2.2.6 – 2.2.12 below. The left-hand column of Table 1 sets out the Acts and section(s) in those Acts creating powers of arrest. The middle column outlines the conduct for which a person may be arrested under those provisions. The right-hand column summarises the grounds of arrest, that is, the arrestor's requisite state of mind in making an arrest.

Police officers have the power to arrest under all the legislative provisions in Table 1. Statutes identified with an asterisk (*) also confer powers of arrest on other 'authorised' persons, as defined by the legislation.

⁷ Ibid, referring to *Lake v Dobson* (1981) 5 PS Rev 2221; *Donaldson v Broomby* (1981) 60 FLR 124, 126; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

⁸ Powers of arrest without warrant under Commonwealth statutes are not included in the Table. The Institute recognises that many Commonwealth arrest provisions are applicable in Tasmania (see, for example, those in Part 1AA, Division 4 of the *Crimes Act 1914* (Cth)), but notes that an analogous exploration and reform of Commonwealth statutes is beyond the legislative power of the Tasmanian Parliament.

Table 1: Powers of Arrest Without Warrant

Act Name and Section	Power to Arrest	Test
<i>Aboriginal Relics Act 1975</i> s 18(7)*	Offending against a provision of this Act and failing or refusing, on demand, to give correct name and address; or does not deliver up, on demand, any object in their possession or under their control that is entitled to be seized under this Act.	Found offending and fails or refuses to provide personal details or there are reasonable grounds for believing the details are false. Note s 18(8) provides that the authorised officer can only arrest where they have reasonable grounds for believing that the purpose of this Act will not be adequately served by proceeding against the offender by summons.
<i>Admission to Courts (Lower Courts) Regulations 2006</i> r 8(3)*	Failing to comply with requirement under sub-regulation (1)(a) or (b); or fails to comply with a requirement under regulation 7(1)(a) or (c); or is in possession of a prohibited thing in a court.	Actually failing to comply with the requirements or actually in possession of a prohibited thing in court.
<i>Animal Welfare Act 1993</i> s 15(1)	Committing or has committed an offence under this Act.	Reasonably believes.
<i>Animal Welfare Act 1993</i> s 15(3)	Refuses or fails to provide a correct name, address and date of birth when requested pursuant to s 15(2).	Actually failing to provide these details or police officer reasonably believes the details are false. Before requesting information, the police officer must have reasonable grounds for believing that a person is committing or has committed an offence under this Act (s 15(2)).
<i>Bail Act 1994</i> s 5(5A)	A person who was admitted to bail has contravened, or is about to contravene, a notice referred to in s 5(1)(a) or a condition of the notice.	Reasonable grounds to believe they have contravened or are about to.
<i>Bail Act 1994</i> s 10(1)	Contravening (i) a requirement of s 7(2); or (ii) the condition specified in s 7(3); or (iii) any condition of an order for bail that has effect after the release of that person from custody; or is about to contravene any such requirement or condition.	Reasonable grounds to believe they have contravened or are about to.
<i>Bail Act 1994</i> s 26(1) and (5)*	A person admitted to bail has or is about to contravene a condition of bail.	Believes on reasonable grounds that they have contravened or are about to contravene.
<i>Children, Young Persons and Their Families Act 1997</i> s 100(2)	Hindering or obstructing the Secretary of the Department, a police officer or another person in the performance or exercise of a function or power under this Act.	Has reasonable grounds for believing the person is hindering or obstructing.
<i>Corrections Act 1997</i> s 24(3)	Contravening s 24(1), which relates to bringing an article or thing into a prison without the authorisation of the Director.	Reasonably believes.
<i>Crime (Confiscation of Profits) Act 1993</i> s 43(b)	Having committed an offence in respect of property seized pursuant to s 42 and being found on premises subject to a search warrant issued under s 40.	Reasonably suspects of having committed an offence and actually being found on property.

Arrest Powers: The Current Law and the Need for Reform

Act Name and Section	Power to Arrest	Test
<i>Criminal Code Act 1924</i> s 302	If an accusation of committing a crime for which they may be arrested without warrant has been made.	A duty to arrest exists where an accusation has actually been made, unless there are reasonable grounds for believing the accusation to be without proper foundation.
<i>Criminal Justice (Mental Impairment) Act 1999</i> s 41(1)*	Escaping from detention or being absent from detention without proper authority after being committed to detention by a restriction order made under this Act or under the <i>Sentencing Act 1997</i> .	Actually escaped or absent without authority.
<i>Debtors Act 1870</i> ⁹ s 3	Making default in payment of a sum of money in the terms outlined in (a) – (g).	Defaulted on judgment or order of any court for payment of money.
<i>Debtors Act 1870</i> s 5(2)	Defendant about to quit Tasmania, where the plaintiff in any action in the Supreme Court proves at any time before final judgment that the plaintiff has good cause of action against the defendant and there is probable cause for believing that the defendant is about to quit Tasmania.	A judge may order a defendant be arrested where a plaintiff has good cause of action against the defendant and there is probable cause for believing that the defendant is about to quit Tasmania unless apprehended, and the absence of the defendant from Tasmania will materially prejudice the plaintiff in the prosecution of their action.
<i>Electoral Act 2004</i> s 119(3)	Committing or having committed or attempting to commit an offence under this Act at or in the immediate vicinity of a polling place or a place where ballot material is being sorted, checked or counted.	Believes on reasonable grounds they are committing an offence.
<i>Environmental Management and Pollution Control Act 1994</i> s 92B(a)	Failure to state full name or residential address.	Actual failure to supply full name or residential address.
<i>Environmental Management and Pollution Control Act 1994</i> s 92B(b)	Supplying false name and residential address	Reasonable belief that the name and address stated is false.
<i>Environmental Management and Pollution Control Act 1994</i> s 92B(c)	Refusal or failure to comply with a direction under s 92(1)(ka) of the Act without reasonable excuse.	Lack of reasonable excuse for refusal or failure to comply.

⁹ It is unclear whether the power to arrest under the Act extends to persons beyond police officers.

Consolidation of Arrest Laws in Tasmania

Act Name and Section	Power to Arrest	Test
<i>Family Violence Act 2004</i> s 10(2)	Being on certain premises entered by a police officer under subsection (1), that is, premises entered to prevent family violence (as defined by s 7 of the Act).	Police officer has entered the premises at the request of a person who apparently resides on the premises; or the officer reasonably suspects that family violence is being, has been or is likely to be committed on those premises, and arrest facilitates the issue of a police family violence order, or the making of an application for a family violence order, in respect of that person.
<i>Family Violence Act 2004</i> s 10(4)(e)	Being on certain premises entered by a police officer to find and retrieve an object used in committing family violence.	Reasonably suspects that a person has committed family violence and in so acting has used or created an object, and arrest facilitates the issue of a police family violence order, or the making of an application for a family violence order, in respect of that person.
<i>Family Violence Act 2004</i> s 10(7)	Committed family violence and is on premises where the officer reasonably suspects the offender may be found.	Reasonably suspects.
<i>Family Violence Act 2004</i> s 11(1)	Committing family violence.	Reasonably suspects while ‘giving priority to the safety, wellbeing and interests of any affected person or affected child’ (s 11(5)).
<i>Firearms Act 1996</i> s 135(1)(d)	Having committed, committing or about to commit, an offence under this Act and being found to be in possession of a firearm or ammunition.	Reasonable grounds to believe.
<i>Firearms Act 1996</i> s 138(3)	Having committed, committing or about to commit, an offence under this Act and there has been a refusal or failure to provide a correct name, address and date of birth when requested under s 138 (1).	Reasonable grounds to believe that an offence is being committed, has been committed or is about to be committed and there has been a failure to provide personal details or the police officer reasonably believes the details are false.
<i>Firearms Act 1996</i> s 140	Has committed or is committing an offence under ss 111(1) (possessing a loaded firearm in public), 112 (discharging firearm in public), 113 (recklessly discharging firearm), 114(1) (carrying firearm with criminal intent), 120(1) (handling under influence of alcohol or drugs) or 128(a) (obstructing police).	Reasonably believes.
<i>Fire Service Act 1979</i> s 125(1)	Committing a prescribed offence, which are outlined in s 125(2): ss 68(2), 69, 71, 120, 128(2)(g) and 128(2)(h).	Finds committing or has reasonable grounds to believe such an offence has been committed.
<i>Forensic Procedures Act 2000</i> s 28(3)(a)	Contravening or failing to comply with an order under s 28(1)(b), which relates to ordering a prescribed offender to a police station or other place to carry out a non-intimate forensic procedure.	The offender can be arrested for the purposes of carrying out a non-intimate forensic procedure if they actually refuse or fail to comply with the order.
<i>Gaming Control Act 1993</i> s 119(4)	Contravening s 119(2), which relates to stating and proving correct name, address and age.	Actually contravenes s 119(2).

Arrest Powers: The Current Law and the Need for Reform

Act Name and Section	Power to Arrest	Test
<i>Inland Fisheries Act 1995</i> s 103*	Failing to provide the correct information required under s 102 (name, address, and/or details of a license or registration); or committing an offence against this Act and the offence is likely to continue or any other procedure would be ineffective.	Where the person actually refuses to provide the information; or where the officer reasonably believes that the information is false; or where the officer reasonably believes an offence has been committed.
<i>Justices Act 1959</i> s 106I(2)	Committing an offence contrary to s 106I(1), which relates to contravening or failing to comply with restraint orders.	Reasonable cause to suspect.
<i>Justices Act 1959</i> s 106L(1A)	Facilitating the making of an application for a restraint order in respect of a person.	Has entered premises pursuant to a request to enter those premises by a person who apparently resides there, or has reason to believe that a person on those premises is or may be under threat or attack or has recently been under threat or attack or that an attack on such a person is imminent.
<i>Land Acquisition Act 1993</i> s 69(4)	Contravening s 69(1), which relates to obstructing, hindering, delaying, threatening or assaulting a person authorised to enter land pursuant to ss 54, 54A, 55 or 56.	Reasonably believes they have contravened s 69(1).
<i>Liquor Licensing Act 1990</i> s 80(3)	Committing, or having committed, an offence under s 80(1) or (2), which compels a person to leave licensed premises when required to do so by the licensee or a police officer.	Reasonably believes they are committing or have committed an offence under s 80(1) or (2).
<i>Liquor Licensing Act 1990</i> s 80A(2)	Committing, or having committed, an offence under s 80A(1), which compels a person to leave a permit area when required.	Reasonably believes they are committing or have committed an offence under s 80A(1).
<i>Liquor Licensing Act 1990</i> s 92(2)	Refusing to provide correct name, address or date of birth following a request for such details under s 92(1).	Reasonable grounds for believing an offence has been or is being committed under this Act and suspect refuses to provide personal details, or the police officer reasonably believes the information to be false.
<i>Liquor Licensing Act 1990</i> s 94(2)	Failing to leave a licensed or permit area when required to do so under s 94(1).	Actually refusing to comply with the requirement.
<i>Litter Act 2007</i> s 44	Refusal or failure to comply with a requirement under s 43(1), which requires a person to state their name and address to a police officer.	Actual failure to comply; or reason to believe that the name or address is false. The officer must have reasonable grounds for believing that the person has committed, or is committing, an offence against this Act.
<i>Living Marine Resources Management Act 1995</i> s 199*	Failing to provide the correct details required by s 196; or having committed an offence under this Act where the offence is likely to continue or recur, or any other procedure would be ineffective; or is contravening a control order.	Actually failing to provide the details or the officer reasonably believes the details to be false; or the officer reasonably believes that an offence or contravention of a control order has been committed.

Consolidation of Arrest Laws in Tasmania

Act Name and Section	Power to Arrest	Test
<i>Local Government Act 1993</i> s 152(2)	Offending on land owned by, or under the control of, the council.	Reasonably believes is offending against a by-law.
<i>Local Government (Highways) Act 1982</i> s 122(4)	Committed an offence against s 122(3), which relates to failing or refusing to provide a correct name and address when requested.	Has reason to believe the offence under s 122(3) has been committed. For the police officer to have the power to demand a name and address, they must find the person committing an offence under this Act (s 122(2)).
<i>Marine Safety (Misuse of Alcohol) Act 2006</i> s 38(4)	Failure to state name, age or address, or providing a false name, age or address to the requesting police officer.	Belief on the part of the police officer that the person has failed to comply with the request under subsection (3) or has provided false information.
<i>Mental Health Act 1996</i> s 72T(6)(b)	Failure to comply with the directions of the controlling authority, Chief Forensic Scientist or an authorised person under subsections (3) and (4).	Actual failure to comply with directions.
<i>Mental Health Act 1996</i> s 72X(3)(b)	Failure to comply with a direction under s 72X(1), made by the controlling authority, Chief Forensic Psychiatrist or an authorised person to leave the secure mental health facility immediately.	Actual failure to comply with a direction under subsection (1), where the controlling authority, Chief Forensic Psychiatrist or an authorised person believes on reasonable grounds that the visit to the forensic patient would fall into one of the categories in s 72X(1)(a)-(e).
<i>Mental Health Act 1996</i> s 72Y(5)(b)	Failure to submit to a formal search and failure to leave the secure mental health facility immediately, as prescribed by s 72Y(3).	Actual failure to comply with directions under subsection (3).
<i>Mental Health Act 1996</i> s 73H(5)(b)	Failure to comply with a direction under s 73H(3), which states that a person who refuses to submit to be searched or examined while in the secure mental health unit may be directed to leave the secure mental health unit immediately.	Actual failure to comply with a search and examination and subsequent refusal to leave the secure mental health facility immediately.
<i>Mental Health Act 1996</i> s 73J(3)	Breaching s73J(1), by bringing unauthorised materials or goods into a secure mental health unit.	Reasonable belief that the person has contravened subsection (1).
<i>Misuse of Drugs Act 2001</i> s 29(4)	Having committed an offence under this Act.	Reasonably believes they have committed an offence. This power of arrest can only be exercised where the police officer has searched or is empowered to search the person pursuant to s 29(2). Section 29(2) requires the police officer to have a 'prescribed belief', which is defined in s 29(1) as a reasonable belief that a controlled substance or other thing is in possession of the person.

Arrest Powers: The Current Law and the Need for Reform

Act Name and Section	Power to Arrest	Test
<i>Misuse of Drugs Act 2001</i> s 31(3)	Failing to comply with a requirement made under s 31(1), which relates to providing a correct name and address and/or information about where they obtained a controlled substance or thing.	Actually failing to provide the details (or the police officer reasonably believes the information to be false or misleading). The police officer must have searched or be empowered to search the person under a search warrant or s 29 of this Act.
<i>Misuse of Drugs Act 2001</i> s 33(a)	Has committed an offence under this Act.	The police officer must be executing a search warrant and they can arrest any person found at that place who they reasonably believe has committed an offence.
<i>National Parks and Reserves Management Act 2002</i> s 66*	Found offending and failing, or refusing to provide a correct name and address or fails to deliver any thing in their possession which is entitled to be seized.	Found offending and fails to provide personal details or there are reasonable grounds for believing the details are false.
<i>National Parks and Reserves Management Act 2002</i> s 71(2)(a)*	Committing an offence under s 69(3)(c), which relates to orders prohibiting the possession or control of hunting equipment.	Reasonable grounds for believing the person committed an offence against s 69(3)(c).
<i>Nature Conservation Act 2002</i> s 53*	Found offending and refusing or failing, on demand, to provide a correct name and address; or failing to deliver up items entitled to be seized.	Found offending and refuses or fails to provide personal details or there are reasonable grounds for believing the information is false.
<i>Nature Conservation Act 2002</i> s 58(2)*	Committing an offence under s 58(1), which relates to contravention or failing to comply with a s 56(3)(c) order, which prohibits the possession or control of hunting equipment.	Reasonable grounds for believing.
<i>Parliamentary Privilege Act 1858</i> s 6*	Creating, or joining in, any disturbance in the House, or in its immediate vicinity, during its actual sitting, on the verbal order of the President or Speaker. An offender may be kept in custody until a warrant can be made out for the imprisonment of such person.	Person has been adjudged by the House guilty of contempt enumerated in the Act (see s 10).
<i>Parliament House Act 1962</i> s 8*	Committed an offence under this Act and refusing to state correct name and address. Offences are contained in s 6.	Believes or suspects to have committed an offence and refuses to provide personal details or, in the opinion of the controlling officer (or person acting under their orders), provides false details.
<i>Poisons Act 1971</i> s 90A(1)(a)	Committing or committed an offence under this Act and being on premises subject to a search warrant issued under the <i>Search Warrants Act 1997</i> .	Believes on reasonable grounds that they are committing or have committed an offence.
<i>Poisons Act 1971</i> s 90B(2)	Committing or committed an offence under this Act in relation to a raw narcotic, a narcotic substance, a prohibited substance, a s 36 substance, or a prohibited plant.	Where a police officer searches or is empowered to search a person (see s 90B(1)) and the police officer believes on reasonable grounds that the person is committing or has committed an offence.

Consolidation of Arrest Laws in Tasmania

Act Name and Section	Power to Arrest	Test
<i>Poisons Act 1971</i> s 90D(3)	Failing to provide a correct name and address and/or the place and name of the person from whom they obtained the substance, plant or article. This power arises where a police officer searches or is empowered to search a person pursuant to s 90B or under a warrant issued under the <i>Search Warrants Act 1997</i> .	Actually failing to provide these details or where the police officer believes the details to be false or misleading on reasonable grounds.
<i>Police Offences Act 1935</i> s 19A(1A)	Failing to leave the reserved area of a sports ground when requested to do so by a police officer – see s 19A(2) for the definitions of ‘sports ground’ and ‘reserved area’.	Actually failing to leave the sports ground. This power is subject to s 19A(1B), which requires the police officer to reasonably believe that a sport will be interrupted or delayed by the person.
<i>Police Offences Act 1935</i> s 34B(3)	Committing an offence against s 34B(1) or (2)(a), which relate to assaulting, resisting or wilfully obstructing a police officer in the course of their duty.	Actually assaulting, resisting or wilfully obstructing a police officer.
<i>Police Offences Act 1935</i> s 38A(4)*	Committing or attempting to commit an offence under this section, which prohibits making off without payment when payment is required on the spot for goods supplied or services done.	With reasonable cause, they suspect there is an offence.
<i>Police Offences Act 1935</i> s 55A(2)	Failing or refusing to provide a correct name and address when required under s 55A(1).	Actually failing to provide the details (or the police officer has reason to believe they are false) when the police officer has become aware or has reasonable grounds for believing the person has or is committing an offence against this Act.
<i>Police Offences Act 1935</i> s 58(2)	Where a person found to be in possession of a poisonous thing (as under s 58(1)) fails to provide a correct name and address when requested by a police officer.	Actually failing to provide the details to a police officer, who has reasonable grounds for believing the person possesses a poisonous thing (subsection (1)).
<i>Police Offences Act 1935</i> s 63A(3)	Failing to comply with a direction given under subsection (1).	Actually failing to comply with a direction given under subsection (1).
<i>Police Offences Act 1935</i> s 63C(3)	Failing to comply with a direction given under subsection (1).	Actually failing to comply with a direction given under subsection (1).
<i>Police Powers (Public Safety) Act 2005</i> s 17(4)	Fails or refuses to comply with a request from a police officer to disclose their identity under s 17(1) or gives a name or address that is false.	After being requested to do so, the suspect actually refuses or fails to disclose their identity, or the police officer has reason to believe that the name and address disclosed are false. This power is to be exercised subject to an authorisation being granted with the written approval of the Premier.

Arrest Powers: The Current Law and the Need for Reform

Act Name and Section	Power to Arrest	Test
<i>Police Powers (Public Safety) Act 2005</i> s 21(9)	Being an unauthorised person who enters a cordoned-off area or disturbs any thing in a cordoned-off area.	Not being authorised by a police officer in attendance at the area, and without reasonable excuse (the onus of proving which is on the person) entering a cordoned-off area or disturbing anything in that area. This power is to be exercised subject to an authorisation being granted with the written approval of the Premier.
<i>Police Powers (Public Safety) Act 2005</i> s 29(2)	Failing or refusing to comply with an order given under the Act.	Actually fails or refuses to comply with the order.
<i>Police Powers (Vehicle Interception) Act 2000</i> s 11A(3)	Found offending against s 11A, which relates to evading police.	Actually found offending.
<i>Police Service Act 2003</i> s 80(3)	Failure or refusal to comply with the requirement to state name and address, or giving a name or address that the police officer reasonably believes is false.	Actually failing to provide the details (or the police officer has reason to believe they are false) when the police officer has become aware or has reasonable grounds for believing the person has or is committing an offence under ss 77(1) (bribery), 78 (impersonation), or 79 (failing to assist police officer) of the Act.
<i>Public Health Act 1997</i> s 67H(4)	Smoking inside a vehicle, and in respect of this section, committing an offence against s 154(2) (failure to comply with a requirement of a police officer) or s 193 (making false or misleading statement).	The police officer reasonably believes that the person is not a child and has, in respect of s 67H, committed an offence against s 154(2) or s 193.
<i>Racing Regulation Act 2004</i> s 54(10)	Contravening the provisions of s 54(8) or s 54(9), which relate to non-compliance with a warning-off notice issued, or entering or attempting to re-enter the racecourse on the same day after leaving or being removed from the racecourse pursuant to the warning-off notice issued.	Actually contravening s 54(8) or (9).
<i>Racing Regulation Act 2004</i> s 97(3)	Failing or refusing to provide a correct name and address when required under s 97(1) or it is reasonably believed that the name or address stated under s 97(1) is false.	Reasonably believes that a person has committed, is committing or is about to commit an offence against this Act and the person actually fails or refuses to provide these personal details, or it is reasonably believed that the name or address stated by the person is false.
<i>Racing Regulation Act 2004</i> s 98(1)(a)	Engaging in unauthorised betting in a public place, or being in a public place for the purpose of engaging in unauthorised betting.	Reasonable believes that a person is or has recently been engaged in unauthorised betting.

Consolidation of Arrest Laws in Tasmania

Act Name and Section	Power to Arrest	Test
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 5(1)(a)	Committed an offence against s 4, which relates to driving while under the influence of alcohol or drugs to the extent that he/she is incapable of having proper control of the vehicle.	Reasonable grounds to suspect.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 5(1AA)	Refuses or fails (without reasonable excuse) to comply with a direction or requirement made by a police officer under s 10(4) or s 10A(1).	Actually refusing or failing to comply with a direction or order.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 5(1A)	Committed an offence against s 6, which relates to driving with excessive breath or blood alcohol levels.	As a result of a breath analysis, has a reasonable ground for believing.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 15(3)	Refusing or failing to state correct name and address following a request under s 15(1).	Actually refusing or failing to provide the details, or the police officer reasonably believes the information is false. Before an officer can request this information, they must have reasonable grounds for believing the person has committed an offence under this Act or the person has been given a direction under the Act.
<i>Road Safety (Alcohol and Drugs) Act 1970</i> s 19A(2)(a)	Committed an offence against s 19A(1), which relates to driving a vehicle while disqualified.	Reasonable grounds to suspect.
<i>Second-hand Dealers and Pawnbrokers Act 1994</i> s 15(1)(b)*	Offering goods for sale, as a pawn or in some other kind of commercial transaction, to a second-hand dealer or pawnbroker.	Reasonable cause to suspect that the goods are stolen goods.
<i>Second-hand Dealers and Pawnbrokers Act 1994</i> s 17(5)	Having committed, or committing, an offence against this Act in the place of business of a second-hand dealer or pawnbroker, and, in response to a request made by the police officer, the person (a) refuses to give his or her full name and address; or (b) gives a name or an address that the officer has reasonable grounds for believing is false or misleading.	Reasonable grounds for believing that the person has committed, or is committing, an offence and, in response to a request made by the police officer, the person (a) actually refuses to give his or her full name and address; or (b) gives a name or an address that the officer has reasonable grounds for believing is false or misleading.
<i>Security and Investigations Agents Act 2002</i> s 27B(3)	Failing to comply with the request of a police officer to provide a name, residential address, date of birth and age.	Police officer or authorised person (under the Act) reasonably suspect that a person is the holder of a licence, and after being requested to do so, the suspected holder of the licence actually fails to provide these personal details.
<i>Security and Investigations Agents Act 2002</i> s 27C(4)	Failing or refusing to comply with a requirement made under s 27C(2) by a police officer or authorised person that the licence holder cease undertaking certain activity and leave the premises or place in which, or in respect of which, that activity is being undertaken.	Police officer or an authorised person (under the Act) reasonably suspect that the holder of a licence is undertaking an activity in contravention of s 27C(1), that is, activity while under the influence of alcohol, a drug or both to such an extent that he or she is incapable of properly undertaking that activity.

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Act Name and Section	Power to Arrest	Test
<i>Sentencing Act 1997</i> s 71(5)	Breaching an area restriction order.	Believes on reasonable grounds
<i>Sex Industry Offences Act 2005</i> s 13(1)	Committing, or having committed or being likely to commit an offence against ss 4 (commercial operator of a sexual services business), 7 (offences against sex workers), 8 (soliciting and accosting), 9 (participation of children) or 14 (hindering or obstructing police officers) of the Act.	Reasonably believes that a person has committed, is committing or is likely to commit an offence against this Act.
<i>Sex Industry Offences Act 2005</i> s 13(3)	Refuses to give full name, address or date of birth after being requested to do so under s 13(2) or it is reasonably believed that the name, address or date of birth given is false or incomplete.	Actually refuses to give full name, address or date of birth after being requested to do so under s 13(2) or it is reasonably believed that the name, address or date of birth given is false or incomplete.
<i>Supreme Court Rules 2000</i> ¹⁰ r 941(1)(a)*	Contempt of court committed in the face of the Court. The Court may by oral order direct that the respondent be arrested.	It is alleged or appears to the Court that a person is actually guilty of contempt of court.
<i>Traffic Act 1925</i> s 41(3)	Refuses to provide a correct name or address following a request for these details made by a police officer under s 41(1)(a).	Actually failing to provide the details requested or where the officer has reasonable grounds for believing the details are false or misleading.
<i>Traffic Act 1925</i> s 32(6)	Driver has committed an offence against s 32(1) and refuses to give their name and address when required so to do by a police officer.	Police officer has the 'view' that an offence has occurred, and the driver refuses to provide their name or address.
<i>Vehicle and Traffic Act 1999</i> s 13(3)	Committed an offence against s 13(1), which relates to driving while disqualified.	Reasonable grounds to suspect.
<i>Wellington Park Act 1993</i> s 67(2)*	Being 'found offending' and failing or refusing to state a correct name and address or does not deliver over items that are entitled to be seized.	Found offending and failure to provide details, or where there are reasonable grounds for believing the information is false. Pursuant to s 67(1), 'found offending' has the same meaning as in s 55(5) of the <i>Police Offences Act 1935</i> .
<i>Wellington Park Act 1993</i> s 69(2)(a)*	Committing an offence under s 69(1), which relates to contravening or failing to comply with an order made under s 68(2)(c). Section 68(2)(c) relates to prohibiting a person from being in possession of hunting equipment.	Reasonable grounds for believing the person has contravened or failed to comply with the order.
<i>Whales Protection Act 1988</i> s 22*	Failing or refusing, on demand, to give a correct name and address, if a person referred to in s 18(1), or, not delivering up, on demand, any thing in one's possession or under one's control entitled to be seized under the Act, if a person referred to in s 20(5).	Actually failing to provide a name and address, where there are reasonable grounds for believing the name and address are false, or actually failing to deliver up any thing on demand.

¹⁰ This is not an Act of Parliament but rather Statutory Rules made by the Court under the *Supreme Court Civil Procedure Act 1932*.

Act Name and Section	Power to Arrest	Test
<i>Youth Justice Act 1997</i> s 24	Prevention of continuation or repetition of an offence; to facilitate the making of a police family violence order; prevent concealment, loss or destruction of evidence relating to an offence; or the youth is unlikely to appear before the Court in response to a complaint or summons.	Believes the offences is serious enough to warrant arrest and believes on reasonable grounds that the arrest is necessary for the purposes listed.
<i>Youth Justice Act 1997</i> s 130(5)	Failing to return, without reasonable excuse, to a detention centre by the end of a period of leave of absence granted under s 130.	Reasonable grounds for believing.

Inconsistency, complexity and uncertainty

2.2.4 Table 1 demonstrates that arrest powers are scattered across a wide variety of legislative instruments and that they feature a range of operative standards. Of course, the sheer number and variety of statutory arrest powers makes it difficult for police officers, judicial officers and lay citizens to be fully conversant with the law in this area. It goes without saying that difficulties of knowledge and understanding are greatest for the lay citizen. When the practical circumstances in which the law of arrest operates are taken into account, the problematic nature of its volume becomes even more apparent. The volume of the law makes it inaccessible to most members of the public. Furthermore, arrests are not made in situations that permit a quick glance through the statute books to determine the legitimacy of what is occurring or proposed to be done. They may involve exigent circumstances and the need for instant decisions. Even where this is not the case, the diversity of arrest powers may still create uncertainty in any given situation about the applicable power and the validity of its exercise.

2.2.5 It is not apparent why a wide variation in arrest powers, particularly in the grounds of arrest, has been enacted. In some cases variation exists even for arrest powers in analogous situations. For example, as Table 1 shows, a number of statutes provide for the arrest of people who, in prescribed situations, fail to provide their personal details when requested to do so. However, the information required to be given varies across different statutes, without apparent reason, even where that information is sought in similar situations. For instance, under the *Liquor Licensing Act 1990*, *Animal Welfare Act 1993*, *Gaming Control Act 1993* and *Firearms Act 1996*, persons who refuse or fail to provide their correct name, address and age or date of birth after a request to do so are liable to be arrested. However, under the *Traffic Act 1925*, *Police Offences Act 1935*, *Road Safety (Alcohol and Drugs) Act 1970*, *Poisons Act 1971*, *Local Government (Highways) Act 1982*, *Whales Protection Act 1988*, *Wellington Park Act 1993*, *Second-hand Dealers and Pawnbrokers Act 1994*, *Environmental Management and Pollution Control Act 1994*, *Misuse of Drugs Act 2001*, *National Parks and Reserves Management Act 2002*, *Nature Conservation Act 2002*, *Police Service Act 2003*, *Racing Regulation Act 2004* and *Police Powers (Public Safety) Act 2005*, persons who refuse or fail to provide their correct name and address only (age or date of birth are not specified) after a request to do so are liable to be arrested. Such variations are a potential source of confusion.

The different statutory provisions also prescribe, as grounds for arrest, a variety of levels of belief or suspicion about the commission of an offence. For example the prescribed tests include: ‘reasonable grounds for believing’; ‘reasonably believes’; ‘reasonable ground to believe’; ‘believes on reasonable grounds’; ‘reasonably suspects’; ‘probable cause for believing’; ‘reasonable cause to suspect’; ‘believes or suspects’; ‘with reasonable cause, they suspect’ and ‘reasonable grounds to suspect’. This problem, and a proposed solution, is discussed in greater detail in Part 5.

Some of the variations in the framing of arrest powers may be explicable on policy grounds, see for example the powers to arrest conferred by ss 10 and 11 of the *Family Violence Act 2004*, s 6 of the

Parliamentary Privilege Act 1858, r 941(1)(a) of the *Supreme Court Rules 2000*, ss 3 and 5(2) of the *Debtors Act 1870*, s 8 of the *Parliament House Act 1962*, and s 130(5) of the *Youth Justice Act 1997*. These will be discussed more fully in paras 3.3.1 – 3.3.19. However, most of the different formulations do not appear to be explicable on this basis. It is a basic principle of criminal justice that like cases should be treated alike. The existence of variations in the law has the potential to violate this principle and to result in unfairness in the operation of the law.

Key statutory provisions

2.2.6 The key statutory arrest provisions in the *Criminal Code Act 1924* and *Police Offences Act 1935* are also problematic and exhibit a number of oddities and inconsistencies. They are also complicated and difficult to interpret.

Tasmanian *Criminal Code* – section 27

2.2.7 As noted above, the principal statutory source of arrest powers in relation to indictable offences is s 27 of the *Criminal Code*. It provides:

S 27:

- (1) It is lawful for a police officer to arrest without warrant any person whom he finds committing a crime.¹¹
- (2) In any case where any of the crimes specified in Appendix A¹² has been committed, it is lawful for a police officer to arrest without warrant any person whom he believes on reasonable grounds to have committed such crime.
- (3) In any case where a police officer believes on reasonable grounds that any of the crimes specified in Appendix A has been committed, it is lawful for him to arrest without warrant any person whom he believes on reasonable grounds to have committed such crime.
- (4) It is the duty of every person to arrest without warrant any person whom he finds committing any of the crimes in Appendix A.
- (5) In any case where any of the crimes specified in Appendix B¹³ has been committed it is lawful for any person to arrest without warrant any person whom he believes on reasonable grounds to have committed such crime.

¹¹ Section 1 of the Code defines ‘crime’ as an offence punishable on indictment.

¹² Appendix A – Crimes for which Offender may be Arrested without Warrant: Assault; Aggravated assault; Any crime under Chapter V; Piracy and offences deemed to be piracy; Rioting; Opposing the making of a riot proclamation; Escape; Unnatural sexual intercourse; Murder; Manslaughter; Threatening to murder; Instigating [*or* aiding] suicide; Disabling with intent to facilitate the commission of an offence [*or* flight of an offender]; Administering a drug with intent to facilitate the commission of an offence [*or* flight of an offender]; Committing an unlawful act intended to cause bodily harm; Preventing escape from a wreck; Wounding or causing grievous bodily harm; Intentionally endangering persons on a railway; Wantonly endangering persons on a railway; Causing injury by poison; Rape; Aggravated sexual assault; Forcible abduction; Stalking; Stealing, other than stealing under sections 228 to 231 or under section 233; Killing an animal with intent to steal; Severing with intent to steal; Aggravated Robbery; Robbery; Armed Robbery; Aggravated Armed Robbery; Demanding property with menaces with intent to steal; Any crime under Chapter XXVII; Receiving stolen property; Arson or any other crime under Chapter XXXI, except under sections 272 to 276 and attempting to commit any of such crimes as aforesaid.

¹³ Appendix B – Crimes Referred to in Sections 27 (5) and 30 (3): Treason; Piracy and offences deemed to be Piracy; Murder; Burglary and Aggravated Burglary; Rape; Unlawfully setting fire to vegetation, in any case

- (6) It is lawful for any person to arrest without warrant any person whom he sees committing a breach of the peace or whom he believes on reasonable grounds to be about to commit or renew a breach of the peace.
- (7) It is lawful for any person who finds another lying or loitering in any place by night under such circumstances as to afford reasonable grounds for believing that he has committed, or is about to commit, a crime, and who does in fact so believe, to arrest him without warrant.
- (8) It is lawful for any person to arrest without warrant any person whom he believes on reasonable grounds to have committed a crime, and to be escaping from, and to be freshly pursued by, some person whom he believes on reasonable grounds to have authority to arrest him for that offence.
- (9) In every case under this section in which it is lawful for a police officer to arrest any person it is his duty to do so.
- (10) It is lawful for a police officer or the person in command of an aircraft to arrest without warrant on board that aircraft a person whom he finds committing, or attempting to commit, or whom he believes on reasonable grounds to have committed, or to have attempted to commit, a crime under Chapter XXXIA.
- (11) It is lawful for any person to assist the person in command of an aircraft to arrest without warrant any other person on board the aircraft unless he knows the arrest to be illegal.
- (12) The power of a police officer to arrest a person under this section is subject to the limits imposed on the power to arrest by section 24 of the *Youth Justice Act 1997*.

Criticisms of section 27

2.2.8 The following criticisms can be made of section 27:

- It is arguable that subsection (2) is redundant in the light of the wider power conferred in subsection (3).
- Subsections (2) and (5) create powers to arrest where certain crimes have been ‘committed’. The use of the term ‘committed’ is problematic. It is the role of a court to determine whether a crime has been ‘committed’. Accordingly, subsections (2) and (5), if interpreted literally, would limit the scope of the arrest powers they create to situations where there has been a determination of guilt. This is absurd.
- Subsection (4) characterises a citizen’s arrest power as a ‘duty’, which is a formulation out-of-step with contemporary attitudes and practices in both good citizenry and law enforcement. It is far more acceptable in contemporary society, especially given the nature of modern crime, for a citizen to inform the police if they reasonably believe that a person is committing a crime, rather than be subject to a duty to execute an arrest him or herself.

2.2.9 The powers of arrest granted to private citizens by section 27 will be discussed in greater detail in Part 8.

where serious danger shall have been caused to the life of any person; Arson, in any case where serious danger shall have been caused to the life of any person; Intentionally endangering persons on a railway; Any crime in the commission whereof serious danger shall have been caused to the life of any person and attempting to commit any such crimes aforesaid.

Police Offences Act – section 55

2.2.10 Section 55 of the *Police Offences Act 1935* creates powers of arrest without warrant for many but not all of the summary offences¹⁴ contained in that Act. Section 55 provides:

- (1) Any police officer may arrest, without warrant, any person found offending against any of the provisions of –
 - (a) Division I of Part II;
 - (b) Parts III to V; or
 - (c) sections 15B, 15C or 15D; or
 - (ca) section 20K; or
 - (d) section 37J(1).
- (2) Where a police officer is empowered to arrest any such person, it is the duty of such officer to exercise such power unless he has reasonable grounds for believing that the purposes of this Act, or of the Act conferring such power, as the case may be, will be adequately served by proceeding against the offender by summons.
- (2A) A police officer may arrest, without warrant, any person found offending against section 14A.
- (2B) Subject to subsection (2C), a police officer may arrest, without warrant, any person whom he believes on reasonable grounds to be on any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner, occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.
- (2C) The power of arrest conferred by subsection (2B) is not exercisable –
 - (a) unless the police officer has previously requested the person in relation to whom he seeks to exercise the power to leave the land, building, structure, premises, aircraft, vehicle or vessel concerned and that person has refused or failed to comply with the request or, having complied with the request, returns to the land, building, structure, premises, aircraft, vehicle or vessel concerned within 14 days after so complying without the consent of the owner or occupier; or
 - (b) if the police officer has reasonable grounds for believing that that person has some reasonable or lawful excuse for being on that land, building, structure, premises, aircraft, vehicle or vessel.
- (2D) A police officer may, without warrant, arrest any person whom the police officer has reasonable grounds for believing has committed an offence under sections 13A, 13B, 13C, 21, 21A or 35.
- (2E) A police officer may, without warrant, arrest a person to facilitate the making of an application for a restraint order under Part XA of the *Justices Act 1959*, if the police officer has reasonable grounds for believing –
 - (a) that the person has intimidated another person; and
 - (b) that the intimidation is likely to continue and give rise to an assault.
- (2F) For the purposes of subsection (2E), intimidation may be verbal, physical or both verbal and physical.

¹⁴ Summary offences are offences that can be tried in the Magistrates Court. They are considered to be less serious than the crimes contained in the *Criminal Code*.

- (2G) A police officer, without warrant, may arrest any person the police officer has reasonable grounds for believing has committed an offence under section 37B.
- (3) Any person may arrest, without warrant, any person found offending against any provision of this Act if such offence involves –
- (a) substantial injury to the person of another;
 - (b) serious danger of such injury;
 - (c) loss of any property of the person so arresting, or of any person by whom he is authorized to effect the arrest; or loss of any property of which the person arresting has charge;
 - (d) serious injury to any property; or
 - (e) injury to the property of a public authority.
- (3A) The power of a police officer to arrest a person under this section is subject to the limits imposed on the power of arrest by section 24 of the *Youth Justice Act 1997*.
- (4) For the purposes of this section, an offence shall be deemed to involve any of the matters specified in subsection (3) if the person arresting has reasonable grounds for believing that such matter has been, or will be, the consequence of any act of the offender in committing such offence.
- (5) For the purposes of this section, a person is said to be “found offending” if he does any act, or makes any omission, or conducts or behaves himself, and thereby causes a person who finds him reasonable grounds for believing that he has, in respect of such act, omission, or conduct, committed an offence against this Act.

Criticisms of section 55

2.2.11 The following criticisms can be made of section 55:

- Identifying the scope of the application of section 55 is not easily done. It involves checking and crosschecking different Parts, Divisions and sections of the Act and also relevant provisions in the *Justices Act 1959* and the *Youth Justice Act 1997*. The application of s 55 is further complicated by subsections (3) and (5). Working out to which offences subsection (3) might apply is a complicated business. It authorises arrest for *any* offence in the Act provided one or other of the conditions in (3)(a)–(e) apply. The conditions in (3)(a)–(e) are only likely to arise where certain kinds of offences are concerned. Further, it is logical that resort will only be had to s 55(3) if no other arrest power is available. Consequently, s 55(3) is likely to have application in respect of contraventions of ss 15, 15A, 16, 17, 19, 19AA, 20, 20AA, 25, 44, 44A, 48 and 49AB of the Act. Subsection (3) also needs to be read in light of subsection (4), which affects the determination of whether the conditions in subsection (3)(a)–(e) are present.
- Subsection (5) is designed to assist in the interpretation of the term ‘found offending’, which appears in subsections (1), (2A) and (3). Subsection (5) is a difficult provision but its intent appears to be to broaden the powers of arrest in subsections (1), (2A) and (3) beyond situations where a person is found presently committing an offence or is reasonably believed¹⁵ to be presently committing an offence to situations where it is believed that he or she has previously committed an offence. Subsection 55(5) may be criticised because it takes the definition of

¹⁵ In *Hibble v Phegan & Ors* (Unreported, TASSC 50/97, Zeeman J, 20 May 1997), Zeeman J interpreted the term ‘committing’ an offence in s 34B(3) of the *Police Offences Act 1935* as encompassing the situation where the arresting officer believes on reasonable grounds that the arrestee is committing an offence under s 34B(1). His Honour used the terms ‘is committing’, ‘found offending’ and ‘offending’ interchangeably. Accordingly, it is possible that the same interpretation will apply to the words ‘found offending’ in s 55.

‘found offending’ well beyond its natural and ordinarily understood meaning. Additionally, it potentially transforms the standard of certainty required for an arrest under the Act into a perplexing abstraction. The aim appears to be to make the operation of the arrest provisions in subsections (1), (2A) and (3) as broad as possible. However, the definition used to achieve this is clumsy and opaque.

- There is authority to suggest that judicial interpretation of the expression ‘found offending’ in ss 55(1), (2A), (3) and (5) may place limits on the powers of arrest they confer and require at least some nexus between the time and place of the arrest and the conduct alleged to constitute the offence for which the arrest is made. In *White v Tunks*,¹⁶ a case involving a citizen’s power of arrest under s 55(3) of the Act, the expression ‘found offending’ was construed narrowly with reference to time and place. Crawford J observed that on the facts of the case before him, the offender ‘could not be said to have been “found offending” ... in circumstances where the alleged offence was committed one to one and a half hours earlier at a different place’.¹⁷

2.2.12 In addition to the powers of arrest in s 55, powers of arrest without warrant are also specifically attached to the offences created in ss 19A, 34B, 38A, 55A and 58 of the *Police Offences Act*. These are included in Table 1.

Comparison of section 27 Criminal Code and section 55 Police Offences Act

2.2.13 Comparison of s 27 of the *Criminal Code* and s 55 of the *Police Offences Act* reveals other anomalies in their operation. For example, the arrest powers for the crimes of destruction or injury to property in the *Criminal Code* are substantially different to those in the *Police Offences Act*. Under the *Criminal Code*, there is no power to arrest without a warrant in respect of the following offences: unlawfully injuring a public utility (s 272); unlawfully injuring property (s 273); unlawfully killing [or maiming] [or wounding] cattle (s 274); and interfering with a boundary mark (s 275). Therefore, for these Code offences, an arrest warrant is required. In contrast, for offences involving injury to property under the *Police Offences Act*, s 55(3) of that Act may authorise arrest without warrant if the injury to property is of a kind enumerated in subparagraphs (c)–(e) of s 55(3). That is, if the offence involves:

- (c) loss of any property of the person so arresting, or of any person by whom he is authorised to effect the arrest; or loss of any property of which the person arresting has charge;
- (d) serious injury to any property; or
- (e) injury to the property of a public authority.

Consequently, the arrest powers for damage to property offences in these two statutory instruments are, on the face of it, inconsistent. It is not apparent why the *Police Offences Act* authorises arrest without warrant for these offences while the *Criminal Code* does not. While there may be valid policy reasons for the distinction, they are not obvious.

2.3 The common law

2.3.1 At common law, a police officer or other ‘peace officer’ may arrest without warrant –

¹⁶ [2003] TASSC 109.

¹⁷ *Ibid*, para 14.

- To prevent the commission of a felony;
- Where a person is found committing a felony or is reasonably suspected of having committed a felony (regardless of whether or not it has actually occurred); and
- Where a breach of the peace is occurring: *R v Ryan* (1890) 11 LR (NSW) 171.¹⁸

2.3.2 A police officer has no power at common law to arrest a person without a warrant in relation to a misdemeanour or summary offence with the exception of cases involving a breach of the peace. In Tasmania, while common law powers of arrest still exist, they have been made largely redundant by the broad range of arrest powers provided by statute. The obsolete distinction between felonies and misdemeanours also virtually erases the continued relevance of common law arrest powers. In Victoria, the common law powers of arrest have been abolished.¹⁹ The value of their continued existence in Tasmania is questionable, given their obscurity and general obsolescence. They seem rather to constitute yet another instance of arrest law ‘overload.’

2.3.3 Although the common law powers of arrest have become essentially obsolete in the light of statutory arrest powers, the common law relating to how an arrest may be lawfully carried out remains relevant. This is discussed in Part 6.

2.4 A previous recommendation to reform the law

2.4.1 In 1977, the Law Reform Commission of Tasmania prepared and published a report on the consolidation of powers of arrest, search and bail.²⁰ In making the reference to the Law Reform Commission, the Attorney-General of the day sought an inquiry and report ‘as a matter of urgency’.²¹ The Report reviewed the existing law in Tasmania, which even then, scattered the powers of arrest amongst various acts, regulations and by-laws. The Report recommended that the law in relation to arrest and search be codified in a new statute. While the Report proposed some minor modifications to the law of arrest as it stood,²² its main goal was to enact the relevant provisions under the *Criminal Code*, the *Police Offences Act*, the *Justices Act* and any other Acts into a new code.²³ The Report included draft legislation for the Parliament to consider. This is reproduced in Appendix A of this Issues Paper. Despite the ‘urgency’ for reform expressed at the time of the Report, the recommendations for codification were never adopted.

2.5 Proliferation of statutory arrest powers

2.5.1 Since 1977 (the year of the previous Tasmanian law reform inquiry into arrest powers), 40 Acts conferring powers of arrest without warrant in Tasmania have been passed compared to only fourteen Acts in the previous 119 years. These Acts are listed in the table below.

¹⁸ Hunter, Cameron and Henning, above n 1, 437.

¹⁹ *Crimes Act 1958* (Vic), s 357.

²⁰ Law Reform Commission, *Report on Powers of Arrest, Search and Bail*, 1977.

²¹ *Ibid*, 3.

²² See, for example, Recommendations 7 (applications for arrest warrants), 10 (conditions necessary for forcible entry) and 14 (rights of persons in custody).

²³ *Ibid*, 12.

Table 2: Powers of arrest without warrant

Acts granting powers of arrest prior to 1977	Acts granting powers of arrest after 1977
<i>Parliamentary Privilege Act 1858</i> <i>Debtors Act 1870</i> <i>Influx of Criminals Prevention Act 1909</i> <i>Criminal Code Act 1924</i> <i>Traffic Act 1925</i> <i>Police Offences Act 1935</i> <i>Racing Regulation Act 1952²⁴</i> <i>Coroners Act 1957</i> <i>Justices Act 1959</i> <i>Child Welfare Act 1960</i> <i>Parliament House Act 1962</i> <i>Road Safety (Alcohol and Drugs) Act 1970</i> <i>Poisons Act 1971</i> <i>Aboriginal Relics Act 1975</i>	<i>Fire Service Act 1979</i> <i>Local Government (Highways) Act 1982</i> <i>Whales Protection Act 1988</i> <i>Liquor Licensing Act 1990</i> <i>Animal Welfare Act 1993</i> <i>Crime (Confiscation of Profits) Act 1993</i> <i>Gaming Control Act 1993</i> <i>Land Acquisition Act 1993</i> <i>Local Government Act 1993</i> <i>Wellington Park Act 1993</i> <i>Bail Act 1994</i> <i>Environmental Management and Pollution Control Act 1994</i> <i>Second-hand Dealers and Pawnbrokers Act 1994</i> <i>Inland Fisheries Act 1995</i> <i>Living Marine Resources Management Act 1995</i> <i>Firearms Act 1996</i> <i>Mental Health Act 1996</i> <i>Children, Young Persons and Their Families Act 1997</i> <i>Corrections Act 1997</i> <i>Public Health Act 1997</i> <i>Sentencing Act 1997</i> <i>Youth Justice Act 1997</i> <i>Criminal Justice (Mental Impairment) Act 1999</i> <i>Vehicle and Traffic Act 1999</i> <i>Forensic Procedures Act 2000</i> <i>Police Powers (Vehicle Interception) Act 2000</i> <i>Supreme Court Rules 2000</i> <i>Misuse of Drugs Act 2001</i> <i>National Parks and Reserves Management Act 2002</i> <i>Nature Conservation Act 2002</i> <i>Security and Investigating Agents Act 2002</i> <i>Police Service Act 2003</i> <i>Electoral Act 2004</i> <i>Family Violence Act 2004</i> <i>Racing Regulation Act 2004</i> <i>Police Powers (Public Safety) Act 2005</i> <i>Sex Industry Offences Act 2005</i> <i>Admission to Courts (Lower Courts) Regulations 2006</i> <i>Marine Safety (Misuse of Alcohol) Act 2006</i> <i>Litter Act 2007</i>

²⁴ On 1 January 2005 the *Racing Regulation Act 2004* commenced. This Act amends but largely implements the thinking behind the arrest provisions that were contained in the *Racing Regulation Act 1952*, which were repealed by the *Racing Regulation (Transitional and Consequential Provisions) Act 2004*.

The proliferation in arrest powers since 1977 can be attributed partly to an increase in specialist legislation, which, in dealing with a particular issue, (one that may affect only a small percentage of the population), creates powers of arrest specific to that matter. It is also attributable to the fact that arrest powers in existing statutory instruments, including those in the *Criminal Code*, are limited in their application and cannot extend to the conduct covered by new legislation. Unfortunately, of course, the proliferation of statutory arrest powers has had the effect of complicating and decreasing the accessibility of this area of law. Inevitably, as noted above, this creates difficulties for arrestors in knowing when they have a valid power of arrest and for arrestees in knowing whether they are required to submit to the authority of the arrestor.

2.6 Submissions and Recommendations

Submissions

2.6.1 The responses to the Issues Paper supported the proposal that arrest powers contained in Tasmanian statutes should be consolidated into a single statute dealing centrally with powers of arrest and capable of being exercised under a variety of other pieces of legislation.

2.6.2 The submission from Tasmania Police provided ‘in principle’ support for the consolidation of arrest powers (and laws) into one statute. The consolidation is viewed as ‘a sensible strategy’:

It is the view of Tasmania Police that the consolidation of arrest laws has the potential to significantly simplify the application of arrest provisions by operational police. The decision whether or not to effect an arrest is often one made under difficult circumstances with the prospect that the arresting officer’s decision is likely to be subjected to substantial internal and external scrutiny after the event. The consolidation of arrest provisions into one piece of legislation is therefore likely to have benefits to police in the field.

The Tasmania Police submission also included a strong caveat to their support for consolidation. They expressed the view that ‘any move to consolidate arrest laws should not in any way diminish legislative powers currently exercisable by Tasmania Police.’

2.6.3 The submission from the Criminal Law Sub Committee of the Law Society of Tasmania also agreed with the proposal to consolidate all arrest powers in Tasmania into one statute. The Committee observed, however, that the ‘complexity and uncertainty of arrest laws as they currently stand’ is more a perceived problem than an actual one. They commented that ‘it was only very rarely that the legitimacy of an arrest became an issue in terms of the prosecution of the matter.’

2.6.4 The then Interim Commissioner for Children considered that ‘the law regulating arrest powers is complex, creating uncertainty and confusion for persons subject to these powers and those applying and interpreting the powers’. The Commissioner stated, ‘Young persons are particularly likely to experience difficulty in understanding their rights and the limitations on police powers in relation to arrest.’

2.6.5 The Police Association of Tasmania generally endorsed the submission made by Tasmania Police.

2.6.6 The Department of Primary Industries and Water also provided ‘in principle’ support to the proposal to consolidate arrest laws into one statute. While not commenting specifically on the majority of proposals contained in the Issues Paper, the submission from the Department said that it ‘would welcome the preparation of a draft Bill in accordance with those proposals.’

Recommendations

2.6.7 It is clear from the discussion above that there is significant inconsistency, incoherence and unnecessary complexity in the law of arrest in Tasmania. Uncertainties and inconsistencies are not only undesirable because they make the law inaccessible (as does its complexity), they may also lead to significant increases in the costs of delivering justice – particularly if the lawfulness of an arrest must later be argued in court. Such arguments arise because the lawfulness of an arrest can be critical in determining the admissibility of evidence obtained in the course of the arrest. If the evidence in question is important in the case, this matter will have clear implications for its outcome. Further, the complexity, uncertainty and inaccessibility of Tasmanian arrest laws raise questions about their compliance with human rights principles. In *Van Alphen v the Netherlands*²⁵ the United Nations Human Rights Committee stated that arrest and detention laws will be arbitrary and in contravention of human rights where they ‘lack of predictability’. The European Court of Human Rights has similarly held that to comply with human rights the ‘law must be sufficiently accessible to the individual and ... sufficiently precise to enable the individual to foresee the consequences of the restriction ...’.²⁶ It is difficult to see how Tasmanian arrest laws could meet these requirements.

2.6.8 Having considered the problems with the current law and the submissions received in response to the Issues Paper, the Institute is of the view that the current law relating to powers of arrest in Tasmania requires reform. Problems of accessibility arising from the disparate locations of arrest powers and the multiplicity of those powers suggest that such reform should take the form of the consolidation of all powers of arrest in a single dedicated legislative instrument. The confusion and complexity in the current law arising from the different, often inconsistent, formulations of the various arrest powers suggest that reform should also rationalise and simplify the law by providing a unified basis for arrest. While it may be theoretically possible to remedy current problems in the law by separately amending the many statutes dealing with arrest, the proliferation of those powers and their complexity, inconsistency and uncertainty suggest that reform should preferably take the form of consolidation. Further, separate amendment of existing statutory provisions cannot guard against the re-emergence of current problems in the event that future legislation is enacted containing additional and divergent arrest powers. While it is arguable that the problem is more perceived than real, there continues to be a trend to create new arrest powers and grounds for arrest, which are sometimes inconsistent, when new offences are created by Parliament. This trend has resulted in over ninety different powers of arrest without warrant. Tasmania Police regard a consolidation as likely to produce benefits for ‘police in the field’. The Institute believes that the benefits will flow to the court system, the justice system and the greater community because a single statute dealing centrally with powers of arrest (and matters incidental to powers of arrest) will minimise any confusion and uncertainty associated with arrest. To paraphrase Michael Kirby (afterwards Kirby J), the argument for collecting, rationalising, simplifying and clarifying arrest powers is highly compelling.²⁷

2.6.9 The principles that should guide consolidation and the form that the consolidation should take are considered in Part 3.

²⁵ *Hugo van Alphen v The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990).

²⁶ *R v Governor of HMP Brockhill ex Parte Evans (No 2)* [2001] 2 AC 19 per Lord Hope of Craighead at 38; *Baranowski v Poland*, no 28358/95, ECHR 2000 III at [52]; *Steel and Others v the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VII [54]; and *Paladi v Moldova*, 39806/05 [2009] ECHR 450 (10 March 2009) at [74].

²⁷ M D Kirby, ‘Controls Over Investigation of Offences and Pre-trial Treatment of Suspects’ (1979) 53 *Australian Law Journal* 626, 632 quoted in New South Wales Law Reform Commission, *Criminal Procedure, Police Powers of Arrest and Detention: Report*, (December 1990) 56.

2.6.10 Other jurisdictions, most notably New South Wales and Queensland, have successfully consolidated the arrest provisions that operate in those jurisdictions and the relevant legislative provisions of the *Police Powers and Responsibilities Act 2000* (Qld) and the *Law Enforcement (Powers and Responsibilities) Act 2002* NSW provide precedent for similar reform in Tasmania.

2.6.11 It has never been the intent of the Institute to diminish the legislative arrest powers currently exercisable by Tasmania Police. In fact, such an undertaking is not within the terms of reference issued by the Attorney-General and the Institute has been concerned in developing its proposals and recommendations not to diminish arrest powers indirectly. Indeed, the proposal in the Issues Paper and the recommendation in this Report to make all offences prima facie arrestable broadens the power of arrest exercisable by police.²⁸

2.6.12 The consolidation of arrest powers will lessen the complexity that the police (and others) face in the field when they execute an arrest. A single reference point for arrest powers will achieve greater understanding for people executing, and people subject to, an arrest.

Recommendation 1

That arrest powers contained in Tasmanian statutes be consolidated into one statute.

²⁸ See below 4.1.1 – 4.1.13.

Part 3

Consolidation

3.1 Principles of consolidation

3.1.1 This Part considers the principles that should guide any consolidation of the laws of arrest. It also looks at the appropriate form that the consolidation should take.

3.1.2 The aim of consolidation of arrest laws in Tasmania is to rationalise and simplify the law in order to increase its certainty, consistency and clarity. A concurrent aim is to make the law more accessible to arrestors, arrestees and those trying to assess the lawfulness of any particular arrest. These aims accord with the human rights principles referred to in para 2.6.7, which prescribe that arrest laws should be characterised by accessibility, certainty and predictability. These requirements apply particularly to arrest laws because they should be able to be applied by a police officer, authorised person or private citizen acting under conditions that may be stressful or volatile and which may involve instantaneous decision-making. The consolidated laws should also aim to minimise confusion:

The law (of arrest) should be constructed so that a police officer should not be compelled to make difficult determinations on fine questions of law. To this end, the law should be expressed in simple and straightforward terms and be sufficiently flexible to take account of the possibility of legitimate mistakes.²⁹

It is important, however, that the public interest in simplicity and consistency not be purely a formalist goal that ignores the practicalities of the criminal justice system. Arrest powers must be such as to enable the police to perform their duties effectively while also being subject to constraints, which ensure that their powers are not used unnecessarily or unreasonably. Accordingly, relevant principles that should guide consolidation are efficiency and fairness in terms of the human rights principles set down above.

Efficiency

3.1.3 The law of arrest should be able to be applied with minimum waste of time, effort, or skill. In other words, the law of arrest should be efficient. Consolidation and clarification of all arrest powers has efficiency benefits for the criminal justice system. The expense and the delay caused by trial proceedings regarding the admissibility of evidence where there is confusion over the lawfulness of an arrest are costs borne ultimately by the community as a whole. When the law is clearly organised in one reference point, a desirable consequence may be a reduction in disputes over the source and legitimacy of an arrest power.

3.1.4 Arrest powers and procedures need to be executed efficiently. In the context of the criminal justice system, efficiency is relevant to the:

- Accountability of individual agents or institutions (the police and courts, for example) in the justice system who are required, in a straightforward and uncomplicated manner, to execute and determine the legality of arrests; and
- Broader public interest goals of adherence to the rule of law, fairness and timeliness.

²⁹ D A Thomas, 'Arrest: A General View' [1966] *Criminal Law Review* 639, 659.

3.1.5 When analysing the large number of statutes relevant to the project of consolidation and reaching the reform proposals contained in this Final Report, the Institute was guided by the following legislative principles or efficiency devices:³⁰

(a) *One 'general' statute should deal as far as possible with arrest in Tasmania*

It is the Institute's view that to ensure the efficient and effective operation of the criminal justice system in Tasmania, there should be only one 'general' criminal law statute dealing with arrest powers for both indictable and summary offences. The arrest provisions in that statute should, as far as possible, provide a simple, uniform approach that applies to all arrestable offences. There should be only limited exceptions to this approach based upon compelling policy grounds.

(b) *Subject-specific arrest provisions should only be created in rare circumstances*

Where a statute aims to regulate a specific and unusual set of conditions or circumstances that are clearly unable to be dealt with by the general arrest provisions, specific provision may be made in a strictly limited manner. There should, however, be a presumption against dealing with specific situations by the enactment of new arrest provisions that overlap with the general provisions.

Fairness

3.1.6 Questions of fairness relate to both fair outcomes and (due) process. Fairness is a by-word of our criminal justice system. It is a quality that prevents prejudice, bias and arbitrariness from contaminating the system.

3.1.7 The determination of whether a particular provision, power or action is fair often depends upon balancing the public interest in law enforcement with the need to protect the civil liberties of citizens. Individuals in a free, democratic society need to be confident that they can go about their business protected from 'arbitrary, irregular, illegal or excessive invasion of their liberties by police, prosecuting authorities, or judicial procedures.'³¹

3.1.8 International human rights instruments provide important perspectives on fairness and arrest. The *International Covenant on Civil and Political Rights* (ICCPR) includes a protection against arbitrary or unlawful arrest, as well as protections against unlawful detention.³² Although not directly enforceable in Australia, the ICCPR provides a strong human rights constraint upon indiscriminate and unlawful exercises of the power of arrest by the state and its agents. Similarly, the *European Convention on Human Rights*³³ also expresses a prohibition against unlawful arrest. Article 5(1)(c) of the Convention (Right to Liberty and Security) states that an arrest may take place for the purpose of

³⁰ These legislative principles have been adapted from Scrutiny of Acts and Regulations Committee (Victorian Parliamentary Committee), *Inquiry into the Vagrancy Act 1966, Final Report* (September 2002).

³¹ Richard Fox, *On-the-Spot Fines and Civic Compliance* (2003) Volume 2, 49, quoted in Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures: Discussion Paper* (2004), 20.

³¹ E W Thomas, *Fairness and certainty in adjudication: formalism v substantialism*, (1999) 9(3) *Otago Law Review* 459.

³² *International Covenant on Civil and Political Rights* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, art 9(1). The ICCPR also guarantees equality before the law and freedom from discrimination, torture or cruel, inhumane or degrading treatment or punishment.

³³ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*, Council of Europe. For other constitutional protections or limitations on the power of arrest see also sections 9 and 10 of the Canadian Charter of Rights.

bringing a person ‘before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’, but this rule operates as an exception to the universal right of not being deprived of one’s liberty. In 1998, the Parliament of the United Kingdom passed the *Human Rights Act 1998* (UK), which ratified and made enforceable the Convention within their domestic law.

3.1.9 Clarity of the law is a hallmark of fairness. If the law of arrest is not clear and comprehensible there is a real risk that arrest powers may be used unlawfully. Statutory arrest provisions that are unnecessarily unclear or complex frustrate the expectation of clarity. International human rights principles establish that ‘arbitrariness’ does not mean ‘against the law’ but exists where there are elements of ‘inappropriateness, injustice and lack of predictability’.³⁴ As stated by Lord Hope in *R v Governor of HMP Brockhill ex Parte Evans (No 2)*,³⁵ to comply with human rights principles domestic laws regulating deprivations of liberty must fulfil a number of requirements including, ‘requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction ...’³⁶

3.1.10 As the discussion in Part 2 of this Report demonstrates, there must be considerable doubt whether Tasmania’s arrest laws could meet human rights requirements of precision and accessibility.

3.1.11 As mentioned previously, the principle of equality or like cases being treated in a like manner is also central to criminal justice and it is anticipated that consolidation will achieve a greater level of fairness with respect to this equality principle.

3.2 Form of consolidation

3.2.1 A consolidation of arrest laws may take a number of different forms. First, and perhaps most obviously, it could simply comprise a separate statute, for example an *Arrest Act* that deals solely with arrest powers in the way that the *Bail Act 1994* (Tas) deals with bail. Another possibility is for the consolidation to be located in an existing piece of legislation, the *Criminal Code Act 1924* (Tas) being perhaps the most obvious choice, given that it is presently the primary source of arrest powers for indictable offences. The Institute is of the view that a separate Act is preferable because it is more likely to achieve accessibility of the law. Creation of a separate statutory instrument dealing with powers of arrest provides an easily identifiable location for the law in this area and complies with the guiding principles of efficiency and fairness accordingly. It is the Institute’s preference that the new Act be known as the *Arrest Act*.

Submissions

3.2.2 Both the Tasmania Police and the Criminal Law Committee of the Law Society of Tasmania agreed with the proposition that if the laws of arrest are to be consolidated, they should form part of a new Act rather than be located in an existing piece of legislation.

3.2.3 The Criminal Law Committee commented that if such a course is taken, the Parliament should ‘ensure that all current powers are repealed and re-enacted into the new legislation.’ They point to the *Bail Act 1994* (Tas) as an example of a consolidating piece of legislation that failed to repeal and re-enact the relevant law completely and comprehensively. A similar oversight with respect to arrest laws would complicate rather than simplify the law.

³⁴ *Van Alphen v the Netherlands* Communication No 305/1988; at [5.8]; *A v Australia* Communication No 560/1993 at [3.1] and [9.2].

³⁵ [2001] 2 AC 19, 38.

³⁶ See also *Baranowski v Poland*, no 28358/95, [52], ECHR 2000 III; *Steel and Others v the United Kingdom*, 23 September 1998, [54], Reports of Judgments and Decisions 1998-VII and *Paladi v Moldova*, 39806/05 [2009] ECHR 450 (10 March 2009), [74].

3.2.4 The then Interim Commissioner for Children supported the proposal to consolidate arrest laws into ‘a single and distinct statute’ but also advocated that ‘a specific section of the proposed Act ... deal with arrest of young people.’

Recommendations

3.2.5 A separate statute repealing all the existing arrest laws and consolidating powers of arrest in one dedicated statute is the simplest and most efficient means by which to achieve a consolidation of the laws. It is a course that is clear and simple, fair and effective.

Recommendation 2

The consolidation of arrest laws should take the form of a new Act to be known as the *Arrest Act*.

3.3 Exceptions to the proposed Arrest Act

3.3.1 Should there be any exceptions to the proposed consolidation of all arrest powers in one Act? There may be legitimate policy reasons for certain subject-specific arrest powers to operate either:

- Outside and as exceptions to any general statute, or
- As separate and distinct provisions inside a general statute.

3.3.2 It is the Institute’s view that the following legislative instruments containing powers of arrest without warrant may merit treatment in either of these ways:

- *Family Violence Act 2004* (Tas), ss 10 and 11. The arrest provisions in this Act are designed to serve particular practical and policy purposes. For example, the arrest powers in s 10 are granted to facilitate the issue of a police family violence order or the making of an application for a family violence order. Section 11 empowers a police officer who reasonably suspects that a person has committed family violence to arrest that person. This arrest power was purposively formulated differently from those found in other legislative instruments to serve the overall objects of the Act set down in s 3. Section 3 makes ‘the safety, psychological wellbeing and interests of people affected by family violence ... paramount considerations’ in the administration of the Act. Accordingly, in s 11 the grounds of arrest (the required state of mind of the arrestor for making an arrest) are set at the lower threshold of ‘reasonably suspects’ rather than the higher standard of ‘reasonably believes’. Further, subsection (5) states that, in deciding whether to arrest a person, the police officer is to give priority to ‘the safety, wellbeing and interests’ of those subjected to suspected family violence. Thus s 11 operates on a different policy basis to other arrest provisions. Its primary objective is the protection of victims of domestic violence. The orthodox purpose of arrest is to initiate the prosecutorial process and to bring the arrestee before a court.³⁷ Given that the purposes and policy behind ss 10 and 11 are different to those underlying other arrest provisions, it is legitimate that they should continue to stand apart from those provisions and comprise exceptions to the general approach to arrest in any consolidating legislation. These arrest powers, while separately formulated, should nevertheless be located in the proposed *Arrest Act*.

³⁷ *Williams* (1986) 161 CLR 278.

- *Parliamentary Privilege Act 1858* (Tas), s 6. This Act permits arrest initiated by the verbal order of the President or Speaker of the Houses of Parliament, where the Houses have adjudged a person guilty of contempt as enumerated in the legislation. As the power depends upon the judgement of a House of Parliament and a verbal order of the President or Speaker and as any person can effect the arrest on such an order, this arrest power is distinguishable from other Tasmanian statutory arrest powers.
- *Supreme Court Rules 2000* (Tas), r 941(1)(a). The Court may, by oral order, direct that a respondent be arrested for contempt of court committed in the face of the Court in any civil proceedings commenced in the Court. Any person who is ordered to do so by the Court may effect the arrest. This power of arrest derives from judicial authority to make an order for arrest rather than from a test of ‘reasonable belief’ and is therefore distinguishable from other statutory arrest powers.
- *Debtors Act 1870* (Tas), ss 3 and 5(2). This Act permits arrest without warrant for default in payment of a sum of money, although it is unclear from the terms of the legislation whether the arrest power is conferred on police officers and officers of the court only or extends to private citizens. The Act contains a codification of the law in relation to the procedure to be followed in respect of civil debt and reflects a fundamental separation of the civil law and criminal law in our justice system. While it is arguable that the arrest provisions in the *Debtors Act 1870* should be treated as an exception to the general principle of consolidation, consideration should be given to the repeal of this arrest provision altogether as being anachronistic and out-of-step with the modern trend to limit arrest powers to the criminal context and to minimise the use of those powers within that context.
- *Parliament House Act 1962* (Tas), s 8. This section permits arrest where an offence under s 6 of the Act has occurred and the alleged offender refuses to state a correct name and address. It is arguable that this arrest power resides essentially in the Parliament as distinct from a police officer. However, in this case it is the ‘controlling officer’ (appointed under s 3 of the Act) or a person acting under his or her orders who can initiate an arrest rather than members of the Parliament, as is the case with the *Parliamentary Privilege Act 1858* (Tas).
- *Youth Justice Act 1997* (Tas), s 130(5). This section permits arrest where a detainee has failed to return, without reasonable excuse, to a detention centre by the end of a period of leave of absence. This Act aims ‘to provide for the treatment and punishment of young persons who have committed offences and for related purposes’ and the Act’s main objectives under s 4 are (a) to provide for the administration of youth justice and (b) to provide how a youth who has committed, or is alleged to have committed, an offence is to be dealt with. As such, it is arguable that there is a desire on the part of the legislature for juveniles to be excluded from the general criminal justice regime. On this basis it might be argued that this power of arrest should stand outside consolidating legislation.

3.3.3 In many respects, however, the arrest powers in the *Parliament House Act 1962* and the *Youth Justice Act 1997* are of a similar nature to other basic powers of arrest without warrant, namely, the power to arrest for failing to provide name and address to the police on request where a person is believed to have committed an offence and power to arrest in cases of escape. Therefore, the arrest powers in these two Acts can be accommodated in a general consolidating provision.

3.3.4 If the above provisions are to continue to operate as exceptions to any consolidated arrest power, as mentioned above, there are two basic options for their location:

- Outside the consolidating legislation and as stated exceptions to it, or
- As separate and distinct parts within the consolidating statute.

3.3.5 The Institute is of the view that the second option is preferable. This is because it accords with the general aims of consolidation – the achievement of certainty, clarity, accessibility, ease of location, rationalisation and as much uniformity for arrest powers as possible. If all arrest powers are located in

one Act, this is likely to ensure that any new, exceptional arrest powers that are created conform as much as possible with existing powers and that the formulation of those powers is undertaken with regard to existing provisions and in a manner that ensures that new inconsistencies and anomalies are not introduced into the law. Further, location of all arrest powers in one Act reduces the possibility of future ad hoc proliferation of non-uniform powers. Principally, however, the location of all arrest powers in one Act promotes accessibility. If it is thought desirable, it might be noted in the *Family Violence Act*, the *Parliamentary Privilege Act*, the *Debtors Act 1870* and the *Supreme Court Rules 2000* that relevant arrest powers are located in the consolidating Act.

Submissions relating to exceptions

3.3.6 Tasmania Police and the Criminal Law Committee of the Law Society both submitted that there are legislative provisions that should be excluded from the proposed consolidation of all arrest powers. They agreed that the arrest powers in the *Parliamentary Privilege Act 1858*, *Supreme Court Rules 2000* and *Family Violence Act 2004* were sufficiently exceptional on policy grounds that they merited being treated differently. While still to be located in a proposed *Arrest Act*, they will operate as distinct and separate provisions within the general consolidating statute. Tasmania Police submitted that one statute on arrest laws that also included specific exceptions to general consolidating provisions would provide a ‘one document reference tool’.

3.3.7 Tasmania Police also indicated that there are other subject-specific arrest powers that in their view also should remain intact and not be transposed into general consolidating provisions. They nominated the arrest provisions in the following statutes as exceptions to the proposed consolidation:

- *Justices Act 1959* (Tas), s 106L(1A);
- *Police Offences Act 1935* (Tas), s 55(2E);
- *Road Safety (Alcohol and Drugs) Act 1974* (Tas), s 7A;
- *Bail Act 1994* (Tas), ss 5A, 10(1), or 26(1) and (5);
- *Firearms Act 1996* (Tas), ss 135(1)(d), 138(3) or 140; and
- *Police Powers (Public Safety) Act 2005* (Tas), ss 17(4), 21(9) or 29(2).

3.3.8 The Criminal Law Committee of the Law Society concurred with the views of Tasmania Police that s 106L(1A) of the *Justices Act 1959* (Tas) should also operate as an exception. They submitted that ‘if family violence is to be an exception then consideration should also be given to including the provisions relating to restraint orders under s 106L(1A) of the *Justices Act* into this exception.’ The proscription against family violence should not be considered more primary or valid than the proscription against ‘other areas of non-familial domestic violence’. They concluded:

It was the committee’s view that restraint orders and the powers relating to arrest and apprehension in relation to restraint orders should be included with the provisions relating to family violence.

Victims/applicants in restraint order matters should not be treated differently, and the provisions relating to facilitation and breach of restraint orders should be the same as those relating to family violence.

3.3.9 The Criminal Law Committee submitted that if arrest laws are to be consolidated, then all arrest ‘powers should be transferred into the consolidated legislation.’ It recognised that within the consolidating legislation ‘there would be a need to have separate and distinct parts to take into account existing areas of arrest.’ The committee suggested that it may be appropriate for the arrest provisions in the *Road Safety (Alcohol and Drugs) Act 1994* (Tas), *Bail Act 1994* (Tas), *Firearms Act 1996* (Tas) and *Misuse of Drugs Act 2001* (Tas) be dealt with separately.

3.3.10 While the Committee also saw some practical value in ‘a one stop shop’ for arrest powers embodied in a single statute, it anticipated that the ‘one stop shop’ may be more imaginary than real:

In terms of the prosecution and defence of any charges, it was felt that consolidation would become cumbersome in that one piece of legislation would need to be looked at to see if an arrest was valid, and then yet another to see if an offence had been committed or what elements need to be proved for a charge to be sustained.

Discussion and Recommendations

3.3.11 It is the Institute’s view that there is nothing inherently exceptional about the arrest powers contained in the *Bail Act 1994* (Tas), *Firearms Act 1996* (Tas) and *Misuse of Drugs Act 2001* (Tas) that warrant them being excluded from general consolidating provisions. These arrest powers relate to offences in the said Acts and are capable of being accommodated without difficulty within general arrest provisions. The powers of arrest conferred by these Acts will not be diminished at all if they are framed within general consolidating provisions.

3.3.12 The *Police Powers (Public Safety) Act 2005* (Tas) confers arrest powers in the context of terrorist acts defined by s 4 of the Act. The arrest powers under Division 2 of the Act can only be exercised when they are authorised by the Commissioner of Police and the Commissioner has received the written approval of the Premier (s 5) for the authorisation. The authorisation of the arrest powers is therefore strictly prescribed to ‘ensure the safety of persons attending events from a terrorist act.’ The powers are only triggered by exceptional circumstances and explicit authorisations and it is therefore arguable that they should be regarded as exceptional to general consolidating provisions. Furthermore, the powers are subject to an expiration clause that states that the powers expire on the tenth anniversary of the day on which they commenced.

3.3.13 Section 7A of the *Road Safety (Alcohol and Drugs) Act 1974* (Tas) relates to a specific power of police officers to require drivers of motor vehicles to undergo breath tests and is quite distinct from a power of arrest without warrant. This power to detain motorists for breath or oral fluid testing (see s 7B of the *Road Safety (Alcohol and Drugs) Act 1974* (Tas)) is intentionally narrow as demonstrated by the restriction set down in s 7A(5): ‘It is the duty of a police officer to ensure that he does not cause a person to be detained for a period longer than is necessary for the proper exercise of the powers conferred by this section.’ As s 7A is not a power of arrest it will not come within the purview of arrest powers consolidated into one statute.

3.3.14 The arrest powers conferred to facilitate the making of a restraint order under s 106L(1A) of the *Justices Act 1959* (Tas) and s 55 (2E) of the *Police Offences Act 1935* (Tas) are slightly different. Under the *Justices Act*, in situations where a police officer has entered premises and the officer reasonably believes that a person on those premises is or may be under threat or attack, or the person has recently been under threat or attack, or attack on such a person is imminent, a person on those premises may be ‘apprehended’ for the purposes of facilitating an application for a restraint order. No offence needs to be committed or needs to be likely to be committed for this power of apprehension to be exercised. Rather, the police officer is required to assess whether a person has acted in a manner that would constitute grounds for the making of a restraint order. Under s 55(2E) of the *Police Offences Act*, an arrest without warrant to facilitate the making of an application for a restraint order or family violence order can take place if the police officer has reasonable grounds for believing:

- (a) that the person has intimidated another person; and
- (b) that the intimidation is likely to continue and give rise to an assault.

3.3.15 This power therefore depends upon the commission or likely commission of an offence. Assault, or behaviour that gives rise to an assault, is intrinsic to the arrest to facilitate the making of a restraint order under the *Police Offences Act 1935* (Tas), but an assault or likely assault is unnecessary under the *Justices Act 1959* (Tas). Under the latter statute, police can intervene to apprehend persons

in volatile situations that do not necessarily constitute conditions where an assault is taking place. Rather, alcohol consumption, mental health indicators or aberrant behaviour may signify the volatility of the situations. Both pieces of legislation, however, are not restricted to relations between family members. They are applicable to non-familial situations of domestic violence, such as cases of shared living arrangements or in cases where visitors come into a domestic arrangement.

3.3.16 As has been noted, the arrest powers in ss 10 and 11 of the *Family Violence Act 2004* (Tas) have also been conferred to facilitate the issue of a police family violence order or the making of an application for a family violence order. In relation to s 10 specifically, like s 106L(1A) of the *Justices Act 1959*, there is no prerequisite for the commission or likely commission of an offence under the *Family Violence Act 2004*. The prime consideration is whether a person has acted in a manner that would constitute grounds for the making of a police family violence order or family violence order. In relation to arrest powers conferred to facilitate the making of a restraint order, family violence order or police family violence order, the overriding purpose is crime prevention rather than the initiation of the prosecutorial process. Based on this, it is legitimate for this group of powers of arrest without warrant to be dealt with differently in any consolidating legislation from the general provisions relating to arrest but they should not to be distinguished from one another.

3.3.17 The arrest powers conferred by s 106L(1A) of the *Justices Act 1959* (Tas) and s 55(2E) of the *Police Offences Act 1935* (Tas) can be applied to cases of non-familial domestic violence and therefore extend beyond cases of ‘family violence’ as defined by s 7 of the *Family Violence Act 2004* (Tas). The *Family Violence Act* deals with violence, defined broadly, between spouses and partners, while the other statutes are capable of dealing with violence in non-familial domestic situations. For these provisions the grounds of arrest are different from those normally applying to arrest for violence offences. Therefore, to maintain the correct test for these provisions they would need to be treated differently in the consolidating legislation.

3.3.18 One statute that includes both general arrest powers and exceptions to those powers, and that deals as far as possible with all powers of arrest in Tasmania offers certainty, efficiency and fairness. The enactment of a single statute will not necessarily mean that police, lawyers, judges and members of the community will no longer need recourse to other pieces of legislation to examine the nature and elements of the offences charged. Referring to multiple statutes is customary in the courtroom. It must be remembered that arrests take place in situations that can be volatile and unpredictable and in such situations one statute is likely to simplify the application of the law of arrest. Accordingly, the Institute does not support the view that any of the powers of arrest considered above should remain outside the consolidating legislation. Those that are to remain as exceptions to any consolidated *general* power of arrest, should nevertheless be included in the consolidating legislation as exceptions to a general arrest power in the consolidating legislation.

Recommendation 3

That the arrest powers in the *Family Violence Act 2004* (Tas), s 106L(1A) of the *Justices Act 1959* (Tas), s 55(2E) of the *Police Offences Act 1935* (Tas), the *Parliamentary Privilege Act 1858* (Tas), the *Police Powers (Public Safety) Act 2005* (Tas) and *Supreme Court Rules 2000* (Tas) be located in the proposed *Arrest Act* as exceptions to the general consolidating arrest power in that Act.

3.3.19 The Institute only received one submission specifically regarding the proposal to review the arrest powers contained in the *Debtors Act 1870* (Tas) with a view to their possible repeal. The Criminal Law Committee of the Law Society agreed with this proposal in principle but said ‘that investigation should be made by the Law Reform Institute into ways of ensuring that fine defaulters are made to honour their debts.’ Although the repeal of the arrest powers contained in the *Debtors Act 1870* would slightly reduce the legislative powers currently exercisable by Tasmania Police, the Institute maintains that arrest powers should be limited to the criminal context rather than extend to civil law matters.

Recommendation 4

That the arrest powers contained in the *Debtors Act 1870* (Tas) be reviewed with a view to their possible repeal. The preliminary view of the Tasmania Law Reform Institute is that they should be repealed.

Part 4

Extent of Arrest Powers

4.1 Classifying offences as arrestable or non-arrestable

4.1.1 Presently, in Tasmania there are powers of arrest without a warrant for only certain classes or categories of offences. There are many offences for which there is no power of arrest, for example, virtually all traffic and road safety offences, offences against municipal by-laws and many summary offences.

4.1.2 When considering reform of the law relating to arrest powers, it is useful and desirable to pose a series of questions:

- Should all offences be classified as prima facie arrestable?
- Should all offences be classified as prima facie non-arrestable?
- Should certain offences be classified as prima facie arrestable and all others as non-arrestable?

4.1.3 The Australian Law Reform Commission (ALRC) considered the problems relating to the classification of offences as arrestable, non-arrestable, or otherwise in its report, *Criminal Investigation*.³⁸ The ALRC ultimately recommended that the best approach to the classification of (Commonwealth and Territorial) offences should be to make them all prima facie arrestable:

This conclusion is reached not because of any belief that there are no offences which should not under any circumstances be arrestable. It would be difficult to accept, for example, that there ever could be justification for arresting someone for riding a bicycle without a light. The difficulty is to fix upon any system of classification that divides offences into ‘arrestable’ and ‘non-arrestable’, which does not create more problems than it solves.³⁹

4.1.4 The ALRC observed that the traditional basis for the power of arrest without warrant at common law was the distinction between *felonies* and *misdemeanours*. However, as has been noted, the criminal law is not presently built on such a distinction and it is now anachronistic. While the distinction between *indictable* and *summary* offences is sometimes considered an appropriate ground for distinguishing arrestable from non-arrestable offences, the ALRC noted that a ‘major difficulty in employing this comparatively well-known distinction ... is the erratic and complex way it is applied.’⁴⁰ Further difficulties arise as to the proper classification of the hybrid class of ‘indictable offences triable summarily’, a significant offence class in Tasmania. A classification based upon a distinction between ‘serious’ and ‘less serious’ offences was also considered but it was rejected because there are many ‘less serious’ offences that will justify arrest in certain circumstances (e.g. public order offences such as offensive behaviour). The option that the power of arrest without warrant be confined only to certain designated groups of offences was also considered and viewed as too complex for the demands of law enforcement. In the interests of simplicity and certainty, the ALRC took the view that ‘the power to arrest should depend not primarily on the character of the

³⁸ Law Reform Commission (Cth) Report No 2 (Interim) *Criminal Investigation* (1975).

³⁹ *Ibid*, para 30.

⁴⁰ *Ibid*, para 32.

offence at all, but on the necessity of arrest as a means of enforcement in the particular situation.’⁴¹ If the power to arrest was taken for granted in respect of any kind of offence, the focus would be placed upon the criteria specified for making a lawful arrest in a particular situation and these criteria should be stated in the legislation.

4.1.5 The ALRC placed very important caveats on its recommendation that all offences should be prima facie arrestable. First, arrest should normally be a matter of last resort; second, safeguards should be created and directed at the exercise of a police officer’s discretion to arrest in any case; and third, the powers of arrest without warrant should not be made available in respect of any offence proclaimed by Parliament to be non-arrestable. It was argued that the ‘occasional piecemeal proclamation of particular offences to be non-arrestable should not unduly complicate the working policeman’s task’.⁴²

4.1.6 All Commonwealth offences are made prima facie arrestable by s 3W of the *Crimes Act 1914* (Cth). The *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth), which inserted s 3W into the *Crimes Act 1914*, was based, in part, on the 1975 ALRC report. Section 3W provides:

- (1) A constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that:
 - (a) the person has committed or is committing the offence; and
 - (b) proceedings by summons against the person would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before a court in respect of the offence;
 - (ii) preventing a repetition or continuation of the offence or the commission of another offence;
 - (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
 - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - (v) preventing the fabrication of evidence in respect of the offence;
 - (vi) preserving the safety or welfare of the person.

4.1.7 The ‘purposes’ set out in s 3W(1)(b)(i)–(vi) attempt to control the exercise of a police officer’s discretion by specifying criteria by which the necessity for arrest is to be judged. They aim to limit the making of arrests to situations where they are clearly necessary – where there is a risk that the suspect may abscond or interfere with witnesses or evidence; to prevent the possible continuation of offences and where there is danger to the safety or welfare of the suspect. The subsection also provides implicit encouragement to police officers to proceed by way of summons rather than arrest. Alternatives to arrest without warrant will be discussed in greater detail in Part 9.

4.1.8 The simplicity and clarity achieved by the ALRC approach as enacted in s 3W of the *Crimes Act* is compelling. It obviates the need for long schedules of arrestable offences like those contained in Appendices A and B of the *Criminal Code Act 1924* (Tas). Regular legislative amendments to schedules to introduce new offences or repeal obsolete offences are also unnecessary. It also simplifies

⁴¹ Ibid, para 34.

⁴² Ibid.

the operation of the law and law enforcers' and courts' inquiry into the source of arrest powers when considering the lawfulness of an arrest. For example, in applying the law, courts and police officers are not required to assess whether a specific offence, amongst a countless number of offences, is arrestable or non-arrestable. Instead, the enquiry focuses upon the factors set down as relevant to the decision whether or not to arrest. An additional factor favouring the elimination of the distinction between arrestable and non-arrestable offences is that Tasmanian police already operate under one legislative regime that makes no such distinction – the *Crimes Act 1914* (Cth). Consequently, it seems sensible to homogenise the totality of their arrest powers in this regard.

4.1.9 The Queensland Parliament, in the *Police Powers and Responsibilities Act 2000* (Qld) has enacted a similar approach to arrest to that found in the Commonwealth *Crimes Act*. Section 365(1) of the Queensland Act gives police officers the power, without warrant, 'to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary' for one or more of the reasons listed in subparas (a)-(l) of that section. The reasons in s 365(1)(a)-(l) are more expansive than those provided in other legislative schemes. Section 365 of the *Police Powers and Responsibilities Act 2000* (Qld) provides:

- (1) It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons –
 - (a) to prevent the continuation or repetition of an offence or the commission of another offence;
 - (b) to make inquiries to establish the person's identity;
 - (c) to ensure the person's appearance before a court;
 - (d) to obtain or preserve evidence relating to the offence;
 - (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;
 - (f) to prevent the fabrication of evidence;
 - (g) to preserve the safety or welfare of any person, including the person arrested;
 - (h) to prevent a person fleeing from a police officer or the location of an offence;
 - (i) because the offence is an offence against section 790 or 791;
 - (j) because the offence is an offence against the *Domestic and Family Violence Protection Act 1989*, section 80;
 - (k) because of the nature and seriousness of the offence;
 - (l) because the offence is –
 - (i) an offence against the *Corrective Services Act 2006*, section 135(4); or
 - (ii) an offence to which the *Corrective Services Act 2006*, section 136 applies.
- (2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 15.

It is worth remembering, however, that the operation of the Queensland legislation is subject to on-going and regular review by the Queensland Crime and Misconduct Commission (CMC), an independent authority created to monitor, review, coordinate and initiate reform of the administration

of criminal justice in Queensland. The CMC's powers include overseeing and monitoring Queensland police and receiving and investigating complaints about police. This institution can act as a significant restraint on excessive or improper use of police power, including arrest powers.

4.1.10 Similarly, in New South Wales no distinction is made between arrestable and non-arrestable offences. Police officers have the power under s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) to arrest without warrant where it is believed that an offence is being or has been committed. The New South Wales Act provides slightly tighter safeguards on the exercise of the discretion to arrest than the Commonwealth legislation by specifying that an arrest *must not be made* unless the police officer suspects on reasonable grounds that the circumstances set down as justifying an arrest are present. Those circumstances are the same as those set down in s 3W(1)(b)(i)–(vi) of the Commonwealth *Crimes Act 1914* (see 4.1.6 above). Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides:

S 99 Power of police officers to arrest without warrant

(cf Crimes Act 1900, s 352, Cth Act, s 3W)

- (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.
- (4) 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.

4.1.11 Victoria has adopted a slightly less expansive approach and draws a temporal distinction between arrest powers for summary and indictable offences. Section 458 of the *Crimes Act 1958* (Vic) empowers anyone to arrest a person *found committing* an offence, whether summary or indictable. Section 459 then provides that police officers may arrest a person whom they believe on reasonable grounds to *have committed an indictable* offence. While the Victorian legislation maintains a distinction between summary and indictable offences, the Victorian approach is vastly less complicated and varied than that currently operating in Tasmania.

4.1.12 Although the approach adopted in Queensland, New South Wales and by the Commonwealth is attractive in its simplicity, there are counter arguments to its adoption in Tasmania. It would constitute a major departure from the law as it is presently framed and would require significant legislative change and retraining of police officers to ensure that the redefinition of police arrest powers and the effect of the rules governing their exercise are understood. There is also the concern that police may use their broadened powers of arrest inappropriately and arrest for minor offences in respect of which they should properly proceed by way of summons. There is evidence that despite legislative and curial exhortations to proceed by way of summons in preference to arrest, police remain reluctant to do so.⁴³ One of the reasons that police are reluctant to use the summons process is because it is time consuming and unwieldy. Generally, a summons is issued on application to a justice of the peace who must be satisfied that there are reasonable grounds for its issue. In a number of jurisdictions a simplified process has been introduced enabling the police to issue on-the-spot attendance notices or notices to appear.⁴⁴

An arrest involves a significant abrogation of the liberty of the citizen and, accordingly, should only be made where there are compelling reasons for doing so. There is concern that if police arrest powers are broadened, there will be little real check upon their inappropriate use. In the absence of a similar institution to the Queensland Crime and Misconduct Commission, only the courts are in a position to provide independent review of the exercise of police powers. However, curial oversight is only ever likely to occur spasmodically when an accused challenges the legitimacy of an arrest at trial. If there is no prosecution or the accused pleads guilty there can be no judicial scrutiny unless the arrestee institutes civil proceedings. Given that the majority of defendants plead guilty⁴⁵ and that civil proceedings for unlawful arrest are rare, clearly judicial oversight can provide very limited supervision of police conduct.⁴⁶

4.1.13 Despite these concerns, the view of the Institute is that the objectives of clarity, simplicity and accessibility warrant reform of the law of arrest in Tasmania to remove the distinction between arrestable and non-arrestable offences. However, the broadened arrest powers should be subject to limitations that clearly define the circumstances when an arrest may be made. In this regard the proscriptive approach in the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* provides a useful precedent. It proscribes the making of an arrest unless the specified circumstances justifying an arrest are present. In this respect it is a shade more stringent than the Commonwealth, Queensland and Victorian legislative regimes.

4.1.14 There is existing precedent in Tasmania for the subjection of arrest powers to limiting criteria. The *Youth Justice Act 1997* (Tas) limits the power of arrest without warrant in relation to young people by providing in s 24 that:

⁴³ See the discussion on this issue and the research referred to in Hunter, Cameron and Henning above n 1, 426.

⁴⁴ See for example, the *Police Powers and Responsibilities Act 2000* (Qld) ss 382–390; the *Criminal Procedure Act 1986* (NSW) ss 47–52 and ss 172–181 and the *Police Administration Act 1978* (NT), s 133B.

⁴⁵ Over 90% of defendants in higher courts plead guilty to the charges laid against them: see, *Criminal Courts 2003-04* (2005) Australian Bureau of Statistics <www.abs.gov.au> at 15 July 2010.

⁴⁶ For an example of judicial disapproval where police arrested an offender rather than proceeding by way of summons, see *DPP v Carr* [2002] NSWSC 194 where Smart J held that it was improper for powers of arrest to be used for minor offences where the police know the name and address of the accused, there is no risk that he will abscond and no reason to believe that a summons will not secure his attendance at court. His Honour held that it was appropriate to exclude evidence of offences obtained in these circumstances.

A police officer may only arrest a youth in relation to an offence if the arresting officer believes the offence is serious enough to warrant an arrest and also believes, on reasonable grounds, that –

- (a) the arrest is necessary to prevent a continuation or repetition of the offence; or
- (b) the arrest is necessary to facilitate the making of a police family violence order, within the meaning of the *Family Violence Act 2004*, an application for a family violence order under that Act or an application for a restraint order under Part XA of the *Justices Act 1959*; or
- (c) the arrest is necessary to prevent concealment, loss or destruction of evidence relating to the offence; or
- (d) the youth is unlikely to appear before the Court in response to a complaint and summons.

Thus, a police officer only has the power to arrest a young person without warrant if the suspected offence is serious *and* one of the conditions in (a)–(d) are met.⁴⁷ This limitation on arrest powers recognises that young people may be particularly vulnerable when under arrest, and therefore it is desirable to minimise the arrest of young people.

4.1.15 It is also proposed that reform be accompanied by an overhaul of the law relating to alternatives to arrest without warrant. In fact, potentially the most effective approach to reform may be achieved by focusing upon the provision of practical alternatives to arrest. This matter is discussed more fully in Part 9.

Submissions

4.1.16 The Tasmania Police submission expressed the view that the current legislative approach to arrest without warrant that distinguishes between arrestable and non-arrestable offences should be reformed. Tasmania Police submitted that all offences in Tasmania should be made prima facie arrestable and agreed that the broadened power of arrest be circumscribed by ‘limiting criteria ... specified in the legislation’. The submission nominated the Queensland legislative model contained in s 365 of the *Police Powers and Responsibilities Act 2001* (Qld) as the preferred approach (‘with necessary amendments suitable for Tasmania Police’) rather than the New South Wales model,⁴⁸ which was regarded as ‘too restrictive’.

4.1.17 Tasmania Police acknowledged that a change in favour of making all offences prima facie arrestable ‘would constitute a major departure from the law as it is presently framed and would require significant legislative change and retraining.’ It observed that ‘any move to make all offences prima facie arrestable with qualifying criteria, is likely to erode the discretion of police with regard to when an arrest can be made.’ It would transform a significant part of police operations:

If qualifying criteria become the primary consideration, then this changes the entire dynamics of the arrest from being offence-based to requiring a more detailed assessment of the circumstances. This is a substantial shift in the application of arrest principles and would demand significant revision of policies, procedures and training for police members.

Nevertheless, Tasmania Police believes that it has the capability to undertake the necessary change.

⁴⁷ This section is also specifically referred to by the Code, s 27(12), and the *Police Offences Act 1935*, s 55(3A).

⁴⁸ See above para 4.1.10.

4.1.18 If all offences are to be prima facie arrestable the legislation conferring arrest powers should also define the circumstances when such powers can be exercised. Such a legislative approach operates within the Commonwealth, Queensland, Victoria and New South Wales jurisdictions. The Criminal Law Committee of the Law Society also agreed with the proposal to abolish the distinction between arrestable and non-arrestable offences in favour of classifying all offences as prima facie arrestable. Their submission stated:

The distinction in Victoria between indictable and summary offences was seen as potentially confusing given Tasmanian provisions, where offences can be viewed as both; such as assault, some sexual assaults and dishonesty offences depending on the value.

It would be undesirable to have someone charged with an indictable offence when a summary charge would have sufficed just to make an arrest valid.

If all offences are to become prima facie arrestable there should be included in the legislation clearly defined circumstances for when an arrest can be made.

It is the committee's view that despite the fact that this would be a significant change to current arrest laws, it was something that could be adopted easily enough with appropriate training being provided to police.

4.1.19 The Criminal Law Committee's submission also preferred the Queensland model of empowering a police officer to arrest without warrant if certain circumstances were satisfied.

Recommendations

4.1.20 There is support to reform the law relating to arrest powers without warrant from the current situation where only certain offences are classified as prima facie arrestable while other offences are non-arrestable, to a situation where all offences are prima facie arrestable. This was the approach to the classification of offences recommended by the ALRC in its 1975 report, *Criminal Investigation*, and is now the approach in force in the New South Wales, Victoria, Queensland and Commonwealth criminal jurisdictions. If all offences are to be classified as prima facie arrestable, the ALRC also suggested that arrest should normally be a matter of last resort in any given situation and that a system of safeguards should be applied to a police officer's power to execute an arrest in any case.

4.1.21 A broadened power of arrest that can be exercised for all offences should be circumscribed by statutorily specified criteria. As has been noted, the Queensland, New South Wales and Commonwealth approaches to specifying the circumstances in which an arrest is 'lawful' vary. The Queensland approach, expressed in s 365 of the *Police Powers and Responsibilities Act 2000* (Qld), prescribes twelve conditions or reasons applying to when an arrest without warrant can take place. This approach is wide-ranging and offers police considerable latitude to exercise their arrest powers. Notably, however, there is no explicit or implicit reference to arrest being a measure of last resort. As long as one of the many criteria specified in the legislation are satisfied, an arrest will be regarded as 'lawful'.

4.1.22 In New South Wales, the principle that arrest is a measure of last resort is more strongly reflected in the relevant legislation. The Second Reading Speech applicable to s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) states bluntly that arrest is a measure of last resort:

The provisions of Part 8 [Powers Relating to Arrest] reflect that arrest is an extreme measure that is to be exercised only when necessary. An arrest should only be used as a last resort as it is the most invasive way of securing the accused person's attendance at court.

Section 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence. Failure to comply with this section would not, of itself, invalidate the charge ... Arrest is a measure of last resort.

Consequently, s 99(3) states that a police officer ‘must not arrest a person’ for an offence 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’ and lists criteria, including that an arrest is necessary to ensure the person’s appearance at court or to prevent the destruction of evidence. The difference in emphasis between the Queensland and New South Wales models is significant. While the Queensland model prescribes broadly the circumstances in which an arrest is ‘lawful’, the New South Wales model proscribes arrest unless certain criteria are satisfied. The Queensland model can be described as an authorising approach and the New South Wales model as a proscriptive approach.

4.1.23 The New South Wales construction of the broadened power to arrest circumscribed by statutorily specified limiting circumstances is similar to the construction of the power of arrest without warrant in relation to young people, conferred by s 24 of the *Youth Justice Act 1997* (Tas). It is arguable that this section also reflects the principle that arrest is a measure of last resort (for young people). Section 24 states that a police officer ‘may only arrest a youth’ for an offence if the officer ‘believes the offence is serious enough to warrant an arrest and also believes on reasonable grounds’ that one of four conditions have been satisfied, including arrest is necessary to prevent destruction of evidence and to ensure appearance at court. The Tasmanian provision seeks to limit recourse to arrest (as it relates to young people) in a way similar to s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

4.1.24 Following the advice of the ALRC in its report on *Criminal Investigation*, both New South Wales and Queensland instituted in the relevant legislation a system of safeguards to be applied to a police officer’s power to execute an arrest in any case. The powers relating to arrest in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) are subject to safeguards contained in s 201 (supplying police officer’s details and giving warnings) of the Act. Subsection 1 of s 201 states:

- (1) A police officer must provide the person subject to the exercise of the power referred to in subsection (3) with the following:
 - (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
 - (b) the name of the police officer and his or her place of duty,
 - (c) the reason for the exercise of the power.

Similar safeguards relating to the supply of a police officer’s details in the course of an arrest also appear in s 637(2) and (3) of the *Police Powers and Responsibilities Act 2000* (Qld):

- (2) The police officer must, as soon as reasonably practicable, inform the person the subject of the power [of arrest] of the following—
 - (a) if the police officer is not in uniform—
 - (i) that he or she is a police officer; and
 - (ii) his or her name, rank and station; or
 - (b) if the police officer is in uniform—his or her name, rank and station.
- (3) if the police officer is not in uniform, the police officer must also produce for inspection his or her identity card.

4.1.25 In New South Wales and Queensland there are also other safeguards on the police officer’s power to effect an arrest in a situation where all offences are prima facie arrestable. Firstly, both these jurisdictions encourage the use of easier and more attractive alternatives to arrest (as is discussed in Part 9). Secondly, both jurisdictions have in place independent agencies that are able to receive and investigate complaints about the conduct of police officers. Both the CMC (Qld) and the Police Integrity Commission (NSW) aim to prevent police misconduct by providing oversight on the exercise of police powers.

4.1.26 If the distinction between arrestable and non-arrestable offences is eliminated in Tasmania and replaced by a regime in which all offences are prima facie arrestable, this broadened power to arrest without warrant must be circumscribed so that it is exercisable only when certain circumstances are present. The preferred model and precedent in this regard is that provided in s 99 of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*. This is because it is more protective of the right to liberty than other similar legislative regimes in Australia. If police powers are to be broadened then the approach that offers greatest protection against their abuse and the most measured approach to their expansion should be adopted.

4.1.27 The legislation conferring this broadened power should also:

- Recognise explicitly the principle that arrest is normally a matter of last resort in any given situation, and
- Establish a system of safeguards such as those provided in s 637(2) and (3) of the *Police Powers and Responsibilities Act 2000* (Qld) to apply to a police officer's power to effect an arrest in any given case.

4.1.28 Changing the nature of all offences in Tasmania so that they all trigger a power of police arrest without warrant would constitute a transformation of the law, but would also result in greater simplicity and certainty in the area of law enforcement. Such a change will require widespread support, training and education for police officers and the broader community. The recent implementation of family violence legislation in Tasmania, which radically transformed the relevant law and which was also supported by a program of training for police and an education campaign directed to the public, suggests that a redefinition of police arrest powers within a new legal framework in which all offences are classified as prima facie arrestable is possible.

Recommendation 5

That:

- (1) The law of arrest relating to powers of arrest be reformed to eliminate the distinction between arrestable and non-arrestable offences;
- (2) The broadened power to arrest be circumscribed by:
 - (a) the statutorily specified requirement that an arrest is to be made only as a matter of last resort, and
 - (b) by provision that an arrest *must not be made* unless the police officer believes on reasonable grounds that specified limiting circumstances exist. In this regard the Institute recommends that the approach in s 99 of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* be adopted in preference to other models currently in operation in Australia;
- (3) The legislation establish a system of safeguards such as those provided in s 637(2) and (3) of the *Police Powers and Responsibilities Act 2000* (Qld) to apply to a police officer's exercise of the power to effect an arrest in any given case;
- (4) That this reform be accompanied by reform of the law relating to alternatives to arrest.

Part 5

When an Arrest May be Made

5.1 Grounds for arrest – standard of belief

5.1.1 The terms of reference under which this project has been conducted specifically required the Institute to compare ‘terminology, prerequisites and other criteria relevant to the exercise of [arrest] powers’. In Tasmania, there are a variety of formulations of the grounds of arrest. Most commonly the power to arrest is based upon the arrestor ‘reasonably believing’ or ‘believing on reasonable grounds’ that the arrestee is committing or has committed an arrestable offence. Fifteen separate arrest provisions, however, use the formulation ‘reasonable grounds *to suspect*’ or a similar formulation rather than ‘reasonable *belief*’ –

- *Police Offences Act 1935*, s 38A(4);
- *Justices Act 1959*, s 106I(2);
- *Parliament House Act 1962*, s 8;⁴⁹
- *Road Safety (Alcohol and Drugs) Act 1970*, ss 5(1)(a) and 19A(2)(a);
- *Crime (Confiscation of Profits) Act 1993*, s 43(b);
- *Second-hand Dealers and Pawnbrokers Act 1994*, s 15;
- *Vehicle and Traffic Act 1999*, s 13(3);
- *Security and Investigations Agents Act 2002*, ss 27B and 27C;
- *Family Violence Act 2004*, ss 10(2), (4), (7) and 11;⁵⁰ and
- *Marine Safety (Misuse of Alcohol) Act 2006*, s 38(4).

5.1.2 In fact, there is great variation in the language used across the legislation: ‘reasonable grounds for believing’; ‘reasonably believes’; ‘reasonable ground to believe’; ‘believes on reasonable grounds’; ‘reasonably suspects’; ‘probable cause for believing’; ‘reasonable cause to suspect’; ‘believes or suspects’; ‘with reasonable cause, they suspect’ and ‘reasonable grounds to suspect’. It is not clear why different legislative regimes use different formulations.

5.1.3 The varying formulations of the grounds of arrest in the Tasmanian legislation create difficulties in its application and interpretation. The difference between the standards of ‘reasonable belief’ and ‘reasonable suspicion’ was considered by the High Court in *George v Rockett*,⁵¹ where it was held that the standard of ‘reasonable belief’ requires a higher level of certainty than a ‘reasonable suspicion’:

⁴⁹ Section 8(1) of this Act uses both standards simultaneously: ‘A person whom the controlling officer or a person acting under his or her orders believes or suspects to have committed an offence under this Act ...’

⁵⁰ For discussion of this provision and its possible retention, see Part 3.3.

⁵¹ (1990) 170 CLR 104.

Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* [1970] AC 942 at 948, “in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove.’” The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief...⁵²

5.1.4 The High Court observed that suspicion and belief are different states of mind and that the existence of facts which are sufficient to induce these states of mind in a reasonable person are likely also to be different.⁵³ It is difficult to identify an underlying rationale for the different states of mind provided in Tasmanian legislation. It would advance the aims of clarity and consistency if a single, uniform standard of certainty as a prerequisite to arrest were settled upon. The view of the Institute is that the higher standard, that is, a ‘reasonable belief’, should be adopted. This is because this standard is currently used in the majority of statutory provisions and also because it sets a higher threshold for the application of coercive powers and incursions on the right to liberty.

Submissions

5.1.5 Tasmania Police submitted that the standard of belief required of an arrestor before she or he exercises her or his power of arrest ought to be based on ‘reasonable grounds to suspect’. This formulation and similar formulations with a ‘reasonable suspicion’ element occur far less frequently in Tasmanian legislation compared to the ‘reasonable belief’ formulation.

5.1.6 The Criminal Law Committee of the Law Society agreed with the Institute’s proposal that a consolidated power of arrest without warrant should have grounds of arrest that relate to the ‘reasonable belief’ of the arrestor.

Recommendations

5.1.7 The great majority of Tasmania’s statutory arrest provisions are currently formulated with ‘reasonable belief’ as the standard of belief necessary before a power of arrest can be applied. The terminology and criteria related to grounds of arrest are inconsistent and confusing. The significant variation in the language and standards used currently across the legislation is apt to mystify. The most consistent and uniform standard of belief currently applied is ‘reasonable belief’, therefore an Act dealing centrally with powers of arrest capable of being exercised under a variety of other pieces of legislation should employ this standard. This is also a higher standard than a reasonable suspicion. Adopting the reasonable belief standard as the uniform standard would comply with the principle of parsimony in that it justifies incursions on the right to liberty in a more limited manner than would the reasonable suspicion standard.

5.1.8 The key pieces of arrest legislation in Tasmania, the *Criminal Code Act 1924* (Tas) and *Police Offences Act 1935* (Tas), both use the ‘reasonable belief’ formulation as the requisite grounds for arrest. This formulation also generally operates with respect to arrest powers in Victoria, the Northern Territory and for Commonwealth offences. Tasmania Police operating under the Commonwealth *Crimes Act 1914* must also have a reasonable belief before they exercise the arrest powers given to them under Commonwealth legislation. The sheer incidence of the ‘reasonable belief’

⁵² Ibid, 115.

⁵³ Ibid. Irrespective of the state of mind required under the various legislative provisions, however, arrestors are not required to assess the legal admissibility of evidence or take into account other considerations relevant to determining the likelihood of a successful conviction. The common law establishes that the level of certainty necessary to justify arrest is lower than that necessary to justify the laying of a charge (see *Williams* (1986) 161 CLR 278, 300) and far lower than the level necessary to found a conviction – beyond reasonable doubt (*Hussien v Chong Fook Kam* [1970] AC 942 (PC)). An arrestee who contends that there was not a reasonable belief or suspicion bears the evidential burden in relation to the issue (*R v King* [1970] SASR 503).

formulation as well as the value of greater uniformity or consistency with Commonwealth laws suggests that such a formulation should be preferred.

5.1.9 The ‘reasonable suspicion’ formulation operates in New South Wales, Queensland, Western Australia and the Australian Capital Territory.

Recommendation 6

That a consolidated general power of arrest without warrant be set down in the *Arrest Act* and that it provide that:

- (1) A police officer has a power to arrest without warrant a person whom he or she believes on reasonable grounds to have committed or be committing an offence.
- (2) This power should be subject to statutorily specified limiting circumstances as suggested in Recommendation 5.

5.2 Special rules regarding vulnerable groups

5.2.1 The Institute recognises that there are certain groups in the community that are especially vulnerable to arrest and may be at particular risk when involved in the process of arrest. The Institute identifies the following as groups that may require special protection during an arrest:

- (a) Children and young people;
- (b) Aborigines and Torres Strait Islanders;
- (c) People with impaired mental and/or physical functions;
- (d) People from non-English speaking backgrounds; and
- (e) Other persons, who by reason of some disability, are unable to communicate properly with the police (such as the seriously visually or aurally impaired, persons who cannot speak, and so on).⁵⁴

5.2.2 To varying degrees, the criminal justice system already recognises that there are categories of persons who are particularly vulnerable when in police custody and require special consideration and treatment in the criminal investigation process. For example, ss 27(12) and 55(3A) of the *Criminal Code* and *Police Offences Act* respectively recognise that children and young people (persons under the age of seventeen) should be considered in a different light during the process of criminal investigation. Accordingly, the *Youth Justice Act 1997* (Tas) and, to a lesser extent, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) institute special rules for young people. Moreover, s 18(1) of the *Criminal Code* provides that ‘no act or omission done or made by a person under 10 years of age is an offence’. Persons under the age of 10 years are incapable of committing an offence and, therefore, are unable to be arrested. The Police Commissioner’s Instructions also contain specific protective provisions dealing with the arrest, questioning and treatment of children and youths,⁵⁵ non-Australian citizens⁵⁶ and Aborigines.⁵⁷

⁵⁴ New South Wales Law Reform Commission, *Criminal Procedure, Police Powers of Arrest and Detention: Report*, (December 1990) 131.

⁵⁵ Clauses 9.1.1.4 – 9.1.1.7, see Appendix B.

⁵⁶ Clause 7.16.

⁵⁷ Clauses 7.10 – 7.10.2.

5.2.3 The problems and special difficulties of Aborigines and Torres Strait Islanders, children, young people and mentally and physically disabled persons during and post-arrest have been considered elsewhere.⁵⁸ The problems of vulnerability and susceptibility both for group members and for police suggests that the interests of vulnerable groups, the police and the wider community would be served by the inclusion of some pragmatic rules related to vulnerable groups in a code of arrest.

5.2.4 The Institute invited comments on whether special rules or protections should be developed as part of a general legislative code for arrest powers to regulate the arrests of persons in these categories. Alternatively, protections may be instituted in the form of subordinate legislation (such as a Code of Practice), which carries with it appropriate and sufficient accountability mechanisms.

Submissions

5.2.5 The then Interim Commissioner for Children strongly advocated that any proposed statute consolidating arrest powers contain a ‘specific section’ that deals with the arrest of young people. The Commissioner said:

It is important that current limitations on arrest powers specific to young people be maintained and not diluted in any way. I refer in particular to section 24 of the *Youth Justice Act 1997*, which requires that the power to arrest be exercised only if the offence is considered serious enough to warrant arrest and if various other criteria are met. This provision should be maintained to reinforce a general provision that arrest must only be used as a last resort.

The Commissioner suggested that the police have a higher duty of care when arresting young people and that the ‘current legislative provisions do not go far enough to protect the rights and interests of young people upon arrest.’ She commented:

Currently, legislation provides that a young person will be informed of their right to communicate with a lawyer before questioning in relation to an offence, at which time they also have the right to communicate with a friend or relative (*Criminal Law (Detention and Interrogation Act) 1995*). If the matter proceeds to court, the court has the duty to inform the young person of their right to legal representation (section 29, *Youth Justice Act 1997*).

I believe that a young person should be informed of their rights to communicate with a lawyer and with a parent/guardian or responsible adult *at the time of arrest*.⁵⁹ In addition, I believe that there should be a positive obligation on police to inform parents/guardians when an arrest of a young person is made and to assist young persons in exercising their rights.

Such ‘positive obligations’ serve to introduce a greater level of protection for young people subject to arrest than is currently the case.

5.2.6 Youth Justice Services (a division of the Tasmanian Department of Health and Human Services) generally supported the views and suggestions of the then Interim Commissioner at a meeting held on 27 April 2007. The protections afforded to persons in custody, as defined by s 3(2) of the *Criminal Law (Detention and Interrogation Act) 1995*, should be exported to young people at the time of arrest. Namely, the right to an interpreter (s 5) and the right to communicate with a friend, relative and legal practitioner (s 6) should apply not just to the circumstances where a person is held in detention for questioning and investigation, but should be afforded to young people as a protection immediately upon the making of an arrest.

5.2.7 The Tasmania Police Manual⁶⁰ of operating procedures and policies states that it is the ‘policy of Tasmania Police that members should only arrest children in situations where it is believed

⁵⁸ New South Wales Law Reform Commission, above n 55, 132.

⁵⁹ Emphasis added.

⁶⁰ This document indicates police policy and training but has no legislative force (see Appendix B).

that proceedings against the child by way of caution, diversionary conferencing or summons would be ineffective, or where necessary to comply with legislative requirements.’ It also orders that ‘members who arrest a child shall immediately advise their supervisor, Divisional Inspector or Duty Officer, of the circumstances.’ These sorts of measures would carry more weight if they were reflected in legislation rather than in policy.

5.2.8 Tasmania Police submitted that current legislative provisions and provisions within the Police Manual provided sufficient protections with respect to the arrest of persons belonging to identified vulnerable groups. The Criminal Law Committee of the Law Society also submitted that existing safeguards are adequate and that no change is needed.

Recommendations

5.2.9 There are currently no protective measures in Tasmania’s arrest legislation that target the arrest of vulnerable groups other than children. The Institute received no submissions from groups that advocate for Indigenous peoples, people with mental illnesses or developmental disabilities or people from non-English speaking backgrounds. There are solid grounds for incorporating protective measures with respect to all these groups into a consolidated *Arrest Act*. As suggested by both the then Interim Commissioner for Children and Youth Justice Services, young persons should be informed, *at the time of arrest*, of their rights to communicate with a lawyer and with a parent/guardian or responsible adult and police should additionally inform parents/guardians when an arrest of a young person is made. Police should assist young persons in exercising their rights to communicate with a lawyer or parent/guardian. Similar provisions should apply to other identified vulnerable groups who are at a particular disadvantage in custodial situations.

5.2.10 In relation to the arrest of persons belonging to Aboriginal and Torres Strait Islander communities, the Royal Commission into Aboriginal Deaths in Custody provided key recommendations with respect to the higher duty of care needed when arresting Indigenous peoples that are yet to find their way into Tasmanian legislation.

5.2.11 The Royal Commission into Aboriginal Deaths in Custody National Report released in 1991 is a landmark examination of the social, cultural and legal factors affecting the deaths of Aboriginal people in custody.⁶¹ The 339 recommendations contained in the Report can be broadly grouped into the following categories: (a) ways of reducing over-representation and contact of Indigenous people with the criminal justice system; and (b) tackling the underlying factors contributing to Indigenous peoples’ contact with the criminal justice system, such as poor health and housing, low employment and education levels, dysfunctional families and communities, dispossession and past government policies.⁶² The Commission maintained that the most significant contributing factor bringing Aboriginal people into conflict with the criminal justice system was their disadvantaged and unequal position in the wider society. Additionally, it found that criminal justice systems were culturally ignorant and insensitive to the needs of Indigenous persons and communities, contributing to the disproportionate rate of deaths in custody. The Commission concluded that while a common thread of abuse, neglect or racism could not be supported in the cases of the 99 Aboriginal deaths investigated,

⁶¹ On 15 April 1991, the Royal Commission's National Report was presented to the Commonwealth, State and Territory governments. On 9 May 1991 it was tabled in the Commonwealth Parliament. The Commission’s proceedings are constituted by over 100,000 pages of transcript, over 20 research papers and 11 report volumes.

⁶² See generally, Department of Justice (Victoria), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Melbourne, October 2005.

Aboriginality played a significant, and in most cases, a dominant role in their being in custody and dying in custody.⁶³ Further, it concluded that:

Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody ... However what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community.⁶⁴

5.2.12 The Commission's 339 recommendations contained in the Final Report included measures to: divert Aboriginal people from custody; address alcohol and substance abuse; enhance self-determination; improve relations with police; and improve the operation of the criminal justice system. Imprisonment as a last resort and minimising the use of arrest were recommended as fundamental principles to be adopted in dealings between Indigenous people and the criminal justice system. After the Report was tabled in the Commonwealth Parliament, governments from all jurisdictions gave a commitment to reducing the over-representation of Aboriginal people in custody and in July 1991, the Commonwealth and all state and territory governments agreed to develop a national response to the recommendations in consultation with Indigenous communities. To varying degrees, mechanisms for implementing and monitoring the recommendations were established in each of the jurisdictions. Since 1992, however, annual implementation reports have been tabled only spasmodically in the parliaments of the Commonwealth, State and Territories. No reports on implementation have been produced nationwide since 1996-97, and Indigenous communities have not been informed about the reasons for this. Yet in spite of the efforts nationwide, both by governments and Indigenous communities, to implement the Commission's Recommendations, there has been minimal reduction in the levels of Indigenous over-representation in the criminal justice system Australia-wide:

- (a) After adjusting for age differences, Indigenous people were 13.3 times as likely as non-Indigenous people to be imprisoned in 2008;
- (b) The imprisonment rate increased by 45.5% for Indigenous women and by 26.6% for indigenous men between 2000 and 2008;
- (c) Indigenous juveniles were 28 times as likely as non-Indigenous juveniles to be detained at 30th June 2007. The indigenous juvenile detention rate increased by 26.7% between 2001 and 2007.⁶⁵

According to the Australian Bureau of Statistics, as at 30 June 2010, the imprisonment rate for Aborigines and Torres Strait islanders was 14 times higher than the rate for non-Indigenous prisoners. Between 2000 and 2010, imprisonment rates for Aboriginal and Torres Strait Islander Australians increased from 1,248 to 1,892 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. In comparison, the rate for non-Indigenous prisoners increased from 130 to 134 per 100,000 adult non-Indigenous population.⁶⁶ The Australian Institute of Criminology found that as at 30 June 2008, Indigenous juveniles in Tasmania were three times as likely as non-Indigenous juveniles.⁶⁷ Citing Chris Cunneen, the *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* states that:

⁶³ Royal Commission into Aboriginal Deaths in Custody, *Royal Commission into Aboriginal Deaths in Custody National Report: Volumes 1- 5*, Australian Government Publishing Service: Canberra, 1991.

⁶⁴ *Ibid*, Vol. 1, 1.3.1, 1.3.2.

⁶⁵ Australian Government Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Steering Committee for the Review of Government Service Provision (2009) 4.12; <<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009>>.

⁶⁶ Australian Bureau of Statistics *Prisoners in Australia, 2010, 4517* <<http://www.abs.gov.au/ausstats/abs@.nsf/>>.

⁶⁷ AIC, *Juveniles in Detention in Australia*, 2009, 33.

the last decade has brought widespread disappointment with the Royal Commission among Aboriginal people ... police officers involved in specific deaths never faced the consequences for their actions, while the implementation of the Recommendations from the Royal Commission has stalled and the momentum set in train by the Royal Commission appears to have been lost.⁶⁸

5.2.13 The Tasmania Police Manual of operating procedures and policies implements some Royal Commission into Aboriginal Deaths in Custody recommendations, including those relating to the care of those detained in police custody, restrictions on multiple charge syndrome, restrictions on conducting warrant checks at cultural events and the notification of a relative/friend and the Aboriginal Legal Service upon arrest or detention of an Indigenous person (Recommendation 224). The Manual states that ‘it is the policy of Tasmania Police that, unless exceptional circumstances exist or statutory requirements require otherwise, Aborigines should be admitted to bail at the first opportunity and not be placed in cells.’ (See Appendix B, 7.10). It is noteworthy, however, that Recommendation 87 – that arrest should only be used as a last resort is not reflected in the Manual, or for that matter in any legislation. Similarly, there is no legislative expression to Recommendation 92 that imprisonment should only be utilised as a sanction of last resort for Indigenous people.

5.2.14 It is the Institute’s view that, given that Indigenous adults and juveniles continue to be placed in detention at rates more than 14 times higher than their non-Indigenous counterparts, a consolidated *Arrest Act* should include a provision that expressly states that arrest should only be used as a last resort for Aborigines and Torres Strait Islanders and that arresting officers should record in writing their reasons for utilising their power to arrest rather than employing an alternative to arrest.

The Institute’s recommendations with respect to the additional protections that should attach to the arrest of vulnerable persons are based on: The *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), Part 3, Division 3 – Vulnerable Persons; *Code of Practice for Custody, Rights, Investigation, Management and Evidence* (CRIME) (NSW), see in particular pp 17-18 which deal with the role of the custody manager when dealing with vulnerable persons; the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); the *Crimes Act 1914* (Cth), Part IC – Investigation of Commonwealth offences, Division 3 – Obligations of investigating officials, ss 23F – 23Q; the *Police Powers and Responsibilities Act 2000* (QLD), Part 3, Division 3 – Special requirements for questioning particular persons (ss 420 – 423) and the *Criminal Law (Detention and Interrogation) Act 1995* (Tas).

⁶⁸ Department of Justice (Victoria), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005).

Recommendation 7

That the proposed Arrest Act should include protective provisions for vulnerable persons. A vulnerable person should be defined as a person who falls into one or more of the following categories:

- Young persons;
- Persons who have impaired intellectual functioning;
- Persons who have impaired physical functioning;
- Aborigines and Torres Strait Islanders;
- Persons who are of non-English speaking background.

The protective provisions for vulnerable people should stipulate:

- (1) That the arresting officer must record in writing the reason for effecting an arrest rather than employing an alternative to arrest;
- (2) That a vulnerable person must be informed *at the time of the arrest* of his or her right to communicate with a friend, relative, parent/guardian, responsible person, legal practitioner and/or interpreter (relevant person) as is appropriate;
- (3) That when a vulnerable person is arrested there should be an obligation to inform a relevant person of the arrest:
 - (a) When a young person is arrested, there should be an obligation upon the police to inform a parent/guardian, responsible person or other relevant person of the arrest.
 - (b) When an Aborigine or Torres Strait Islander is arrested the Aboriginal Legal Service should be notified via the on-call Field Officer in accordance with Tasmania Police requirements (Aboriginal Strategic Plan).
 - (c) If a person with impaired intellectual or physical functioning is arrested, there should be an obligation upon police to notify a relevant person or responsible person as appropriate.
- (4) Then the police must assist an arrestee who is a vulnerable person in communicating with a relevant person and the relevant person should be present during any interview.
- (5) That when a person from a non-English speaking background is arrested the police officer conducting the investigation must defer any questioning until an interpreter is present.

Part 6

Executing a Lawful Arrest

6.1 Introduction

6.1.1 An arrest will only be lawful if the arrestor has a power to arrest and the arrest is executed lawfully. So far this Report has focused upon arrest powers. This Part considers how the law requires an arrest to be executed, in particular it considers:

- Informing the arrestee of the reasons for the arrest;
- The use of force in making an arrest; and
- The place of arrest.

6.1.2 It is logical that any reforms relating to the execution of an arrest be included in the proposed consolidating arrest legislation.

Submissions

6.1.3 Tasmania Police, the Criminal Law Committee of the Law Society and the then Interim Commissioner for Children all agreed with the proposal to locate the laws concerning how an arrest should be executed within legislation consolidating powers of arrest in Tasmania.

Recommendation 8

That laws concerning how an arrest should be executed be located in legislation consolidating powers of arrest.

6.2 Informing of the reason for arrest

6.2.1 At common law a person must be informed of the reason for their arrest at the time of the arrest unless it is not practicable to do so (for example, because the arrestee is attempting to flee or is unconscious) or unless the reasons are obvious (for instance, the gunman at the scene of a bank robbery).⁶⁹ Section 301(2) of the *Criminal Code Act 1924* (Tas) is to *similar* effect, ‘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.’⁷⁰

6.2.2 The Tasmania Law Reform Institute has observed previously that s 301(2) could be improved if it was specified that the duty to give reasons exists ‘at the time of the arrest’ and not at some vague time after an arrest.⁷¹ In contrast to the common law, the *Criminal Code* does not provide that it is unnecessary to give reasons for an arrest where those reasons are obvious. The Institute has previously

⁶⁹ *Christie v Leachinsky* [1947] AC 573.

⁷⁰ Section 301(2) of the *Criminal Code* applies to indictable offences and the duty at common law applies to summary offences: *Gow v Davies* [1992] 1 Tas R 1; *Criminal Code* s 4(3).

⁷¹ Tasmania Law Reform Institute, *Custody, Arrest and Police Bail, Issues Paper No. 1* (March 2002) and *Custody, Arrest and Police Bail, Final Report No. 1* (March 2003). Both publications are available at http://www.law.utas.edu.au/reform/report_publications.html.

expressed support for the *Code* position in this regard, because reasons should be stated even where they may seem obvious. Doing so is not an onerous obligation and even though the reasons may seem obvious to the arrestor, they may not be obvious to the arrestee.

6.2.3 Another problem with the *Criminal Code* duty to give reasons is that, unlike the position at common law where a failure to provide reasons makes an arrest unlawful, the effect of a failure to give reasons for arrest under the *Code* is unclear. Section 301(3) of the *Criminal Code* only states that the failure to fulfil the duty of notification ‘shall not of itself deprive the person executing the process or 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 Institute has closely reviewed the meaning and significance of this provision⁷² and has recommended that amendments be made to subsections 301(2) and (3). This recommendation is largely reproduced in Recommendation 10 below. However, in the light of the recommendation that arrest laws be consolidated, it is also recommended that this duty form part of that consolidation.⁷³

Submissions

6.2.4 Tasmania Police supported the Institute’s proposal to amend s 301(2) and (3) of the *Criminal Code* and place the reworked provisions in the consolidating legislation. The duty to inform an arrested person of the reason for their arrest at the time of the arrest unless it is not practicable to do so was not considered contentious. However, Tasmania Police considered the effect of a failure to inform of the reasons for arrest to be problematic. They did not support the Institute’s proposal that a failure to inform an arrested person of the reason for arrest ‘shall make the arrest or the execution of the process unlawful.’ Tasmania Police commented:

If it was deemed necessary to have a provision of that nature then the decision as to the unlawfulness/admissibility of evidence following the arrest should be left to judicial discretion.

6.2.5 The concern raised by Tasmania Police is addressed in the submission of the Criminal Law Committee of the Law Society. The Committee submitted that altering the language of the Institute’s proposal from ‘shall’ to ‘may’ would allow the retention of ‘judicial discretion to exclude evidence unlawfully obtained.’ Aside from this minor amendment, the Committee agreed with the Institute’s proposed construction of the duty to inform the arrestee of the reasons for arrest.

6.2.6 The then Interim Commissioner for Children believes that police have a higher duty of care when executing an arrest against young people. In addition to the general duty to inform an arrested person of the reason for their arrest at the time of the arrest unless it is not practicable to do so, the Commissioner stated that ‘a person arresting a young person should also have the duty to inform the young person of their rights and responsibilities, including the right to contact a lawyer and a parent/guardian or responsible adult’. The Commissioner is of the view that the existing legislative provisions insufficiently protect the rights and interests of young people upon arrest. Similar duties to those contained within s 6 of the *Criminal Law (Detention and Interrogation) Act 1995* (Right to communicate with friend, relative and legal practitioner before questioning or investigation in relation to an offence) and s 29 of the *Youth Justice Act 1997* should be afforded to young people at the time of the arrest. For example, s 29(1)(i) and (ii) of the *Youth Justice Act* states that:

⁷² Ibid.

⁷³ A full discussion of this recommendation can be found in Tasmania Law Reform Institute, *Custody, Arrest and Police Bail, Final Report No. 1*, 2003, available at <www.law.utas.edu.au/reform/report_publications>.

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The Court has a duty, as far as practicable –

- (a) to ensure that the youth before the Court and the guardian, if present, understand –
 - (i) the nature and purpose of the proceedings; and
 - (ii) the right of the youth to have legal representation . . .

Accordingly, it is argued that in addition to informing the young person of the reason for their arrest at the time of the arrest, unless it is not practicable to do so, the police should also inform the young person of their rights and responsibilities, including the right to contact a lawyer (see 5.2.5, 5.2.6 and Recommendation 7).

Recommendations

6.2.7 The Institute has previously critiqued ss 301(2) and (3) of the *Criminal Code* concerning the notification of the grounds of arrest.⁷⁴ The Law Reform Commission (of Tasmania) in its 1977 *Report on Powers of Arrest, Search and Bail*, was also concerned about these provisions.⁷⁵ The *Criminal Code* is unclear and ill-defined and the Issues Paper proposed that the existing s 301(2) and (3) be repealed and replaced by a legislative formulation based on that recommended initially in the Institute's Final Report on *Custody, Arrest and Police Bail*.⁷⁶ The Institute maintains the views expressed in that Report. It does not agree with the proposal of the Criminal Law Committee of the Law Society. Substituting the word 'may' for the word 'will' in the Institute's original proposal would simply introduce uncertainty into the operation of the law; it would run counter to the position at common law as expressed in *Christie v Leachinskey* and would dilute the protections provided by the law to arrestees. The reform recommended by the Institute does not affect the judicial discretion in s 138 of the *Evidence Act 2001* (Tas) to exclude evidence on public policy grounds where it is unlawfully obtained. Where an arrest is unlawful, whether because reasons for it have not been given or for any other reason, the trial judge retains a discretion to exclude evidence obtained as a result of it. Evidence obtained pursuant to an unlawful arrest is not ipso facto inadmissible. It may simply be excluded in the exercise of the trial judge's discretion under s 138 of the *Evidence Act*.

⁷⁴ See Tasmania Law Reform Institute, above n 71.

⁷⁵ Tasmania Law Reform Commission, *Report on Powers of Arrest, Search and Bail* (1977).

⁷⁶ See Tasmania Law Reform Institute, *Custody, Arrest and Police Bail, Final Report No. 1*, above n 71, 26–27.

Recommendation 9

That the consolidation of arrest laws provide that:

- (1) It is the duty of a person arresting another, whether with or without 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.
- (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) This subsection does not apply to the arrest of the other person if:
 - (a) the condition or duties of the person making the arrest make it impracticable to perform this duty; or
 - (b) the other person's actions or condition make it impracticable for the person making the arrest to perform this duty.
- (4) A failure to fulfill either of the aforesaid duties:
 - (a) will make the arrest or the execution of the process or warrant unlawful; but
 - (b) Such 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.

6.3 The use of force in making an arrest

6.3.1 The common law concerning the use of force in making an arrest has been summarised in a recent Victorian Parliamentary discussion paper, *Warrant Powers and Procedures: Discussion Paper*.⁷⁷

Reasonable force may be used to execute an arrest, although “all necessary and reasonable force” can be used to prevent an unlawful arrest.⁷⁸ A person who resists arrest does not commit an offence if he or she reasonably believes that the person executing the arrest is not a police officer.⁷⁹

6.3.2 The *Criminal Code* substantially codifies the common law position in ss 26 (force used in executing an arrest), 30 (police officer preventing escape from arrest), 31 (other cases involving any person preventing escape from arrest) and 32 (any person preventing escape or rescue after arrest). One of the immediately obvious deficiencies of the *Criminal Code* provisions is that they spread the law relating to force in arrest across three provisions. This seems unnecessarily complicated when other statutory regimes such as the Commonwealth *Crimes Act 1914* and the Victorian *Crimes Act 1958* manage to limit the law relating to this matter to one provision (see ss 3ZC and 462A respectively).

In determining the reasonableness of or the necessity for the force used to make an arrest, the common law places limits on the circumstances where force can be applied which is likely or intended to cause

⁷⁷ Richard Fox, ‘Executing an Arrest’, *Victorian Criminal Procedure 2002* (2002), 106–07 quoted in Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures: Discussion Paper* (2004), 52 (footnotes from original).

⁷⁸ *Ibid.*

⁷⁹ *Reynhoudt* (1962) 107 CLR 381; *Kenlin v Gardiner* [1967] 2 QB 510.

death or grievous bodily harm. In *R v Turner*, O'Bryan, Dean and Hudson JJ held that when considering the lawfulness of a citizen's arrest that had resulted in the death of the arrestee,

[w]hat is reasonable depends on two factors. He [the arrestor] is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (ie the commission of the felony or the escape of the felon).⁸⁰

To some extent this is reflected in the *Criminal Code*. Section 30 permits a police officer to use such force as is reasonably necessary (s 30(1)) or as he or she believes on reasonable grounds to be necessary (s 30(2)) to prevent the escape of the arrestee. However, s 30(3) prohibits the use of 'force which is intended or is likely to cause death or grievous bodily harm' unless the arrest relates to the commission of an Appendix B crime and the person sought to be arrested has been called upon to surrender. In contrast, ss 31 and 32 do not authorise the 'use of force which is intended or is likely to cause death or grievous bodily harm' in cases where any person (as opposed to a police officer) is preventing escape from arrest or preventing a rescue after an arrest. In other words, for private citizens, the use of force likely to cause death or grievous bodily harm is unlawful. The ALRC has commented that offence seriousness is not an appropriate limit on the use of force intended or likely to cause death or grievous bodily harm.

Principle of proportionality

6.3.3 The principle of proportionality requires that no more force be used in effecting an arrest than is reasonably proportional to averting the mischief that might result if the suspect were not apprehended. This requires the reasonableness of the use of force and the amount of force used to be judged according to the seriousness of the offence for which the suspect is sought to be apprehended and other factors justifying the arrest. Sections 3ZC of the *Crimes Act 1914* (Cth) and 462A of the *Crimes Act 1958* (Vic)⁸¹ apply the principle of proportionality with respect to the use of force in effecting an arrest in those jurisdictions where they operate. In contrast, the Tasmanian legislation does not limit the use of force in accordance with this principle. Accordingly, both the Commonwealth and Victorian legislation, (influenced in part by the ALRC report on *Criminal Investigation*⁸²) expressly place greater limits on the use of force in making an arrest than the Tasmanian legislation. The ALRC recommended that lethal or dangerous force should not be used by either police officers or private citizens 'except where the person making the arrest believes on reasonable grounds that such force is necessary to protect the life of or prevent serious injury to some person, and is satisfied that no other means is available to effect the arrest.'⁸³ Section 3ZC of the Commonwealth *Crimes Act 1914* provides:

- (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:
 - (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable);
or

⁸⁰ (1962) VR 30.

⁸¹ S 462A – A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

⁸² Law Reform Commission (Cth) Report No 2 (Interim) *Criminal Investigation* (1975), paras 51–54.

⁸³ *Ibid.*

- (b) if the person is attempting to escape arrest by fleeing - do such a thing unless:
 - (i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and
 - (ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.

Some commentators suggest that the principle of proportionality has also been recognised at common law:

The ... common law's permission to use enough force as is "reasonably necessary" to effect the arrest remains, but in a modified form. There may be reasonable alternatives. In addition, no more force may be used than is reasonably *proportional* to preventing the mischief which might arise if the suspect were allowed to escape; this is a principle of proportionality.⁸⁴

6.3.4 The law relating to force in arrest developed at a time when police had limited powers of arrest for serious offences (felonies). These offences were punishable by death. The means to effect arrests were comparatively unsophisticated. Today the police have advanced technology and weaponry at their disposal in apprehending suspects. Moreover, their arrest powers extend to many minor offences. The principle of proportionality has a potentially significant role to play in this milieu. If the distinction between arrestable and non-arrestable offences is removed it becomes particularly important to judge the use of force in effecting an arrest according to this principle. Accordingly, it is the Institute's view that this principle should receive legislative imprimatur along the lines presently contained in s 3ZC of the *Crimes Act 1914* (Cth).

Submissions

6.3.5 The Institute's proposals that the present *Criminal Code* provisions concerning the use of force in relation to arrests (ss 26, 30, 31 and 32) be rationalised and reformed to enact the principle of proportionality and relocated to consolidating arrest legislation were agreed with by both Tasmania Police and the Criminal Law Committee of the Law Society. Tasmania Police did observe, however, that 'specific mention should be made within any proposed legislation regarding causing damage to property when executing any process'.

6.3.6 The uses of force provisions, including the principle of proportionality, contained in the Commonwealth *Crimes Act 1914* were presented as a suitable legislative model to follow. Tasmania Police and the Criminal Law Committee supported the Commonwealth model, save for the Tasmania Police submission commenting that 'section 3ZC of the Commonwealth *Crimes Act* is very generic and does not specifically provide for causing damage to property whilst executing a process'.

Recommendations

6.3.7 Currently, the use of force provisions relating to the execution of an arrest are spread over four separate sections of the *Criminal Code* and there is significant overlap between the sections. These four sections are capable of being collapsed into a single section that encapsulates the law as currently expressed, as well as the principle of proportionality (which is not currently reflected). The Institute recommends, therefore, that ss 26, 30, 31 and 32 be repealed and that the following legislative amendment concerning the use of force in arrest be inserted in the proposed legislation consolidating the powers of arrest:

⁸⁴ Hunter, Cameron and Henning, above n 1, 471; see also *R v Turner* [1962] VR 30; *Lippl v Haines* (1989) 18 NSWLR 620 (NSW CA).

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- (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (2) Without limiting the operation of subsection (1), a person, in the course of arresting another person for an offence, may cause such damage to property that is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (3) Without limiting the operation of subsection (1) and (2), a police officer must not, in the course of arresting a person for an offence:
 - (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); or
 - (b) if the person is attempting to escape arrest by fleeing - do such a thing unless:
 - (i) the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); and
 - (ii) the person has, if practicable, been called on to surrender and the police officer believes on reasonable grounds that the person cannot be apprehended in any other manner.

Recommendation 10

That the present Tasmanian Criminal Code provisions concerning the use of force in relation to arrests (ss 26, 30, 31 and 32) be repealed and a new provision enacted in the proposed *Arrest Act* to enact the principle of proportionality as follows:

- (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (2) Without limiting the operation of subsection (1), a person, in the course of arresting another person for an offence, may cause such damage to property that is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
- (3) Without limiting the operation of subsection (1) and (2), a police officer must not, in the course of arresting a person for an offence:
 - (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); or
 - (b) if the person is attempting to escape arrest by fleeing - do such a thing unless:
 - (i) the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); and
 - (ii) the person has, if practicable, been called on to surrender and the police officer believes on reasonable grounds that the person cannot be apprehended in any other manner.

6.4 The place of arrest

6.4.1 Subsequent to the publication of the *Consolidation of Arrest Laws in Tasmania Issues Paper* in July 2006, the Parliament of Tasmania amended the *Criminal Code* by inserting s 26A into the Act.⁸⁵ Section 26A ('Entry on premises for purposes of arrest') took effect from 1 November 2006, just over a month after the closing date for responses to the Issues Paper. It is set out below:

26A. Entry on premises for purposes of arrest

- (1) A police officer may enter (using reasonable force if necessary), remain on and search premises, including a conveyance –
 - (a) on or in which the police officer has reasonable grounds for believing that a person named in a warrant for arrest is present; or
 - (b) for the purpose of making an arrest without warrant if it is lawful to do so.
- (2) Before entering any premises pursuant to subsection (1), a police officer must communicate or attempt to communicate to a person within the premises the police officer's authority to enter the premises unless the police officer reasonably believes that communicating or attempting to communicate would be likely to endanger any person or frustrate the arrest.

6.4.2 Section 26A(1) is very similar to the general statutory power to enter premises as proposed by the Institute in the Issues Paper. There are some key differences, however:

- The Institute proposed that the expression 'premises' should be defined as including any land, building, structure, motor vehicle, vessel and aircraft, while s 26A(1) only speaks of premises as including a conveyance. The relatively narrow expression in the legislation may be problematic.
- The Institute proposed a power of entry on premises while the legislation refers to a power of entry, remaining on and searching premises. The power to remain on and search premises is consistent with other jurisdictions, such as the Commonwealth and Queensland, but raises the question of what is a reasonable timeframe for remaining on and searching premises.
- The Institute proposed a broad requirement of 'proper announcement' before forcible entry, but s 26A(2) allows the broad requirement to be put aside if the 'police officer reasonably believes that communicating or attempting to communicate would be likely to endanger any person or frustrate the arrest.' This limitation, although the wording is not identical, is consistent with s 19(2) of the *Search Warrants Act 1997* (Tas).

6.4.3 Section 26A also expresses to a very large extent the submission made by Tasmania Police in response to the Issues Paper. It grants the police a general statutory power to enter premises, including private premises, to effect an arrest, allows forcible entry without 'proper announcement' in certain situations and allows the police to search for an individual of interest once entry is gained to the premises. In doing so, it goes well beyond the common law position as articulated in *Lippl v Haines*.⁸⁶ The legislation granting police the power to enter premises for the purposes of arrest is a welcome and a long overdue amendment to the *Criminal Code* that should provide police and the public with a level of certainty that, until recently, has been absent. There are no safeguards (aside from the common law) currently limiting the power of police to enter premises, forcibly if necessary, for the purposes of arrest. Statutory safeguards such as staying for a reasonable time only (*cf Police Powers and Responsibilities Act 2000* (Qld), s 21; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 10(1)), requiring the police to supply their details where they arrest or search a person or place (*cf Police Powers and Responsibilities Act 2000* (Qld), s 637; *Law Enforcement (Powers and*

⁸⁵ Section 26A amended by *Justice and Related Legislation (Miscellaneous Amendments) Act 2006* (No. 16 of 2006), s 17.

⁸⁶ (1989) 18 NSWLR 620.

Responsibilities Act 2002 (NSW), s 201) have the benefit of providing even greater certainty and clarity to the law as well as protection of members of the public.

6.4.4 While s 26A enacts a number of the essential ingredients proposed by the Institute in the Issues Paper, the lacunae noted above raise the question of whether the power of entry it grants should be subject to further limitations or safeguards such as those existing in other Australian jurisdictions. There is also the question of whether this power should be relocated to the consolidating arrest legislation.

The Commonwealth provision is set out below:

Crimes Act 1914 (Cth), s 3ZB

- (1) Subject to subsection (3), if:
 - (a) a constable has, under a warrant, power to arrest a person for an offence; and
 - (b) the constable believes on reasonable grounds that the person is on any premises;
the constable may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.
- (2) Subject to subsection (3), if:
 - (a) a constable may, under section 3W, arrest a person without warrant for an offence; and
 - (b) the offence is an indictable offence; and
 - (c) the constable believes on reasonable grounds that the person is on any premises;
the constable may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.
- (3) A constable must not enter a dwelling house under subsection (1) or (2) at any time during the period commencing at 9 pm on a day and ending at 6 am on the following day unless the constable believes on reasonable grounds that:
 - (a) it would not be practicable to arrest the person, either at the dwelling house or elsewhere, at another time; or
 - (b) it is necessary to do so in order to prevent the concealment, loss or destruction of evidence relating to the offence.

6.4.5 Notably, the power of entry contained in the Commonwealth provision is limited to entries pursuant to a search warrant or to effect an arrest for an indictable offence. There is no power of entry to effect an arrest for a summary offence. However, legislative provisions in other jurisdictions do extend powers of entry pursuant to an arrest for summary offences. For example, s 21 of the *Police Powers and Responsibilities Act 2000* (Qld) grants the police a general power to enter to effect an arrest without warrant. It provides:

- (1) A police officer may enter a place and stay for a reasonable time on the place—
 - (a) to arrest a person without a warrant;

6.4.6 That power is, however, subject to safeguards set out in subsection (2), which provides that the police may only enter a dwelling or house without the consent of the occupier if they reasonably suspect that the person to be arrested is at the dwelling. Further, before a forcible entry can be made the police officer must, if reasonably practicable, ask the occupier to permit the entry and give the occupier reasonable opportunity to allow the entry (s 635). Other statutory safeguards also apply including those in s 637 which require the police to supply their details where they arrest or search a person or place. The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 10 is in

similar terms. It also grants police the power to enter to effect an arrest in respect of any offence. The advantage of these provisions is that they achieve clarity and certainty in the law by eliminating distinctions in relation to offences in respect of which the police may enter to effect an arrest. Essentially, they reproduce the law as stated in *Lippl v Haines* (1989) 18 NSWLR 620 (see below at 6.4.7).

6.4.7 Although not binding authority in Tasmania, the New South Wales Court of Appeal decision in *Lippl v Haines*⁸⁷ is instructive because it deals with an issue not covered by s 26A – exactly when it is lawful to enter premises to effect an arrest. The Court concluded that:⁸⁸

a person exercising a statutory power to arrest had a power to enter a house against the will of the householder but only if:

- (a) there were reasonable and probable grounds for the belief that the person sought was within the premises; and
- (b) proper announcement was made prior to entry.

6.4.8 The case of *O'Neill*,⁸⁹ which relies heavily upon the judgments in *Lippl v Haines*, considered what is a ‘proper announcement made prior to entry’. The nature of the announcement required in s 26A accords with the decision in this case in that it requires the police to notify the occupant of their ‘authority’ to enter. In *O'Neill* it was held that a ‘proper announcement’ is one in which the occupier of the premises is made aware of the police officer’s authority to enter, and just what that authority is. Such authority consists of the basis on which the police may lawfully enter without consent, such as to effect an arrest. It does not consist of such things as a desire to ‘talk to the occupant’ nor does it consist of a statement that it is the police who want to enter. The legal basis for the entry must be stated. The notification of a proper authority to enter once rejected by the occupier provides the basis for lawful forcible entry to effect an arrest. Notification of anything less is entitled to be rejected by the occupant as a basis for permitting entry.

Submissions

6.4.9 Both Tasmania Police and the Criminal Law Committee of the Law Society agreed that any consolidating legislation in relation to powers of arrest should contain a general statutory power to enter premises, including private premises, to effect an arrest. The Institute agrees with this position and therefore recommends that s 26A of the Criminal Code be repealed and a similar provision enacted in the consolidating arrest legislation. Both Tasmania Police and the Criminal Law Committee of the Law Society also agreed that the power of entry to arrest be extended to all arrestable offences rather than a particular class of offences. Section 26A of the *Criminal Code* enacts this approach.

6.4.10 The Institute also proposed in the Issues Paper that in the case of forcible entry onto premises for the purposes of arrest, there should be a requirement of ‘proper announcement’ by the police before entry. Tasmania Police did not agree with the ‘announcement proposal’ in the form expressed by the Institute, that is, police have called upon the person/occupier to permit the entry, have stated the grounds of the authority to enter and have given the occupier reasonable opportunity to allow entry. According to Tasmania Police, an announcement should be made, if practicable, where:

- The safety of the police/public or occupants is not of concern;
- There is no concern that evidence will be destroyed prior to entry; and
- There is no concern that the offender will take flight.

⁸⁷ (1989) 18 NSWLR 620. The court considered the arrest power in s 352 *Crimes Act 1900* (NSW) which has been replaced by the arrest provisions of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

⁸⁸ Hunter, Cameron and Henning, above n 1, 475.

⁸⁹ [2001] NSWCCA 193; BC 200102586.

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Using this formulation, if the police have any concerns about the safety of the situation (for themselves, the public or the occupants), destruction of evidence or the flight of the offender there should not be a requirement for proper announcement before the forcible entry onto premises.

6.4.11 The Institute was referred to s 19 of the *Search Warrants Act 1997* (Tas) that deals with announcement before entry. It states:

- (1) Before any person enters premises under a warrant, the executing officer is to –
 - (a) announce that he or she and any person assisting is authorised to enter the premises;
and
 - (b) give any person at the premises an opportunity to allow entry to the premises.
- (2) The executing officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure –
 - (a) the safety of a person (including a police officer); or
 - (b) that the effective execution of the warrant is not frustrated.

Tasmania Police also submitted that provision should also be made ‘within the legislation to search for an individual of interest once entry is gained to the premises.’

6.4.12 The Criminal Law Committee of the Law Society also disagreed with the announcement before entry provisions proposed by the Institute:

The committee has concerns that proper announcement could well lead to arrest for more serious offences than those for which entry was to be gained for [sic].

It could also put an innocent occupier at jeopardy for arrest. For example:

- a. Police wish to gain an entry and make an announcement. The occupier who is not a person of interest to police, delays police entry and allows the person of interest to escape. This could well result in the person not [sic] of interest being arrested for perverting the course of justice.
- b. Police announce entry, drug dealer flushes drugs down the toilet, again he is at risk of pervert [sic] charges as well as anything else he might have been charged with.
- c. Police announce entry and are shot at. Again further charges will follow.
- d. Police announce intended entry, an innocent occupant is taken hostage and a siege develops.

It is clear that the Criminal Law Committee is concerned that the announcement before entry provisions may inflame, ignite or provoke already tense situations and may lead to further criminal conduct and/or dangerous behaviour. Such a provision, it is argued, ‘might create more problems than it solves.’

6.4.13 Section 26A of the *Criminal Code* already contains provision for proper announcement. This approach is based on the view expressed in cases like *Lippl v Haines* and *O’Neill* that there are compelling reasons for proper announcement to be made. An unexpected intrusion onto a person’s property can precipitate a violent or terrified response. It is in the interests of the personal safety of all concerned as well as respect for the privacy of the individual that the law requires, prior to entrance to arrest, that a police officer identify himself and notify the occupier of his authority to enter. The Institute agrees with this approach and therefore does not advocate changing s 26A to remove its requirement of proper announcement. Further, s 26A does excuse the requirement to make announcement in exigent circumstances, which should address the concerns of both the Criminal Law Committee and Tasmania Police.

6.4.14 Tasmania Police did not support the idea that the general legislative power to enter premises should be subject to certain additional statutory safeguards, such as, a requirement that police supply

their details where they arrest or search a person or place. The Criminal Law Committee of the Law Society were open to additional safeguards ‘not necessarily including the announcement provision.’

6.4.15 Despite the views of Tasmania Police, the Institute recommends the inclusion of additional safeguards in the statutory power of entry along the lines of those contained in the *Police Powers and Responsibilities Act 2000* (Qld), the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the *Crimes Act 1914* (Cth). Such safeguards should include the requirement that the police have reasonable grounds for believing that the person to be arrested is on the premises in question. This requirement already applies under s 26A(1)(a) of the *Criminal Code* to a person in respect of whom the police have an arrest warrant and may also apply impliedly to persons to be arrested without a warrant. Nevertheless, this matter should be clarified and made explicit. Additional safeguards that should be included are the requirement that the police supply their details to the occupants after the arrest is made and that they remain on the premises to effect their purpose in entering for only a reasonable time. The Commonwealth legislation also places time restrictions on when the police may enter premises to arrest (s 3ZB(3)). These limitations attempt to restrict entrance to daytime hours when the occupants are unlikely to be sleeping. The aim is to protect, as far as possible, occupants’ rights to privacy, particularly of those not involved in the police investigation and to reduce the possibility of a fearful response by occupants. These limitations are, of course, subject to exceptions for circumstances compelling entry during the night.

6.4.16 No persuasive reasons have been advanced for not including additional safeguards on police powers of entry such as those considered here. Their inclusion is consistent with the need to respect and promote rights of privacy and liberty. The Institute therefore recommends that the power of entry to arrest included in the consolidating arrest legislation explicitly make provision for additional safeguards including the requirement that the police must have reasonable grounds for believing that the person to be arrested is on the premises; the requirement that the police supply their details to the occupants and remain on the premises to effect the arrest for only such time as is reasonably necessary in the circumstances; and that they not exercise their powers of entry between the hours of 9.00 pm and 6.00 am unless they have reasonable grounds to believe that it would not be practicable to arrest the person at another time or it is necessary to do so in order to prevent the concealment, loss or destruction of evidence.

Recommendations

Recommendation 11

That the recently legislated s 26A of the *Criminal Code Act 1924* (Tas) be relocated to legislation consolidating the powers of arrest.

The expression ‘premises’ should be defined as including any land, building, structure, motor vehicle, vessel and aircraft.

The power of entry should be subject to additional safeguards such as those contained in the *Police Powers and Responsibilities Act 2000* (Qld), the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the Commonwealth *Crimes Act 1914* including:

- (1) A requirement that the police must have reasonable grounds for believing that the person to be arrested is on the premises;
- (2) A requirement that the police supply their details to the occupants and remain on the premises to effect the arrest for only such time as is reasonably necessary in the circumstances and,
- (3) That the police not exercise their powers of entry between the hours of 9.00 pm and 6.00 am unless they have reasonable grounds to believe that it would not be practicable to arrest the person at another time or it is necessary to do so in order to prevent the concealment, loss or destruction of evidence.

Part 7

Arrest Warrants

7.1 Introduction

7.1.1 This Report considers three aspects of arrest warrants:

1. The issuing of an arrest warrant;
2. The power of arrest pursuant to a warrant of arrest; and
3. How an arrest pursuant to a warrant of arrest must be executed.

The first aspect, the law relating to the issuing of arrest warrants, is the primary focus of this Part. The second aspect, the power of arrest pursuant to a warrant of arrest, is fairly straightforward, and will be briefly considered at the end of this Part. The third aspect, how an arrest by warrant should be executed, gives rise to the same issues considered in Part 6 and in respect of those matters, reference should be had to that Part of this Report.

7.1.2 Although not as common as arrest without warrant, arrest with warrant is an important aspect of arrest law. In *R v Inland Revenue Commissioners: Ex parte Rossminster Ltd*, Lord Wilberforce said,

There is no mystery about the word ‘warrant’: it simply means a document issued by a person in authority under power conferred in that behalf authorising the doing of an act which would otherwise be illegal.⁹⁰

7.1.3 The principal purpose of the warrant system is to interpose an independent judicial officer between the actions of investigating officials and the individual citizen. It acts as a protective device. Before any person can be arrested pursuant to a warrant of arrest a warrant must be issued specifically in relation to that person, there being no such thing as a general arrest warrant.

7.1.4 A key reason for encouraging arrests under warrants is that such arrests may reduce justiciable disputes downstream regarding wrongful imprisonment or issues of illegally obtained evidence. However, if the process for obtaining arrest warrants is cumbersome or time-consuming, it will act as a disincentive to their use. It may encourage an increase in their use if telephone warrants or warrants issued by other electronic means were available, particularly in urgent cases.

7.2 Issuing arrest warrants

7.2.1 The most common reason for issuing a warrant of arrest is to initiate a criminal prosecution against the arrestee (i.e. because they are suspected of having committed an offence). The primary statutory provision relating to arrest warrants is s 32 of the *Justices Act 1959* (Tas). However, arrest warrants may also be issued for other purposes, for example, in order to secure a person’s presence at a court hearing (for example if the person is the subject of a sentencing order or a witness).

⁹⁰ [1980] AC 952, 1000.

7.2.2 Section 32 of the *Justices Act* provides:

When complaint is made to a justice he may –

...

- (b) where the complaint is –
 - (i) that a person has committed or is accessory to having committed an indictable offence within the State;
 - (ii) that a person charged with having committed or with being suspected of having committed an indictable offence on the high seas or in any creek, harbour, haven, or other place in which the Admiralty of England has and claims to have jurisdiction or on land outside the State, of which offence cognizance may be taken by the Supreme Court, is suspected of being within the State; or
 - (iii) that a person has committed a simple offence the matter whereof is substantiated before him on oath –

issue his warrant for the apprehension of the person complained against;

...

7.2.3 Arrest warrants are generally issued upon application to a justice of the peace or magistrate. This process has the potential to import a level of transparency, objectivity and independence into the decision to arrest that may sometimes be lacking where a police officer arrests without warrant.

Despite the advantages of arrest pursuant to arrest warrant, anecdotal evidence suggests that arrests without warrant are far more common. This no doubt reflects the practical realities of everyday policing and the nature of investigative processes. It also reflects the fact that police powers to arrest without warrant have been extended to a wide range of offences for which there would be no power of arrest at common law.

7.2.4 The law with respect to arrest warrants in Tasmania is uncertain. In contrast, for search warrants, the *Search Warrants Act 1997* (Tas) acts as a code for the use of search warrants by police. There is also a body of judicial authority dealing with the issue and execution of search warrants (see for example, *MacLeod*,⁹¹ *George v Rockett*,⁹² *Alister*,⁹³ *Stankovich*⁹⁴ and *Hart v Commissioner, Australian Federal Police*⁹⁵). It is uncertain to what extent the approach adopted in relation to search warrants in these cases applies to arrest warrants. They may, nevertheless, provide persuasive authority on some issues. For example, the role of a justice of the peace in issuing warrants was considered in *MacLeod* and *George v Rockett*. In *MacLeod*, Slicer J held that a justice ‘is exercising both an administrative and judicial function at the time he [sic] is being asked to issue a warrant. ... His judicial function requires him to exercise his own judgment on the basis of the material placed before him.’⁹⁶ Although his Honour made reference in this case to ‘common law warrants of apprehension (which also require the holding of a belief and suspicion),’⁹⁷ arrest warrants were not considered in any detail. The nature of the ‘judicial function’ in relation to search warrants was elaborated upon by the High Court in *George v Rockett*,⁹⁸ which, in turn, adopted comments from the judgment of Burchett J in *Parker v Churchill*:

⁹¹ [1991] Tas R 144.

⁹² (1990) 170 CLR 104.

⁹³ (1984) 154 CLR 404.

⁹⁴ (2004) ACTSC 93.

⁹⁵ (2002) 196 ALR 1.

⁹⁶ [1991] Tas R 144, para 22.

⁹⁷ *Ibid*, para 24.

⁹⁸ (1990) 170 CLR 104.

The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.⁹⁹

7.2.5 While it may be possible to conclude from these cases that it is necessary for the informant to produce to the justice sufficient material to justify the issue of a warrant, s 32 of the *Justices Act* does not explicitly impose this requirement. Similarly, there is no legislative imperative for a justice ‘to exercise his own judgment on the basis of the material placed before him’. In comparison, s 3ZA(1) of the *Crimes Act 1914* (Cth) requires that the ‘issuing officer’ receive information on oath and an affidavit from the informant setting out the reasons why the warrant is sought, including, at s 3ZA(1)(b):

- (i) the reasons why it is believed that the person committed the offence; and
- (ii) the reasons why it is claimed that proceedings by summons would not achieve one or more of the purposes set out in paragraph 3W(1)(b).

Further, the ‘issuing officer’ is required to satisfy him or herself that there are reasonable grounds for the issue of the warrant and must also specify or record the reasons relied upon as justifying its issue. In addition, section 3ZA(1)(b)(ii) requires that the need to issue the warrant be judged according to the same criteria that apply to the making of arrests without a warrant under s 3W of the Act. These criteria include whether proceeding by way of summons would be more appropriate.

7.2.6 In Queensland, under s 370(3) of the *Police Powers and Responsibilities Act 2000* (Qld), an arrest warrant application must be sworn and state the grounds on which the warrant is sought. Under subsection (5) the justice may refuse to consider the application until the police officer gives the justice all the information the justice requires about the application in the way the justice requires. Section 371 states,

the justice may issue an arrest warrant only if satisfied there are reasonable grounds for suspecting –

- (a) that the person has committed the offence; and
- (b) for an offence other than an indictable offence, proceedings by way of complaint and summons or notice to appear for the offence would be ineffective, including because the person can not currently be located or served with a complaint and summons or notice to appear for the offence.

7.2.7 The legislation in Tasmania does not set thresholds or standards that police or justices should meet in applying for and issuing arrest warrants. Accordingly, it would seem to require less accountability and provide fewer safeguards than legislation operating elsewhere, for example, in the Commonwealth and Queensland jurisdictions.

7.2.8 A more rigorous statutory regime for arrest warrants would offer greater accountability and bring Tasmanian law in this regard into line with Commonwealth legislation already operating here. It is also suggested that, like s 3W of the Commonwealth *Crimes Act 1914*, Tasmanian legislation should specify the criteria that should apply to the issue of an arrest warrant. The desirability of certainty and clarity suggest that the criteria should be the same as those applying to arrest without a warrant. For example, the need to issue an arrest warrant might be judged according to whether it is necessary to:

⁹⁹ (1985) 9 FCR 316, 322.

- Ensure that the person will appear in court;
- Conduct investigative procedures authorized by statute;
- Prevent interference with witnesses;
- Prevent the continuation or repetition of a criminal offence;
- Prevent personal injury or serious damage to property; or
- Prevent the fabrication, concealment, loss or destruction of evidence relating to the offence for which the warrant is sought.

7.2.9 The Institute is, therefore, of the view that legislation dealing with the issue of arrest warrants should specify that the issuing official must satisfy him or herself that there are reasonable grounds for issuing the warrant. The legislation should also require that sufficient information be provided by evidence on oath or affidavit to establish the necessity for the warrant. Further, the criteria for judging the necessity for the warrant should also be set down in the legislation. Finally, the requirements of accessibility and certainty suggest that provisions relating to arrest warrants should be located in the legislation consolidating arrest powers.

Submissions

7.2.10 Tasmania Police did not support legislating the procedure for the issuing of warrants as proposed by the Institute. They commented that legislation ‘causes a too prescriptive approach to law enforcement.’ Specifically with respect to the procedure proposed by the Institute, they commented that part (c) – the judicial officer that endorses the affidavit state the reasons on which s/he relies to issue the warrant – be removed from the process. Tasmania Police also did not support the idea that telephone warrants or warrants by other electronic means be introduced and made available in certain sorts of cases.

7.2.11 The Criminal Law Committee of the Law Society responded that the existing provisions within s 32 of the *Justices Act*, ‘along with existing judicial interpretation of this provision’ were sufficient. The Committee regarded the Institute’s proposal as ‘too restrictive.’ The Committee had ‘no difficulties with the provision for telephone or electronic warrants in urgent matters.’ It noted ‘such provisions already existed for some matters and were unaware of any difficulties where such provisions existed.’

Recommendations

7.2.12 Tasmania’s *Search Warrants Act 1997* provides much more certainty and clarity with respect to the issuing of search warrants and the precondition for their issue than is the case with respect to arrest warrants. The *Search Warrants Act* establishes certain standards that an issuing officer and the police should meet in issuing, applying for and executing search warrants. Although highly prescriptive, the Act sets out accountability mechanisms that provide clear safeguards to the citizens that are the subject of such warrants. Section 5 of the Act provides for when search warrants can be issued:

- (1) An issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises.
- (2) If an issuing officer issues a warrant, the issuing officer is to state in the warrant –
 - (a) the offence to which the warrant relates; and
 - (b) a description of the premises to which the warrant relates; and
 - (c) the kinds of evidential material that are to be searched for under the warrant; and

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- (d) the name of the police officer who, unless he or she inserts the name of another police officer in the warrant, is to be responsible for executing the warrant; and
 - (e) the period for which the warrant remains in force, which is not to be more than 28 days; and
 - (f) whether the warrant may be executed at any time or only during particular hours; and
 - (g) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (c)) found at the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be –
 - (i) evidential material in relation to an offence to which the warrant relates; or
 - (ii) evidential material in relation to another offence –if the executing officer or person assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence; and
 - (h) that the warrant authorises the executing officer or a person assisting who is a police officer to conduct an ordinary search and a frisk search of any person who is at or near the premises when the warrant is executed if the executing officer or person assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession; and
 - (i) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (c)) found, in the course of a search of a person, on or in the possession of the person that the executing officer or a person assisting who is a police officer believes on reasonable grounds to be –
 - (i) evidential material in relation to an offence to which the warrant relates; or
 - (ii) evidential material in relation to another offence –if the executing officer or person assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.
- (3) Subsection (2)(e) does not prevent the issue of successive warrants in relation to the same premises.

There are clear roles and obligations for the issuing officer, invariably a magistrate, and the police officer with respect to the information to be provided and the execution of search warrants. Sections 6 (Things authorised by search warrant), 8 (Details of warrant to be given to occupier, &c.), 9 (Specific powers available to police officers executing warrant) and 12 (Copies of seized things to be provided) further enhance the roles and responsibilities of police officers executing search warrants. The Act also provides for electronic warrants and defines clearly the roles of police officers and issuing officers, with respect to such warrants:

15. Warrants by telephone or other electronic means

- (1) A police officer may make an application to an issuing officer for a warrant by telephone, telex, facsimile or other electronic means –
 - (a) in an urgent case; or
 - (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (2) The issuing officer may require communication by voice to the extent that is practicable in the circumstances.
- (3) An application under this section is to include all information required to be provided in an ordinary application for a warrant, but the application may, if necessary, be made before the information is sworn.

- (4) If an application is made to an issuing officer under this section and the issuing officer, after considering the information and having received and considered such further information (if any) as the issuing officer required, is satisfied that –
- (a) a warrant in the terms of the application should be issued urgently; or
 - (b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant –
- the issuing officer may complete and sign the same form of warrant that would be issued under section 5.
- (5) If the issuing officer decides to issue the warrant, the issuing officer is to inform the applicant, by telephone, telex, facsimile or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.
- (6) The applicant is to then complete a form of warrant in terms substantially corresponding to those given by the issuing officer, stating on the form the name of the issuing officer and the day on which and the time at which the warrant was signed.
- (7) The applicant, not later than the day after the day of expiry of the warrant or the day after the day on which the warrant was executed, whichever is the earlier, is to give or transmit to the issuing officer the form of warrant completed by the applicant and, if the information referred to in subsection (3) was not sworn, that information duly sworn.
- (8) The issuing officer is to attach to the documents provided under subsection (7) the form of warrant completed by the issuing officer.
- (9) If –
- (a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a warrant issued under this section was duly authorised; and
 - (b) the form of warrant signed by the issuing officer is not produced in evidence –
- the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

The *Search Warrants Act 1997* offers an excellent model for the issuing of such warrants. It provides clarity, precision and certainty, and unlike the case of arrest warrants, the law and procedure is not significantly based on the exclusive knowledge of existing judicial interpretations of s 32 of the *Justices Act 1959* (Tas).

7.2.13 In November 2006, the Government introduced legislation to enable the use of a ‘certified facsimile of the warrant’ in certain circumstances.¹⁰⁰ Section 301(1) of the *Criminal Code* states that ‘It is the duty of a person executing any process or warrant to have it with him, and to produce it if required’ and sub-section (2) requires an arrestor, whether arresting with or without warrant, ‘to give notice, if practicable, of the process or warrant under which he is acting.’ These provisions, including s 301(3), have been discussed and critiqued previously (see 6.2 above). The amendment that came into effect after 1 November 2006 inserted s 301(4)–(9) into the *Criminal Code*:

- (4) Notwithstanding subsection (1), a police officer may arrest a person, whether or not the police officer has a warrant for the arrest of that person in his or her possession at the time of making the arrest, if the police officer has reasonable grounds for believing that a warrant for the arrest has been issued in relation to that person.
- (5) If a police officer arrests a person under subsection (4), the police officer must, as soon as practicable –
 - (a) deliver that person into the custody of an officer in charge of a police station; and
 - (b) produce or cause to be produced to the person taken into custody the warrant or a certified facsimile of the warrant.

¹⁰⁰ See *Justice and Related Legislation (Miscellaneous Amendments) Act 2006* (No. 16 of 2006), s 17(c).

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- (6) If a person is delivered into the custody of an officer in charge of a police station under subsection (5), it is lawful for the officer in charge of the police station to detain the person until the warrant or certified facsimile of the warrant is produced to that person.
- (7) The warrant is taken to be executed at the time at which the warrant or certified facsimile of the warrant is produced in accordance with subsection (5) to the person taken into custody.
- (8) For the purposes of this section, a certified facsimile is a facsimile that contains in the text printed from the facsimile machine –
 - (a) a statement signed by the person using the machine to send the facsimile that the person has seen the original warrant and that the facsimile is a copy of the original warrant; and
 - (b) a statement specifying the time that the facsimile was sent.
- (9) A certified facsimile of a warrant may be used to execute the original warrant for a period not exceeding 8 hours from the time when the certified facsimile is sent by the facsimile machine.¹⁰¹

7.2.14 The results of these add-ons are quite far-reaching and go beyond simply making provision for the use of a ‘certified facsimile of the warrant’ in certain circumstances. Section 301(4) limits the applicability of the duty expressed in subsection (1): it allows for a police officer to arrest a person acting lawfully if the officer has ‘reasonable grounds for believing that a warrant for the arrest has been issued in relation to that person.’ Therefore, a person stopped at a random breath test or stopped for a minor traffic offence can be arrested without a warrant if the officer reasonably believes that there exists in the system a warrant for the arrest of that person. Under subsection (5), upon the arrest of that person the officer has the duty, ‘as soon as practicable’, to take the person ‘into the custody of an officer in charge of a police station’ and produce ‘the warrant or a certified facsimile of the warrant.’ The arrested person may be detained ‘until the warrant or certified facsimile of the warrant is produced to that person’ (subsection (6)). It is of concern that there is no time limit on the detention of the arrested person. A person arrested on a Saturday morning may be detained indefinitely until the warrant is executed (see subsection (7)). The only time limit expressed in the legislation is that a certified facsimile (defined by subsection (8)) of a warrant ‘may be used to execute the original warrant for a period not exceeding 8 hours from the time when the certified facsimile is sent by the facsimile machine (subsection (9)).’ The clock starts ticking from the moment that the certified facsimile is sent, not from the time the person is arrested, nor even from the time the original warrant is requested.

7.2.15 These legislative changes were introduced presumably to enable the easier use of facsimile copies, to save time and to enable warrants to be executed long distances from where the original warrant was issued. They are efficient in circumstances where a police officer comes across a person whose reputation and activities are well-known to police – they can be arrested without a warrant even if they are behaving lawfully at the time. The changes, however, reduce the scope of the duties that were formerly required of arresting persons and enable people, even if acting lawfully, to be arrested and detained while original warrants are identified, located, requested and sent. Awkward means and procedures for the use of facsimile warrants have had the effect of increasing police powers and reducing the protections offered to citizens.

7.2.16 The legislative changes introduced in 2006 did not address the need for greater certainty and clarity with respect to the issuing of arrest warrants and the preconditions necessary for their issue. Unlike the *Search Warrants Act 1997*, there is a lack of transparency relating to the standards that an issuing officer and the police should meet in issuing, applying for and executing search warrants. There is also a lack of clear accountability mechanisms that provide clear safeguards to the citizens that are the subject of arrest warrants and that would operate to counterbalance the powers of the

¹⁰¹ See also s 21(4) of the *Criminal Code Act 1924*, which was also inserted by the *Justice and Related Legislation (Miscellaneous Amendments) Act 2006* (No. 16 of 2006), s 17(a).

police. As mentioned, the *Search Warrants Act* offers an excellent model to follow for the regulation of arrest warrants, and that Act also provides a far more manageable procedure for the use of warrants by electronic means.

7.2.17 The impact and effect of arrest warrants which involve a denial of the right to liberty, are arguably no less, and indeed, are greater than the impact and effect of search warrants, yet the law regulating arrest warrants is far inferior to that regulating search warrants. The legislative framework regulating arrest warrants continues to be spare, obscure and undemanding and relies heavily upon existing judicial interpretation of the main legislative provisions. In contrast, the legislative framework pertaining to search warrants is sufficient and ample and does not rely upon a specialised or exclusive knowledge. The codified model in place for search warrants should be essentially reproduced for arrest warrants and inserted into a consolidated *Arrest Act*.

Recommendation 12

That the proposed *Arrest Act* contain a codified model for the issuing and execution of arrest warrants in a framework similar to that which applies currently to search warrants.

That the Act specifies the criteria for the issue of the warrant consistent with those provided for the making of an arrest without a warrant.

Further, that the Act require that –

- (1) Information be provided on oath or affidavit stating the reasons for seeking the arrest warrant;
- (2) The judicial officer satisfy him or herself that the stated reasons establish reasonable grounds for issuing the warrant, or that there are other such grounds; and
- (3) The judicial officer endorses the affidavit stating the reasons on which s/he relies to issue the warrant.

7.3 Power of arrest with warrant

7.3.1 In contrast to the proliferation of statutory powers of arrest without warrant, provision concerning the power to arrest pursuant to a warrant of arrest exists only in s 21(2) and (3) of the *Criminal Code*.¹⁰² The Institute does not propose any changes to the substance of this provision, but does propose that it be relocated to the proposed consolidation of arrest laws.

¹⁰² Subsections 21(2) and (3) of the Code provide:

- (2) It is lawful for a person who is charged by law with the duty of executing the lawful process of a court, and who is required to arrest or detain another person under such process, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the terms of the process.
- (3) It is lawful for a person who is charged by law with the duty of executing a lawful warrant issued by any court or justice or other person having jurisdiction to issue it, and who is required to arrest or detain another person under such warrant, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the directions of the warrant.

Submissions

7.3.2 Both Tasmania Police and the Criminal Law Committee of the Law Society agreed with the Institute's proposal that the power of arrest pursuant to an arrest warrant currently set down in s 21(2) and (3) of the *Criminal Code* be relocated to the legislation consolidating powers of arrest.

Recommendations

7.3.3 Section 21(4) was introduced in 2006 by the *Justice and Related Legislation (Miscellaneous Amendments) Act 2006*, s 17(a) to give effect to the amendments in s 301(4)–(9) of the *Criminal Code*. It provides:

It is lawful for a police officer who is charged by law with the duty of executing a lawful warrant issued by any court or justice or other person having jurisdiction to issue it, and who is required to arrest or detain a person under that warrant, to arrest or detain that person in accordance with section 301(4) and (5).

As mentioned above, taken with s 301(4) and (5), s 21(4) has the effect of increasing police powers of arrest. It allows for a police officer to arrest without a warrant a person acting lawfully if the officer reasonably believes that a warrant for the arrest of that person has been issued. The arrest warrant or certified facsimile of the warrant can be executed at a later stage and while the person is being held in custody.

7.3.4 As argued and recommended above, the Institute recommends the enactment of a codified model for the issuing and execution of arrest warrants in a framework similar to that which applies currently to search warrants. The power of arrest pursuant to an arrest warrant currently set down in s 21(2), (3) and (4) of the *Criminal Code* should be part of that codified model and should be relocated to the legislation consolidating powers of arrest.

Recommendation 13

That the power of arrest pursuant to an arrest warrant currently set down in s 21(2), (3) and (4) of the *Criminal Code* be relocated to the legislation consolidating powers of arrest.

Part 8

Arrest Powers Conferred on Persons Other than the Police

8.1 Introduction

8.1.1 Police have the power to arrest under all current arrest powers in Tasmania. In addition, many arrest powers specifically extend to other nominated people and some extend to any person (i.e. ordinary citizens). This Part considers how these powers should be accommodated in the proposed consolidating legislation.

8.2 Authorised persons

8.2.1 ‘Authorised persons’ of various agencies have powers of arrest under a number of Acts including:

- Wardens as defined by s 15 of the *Aboriginal Relics Act 1975* (Tas);
- Rangers appointed under s 10 of the *National Parks and Reserves Management Act 2002* (Tas) or under s 8 of the *Nature Conservation Act 2002* (Tas);
- Authorised officers appointed under s 13 of the *Wellington Park Act 1993* (Tas);
- An officer appointed under s 20 of the *Inland Fisheries Act 1995* (Tas);
- Fisheries officers or persons appointed under s 164 of the *Living Marine Resources Management Act 1995* (Tas);
- Naval officers in command of an Australian Defence Force vessel under s 171 of the *Living Marine Resources Management Act 1995* (Tas); and
- Authorised persons defined by s 3 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

Additionally, s 21(2) and (3) of the *Criminal Code Act 1924* (Tas) confers arrest powers on anyone lawfully charged by a justice with executing any lawful process or warrant.

The Institute is not aware of the extent to which these arrest powers are used, or to what extent they are viewed as necessary by the agencies to which they apply and did not receive any submissions in relation to the extent of their current use.

8.2.2 In the absence of any suggestion or evidence to the contrary, it must be assumed that the arrest powers of authorised persons of government agencies are necessary and so should not be taken away. However, to realise the potential benefits of consolidation fully, it is proposed that the arrest powers of authorised persons be included in the consolidation of arrest powers. It is suggested that this be achieved by granting the relevant people and authorities the power of arrest without warrant on the same grounds as those specified for police (along with the same restrictions) but that those powers be limited to the specified offences for which they currently have the power to arrest. These offences and the relevant authorised persons should be set out in a schedule to the consolidating Act. While this cannot achieve, and it is not desirable that it should achieve, complete uniformity with police powers of arrest, it has the benefit of locating all arrest powers in one statute and providing a uniform basis for their exercise.

Submissions

8.2.3 The Criminal Law Committee of the Law Society agreed with the proposal put forward by the Institute. The Committee, however, was ‘unable to comment on the extent to which these powers are currently used.’ If it was deemed necessary that ‘authorised’ persons of various agencies continue to have powers of arrest, the Committee was of the view that such powers should be standardised and included in the consolidating legislation.

8.2.4 The Secretary of the Department of Primary Industries and Water commented that ‘the police would effect the majority of arrests for offences committed pursuant to legislation that we administer.’ This legislation includes the *Inland Fisheries Act 1995* (Tas) and the *Living Marine Resources Management Act 1995* (Tas). Nevertheless, the Department considered the maintenance of the powers of arrest for departmental officers or other authorised persons to be ‘important’:

it is important that current powers for arrest contained in that legislation are carried over into consolidating legislation in order that our authorised offices have the necessary powers to perform their statutory functions.

8.2.5 There were no submissions received regarding limiting or eliminating the powers of arrest of authorised officers. There is no statistical data available concerning the extent or frequency of the use of these powers and their effect.

Recommendations

8.2.6 There were no arguments presented to the Institute that the arrest powers of authorised officers of government agencies (other than the police) are unnecessary. The Department of Primary Industries, Parks, Water and Environment (DPIPWE) (formerly the Department of Environment, Parks, Heritage and the Arts and the Department of Primary Industries and Water) and other government agencies are required to perform certain statutory functions and the powers of arrest given to authorised persons managed by government agencies are viewed as important in enabling such functions to be undertaken. It is of concern, however, that there is no capacity currently to publicly access data on the number of arrests effected by such authorised persons. Although it appears that the police would in fact effect most arrests for offences committed pursuant to particular legislation administered by government agencies, the lack of arrest (and prosecution) data means that there is little way of tracking the value and efficacy of the legislation in place authorising nominated persons to exercise arrest powers.

8.2.7 There are a variety of formulations concerning an authorised person’s power of arrest. They need to be consistent and brought into line with the powers of arrest (and grounds of arrest) recommended for the police. The duties and restrictions imposed on general police powers of arrest should similarly be imposed with respect to the powers of authorised persons to arrest for limited and specified offences. Authorised persons should have no greater powers of arrest than police, nor should they operate under fewer obligations and less scrutiny. The offences that give rise to arrest and the relevant authorised persons should be included as a schedule to the consolidating Act.

Recommendation 14

That all arrest powers without warrant of authorised persons be included in the Act consolidating arrest powers. It is suggested that those powers be made exercisable on the same grounds as those specified for police (along with the same restrictions) but that they be limited to the specified offences for which the authorised persons currently have the power to arrest. These offences and the relevant authorised persons should be set out in a schedule to the consolidating Act.

Recommendation 15

That government departments and agencies that empower authorised persons to arrest under legislation, which they administer, begin to record and disclose publicly data on the number of arrests effected by their authorised officers and the outcome of those arrests.

8.3 Powers of private citizens to arrest

8.3.1 The *Criminal Code* and the *Police Offences Act* are the principal sources of the powers of arrest of ordinary citizens. Section 27(4)–(8) of the *Criminal Code* specifies the circumstances when any person may lawfully arrest someone without a warrant:

- When any person is found committing any crime listed in Appendix A, in which case there is a ‘duty’ to arrest;
- When a crime listed in Appendix B has been committed, and it is believed on reasonable grounds that the person has committed such crime;
- Cases involving breaches of the peace;
- Cases involving loitering by night; and
- When it is believed on reasonable grounds that a person has committed a crime and the offender is escaping from lawful arrest.

Additionally, s 28 of the *Criminal Code* establishes that it is the ‘duty’ of a citizen to assist a police officer ‘in any case where any person is called upon by a police officer to assist him in making an arrest’.

8.3.2 Section 55(3) of the *Police Offences Act* empowers any person to arrest someone found offending against any provision of the *Police Offences Act* if such offence involves:

- Substantial injury to the person of another;
- Serious danger of such injury;
- Loss of any property of the person so arresting, or of any person by whom he or she is authorised to affect the arrest, or loss of any property of which the person arresting has charge;
- Serious injury to any property; or
- Injury to the property of a public authority.¹⁰³

8.3.3 Other legislation also confers powers of arrest on special categories of private citizens in specific situations. The following persons have special arrest powers:

- Persons acting as a surety for a person on bail and bound by a recognisance pursuant to s 7(5) of the *Bail Act 1994* (Tas);
- Persons in command of an aircraft within the meaning of s 27(10) and (11) of the *Criminal Code*;
- A second-hand dealer, pawnbroker or an employee of such person to whom any stolen goods are offered for sale under s 15 of the *Second-hand Dealers and Pawnbrokers Act 1994* (Tas); and

¹⁰³ Section 38A(4) of the *Police Offences Act 1935* also gives any person a power to arrest when a person is making off or attempting to make off without payment when payment is required on the spot.

- Plaintiffs owed a sum of money by order or judgment of a Court within the meaning of the *Debtors Act 1870* (Tas).

8.3.4 Citizens' powers of arrest derive from common law rights of self-protection and protection of property and while such powers are infrequently used, there appear to be no compelling reasons for extinguishing them. However, as the discussion here shows, at present those powers are constituted according to a variety of formulations. As with police powers of arrest, this reduces the clarity, certainty and comprehensibility of the law. Accordingly, it may be argued that they should be rationalised and standardised. However, such standardisation may have the effect of expanding citizens' powers of arrest. In Victoria, for example, s 458 of the *Crimes Act 1958* (Vic) permits any person, whether a police officer or not, to arrest someone he or she *finds committing* an offence where he or she believes that it is necessary to do so to ensure the appearance of the person before a court; to preserve public order; to prevent the continuation or repetition of the offence; or for the safety and welfare of a member of the public or the offender. Private citizens are not granted powers of arrest co-extensive with police powers, which permit arrest where a person is reasonably believed to *have committed* an offence but their powers of arrest do extend to all offences. A different approach is taken by the Commonwealth *Crimes Act 1914*, s 3Z, which limits the powers of arrest of private individuals to indictable offences and then only to circumstances where the arrestor believes on reasonable grounds that proceeding by way of summons would not achieve one of the purposes set out in s 3W(1)(b) of the Act. Both the legislative models considered here limit private citizens' powers of arrest in some way. Under the Victorian model, that power has a temporal limitation – the arrestor must find the arrestee *committing* an offence. The Commonwealth model limits the power to indictable offences.

Submissions

8.3.5 The Criminal Law Committee of the Law Society responded to the Issues Paper by stating 'that the current powers to arrest (by private citizens) should be retained and incorporated into legislation consolidating arrest powers.' The Committee was of the view that there was no need to rationalise or standardise citizens' powers of arrest.

Recommendations

8.3.6 The proposal to make all offences arrestable and discontinue the distinctions between arrestable and non-arrestable offences will require a new formulation regulating the power of private citizens to arrest without warrant.

8.3.7 It is not appropriate to grant private citizens powers of arrest co-extensive with police powers, that is, powers to arrest without warrant a person whom he or she believes on reasonable grounds to have committed or be committing an arrestable offence. This necessarily begs the question: in what circumstances should private citizens have the power to arrest?

8.3.8 Requiring citizens to memorise a current catalogue of offences that give rise to a power of arrest is impractical. The formulation in s 55(3) of the *Police Offences Act* appears, on the surface, to be more conducive to understanding and application. It states:

- (3) Any person may arrest, without warrant, any person found offending against any provision of this Act if such offence involves –
 - (a) substantial injury to the person of another;
 - (b) serious danger of such injury;
 - (c) loss of any property of the person so arresting, or of any person by whom he is authorized to effect the arrest; or loss of any property of which the person arresting has charge;
 - (d) serious injury to any property; or
 - (e) injury to the property of a public authority.

This provision gives private citizens a broad power to arrest for offences against people and property, and the formulation captures or accommodates the majority of offences catalogued in Appendix A and B of the *Criminal Code*. Like the citizen's arrest power in s 27(4) of the *Criminal Code* and s 458 of the Victorian *Crimes Act 1958*, the *Police Offences Act* formulation has a temporal limitation – the arrestor must find the arrestee *committing* an offence that fits the criteria laid out in (a)–(e). As mentioned, the Victorian legislation goes further in circumscribing the power, requiring the citizen to believe concurrently that the arrest is necessary to ensure the appearance of the person before a court, to preserve public order, to prevent the continuation or repetition of the offence, or for the safety and welfare of a member of the public or the offender.

8.3.9 In line with what has been recommended previously and the principle to simplify and make consolidating legislation easier to understand, it is recommended that the *Police Offences Act* provide the basis for formulating the power of private citizens to arrest in any new consolidating legislation, without the definition of 'found offending' in s 55(5) (see paras 2.2.9 – 2.2.11).

8.3.10 The powers of arrest given to special categories of private citizens under the *Bail Act 1994* (Tas), *Second-hand Dealers and Pawnbrokers Act 1994* (Tas) and the *Criminal Code*, s 27(10) and (11) should be incorporated into the provisions in the consolidating legislation.

Duty to arrest

8.3.11 Section 27(4) of the *Criminal Code* provides that it is the *duty of any person* to arrest without warrant any person found committing an Appendix A crime. A further duty is imposed by s 28 on private citizens to arrest where they are called upon by a police officer to assist him or her in making an arrest. The duty of private citizens to arrest is more limited than that of police officers. Section 27(9) of the *Criminal Code* provides that in *every case* where it is lawful for a police officer to arrest any person it is his or her duty to do so. In reality, however, the duty imposed by s 27(9) is, in the words of Lord Diplock, one of 'imperfect obligation'.¹⁰⁴ It is well recognised that the police have a broad discretion in the exercise of their arrest powers.¹⁰⁵ It may be for this reason that most modern legislative provisions relating to the general powers of police to arrest do not impose a duty on police to exercise those powers.¹⁰⁶ Further, as detailed in Part 4, many modern statutory regimes seek to limit the exercise of police arrest powers by stipulating criteria for their use and specifically or impliedly encouraging the use of alternative measures to gain an offender's attendance at court.

In 1977, the Law Reform Commission of Tasmania considered the question of whether citizens should have a duty to arrest and concluded that such a duty should only be imposed on private citizens in the circumstances like those set down in s 28 of the *Criminal Code*. The Commission made the following comments about this matter:

We think that it should be 'lawful' for a private citizen to arrest a person without a warrant under certain circumstances but that it should not be made his 'duty' to do so unless called upon by a police officer to assist him in making an arrest. Having regard to the present social conditions and the low incidence of private arrests, it seems to us to be unrealistic to impose a 'duty' of arrest upon a private citizen where he is not asked by a police officer to assist.¹⁰⁷

¹⁰⁴ *Albert v Lavin* [1982] AC 546, 565.

¹⁰⁵ See for example, *Wright v McQualter* [1970] 17 FLR 305; *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118; *R v Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 3)* [1973] 2 WLR 43; *R v McAulay* (1979) 41 FLR 267; *Innes v Weate* [1984] Tas SR 14.

¹⁰⁶ See for example, the arrest provisions in the *Police Powers and Responsibilities Act 2000* (Qld); the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the *Crimes Act 1958* (Vic) and the *Crimes Act 1914* (Cth).

¹⁰⁷ Law Reform Commission, *Report on Powers of Arrest, Search and Bail* (1977), 8.

8.3.12 The Institute supports this view. The general duty to arrest should be removed but private citizens should continue to have a 'duty' to arrest consistent with s 28 of the *Criminal Code*, that is, there should be a duty to assist police to make arrests in any case where a person is called upon by a police officer to assist him or her in making an arrest.

Recommendation 16

That private citizens' powers of arrest are incorporated into legislation consolidating arrest powers.

That the power state that any person may arrest, without warrant, any person found offending if such offence involves –

- (1) Substantial injury to the person of another;
- (2) Serious danger of such injury;
- (3) Loss of any property of the person so arresting, or of any person by whom he is authorised to effect the arrest; or loss of any property of which the person arresting has charge;
- (4) Serious injury to any property;
- (5) Injury to the property of a public authority; or
- (6) Escape from some person reasonably believed to have authority to arrest the escapee.

Recommendation 17

That the duty of private citizens to make an arrest be incorporated into legislation consolidating arrest powers but be limited to the situation where a police officer calls upon them to provide assistance in the making of an arrest.

Recommendation 18

That the powers of arrest granted to private citizens under the *Bail Act 1994* (Tas), *Second-hand Dealers and Pawnbrokers Act 1994* (Tas), and s 27(10) and (11) of the *Criminal Code Act 1924* (Tas) be repealed and incorporated into the new consolidating legislation.

Part 9

Alternatives to Arrest

9.1 Introduction

9.1.1 In Tasmania, it is open to the police to proceed by summons rather than arrest. A summons is a court order requiring a person to appear in court on a specified date and at a specified time.¹⁰⁸

9.1.2 Arrest and summons constitute two separate ways to initiate criminal proceedings against a suspect. The two processes are suited to different circumstances, though they may overlap. Arrest is an intrusive and relatively expensive procedure. However, where it is imperative that the suspect be apprehended immediately, or where the suspect may be unlikely to appear in court of their own volition, arrest may be the most appropriate way to initiate criminal proceedings. In contrast, proceeding by way of summons, though currently more time consuming for investigating officials, is less intrusive to the suspect. Thus, proceeding by way of summons may be the more appropriate course where time is not a paramount consideration and there is no reason to think the suspect will not appear in court in accordance with a summons.

9.2 Current law and procedure

9.2.1 The process¹⁰⁹ for obtaining a summons is relatively cumbersome. It requires that a complaint (the formal document commencing all criminal proceedings) be laid before a justice accompanied by an application for a summons. The justice may only issue a summons if satisfied that there are reasonable grounds for doing so. The time expended in the administrative process of making a complaint and the judicial process of determining the application, makes the summons procedure far less attractive to police officers than arrests, which can be effected in an instant.

Current policy

9.2.2 The Tasmania Police Manual states that ‘it is the policy of Tasmania Police that members should only arrest in cases where proceedings by summons would not be an appropriate means of ensuring a person’s appearance before a court.’¹¹⁰ To some extent this policy is supported by s 55(2) of the *Police Offences Act 1935* (Tas), which requires a police officer to effect an arrest in the circumstances there stipulated ‘*unless* he [sic] has reasonable grounds for believing that the purposes of this Act, or of the Act conferring such power, as the case may be, will be adequately served by proceeding against the offender by summons.’¹¹¹ However, the Institute is of the view that encouraging the use of alternatives to arrest requires stronger measures than s 55 provides.

9.2.3 In Part 4 of the Issues Paper it was suggested that greater encouragement to use alternatives to arrest might be achieved if exercise of the power to arrest were restricted by the provision of statutory criteria defining when an arrest may be made and expressly excluding the making of an arrest unless one or more of those criteria are satisfied. These criteria should include exclusion of the

¹⁰⁸ A summons may also be issued as a means of ensuring witnesses appear in court.

¹⁰⁹ See s 32 *Justices Act 1959* (Tas).

¹¹⁰ Para 7.1.

¹¹¹ [emphasis added].

possibility of proceeding in an alternative manner to arrest. Thus, in situations where a summons is more appropriate than an arrest, any arrest made may be considered unlawful as not fulfilling the legislative criteria.

9.3 Attendance notices or notices to appear

9.3.1 In recognition of the fact that the summons process is currently cumbersome and that this operates as a disincentive to its use, the Institute proposes that a faster and easier process be introduced, which, like arrest, can be carried out on-the-spot. This process would be based on the ‘notice to appear’ system that has been introduced in other Australian jurisdictions (see for example, the *Police Powers and Responsibilities Act 2000* (Qld), ss 382–390 and the *Police Administration Act 2007* (NT), s 133A–133E). There is evidence that these simplified procedures are having an impact on police practices.¹¹²

9.3.2 Accordingly, where a police officer finds someone committing or believes on reasonable grounds that a person has committed an offence and there are no reasons to believe that that person will not appear at court to answer a charge, the officer should have the power to issue an on-the-spot attendance notice to that person to appear at court at the time and place specified in the notice. Such a procedure is similar to that involved in the issuing of on-the-spot infringement notices by the police for some traffic offences.¹¹³ It would eliminate the delays and paperwork involved in applying for a summons and would also eliminate the need for obtaining the services of a justice in the initiating process. It also obviates separate service of the summons. The procedure provided in Chapter 14, Part 5 of the *Police Powers and Responsibilities Act 2000* (Qld) is illustrative. Section 382(1) states that the ‘object of this section is to provide an alternative way for a police officer to start or continue a proceeding against a person that reduces the need for custody associated with arrest and does not involve the delay associated with issuing a complaint and summons.’ Section 382(2) of that Act empowers a police officer to issue and serve a notice to appear on a person whom the officer reasonably suspects has committed or is committing an offence. Under s 384(1), a notice to appear form must –

- (a) state the substance of the offence alleged to have been committed; and
- (b) state the name of the person alleged to have committed the offence; and
- (c) clearly state whether the person was, at the time of the alleged offence, an adult or a child; and
- (d) require the person to appear before a court of summary jurisdiction in relation to the offence at a stated time and place; and
- (e) if a police officer issues the notice to appear at the request of another police officer (the requesting police officer) – state the requesting police officer’s particulars that would otherwise have been stated on the notice to appear had the requesting police officer issued and served it; and
- (f) be signed by the police officer serving the notice to appear.

¹¹² The Queensland Criminal Justice Commission Report, *Police Powers in Queensland: Notices to Appear* (1999) found that before the introduction of notices to appear, 86% of criminal proceedings in Queensland were initiated by way of arrest, with only 14% being initiated by way of summons. In contrast, in the six months after the introduction of notices to appear as many as 50% of all proceedings were commenced by notice to appear, with 45% being initiated by arrest and 5% by summons. However, the Queensland Criminal Justice Commission, *Police Powers in Queensland; Findings from the 1999 Defendants Survey* (2000) also found that a large proportion (21% – 27%) of those issued with notices to appear had also been arrested suggesting that notices to appear are not necessarily being used as an alternative to arrest to reduce the arrest rate of suspects. See Hunter, Cameron and Henning, above n 1, 426–427.

¹¹³ See for example s 43H *Traffic Act 1925* (Tas).

A notice to appear form must state a place where the court will be sitting at the time stated on the form, and the time for the person's appearance before a court must be 14 days or less after the notice is served. Before the defendant is required to appear at court under the notice, the notice must be lodged with the clerk of the court. The legislation gives a notice to appear equivalent status to a summons. Of course, this procedure will only be suitable in those circumstances where proceeding by summons would also be appropriate. It will not apply, for example, where the offence in question is of a serious nature or involves injury to a person or serious injury to property or the likelihood of such injury.

Submissions

9.3.3 The Criminal Law Committee of the Law Society responded that the 'current summons system works well.' If the system, however, could be 'simplified by an attendant notice system then the committee would not oppose such a course.'

Tasmania Police submitted that 'the implementation of on-the-spot notices by police, particularly in the field, will require careful examination on a range of fronts, including how this might effectively interface with other elements of the criminal justice system, especially the courts.'

The then Interim Commissioner for Children also supported the proposal for the introduction of on-the-spot attendance notices. She stated:

However, there are a number of safeguards I would like to see included in the proposal to introduce on-the-spot attendance notices as an alternative to arrest or summons.

Section 26 of the *Youth Justice Act 1997* requires that where a proceeding is initiated against a young person by way of complaint and summons, a copy must be served on the young person's guardian and on the Secretary. In my view, if on-the-spot attendance notices are introduced and may be used in relation to young people, police must be required to notify and serve a copy on the young person's parents/guardians and the Secretary as soon as possible.

The Commissioner also suggested that the proposed *Arrest Act* include a provision requiring police to exercise appropriate discretion when issuing on-the-spot attendance notices to young people:

That is, notices should not be issued at the young person's school or work, where this is avoidable. These suggested safeguards are similar to those included in Queensland's *Police Powers and Responsibilities Act 2000*, ss 383 and 392.

Recommendations

9.3.4 Instead of arresting and charging a person, or serving a summons, an alternative way of starting criminal proceedings via the issuing of a notice, similar to an infringement notice, provides an attractive and less coercive option to police officers in the right set of circumstances. An on-the-spot notice to appear regime, requiring the defendant to appear in a nominated court on a designated date within at least 14 days, has the potential to discourage police officers arresting for minor offences and may offer a less cumbersome option than proceeding by way of summons.

9.3.5 In terms of its speed and simplicity, such a system has the capacity to offer police a real incentive not to arrest unless the alleged offender's appearance before a court in respect of the offence is in serious doubt. The Queensland system of on-the-spot attendance notices provides a model to follow and adapt. Section 384 states the constituent features of the notice to appear form:

- (1) A notice to appear must—
 - (a) state the substance of the offence alleged to have been committed; and
 - (b) state the name of the person alleged to have committed the offence; and

Alternatives to Arrest

- (c) clearly state whether the person was, at the time of the alleged offence, an adult or a child; and
 - (d) require the person to appear before a court of summary jurisdiction in relation to the offence at a stated time and place; and
 - (e) if a police officer issues the notice to appear at the request of another police officer (the requesting police officer)—state the requesting police officer's particulars that would otherwise have been stated on the notice to appear had the requesting police officer issued and served it; and
 - (f) be signed by the police officer serving the notice to appear.
- (2) The place stated in a notice to appear for the person's appearance must be a place where the court will be sitting at the time stated.
- (3) The time stated in a notice to appear for the person's appearance before a court must be a time—
- (a) for an adult—at least 14 days or, with the person's written agreement, a stated shorter time, after the notice is served; or
 - (b) for a child—
 - (i) as soon as practicable after service of the notice to appear; and
 - (ii) fixed generally by the clerk of the court for hearing matters under the *Juvenile Justice Act 1992*.

Such a system provides an efficient option for police because certainty is required about the time and place the court will be sitting. At the time of issuing the notice, the police can be confident that a person is capable of appearing before a court within 14 days or sooner, and that a person who fails to appear may be arrested immediately (s 389). Other aspects of the Queensland model relate to:

- 382. Notice to appear may be issued for offence
- 383. Notice to appear must be served discreetly on a child
- 385. Filing of notice to appear
- 386. General particulars only are required on a notice to appear
- 387. Particulars of notice to appear offence must be given in the proceeding
- 388. Notice to appear equivalent to a complaint and summons
- 389. Court may order immediate arrest of person who fails to appear
- 390. Court must strike out notice to appear if service insufficient

As the then Interim Commissioner for Children noted, the Queensland model also has special procedures regarding young people that should be reflected in any equivalent system developed for Tasmania.

If the reform recommended by the Institute that the distinction between arrestable and non-arrestable offences be removed (Recommendation 5) is to occur, it should be accompanied by reform of the law relating to alternatives to arrest. Two important riders expressed by the ALRC in recommending that all Commonwealth offences become prima facie arrestable are that first, arrest should normally be considered an option of last resort and secondly, legislative safeguards should limit the exercise of a police officer's discretion to arrest in any case (see 4.1.5). If Tasmania is to pursue the reform of making all offences prima facie arrestable, it is imperative that effective alternatives to arrest are developed. Currently, s 55(2) of the *Police Offences Act* provides inadequate motivation or guidance for police officers to seek or execute alternatives to arrest.

Recommendation 19

To promote further alternatives to arrest and to enhance arrest as a measure of last resort, a statutory regime, similar to that contained in the *Police Powers and Responsibilities Act 2000* (Qld), ss 382-390, should be enacted enabling the police to issue on-the-spot attendance notices.

Appendix A – Legislation Proposed

Tasmania Law Reform Commission

(Proposed) *Arrest and Search Act 1977*, Parts I and II

PART I - PRELIMINARY

1.
 - (1) This Act may be cited as the *Arrest and Search Act 1977*.
 - (2) This Act shall commence on a date to be fixed by proclamation.
2. The Acts that are specified in the First Schedule are repealed to the extent indicated therein.
3. Interpretation

"arrest" means to detain and keep in custody for the purpose of bringing the arrested person before a court;

"indictable offence" means an offence which may be prosecuted upon indictment before the Supreme Court;

"offence" means any breach of the law for which a person may be punished summarily or otherwise and includes an indictable offence;

"premises" includes land, buildings, vehicles, vessels, or aircraft;

"simple offence" means any offence (indictable or not) punishable, on summary conviction before justices, by fine, imprisonment, or otherwise, etc.

PART II - ARREST

4. Any person may arrest, without warrant, any person—
 - (a) whom he finds committing any offence which involves—
 - (i) substantial injury to the person of another;
 - (ii) serious danger of such injury;
 - (iii) loss of, or serious injury to, any property; or
 - (iv) forcible and unlawful entry to any premises;
 - (b) whom he sees committing a breach of the peace;
 - (c) whom he finds lying or loitering in any place by night under such circumstances as to afford reasonable grounds for believing that he has committed or is about to commit a crime;
 - (d) whom he believes on reasonable grounds to have committed a crime and to be escaping from, and to be freshly pursued by, some person whom he believes on reasonable grounds to have authority to arrest him for that offence.

(Cf. section 27 *Criminal Code* and section 55(3) *Police Offences Act*)

5.

- (1) Subject to this section, any police officer may arrest, without warrant, any person—
 - (a) whom he finds committing an offence specified in the Second Schedule;
 - (b) whom he believes on reasonable grounds to have committed such an offence.
- (2) Notwithstanding subsection (1), a police officer shall arrest a person only if he believes on reasonable grounds that it is not appropriate to proceed against such person by way of summons.
- (3) Any police officer who believes on reasonable grounds that a person has committed an offence, other than an offence specified in the Second Schedule, may call upon that person to stop and give his name and address. If such person fails to do so, such officer may then arrest him without warrant.
- (4) In this section, an attempt to commit an offence is itself an offence.
(Cf. section 27 Criminal Code and sections 55 and 55A Police Offences Act)

6.

- (1) Where a person other than a police officer arrests a person without warrant, such arresting person shall take the arrested person before a police officer or a justice without delay to be dealt with according to law.
- (2) Where the arrested person is taken before a police officer, such police officer shall receive him into his custody and may thereupon—
 - (a) release him conditionally or unconditionally; or
 - (b) retain him in custody and take him before a justice as soon as reasonably practicable to be dealt with according to law.
(Cf. section 56 *Police Offences Act* and section 303 *Criminal Code*)

7.

- (1) When complaint is made to a justice he may—
 - (a) issue a summons to the person complained against;
 - (b) where the complaint is—
 - (i) that a person has committed or is accessory to having committed an indictable offence within the State;
 - (ii) that a person charged with having committed or with being suspected of having committed an indictable offence on the high seas or in any creek, harbour, haven, or other place in which the Admiralty of England has and claims to have jurisdiction or on land outside the State, of which offence cognizance may be taken by the Supreme Court, is suspected of being within the State; or
 - (iii) that a person has committed a simple offence the matter whereof is substantiated before him on oath, issue his warrant for the apprehension of the person complained against; or
 - (c) where the person complained against is imprisoned for any other cause, issue his warrant to the gaoler to bring up the body of that person as often as is required for the proceedings upon the complaint, and the gaoler shall obey the warrant.
- (2) A justice shall not issue a warrant under subsection (1) unless—
 - (a) the complaint is supported by statutory declaration by or on behalf of the complainant specifying the reasons for seeking the warrant; and

Appendix A

(b) he is satisfied that there are reasonable grounds for issuing the warrant.

(Cf. section 32 *Justices Act*)

8. A person has a duty to assist a police officer in making an arrest, when called upon to do so, unless he knows the arrest to be unlawful.

(Cf. section 28 *Criminal Code*)

9.

(1) It is lawful for a police officer or the person in command of an aircraft to arrest without warrant on board that aircraft a person whom he finds committing, or attempting to commit, or whom he believes on reasonable grounds to have committed, or to have attempted to commit, a crime under Chapter XXXIA of the *Criminal Code*.

(2) It is lawful for any person to assist the person in command of an aircraft to arrest without warrant any other person on board the aircraft unless he knows the arrest to be illegal.

(Cf. section 27 *Criminal Code*)

10.

(1) Where a police officer is proceeding lawfully to arrest a person, with or without warrant, and the person sought to be arrested takes to flight in order to avoid arrest, it is lawful for the police officer, and for any person lawfully assisting him, to use such force as may be reasonably necessary to prevent the escape of the person sought to be arrested.

(2) Where a police officer has lawfully arrested any person, it is lawful for him to use such force as he believes on reasonable grounds to be necessary to prevent the escape or rescue of the person so arrested.

(3) This section shall not authorize the use of force which is intended or is likely to cause death or grievous bodily harm, except in a case where the person sought to be arrested is suspected on reasonable grounds of having committed any of the offences specified in the Third Schedule, nor until the person sought to be arrested has been called upon to surrender.

(Cf. section 30 *Criminal Code*)

11.

(1) It is lawful for any person who is proceeding lawfully to arrest another person to use such force as may be reasonably necessary to prevent his escape.

(2) This section shall not authorize the use of force which is intended or is likely to cause death or grievous bodily harm.

(Cf. section 31 *Criminal Code*)

12.

(1) Where any person has lawfully arrested another person it is lawful for him to use such force as he believes on reasonable grounds to be necessary to prevent the escape or rescue of the person arrested.

(2) This section shall not authorize the use of force which is intended or is likely to cause death or grievous bodily harm.

(Cf. section 32 *Criminal Code*)

13.

(1) A warrant of arrest issued by a justice shall remain in force until it is executed or withdrawn.

- (2) A warrant to arrest a person charged with an offence may be executed by a police officer notwithstanding that it is not in his possession at the time, but the warrant shall, on the demand of the person arrested, be shown to him as soon as reasonably practicable.
- (3) It is the duty of a person arresting another, whether with or without a warrant, to give notice, if practicable, of the process or warrant under which he is acting or of the cause of the arrest.
- (4) A failure to fulfil either of the aforesaid duties shall not of itself deprive the person executing the process or 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.

(Cf. section 301 *Criminal Code*)

14. It is the duty of every police officer to arrest any person against whom an accusation has been made to him of having committed an indictable offence for which he may be arrested without warrant, unless he has reasonable grounds for believing such accusation to be without foundation.

(Cf. section 302 *Criminal Code*)

15.

- (1) Subject to this section, a police officer may, without warrant, stop any vehicle, vessel or aircraft or enter any premises for the purpose of—
 - (a) arresting any person named in a warrant of arrest and reasonably believed to be there; or
 - (b) in the absence of a warrant, accomplishing the lawful arrest of a person reasonably believed to be there and to have committed an offence specified in the Second Schedule for which a summons is inappropriate.
- (2) Force shall not be used to enter premises until any occupant has been called upon to permit entry and such entry has been refused.

Appendix B – Tasmania Police Manual

2.24 MENTALLY DISTURBED PERSONS

POLICY

It is the policy of Tasmania Police that mentally disturbed persons should be encouraged to make a voluntary informal admission before compulsory powers under the Mental Health Act 1996 are invoked.

2.24.1 GENERAL

- (1) The Department's policy in relation to persons suffering from mental disorder accords with that of the Department of Health and Human Services, which states:

‘Informal Admissions Sections 18 and 19 should be the rule. Compulsory powers (ie Mental Health Act Sections 15 and 16) should only be invoked when the person apparently suffering from a mental disorder cannot be persuaded to go to hospital voluntarily.’
- (2) Members and authorised officers should bear this policy in mind when dealing with persons considered to be in need of admission for observation.

7.1 ARREST

POLICY

It is the policy of Tasmania Police that members should only arrest in cases where proceedings by summons would not be an appropriate means of ensuring a person's appearance before a court.

7.1.1 DEFINITION

- (1) An ‘arrest’ is the act of taking another person into lawful custody:
 - (a) for a specified offence;
 - (b) pursuant to a warrant issued by a justice;
 - (c) to facilitate the making of a police family violence order;
 - (d) to make application for a family violence order or restraint order.

7.1.2 DISCRETION TO ARREST

- (1) In many cases, members will have discretion whether or not to effect an arrest. As a general rule, an arrest may be appropriate in the following circumstances:
 - (a) for serious offences;
 - (b) to prevent the continuation or repetition of the offence, or the commission of another offence;
 - (c) to preserve the safety or welfare of any person, or the harassment of witnesses;
 - (d) to prevent the fabrication, concealment, loss or destruction of evidence;
 - (e) to enable forensic material to be obtained if in accordance with the Forensic Procedures Act 2000;
 - (f) to facilitate the making of a police family violence order, an application for a family violence order or an application for a restraint order.

7.1.3 ARREST WITHOUT WARRANT

- (1) Powers of police to arrest without warrant are contained in a variety of legislation.
- (2) Members should be conversant with these powers and:
 - (a) be able to justify their actions;

- (b) know the nature and legal aspects of the offence involved; and
- (c) ensure the legal ingredients are present to justify the charge.

7.1.4 ARREST ON WARRANT

- (1) A warrant for arrest is an order made by a Justice which police are bound to obey.
- (2) Members should exercise discretion in relation to the proper time, place and manner of execution.
- (3) Where a person is arrested on warrant the custody officer is to record the words “Arrested on Warrant” within the nature of the charge.

7.1.5 METHOD OF ARREST

- (1) Members effecting an arrest should:
 - (a) use an absolute minimum of force;
 - (b) identify themselves as a police officer (if in plain clothes);
 - (c) lay hands on or touch the arrested person;
 - (d) advise the arrested person that they are under arrest, and of the grounds of arrest, and produce a warrant if applicable; [refer 8.8 WARRANTS]
 - (e) be as inconspicuous as possible, and not unnecessarily delay the decision to arrest; and
 - (f) treat persons under arrest with courtesy, and afford no justification for allegations that their treatment was anything other than civil and reasonable.
- (2) The power of arrest applies to police officers at all times, irrespective of whether a member is on or off duty, or the nature of the duty being performed.
- (3) When members approach or arrest a person, they should be aware of the possibility that the person may be carrying or concealing a weapon and that a danger of being injured exists to the arresting officer and other members involved.

7.1.6 IDENTIFICATION ON ARREST

- (1) Members should exercise caution when arresting a person:
 - (a) whose identity is not personally known; or
 - (b) where there is a doubt as to the identity of such person.
- (2) All claims of mistaken identity should be thoroughly investigated.

7.1.7 SEARCH PROCEDURES ON ARREST

- (1) Section 58B of the Police Offences Act 1935 permits the searching of persons in lawful custody where it is believed on reasonable grounds that it is necessary.
- (2) It also allows the retention of weapons, clothing and articles under certain circumstances.
- (3) A police officer may only use such force as is reasonably necessary for these purposes.
- (4) After a person has been taken into lawful custody, a member may conduct a frisk search of that person prior to transporting that person in a police vehicle.
- (5) A “frisk search” means:
 - (a) a search of a person conducted by quickly running the hands over the person’s outer garments; and
 - (b) an examination of anything worn, including the pockets, or carried by the person that is conveniently or voluntarily removed from the person.
- (6) A police officer who conducts a search of a person must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search.
- (7) A ‘frisk search’ should be conducted on a person by a police officer of the same sex as the person.

7.1.8 ASSISTANCE FROM THE PUBLIC TO EFFECT ARREST

- (1) Members of the public can be legally obliged to assist police to arrest an offender if called upon and requested to do so. [refer Criminal Code Act, s. 28 & 117, & Police Service Act 2003, s. 79]
- (2) No particular form of words is required, but the requesting officer should:
 - (a) identify themselves as a police officer (even if in uniform);
 - (b) advise the person from whom assistance is sought that they are acting in the lawful execution of their duty; and
 - (c) if necessary, inform the person it is an offence for them to refuse to assist.

7.1.9 ARRESTS BY PRIVATE PERSONS

- (1) Members have a duty to receive into custody any person arrested by a private person, unless:
 - (a) proceedings by summons would be more appropriate; or
 - (b) the offence is of a trifling nature.
- (2) The person who made the arrest should be requested to accompany the receiving member to a police station and, where appropriate, to sign the charge record as the arresting person.
- (3) Should such person refuse to accompany the member or sign the charge record, the receiving member should:
 - (a) obtain sufficient details to proceed by summons; and
 - (b) not detain the arrested person unless there are reasonable grounds for doing so. [refer Police Offences Act, s. 56(2), & Criminal Code Act, s. 303]

7.2.6 OPERATIONAL INFORMATION SERVICES CHECKS

- (1) Where a person is in custody, members are to ascertain from Intrepid Centralised Enquiry (ICE) whether:
 - (a) there is an outstanding warrant for their arrest;
 - (b) they are otherwise wanted or enquired after; or
 - (c) there are any warnings recorded in respect of that person.

7.2.7 UNCONDITIONAL RELEASE

- (1) In the event of a person establishing their innocence after being taken into custody but prior to being conveyed to a Police Station, or where a custody officer is not satisfied that an offence is disclosed, such person should be released unconditionally.
- (2) Members should do everything possible to allay any sense of grievance.
- (3) A supervisor should be verbally notified immediately.
- (4) A report outlining the circumstances of the incident should also be submitted to the OIC of the Division prior to the completion of duty.
- (5) Where a person in custody has been presented to a Custody Officer, and is unconditionally released, the custody officer is to record the reason for the release.
- (6) The unconditional release of a person in custody does not apply to a person arrested on warrant.

7.2.15 FORENSIC PROCEDURES ON CHARGING

- (1) When a person aged 15 years or older is charged with a "Serious Offence" contained in the *Forensic Procedures Act 2000*, Non-Intimate samples can be ordered by any Police Officer.
- (2) Apart from those procedures which are required for an investigation, members should obtain fingerprints, photographs and a DNA sample from the person.
- (3) The primary method for DNA sampling is the buccal swab.

- (4) Samples can be obtained from persons under 15 years with the consent of the person and parent, or on the authorisation of a Magistrate.
- (5) Further details can be obtained by referring to the Forensic Procedures Act Resource Guide. [refer Forensic Procedures Act 2000 & Forensic Procedures Act 2000 Resource Guide]

7.10 ABORIGINAL PERSONS

POLICY

It is the policy of Tasmania Police that, unless exceptional circumstances exist or statutory requirements require otherwise, Aboriginal persons should be admitted to bail at the first opportunity and not be placed in cells.

7.10.1 SPECIAL VIGILANCE AND PRECAUTIONS

- (1) It is believed that some Aboriginal persons affected by alcohol, drugs or incarceration have a predisposition to suicide or self injury. Members should exercise special vigilance and precautions to ensure the safety and well being of Aboriginal persons should there be a need to detain them in police custody.

7.10.2 DETENTION AND/OR INTERROGATION

- (1) In the event that it becomes necessary to detain and/or interview an Aboriginal person, the member performing the function of custody officer into whose custody the person is first received, or the senior interviewing member if the person is not in custody, is responsible for making every effort to:
 - (a) notify a relative or friend and the Aboriginal Legal Service (ALS),
 - (b) if attendance of any of those notified is requested, take all reasonable steps to make the necessary arrangements, and
 - (c) advise the District Aboriginal Liaison Officer or Tasmania Police Aboriginal Liaison Co-ordinator of significant matters.
- (2) Members should not hesitate to seek the advice or assistance of the ALS. The ALS can be expected to respond positively and helpfully. Contact telephone numbers should be displayed in all stations, Charge Rooms and Watch-Houses.
- (3) If an Aboriginal person requests that the ALS not be provided with their personal details, the member responsible for notification should advise the ALS that an Aboriginal person has been arrested and detained, and that the person has requested non-intervention by the ALS. The ALS should be provided with details of the person's sex, age, physical condition and offence/s.
- (4) The member concerned should record that the Aboriginal person requested non-intervention of the ALS and request the Aboriginal person to sign the record.

7.10.3 MULTIPLE CHARGE SYNDROME

- (1) The Royal Commission into Aboriginal Deaths in Custody recommended that the Attorneys-General of each State monitor the charging of Aboriginal people with multiple charge syndrome, ie, indecent, abusive language or similar, coupled with assault, obstruct or resist police.
- (2) Inspectors and Supervisors are directed to monitor the arresting and charging of persons for that sequence of offences or similar offences within their span of control.
- (3) Whenever a person is charged with those offences, a sergeant of police is to be notified and should where practicable be present at the charging to ensure the propriety of the charging procedures in relation to the offences.

7.10.4 OFFENSIVE LANGUAGE CHARGES

- (1) The Royal Commission into Aboriginal Deaths in Custody recommended, in part, that the use of offensive language in circumstances of intervention by police should not normally be occasion for arrest or charge.
- (2) Members are reminded that in the exercise of their discretion, they should not arrest or charge members of

Appendix B

the public for offensive language type offences except when the intervention was not initiated by them, and except when the exchange in which the language is clearly open to having been heard by members of the public.

- (3) Supervisors are directed to monitor the arresting and charging of persons by police officers to ensure adherence to the above principle.

7.10.5 WARRANT CHECKS AT ABORIGINAL CULTURAL EVENTS

- (1) The Royal Commission into Aboriginal Deaths in custody recommended that the practice of warrant checks at cultural gatherings cease.
- (2) Accordingly, members are directed not to conduct warrant checks at cultural events, including activities such as Aboriginal sporting days, except in certain circumstances.
- (3) The arrest on warrant of persons attending cultural gatherings is not to occur unless the warrant to be executed relates to a crime, is not of a trivial nature and cannot reasonably be delayed to a more appropriate time or place.

7.11 DIPLOMATIC IMMUNITY

7.11.1 GENERAL

ORDER

Members shall not arrest or detain any person who enjoys full diplomatic immunity.

- (1) Under Australasian law and international conventions, members of foreign diplomatic missions, consular posts and international organisations, must be accorded certain rights, privileges and immunities by police and the courts.
- (2) Only such officials who have been officially accredited by the Department of Foreign Affairs and Trade (DFAT) are entitled to privileges and immunities. Accreditation is evidenced by the issue of coloured identification cards signifying varying degrees of diplomatic immunity.
- (3) Immunity is a legal barrier which precludes Australian Courts from exercising jurisdiction over cases involving persons who enjoy it. This is not, however, a blanket authority or excuse to disregard the law or lawful directions of a police officer.
- (4) It is essential that all diplomats, their families and staff are treated with the highest respect and members should ensure their freedom and dignity are not impinged upon.

7.12.1 UNCONSCIOUS PERSONS

ORDER

Members who find a person:

- unconscious; or
- not easily aroused;

shall immediately convey, or cause that person to be conveyed, to a hospital or otherwise afford them appropriate medical assistance before they are detained.

Note: This order is to be complied with regardless of whether the person smells of intoxicating liquor and is believed to be drunk and incapable of taking care of themselves.

7.15.1 ARREST OF DEFENCE FORCE PERSONNEL

- (1) When a member of any defence force, including any sailor, soldier or airman of a visiting force, is arrested, the Officer in Charge of the police station or office concerned should immediately cause the member's unit or ship to be informed of the circumstances. [refer 17.3.2 OFFENCES ON DEFENCE ESTABLISHMENTS]

7.16 NON-AUSTRALIAN CITIZENS

7.16.1 GENERAL

- (1) Members have the power to arrest non-Australian persons for any offence committed against any State or Federal Act for which such a power would normally exist. Once an arrested person has been identified as a foreign national, Protective Services (PS) should be immediately notified. PS will then notify or authorise the notification of the Department of Foreign Affairs and Trade (DFAT). [refer 7.11 DIPLOMATIC IMMUNITY]
- (2) Where a foreign national is taken into custody and the person requests the local consulate be notified, the appropriate consular representative is to be notified without delay and informed of the foreign national's situation.
- (3) A consular official should be allowed access to the person in custody.
- (4) When the foreign national is Chinese or Vietnamese, the local consulate is to be notified unless the detained person requests otherwise.
- (5) The right of access and communication may be temporarily denied if the provisions of the Criminal Law (Detention and Interrogation) Act 1995 are applied. [refer: Criminal Law (Detention and Interrogation) Act, s. 6(3)]

ORDER

Members shall not make direct contact with Embassies or Consular Offices without first notifying and receiving authorisation from Protective Services.

7.16.2 FINGERPRINTING OF NON-AUSTRALIAN CITIZENS UNDER THE MIGRATION ACT

- (1) Where a person is in custody as an unlawful non-Australian citizen or held for removal or deportation under the provisions of the *Migration Act 1958*, they are to be fingerprinted only at the express request of an officer of the Department of Immigration and Multicultural Affairs. [refer: Migration Act, s. 258]

7.17.1 COMMONWEALTH OFFENCES

- (1) Under the *Commonwealth Crimes Act 1914*, police may arrest any person without warrant if they have reasonable grounds to believe that the person has committed, or is committing an offence under the Crimes Act, and that proceedings against the persons by summons would not be effective.

7.18.1 ASSISTANCE TO EFFECT ARREST TO REVOKE SURETY

- (1) A person acting as surety for a person on bail, and bound by a recognisance pursuant to Section 7 of the *Bail Act 1994*, may arrest their principal if they believe on reasonable grounds that the person admitted to bail has contravened, or is about to contravene, a condition of bail.
- (2) When requested, members are legally obliged to assist persons bound by a recognisance to arrest their principal. [refer: Bail Act, s. 26(5)]

7.21.1 ARREST OF MARRIED PERSONS IN PROPERTY DISPUTES

- (1) Members should avoid arresting married persons on a charge of stealing, receiving, or injuring the property of their spouse.
- (2) If advice is required, members should consult their Supervisor and, where necessary, contact their Divisional Inspector or Duty Officer.

9.1 YOUTHS AND CHILDREN

This section contains the following topics:

Policy

It is the policy of Tasmania Police that members should afford children special treatment and consideration

in accordance with the requirements of the Youth Justice Act 1997 and the Children, Young Persons and Their Families Act 1997. Further, that members should only arrest youths in situations where it is believed that proceedings against the youth by way of caution, community conference or summons would be ineffective, or where necessary to comply with legislative requirements.

9.1.1 YOUTH JUSTICE

9.1.1.1 DEFINITION

- (1) A 'youth' means a person who is 10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred. [refer Youth Justice Act 1997]

9.1.1.2 GENERAL

- (1) The Youth Justice Act 1997 is based on the principles of restorative justice and it relies fundamentally on effective diversionary procedures to achieve its objectives. Diversionary procedures are intended to keep youths out of the court system and encourage them to take responsibility for their actions with the aim of changing their behaviour.
- (2) Members shall be conversant with the powers, obligations and authority conferred on them by the Youth Justice Act 1997.

9.1.1.3 NOTIFICATION

ORDER

Members who arrest a youth shall immediately advise their supervisor, Divisional Inspector or Duty Officer of the circumstances.

9.1.1.4 ARREST OF YOUTHS

- (1) Subject to the Youth Justice Act 1997, the law of the State relating to investigation, interrogation, arrest, bail, remand and custody applies to youths, with necessary adaptations and any further adaptations that are set out in the Act or the regulations.
- (2) A police officer may only arrest a youth in relation to an offence if the arresting officer believes the offence is serious enough to warrant an arrest and also believes, on reasonable grounds, that—
 - (a) the arrest is necessary to prevent a continuation or repetition of the offence; or
 - (b) the arrest is necessary to facilitate the making of a police family violence order, an application for a family violence order pursuant to the Family Violence Act 2004, or an application for a restraint order under Part XA of the Justices Act 1959; or
 - (c) the arrest is necessary to prevent concealment, loss or destruction of evidence relating to the offence; or
 - (d) the youth is unlikely to appear before the Court in response to a complaint and summons. [refer Youth Justice Act 1997, s. 24]
- (3) The power of a police officer to arrest a person under section 27 of the Criminal Code 1924 is subject to the limits imposed in the above paragraph.

9.1.1.5 CUSTODY OF YOUTHS

- (1) An arrested youth should not be detained in custody in a Watch-House unless:
 - (a) arrested as an absconder from an institution;
 - (b) it is considered that, having regard to the serious nature of the charge or other circumstances of the case, the youth shall be detained for court;
 - (c) the child has appeared before a justice or a court and an order remanding the child in custody has been made; or
 - (d) otherwise in accordance with the provisions of the *Criminal Law (Detention and Interrogation) Act*.
- (2) A youth arrested and required to be kept in custody until brought before a court must be detained in a watch-house.

- (3) Where a youth who less than 19 years of age is detained in a watch-house the watch-house keeper must take steps to keep the youth from coming into contact with any adult detained in that watch-house. [refer Youth Justice Act 1997, s. 25]

9.1.1.6 CUSTODY AND BAIL

- (1) If a youth is not admitted to bail under section 34 the Justices Act 1959 or under section 4 of the *Criminal Law (Detention and Interrogation) Act 1995*, the youth shall be detained in a watch-house while waiting to be brought before a justice. [refer *Youth Justice Act 1997*, s. 25]

9.1.1.7 INTERVIEW OF YOUTHS

(1) SUSPECT/OFFENDER

- (a) Where a member intends to interview or ask any investigatory questions of a youth whom the officer has reasonable cause to suspect may have committed an offence, the interview should be conducted in the presence of a parent, guardian or other independent person. Where practicable the person present should be of the youth's choice.
- (b) No more than two (2) officers should be present at such interview.
- (c) Where a youth who is to be interviewed is an Aborigine, and a parent or guardian cannot be contacted, the initial enquiry for an 'independent person' should be directed to the Aboriginal Legal Service.

(2) WITNESS/COMPLAINANT

- (a) Members should be cognisant of the fact that youths' intellectual development and capacity varies. Members should therefore give consideration to the comprehension ability of youths and consider the appropriateness of having a parent, guardian or responsible adult present during the taking of any witness statements. Such persons should be independent and, if practicable, of the youth's choice. The desirability of having a parent, guardian or responsible adult present increases as the age of the witness decreases. [refer 4.5.8 SEX CRIMES & 4.7 POLICE INTERVIEWS]