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THE UNIVERSITY OF SYDNEY

INSTITUTE OF CRIMINOLOGY

SHORT COURSE FOR POLICE OFFICERS

WEDNESDAY, 10 MAY, 1978

REFORMING CRIMINAL INVESTIGATION LAW AND PROCEDURE

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

The attached pages are Chapter 12 of the Report of the Law Reform Commission, *Criminal Investigation* (A.L.R.C.2), 1975. With some modifications, the recommendations were adopted by the Commonwealth Government and were the basis of the *Criminal Investigation Bill 1977*. The judge will speak about the Bill and the Commission's recommendations.

99 Elizabeth Street,
Sydney.

March, 1978

12. Summary of Recommendations

GENERAL

303. There should be a single legislative code of procedure governing the conduct of all members of the Australia Police, whether they happen to be working in the Territories or the States, and whatever task they happen to be performing (Para. 14).

304. The law enforcement powers of customs and excise officers should be brought into line with those of the Australia Police by amendment of the appropriate legislation (Para. 18).

305. A systematic review should be made of the law enforcement powers of federal officers other than those within our present terms of reference, in order to determine which are sufficiently controlled, and which, if any, ought to be circumscribed (Para. 17).

306. State police officers should be bound by the proposed legislation governing the powers of the Australia Police to the extent only that they deal with persons arrested by Australia Police officers for federal offences (Para. 19).

307. State magistrates and justices should apply the proposed federal legislative code in pre-trial matters relating to persons arrested by members of the Australia Police. Arrangements should be entered into with the States with respect to the jurisdiction and availability of such judicial officers (Paras 19, 176).

ARREST AND SUMMONS

308. Australia Police officers should proceed by way of summons rather than arrest wherever possible (Para. 29).

309. There should be enacted for the Australia Police a single, streamlined and modernised set of summons provisions to replace the State and Territorial legislation presently applicable to the force. The new legislation should contain detailed provisions with respect to the service of summonses by post, especially for lesser offences (Para. 62).

310. There should be a single law controlling the issue of arrest warrants to members of the Australia Police. The procedure for the issuing of such warrants should be tightened by requiring that:

(a) the information on oath be supported by an affidavit of the police officer stating detailed reasons for seeking the arrest warrant;

(b) the judicial officer be required to satisfy himself, by questioning if necessary, that the stated reasons amount to reasonable grounds for issuing the warrant, or that there are other such grounds; and

(c) the judicial officer endorse the affidavit indicating those reasons on which he relies in issuing the warrant (Para. 26).

311. All Commonwealth and Territorial offences should be prima facie arrestable, except those declared by regulation to be non-arrestable (Para. 34).

312. No arrests should be made in any particular case unless the police officer has a reasonable belief not only that the person has committed an offence, but also that proceedings against

him by way of summons would not be effective or appropriate in the circumstances. Arrest must be justified by the necessity to:

(a) ensure the appearance of the offender before a court of competent jurisdiction;

(b) prevent the continuation or repetition of the offence; or

(c) prevent the loss or destruction of evidence relating to the offence (Paras. 38-44).

313. Australia Police officers in the Territories should have the power to arrest without warrant fugitive interstate offenders in circumstances where it is believed on reasonable grounds that the person has committed an offence elsewhere which, if committed in the Territory, would be a serious offence. 'Serious' offences should be regarded as those punishable by a term of imprisonment of more than six months (Para. 35).

314. Private citizens should have the power to arrest without warrant for federal offences only where the person is believed to be committing or to have just committed the offence, and the exercise of the power should be subject to the same criteria as govern the Australia Police. The duty of the private citizen should be to forthwith take the person arrested before either a justice or magistrate, or a police officer (Para. 47).

315. The arrest powers of customs and excise officers should be brought into line with those of the Australia Police and made exercisable only when the officer is satisfied that proceedings by way of summons would be ineffective or inappropriate in the circumstances (Para. 45).

316. It should be unlawful to use more force, or to expose a person to more indignity, than is reasonably necessary to effect an arrest or prevent the escape of the person from lawful custody (Paras. 51-53).

317. The common law 'fleeing felon' rule should be abolished. Lethal or dangerous force should not be used 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 (Para. 54).

318. Immediate steps should be taken to re-establish on a proper basis the control of police use of firearms in the Northern Territory. Comprehensive and efficient training and retraining programs in the use of firearms should be introduced, particularly in the Northern Territory (Paras 56-57).

319. Personal searches of the body by police officers in the context of arrests should be confined to 'frisk'-type searches believed to be necessary for the purpose of discovering either dangerous weapons or evidence with respect to the particular offence for which the person is in custody (Paras 58-59).

320. There should be a power to enter premises:

(a) in order to arrest a person named in a warrant of arrest and reasonably believed to be on the premises; and

(b) in the absence of a warrant, to accomplish the lawful arrest of a person reasonably believed to have committed a serious offence and to be on the premises.

This power should not authorise police officers to enter premises for arrests at night where it would be practicable to make that arrest during the day (Para. 60).

321. Persons arrested should be notified at the time of their arrest, where practicable, of the reasons for their arrest (Para. 61).

PROCEDURES SHORT OF ARREST

322. The power to require a person to furnish his name and address, now available only in traffic cases, should be extended to situations where the policeman has reasonable grounds for believing that the person can assist him in relation to an offence which has been, may have been, or may be committed. The police officer should be required to specify the reason for which the person's name and address is sought, and there should a reciprocal right, in such a situation, for a citizen to demand and receive from the policeman particulars of his own identity (Paras 79-81).

323. As a general rule, a police officer should not be entitled to question a person against his will or to exercise any other compulsive investigative power in respect of that person unless he can satisfy the criteria that would justify an arrest of that person (Paras 8, 64).[*]

324. Procedures should be introduced to ensure that pre-arrest 'voluntary co-operation' is genuinely voluntary. A police officer should not question any person whom he thinks might conceivably be the author of a serious crime, nor seek to have that person go to a police station or anywhere else for the purpose of procuring evidence against him, without previously advising him of his rights to refuse to answer any questions to go to any such place for any such purpose. Failure to produce a signed acknowledgment that this advice was given should be prima facie evidence that it was not given, and should be grounds for a court refusing in a proper case to admit in evidence any confession or other damaging evidence that may have been obtained (Para. 66ff).

CUSTODIAL INVESTIGATION

325. Police duties and powers in relation to persons in custody should be systematically defined in legislation, the duties by reference to whether the person is under 'restraint' and the powers by reference to whether he is in 'lawful custody' (Paras 82-86).

326. Persons under restraint should be notified of their rights before any questioning or other form of investigative procedure involving their participation commences. They should be informed of the fact that they are under restraint, why they are under restraint, and what their rights are, in the first place in respect to the answering of questions, access to friends and relatives, and access to a lawyer, and subsequently, if the occasion arises, in relation to identification parades, bail and the like. This information should be communicated in a language which the person can understand both in writing and, where practicable, orally (Para. 100).

327. Police officers dealing with persons in custody should be required to identify themselves. Uniformed officers should wear a permanently attached badge or label of easily legible size recording the name or number of the officer in question (Para. 102).

328. The permissible duration of police custody should be precisely specified in legislation. The statutory maximum should be four hours, although this should be capable of extension up to another eight hours following application (be telephone if necessary) to a magistrate. Further extensions should be obtainable only from a Federal, Territory or State Supreme Court judge (Para. 89).

329. The four-hour period should be, and be regarded as, the maximum rather than the norm.

[*] Mr Brennan dissents from this recommendation, and also those following which would both limit the power to question before arrest and allow a degree of questioning after arrest, see paras 10, 72-8.

The primary statutory requirement should be to take the person before a justice or magistrate, to make a police bail decision, or to release him, 'as soon as reasonably practicable' after the custody begins. The four hour period should be kept under review, and if it appears that this 'as soon as reasonably practicable' safeguard is not being observed in practice, then the basic time limit should be reduced accordingly (Para. 94).

330. A person under restraint should have the right to communicate with a friend or relative, subject only to the right of police to prevent this if they have a reasonably founded belief that it will result in the escape of an accomplice or the loss or fabrication of evidence (Para. 103).

331. A system should be introduced to enable friends, relatives or the legal adviser of a person under restraint to establish his whereabouts. It should be mandatory for police officers to answer such bona fide inquiries promptly and accurately (Para. 104).

332. A person under restraint should be afforded the facilities necessary to enable him to communicate with, and arrange for the presence of, a lawyer of his choice. He should be aided in this respect by being furnished, if necessary, with a list of legal practitioners in the area, the list being compiled in consultation with the appropriate Law Society and containing the names of lawyers who have indicated their willingness to represent such persons (Paras. 107-8, 110-11).

333. If the person under restraint, after notification of this right, requests consultation with a lawyer, then no questions should be asked pending the arrival of that lawyer, although police should not be required to wait longer than two hours for such arrival. Facilities should be made available for the private consultation of a person with his lawyer before any such questioning begins (Para. 109).

334. The lawyer representing a person under restraint should be entitled to be present during questioning of such person and to give his client any advice that may be sought at any time, but not to otherwise interfere with the proceedings (Para. 109).

335. The police power to take fingerprints, photographs, handwriting samples and the like should be limited to situations where the obtaining of such fingerprints etc. is reasonably believed to be necessary for the identification of the person in relation to the offence for which he is in custody, or where a magistrate's order has been obtained (Paras 113-15).

336. Prints, photographs and samples taken in connection with an offence which is not found by a court to be proved, or which is not proceeded with, should be destroyed. It should be an offence for a police officer or other person to make a copy of any prints etc. required to be destroyed in this way (Para. 116).

337. There should be a general statutory obligation to conduct identification parades fairly. All identification parades should be photographed, preferably in colour (Paras 120-1). A suspected person should be informed of his right not to participate in a parade, and to have a lawyer or an independent witness present during any such parade (Paras 124-5). Full written records should be kept of the conduct of identification parades, including a written description by the witness of the person he is seeking to identify before he views the parade (Para. 123).

338. There should be legislative provision governing identification by photographs: a general requirement of fairness, a requirement of written records, including witness's prior description, and a requirement that, but for exceptional circumstances, the showing of photographs of a suspect to a witness after that suspect has been apprehended should be prohibited (Paras 126-8).

339. The use of identity kit pictures should be controlled in a way similar to the use of photographs (Para. 129).

340. A warning should be given by the judge at the trial of a case against the accused turning wholly or substantially on the correctness of one or more identifications, by any means, of the accused. Such warning should draw the jury's attention to the special need for caution before convicting in reliance on identification evidence (Para. 130).

341. No medical examination of a person under restraint should be undertaken except pursuant to (a) the consent, acknowledged in writing, of the person concerned or (b) a court order from a magistrate obtained after application by a senior police officer supported by affidavit setting out proper reasons. Nothing should be taken to derogate from the overriding power of the court to exclude evidence obtained by the use of excessive force or inhuman treatment (Paras 131-2).

342. The obtaining of body samples from an accused for the purpose of forensic analysis should be subject to the same controls as medical examinations (Para. 134).

343. There should be a general statutory prohibition upon the inhuman or degrading treatment of persons in custody, and explicit rules governing the provision of reasonable toilet facilities, food and drink, the provision, if necessary, of medical treatment and the opportunity to wash or shower, shave and obtain a change of clothes prior to court appearance (Para. 135).

QUESTIONING AND THE RIGHT TO SILENCE

344. There should be statutory recognition of the suspect's right to silence, a statutory requirement that he be notified of that right and a statutory guarantee that he be afforded the opportunity to obtain such professional assistance as is necessary to enable him to exercise that right (Paras 142, 146ff.).

345. There should be procedures introduced for ensuring the reliability of confessional evidence and minimising contests as to the circumstances in which it was obtained. Interviews should preferably be (a) recorded by mechanical means or (b) corroborated by a third person and, if these measures are not practicable in the circumstances, (c) checked by a third person after being reduced to writing, or at least (d) reduced to writing and signed by the accused (Paras 154-62).

346. Special provision should be made with respect to tape recording of interviews concerning the custody of tapes and the obtaining of copies thereof, the power of the court to edit out, in camera, irrelevant and prejudicial material, and the erasure of such tapes if no proceedings have been commenced within twelve months (Paras 156-9).

347. A failure to employ one of the above-mentioned safeguards in circumstances where it was practicable to do so should prima facie result in the exclusion of the evidence. Even if the confessional evidence is declared admissible after application of the reverse-onus discretionary exclusionary rule of evidence, the failure to employ safeguards should be treated by the tribunal of fact as going to the weight of such evidence, and legislation should provide accordingly (Para. 163).

348. The common law voluntariness rule, resulting in the automatic exclusion of confessional evidence involuntarily obtained, should be incorporated in the legislation in modified form. Confessions extracted by violence or the threat thereof should be deemed involuntary, but other forms of inducement should not produce that result unless they are held likely to have caused an untrue admission to be made (Paras 151-3).

RELEASE AND BAIL

349. It should be made clear that a police officer is entitled to release a person in custody at any time without a charge being laid or a summons issuing, with no liability being attracted provided the restraint was well grounded in law until the time of release (Para. 165).

350. It should be made clear that there is an obligation immediately to release a person arrested when one or other of the criteria necessary to justify that arrest no longer apply (Paras 44, 165).

351. There should be detailed legislative provisions governing the release of persons on police bail. So far as possible the principles should be the same for police as court bail. The latter is outside our present terms of reference, but needs urgent law reform attention (Para. 173).

352. Persons in custody charged with an offence should be fully notified of their rights to apply for bail, to have legal advice in this respect and to communicate with such other people as may be necessary to obtain assistance. The criteria and conditions on which bail may be granted should also be notified in writing (Para. 175).

353. The bail decision should be made within the four-hour maximum time limit (as lawfully extended) for custodial investigation. It should be capable of being made by any police officer of or above the rank of sergeant or for the time being in charge of a police station (Para. 175-6).

354. The bail decision should be made by reference to specific criteria set out in legislation. These should address attention respectively to (a) the probability of appearance at court, (b) the interests of the accused and (c) the protection of the community. The last-mentioned criterion should not include 'the probability of the accused committing further offences': the Commission does not favour the power of preventive detention. Consideration should be given to adapting the Manhattan points system for determination of probability of appearance, and incorporating this practical scheme in bail procedure by way of regulations or police commissioner's orders (Paras 178-182).

355. There should be much more flexibility as to the conditions on which a person may be released on bail. Non-monetary conditions should be emphasised. Various classes of conditions should be set out in the legislation in an increasing order of stringency, with the police officer obliged to set the least onerous condition consistent with the person's release. The traditional language in which bail conditions have been set should be modernised and simplified (Paras 174, 183-6).

356. There should be a right of immediate appeal to a magistrate (by telephone if necessary) if bail is refused or conditions considered too stringent are imposed (Para. 175).

357. A person released on bail who wilfully and unreasonably fails to appear as instructed or breaks a condition of release imposed on him should be guilty of a criminal offence (Para. 177).

358. Other minor reforms with respect to police bail should include:

(a) provision to enable the subsequent deposit of cash in lieu of security where money bail is set (Para. 187);

(b) provision enabling payment of bail money by cheque rather than cash if this is acceptable to the police officer (Para. 187);

(c) provision removing the 14-day limitation on duration of police bail which has proved onerous in some jurisdictions (Para. 175); and

(d) provision enabling a person charged with multiple offences to be bailed on one alone (Para. 175).

SEARCH, SURVEILLANCE AND ENTRAPMENT

359. General search warrants in all forms should be abolished (Para. 196).

360. The procedures governing the issue of search warrants should be tightened by requiring an affidavit from the informant stating the reasons why the warrant is thought necessary, and requiring the judicial officer to (a) satisfy himself that the stated reasons or some others justify the issue of warrant and (b) endorse it accordingly (Para. 200).

361. Procedures should be introduced for the issuing of search warrants by telephone in exceptional cases (Paras 201-2).

362. Searches and seizures made without warrant or court order should be lawful only if made,

(a) pursuant to specific statutory provision which sets out the specific purposes of the search (Paras 206-9);

(b) at the invitation or with the consent of the person in question, as evidence by a signed acknowledgment, the absence of which should be prima facie evidence that the consent was not given (Para. 205), or

(c) in response to circumstances of such seriousness and urgency as to require and justify immediate action without authority of such an order or warrant (Paras 197.)

363. The 'urgency' power of search should be extended to searches incident to arrest, emergency searches necessary to prevent loss of evidence, and searches of persons and vehicles suspected on reasonable grounds to be carrying any article which is an offensive weapon, or is either the fruit, instrument or material evidence of the commission of a serious offence (Paras 203-4).

364. The search and seizure powers of customs and excise officers should be redrawn to provide for (a) the abolition of general warrants and their replacement with powers to search with and without warrant analogous to those of the Australia Police; (b) specific statutory power to search without warrant in certain 'behind-the barrier' customs situations; and (c) power to search without warrant for certain closely defined customs purposes (Paras 206-8).

365. Separate legislation should be introduced, after further study, to rationalise, simplify and make more relevant to modern law enforcement conditions the existing law with respect to the use of electronic listening devices. Such legislation ought to be based on the following general principles:

(a) there is no distinction in principle between telephone tapping and other forms of surveillance involving the use of electronic listening devices;

(b) monitoring of conversations without the consent of either party ought to be permitted only in respect of very serious offences and when the monitoring has been authorised, by reference to stringent criteria, by a Federal, Territorial or State Supreme Court judge; and

(c) monitoring of conversations with the consent of one party should be permissible on a similar basis as is the case with respect to search warrants (Paras 223-5).

366. Entrapment, which may be defined as the practice of inducing the commission of an offence which the person induced would not otherwise have committed on the occasion in

question either with the entrapper or anyone else, should be prohibited. The appropriate sanctions should be (a) the operation of the discretionary exclusionary rule prima facie to exclude evidence so obtained, and (b) action under the proposed police discipline code (Paras 226-9).

USE OF CRIMINAL INTELLIGENCE DATA

367. A working party should be established immediately to make detailed recommendations with respect to (a) the subject-matter of the data which might properly be collected, (b) the specific circumstances in which it is appropriate for the police to disseminate such data, (c) the problem of expunging of criminal records after appropriate time lapse, (d) the mechanisms by which individuals might ensure the review and correction of sensitive intelligence data concerning themselves, and (e) the kind of machinery that should be established to provide redress in cases where police or departmental powers with respect to the collection, storage and use of criminal data are abused or misused (Paras 244-51).

368. Pending the report of such a task force, legislation is possible and desirable now with respect to two general subject areas, (a) the security of crime information and (b) access to criminal history records (Paras 234ff.).

369. It should be made an offence to divulge or request any criminal information from police records except as prescribed by regulations. A statutory duty should be imposed upon the Secretary of the Department of Police and Customs to take all such measures as are necessary to ensure the accuracy and security of criminal history and crime intelligence records (Paras 239-40).

370. Individuals should be given access to their own criminal history files if they apply in person and supply the relevant proof of identity. Pending the development of mechanisms for the correction of errors, complaints should be made to the Ombudsman. It should be an offence to require that a person produce his criminal history record as a condition of employment or for any similar purpose except where such a request is expressly authorised by regulations or statute (Paras 242-3).

SPECIAL PROBLEMS OF MINORITY GROUPS

371. Aboriginals and Torres Strait Islanders, when under restraint or in a pre-custodial questioning situation for serious offences, or any offences against the person or property, should be entitled to the presence during any questioning or other investigative procedures of a 'prisoner's friend', i.e. a lawyer, welfare officer, relative or other person, Aboriginal or not, who is able to interpret if necessary, and who is chosen by the person in custody of his own volition, either directly or from a list of appropriate persons supplied (Paras 68, 253-5).

372. Where an Aboriginal or Torres Strait Islander is in custody for an offence, police should be required to notify forthwith the appropriate Aboriginal Legal Service of that fact, unless the prisoner objects to such notification (Para. 256-7).

373. The onus of proving that an Aboriginal waived his right to the presence of a prisoner's friend, or objected to the notification of an Aboriginal Legal Service, should rest upon the police (Paras 254, 257).

374. The training of police officers in the Northern Territory should include some attention to the culture, language and habits of thought of Aboriginals (Para. 258).

375. Persons unable to speak or understand English with reasonable facility should not be questioned except in the presence, and with the assistance, of a competent interpreter (Paras 262-4).

376. No questioning of a child under 16 should take place except in the presence of a parent, relative, friend, lawyer, welfare officer or other responsible person. This should apply:
   (a) in a custodial situation, to any offence whatsoever; and
   (b) so far as pre-custodial questioning is concerned, to serious offences and offences against the person or property (Paras 68, 266).

377. When a child under 16 is under police restraint, his parent or guardian should be immediately notified. If such a person, or other 'prisoner's friend', is unavailable the interview should proceed only in the presence of a senior police officer or police woman not connected with the investigation (Para. 267).

SPECIAL PROBLEMS OF REMOTE AREAS

378. Legislative provisions should enable and encourage the use of the telephone or similar means of communication as an integral part of police dealings with suspects (Para. 270).

379. The oral communication system in the Northern Territory should be substantially upgraded as a matter of urgency, preferably by the installation of telex facilities at all police outstations (Paras 272-5).

380. A detailed feasibility study should be undertaken as a matter of urgency in relation to the acquisition of appropriate police aircraft for the Northern Territory. The physical communication system is urgently in need of upgrading (Paras 276-82).

381. Magistrates' court sittings should be conducted at more remote area locations, particularly on Aboriginal settlements, and with greater frequency. At least two additional stipendiary magistrates should be appointed as soon as possible to relieve existing pressures and enable the expansion of court facilities to new locations (Paras 283-6).

ENFORCING THE RULES

382. A reverse-onus discretionary exclusionary rule of evidence should be introduced. This should provide that evidence obtained by or in consequence of any contravention of any statutory or common law rule – including all the various rules of procedure proposed in this report – should not be admissible in any criminal proceedings for any purpose unless the court decides in the exercise of its discretion that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. The burden of satisfying the court that any such illegally obtained evidence should be admitted should rest with the party seeking to have it admitted, i.e., normally, the prosecution. Certain criteria should be incorporated in the legislation to signpost to the court its obligation to weigh the gravity of the contravention of the procedural rules against the gravity of the offence charged in the context of the total circumstances of the particular case (Para. 298).

383. Breach of the rules recommended herein should not normally constitute a criminal offence. Criminal offences are recommended only with respect to certain aspects of the keeping and disclosure of criminal records (Para. 299).

384 Such civil remedies as are, and would be under the new rules, available in respect of misuses of police power, should be preserved (Para. 300).

385 Breaches of the rules recommended herein should constitute a breach of the proposed police discipline code, and be subject to externally initiated action under that code as recommended in the Commission's report on *Complaints Against Police* (ALRC 1) (Para. 301).

M. D. KIRBY (Chairman)
E. G. BRENNAN
J. CAIN
A. C. CASTLES
G. E. EVANS
G. E. HAWKINS

5 September 1975

1977

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

(As read a first time)

CRIMINAL INVESTIGATION BILL 1977

TABLE OF PROVISIONS

2,650/24.3.1977—17004/76 Cat. No. 77 4095 9—Recommended retail price $1.05

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