



# Criminal Justice Support Network

A project of Intellectual Disability Rights Service

## Arrest and detention of vulnerable persons

This is a brief summary of the general position where a person is detained for questioning by the police.

### Arrest

- **Accompanying police officers to the police station:** There is no obligation for a person to accompany police unless they are under arrest.

### Processes at the police station

- **Who is a “vulnerable” person:** A suspect with an intellectual disability will be a vulnerable person because they are a person with “impaired intellectual functioning”. If a police officer suspects that a person is a vulnerable person they are to treat them as such (p7 CRIME)\*. Police officers are supplied with indicators to assist them in determining whether the person is intellectually impaired (refer to p101 CRIME).
- **How long can the person be detained?:** Police can arrest and detain a person for the purposes of carrying out an investigation for a reasonable period of up to 4 hours before they need to get an extension for a further 8 hours from an authorised justice. The time taken for the suspect to arrange for a support person, for the support person to travel to the police station and for the suspect to consult with the support person is not counted in the 4 hours (pp10 and 11 CRIME).
- **Custody manager and custody records:** When a person is brought into the police station, they are brought before the custody manager. The custody manager is responsible for determining whether the suspect is a vulnerable person and for maintaining certain custody records. The person’s lawyer or support person is to be shown the person’s custody record when they arrive at the police station (p17-19 CRIME).
- **Support person:** If the custody manager suspects that the person is a vulnerable person they are to take immediate steps to contact a support person (p19 CRIME). If the person is a child (i.e. under 18) they cannot waive their right to a support person (p20 CRIME). The support person has 2 hours in which to arrive at the police station, beyond which the investigation need not be delayed (p21 CRIME). Where possible, the support person is to be given the opportunity to consult privately with the person within the view of the police (p20 CRIME). They are to be present in any police interview (p50 CRIME). If the person is unable to read, the support person is to help check any documentation and to sign instead of the person if they person agrees. The support person is also to have the opportunity to sign the record of interview (pp20 and 64 CRIME).

- **Legal advice:** A detained person is entitled to contact a lawyer and obtain legal advice (p22 CRIME). If the person is under 18, they can contact the Legal Aid Hotline on **1800 10 18 10**. The Hotline operates from 9am to midnight on weekdays and is a 24 hour service on weekends and public holidays. During working hours a person with an intellectual disability or someone calling on their behalf can contact the Intellectual Disability Rights Service for advice on **1800 66 66 11**. Law Access also provides free telephone legal advice during office hours **1300 888 529**
- **The caution:** The caution should be administered in front of the support person. A copy of the *Caution and Summary of Part 10A* form is to be given to the support person (p20 CRIME). Police officers are to take particular care in administering the caution to a vulnerable person (p51 CRIME)
- **Advising others of the arrest:** The custody manager must attempt to contact someone responsible for the person's welfare to advise them of the arrest, the reason for it and where the person is. Where the person is a child (under 18) the parent or guardian is the person that is to be contacted. Where the person is an Aboriginal or Torres Strait Islander, the custody manager is also to contact an Aboriginal legal aid organization (p20 CRIME).
- **Issuing charges:** If the person is to be charged (or other action is to be taken) this is to occur in the presence of the support person. Copies of the charge sheets are to be given to the support person (p46 CRIME).

## The police interview

- **Right to silence:** A person does not have to participate in any police interview or answer any questions (usually the person should provide their name and address).
- **Communication:** Police officers are given further guidance about how best to communicate with a person with a disability under 'Disability Issues' in the *Police Service Handbook*.

## Aboriginal and Torres Strait Islanders and children

There are additional obligations on the police where the detained person is under 18 or an Aboriginal or Torres Strait Islander person.

***CRIME is the "Custody, Rights, Investigation, Management and Evidence" handbook which summarises the law and police practice in relation to people being questioned by the police.***

## Relevant provisions of the Evidence Act 1995 (NSW)

It is important to make sure you have regard to the special needs of people with intellectual disability. Otherwise, a court might refuse to admit your interview into evidence. Below are some of the more common bases for excluding interview evidence.

### Discretion to exclude improperly or illegally obtained evidence (s138 *Evidence Act 1995*)

Applies if:

- The evidence is improperly or illegally obtained.
- The desirability of admitting is outweighed by the undesirability of admitting evidence obtained in that way.
- Evidence is deemed to have been improperly obtained if the investigator did or omitted to do an act that he or she knew or ought reasonably to have known was likely to impair substantially the ability of the person being questioned to respond rationally to questioning.

Eg *Pollard v R* (1992) VR 176

### Discretion to exclude admissions (s90 *Evidence Act 1995*)

Requirements:

- In the circumstances in which the admission was made, it would be unfair to the defendant to use the evidence.

Eg *R v Swaffield* (*Evidence Act* reflects the common law)

Eg *R v Parker* (1989) 19 NSWLR 177 (Intellectual disability is relevant)

Eg *Pavic v R* (1998) HCA

### Requirement to exclude unreliable evidence (s85 *Evidence Act 1995*)

Requirements:

- Applies only in the course of official questioning or in relation to the act of persons capable of influencing decision to prosecute.
- Not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
- Intellectual disability and nature of questions and the manner in which they were put are matters that must be taken into account.

Eg *R v Truong* (1996) 86 A Crim R 188

**REMEMBER, CATERING FOR THE SUSPECT'S DISABILITY RELATED NEEDS ENHANCES THE PROSPECTS OF INTERVIEW EVIDENCE BEING ADMITTED.**

## Recording refusals by suspects to participate in an ERISP interview

### Police Circular PC 05/02

The Code of Practice of CRIME (Custody, Rights, Investigation, Management and Evidence) contains guidelines for police for when the suspect refuses to participate in an ERISP interview. Find it on the NSW Police Intranet under law/ Code of Practice for CRIME/ (scroll down to) Questioning suspects/ Admissibility of evidence.

Section 5(2) (e) of the Listening Devices Act 1984 provides an exemption to the usual rule that conversations cannot be recorded without the consent of the both parties.

However, several legal practitioners of the Criminal Law Committee chaired by the Law Society of NSW, have recently suggested that some investigating police misinterpret the application of that legislation, by incorrectly implying to suspects that they have the power to compel the suspect to participate in a recorded ERISP interview solely for the purpose of recording their refusal.

The Code of Practice for CRIME sets out the advantages to both the suspect and police by having the refusal recorded electronically. However, the suspect has the right to refuse to participate in an electronic interview without being coerced.

To clarify the matter, the Code of Practice for CRIME has been amended. Under the heading 'Admissibility of interview evidence' the last sentences read: "You do not need their permission to record their refusal". This followed by:

However, you do not have the power to compel or intimate to the suspect that they must participate in an electronic recorded interview for the purpose of recording their refusal. Record the refusal in your notebook and if appropriate, on the fact sheet.

There are Acts of Parliament that may impose an obligation on a person to give certain information to police.

The right to silence is only lost to the extent that the person is obliged to give certain information. For example, under Road Transport legislation a driver is required to give their name and place of abode, etc; the owner is to give information about a person in charge of their vehicle; any person is to give information as to the identity of the driver alleged to have committed an offence and a driver is to give their version of an accident, etc.

The particular Act may provide for the information to be given orally or in writing. However, no Act imposes an obligation on that person to provide that information in an electronic interview."

Further guidelines to police may be found in Law Notes 5, 6 and 26 of 2000-1 and Law News 63 (last revised and updated in 2003) on the Legal Services intranet.

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