

Crimes (Custody and Investigation) Bill

No.

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LEGISLATIVE COUNCIL

Read 1° 3 May 1988

(Brought from the Legislative Assembly)

A BILL

for

An Act to amend the *Crimes Act* 1958 to reform the law governing consensual questioning of persons suspected of having committed offences and for other purposes.

Crimes (Custody and Investigation) Act 1987

The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

Purposes.

1. The purposes of this Act are—
 - 5 (a) to reform the law governing consensual questioning and investigation of persons suspected of having committed offences; and
 - 10 (b) to provide for the tape recording of confessions or admissions as a prerequisite for admissibility in proceedings for indictable offences.

Commencement.

2. This Act comes into operation on a day to be proclaimed.

Principal Act.

3. In this Act, the *Crimes Act* 1958 is called the Principal Act.

No. 6231.
Reprinted to
No. 19/1987.

PART 2—AMENDMENT OF THE *CRIMES ACT 1958***Repeal of section 460 of the *Crimes Act 1958*.**

4. Section 460 of the Principal Act is repealed.

New Subdivision inserted.

5. After section 463B of the Principal Act insert—

5

“(30A) *Custody and Investigation*”

Definitions.

‘464. (1) For the purposes of this Subdivision a person is in custody if he or she is—

(a) under lawful arrest by warrant; or 10

(b) under lawful arrest under section 458 or 459 or a provision of any other Act; or

(c) in the company of an investigating official (other than an investigating official who is engaged in covert investigations under the orders of a superior) and is— 15

(i) being questioned; or

(ii) to be questioned; or

(iii) otherwise being investigated—

to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence. 20

(2) In this Subdivision—

“**Investigating official**” means a member of the police force or a person appointed by or under an Act or a Commonwealth Act whose functions or duties include functions or duties in respect of the prevention or investigation of offences. 25

“**Legal practitioner**” means a person who is enrolled as a barrister and solicitor of the Supreme Court.

“**Police gaol**” has the same meaning as in the *Corrections Act 1986*. 30

“**Prison**” has the same meaning as in the *Corrections Act 1986* but includes a youth training centre established under section 92 of the *Community Welfare Services Act 1970*.

“**Tape-recording**” includes audio recording and video recording.’ 35

Detention of person in custody.

“464A. (1) Every person taken into custody for an offence (whether committed in Victoria or elsewhere) must be—

(a) released unconditionally; or

(b) released on bail; or

(c) brought before a justice or a Magistrates' Court—

within a reasonable time of being taken into custody.

5 (2) If a person suspected of having committed an offence has been taken into custody, an investigating official may, within the reasonable time referred to in sub-section (1), inform the person of the circumstances of the offence which the person is suspected to have committed and the grounds for that suspicion and may in order to determine the involvement (if any) of the person in the commission of the offence—

10 (a) if that person consents, question that person; or

(b) if that person consents, carry out investigations in which that person participates.

15 (3) Before any questioning or investigation under sub-section (2) commences, an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence.

(4) In determining what constitutes a reasonable time for the purposes of sub-section (1) the following matters may be considered:

20 (a) The period of time reasonably required to bring the person before a justice or a Magistrates' Court;

(b) If the person consents to an investigating official questioning the person or carrying out investigations in which the person participates—

25 (i) the number and complexity of offences to be investigated; and

(ii) any need of the investigating official to read and collate relevant material or to take any other steps that are reasonably necessary by way of preparation for the questioning or investigation; and

30 (iii) any need to transport the person from the place of apprehension to a place where facilities are available to conduct an interview or investigation; and

35 (iv) the number of other people who need to be questioned during the period of custody in respect of the offence for which the person is in custody; and

(v) any need to visit the place where the offence is believed to have been committed or any other place reasonably connected with the investigation of the offence; and

40 (vi) any time taken to communicate with a legal practitioner, friend, relative, parent, guardian or independent person; and

(vii) any time taken by a legal practitioner, interpreter, parent, guardian or independent person to arrive at the

- place where questioning or investigation is to take place;
and
- (viii) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to receive medical attention; and 5
 - (ix) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to rest; and
 - (x) the total period of time during which the person has been in the company of an investigating official before and after the commencement of custody; and 10
 - (xi) any other matters reasonably connected with the investigation of the offence.”

Questioning or investigation of person already held for another matter.

“464B. (1) An investigating official may apply to a Magistrates’ Court or, if the application is in respect of a child under the age of 17 years, a children’s court for an order that a person— 15

- (a) held in a prison or police gaol; and
- (b) reasonably suspected of having committed an offence other than the offence for which he or she is being held— 20

be delivered into the custody of the investigating official for the purpose of questioning or investigation in respect of the first-mentioned offence.

(2) An application under sub-section (1) must—

- (a) be in writing; and
- (b) state the grounds on which the application is made; and 25
- (c) be served on the person being held by delivering a true copy of the application—
 - (i) to the person personally; or
 - (ii) to the officer in charge of the prison or police gaol in which the person is held — 30

at least 48 hours before the hearing of the application or, if in exceptional circumstances a Magistrates’ Court or children’s court (as the case may be) allows a shorter period, at least that period before the hearing of the application.

(3) At any time after the filing of an application under sub-section (1), the Magistrates’ Court or children’s court (as the case may be) may order that the person being held in a prison or police gaol be brought before the court for the hearing of the application under sub-section (1). 35

(4) While an order made under sub-section (3) is being carried out, the person is to be taken to be in the legal custody of the person acting under the order. 40

5 (5) On an application under sub-section (1), a Magistrates' Court or children's court (as the case may be) may, if the person being held consents, order the transfer of the custody of the person to the applicant for the purpose of questioning or investigation for a maximum period of time specified in the order and consented to by the person.

(6) An order under sub-section (5) has effect as a suspension of a direction in a warrant of commitment to deliver a person to the place of detention specified in the warrant or to hold a person in that place (as the case may be).

10 (7) A Magistrates' Court or children's court (as the case may be) may, with the consent of the person held—

(a) extend a period of custody ordered under sub-section (5);
or

15 (b) on a subsequent application under sub-section (1), make orders whether in respect of the same or a different offence reasonably suspected of having been committed by the person held.

(8) At—

20 (a) the end of the period, or any extended period, specified in an order under sub-section (5); or

(b) the cessation of questioning or investigation—

whichever is the earlier, the investigating official must deliver the person in custody to the place of detention at which the person was held at the time of the application for the order.”

25 **Right to communicate with friend, relative and legal practitioner.**

“464C. (1) Before any questioning or investigation under section 464A (2) commences, an investigating official must inform the person in custody that he or she—

30 (a) may communicate with or attempt to communicate with a friend or relative to inform that person of his or her whereabouts; and

(b) may communicate with or attempt to communicate with a legal practitioner—

35 and, unless the investigating official believes on reasonable grounds that—

(c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or

(d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed—

40 the investigating official must defer the questioning and investigation for a time that is reasonable in the circumstances to enable the person to make, or attempt to make, the communication.

(2) Subject to sub-section (1), if a person wishes to communicate with a friend, relative or legal practitioner, the investigating official in whose custody the person then is—

- (a) must afford the person reasonable facilities as soon as practicable to enable the person to do so; and 5
- (b) must allow the person's legal practitioner or a clerk of the legal practitioner to communicate with the person in custody in circumstances in which as far as practicable the communication will not be overheard."

Right to an interpreter. 10

"464D. If a person in custody does not have a knowledge of the English language that is sufficient to enable the person to understand the questioning, an investigating official must, before any questioning or investigation under section 464A (2) commences, arrange for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present." 15

Persons under 17 years.

"464E. (1) If a person in custody is under the age of 17 years, an investigating official must not, subject to sub-section (2), question or carry out an investigation under section 464A (2) unless— 20

- (a) a parent or guardian of the person in custody or, if a parent or guardian is not available, an independent person is present; and
- (b) before the commencement of any questioning or investigation, the investigating official has allowed the person in custody to communicate with his or her parent or guardian or the independent person in circumstances in which as far as practicable the communication will not be overheard. 25

(2) Sub-section (1) does not apply if the investigating official believes on reasonable grounds that— 30

- (a) the communication necessary to give effect to sub-section (1) (a) would result in the escape of an accomplice or the fabrication or destruction of evidence; or
- (b) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed." 35

Right of foreign national to communicate with consular office.

"464F. (1) If a person in custody is not a citizen or permanent resident of Australia, the investigating official in whose custody the person then is must, before any questioning or investigation under section 464A (2) commences, inform the person in custody that he or she may communicate with or attempt to communicate with the 40

consular office of the country of which the person is a citizen and, unless the investigating official believes on reasonable grounds that—

- 5 (a) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or
 (b) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed—

the investigating official must defer the questioning or investigation for a time that is reasonable in the circumstances to enable the person to make, or attempt to make, the communication.

- 10 (2) Subject to sub-section (1), if a person referred to in that sub-section wishes to communicate with the consular office of the country of which he or she is a citizen, the investigating official in whose custody the person then is must afford the person reasonable facilities as soon as practicable to enable the person to do so.”

15 **Tape-recording of information required to be given to person in custody.**

- 20 “464G. If a person is in custody in relation to an indictable offence, an investigating official who is required by sections 464A (3), 464C (1) and 464F (1) to give the person in custody certain information must tape-record the giving of that information and the person’s responses, if any.”

Tape-recording of confessions and admissions.

- 25 “464H. (1) Subject to sub-section (2), evidence of a confession or admission made to an investigating official by a person who—

- (a) was suspected; or
 (b) ought reasonably to have been suspected—
 of having committed an offence is inadmissible as part of the prosecution case in proceedings for an indictable offence unless—
 30 (c) if the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was tape-recorded; or
 (d) if the confession or admission was made during questioning, the questioning and anything said by the person questioned
 35 was tape-recorded—

and the tape-recording is available to be tendered in evidence.

- 40 (2) A court may admit evidence of a confession or admission otherwise inadmissible by reason of sub-section (1) if the prosecution satisfies the court on the balance of probabilities that the circumstances—

- (a) are exceptional; and
 (b) justify the reception of the evidence.

(3) If the questioning of a person is recorded as required under this section, the investigating official must give to the person or his or her legal practitioner without charge—

- (a) the tape-recording or a copy of it within 7 days; and
- (b) if a transcript of the tape-recording is prepared, a copy of the transcript. 5

(4) Nothing in this section prevents the use of a tape-recording in a proceeding for a summary offence.”

Requirements of preceding sections are cumulative.

“464I. (1) Subject to sub-section (2), in all cases where a person is in custody, an investigating official must comply with sections 464A (3) and 464C and also with sections 464D, 464E and 464F, where appropriate. 10

(2) If an order is made under section 464B (5), an investigating official must comply with sections 464A (3) and 464C (other than sub-section (1) (a)) and also with sections 464D and 464E, where appropriate.” 15

Right to remain silent, etc. not affected.

“464J. Nothing in sections 464 to 464I affects—

- (a) the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations except where required to do so by or under an Act or a Commonwealth Act; or 20
- (b) the onus on the prosecution to establish the voluntariness of an admission or confession made by a person suspected of having committed an offence; or 25
- (c) the discretion of a court to exclude unfairly obtained evidence; or
- (d) the discretion of a court to exclude illegally or improperly obtained evidence.”. 30

PART 3—TRANSITIONAL PROVISION

Transitional provision.

6. (1) This Act applies only with respect to—

- (a) persons taken into custody; or
- (b) persons in respect of whom an application is made under section 464B (1)— 35

after the commencement of this Act.

(2) Until the commencement of section 11 of the *Corrections Act* 1986, section 464 (2) of the Principal Act has effect as if for the definition of "police gaol" in that section there were substituted the following definition:

5 ' "Police gaol" means a police gaol within the meaning of section 113 or 115 of the *Community Welfare Services Act* 1970.'

