

Question 1: Is the person “in custody” or “a protected person”

Vic – In Custody –

S 464(1)(c) –

- In the company of an investigating officer; To be questioned; Is being questioned; Otherwise being investigated to determine their involvement in a crime AND if there is sufficient information in the possession of the IO to justify the arrest of that person in respect of that crime.

Commonwealth - Protected Person

S 23 B Crimes Act (1914) Cth

- **Protected person if:**
 - Not under arrest; IO believes there is sufficient evidence to determine suspect committed offence; or PO will not allow person to leave; or PO causes person to have subjective belief (gives reasonable grounds) that suspect cannot leave.

If yes – obligations on Police

Note: obligation to tape evidence for admission has a broader test – applies to suspects and those who ought to be suspected *R v Alexander*; *R v Heaney* not only protected people or those in custody (s 464H(1))

Question 2: How long as the suspect been held for?

Suspect can only be held for a reasonable time

- If the suspect is held for longer than a reasonable period of time –
 - Unlawfully held
 - Admissions made during unlawful detention could be excluded on the basis that they would be unlawfully/improperly obtained (discretionary/ exemption not automatic – s 138, s 139 Evidence Act)
- **VIC – s 464A(4)** – lists factors that may be considered as to what constitutes a reasonable period of time:
 - Number and complexity of offences being investigated; need of PO to prepare for questions or investigation; Need to transport accused to a place with taping facilities; time reasonably required to bring a person before bail/justice; number of co-offenders; need to visit place connected with the offence; time taken to communicate with a legal practitioner, friend, relative, parent, guardian or independent persons and time taken for them to arrive; time during which question is delayed/ suspended to allow person to receive medical treatment/ rest; total period of time during which accused in company of police before/ after commencement of custody; any other matters connected the investigation of the offence.
- *R v Hill* –
 - Suspect held for 13.5 hours – defence argued that admission made inadmissible because of failure to present to bail justice
 - **Held:** Evidence admitted because consideration of Vic factors = reasonable period of time.
- *R v Frugnet* [1999]: Necessary period of time -
 - Complexity of investigation; Preservation of evidence; Coordination of three police force; Need to identify other offenders; Search of motor vehicles, premises; Making of arrangements to interview not only D but other persons reasonably involved in the offence
- **Cth: Crimes Act 1914 (Cth) s23D**
 - Generally – 4 hours
 - Indigenous/ Minor – 2 hours
 - Can be extended to 8 hours if *serious offence*
 - *Serious offence:* punishable by more than 12 months imprisonment

Within a reasonable period of time person must be:

- Released unconditionally; released on police bail; brought before a bail justice; or brought before a magistrate – s 464A(1)

Question 3: Was the person appropriately cautioned before admissions?

S 464A(3) – Consists of two rights: Right to silence/Warn that any comment or action may be used as evidence.

MUST BE GIVEN BEFORE ANY QUESTION/ MUS ;LT be given whenever suspect is in company of IO

Excludes undercover PO or covert PO

S 464G – Requires recording Caution and other information *if practicable* (see Willis).

After Caution –

Suspect has right to silence. Cannot ask why individual refuses to answer question, should not repeatedly question silent suspect; excessive questioning after exercise of right to silence may raise questions of coercion and admissibility

- **S 89 Evidence Act 2008 (vic)**
 - No inference to be drawn from silence

Failure to caution a person in custody

S 464J –

• preserves common law right to silence and the right of courts to exclude on basis of fairness and if illegally or improperly obtained.

Evidence Act s 139 (1) –

- Failure to caution = any admission made by the suspect will be taken to have been obtained improperly

Evidence Act s 138 –

- Improper evidence is excluded unless desirability of admitting evidence outweighs concerns about how it was obtained
 - 1) **Police officer**
 - 2) **Uses terminology “Under arrest” – not “in custody”**
 - a. Evidence act has expanded definition of under arrest – the definition of under arrest used in s 139 s effectively the same as “in custody”

Willis v the Queen [2016] VSCA 176

- Must be a caution, should be recorded as per s 464G Crimes Act 1958
- If caution unrecorded but Court accepts that suspect/ accused was cautioned prior to admission then court may still admit evidence.

Issue – Right to silence and Police undercover operations

R v Favata [2004] VSC 7 –

- Asserting the right to silence in a police interview does not prevent the admission of evidence collected later by an undercover or covert police operation.

Question 4: Was the person provided the opportunity to contact a relative, lawyer, friend, consular official, interpreter or independent person?

- All accused have right to be informed that they may contact **relative, friend or lawyer** - 464C/23F
- Must be given a reasonable period of time to contact friend, relative or lawyer (not enough to simply offer) 464C(1)/ 23G
- Must be given facility to communicate and Must be given privacy protection for communications with lawyers or lawyers clerks – 464(2)(b)
- Contact rights may be deferred in line with s 464(1)(c)/ s 23L exceptions if:
 - Police believe on reasonable grounds risks of escape, fabrication and/or the destruction of evidence
 - *R v Frugneit* [1999]
 - Permissible for police not to allow suspect to contact wife
- S 464(1)(d) – questioning so urgent relating to safety of other people that it should not be delayed

- *R v Saxon* [1998] –
 - Permissible for police not to allow Saxon to contact his girlfriend

Minor	Foreign Citizen	Poor English/ Deaf	Aboriginal/ TI	Vulnerable Person
<p>Police must accurately establish age – objective test</p> <p>Must have parent, guardian or independent person present during questioning CTH: 23K VIC: s 464E –</p> <ul style="list-style-type: none"> • Exceptions: 464E(2) – escapes, destruction, fabrication. Or there is urgent need for evidence 	<p>Right to consult consular official CTH: 23L VIC: 464 F</p>	<p>Must have interpreter present</p> <p>“English sufficient to understand the questioning” VIC s 464 – Crimes Act; s 139(3) Evidence Act 2008 (vic) - Police caution must given in appropriate language</p> <p>CTH: s 23N</p>	<p>Vic – no statutory provisions but police practice to notify Aboriginal legal service and local aboriginal community justice panel</p> <p><i>R v Anunga</i> Developed in NT Required support person to be present Not law – merely guideline</p> <p>CTH: s 23H</p>	<p><u>No specific protection</u></p> <p>Fairness Discretion; Vicpol manual (not law) recommends friend or relevant present or trained independent person</p>

R v Thomas [2006] VSCA – Jihadi Jack

- Threats = negative inducement by authority = coercion and non voluntariness
- Failure to comply with section 23 G – told could have lawyer but failure to provide facilities and allow access to lawyer
- **Appeals court overturned the conviction**
- Admissions not voluntary
 - Coercive interviews
- Unfairness discretion – s 90 Evidence Act – contrary to public policy – knowing non-compliance by AFP with S 23G requirement