

TOPIC: CRIMINAL PROCEDURE	
Topic: Arrest	
There is no common law power of arrest and, generally, no person shall be arrested without warrant (s 457 CA). If warrant for one thing and then find a different crime: The search of the (shed) was within the scope of the warrant (or at least a lawful incidental search), so seizing the items within that property was lawful.	
Arrest With Warrant (s 12 CA)	STATE: A warrant must be issued in accordance with section 12(1)CA). Under s12(5) CA, an arrest warrant must not be issued in the first instance unless it is probable that the accused will not answer a summons, the accused has absconded, is likely to abscond, or is avoiding service of a summons, or a warrant is required or authorised by another Act or there is other good cause for its issue. This warrant should contain a copy of the charge-sheet, a summary of the charges, advice regarding access to legal advice and legal aid, as well as the relevant contact details for these services pursuant to s13 CA. STATE (if time): An arrest warrant requires evidence to be provided on oath, affirmation, or by affidavit, in accordance with section 61(2) MCA. It may be issued by a registrar, judicial registrar, or magistrate under section 57(4) MCA, or by a judge of the County Court or Supreme Court under section 57(7) MCA. A judge of the County Court or Supreme Court also has the power to recall or revoke the warrant under section 57(7) MCA. Contents of arrest warrant must include (s13 CA): • A copy of the charge sheet • A notice that contains a summary of the charges • Advice that D should seek legal advice • Advice that D has the right (if eligible) to legal aid • Details for contacting Victoria Legal Aid. Execution of the warrant STATE: Pursuant to s64 MCA, an arrest warrant allows the arresting officer to break, enter and search any place where the person named in the warrant is suspected to reside, arrest the person and bring him or her to court. A warrant may be directed to a particular police officer, all police officers, or anyone authorised to arrest (s 63 MCA). Even if a specific officer is named, other police or PSOs can execute the warrant and make the arrest (s 65 MCA). The arresting officer must usually have a copy of the warrant on him or her, and show it to D, but can execute warrant even if not in possession of it (s 65 MCA).

Arrest without a warrant 1. Citizen arrest 2. Police arrest	STATE: Generally, no person shall be arrested without a warrant (s 457 CA). However, pursuant to s 458 CA, any person may arrest someone without warrant if they find an individual to be committing an indictable or summary offence, were instructed to do so by a police officer or believe on reasonable grounds that it is necessary to stop the offender from escaping legal custody or avoiding lawful apprehension (s 458(1)(a)). This cannot merely be failure to comply with rules, regulations, by-laws, or subordinate legislation. The purpose must be to take the suspect to a bail justice of the MC to be dealt with according to law. If it was not told to the offender that they were under arrest: STATE: Either with or without warrant, it was/was not conveyed to [D] that they are under arrest (and no longer free). [D] is entitled to know the reason for their apprehension, though technical language or specific wording is not necessary. If a charge sheet has been filed, [D] is also entitled to a copy of it. Further, [D] cannot complain of not being supplied with the requisite information if they have made it difficult to convey, namely as they ____ [conduct – e.g., ran away]. FACTORS STATE: Any person who may arrest someone without a warrant if the relevant factors are made out. They must find or believe [the offender] is committing a summary or indictable offence and believe on reasonable grounds, that D's apprehension is necessary (s 458(1)(a) CA 1. 'Finds Committing' an Offence When [arresting person] is found doing any act or behaving or conducting themselves or in such circumstances that the person finding them believes on reasonable grounds that D is guilty of an offence (s 462 CA). Here, ____ [arresting person] [found/did not find] [D] committing any offence, as ____ what they were doing is clearly linked to a crime or finding the offender in a situation that points strongly to guilt, even if no one saw the crime happen. STATE: There is no need to catch the suspect 'in the act'. However, there needs to be reasonable grounds for believing that the suspect has committed an offence (s 462 CA). Notably, later finding out that the suspect did not commit the offence does not make the arrest unlawful (s 461(1) CA) 2. They were instructed to do so by the police officer (s 458(1)(b) CA). STATE: [arresting person] may arrest [D] without warrant if they have been instructed to do so by any police officer having power under the CA to apprehend [D] (s 458(1)(b)). Here, ____ [police officer] instructed ____ [arresting person] to ____ [specific instructions], which ____ [would/would not satisfy] this provision.
---	---

	3. Belief on reasonable grounds STATE: [Citizen] will argue that the arrest was lawful because they believe, on reasonable grounds, that X was escaping custody or avoiding lawful apprehension (s 458(1)(c) CA) Acceptable reasons (s 458(1)(a) CA): (i) To ensure the offender's attendance at court; (ii) To preserve public order; (iii) To prevent the continuation of the offence or further offending; or (iv) For the safety or welfare of members of the public or of the offender (i.e., any danger involved in actions of offender leads to reasonable grounds to perform arrest) Counter-argue if possible: X may argue that [citizen] did not see them committing [offence] or did not suspect them on reasonable grounds to warrant arrest. However, there is no need to catch the suspect 'in the act', there just need to be reasonable grounds for believing that the suspect has committed an offence (s 462). [Elaborate OTF why they had a reasonable belief based on the offender doing any act/ behaviour/ conduct/ circumstances]. Last step: STATE: Ultimately, it is [likely/unlikely] that the arrest would be lawful pursuant to s 458 CA. However, if it subsequently appears that the person apprehended, [D], did not commit the offence alleged, the apprehension will still be lawful provided it was made under a belief on reasonable grounds (s 461(1) CA). An arrest under s 458 (or s 459) does not automatically carry a power to enter or search premises. This power may only be conferred under s 459A CA for certain situations. If a police officer executes an arrest without warrant for a conventional offence as a trespasser on private property, they typically will not be acting in the course of their duty. However, they would have an implied licence (as all members of the public) to walk on a path or a driveway.
Arrest without a warrant - PSO/Police Arrest	STATE: In addition to powers conferred under s 458 CA, police officers (and protective services officers) on duty have further powers to apprehend offenders without a warrant pursuant to s 459 CA. [Police or PSO] may arrest without warrant if they believe, on reasonable grounds, that [the offender] has committed an indictable offence in Victoria or committed an offence elsewhere, which would be an indictable offence in Victoria (s 459(1) CA) - only indictable offences are offences Here, [Officer] received a tip that a person matching [Accused]'s description was [carrying stolen electronics / about to commit X]. The tip was [recent/contemporaneous] and described [specific clothing/physical features/location], which matched [Accused].

	[Officer] then independently observed [behaviour – e.g. repeatedly checking around, adjusting an unusually heavy backpack, loitering near the crime scene, acting nervously]. Taken together, the specific tip + corroborating observations may be said to create more than a mere hunch and support an objectively reasonable belief that [Accused] was [in possession of stolen goods/committing offence]. STATE: PSOs can only exercise this power to apprehend without warrant in relation to a person who is at, or in the vicinity of a designated place (s 459(2A) CA). ____ [D] [was/was not] at or in the vicinity of a designated place, as ____ [reason]. These powers may be exercised where the police officer believes on reasonable grounds that [D] either: (a) has committed an indictable offence in Victoria; or (b) committed an offence elsewhere, which if committed in Victoria would be an indictable offence (s 459(1) CA). In either case, the relevant indictable offence can be one capable of being heard and determined summarily (s 459(1) CA). STATE: However, a police officer is not required to take a person who is found committing an offence into custody if the officer believes, on reasonable grounds, that legal proceedings can be effectively initiated by way of a summons or a notice to appear, pursuant to section 461 CA.
Was the arrest lawful? - Right to remain silent - Right to reasons - Right to a lawyer	STATE: There is no fixed formula for what constitutes an arrest, but the words or conduct of the police must clearly convey to the person (D) that they are no longer free to leave. The individual must understand that they are being detained (e.g clear words, language). At the time of arrest, the individual should be informed of their right to remain silent in accordance with section 464A(3) CA. If a charge sheet is filed, the individual is also entitled to receive a copy. Additionally, the individual should be informed of the suspected offence for which they are being arrested, as required by section 464A(2)(i) of CA. Protection and Rights in Custody STATE: If a suspect is in custody, an investigating official may inform the suspect of the circumstances of the offence and may question the suspect: s 464A(2)(a) CA Before questioning, the arrested person must be informed of: • Their right to silence: ss 464A(3), 464J While in custody, the arrested person has other rights: • The right to communicate with lawyer AND friend/relative: s 464C • The right to an interpreter: s 464D • The right to communicate with consular office: s 464F

- Aboriginal Legal Service must be notified if Aboriginal person in custody: s 464FA
- Children must have parent, guardian or independent person present: s 464E

Use of Force

STATE: Here, X grabbed person without justification, which may amount to unreasonable force.

Any person may use force if they believe, on reasonable grounds, that it is necessary (s 462A CA):

- to prevent the commission, continuation or completion of an indictable offence; or
- to effect or assist in effecting the lawful arrest of the person committing or suspected of committing any offence.

HOWEVER, the use of force must not be disproportionate to the objective. A person cannot apply greater force than necessary to meet the objective (to arrest and detain the person).

→ E.g., If a police officer is arresting someone and they sprint away, a reasonable/proportionate level of force would be to tackle them to the ground to prevent them from running away. An excessive use of force would be shooting them.

Reason for their arrest

STATE: The individual must be informed of the reason for their arrest and the circumstances of the alleged offence, as required by section 464A(2)(a). Words or conduct must clearly convey to [arrested person] that they are no longer at liberty to leave, and the offender must understand this. This is a long-standing principle, confirmed in (Christie v Leachinsky) Here, X was not informed by the arresting officer of why he/she was being arrested, violating s464A(2)(a).

Right to remain silent

STATE: They must also be informed of their right to remain silent, in accordance with sections 464A(3) X needs to be informed of her/ his right to remain silent by stating "You do not have to say or do anything, but anything you say or do may be used in evidence" (s 464A(3) CA). This needed to be given before any questioning commenced, and likely this did not occur. This has been breached OTF as they did not inform D of their right to remain silent.

Right to a Lawyer

STATE: Additionally, the individual must be informed of their right to attempt to communicate with both a lawyer and a friend or relative. They are entitled to make two phone calls under section 464C. Any conversation with a

lawyer should take place in private, as far as practicable, as set out in section 464C(2)(b). Here, the detective undermined, mislead X about the right to a lawyer. There is nothing on the facts that suggest that X was made aware of his right to communicate with a friend or relative.

Other rights include:

- The right to an interpreter, under section 464D.
- The right to communicate with their country's consular office, under section 464F.
- If the person in custody is Aboriginal, the Aboriginal Legal Service must be notified, in accordance with section 464FA.
- If the person in custody is a child, a parent, guardian, or independent person must be present during the interview process, as required by section 464E.

If time - Has any sections in the Charter of Human Rights and Responsibilities been breached?

STATE: The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* provides additional protections that go beyond other legal rights. While these are not strictly legal requirements, they serve to uphold fundamental human rights under section 5 of the Charter. The following right has been breached.

- A person must be informed of the reason for the charge laid against them.
- They must have access to legal aid where necessary and be provided interpreter assistance if required.
- An individual must not be compelled to testify against themselves and should not be treated in a way that is inappropriate or degrading.
- They must also be given adequate time and facilities to prepare their defence.
- The Charter recognises the right to liberty and security of the person under section 2
- The right to humane treatment when deprived of liberty under section 22. -
- A person is entitled to a fair hearing under section 24
- Has specific rights in criminal proceedings as outlined in section 25.
- Under section 26, individuals have the right not to be tried or punished more than once for the same offence.

What happens when the rights are not complied with?

STATE: On balance, the arrest is likely not awful as there has been non-compliance with relevant procedures (e.g person was not given reason for their arrest), any evidence obtained as a result may be deemed inadmissible at trial, subject to judicial discretion, under sections 464J and 464AH(2) of the *Crimes Act 1958 (Vic)*.

The court has the discretion to exclude evidence that has been unfairly,

	illegally, or improperly obtained, in accordance with section 464J. However, the court may still admit improperly recorded admissions or confessions if exceptional circumstances justify the admission of such evidence, as outlined in section 464H(2).
Was X's rights violated during detention, questioning, tape recordings, fingerprints?	Custody Under section 464(1) CA a person is considered to be in custody when they are either lawfully arrested, with or without a warrant, or are in the company of an investigating official for the purpose of being questioned, about to be questioned, or otherwise investigated to determine their involvement in the commission of an offence. Here, X is in custody (sitting at a police station, sitting in company of investigating official and therefore the following rights apply. **Importantly, the person does not need to be physically detained to be considered in custody. Once a person is in custody, they are entitled to specific legal rights and protections. STEP 2: Custody STATE: There is a presumption of liberty under section 464I CA and the police have no power to detain a person against their will unless that person is under arrest. Every person who is taken into custody for an offence must, within a reasonable time, either be released unconditionally, released on bail, or brought before a bail justice or the Magistrates' Court (s464A(4)). If the person is detained without a warrant, this requirement is governed by section 464A CA if detained with a warrant, section 64 MA applies. A person does not need to be physically detained to be considered 'in custody'. According to section 464(1) CA, a person is deemed to be in custody if they are: • under lawful arrest, whether with or without a warrant, or • in the company of an investigating official and are being, or are going to be, questioned or otherwise investigated. Reasonable time STATE: Every person taken into custody for an offence must, within a reasonable time, be either released unconditionally, released on bail, or brought before a bail justice or the Magistrates' Court. What constitutes a 'reasonable time' depends on various factors under section 464A(4) CA, with the applicable provisions being section 464A CA (for arrests without a warrant) and section 64 of the MCA (for arrests with a warrant). STATE: The court will consider the following factors • number and complexity of offences ; it is a relevantly minor offence. It is not complex offence because it is one offence. • need to prepare for questioning • need for transportation;

time for communicating with lawyer, interpreter, parent, etc; **there was no communication with the lawyer**

- suspension of questioning for medical reasons or to allow D to rest
- need to visit the crime scene

STATE: Overnight detention without charge or bail hearing likely breached this requirement. The period of time seems to be excessive.

The investigating official may

- inform the person of the circumstances of the suspected offence and
- question the person or carry out investigations (**s 464A(2) CA**).

At the beginning of questioning, the investigating official **must** inform the person of the circumstances of the suspected offence.

Interviews

STATE: A police officer **does not have a general power to detain or interrogate a person** unless the person is under arrest. Under section **464I of the Crimes Act 1958 (Vic)**, there is a **presumption of liberty**, meaning police officers cannot detain someone merely for questioning unless that person is lawfully arrested.

STATE: Any person who is taken into custody for an offence can be questioned or investigated (forensic, fingerprinting) during that time, as permitted under section **464A(2)(b) CA**. **This was/not done here.**

However, individuals generally do not have to answer questions, as outlined in **section 464J CA**. Nonetheless, the accused must provide their name and address when required under certain circumstances, in accordance with **section 456AA**.

Give persons name and address

However, a police officer may lawfully request a person's name and address if they reasonably believe the person has committed, or is about to commit, any offence whether summary or indictable. Additionally, an officer may request this information if it is required to assist in the investigation of an indictable offence.

It is a summary offence for a person to refuse to provide their name and address or to give a false name to police.

Tape Recordings

Any questioning or conversation during which legal rights are advised must be recorded. This includes discussions under **section 464G** and any confessions or admissions under **section 464H CA**. **Confessions must be recorded or confirmed s464H(2)(c)**

Confessions before questioning

Confessions or admissions made before the commencement of questioning may be admissible, if **the substance** of the confession or admission **was confirmed by the suspect and the confirmation was recorded** by audio recording or audiovisual recording'

- This means confessions conducted in police cars must be confirmed at a police station later.

STATE: A confession or admission that [D] made to an investigating official is **inadmissible** as evidence unless it was either:

(a) **recorded** (audio or AV); or

(b) later **confirmed** by ____ [D] **and** the confirmation was **recorded** (s 464H(1) CA).

STATE: Here, a confession or admission was made by ____ [D] ____ [before/during] questioning, and it ____ [was/was not] recorded. Thus, it would be ____ [admissible/inadmissible] . Confessions must be recorded or confirmed s464H(2)(c)

If inadmissible: Exception

The court may admit evidence of a confession or admission otherwise inadmissible under s 464H(1) if the person seeking to adduce the evidence satisfies the court on the balance of probabilities (OBP) that the circumstances are exceptional and justify the reception of the evidence (s 464H(2) CA).

If admissible: Provision of recording to legal practitioner

If the confession or admission is recorded, the investigating official must give a copy of the recording to ____ [D]'s legal practitioner within 7 days (of the recording being made) without charge (s 464H(3) CA).

Fit for Interview

STATE: It then needs to be determined whether the suspect was fit to be interviewed. A suspect must be **considered fit to participate in an interview**. In assessing fitness, the court may consider several factors, including:

- The suspect's general language and communication skills,
- Their specific ability to understand legal cautions and terminology (including terms such as names of body parts),
- Their memory and ability to understand the sequence of events, and
- Their prior experience with authority figures and the criminal justice

system.

STATE: Additionally, the MC cannot make an order unless it is **satisfied OBP** that [D] is **fit to be questioned**, having considered any known likely psychological effect of the questioning on them, and having received evidence on their fitness from a medical practitioner (**s 464B(5C) CA**). Here, it ____ [is possible/is not likely] ____ [D] is not fit to be questioned, as ____ [reason].

Also consider:

- **Immediate precursors** to interview esp. last sleep, last meal, intoxication, medications, head/other injuries, other distress
- **Police use of:** leading questions, complex sentences, questions requiring “yes/no” responses, sudden changes in topic
- **Police conduct:** pressuring suspect to fabricate responses, ignoring or misunderstanding suspect’s response, failing to check response consistency etc.

Fingerprinting

STATE: Police may take a person’s fingerprints above the age of 15 years old without their consent, but only if they hold a reasonable belief that an offence has been committed or that a charge or summons has been issued referred to Schedule 7. This is provided for under section **464K(1) CA**.

To do so, the following conditions must be met:

- The person must be an indictable offender (IO) or a person accused of a serious offence (SO) listed in Schedule 7 of the *Criminal Procedure Act 2009 (Vic)*.
- Police must provide the individual with information about the reason for fingerprinting, the potential use of force, and other relevant rights.
- Police must also record that this information and notification of rights has been given.

Fingerprints may be taken using reasonable force if the person refuses to comply. However, the police must inform the person that the fingerprints may be used as evidence, in accordance with section **464K(2) CA**.

Forensic Procedure

STATE: Forensic procedures may only be carried out in relation to indictable offences. A forensic procedure refers to **any process used to collect evidence from a person’s body**, excluding fingerprinting. This is defined under **section 464(1) of the Crimes Act 1958 (Vic)**.

Police may request a forensic procedure if they have reasonable grounds to believe it will help prove or disprove the suspect’s involvement in an

indictable offence, pursuant to **section 464R(1) of the Crimes Act**.

This procedure may involve collecting both **intimate and non-intimate samples**. Intimate samples include blood, saliva, pubic hair, genital or anal swabs, and mouth scrapings. Non-intimate samples may include hair, nail scrapings, and other external swabs (as outlined in **section 464(1)**).

Adults must **give informed consent**. Informed consent requires information about the purpose and nature of the procedure (**s 464S(1) CA**).

- consent must be recorded by the police officer: **s 464S(2) CA**

STATE (right to consent): A senior police officer has the authority to approve the taking of a non-intimate sample, in accordance with **section 464R**. X has a right to consent and officer falsely told X that he had no choice but to consent and therefore breaching s464R CA.

Additionally, police may require a person in custody to take part in activities such as re-enactments, identification parades, or visiting the crime scene under **section 464A(2)(b) of the Crimes Act 1958 (Vic)**.

- All other cases (children and adult refusal to consent for intimate sample) will be decided by Magistrate (**s 464T CA**).

LAST STEP: Conclusion

STATE: [Arrested person] may take civil action against the police for wrongful imprisonment if there are no reasonable grounds for arrest (**s 461 CA**). Here, [Arrested person] was not informed about his rights (e.g right to remain silent, right to a lawyer).

STATE: Subsequently, evidence obtained after the arrest or from the point they were unlawfully arrested may be excluded, although the court has discretion on whether this will happen (**s 464J CA; ss 138, 139 EA**). **Section 464J covers evidence that is unfairly, illegal and improper. This will likely be made out. Therefore, the evidence will not be admitted or used at trial.**

[Arrested person] may not be liable for certain conduct during the arrest. They may have a defence available to the charge of [Include relevant conduct]:

- resisting arrest
- escaping from legal custody
- obstructing/hindering/assaulting police in the execution of their duty.

[Arresting person] may be liable for false imprisonment or assault offences.

STATE: At the judge's discretion, the evidence obtained during the unlawful arrest is likely to be excluded at trial. The evidence obtained after the arrest is likely inadmissible.

