

Youth Justice

Your Guide to Cops and Court in NSW

4th Edition

Macquarie Legal Centre

Jane Sanders

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At the police station

Your rights in police custody

If you watch too many American cop shows on TV, you probably think that you only have the right to one phone call from the police station – but it's not true here.

So, what exactly are your rights in NSW police stations?

This chapter explains what happens after you are arrested and taken into police *custody*. Being in *custody* means you are detained and cannot leave until the police let you go.

Detention after arrest

If you have been arrested for an offence, Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) allows the police to detain you for a reasonable time while they investigate the offence.

It is important to understand that the police cannot arrest you just to investigate or ask you questions. They must already have reasonable grounds to suspect that you have committed an offence.

Part 9 does not apply to people who have been arrested for *breach of bail* or a *breach of the peace*. If you are arrested for breach of bail, police must take you to court as soon as possible (often this will be the next day). If you are arrested for breach of the peace, they must let you go as soon as the situation has calmed down and there is no longer any threat of violence or property damage.

For more information about being arrested, see *Arrest and warrants* chapter.

How long can police keep you in custody?

The investigation period

If you have been arrested for an offence, police can hold you for a reasonable time while they investigate the crime and question you. This is called the *investigation period* and can be up to four hours.

Police can apply to a magistrate (or other *authorised officer* such as a court registrar) to extend this time by up to eight hours, so the total time might be 12 hours.

Time out

Unfortunately, you might spend much longer than four hours at the police station, because there are a lot of things that are not counted as part of the investigation period.

This means the clock stops running while certain things are happening, for example:

- talking to your support person or lawyer
- waiting for your support person or lawyer to arrive at the police station
- using the bathroom
- sobering up
- waiting for police to do their paperwork.

After the end of the investigation period

After the maximum time expires, police must either release you without charge, or charge you. If they charge you, they must decide whether to grant bail (see *Bail* chapter).

The custody manager

At every police station where people are detained, there is a senior police officer in the role of *custody manager*. He or she is responsible for ensuring that people in police custody are treated fairly and understand their rights.

Telling you about your rights

The custody manager must tell you about your rights while in custody, and also give you a written summary of these rights. Here are some of the things the custody manager must tell you:

- you don't have to say anything, but that anything you do say or do may be used in evidence (this is called *cautioning* you)
- an authorised officer can extend the investigation period beyond four hours
- you can contact a friend, relative, guardian or independent person to tell them where you are or to ask them to come to the police station
- you can contact a lawyer and get advice over the phone or ask them to come to the police station.

Helping vulnerable people exercise their rights

If you are a *vulnerable person* (see *Vulnerable people in police custody* on page 140), the custody manager must take extra care to ensure you understand your rights, and must help you exercise your rights.

Record keeping

The custody manager must keep records including:

- the reasons for your detention
- the names and ranks of the police officers involved
- the time they detained you and released you
- details of any phone calls made and people who attended the police station to support you
- the time any investigative procedure (eg interview) started and ended
- details of any time out periods
- details of any application for a detention warrant (for an extension of time to detain you), and
- if the police denied you any of your rights, the reason for this.

When you are released from the police station, the police must give you a copy of your *custody management record*. If you have been charged, it's a good idea to show this to your lawyer.

What are your rights in police custody?

Questioning

You don't have to say anything. Remember, anything you say or do may be used in evidence, so get legal advice before you answer questions. If you're under 18 there must be an adult present while you are being questioned. For more information see *Police questioning* chapter.

Communicating with people who can help you

Contacting friends, family and support people

If you are under 18, the custody manager must provide a telephone so you can contact a *friend, relative, guardian or independent person* – in other words, anyone you like. You can ask your support person to come to the police station, and the police must let you see them. The police must provide reasonable facilities for you to talk to your support person in private.

The custody manager can refuse to let you contact a support person in certain circumstances (eg where the custody manager believes that the investigation is urgent, or that you might warn an accomplice and assist them to avoid arrest). If the police refuse to let you contact someone, tell your lawyer at court.

If you are over 18, you are not automatically allowed to have a support person present during questioning unless you are a vulnerable person (see *Vulnerable people in police custody* on page 140). However, the police often allow a support person to be present if you ask.

Lawyers

The custody manager must provide a telephone so you can contact a lawyer.

If you're under 18, they must tell you about the Legal Aid Hotline for under 18s (see *Contacts* on page 410) and make sure you have the opportunity to call them. The hotline is open from 9am–midnight Monday–Friday, and 24 hours on weekends. The children's lawyer on this line gives free and confidential legal advice about criminal matters.

If you are an Aboriginal or Torres Strait Islander person, the police must call the Aboriginal Legal Service Custody Hotline, unless you have already arranged to speak with your own lawyer.

If you ask your lawyer to come to the police station, the police must let you see them. You can have your lawyer with you during questioning. Usually the only way to get a lawyer to come to the police station is to pay a private lawyer, so this is not an option for most people.

Some Community Legal Centres might give you telephone advice or (very rarely) come to the police station. These services usually only operate during business hours.

Whether you are speaking to your lawyer in person or on the phone, the police must provide reasonable facilities for you to talk in private. But be careful what you say to your lawyer, just in case the police hear you.

You can refuse to answer questions until you get legal advice – even if you can't get that legal advice until after the police release you. It's a good idea to get legal advice before you answer any questions.

Consular officials and interpreters

If you are not an Australian citizen or a permanent resident, you have a right to communicate with an official from your own country's consulate (embassy).

If you can't communicate fluently in English, police must get an interpreter (or, if this is not practicable, arrange for a telephone interpreter).

Police don't have to let you communicate with an interpreter or consular official if the custody manager believes that the investigation is urgent. If this happens to you, tell your lawyer at court.

Refreshments and facilities

Police must provide you with reasonable refreshments and access to toilets. They must also provide facilities to wash, shower, shave, etc, if it is reasonably practicable and if the custody manager is satisfied that this will not hinder the investigation.

Medical assistance

The custody manager must arrange for medical assistance if it appears that you need it, or if you ask for it and they think it's a reasonable request.

If police deny you your rights

If the police deny any of your rights, tell your support person or lawyer. You might want to make a complaint (see *Complaints and cooperation: working to improve police practices* chapter).

Tell your lawyer at court if you think the police didn't treat you fairly. It might help your case in court, or the lawyer might help you to complain.

Vulnerable people in police custody

Police must follow special procedures when they detain a vulnerable person.

Who is a vulnerable person?

Part 9 of LEPR defines *vulnerable persons* as:

- children (people under 18)
- people with a disability (intellectual, mental or physical)
- Aboriginal and Torres Strait Islander people, and
- people from non-English speaking backgrounds.

Right to a support person

If you are a vulnerable person, you can have a *support person* with you during any *investigative procedure* (eg questioning).

A support person can be:

- a parent or guardian
- a lawyer of your choice, or
- a person there with your consent (or, if you are under 14, with the consent of your parent or guardian).

If you are under 18 you cannot *wave* (give up) your right to a support person.

The police must not question you until your support person arrives, unless the safety of other people makes the investigation urgent.

Your support person is not just a mere observer, but can assist and support you, observe whether the interview is fair, and identify communication problems. The custody manager must tell your support person this.

The police can exclude your support person if they unreasonably interfere, but then you can choose another support person to be with you.

Role of custody manager

The custody manager must, as far as practicable, assist you to exercise your rights, including:

- telling you how to get legal advice
- making a phone call to a lawyer (if you are under 18, this will usually mean calling the Legal Aid Hotline)
- helping you find a support person if you need one.

The custody manager must also speak to your support person and explain their role.

Special rules for some types of vulnerable people

Special rules apply to some types of vulnerable people.

Aboriginal people and Torres Strait Islanders

If you are an Aboriginal or Torres Strait Islander person, and you haven't arranged for a lawyer, the custody manager must notify the Aboriginal Legal Service. The Aboriginal Legal Service has a 24-hour custody hotline that police can ring.

There are special rules to protect Aboriginal and Torres Strait Islander people in police cells. The police must not put you alone in a cell, and, if possible, they should put you in a cell with another Aboriginal person or Torres Strait Islander.

Children (under 18) and people with disabilities

If you are a *child* (under 18) or you have an intellectual or physical disability, the custody manager must advise the person responsible for your welfare where you are and why the police have detained you.

This seems to mean that if you are a child you cannot keep the police matter confidential from your parents, if you live with them. If you are living independently or in a refuge, then your parents are not the people responsible for your welfare, so the police probably should contact your carer, case worker, youth worker or some other relevant person.

A child can't waive (give up) their right to have a support person with them.

Police must not put children in police cells unless no other secure accommodation is available and it is not practicable to supervise the child outside a cell, or the custody manager considers that the cell provides more comfortable accommodation than any other part of the police station.

If children are put in cells, they should not share them with adults except in exceptional circumstances that make it necessary for the well-being of the child (an example might be if a mother and her teenage daughter are both arrested).

ROLE FOR YOUTH WORKERS IN THE POLICE FOYER

– **David Crispe**, youth worker and ex-police officer

One of the young people from our program came hammering through the door puffing 'Sam, come quick! Matt just got arrested by the cops. He wants you to come down'.

I went down to the train station where some police were questioning Matt. I asked what was going on. They said that Matt had a stolen mobile phone. Before the police put Matt in the car he whispered to me that he was afraid of being hurt. (This fear had come from a previous encounter with police.) I reassured him that he would be OK and that I would be at the station.

I met the arresting officer at the police station and we had a chat outside. I found this officer to be extremely professional with a surprisingly good attitude towards young people – he could see the good side of young people, separate from the offence committed.

Matt wanted me in on his interview but because he was under 16 it was up to his parents to come down or nominate another adult to sit in on the interview (see *Police questioning of under 18s* on page 154). His parents decided to come to the station. The police officer asked if I would like a coffee while I waited. The wait turned out to be three hours! Basically, my role from then was to sit in the police station foyer, give reassuring looks to Matt when he was moved past the foyer area, spend a few hours with his parents helping them work through their concerns, explain police and court procedures to them and the likely outcomes of this incident for Matt, and finally be there when Matt was released.

When Matt was released I sat by him while his parents asked him what he wanted to do from this point. I helped in this communication on both Matt's and his parents' side by breaking down some of the barriers between them and rewording some miscommunications. When this was over I walked with Matt up to the train station. I didn't say much, I just listened to him blow off some steam about his parents.

On my way home I wondered if I had achieved anything by being at the police station, especially since his parents were there. However, I can now see several things that I achieved for Matt. My being there when he got arrested was reassuring to Matt to calm his obvious anxiety. Sometimes when young people get anxious when dealing with cops, they can become aggressive which often leads to the trifecta (charges of offensive language, resisting arrest and assaulting police). A youth worker's mere presence in these situations alone is of value. The same thing is true at the police station.

A basic knowledge of police options under the *Young Offenders Act 1997* and court procedures helps the youth worker to explain possible outcomes to young people and their carers. I was also able to mediate between Matt and his parents. Finding common ground between young people and parents can make the situation a lot easier to deal with. I only take on this mediation role if I can make it clear that I am there for the young person if things get heavy with parents or guardians. Probably the most significant achievement is the fact that Matt saw that there are adults who do care about him, who accept him for who he is, and are prepared to stick by him no matter what.

Fingerprints and photos

Fingerprints, palm prints and photographs may be taken for identification only. This includes ensuring that you are who you say you are, and that police have a correct, up-to-date criminal record to hand up in court. In practice, this seems to be a routine police procedure carried out when a person is charged.

If you are under 14, the police must get an order from the Children's Court to take fingerprints and photographs.

You may later be able to have prints and photographs destroyed if you are let off without being charged, if you are found not guilty, or found guilty but let off without a conviction. If you are under 18 and the offence alleged against you is not proved, the court will issue an order to have any prints and photographs destroyed if desired.

You might also be required to have your fingerprints or palm prints taken if you are issued with a *criminal infringement notice* (not an ordinary penalty notice for parking, traffic, railway offences, etc) or a *court attendance notice*. See *How police deal with you for alleged offences* on page 147.

Forensic procedures

The *Crimes (Forensic Procedures) Act 2000* allows police to carry out *forensic procedures* in certain circumstances.

You might be wondering what exactly is a forensic procedure? When can police carry these out? Can I refuse? What happens after the forensic procedure is carried out?

What is a forensic procedure?

Forensic procedures are used by police to gather evidence. Common types of forensic procedures include taking your photo, a blood test, or a DNA sample.

A forensic procedure does not include any intrusion into a person's body cavities except the mouth.

There are two kinds of forensic procedure:

Non-intimate forensic procedure

- carrying out a self-administered *buccal swab* (a buccal swab means inserting a sterile swab into your mouth to take a DNA sample)
- taking a sample of hair other than pubic hair
- taking a sample from a nail or under a nail
- taking a hand print, fingerprint, footprint or toe print

- an external examination of a part of the body (but not your genitals, bottom or breasts if it involves touching the body or removing clothes)
- taking a sample by swab or washing from any external part of the body (but not your genitals, bottom or breasts)
- taking a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body (but not your genitals, bottom or breasts)
- photographing a part of the body (but not your genitals, bottom or breasts), or
- taking an impression or cast of a wound from a part of the body (but not your genitals, bottom or breasts).

Intimate forensic procedure

- carrying out a buccal swab administered by another person
- taking a sample of blood
- taking a dental impression
- taking a sample of pubic hair
- an external examination of the genital or bottom area or the buttocks
- an external examination of the breasts of a female or a transgender person who identifies as a female
- taking a sample by swab or washing from your genitals, bottom area or breasts
- taking a sample by vacuum suction, by scraping or by lifting by tape from your genitals, bottom area or breasts
- photographing your genitals, bottom area or breasts
- taking an impression or cast of a wound from your genitals, bottom area or breasts.

When can police carry out forensic procedures?

Police can carry out a forensic procedure on:

- a suspect (a person who police suspect on reasonable grounds has committed an offence)
- a serious indictable offender (a person serving a prison sentence for an offence carrying a maximum penalty of 5 years' imprisonment or more), or
- a *volunteer* (eg someone who is not a suspect but wants to take a DNA test to establish their innocence).

Suspects

Police can carry out a forensic procedure on a suspect aged 18 or over, with the suspect's *informed consent*.

If the person does not consent, police must get an order from either a court or a senior police officer (depending on the type of offence alleged and the type of forensic procedure they want to do).

A suspect does not have to be under arrest for police to request or carry out a forensic procedure.

What is informed consent?

Informed consent means you are made aware of:

- the way the procedure will be conducted
- the fact that you are under no obligation to undergo the procedure
- the fact that evidence gained from the procedure may be used in court, and that information collected may be placed on the DNA database system
- the fact that you may consult legal advice before making a decision, and that you may withdraw your consent to the procedure or to the police holding material they obtain from a forensic procedure at any time.

Children and incapable persons

Children and *incapable persons* (eg people with intellectual disabilities who cannot understand the procedure or its implications) are deemed unable to give informed consent.

To carry out a forensic procedure on a suspect who is a child or incapable person, police must apply for a court order.

Serious indictable offenders

A *serious indictable offender* is someone who is serving a prison sentence for an offence that carries a maximum penalty of 5 years' imprisonment or more. In practice, nearly all people serving prison sentences are serious indictable offenders.

As with suspects, police must seek the person's informed consent to do a forensic procedure. If the person is a child or incapable person, they cannot give consent and the police must seek a court order.

Police conduct forensic procedures on prisoners, usually by buccal swab, to obtain a DNA sample. The person's DNA profile is then put on a database and matched against DNA profiles from unsolved crimes.

Many people find that, after having their DNA taken for the first time in prison, they end up with a whole lot of charges relating to offences committed a long time ago. This can be a serious setback for people trying to rehabilitate after a prison sentence.

Volunteers

A person who is not a suspect may *volunteer* to undergo a forensic procedure.

If the person is a child or incapable person, they cannot give consent. However, a parent or guardian may volunteer on a child's behalf.

Forensic procedures and under 18s

A forensic procedure cannot be carried out on a child under 10.

If you are under 18 you are not legally able to consent to a forensic procedure.

Suspects

To carry out a forensic procedure on a child who is a suspect, the police must apply to the Children's Court.

When the application is heard at court, you must have an *interview friend* (support person) present, and you may also have legal representation.

Before ordering a forensic procedure, the magistrate must be satisfied that:

- the child is a suspect
- there are reasonable grounds to believe the child committed a certain type of offence
- there are reasonable grounds to believe that evidence gained from the forensic procedure may help to confirm or disprove that the child committed the offence, and
- carrying out the procedure is justified in all the circumstances.

Serious indictable offenders

A court may order that a non-intimate forensic procedure be carried out on a child serving a sentence of imprisonment (but not a control order) for a serious indictable offence (see *Outcomes of court* chapter).

A court may grant an order if satisfied that carrying out the procedure is justified in all the circumstances.

Volunteers

Police may carry out a forensic procedure on a child who is not a suspect if a parent or guardian *volunteers* on their behalf. The parent or guardian must give their informed consent.

If the consent of a parent or guardian cannot be reasonably obtained (or is withdrawn) a magistrate may order the forensic procedure.

Even with parental consent or a court order, the forensic procedure *cannot* be carried out if the child objects or resists.

Presence of support person during forensic procedure

If reasonably practicable, an interview friend (support person) and/or a lawyer must be present while the procedure is carried out on a child.

What happens after the forensic procedure is carried out?

The law about use and retention of forensic material is very complex and will not be explained in detail here.

If a forensic procedure involves taking a DNA sample, this will be used to create a DNA profile that will be put on a database. If you are a suspect or a serious indictable offender, this can be matched against the unsolved crimes database. If there is a *cold hit* (ie your DNA profile matches the DNA taken from a crime scene), you may be charged with an offence.

If you had a forensic procedure carried out as a suspect, there are rules about destruction of forensic material. In general, forensic material must be destroyed if you are found not guilty of the charge, if charges are discontinued, or if no charges have been laid within 12 months.

How police deal with you for alleged offences

If the police have enough evidence that you have committed an offence, they decide how to deal with the alleged offence. Depending on the circumstances, police can:

- give you a warning
- give you an infringement notice (an on-the-spot fine)
- give you a formal caution instead of an infringement notice
- given you a cannabis caution (over 18s only)
- give you a formal caution under the *Young Offenders Act 1997* (under 18s only)
- send you to a youth justice conference under the *Young Offenders Act 1997* (under 18s only)
- send your case to court.

Warnings, Cautions and conferences for under 18s

The *Young Offenders Act 1997* allows police to deal with under 18s by:

- informal warning

- formal caution, or
- youth justice conference.

For more information about these options, see *The Young Offenders Act: warnings, cautions and conferences* chapter.

Warnings for over 18s

Police have the discretion to give warnings to adults for minor offences (eg offensive language or jaywalking). You don't have to admit the offence to get a warning, but if you deny it police are probably less likely to just warn you. The police officer may or may not record the warning, and your name, in their notebook. You don't get a criminal record if you get a warning.

Cannabis cautions for over 18s

Police can caution you for cannabis possession if you:

- are 18 or over
- possess up to 15 grams of cannabis for personal use only (this means you did not intend to share it with, give or sell it to anyone else)
- admit to the offence
- have no past convictions for drugs, violence or sexual assault, and
- have had no more than two previous cannabis cautions.

Infringement notice (on-the-spot fine)

Police and other officials can give you an *infringement notice* (sometimes called a penalty notice or on-the-spot fine) for minor offences, such as fare evasion, traffic offences and littering. They may give this out at the scene or may post it to you later. Occasionally, they arrest you and take you back to the police station, then give you an infringement notice.

Although anyone over the age of 10 can be charged with an offence, and can theoretically be given an infringement notice, the NSW Police Handbook says that officers should only issue fines to those 14 years and over.

Instead of paying the fine, you can choose to go to court. To go to court, you must send in the *court election* form on the penalty notice.

If you do nothing about the fine, it won't go away. The State Debt Recovery Office will try to get you to pay it. The fine could get bigger, the RTA could suspend your licence, and the sheriff could take your personal belongings. See *Unpaid fines* chapter.

Caution instead of infringement notice

Many officers who have the power to issue infringement notices (eg transit officer, council rangers) now have the option to give you a caution instead.

Examples of situations when a caution might be given include:

- if it is your first offence
- if you have a good excuse for committing the offence
- if you have a disability
- if you are homeless.

Criminal infringement notice for over 18s

Under a law introduced in 2002, police may give adults a *criminal infringement notice* for certain offences, instead of commencing criminal proceedings at court. A person can still elect to go to court if given one of these infringement notices.

Criminal infringement notices can only be issued for less serious offences such as:

- stealing (where the value of the property or amount stolen does not exceed \$300)
- unlawful possession of property (goods in custody)
- offensive conduct or language
- obstructing traffic
- unauthorised entry of a vehicle or boat.

Send your case to court

If none of the above options are appropriate, the police may give you a *court attendance notice* (CAN) to send you to court.

Types of court attendance notice

There are four types of CAN. The first three are quite similar and do not involve a bail undertaking, which means you are free until your court date without any conditions attached.

- A *no bail CAN* means that you are free until the court date and don't have to sign any bail agreement. This is usually issued at the police station.
- A *field CAN* is like a no bail CAN but is issued out in the field (on the street, at your home or wherever). It is a small yellow piece of paper.
- A *future CAN* is like a no bail CAN but is usually given to you a few weeks after the alleged offence. This used to be known as a *summons*.

- A *bail CAN* is issued when the police consider the matter too serious to let you go free without any conditions. The police will either allow you to go free after signing a bail undertaking, or they may refuse bail altogether and keep you locked up until you go to court.

For more information, see chapters on *Bail* and *Going to court*.

HOW THE POLICE EXERCISE THEIR DISCRETION

There are many things which affect the police decision. These include, your age, the seriousness of the crime, whether you admit that you committed the crime or not, and what your police record is like. The police have a wide discretion about how they deal with most offences.

In most cases, the choice is largely left up to the investigating officer. For under 18s, the investigating officer might pass the decision on to the specialist youth officer to consider a caution or youth justice conference. Advocates (relatives, welfare workers, lawyers, etc) can attempt to persuade the police to use the most appropriate option.

With under 18s, police can use cautions and conferences for a wide range of offences. For these offences, police must consider a caution or conference before deciding to take the matter to court. Young people should get legal advice about the possibilities of cautions, conferences and court, before they answer police questions.

Police must use court attendance notices (CAN) without arresting you first – unless they suspect on reasonable grounds that it is necessary to arrest you to ensure you appear at court, don't interfere with witnesses, don't keep offending, etc (see *Arrest is a last resort* on page 126).

If police decide to take you to court, and they don't give you a field, future or no bail CAN, they must make a decision about bail. This decision is made by the custody manager, not the arresting or investigating officer.
