

# ARRESTING "ARREST": PATHWAYS THROUGH THE MORASS

by

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"Arrest" as an event, like the opaqueness of water can be observed; and just as the elements of water can be ascertained, the elements of what constitutes a "lawful" arrest too can be explained. However, in situations where there has been an arrest without a warrant,<sup>1</sup> just as we find it difficult to describe the taste of water, identifying the characteristics of what ought to constitute a "lawful" arrest in a given situation too has proved to be an elusive task! In highlighting the distortions that could arise in formulating rules relating to arrest when clear policy guidelines have not been used to correlate concepts evolved in case law to new statutory provisions, an effort will be made in this paper to evaluate the scope of two "arrest" provisions under which general powers of arrest have been frequently exercised in Western Australia.<sup>2</sup> This evaluation will be made in the context of provisions that deal with the exercise of powers of arrest in some of the other Australian jurisdictions and the recent recommendations of the Western Australian Law Reform Commission (hereinafter referred to as WALRC), with a view to suggesting a framework for the formulation of rules on arrest in the Code jurisdictions of Australia.

All forms of restraint including those under a warrant or a statutory provision, trigger off a series of rights and obligations in the parties to the event. These rights and obligations revolve around rules associated with the procedural machinery for the administration of criminal justice, such as those relating to the right of silence, issuance of cautions, interrogation of suspects, pre and post arrest restraint, admissibility of statements obtained during periods of restraint and the granting of police bail. In judicial pronouncements, there are references to phrases such as

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1 Several statutory provisions in Western Australia deal quite exhaustively with the general power of arrest under a warrant. These provisions indicate with greater certainty as to the circumstances in which arrests **with** warrants will be considered "lawful". Refer ss.151, 225-231, 439, 580, 635, 727 of the *Criminal Code Act* 1913 (WA) (as amended); ss.36, 37, 46, 49, 59, 60, 61, 62, 63, 75, 76, 77, 158, 162, 171 B1 and 223, of the *Justices Act* 1902 (WA) (as amended); and ss.54(2) and 56 of the *Bail Act* 1982 (WA) (as amended); for a summary of the general powers of arrest under a warrant in the other states, refer D. Lanham, M. Weinberg, K.E. Brown and G.W. Ryan, *Criminal Fraud*, The Law Book Company, Sydney, 1987 at 455-458; Australian Law Reform Commission, *Criminal Investigation: An Interim Report* [Report No. 2] Australian Government Publishing Service 1975 at 11-19.

2 Section 564 of the *Criminal Code* 1913 (WA) (as amended) reads:

- (1) In this section "arrestable offence" means an offence punishable with imprisonment, with or without any other punishment.
- (2) It is lawful for any person to arrest without warrant any person who is, or whom he suspects, on reasonable grounds, to be, in the course of committing an arrestable offence.
- (3) Where an arrestable offence has been committed, it is lawful for any person to arrest without warrant any person who has committed the offence or whom he suspects, on reasonable grounds, to have committed the offence.
- (4) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, it is lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds, to have committed the offence.
- (5) Where it is lawful under this section for a police officer to arrest a person, it is lawful for the police officer, for the purpose of effecting the arrest, to enter upon any place where the person is or where the police officer suspects, on reasonable grounds, the person may be.

The relevant portion of section 43 of the *Police Act* 1892 (WA) (as amended) states:

"Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night may apprehend ... all persons whom he shall have just cause to suspect of having committed or being about to commit any offence, ... and shall detain any person so apprehended in custody, until he can be brought before a Justice, to be dealt with for such offence".

“detention for purposes of general inquiry”, “arrest” and “custody” to distinguish the characteristics of different types of restraint. Associated with these forms of restraint are various rights of search and seizure. Therefore, it has become imperative to ascertain the nature and legality of the form of restraint without warrant which the courts tend to describe as an “arrest”, as so many of the rights and obligations that relate to the administration of criminal justice at the pre-trial stage, civil actions for damages for false imprisonment, trespass to the body and property, malicious prosecution<sup>3</sup> and disciplinary procedures against police officers for wrongful arrests, revolve around the issue of whether there was a “lawful” arrest or not.

In seeking the pathways to ascertain what ought to be viewed as a “lawful” arrest in instances where a warrant has not been issued, an evaluation will be made first, of the policy factors that may have influenced the classification of offences as “arrestable” (ie, non-warrant offences) and “non-arrestable” offences in the Criminal Code of Western Australia. Thereafter, in the light of the approaches adopted by the courts in identifying situations of restraint as amounting to arrest, an analysis will be offered of the significance of the classification of offences as “arrestable” and “non-arrestable” in the interpretation of the legislatively prescribed variables that make an arrest “lawful”. In doing so, an effort will also be made to explain the impact of the policies that may have influenced the categorisation of offences as “arrestable” and “non-arrestable” on the rules evolved by the courts in regard to pre-arrest and post-arrest restraint. It is only then one can grasp the urgent need for consistent cohesive principles to accomplish specific objects through the exercise of arrest powers, and focus on areas of existing pre and post-arrest laws that may require modification. Such an approach may also highlight to some extent the need for caution in adopting the recommendations of the WALRC<sup>4</sup> in regard to the amendment of the prevailing arrest provisions in the Criminal Code<sup>5</sup> and the Police Act<sup>6</sup> of Western Australia.

**i) Policy factors that may have influenced the classification of offences in the Criminal Code of Western Australia as “arrestable” and “non-arrestable” offences**

Section 43 of the Police Act of Western Australia [hereinafter referred to as PA (WA)] states that a police officer may arrest without a warrant “all persons whom he shall have just cause to suspect of having committed or being about to commit *any offence*, ...” (italics mine). The term “offence” has been extended to cover any “act” or “omission” that would constitute an offence in Western Australia.<sup>7</sup> Yet, the Criminal Code of Western Australia [hereinafter referred to as the CC(WA)], clearly makes a distinction between “arrestable” and “non-arrestable” offences in delimiting the powers of police officers and citizens in regard to arrest.<sup>8</sup> Prior to the categorisation of “non-warrant” and “warrant” offences as “arrestable” and “non-arrestable” in 1985, the power to arrest without a warrant was extended to specific “crimes” and “misdemeanours”,<sup>9</sup> and in regard to the latter the power was restricted in many instances to situations where the arresting party found the suspect committing an offence.<sup>10</sup> During the parliamentary debate on the bill

3 These civil law remedies for “unlawful” arrest were preserved in Western Australia by s.5 of the *Criminal Code Act Compilation Act 1913* (WA); also refer to s.737 of the *Criminal Code Act 1913* (WA) (as amended).

4 See Western Australian Law Reform Commission, *Report on Police Act Offences*, Government Printer, Western Australia 1992 at 177-184 and 237.

5 *Criminal Code Act 1913* (WA) (as amended).

6 *Police Act 1892* (WA) (as amended).

7 See *Letts v. King* [1985] 3 MVR 47; *Romito v. Williams* SCL 920649, 1992 (WA) (unreported).

8 Section 564(1).

9 Section 5 of the pre-1985 Code, repealed by s.5 of Act No. 119 of 1985; s.5 has been retained in the *Criminal Code of Queensland 1899* (Qld) (as amended); see commentary on s.5 in RF Carter, *Carter’s Criminal Law of Queensland*, 8th edn, Butterworths, Sydney, 1992 at 2077-2078.

10 MJ Murray QC, *The Criminal Code: A General Review* Vol. I 1983 (a report submitted to the Attorney General of Western Australia) (hereinafter referred to as the “Murray Report”) at 7.

introducing amendments to the arrest provisions, it was pointed out, only a lawyer who had practiced in the area of criminal law for several years would have been familiar with these "non-warrant" offences and the "elements" that were required to prove such offences.<sup>11</sup> The Murray Report referred to these provisions on arrest as a "hotchpotch"<sup>12</sup> that was "unnecessarily complex" because "... often the distinction made as to the various circumstances which, or types of offences which, do or do not allow arrest without warrant, are not seen to be related to any particularly logical basis for making the distinctions".<sup>13</sup> The author of the report, Mr MJ Murray QC, added:

"It seems odd to me to find wider powers of arrest which may be applied to indictable offences in the Police Act than exist in the Code."<sup>14</sup>

Prior to the 1985 amendments, "warrant" and "non-warrant" offences in the Code were demarcated, subject to certain qualifications, primarily by reference to the proceedings under which an offender would have been tried for these offences.<sup>15</sup> Thus specified indictable offences [defined as "crimes" and "misdemeanours" in the CC(WA)]<sup>16</sup> were viewed as "non-warrant" offences. All simple offences, along with those indictable offences which were not categorised as "non-warrant" offences, were viewed as "warrant" offences.<sup>17</sup>

Trials for indictable offences are generally conducted before a jury and have been considered as being more "serious" than simple offences.<sup>18</sup> Those charged with simple offences are tried in the summary courts.<sup>19</sup> Traditionally it has been felt it would be too much of an intrusion on the liberty of a citizen to arrest him/her without a warrant, if the offence could have been tried in summary proceedings.<sup>20</sup> It was perhaps this principle of restraint that led to curbs being placed on the powers of arrest without a warrant in regard to non-indictable offences in the Code jurisdictions of Western Australia and Queensland.<sup>21</sup>

More recently, the Canadian Law Reform Commission has presented the case for implementing the principle of restraint by focussing on the need to remove the more intrusive features associated with the administration of criminal justice:

"Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other non-coercive, less formal, and more positive approaches is to be preferred whenever possible and appropriate."<sup>22</sup>

11 Submissions by Mr A Mensaros and Mr JF Grill during the debate on the "Criminal Law Amendment Bill" in *Parliamentary Debates* (New Series) (1985) Vol. 2 at 4566 and 4468.

12 *Supra* n.10 at 7.

13 *Ibid.*

14 *Ibid* at 8.

15 *Ibid* at 2-4; also refer Carter *supra* n.9 and JB Bishop *Criminal Procedure* Butterworths Sydney 1983 at 47.

16 In this article the term "non-warrant" offences has been used for purposes of referring to "offences" in regard to which there could be an arrest without warrant. The term "arrestable" offence is not in common use in the other Australian states.

17 Section 5 of the pre-1985 Code; thus, provision was made for a justice to issue a warrant in regard to a simple offence in ss.52 and 59 of the *Justices Act 1902* (WA) (as amended).

18 Refer Murray Report *supra* n.10 at 2; also refer to G Williams *Textbook of Criminal Law* 2nd edn Stevens and Sons London 1983 at 18-19.

19 Refer definitions of "indictable offence", "simple offence" and "summary conviction" in s.4 of the *Justices Act 1902* (WA) (as amended).

20 Refer C Philips *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* Her Majesty's Stationary Office London 1981 at 18.

21 See Carter, *supra* n.1 at 2077-2978, also TR Hartigan and FN Albietz *An Outline of the Powers and Duties of Justices of the Peace in Queensland* 7th edn The Law Book Company Sydney 1987 at 38-39.

22 Law Reform Commission of Canada *Arrest* [Report No. 29] Ottawa 1986 at 7.

There may have, however, been other reasons for not permitting officers or private citizens to arrest without warrants those who were suspected of committing less “serious” offences. The “warrant” requirement may have been used for the purpose of regulating the use of discretion by an officer (or private citizen) in order to prevent the precipitate use of “arrest” powers or over zealous policing.<sup>23</sup> The Australian Law Reform Commission has also pointed out that arrests cost the state more money than other ways of bringing suspects before the courts, and an arrest record, apart from having a stigmatising effect, may also affect the eventual outcome of a trial in a manner that may be prejudicial to a party who is “arrested” with or without a warrant.<sup>24</sup>

Section 43 of the PA(WA), however, clearly violates this principle of restraint. It enables a police officer to arrest a person for “any” offence without a warrant, including offences under the PA, even though offenders charged with offences under the PA(WA) can be tried only in the summary courts. The 1985 amendments of the Code also reflect a trend that contradicts the “restraint” principle. Rather than restricting the category of “non-warrant” offences under the Code, the Murray Report recommended a wider category of “non-warrant offences” (ie, “arrestable offences”) by suggesting that an offence ought to be viewed as an “arrestable offence” if it was “punishable with imprisonment”.<sup>25</sup> It was felt such an approach to defining “non-warrant” offences would “... provide clear guidance as to powers of arrest”<sup>26</sup> and enable police officers to act with some confidence that they were acting within their powers in performing their duties.<sup>27</sup>

Several offences in the PA(WA) are punishable with imprisonment, and since the definition of “arrestable offences” in section 564(1) of the CC(WA) would encompass all these offences, the residuary power of arrest under section 43 of the PA(WA) will have to be confined to offences that are “not punishable with imprisonment”. However, even such a residuary power of arrest as provided for in section 43 may be viewed as being displaced by section 564(1), as all offences that do not fall within the definition of “arrestable” offences may be viewed as “non-arrestable” in the light of what Jackson CJ stated in *Kiely and Ors v. R*:<sup>28</sup>

“In my view section 2 defines an ‘offence’ for the purposes of the law of Western Australia (see section 2 of the Criminal Code Act) and unless the context of a particular provision otherwise requires, the term ‘offence’ when used in the Code should be understood to mean an offence under the law of this state.”<sup>29</sup>

This would mean section 43 would provide the police only with a power to arrest a person who is “about to commit an offence”, whether it be “arrestable or non-arrestable”. This power may have been included in section 43 because of the technicalities of the proximity rule in the law of attempt<sup>30</sup> and may have nothing to do with the definition of a separate offence of “being about to commit an offence”.<sup>31</sup> However, in view of the peculiar wording of section 43 of the Police Act, even if a person who is arrested “for being about to commit an offence” is viewed as having

23 Refer to representations of Mr Mensaros, *supra* n.11 at 4566.

24 See Australian Law Reform Commission *Criminal Investigation: An Interim Report* [Report No. 2] at 15.

25 *Supra* n.10, Vol. 2 at 354-357.

26 *Ibid* at 357.

27 *Ibid*.

28 [1974] WAR 180.

29 *Ibid* at 181.

30 RW Harding, ‘The Law of Arrest in Australia’ in *The Australian Criminal Justice System* 2nd edn by D. Chappell and P. Wilson Butterworths Sydney 1977 333 at 337.

31 The WALRC seemed to view the phrase “... being about to commit an offence” in section 43 as creating an offence, *supra* n.4 at 44; for a contrary view, refer *Feldman v. Buck* [1966] SASR 236 at 239, where Napier CJ pointed out in the course of interpreting s.75 of the *Police Offences Act* (1953-61) (SA) (as amended), which in many respects is worded similar to the part dealing with general powers of arrest in s.43, that “... the power to arrest any person on suspicion of being ‘about to commit an offence’ is, no doubt, directed primarily to the keeping of the peace”.

committed an offence, since no provision has been made for the punishment of a person arrested under such circumstances in section 43, the "offence" may be viewed as an offence punishable with imprisonment by virtue of section 124 of the PA(WA).<sup>32</sup> Should this not be so, this residuary power afforded to the police could still be justified on the ground that it is in keeping with the preventative powers of law enforcement associated with "arrest" and recognised in sections 237, 568 and 569 of the CC(WA) and the wide definition of "arrestable offences" in section 564(1). Mr Murray, however, may not have contemplated a general preventative power of arrest being given to the police along the lines of the power in section 43 because he, in fact, recommended the repeal of a similar power given to a police officer to arrest without a warrant a person found loitering at night in such circumstances as to afford reasonable grounds to believe that he is about to commit an offence under section 564(8) of the pre-1985 Code provisions.<sup>33</sup>

The exercise of preventative powers of "detention" is recognised in Western Australia in regard to those engaged in "drunk and disorderly" conduct,<sup>34</sup> presumably, on the assumption that such behaviour may lead to the commission of "arrestable offences". The same reasoning may have to be resorted to if "non-warrant" offence categories are defined widely, as under section 564(1), and protection and safety of the public are the main objectives sought to be fulfilled through an arrest. Further, if "arrestable offences" are to be extended to a wide category of "non-warrant" offences, the inclusion of a power to arrest a person who is "about to commit such an offence" too would be in keeping with the realities of policing, even though such a power could easily be abused.

The WALRC,<sup>35</sup> however, has recommended the adoption of a provision similar to section 352 of the Australian Capital Territory Crimes Act of 1900.<sup>36</sup> Such a provision would be in keeping with the principle of restraint mentioned earlier, and emphasise the primary objective of the arrest power under the section as that of ensuring the attendance of a suspect in court.<sup>37</sup> Should Western Australia adopt such a provision, the preventative powers of arrest in section 43 will have to be

32 Section 124 reads: "Every offence against this Act for which no special penalty is appointed shall render the offender liable, on conviction before a Justice, to a penalty of not more than \$100 or to be imprisoned for any term not exceeding one calendar month in any gaol of the said State either with or without hard labour.

33 *Supra*, n.10 Vol. 2 at 356.

34 Refer ss.53 to 53L of the PA 1892 (WA) (as amended).

35 *Supra* n.4 at 180.

36 352.(1) Any person may, without warrant, apprehend:

- (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment or on summary conviction, under any law in force in the Territory; or
- (b) any person who has committed an offence punishable by imprisonment for 5 years or more, being an offence for which she or he has not been tried; and may:
- (c) detain the person only for so long as is necessary and reasonable while the first-mentioned person arranges for the attendance of a police officer; or
- (d) as soon as is reasonably practicable, take the person, and any property found upon the person, to a police officer.
- (2) A police officer may, without warrant, arrest a person for an offence against a law of the Territory if the police officer believes on reasonable grounds that:
  - (a) the person has committed or is committing the offence; and
  - (b) proceedings by way of summons against the person in respect of the offence would not achieve one or more of the following purposes;
    - (i) ensuring the appearance of the person before the court in respect of the offence;
    - (ii) preventing the continuation of, or a repetition of, the offence or the commission of some other offence;
    - (iii) preventing the concealment, loss or destruction of evidence of, or relating to, the offence;
    - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
    - (v) preventing the fabrication of evidence to be given or produced in proceedings in respect of the offence;
    - (vi) preserving the safety or welfare of the person.

37 *Supra* n.4 at 179-180.

ignored as it would be clearly inconsistent with the objectives of the arrest power stipulated in the new provision. Modifications may also have to be made to rules evolved in case law in regard to pre and post arrest detention. These, and other related issues, will be discussed under (iv) and (v) below.

**ii) Seeking pathways amidst “judicial” ambivalence on notions of “arrest”**

Here again the courts have not looked to the objectives of an arrest provision in attempting to explain the nature of the event of “arrest”. Statutes refer to restraint with phrases such as “detention”, “arrest” and “custody”. Section 564 of the CC(WA) for instance, refers to the phrase “arrest” without defining it. Section 43 of the PA(WA) refers to the “detention” of a suspect. The courts have sought to explain the event of arrest by referring to the nature of the event and then specific acts that manifest the states of mind of the parties to the event. In the process of doing so, the courts have also sought to compartmentalise restraint with phrases such as “detention for purposes of making a general inquiry”, “authorised detention” and “custody”.<sup>38</sup> At least one aspect of this classification is reasonably clear. That is, once a person is “arrested”, it could be said he/she is in the “custody” of the arresting party.<sup>39</sup>

The earlier High Court and Privy Council decisions drew a distinction between restraints (ie, “detention”) for purposes of making a general inquiry and restraints that extended beyond the objectives of a general inquiry. In *McDermott v R*<sup>40</sup> for instance, the accused who was convicted for murdering the deceased on 5 September 1936 was questioned by the police for the first time in 1944, and a written statement was obtained from him concerning his movements between 5 and 8 September 1936. After conducting further investigations, four detectives met the accused on 10 October 1946 and took him to a police station and questioned him for one hour. Several statements were made by the accused during this hour. The police, thereafter, charged the accused. The trial judge refused to exercise his discretion and bar the admissibility of the statements made by the accused on the basis that there was nothing to indicate that the questioning was unfair.

During the appeal to the High Court, the appellant contended that the statements were obtained by the officers through “cross-examination” while he was in the “custody” of the police, and the trial judge should have exercised his discretion to bar the statements.

Dixon J held that the appellant had not been “formally arrested”<sup>41</sup> at the time he was taken to the police station. The officers had told him that they wanted him to go along with them to the police station, and he went along with them in the police car without making any “demur”.<sup>42</sup> Thereafter, his Honour indicated that the Judges’ Rules which provided guidelines on the modes in which a suspect who is in “custody” could be questioned, were merely administrative directions issued by the judges of the High Court in England, and therefore, inapplicable in New South Wales. His Honour concluded that the questioning was not “unfair” and the trial judge had been correct in refusing to bar the admissibility of the appellant’s statements.

Dixon J focussed entirely on the states of mind of the officers who were making the inquiries and looked to a formal expression of an intention to end the process of making “general” inquiries to ascertain a manifestation of an “intention” to arrest the accused. Even though the detectives had taken the accused to the police station, cautioned him and then questioned him, and that too after several years of investigation into the offence (from 1936 to 1946) and the possibility of inferring the fact that the officers had a reasonable suspicion that the accused may have committed the

38 *Maines v. Roy* [1990] 1 WAR 508 at 511-512; *Hussein v. Chong Fook Kam* [1970] AC 942 at 947; refer also, DN Clarke and D Feldman ‘Arrest by any Other Name’ [1979] Crim LR 702; G Williams ‘When Is An Arrest?’ (1991) 54 Mod LR 408 at 410-413.

39 *Williams v. R* (1986) 66 ALR 385 at 396-397.

40 (1948) 76 CLR 501.

41 *Ibid* at 510.

42 *Ibid*.

murder was open to the court, Dixon J was reluctant to interfere with the discretion afforded to police officers to determine whether to arrest a suspect or not, unless the officers had manifested their intention to arrest in a formal manner.

Two years later, the High Court in *R v. Lee*<sup>43</sup> displayed the same reluctance to interfere with the discretion afforded to a police officer in common law to make a decision on whether to arrest a suspect, in a situation where the officers had not made up their minds to “charge” the suspects. The three respondents in this case were charged with murder and had been picked up from their hotel by the police at 3am and then taken to police headquarters and questioned from 4am to 7am in separate rooms. They were charged at 7am.

It was contended by the accused that they were in “custody” of the police when they were taken to police headquarters, and since they had made statements to the police prior to cautions being issued to them, in keeping with the Police Commissioner’s standing orders,<sup>44</sup> the statements were “unfairly” obtained and therefore, should not be admitted in evidence. The trial judge refused to bar the statements and the accused were convicted. They succeeded in their appeal to the Court of Criminal Appeal of Victoria, and the Crown in turn appealed to the High Court.

In the High Court it was held the police officers had been directed under the Standing Orders to issue cautions only after they had made up their minds to charge the respondents. They had neither made up their minds to do so nor “arrest” the appellants at the time the statements were made. The “matter” was still at the stage of inquiry or investigation, and the statements were not obtained in breach of the standing orders.<sup>45</sup> It was held, therefore, that the statements were not “unfairly” obtained in breach of the standing orders.

*Hussein v. Chong Fook Kam*<sup>46</sup> is another case that illustrates quite vividly the uncertainty and confusion that could arise when the courts do not scrutinise carefully the policy factors that influenced the formulation of the “arrest” power in a statute. In hearing an appeal from Malaysia in the Privy Council, Lord Devlin sought to lay down clearer guidelines to distinguish between “detention for purposes of general inquiry” and “custody”, and avoid the trend displayed in the early High Court decisions of looking to formal expressions of arrest of a restraining party to ascertain the event of “arrest”.

In *Hussein* a complaint had been made to the police on 10 July at 10.15pm of an incident in which a log had fallen off a truck and crashed through the windscreen of a car travelling in the opposite direction, killing one of the passengers in the car and injuring two others.

Following the complaint the police made inquiries and identified the licence plate number of the truck. The following day (ie, 11 July) a constable saw a truck with this licence plate number parked in front of a restaurant and restrained the truck driver and his assistant from leaving the area. This incident occurred at 7.55am. The corporal in charge of the police station in the area arrived 10 minutes later (ie, 8.05am). He told the driver and his assistant (the plaintiffs) that he had received instructions to detain them “on suspicion of a fatal accident case”. At 1pm an inspector and a district superintendent of police arrived and interrogated the plaintiffs. The plaintiffs indicated they had not been involved in any accident the previous day.

The officers were not satisfied with their explanations and took the plaintiffs to the police station. They arrived at the station at 5pm. Thereafter, the plaintiffs were taken by the police to another location to check on their alibi. When they arrived at their destination the police officers questioned two individuals who were there. They, however, were reluctant to answer the

43 (1950) 82 CLR 133.

44 *Ibid* at 142 reference is made to the relevant rule in the Commissioner’s Standing Orders, Rule 2 stated: “When any member of the Force has made up his mind to charge a person with a crime, he must first caution the person before asking any questions, or any further questions, as the case may be”.

45 *Ibid* at 155.

46 [1970] AC 942.

questions put to them by the police officers. The accused were then taken back to the police station at 6.15pm. They were brought before a magistrate the following day, and after being kept in remand for seven days they were released as the police had not been able to find sufficient evidence to proceed against them.

In an action for damages against the officers for false imprisonment the Federal Court of Malaysia, overruling the decision of the High Court, awarded damages to the plaintiffs. The officers appealed to the Privy Council, and Lord Devlin referred to the criteria that should be used in determining the stage at which the officers had “arrested” the suspects:

“An ‘arrest’ occurs when a police officer states in terms he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. *It does not occur when he stops an individual to make inquiries* (my italics).”<sup>47</sup>

Applying these principles his Lordship came to the conclusion that there was an arrest only when the corporal told the plaintiffs<sup>48</sup> that he had received instructions to restrain them. The police officers had asserted in their pleadings that the arrest had occurred at 6.15pm because it was only at that stage they had a “reasonable suspicion” that the plaintiffs may have committed the offences for which they had been restrained. It was argued on behalf of the officers that prior to that stage they had been merely making “inquiries”.

Lord Devlin indicated that there was an arrest at 8.05am, and since the arrest was not made on a reasonable suspicion that an offence had been committed by the plaintiffs the arrest was unlawful and the detention that followed it was also “unlawful”. The detention became “lawful” only at 6.15pm, when the officers had a reasonable suspicion that the plaintiffs may have committed the offences under investigation. The plaintiffs could, therefore, claim damages only for the period of detention, that was “unlawful”, that is, the period after arrest from 8.05am to 6.15pm. Lord Devlin impliedly seemed to indicate that the detention prior to 8.05am was “a detention for purposes of general inquiry” because there was nothing in the facts to indicate that the constable had by his words or conduct indicated to the plaintiffs that force would be used for purposes of restraining them. Does this mean when a person is “stopped” for questioning without any indication of the possibility of force being used to curtail the movements of the restrained person, irrespective of what the state of mind of the latter may have been, there would be no arrest? Under the criteria suggested by Lord Devlin the acts of “restraint” of the police officers in *McDermott* and *Lee*, prior to their “formal” assertions of an intention to arrest the suspects, would have amounted to “arrests”. The quandary one faces in adopting Lord Devlin’s criteria would be an “arrest” that is unlawful in the first instance, followed by an unlawful detention being converted to a lawful “arrest” and “detention” at a subsequent stage. It may convey to the police the message that the law recognises the possibility that the means could justify the end. The arresting party could have a second “go” at justifying a restraint that was unlawful in the first instance through further investigation while the suspect is being, albeit, “unlawfully” restrained.

The Victorian Court of Criminal Appeal, however, came out strongly against any kind of restraint that would make the suspect believe that his movements are being curtailed, to be legitimised in the form of a “detention for purposes of general inquiry”. In *Amad v. R*<sup>49</sup> Smith J pointed out:

47 *Ibid* at 947.

48 Though the parties who were claiming damages were respondents when the appeal was heard in the Privy Council, since Lord Devlin referred to them as the “plaintiffs” in his judgment, I have also referred to the claimants as “plaintiffs” in the text.

49 [1962] VR 545.



"... a person is to be regarded as in custody not only after formal arrest, but also where he is in, say, a police vehicle, or on police premises, and the police by their words and conduct have given him reasonable grounds for believing, and caused him to believe, that he would not be allowed to go should he try to do so."<sup>50</sup>

However, without defining what "arrest" means, the Mason and Brennan JJ in *Williams v. R*<sup>51</sup> indicated:

"There is nothing to prevent a police officer from asking a suspect questions designed to elicit information about the commission of an offence and the suspect's involvement in it, **whether or not** the suspect is in custody. But if the suspect has been **arrested** and the inquiries are not complete at the time when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed..."<sup>52</sup>

In *Bales v. Parmeter*<sup>53</sup> the Court of Criminal Appeal of NSW was even more forthright in disapproving the practice of what Lord Devlin called "stopping" a person to make general inquiries. It was held that the officers cannot "confine" any person merely for the purpose of asking him questions, and that no person is entitled to impose any physical restraint upon another except as authorised under the law.<sup>54</sup>

This shift towards looking to the state of mind of the suspect to determine whether there was psychological detention or not for purposes of identifying the event as an arrest was reversed by the High Court in *Van der Meer v. R*.<sup>55</sup> In this case the three appellants appealed from their convictions for rape, indecent assault and assault occasioning bodily harm on the basis that the trial judge should have barred the admissibility of certain statements that had been obtained by the police "unfairly" while they were in their custody. The three appellants had been taken to the police station separately during different hours of the day and questioned periodically in separate rooms from 10.15am to 12.30am the following morning. Two of the appellants contended that they had not been cautioned in accordance with the Judges' Rules.<sup>56</sup> They indicated that the cautions had been issued to them at a rather late stage in the interrogation and, therefore, the statements that they had made prior to being cautioned should not be admitted in evidence as they were "unfairly" obtained. In addition, all three appellants contended that they had initially denied all knowledge of these events but the police had continued to persist in questioning them against their will, and "broke down the answers" to the questions put to them, through intensive cross examination. The majority (Wilson, Dawson and Toohey JJ) held:

"We do not accept the submission made on behalf of the applicants that they were in custody from the time each of them was brought to the police station. As mentioned earlier, Ayliffe arrived at the police station for reasons quite unconnected with the incident giving rise to the charges against him. When Van der Meer and Mayo were first seen at Ayliffe's home, they were asked questions of a general nature. Sergeant Dickson asked them to accompany him to the police station and they did so. Storhannus was not

50 *Ibid* at 546-47.

51 (1986) 66 ALR 385.

52 *Ibid* at 401.

53 [1935] 3 NSWSR 182.

54 *Ibid* at 188.

55 (1988) 62 ALJR 656.

56 *Ibid* at 665; it would seem that the appellants were referring to Rule 2 of the Judges' Rules, which was in fact the same as the one that the High Court referred to in *Lee*, see *supra* n.44. The majority (Wilson, Dawson and Toohey JJ) stated: "The precise status of the Judges' Rules in Queensland does not appear to have been decided. But it is apparent that they are regarded by the judges as a yardstick against which questions of impropriety and unfairness may be judged" at 666; see, however, D Byrne and JD Heydon *Cross on Evidence* 4th edn Butterworths Sydney 1991 at 971, where the authors indicate that the pre-1964 Judges' Rules were adopted in Queensland.

interviewed until the middle of the afternoon and while it is true that he was brought to the police station by police officers, the evidence does not suggest that he was then in custody. From the very nature of the investigation being carried out and the difficulties surrounding that investigation, given the condition of the complainants and the varying roles played by each of the accused, it would inevitably have taken some time before any police officer could reasonably suspect that one of the applicants had committed an offence. Certainly, none of the applicants was encouraged to leave the police station but that is a far cry from saying that they were in custody from the outset. The trial judge implicitly held that none of the applicants was taken into custody until the times respectively when each was charged and we are not persuaded that his Honour was wrong in so holding.<sup>57</sup>

Thus, it would seem that where a person is “invited” to the police station, and feels that he/she is not free to refuse to go along with the police, even though the officers may not have said or done anything to indicate that the suspect has been deprived of his/her liberty, and there is what some writers call “psychological detention”,<sup>58</sup> the courts may not identify the “event” as an arrest.

It would seem on the principles laid down in *Van der Meer* it is only where an officer has reasonable grounds to believe that the suspect has committed an offence and charges the suspect one could say there is an arrest. There has to be a formal pronouncement clearly manifesting the intention of the arresting party to place the suspect under “custody”.

However, in instances where a suspect has been prosecuted for resisting lawful arrest or obstructing a police officer in the execution of his/her duties, an effort has been made to look not only to formal pronouncements or other acts manifesting the intentions of an arresting party but also the impact that these manifested forms of conduct have had on the perceptions of the suspect to determine whether there has been an arrest or not. Thus, in *Delitt v. Small*<sup>59</sup> there was conflicting evidence as to whether the officer had touched the accused when he told him he was being arrested for “driving under the influence of either liquor or a drug” and thereafter asked him to get into the police vehicle. The accused walked up to the police vehicle and then refused to get into the vehicle. On the issue of whether the accused had resisted the officer in the execution of his duties, the magistrate held there had been no arrest at the stage at which the accused had refused to get into the police vehicle.

On appeal by the prosecution it was held by the Court of Criminal Appeal of Queensland that there could be an arrest through the use of words such as “I arrest you”, “get into the car” without touching a suspect provided the suspect submitted to the authority of the officer and went with the officer. There could, therefore, be an arrest through the use of words that in the circumstances of the case were calculated to bring to an accused’s notice and did bring to the accused’s notice, that he/she was under compulsion. And if the accused submitted to that compulsion, then the detention may be viewed as an “arrest”. The accused in this case had submitted to the compulsion when he walked towards the police vehicle before deciding not to enter the vehicle. It was held, therefore, there had been an arrest at the initial stages itself, when the accused “submitted to the compulsion”. Further, Glanville Williams has added that even a feigned submission in these circumstances would suffice for there to be an arrest.<sup>60</sup>

However, in the Western Australian case of *Fletcher v. Pollard*,<sup>61</sup> even though the accused had not submitted to the “compulsion” of a police officer when the latter had communicated his

57 *Supra* n.55 at 666-667.

58 Janet November ‘R v. Goodwin: The Meaning of Arrest, Unlawful Arrest and Arbitrary Detention’ [1993] New Zealand Law Journal 54 at 59.

59 [1978] Qd R 303.

60 GL Williams ‘Requisites of a Valid Arrest’ [1954] Crim LR 6 at 12-13.

61 SCL 4664, 1982 (WA) (unreported).

intention to arrest her, it was held by Pidgeon J, in the Supreme Court, that there was an “arrest”. His Honour held, there can be an arrest without “touching” or having physical contact with a person but there must be a form of words calculated to, and in fact bring to the notice of the person concerned, that he/she is under an arrest. Therefore, it would seem even a mere communication over the phone of an intention to arrest and a threat of use of force to restrain a person, irrespective of what that person’s response was thereafter, could amount to an “arrest” in Western Australia!

Further, in *Kuczynski v. R*<sup>62</sup> it is pointed out by the Court of Criminal Appeal of Western Australia that even such a verbal communication of an intention to arrest may not be necessary in situations where the accused’s conduct made communication impossible. No reference was made to section 232 of the *CC(WA)* which does not require proof of communication of an intention to arrest for there to be a valid arrest.<sup>63</sup> In this case the officers were investigating a complaint regarding a sexual assault and while questioning the suspect, the latter asked them whether he was under arrest. The officers said he was not, and then he walked up to the verandah, told them he wanted to go to the parking lot where his car was parked, walked up to his car, pretended to look for the keys and then, according to the testimony of an officer, “ran away as fast as he could”.<sup>64</sup>

The police officers gave chase and one of them brought him down with a “rugby tackle”. Pidgeon J held on this occasion that given the circumstances, the manifestation of an intention to arrest could be by way of conduct and that could include “physical restraint of a person with the intention of detaining him”.<sup>65</sup> There need not be a verbal communication calculated to bring to the person’s notice that he/she was under arrest for the restraint to be an arrest. It would seem, therefore, what matters for purposes of determining whether there is an arrest in a given situation is the manifested intention of the arresting party either through a formal communication or a form of conduct that could reflect a threat to use force or the use of force to restrain a suspect. Factors relating to the subjective perceptions of the suspect about the “manifested intentions” of the restraining party were not given the same degree of weight in identifying the event as an “arrest” in *Kuczynski*.

The approach adopted in *Kuczynski* was more in keeping with the views expressed in *Van der Meer* and *Hussein* than *Delitt*, even though in *Kuczynski* the court offered its views on arrest in the course of determining issues on the admissibility of statements made by the appellant while he was in the custody of the police, rather than in the context of a prosecution for resisting lawful arrest or obstruction of an officer in the execution of his/her duties.

### iii) The implications of adopting a concept of “arrest” based on the restraining party’s state of mind

As the weight of authority seems to be tilted in favour of looking mainly to the conduct that manifests the intention of the arresting party to determine whether there was an arrest, is it possible to find justification for this approach in any of the policy objectives that ought to set the framework for the exercise of an arrest power? No doubt a concept of “arrest” centred on an act manifesting the intention of the arresting party would provide a less strange custodial definition of arrest than

62 SCL 8286, 1990 (WA) (unreported).

63 Section 232 states: It is the duty of a person executing any process or warrant to have it with him, and to produce it if required.

It is the duty of a person arresting another, whether with or without warrant, to give notice, if practicable, of the process or warrant under which he is acting or of the cause of the arrest.

A failure to fulfill either of the aforesaid duties does not of itself make the execution of the process or warrant or the arrest unlawful, but is relevant to the inquiry whether the process or warrant might not have been executed or the arrest made by reasonable means in a less forcible manner.

64 *Supra* n.62 at 4.

65 *Ibid* at 12.

one that is based on a citizen's belief that he/she has been "arrested" when the officer in fact did not intend to take the suspect into custody.<sup>66</sup> Further, such a concept would also permit the courts to evolve and legitimise concepts of restraint prior to arrest to facilitate the investigative process particularly in instances where complex crimes or multiple offences have been committed. Unfortunately, since "detention for purposes of general inquiry" is such a nebulous concept, we have to define its parameters in the context of the objectives that have influenced the formulation of an arrest power in a given jurisdiction.

Giving a wide discretion to an arresting party in regard to decisions as to when to formally manifest by way of words or conduct an intention to arrest, furthers the objectives of the restraint principle, and in addition, facilitates an arresting party's efforts to fulfill the requirements prescribed under section 352 of the ACT Crimes Act, 1900 to complete an arrest in a manner that would be "lawful". On the other hand, it could also be argued that looking only to the manifested intention of an arresting party will not promote the objectives of the restraint principle because even if the suspect was not aware of the nature of the restraint there could still be an "arrest". Is this the way to ensure that the suspect appears in court when there are other alternative procedures by which he/she could be made to appear in court? Such a definition of arrest, however, could also further the objectives of a policy of preventative law enforcement, as the courts would be concerned primarily with the intention of the arresting party.

Should that be the case and if we are to provide for a wide category of non-warrant offences (ie, "arrestable" offences) as under the CC(WA), is there a need to evolve a concept of "detention to make a general inquiry"? The narrower the categories of offences in regard to which an arrest power can be exercised (as under s.352 of the ACT *Crimes Act*), along with the requirement of high levels of awareness as to the likelihood of the offence having been committed prior to the exercise of such a power,<sup>67</sup> the greater would there be the need for a concept of "detention for purposes of general inquiry". There is no provision in the CC(WA) that indicates that those who voluntarily enter a police car, or accompany the police to the police station or some other place even though they are not charged with an offence ought to be deemed to be in the "custody" of the police. However, even though there are narrower "non-warrant" categories of offences in regard to which the arrest power can be exercised under the Commonwealth<sup>68</sup> and Victorian Crimes Acts,<sup>69</sup> yet there are other provisions in these Acts curtailing "detention for purposes of general inquiry" in the above circumstances. "Restraint" in any of the above circumstances is

66 Refer also, GL Teh 'Detention for Interrogation' (1973) 9 Melbourne University Law Review 11 at 17-19.

67 As reflected in the words "believes on reasonable grounds" in s.352(2) of the *Crimes Act* 1900 (ACT) (as amended) as contrasted with "suspects, on reasonable grounds" in s.564 of the CC(WA). The difference between these phrases has been discussed in the text to footnotes 79 to 84, *infra*; see also, ss.458(1)(a) and 459(a) of the *Crimes Act* 1958 (Vic) (as amended).

68 Sections 8 and 8A of the *Crimes Act* (Cth) (as amended) state:

8. The powers of arrest without warrant possessed by a constable, or by any person, under the common law, with respect to breaches of the peace, may be exercised by any constable, or by any person, as the case may be, with respect to offences against this Act which involve any breach of the peace.

8A. Any constable may, without warrant, arrest any person, if the constable *has reasonable ground to believe*:

(a) that the person has committed an offence against a law of the Commonwealth; and  
(b) that proceedings against the person by summons would not be effective.  
[italics mine]

69 Sections 458 and 459 of the *Crimes Act* 1950 (Vic) (as amended).

70 Refer s.23B(2) of the *Crimes Act* 1914 (Cth) (as amended); s.464(1)(c) of the *Crimes Act*, 1958 (Vic) (as amended); refer also, RG Fox *Victorian Criminal Procedure* 7th edn Monash Law Book Co-operative Limited Victoria 1992 at 77-78. However, the NSW provisions concerning the exercise of the general powers of arrest without a warrant, do not refer to similar constraints in regard to detention for purposes of general inquiry [refer s.352(1) of the NSW *Crimes Act*, 1900 (as amended)]. Yet s.352(1) of the NSW *Crimes Act* 1900 provides for an arrest power over a wider range of offences than the Victorian and ACT provisions, and in addition permits private citizens and police officers to exercise arrest powers in specified circumstances where they have a "reasonable cause to suspect" (rather than "believe, on reasonable grounds" as under the ACT and Victorian provisions).

deemed to be “arrest” under these Acts.<sup>70</sup> It could be argued on the other hand, that there is no need for including provisions such as those in the Commonwealth and Victorian Crimes Acts in the CC(WA) because there are no sections in the CC(WA) or PA(WA) which give an arresting party a power to question a person and justify a delay in arresting a suspect merely because the former felt there should be a “general inquiry”.

As it has been pointed out earlier, if the objective of an arrest power is to merely ensure attendance of a suspect in court, it would become imperative for the courts to lay down some criteria to ascertain the nature of such a restraint and distinguish it clearly from an “arrest”. As the Canadian Law Reform Commission has pointed out, should this aspect of restraint for purposes of general inquiry not be recognised either by the legislature or the courts, it could lead to grave problems in the application of a provision that is (such as section 352 of the Crimes Act, 1900) designed to promote the objectives of the restraint principle:

“Where a police officer stops someone who he or she has reasonable grounds to believe has committed a criminal offence, how much time is the officer allowed to make the determination as to: whether the person is providing information about his or her identity; whether the person has a criminal record with a history of failure to appear in court; or, whether the person may destroy evidence relating to the offence? Clearly some reasonable period of time must be allowed for the determination of these questions ...”<sup>71</sup>

Should a person who is “stopped” or “invited” for the purpose of making a general inquiry be told both orally and in writing that he could leave at any time? Would this clear up all uncertainty that may exist as to psychological detention and “arrest” in the minds of both parties? When such a proposal was put forward by Lord Denning in the course of the debate in the House of Lords on the Police and Evidence Bill, the Home Office Minister, Lord Elton pointed out that “... there would be an enormous administrative burden on the police” and added:

“A great many people attend police stations voluntarily for all sorts of reasons. They include, for example, victims of burglary, attending to identify property and victims of assault attending to identify a suspect or provide a statement. ... If these amendments are accepted, the first thing that must happen would be that a policeman would inform them orally and in writing that they were entitled to leave at will unless placed under arrest. Is that the way to treat a shaken victim or a hesitating and irresolute witness? Such people need encouragement to come to the police, and particularly in the case of victims of rape and sexual assault ... Similarly, the large volume of paper that would be produced by the voluntary attendance forms would be entirely disproportionate to any good it would achieve.”<sup>72</sup>

It is in view of these difficulties that the legislature has occasionally intervened to recognise the need to restrain suspects for purposes of making inquiries and for conducting searches in regard to specified items. Thus for instance, section 50 of the PA(WA) permits an officer to demand from any individual his/her name and address.<sup>73</sup> Section 49 PA(WA) even permits an officer to stop and search any person reasonably suspected of having or conveying any stolen or unlawfully obtained goods.

71 Law Reform Commission of Canada *Arrest* [Working Paper 41] Ottawa 1985 at 81.

72 Quoted from M Zander *The Police and Criminal Evidence Act of 1984* 2nd edn Sweet and Maxwell London 1990 at 67.

73 Fullager J held that the power conferred under section 50 should be confined only for the purposes of enforcing the provisions of the Police Act. *Trobridge v. Hardy* (1955) 94 CLR 147 at 154; however, in *Yarran v. Czerkasow* [1982] WAR 239 at 240, Wallace J seemed to indicate that section 50 need not be confined to merely enforcing the provisions of the Police Act.

However, if Western Australia is to retain its present definition of “arrestable offences” and the residuary powers of arrest afforded to the police under section 43 of the PA(WA), and the preferred view of “arrest” expressed in the judicial decisions is adopted, it may not be necessary to recognise a distinct category of restraint such as “detention for purposes of general inquiry”. If the principle of restraint is of lesser importance than the “preventative” and “public order” objectives, it may be more useful to incorporate appropriate rules of “fairness”<sup>74</sup> in a formal manner to regulate police conduct after there has been an arrest.

#### iv) An evaluation of the requirements that make an “arrest” lawful

The restraining party may manifest an intention to arrest through his/her acts or words, yet the arrest may not be viewed as being “lawful” if the conduct of the restraining party does not comply with certain “internal” and “external” variables prescribed by the legislature. Section 564 of the CC(WA) prescribes to a large measure the “variables” that make the exercise of the general arrest power “legal” in Western Australia.

An analysis of the various limbs of the subsections of section 564, in the light of the variables that require compliance, would reveal the scope of the general power of arrest that the provision has provided for:

Section 564(2) states:

- i) It is lawful for *any person* to arrest without warrant any person who is in the *course of committing any offence* (italics mine);
- ii) It is lawful for *any person* to arrest without warrant any person *whom he suspects on reasonable grounds to be in the course of committing an arrestable offence* (italics mine).

Was there a need to include (i) when (ii) would have sufficed to cover situation (i)? It would seem, however, that (i) merely reiterates the common law position in regard to an arrest by a private citizen or police officer, and then goes on to offer greater protection to the private citizen in (ii) in situations where he/she arrests any person whom he/she suspects on “reasonable ground to be in the course of committing an arrestable offence”. Thus A may suspect B of engaging in an act of “entering”,<sup>75</sup> without being aware that B has lost his key and was trying to enter his own house through an open window. If A arrests B on a reasonable suspicion that B was in the course of committing an offence, the arrest would still be viewed as “lawful”.

Thus in keeping with the expansion of the categories of “non-warrant” offences and the emphasis on crime prevention and maintenance of public order, the “variables” associated with the “legality” of an arrest too have been expanded. However, this trend towards expanding the variables associated with “legality” of an arrest by a “private citizen” has been less drastic in instances where an offence *has been committed*.

74 The Canadian Law Reform Commission has explained the attributes of fairness in a succinct manner. “Fairness” requires: i) the neutrality and impartiality of those accorded important decision making functions; ii) there should be deliberation throughout the process of administration of justice. There should be no “rush to justice”; iii) those suspected will possess adequate information to understand the nature of their potential jeopardy and the substance of the allegations made against them; iv) that procedures comport with civil standards and the dictates of humanity; v) that procedures be egalitarian in treatment and application; vi) that there be remedial processes when rights are violated. See Law Reform Commission of Canada *Our Criminal Procedure* Ottawa 1988 at 23-24. This concept of “fairness” in procedures relating to the administration of criminal justice has been recognised in Australia. Refer *McKinney v. R* (1991) 65 ALJR 240 at 244.

75 Refer to s.400(2) of the CC(WA) for a definition of “entering”, and s.401 of the same Act for descriptions of the offences that include “entering” as an element.

Section 564(3) states:

Where an arrestable offence has been committed, it is lawful for *any person* to arrest without warrant,

- i) any person who has committed the offence; or
- ii) whom he *suspects, on reasonable grounds to have committed the offence* (italics mine).

Section 564(2) does not refer to a situation where an offence has been committed, whereas s.564(3) indicates quite clearly that an offence should have been committed. This subsection deals with a situation where an offence has been committed but the arresting party has made a mistake in regard to the individual who committed the offence. Therefore, if there had been an “arrest”, and it is subsequently decided in a court that no offence was committed by the suspect, the “arresting” party will not be able to seek any protection under the provisions of s.564(3). Even though limb (ii), through its deceptively wide wording may seem to offer greater protection to a private citizen in making an arrest on “reasonable grounds that an offence has been committed”, it may in effect, place an arresting party in a precarious position in view of the wide definition offered to the term “offence” in section 2 of the Code. Section 2 defines an offence as “an act that renders a person liable to punishment”. Thus if a private citizen arrested another on a reasonable suspicion that he/she has committed an offence, and the latter pleads self-defence and is acquitted, no “offence” would have been committed. Section 564(3) would not offer any protection to an arresting party in those circumstances.

Section 564(4), however, affords protection to police officers who exercise powers of arrest in situations where an offence has not been committed. Section 564(4) states:

- i) The officer must have reasonable grounds for suspecting that an arrestable offence has been committed;
- ii) It is then lawful for the police officer to arrest without warrant any person whom the police officer suspects, on reasonable grounds to have committed the offence.

Again, in keeping with a seemingly undeclared policy of furthering the goals of preventative law enforcement, section 564(5) enhances the powers of police officers to enter into private premises to effect an arrest. Under section 564(5), where it is “lawful” for an officer to arrest under this section [that is, under sections 564(2),(3) or (4)], the officer may enter *upon any place* where the police officer suspects on reasonable grounds, the person may be, for purposes of effecting an arrest. This section affords the officer not only the power to enter the private premises which the suspect may be occupying as an owner, tenant or licensee but also “any place” in which the officer suspects on reasonable grounds the suspect may be, for purposes of effecting an arrest.

It could be argued that the phrase “lawful” arrest is a misnomer, for after all, for there to be an arrest there has to be a “lawful” exercise of authority. As Glanville Williams has pointed out: “An illegal arrest is no more an arrest than an illegal marriage is a marriage.”<sup>76</sup>

Section 564 of the CC(WA), however, focuses on the situations in which an arrest could be made without offering a definition of “arrest”. Further, section 564(5) refers to the situations in which a “lawful” arrest could be made, and then goes on to add to the list of variables that may make an arrest “lawful” when an officer enters “any place” to make an arrest.<sup>77</sup> As the Canadian Law Reform Commission pointed out:

“A definition of arrest involving lawfulness, in effect, would require a re-statement or even an oversimplification of the law of arrest.”<sup>78</sup>

<sup>76</sup> G Williams *Textbook of Criminal Law* 2nd edn Stevens and Sons London 1983 at 485.

<sup>77</sup> Sections 231 and 233 of the CC(WA) also view “arrest” as an event, and specify the circumstances in which the use of force to effect an arrest would be “lawful”.

<sup>78</sup> *Supra* n.71 at 70; also refer to the views of Lord Griffiths in *Murray v. Ministry of Defence* [1988] 2 All ER 521 at 526, where his Lordship also cited *Spicer v. Holt* [1976] 3 All ER 71 at 79, where Viscount Dilhorne stated: “‘Arrest’ is an ordinary English word ... Whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases.”

Perhaps this may explain to some extent why “arrest” is not defined in the Code.

The Code clearly contemplates “arrest” as an event and leaves it to the courts to define the event. As explained earlier, the preferred views on arrest do not define the event purely in terms of restraint. They refer to the “event of arrest” as relating to conduct on the part of an arresting party manifesting an intention to take a person into custody. Such conduct, however, need not always be manifested in the form of acts of restraint. Moreover, “arrest” is not viewed in the Code, the way marriage is, as a legal fiction. Just as the event of “birth” could lead to an evaluation of the legitimate or illegitimate status of a person in law in the light of certain variables, the legality of an “arrest” may also be evaluated in the light of legislatively prescribed variables. It was, therefore, important to identify the characteristics of the event of “arrest”, particularly in view of the approach taken in the CC(WA), before proceeding to ascertain the criteria for “lawful” arrest under head (iii) above. The emphasis on the preventative aspect of the arrest power in section 564 is clearly reflected in the words used to describe the mental state that is required of the arresting party at the time of the “arrest”. The words used are “suspects, on reasonable grounds” instead of “believes on reasonable grounds” as in the corresponding pre-1985 provisions of the CC(WA).<sup>79</sup> Although there may be “hair splitting” contentions as to whether these provisions refer to the officer suspecting or believing that the suspect committed the offence or whether they refer to the officer having to merely establish reasonable grounds to show why he/she believed or suspected that a person has committed an offence, the fact remains that a deliberate change was made from “believes” to “suspects” in the post-1985 provisions of the CC(WA).

In discussing the meaning of the phrases “reasonable cause to suspect” in section 18(e) of the Police Ordinance of 1927 (ACT) and “reasonable grounds to believe” in section 8A of the Crimes Act, 1914 (Cth) in *McIntosh v. Webster*,<sup>80</sup> Connor J stated:

“Suspicion is in a lower order than belief; and after considering the wording of the two provisions I have come to the view that they cannot operate together ... Suspicion is less than belief; belief includes or absorbs suspicion.”<sup>81</sup>

More recently the High Court in interpreting the words “suspected, on reasonable grounds” and “reasonable grounds to believe” in section 679 of the Queensland Criminal Code,<sup>82</sup> which dealt with the requirements that an applicant for a search warrant had to fulfil, indicated:

“A suspicion that something exists in more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a ‘slight opinion, but without sufficient evidence’, as Chambers’ Dictionary expresses it ...

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on a balance of probabilities that the subject matter in fact occurred or exists; the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition ...”<sup>83</sup>

<sup>79</sup> Repealed by Act No 119 of 1985 (WA); s.564 CC 1913 (WA) read:

When an offence is such that the offender may be arrested without warrant generally-

- (a) It is lawful for a police officer who *believes, on reasonable grounds*, that the offence has been committed, and that any person has committed it, to arrest that person without warrant, whether the offence has been actually committed or not, and whether the person arrested committed the offence or not: ...
- (d) If the offence has been actually committed, it is lawful for any person who *believes, on reasonable grounds*, that another person has committed the offence to arrest that person without warrant, whether that other person has committed the offence or not: ... (italics mine)

Also note, s.352(2) of the *Crimes Act* 1900 (ACT) uses the words “believes on reasonable grounds”, see *supra* n.36.

<sup>80</sup> (1980) 30 ACTR 19.

<sup>81</sup> *Ibid* at 29-30.

<sup>82</sup> Section 711 is the corresponding provision in the CC(WA).

<sup>83</sup> *George v. Rockett* (1990) 64 ALJR 384 at 389.



This distinction as to the state of mind required of the arresting party has not always been borne in mind in judicial pronouncements. Thus the High Court in a landmark decision on the characteristics of the "power" to arrest in the Australian jurisdictions indicated:

"In the ordinary case of an arrest on *suspicion*, the arresting officer must have satisfied himself at the time of the arrest that there are reasonable grounds for *suspecting* the guilt of the person arrested, although the grounds of *suspicion* need not consist of admissible evidence. If the arresting officer *believes* the information in his possession to be true, if the information reasonably points to the guilt of the arrested person and if the arresting officer thus *believes* that the arrested person is so likely to be guilty of the offence for which he has been arrested that on general grounds of justice charge is warranted, he has reasonable and probable cause for commencing a prosecution" [italics mine].<sup>84</sup>

To make matters worse the courts have interpreted the phrase "just cause to suspect" to mean the same thing as "reasonable grounds to suspect".<sup>85</sup> The "reasonable grounds for suspicion" that section 564(4) refers to do not relate to a mistake in regard to an "offence" that may have led to the arrest of a suspect. Section 564(4) states that there should be an arrest in regard to "an" arrestable offence, not "any" offence as under section 43 of the PA(WA), in the course of the exercise of a power of arrest on a reasonable suspicion by an officer. Under section 43 of the PA(WA) the officer should have a "just cause to suspect" the commission of "any offence". Thus, in a situation where an officer arrests a person on "a reasonable suspicion" that he/she has committed "an" arrestable offence, and it turns out that no offence had been committed by the suspect or that the suspect had committed another offence, the arrest would be considered unlawful under section 564(4) of CC(WA). However, it may be viewed as lawful on the basis that irrespective of the officer's suspicions, the facts on being objectively viewed provided a "just cause to suspect" that the arrested party had committed an offence. Thus in *R v. King*<sup>86</sup> where an accused person was arrested under section 75 of the Police Offences Act, 1953-67 (SA) by an officer who had a "reasonable cause to suspect" that the accused had committed "some" offence, and he was subsequently convicted of receiving stolen property, the Court of Criminal Appeal of South Australia held, that since section 75 of the Police Offences Act<sup>87</sup> referred to a suspicion in regard to "any" offence, the arrest was lawful. However, recently in *Romito v. Williams*<sup>88</sup> the Court of Criminal Appeal of Western Australia indicated that an officer exercising his powers of

84 *Supra* n.39 at 400-401. In *Williams* the High Court heard an appeal from a decision of the Court of Criminal Appeal of Tasmania. Section 27 of the *Criminal Code* 1924 (Tas) (as amended) states:

- (1) It is lawful for a police officer to arrest without warrant any person whom he finds committing a crime.
- (2) In any case where any of the crimes specified in Appendix A has been committed it is lawful for a police officer to arrest without warrant any person whom he *believes on reasonable grounds* to have committed such crime [italics mine].
- (3) In any case where a police officer *believes on reasonable grounds* that any of the crimes specified in Appendix A has been committed it is lawful for him to arrest without warrant any person whom he *believes on reasonable grounds* to have committed such crime ... [italics mine].

85 See *White v. Kain* [1921] SASR 339 at 343; *Misel v Tease* [1942] VLR 69 at 72; refer also, PW Nichols *Police Offences of Western Australia* Butterworths 1979 at 31-32.

86 [1970] SASR 503; refer also to DM Campbell J's views in *Veivers v. Roberts ex parte Veivers* [1980] Qd R 226 at 228 where his Honour indicated, obiter, that a constable could have *reasonable grounds for believing* that an offence has been committed despite having made a mistake as to the law.

87 Section 75 of the *Police Offences Act* (1953-1961) (SA) (as amended) was preceded by a provision that used the phrase "just cause to suspect". There was no reference to an officer arresting a person "whom he *finds* committing an offence" in the earlier section. When section 75 was enacted the phrase "just cause to suspect" was deleted and "reasonable cause to suspect" was included. For a history of the provisions dealing with the power of arrest included in s.75, refer *Feldman v. Buck and anor* [1966] SASR 236 at 238 and 240. There is nothing in the judgments in *Feldman* to suggest that "reasonable grounds for suspicion" ought to be interpreted differently from "just cause to suspect". Section 75, however, was repealed by s.32 of the *Police Offences Act Amendment Act*, 1985 (SA) and re-enacted as s.75 of the *Summary Offences Act* 1953 (SA) (as amended).

88 *Supra* n.7.

arrest under section 43 of the PA(WA) "... will not be permitted, in hindsight, to attempt to justify an arrest on a ground which was not the basis of the arrest",<sup>89</sup> without any comments on the words "any offence" in the context of the phrase "just cause to suspect".

Thus, even though the external variables that relate to a valid exercise of an arrest power under section 564 have been clearly specified, the requirement concerning the mental state that is required of an arresting party for there to be a "lawful" arrest has not been clearly demarcated from other phrases that relate to the exercise of the power of arrest, such as "reasonable grounds to believe" and "just cause to suspect". This has happened largely because the courts have not sought to explore the objectives sought to be accomplished by the statutory provisions that conferred these arrest powers.

**v) Seeking pathways through the "morass"; approaches to delimiting and demarcating powers of restraint**

In explaining the absence of a coherent underlying policy objective in the classification of offences as "arrestable" and "non-arrestable", and the modes of ascertaining the event of arrest and its "lawfulness", reference was also made to rules that have evolved in regard to restraint prior to arrest. The legislatures and superior courts of the various states have, in addition, sought to regulate forms of restraint after arrest without looking to policy objectives that could provide a continuum to underpin the use of discretion in regard to decision making in connection with the exercise of powers of restraint.

The marked preference for "preventative law enforcement" and "public order" objectives in the formulation of arrest powers in Western Australia as reflected in section 564 of the CC and the residuary powers of section 43 of the PA, offers a significant contrast to trends in the other Australian states. The WALRC has sought to promote some uniformity in regard to the formulation and exercise of arrest powers by proposing that a provision similar to section 352 of the ACT Crimes Act of 1900 should be adopted in Western Australia.<sup>90</sup> It has done so, without looking carefully into the implications such a change would have on rules that relate to pre-arrest and post-arrest restraint that have been evolved by the courts.

The criteria for arrest without warrant as reflected in section 352 of the ACT Crimes Act 1900 seem to parallel the criteria that are used by "authorised police officers"<sup>91</sup> and magistrates in decisions to grant bail in Western Australia. Should there be a duplication of decision making on similar criteria by officials involved in the administration of criminal justice system? Should there be instead, as at present, an emphasis on the preventative aspects of law enforcement in regard to the exercise of arrest powers and a shift in focus to decisions that relate to ensuring attendance in courts at a secondary stage, preferably by those who would have more information about the suspect? Such an approach has been favoured by Glanville Williams:

"Although the rule is sometimes stated in terms of 'reasonable belief', 'suspicion' is a better word because the evidence before the officer need not be such as to cause him positively to believe that the accused is an offender. It is enough that there is evidence pointing in that direction with sufficient cogency to justify an arrest. ... The point will become clearer if it is realised that an arrest is not the same as the initiation of a

<sup>89</sup> *Ibid* at 11.

<sup>90</sup> *Supra* n.4.

<sup>91</sup> See ss.5,6 and Part C of the schedule of the *Bail Act* 1982 (WA) (as amended); Part C refers only to "authorised officers" having jurisdiction to grant bail. An "authorised officer" is defined in s.3(1) of the *Bail Act* to include "authorised police officers". The phrase "authorised police officer" has been defined in s.3(1) to mean "a police officer who holds the rank of sergeant, or a higher rank, or is for the time being in charge of a police station or lock-up".

prosecution against the offender. The task of formally charging the person arrested devolves on the station officer, and it is probable that the prosecution proper does not commence until the accused is brought before the magistrates. It is not lawful for anyone to prosecute unless he believes that the accused is guilty, but the constable who arrests has not reached that stage and need not believe that the accused is guilty or that he will probably be convicted”.<sup>92</sup>

The rules in regard to post-arrest restraint were laid down in the High Court decision of *Williams v. R.*<sup>93</sup> The High Court in interpreting section 34A(1) of the Justices Act of Tasmania,<sup>94</sup> which stated that a person taken into custody for an offence should be produced before a justice “as soon as is practicable”, held that the police should not delay in taking an arrested person before a justice merely for the purpose of conducting investigations into the offence. Mason and Brennan JJ rejected the views of Lord Denning in *Dallison v. Caffery*<sup>95</sup> where his Lordship had indicated that a police officer should be permitted to detain a suspect taken into custody in order to do “what is reasonable to investigate the matter and to see whether the suspicions are supported or not by further evidence”.<sup>96</sup> Lord Denning indicated such an approach would ensure that justice is done not only to the suspect, but to the community as well.<sup>97</sup> However, Mason and Brennan JJ pointed out:

“The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law’s protection of personal liberty in order to enhance the armoury of law enforcement. It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation. If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able – as the courts are not – to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody.”<sup>98</sup>

Apart from the exceptional circumstances mentioned in section 5(1)(a) of the Bail Act,<sup>99</sup> a “police officer” has a duty to consider an arrested person’s case for bail “as soon as is practicable” and grant bail.<sup>100</sup> If the officer decides not to grant bail the suspect has to be brought before a court “as soon as is practicable”.<sup>101</sup> Section 3 of the Bail Act states “as soon as is practicable” means “as soon as is reasonably practicable”. Only if the officer decides not to grant bail the suspect has to be brought before the court “as soon as is reasonably practicable”. Does this mean the rule in *Williams* applies only to the second situation where the officer has “considered the suspect’s case for bail” and has to bring the suspect before the court “as soon as is reasonably practicable”? Are there circumstances in which the police could delay the process of “considering” whether to grant bail or not? Could they do so for purposes of conducting “investigations” on the basis that the statute has now indirectly provided for a situation where the decision to grant bail ought to be considered only “as soon as it is reasonably practicable” to do so? Or, do the words “as soon as it is reasonably practicable” refer only to a situation where the officer’s decision to consider bail is confined to finding out whether he/she is “empowered” to grant bail?<sup>102</sup>

92 GL Williams ‘Arrest for Felony at Common Law’ [1954] Crim LR 408 at 409.

93 *Supra* n.39.

94 *Justices Act* 1959 (Tas) (as amended).

95 [1965] 1 QB 348.

96 *Supra* n.39 at 398; also refer, *supra* n.95 at 367.

97 *Supra* n.95 at 367.

98 *Ibid.*

99 *Bail Act* 1982 (WA) (as amended).

100 *Ibid* s.6(1)(b).

101 *Ibid.*

102 *Ibid* s.6(1)(a).

In view of the definition of “as soon as is practicable” in section 3 of Bail Act, one could also contend that this provision has modified the common law position in regard to detention after an arrest as explained in *Williams*. As Donaldson LJ pointed out in *R v. Holmes*:<sup>103</sup>

“Practicability is obviously a slightly elastic concept which must take account of the availability of police manpower, transport and magistrates’ courts. It will also have to take account of any unavoidable delay in obtaining sufficient evidence to charge, but this latter factor has to be assessed in the light of the power of the police to release on bail conditioned by a requirement to return to the police station when further inquiries have been completed and a power to release and re-arrest when the evidence is more nearly sufficient.”<sup>104</sup>

If Western Australia is to adopt the “reasonable grounds for suspicion” rule in connection with the exercise of the arrest power in regard to a wide category of “arrestable offences”, such a modification to the rule in *Williams* may be justified. On the other hand, if the phrase “reasonable grounds for belief” is included, would there be a need to make such a wide allowance for delay in considering the suspect’s case for bail or bringing him/her before a justice? After all, the phrase “reasonable grounds for belief” requires such a high degree of certainty as to whether the suspect committed the offence or not that one has to but wonder whether the phrase “as soon as is practicable” should be limited to the interpretation offered in *Williams*?<sup>105</sup>

Moreover, if “the reasonable grounds for belief” requirement is adopted, provision will have to be made for “detention for purposes of general inquiry” of a suspect prior to an arrest. In requiring an arresting party to have a high degree of certainty as to the specified variables prior to engaging in an act of arresting a suspect, section 352 of the ACT Crimes Act seeks to implement a policy of restraint in the exercise of arrest powers. However, if no provisions are made for the arresting parties to make general inquiries by “stopping” the suspect, there could be a spate of arrests on holding charges for purposes of making “general inquiries”.<sup>106</sup> On the other hand, if time limits are sought to be placed on the period of restraint for purposes of “making general inquiries”, it could lead to all the attendant problems associated with determining when the restraint commenced.<sup>107</sup> In fact, in Victoria, after experimentation with a six hour allowable period of restraint for interrogation after arrest, a switch was made to the phrase “...within a reasonable time of being taken into custody”.<sup>108</sup> Further, the “reasonable grounds for belief” test as specified in section 352 of the ACT Crimes Act, 1900 would rule out the protection afforded to an arresting officer under the “just cause to suspect” rule in section 43 of the PA(WA) in situations where an officer arrests a person for “some offence” as in *R v. King*. The “reasonable grounds for suspicion” criterion too, provides greater protection to an arresting party, particularly in a context where “arrestable offences” are defined widely. However, under the “belief” standard

<sup>103</sup> [1981] 2 All ER 612; Donaldson LJ’s views were referred to in *Williams* and rejected by Mason and Brennan JJ. The *Justices Act 1959* (Tas) does not offer a wide definition of “as soon as is practicable” along the lines of s.3 of the *Bail Act 1982* (WA); for another explanation of “practicable”, refer New South Wales Law Reform Commission *Criminal Procedure: Police Powers of Detention and Investigation After Arrest* [Report No. 66] Sydney 1990 at 12-13.

<sup>104</sup> *Ibid* at 616.

<sup>105</sup> Note s.27 of the *Criminal Code Act 1924* (Tas) (as amended) refers to the phrase “believes on reasonable grounds”, see *supra*, n.84.

<sup>106</sup> For a brief explanation of the law on “holding charges”, refer *supra* n.103 New South Wales Law Reform Commission at 65-66.

<sup>107</sup> J Willis and P Sallmann ‘The Debate About Section 460 of the Victorian Crimes Act: Criminal Investigation in a Nutshell’ (1985) 18 ANZJ Crim 215 at 222-223; also refer *supra* n.103 New South Wales Law Reform Commission at 65-69.

<sup>108</sup> Section 464A(1) of the *Crimes Act 1958* (Vic) (as amended); s.464A(4) refers to an exhaustive list of factors that may be taken into consideration in determining what constitutes “reasonable time”.

an officer is less likely to make a mistake. Further, if an officer acted on a “belief” that is deemed not “reasonable”, he/she may have to pay lesser damages than an officer who had acted on a “suspicion” that was not “reasonable” because the latter’s conduct may more likely to have been high handed and unreasonable.

In delimiting offences as “non-warrant offences” for purposes of authorising the exercise of an arrest power, the policy makers should, therefore, not only bear in mind the objectives sought to be accomplished through the exercise of arrest powers, but also, the impact such a classification would have on the variables that would make an arrest “lawful”. They should also consider the impact of such a classification on the existing pre-arrest rules on “restraint for purposes of general inquiry” and post arrest rules on “restraint for purposes of interrogation”.

## **Conclusion**

At the commencement of this article, it was pointed out that just as describing the taste of water seems beyond words, explaining what ought to be viewed as a “lawful” arrest in a given situation too has been a rather elusive task! The courts seem to be moving in the direction of looking mainly into the acts of the arresting party to ascertain whether he/she manifested an intention to restrain a person in custody to determine whether there has been an “arrest”. The legislatures, in turn, in order to explain the characteristics of a “lawful” arrest, have sought to sandwich the concept of arrest which they have left the courts to evolve, between two layers of requirements relating to the mental state of the arresting party and carefully defined external circumstances. Apart from the uncertainty as to the circumstances in which an “event” could constitute an arrest, there is also a lack of clarity as to the exact mental state that would be required in an arresting party at the time of the arrest for there to be a “lawful” arrest. A description of what ought to constitute a “lawful” arrest remains elusive because the rules relating to the power of arrest in regard to non-warrant offences, pre-arrest restraint and post arrest restraint have evolved rather haphazardly without clear policy objectives that would provide a foundation for classifying different modes of restraint. It is when policy objectives provide a framework for classifying powers of restraint along lines similar to those suggested in this article, the pathways through the existing morass in the law of arrests without warrants, will offer less treacherous, less awesome routes to the “portals of justice”.