

**POLICY STATEMENT ON
PRINCIPLES
APPLYING TO
DETENTION IN
A CRIMINAL
LAW CONTEXT**

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Law Council
OF AUSTRALIA

INTRODUCTION

A key objective of the Law Council is the maintenance and promotion of the rule of law. For this reason, the Law Council often provides analysis of federal legislation and federal executive action based on the Law Council's Policy Statement on Rule of Law Principles.¹

This document seeks to expand on those principles as they apply to the arrest, detention and imprisonment² of individuals in a criminal law context. They are not intended to apply to other forms of detention such as that imposed for mental health or quarantine purposes.

Australia is a party to the seven main international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. These international instruments set out in clear terms Australia's international human rights obligations. Key amongst those obligations is that the state should respect the right to liberty and security of the person and freedom of movement of all persons. However, these rights are qualified and may be subject to necessary limitations. For that reason, these international instruments also prescribe the limited circumstances in which the state may act to deprive a person of his or her liberty, the procedures the state should follow when it does and the minimum standards that should be observed.

The instruments which are most relevant to states' obligations with respect to detention in a criminal law context are:

- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) (and its Optional Protocol); and
- The Convention on the Rights of the Child (CROC).

These treaties are further supplemented by a series of non-binding, but authoritative, internationally agreed standards including the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (the UN Detention Principles), the United Nations *Standard Minimum Rules for the Treatment of Prisoners* and the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice*.

The Law Council's principles draw heavily on these international materials but are somewhat less comprehensive in their coverage. There is limited utility in simply reproducing these international standards under the Law Council's banner. Instead, the Law Council's principles are focused on the matters which are most pertinent from an Australian perspective and are expressed in terms which address, more directly, issues of contemporary concern in Australia.

The Law Council's principles do not specifically address the detention of indigenous Australians. As emphasised in the Law Council's *Indigenous Australians and the Legal Profession Policy Statement*,³ there remains an urgent need to address the factors which lead to a disproportionate number of Indigenous Australians being arrested, detained and imprisoned, and the high level of deaths of Indigenous persons in places of detention. These issues warrant more detailed consideration and attention than it is possible to give them in this context, and may in turn be the subject of a separate Law Council policy statement.

The principles are intended to be read together with the broader Rule of Law Principles.

¹ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011

² In its 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Detention Principles)*, the United Nations General Assembly defined "arrest" as the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

³ Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession*, 2010

1. ARREST AND DETENTION SHOULD BE AUTHORISED BY LAW

- a. A person should only be arrested, detained or imprisoned on grounds which are established by law.
- b. A detained person should be entitled to challenge the lawfulness of his or her detention before a court of law.
- c. Proceedings to challenge the lawfulness of a person's detention should be simple and expeditious.
- d. The court should be empowered to order release where detention is unlawful.
- e. The involuntary detention of a citizen in custody by the State is penal or punitive in character and, subject to certain exceptions, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.
- f. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation, in addition to any other effective remedy to which he or she is entitled.

2. NO ONE SHOULD BE SUBJECTED TO ARBITRARY ARREST OR DETENTION.

- a. "Arbitrariness" is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice, lack of predictability and due process of law. For example, arbitrariness may result from a law which is vague or allows for the exercise of powers in broad circumstances which are not sufficiently defined.

3. ARREST AND/ OR DETENTION OF A PERSON BELIEVED TO HAVE COMMITTED AN OFFENCE

- a. A person should not be arrested or detained on a mere suspicion. An authorised officer should only issue a warrant for a person's arrest where, having received evidence on oath, he or she is satisfied that there are *reasonable grounds for believing* that:
 - i. The person has committed an offence; and
 - ii. Proceeding by way of summons would not secure one or more of the following outcomes:
 - A. ensuring the appearance of the person before a court in respect of the offence;
 - B. preventing a repetition or continuation of the offence or the commission of another offence;
 - C. preventing the concealment, loss or destruction of evidence relating to the offence;
 - D. preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - E. preventing the fabrication of evidence in respect of the offence;
 - F. preserving the safety or welfare of the person.
- b. An arresting officer should only arrest a person without a warrant where he or she *believes on reasonable grounds* the same matters.⁴
- c. The state should fully and promptly inform a person and his or her legal adviser of the reasons for his or her arrest or detention in a language and in terms he or she understands. If necessary, the state should provide an interpreter free of charge.
- d. Where a person is asked to attend or remain at a place for questioning by a law enforcement or intelligence agency, but he or she is not under arrest or otherwise compelled to do so, the person should be informed, in a language and in terms that he or she understands, that he or she is not obliged by law to attend or remain at that place.

⁴ The Law Council recognises that some states and territories have adopted a standard of reasonable suspicion, rather than reasonable belief, for arrest without warrant by a police officer. However, the preferred Law Council position is the reasonable belief standard.

- e. Anyone arrested on the belief that he or she has committed a criminal offence should:
 - i. Be charged promptly and released by the arresting authority, either on bail or on his or her own undertaking to appear before the court at a specified date; or
 - ii. Be brought promptly before a judicial officer to determine the issue of bail or otherwise deal with the person according to law; or
 - iii. Be released unconditionally.
- f. Following arrest, and only so long as the pre-conditions for arrest continue to be met, a period of detention for the purposes of undertaking investigation of the offence may be allowed. However, that period should be subject to strict statutory limitations.
- g. Any provision for extension of this period in extraordinary cases should:
 - i. require prior judicial authorisation;
 - ii. only be authorised where it can be demonstrated, based on evidence on oath, that the extraordinary circumstances of the investigation require it;
 - iii. be subject to a strict limitation on the maximum period of detention.
- h. An arrested or detained person should have full access to a competent and independent legal adviser of his or her choice to establish and defend his or her rights. The state should allow adequate time and facilities for this access, without delay or censorship and in full confidentiality.

4. DETENTION AWAITING TRIAL

- a. A person who has been charged with a criminal offence, including an indictable offence, and is awaiting trial, should not generally be detained in custody. For that reason, there should be a presumption in favour of bail in all cases. This presumption may be rebutted where the court is satisfied there is an unacceptable risk, which cannot be mitigated by the imposition of conditions, that the person:
 - i. will not appear in court when required; or
 - ii. will reoffend; or
 - iii. will interfere with the investigation; or
 - iiiv. will intimidate or attempt to influence potential witnesses; or
 - v. will threaten or cause harm to another person or the community at large.
- a. The presumption in favour of bail should not be reversed regardless of the nature of the offence. Although the seriousness of the offence with which a person is charged may be taken into account in determining whether he or she is: a flight risk; at risk of reoffending; or a risk to the community, the seriousness of the offence alone should not determine whether bail is granted.
- b. Throughout any pre-trial detention, the right to the presumption of innocence should be guaranteed. For this reason, a person in detention awaiting trial should be held separately from convicted persons.
- c. Any person who is subject to criminal charge should be tried within a reasonable time. In determining what is reasonable, whether or not a person is in pre-trial detention is a significant consideration. For that reason, where a person has been denied bail, the state has an increased obligation to ensure that he or she is tried in a timely way. If delays do arise, the question of bail should be reconsidered in view of the likely prejudice caused to the person by their ongoing detention.
- d. A person in detention awaiting trial should have access to his or her legal adviser, for the purposes of preparing a response to the case against him or her. This requires that a person not be detained in a remote or inaccessible location, that undue restrictions are not placed on when and for how long a person may confer with his or her legal adviser and that adequate facilities are available to allow for confidential communication between a person and his or her legal adviser.

5. DETENTION FOR QUESTIONING OF 'NON-SUSPECTS'

- a. A person who is not suspected of criminal activity, or in relation to whom there are insufficient grounds for arrest, should not be detained for the purposes of intelligence gathering. Nonetheless, a person may be compelled by summons to attend at a certain place and time for the purposes of answering questions for such a purpose or for an authorised investigation.
- b. Any legislative regime which allows for a summons of this type to be issued should be exceptional and:
 - i. Be confined to the investigation of serious offences;
 - ii. Require that a summons may only be issued by an independent authority where he or she is satisfied, having received evidence on oath, that:
 - A. the summons is likely to produce evidence that is directly relevant to the matter under investigation; and
 - B. other less coercive investigative methods have failed or will fail to produce or preserve relevant evidence;
 - iii. Provide that where a person invokes the privilege against self incrimination, both use and derivative use immunity attaches to the information provided by him or her; and
 - iiiv. Allow the person to be assisted throughout any questioning by his or her legal adviser of choice.

6. PREVENTATIVE DETENTION

- a. No one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal. Therefore, beyond a brief investigative period following arrest, a person should not be detained in relation to a criminal matter without charge or trial.
- b. If the State seeks to impose restrictions on a person's liberty, not for punitive purposes but in order to pre-empt and prevent criminal activity, it may only do so where the detention or other restrictive measures have been ordered by a court.
- c. A court should only issue an order of this kind if:
 - i. the affected person or his or legal adviser has had the opportunity to access and contest the evidence relied upon; adduce contrary evidence and make submissions to the court in relation to both;
 - ii. the court is satisfied, to a high degree of probability, that such an extraordinary measure is necessary and reasonable, for example to prevent the commission of a relevant serious offence in view of:
 - A. the seriousness of the harm to be averted, in relation to which the State bears the onus of proof;
 - B. the level of risk posed by the person sought to be detained or otherwise restrained; and
 - C. the absence of other available, less restrictive measures for achieving the same protective purpose.
- d. Orders providing for preventative detention or other restrictive measures should be subject to appeal.
- e. The court must provide reasons for its decision.
- f. In the case of a preventive detention order made independently of, and unrelated to a conviction for a particular offence, the order should not authorise indefinite detention, but rather should expire after a specified time, in the absence of a fresh application for its renewal. Further, a person subject to such an order or other restrictive measures should be able to apply to court to revoke the order where new information, bearing on the necessity and appropriateness of the order, becomes available prior to its expiry.

- g. In the case of a preventive detention order in the form of an indeterminate order imposed on conviction for a serious offence, when the prescribed punitive term of imprisonment has been served: such detention should form a measure of last resort; the detention conditions should be non-punitive and be aimed at detainees' rehabilitation; provision should be made for regular, and independent review of the reasonableness and necessity of ongoing detention; and such detention should be subject to judicial review. If the prisoner has fully served the sentence imposed at the time of conviction, he or she should not be subjected to retroactive or double punishment.
- h. A preventative detention regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the due process guarantees which underpin a fair trial, including the prohibition on double punishment.
- i. In the absence of the above matters, preventative detention may become arbitrary and in breach of international law.

7. CONDITIONS OF DETENTION – GENERAL

- a. No one should be held in conditions of detention which amount to torture or cruel, inhuman or degrading treatment. This includes being held in incommunicado detention or lengthy solitary confinement.
- b. Conditions of detention and imprisonment should be humane and dignified. They should comply with key international human rights standards, including the United Nations Standard Minimum Rules for the Treatment of Prisoners.
- c. Without detracting from the generality of the previous principle, the following obligations are emphasised:
 - i. Key services, including education and recreation services, rehabilitation, counselling and health care, should be available as appropriate to detainees' and prisoners' needs, with their mental health needs identified and treated in particular. Reasonable adjustments to services and accommodation shall be made to meet the needs of persons with disabilities.
 - ii. Each prisoner shall occupy by night a cell or room by himself or herself. It is not desirable to have two or more prisoners in a cell or room.
 - iii. Post conviction, the essential aim of the treatment of prisoners should be their reformation and social rehabilitation.
 - iiiv. To the greatest extent possible, detainees and prisoners should be kept near their usual place of residence and communication with and visits from family should be facilitated in such a manner as to allow the maintenance and development of normal family relationships.
 - v. Persons in detention shall be subject to treatment appropriate to their status. For example, unconvicted persons shall be separated from convicted persons and children shall be separated from adults, unless contrary to their best interests.
 - vi. Detention facilities should be open to scrutiny and monitoring by independent national and international bodies as provided for in the Optional Protocol to the Convention Against Torture (OPCAT).
 - vii. Whenever the death or disappearance of a person occurs during his or her detention, an inquiry into the cause of death or disappearance should be held by an independent authority, with the findings to be made available upon request, unless doing so would jeopardize an ongoing criminal investigation. Similar inquiries should be conducted into credible allegations of acts of torture and other cruel, inhuman treatment or punishment committed in detention. When such inquiries are conducted, the State should fund legal representation of interested persons if they are unable to do so.
 - viii. The State should legislate for appropriate standards for detention conditions to be met by public and private authorities, and for penalties for non-compliance.

8. DETENTION OF CHILDREN⁵

- a. In all actions concerning children, the best interests of the child shall be a primary consideration.
- b. The arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time. Pre-trial detention of children should be avoided to the greatest extent possible.
- c. Every child accused of or convicted of a criminal offence should be treated in a manner which:
 - i. is consistent with the promotion of the child's sense of dignity and worth;
 - ii. reinforces the child's respect for the human rights and freedoms of others; and
 - iii. takes into account the child's age, sex or gender and needs and the desirability of promoting the child reintegrating and assuming a constructive role in society.
- d. Every child in detention shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of his or her detention before a court, and to a prompt decision on any such action. Cases involving children shall from the outset be handled expeditiously.
- e. No child should be imprisoned for life without possibility of release.
- f. Every child in detention should have the right to privacy and to maintain family contact. When children are arrested, notice of the arrest and the reasons should be provided directly to their parents, guardians or legal representatives.

Authorised by LCA Directors
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⁵. For the purposes of these Principles, a child means every human being below the age of eighteen years.