

## Guidelines for Police and Legal Practitioners at Police Stations

After several years of negotiations between police and lawyers through the Section's police/lawyers liaison committee, the Section is pleased to advise that an agreement has been reached. The guidelines were approved by the LIV Council in October.

Congratulations to all members of the police/lawyers liaison committee, past and present, who have contributed to these guidelines. Special gratitude is expressed to Rob Melasecca and Michael McNamara who attended many meetings and advocated members' interests.

The guidelines are reproduced below for your future reference.

### ***Situation***

1. A suspect in police custody<sup>1</sup> has a legislative right under s464C of the *Crimes Act 1958* to personally communicate with a legal practitioner. In the past there has been some confusion as to the extent of this right, as well as precisely what rights are possessed by legal practitioners whilst on police premises.
2. To clear up any confusion, the Victoria Police, the Law Institute of Victoria and the Victorian Bar Council have developed guidelines, which clearly set out both the rights and responsibilities of police and legal practitioners whilst a suspect remains on police premises as set out in current Victoria Police policy and legislation.
3. These guidelines do not replace or override existing instructions, but are an attempt to place all relevant material in a single document. They are to complement existing instructions and are to be read in conjunction with: 12.5 (Aboriginals & Torres Strait Islanders); 4.6 (Questioning of Suspects); 4.7.2 (Identification Parades); 7.7.2 (Bail by Police); 10.2.5 (Care of Prisoners); Operating Procedures – *Victoria Police Manual*; and Chapter 2 Ethical Standards – *Victoria Police Manual*.

### ***Visits by Legal Representatives***

#### **Identification**

4. Upon arrival at police premises a legal practitioner must produce a membership card from the Law Institute of Victoria, a Victorian Bar membership/identity card or a practising certificate as identification to avoid any misunderstandings when requesting access:
  - to a suspect who is to be interviewed; or
  - to visit a prisoner in police custody.
5. On occasions, a clerk employed by the legal practitioner will attend a police station on the legal practitioner's behalf. On such occasions, the clerk must also produce adequate identification prior to receiving access to a suspect or prisoner.

## **Recording of Visits**

6. A register must be kept at all Watch Houses and Police Gaols to record visits to prisoners. Visits by police members must also be recorded except in cases of welfare or supervision visits.

The book must include a record of:

- the visitor's name and address/station; and
- the date, time, duration and reason for the visit.

## ***Communication Between a Suspect and a Legal Practitioner – Advice Of Rights and Cautions***

### **Prior to Commencing the Interview**

7. Before any questioning or investigation of a suspect in custody for an indictable offence, the investigating members must caution the suspect and inform the person of his or her right to communicate with a friend or relative and a legal practitioner. The giving of the caution, the required information and the person's responses must be tape recorded where facilities are available. The suspect must be given every reasonable opportunity to exercise this right before questioning and investigation of the suspect takes place, unless the circumstances set out in paragraph 15 of this Code apply.
8. If the suspect wishes to communicate with a legal practitioner, the interview must then be suspended and should not be recommenced until the interview should not be commenced until after that communication has taken place.
9. If the suspect wishes to communicate with a legal practitioner, reasonable facilities must be provided as soon as practicable to enable the suspect to communicate with a legal practitioner. The communication between the suspect and the legal practitioner should be held as far as practicable in private and out of the hearing of other persons. However, for welfare and/or security reasons, an investigating member may keep this communication within his or her view but not hearing. If such a welfare/security situation arises, that fact must be conveyed to the legal practitioner. The communication must be for a time that is reasonable in all the circumstances.
10. A request by a suspect to communicate and the actual communication with a legal practitioner must be made personally by the suspect, unless:
  - suspect clearly expresses a desire that the right to communicate be exercised by somebody else on his or her behalf;
  - circumstances make it imperative for the investigating officer to make the communication for the suspect.

## **Unavailability of a Legal Practitioner**

11. If the suspect's legal practitioner is unavailable, all reasonable attempts must be made to allow the suspect to communicate or attempt to communicate with another practitioner. The suspect must be given a reasonable period of time to communicate with another legal practitioner before the interview is commenced.

## **Briefing by a Third Party**

12. It is the suspect who has the personal right to communicate with a legal practitioner. In circumstances where a legal practitioner, briefed by a third party to represent the suspect, arrives or communicates his or her involvement, prior to the suspect exercising his/her right to communicate with a legal practitioner, the suspect must be informed of the arrival of or communication from the legal practitioner and be asked whether he or she wishes to communicate with that legal practitioner, must be tape-recorded where facilities are available. If communication with the particular legal practitioner is desired by the suspect, that communication must be facilitated.
13. Once a suspect has indicated that he or she does not wish to communicate with the legal practitioner, and that wish has been tape recorded, the legal practitioner. The giving of that information and the relevant responses, if a practitioner cannot insist upon communication or the interruption of an interview.
14. If a legal practitioner is refused communication, the investigating member may be called upon to justify his or her actions, either if a complaint is made or at a court hearing of the charges brought against the suspect.

## **Security Risk**

15. An investigating member must inform a suspect in custody of his or her rights of communication, prior to commencing any investigation or questioning. However, the investigating member is not obliged to defer the investigation or questioning for a reasonable time to allow a suspect to exercise his or her rights of communication, if the investigating member believes on reasonable grounds that:
  - the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or
  - the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed.

In such circumstances the suspect should be advised that the investigation or questioning will not be deferred in the usual way.

## **Communication Between a Legal Practitioner and a Prisoner**

16. In cases where a legal practitioner visits a prisoner, a police member must remain within view but out of hearing. If the legal practitioner's visit poses a security risk he or she should not be admitted. In situations where it is the legal practitioner who poses the security risk, the suspect or prisoner should be informed that he or she can communicate with another legal practitioner.

### **Position when a Suspect does not want to be Interviewed**

17. If a legal practitioner advises that a suspect does not want to be interviewed and does not intend to answer any questions (and the suspect confirms this at the commencement of or during the interview), the investigating member should, as a matter of fairness, inform the suspect of the allegations and then carefully consider the evidentiary value in continuing the interview. Such consideration is necessary as it is possible that to continue the interview may result in any admissions made by the suspect, in the course of further questioning, being excluded as involuntary or in the exercise of judicial discretion.

### ***Legal Practitioners Being Present at Interviews***

#### **Legal Obligation**

18. There is no legal obligation for police to allow a legal practitioner to be present at an interview. If a legal practitioner requests to be present at the interview and/or the suspect requests his or her presence, the investigating member should allow the legal practitioner to be present.
19. An investigating member should advise a legal practitioner who wants to be present at an interview that:
  - the legal practitioner may be present at the interview;
  - by reason of their presence a legal practitioner may be called as a witness for the prosecution or the defence; and
  - the legal practitioner must not take part in or interrupt the interview without basis or justification.

#### **The interruption of an interview by a legal practitioner**

20. A justifiable interruption includes those situations where new and unexpected matters are raised in the interview for which the legal practitioner has no instructions or insufficient instructions and the practitioner considers it necessary to discuss the matters raised with the suspect before the suspect answers the matters raised.
21. A legal practitioner must not interrupt an interview without basis or justification. The interruption of an interview on a regular, continuous or question by question basis to provide legal advice is not a

justifiable interruption.

22. If a legal practitioner continues to interrupt the interview without basis or justification after being warned not to do so by the investigating member conducting the interview, the investigating member may ask the practitioner to leave. A practitioner requested to leave and who fails to do so may be removed.
23. If the practitioner is removed, the suspect should not be interviewed further until given the opportunity to communicate with or attempt to communicate with a friend or relative or another legal practitioner. The requirements of paragraphs 9 and 12 should be adhered to if communication with another legal practitioner is sought.

#### ***Non – Provision Of Legal Advice By Police***

24. Although an investigating member may advise a suspect or prisoner about the investigative and/or court process, an investigating officer must not give to a suspect or prisoner any legal advice, other than to recommend that he or she should seek such advice from a legal practitioner. Further, no comment should be made regarding the suspect's choice of legal practitioner nor about any costs involved.

#### ***Complaints against Police***

25. A legal practitioner who wishes to complain about the conduct of police members with whom he or she has had dealings at police premises should be advised that a complaint can be made to the Officer in Charge of the premises or to the Ethical Standards Department of Victoria Police or to the Deputy Ombudsman (Police Complaints).

#### ***Complaints Against Legal Practitioners***

26. A complaint against a legal practitioner should be forwarded to and considered by through the police member's District/ Regional Commander who may forward it to the Deputy Commissioner (Operations) for consideration. The Deputy Commissioner (Operations) may, where warranted, forward the complaint to the Law Institute of Victoria or the Legal Ombudsman. A complaint against a member of the Victorian Bar can be directed to either the Bar Council Ethics Committee or to the Legal Ombudsman. Where an issue of law requires consideration, to the Police Legal Adviser may be consulted where it will be assessed and any necessary action taken.

#### ***Identification Parades***

##### **The attendance of a legal practitioner at an identification parade**

27. Although it is not a legal requirement, a suspect can be told that he or she may have a legal practitioner, friend or relative present at an identification parade.

28. The suspect must be given every reasonable opportunity to communicate with or attempt to communicate with a legal practitioner before the conduct of an identification parade, whether it involves visual and/or voice identification unless the investigating member believes on reasonable grounds that:
- communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or
  - the identification of suspects is so urgent, having regard to the safety of other people, that it should not be delayed unduly.

In such circumstances, the suspect should be advised that the identification parade will not be delayed unduly.

#### **Information for a legal practitioner attending an identification parade**

29. The police officer conducting the identification parade must inform any legal practitioner, parent or other party present on the suspect's behalf that they may:
- observe the identification parade;
  - listen to any conversation between a witness and a participant;
  - not take part in any conversation;
  - not speak to any witness or participant; and
  - not otherwise interfere with the conduct of the parade.

The conducting officer must also note:

- any objection to the conduct of an identification parade; and
- communications to him/her from the legal practitioner relevant to the conduct of the identification parade.

#### ***Bail or Remand Applications on Police Premises***

##### **Persons being bailed by police**

30. Where it is not practicable to bring an arrested person before a court forthwith after the person is taken into custody, a member of the police force of or above the rank of Sergeant or for the time being in charge of a police station may either refuse or grant bail per section 10 of the Bail Act 1977.

31. The bail that is granted in these circumstances by an authorised officer may be subject to certain conditions; such as sureties, deposit or security. Where bail is refused or the person charged objects to the amount of bail fixed or conditions that are set by the police, it is mandatory that the member conducting the proceeding advise the person that he or she has the right to apply to a magistrate or a bail justice to have the matter reconsidered per section 10 of the *Bail Act 1977*.

### **Bail hearings before a Bail Justice**

32. If the person requires the attendance of a bail justice, a legal practitioner is entitled to appear for the person at the hearing of the bail application. The legal practitioner must be allowed to consult with the person out of the hearing of police and for a reasonable period of time before the bail application is commenced.

### **The right of the public to attend a bail hearing determined by police**

33. When a bail is to be determined by police (section 10 Bail Act 1977 and section 7.7.2, Operating Procedures, Victoria Police Manual) and where a legal practitioner requests that the family, relatives, friends, etc., of the accused person attend a bail or remand application on police premises the investigating officer must consent to such request, providing that:

- the attendance of family, relatives or friends would not present a security risk or otherwise be impracticable.

34. When bail is to be determined by a Bail Justice, the Justice will determine the conduct of the bail hearing and will determine who may or may not be present.

These Guidelines adopt the terms 'suspect' and 'custody' as defined within sections 464(1) and (2) Crimes Act 1958.