

# POLICE POWERS

"(Police officers) have no power whatever to arrest or detain a citizen for the purpose of questioning him or of facilitating their investigations. It matters not at all whether the questioning or the investigation is for the purpose of enabling them to ascertain whether he is the person guilty of a crime known to have been committed or is for the purpose of enabling them to discover whether a crime has or has not been committed. If the police do so act in purported exercise of such a power, their conduct is not only destructive of civil liberties but it is unlawful."

**Regina v Banner (1970) VR 240 at p 249 - the Full Bench of the Northern Territory Supreme Court**

"It is an ancient principle of the Common Law that a person not under arrest has no obligation to stop for police, or answer their questions. And there is no statute that removes that right. The conferring of such a power on a police officer would be a substantial detraction from the fundamental freedoms which have been guaranteed to the citizen by the Common Law for centuries."

**Justice Stephen Kaye - Melbourne Supreme Court ruling - 25 November 2011**

"There is no common law power vested in police giving them the unfettered right to stop or detain a person and seek identification details. Nor, is s.59 of the (Road Safety) Act a statutory source of such power."

**Magistrate Duncan Reynolds - Melbourne - July 2013**

**NOTE: None of the above precedents have been overturned on appeal or in the High Court**

## RECORDING POLICE

**SURVEILLANCE DEVICES ACT 2007 - Section 7 - Prohibition on installation, use and maintenance of listening devices**

**(1) A person must not knowingly install, use or cause to be used or maintain a listening device:**

**(a) To overhear, record, monitor or listen to a private conversation to which the person is not a party, or**

**(b) To record a private conversation to which the person is a party**

ANALYSIS of 1(a) The person recording is a party to the conversation.

ANALYSIS of 1(b) A conversation on the roadside between a person and a policeman is not a private conversation.

CONCLUSION A person video recording an encounter between himself and police is doing so legally.

**(3) Subsection (1) (b) does not apply to the use of a listening device by a party to a private conversation if:**

**(a) All of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used, or**

**(b) A principal party to the conversation consents to the listening device being so used and the recording of the conversation:**

**(i) Is reasonably necessary for the protection of the lawful interests of that principal party, or**

**(ii) Is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation**

ANALYSIS of 3 A conversation on the roadside between a person and a policeman is not a private conversation.

ANALYSIS of 3(b)(i) A recording made to protect the lawful interests of the person recording is legal.

ANALYSIS of 3(b)(ii) Such a conversation is not private, therefore can be published.

CONCLUSION A person recording an encounter between himself and police is doing so legally. That person is also legally entitled to publish the recording to the public, such as on Youtube or other websites.

News media do this every day, recording people and events without requiring the consent of those being recorded. The media is not subject to any special dispensation by law to do this, therefore members of the public have the same rights to record their encounters with police.

Any policeman who tries to prevent a member of the public doing this is acting illegally and can and should be prosecuted.

# NSW POLICE FORCE HANDBOOK 2014 - PAGE 223

## PHOTOGRAPHING OR FILMING POLICE

Under section 91 of the Law Enforcement (Powers and Responsibilities) Act 2002, a police officer may establish a crime scene and exclude the media or members of the public from entering or being inside the crime scene.

Once a crime scene is created, a police officer must, if reasonably appropriate, give the public notice that the premises are a crime scene. Any action that police officers take should be reasonable and justified, having regard to the need to preserve the integrity of the crime scene.

However, the media or members of the public have the legal right to photograph or film into the crime scene from a public space or from a privately owned place with the consent of the owner/occupier. Police have no specific rights or powers to do anything to prevent the media taking photographs of or filming police officers or family members at crime scenes, if the media remain out of the crime scene itself and obey all other laws.

Generally speaking, if the media or members of the public photograph or video police officers, victims, operations, incidents or crime scenes from a public space or from a privately owned place with the consent of the owner/occupier, police do not have the power to:

- Prevent the person from taking photographs or filming
- Confiscate photographic or filming equipment
- Delete, or order a person to delete, images or recordings

The media or members of the public can only be requested to move on if there are legitimate safety or operational reasons that provide a legal power to do so. Feeling uncomfortable about being filmed or photographed is not an operational reason.

It is also not the job of police officers to decide whether legally obtained media footage or photographs are insensitive or in poor taste. What the media may publish is governed by various broadcasting laws and codes of conduct.

## THE RIGHT TO REFUSE TO INCRIMINATE ONESELF

The Australian Government Law Reform Commission states the following:

**15.89 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person.[123] Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).**

There are many more references to an Australian citizen's right to not incriminate himself or produce any document that may tend to incriminate him and this is where motorists should stand up for their rights in this regard.

As proven by the precedents set by various judges, common law supersedes statutory law. Therefore, whether there are statutory laws compelling a person to submit to providing anything that may tend to incriminate him, the fact remains that a person has the legal right to not provide any material, whether verbal or tangible, if the production of that material would tend to incriminate that person.

It can be argued that any material thing could be considered to be a document. In fact most dictionaries will define a document as being a piece of information. Therefore using that definition, a document can be any or all of the following: verbal statements, physical documents, data such as computer files, breath alcohol samples, blood alcohol samples, DNA samples and anything else that constitutes information.

No person should ever succumb to any demand to produce anything that may tend to incriminate him, no matter what police or other officials say or threaten. Every citizen has the common law right to refuse to incriminate himself in any way.

Obviously any attempt to coerce or forcibly take any material from a person against his will that may tend to incriminate him should not only make that material completely inadmissible as evidence in any prosecution, but will possibly render the person who has coercively or forcibly obtained that material to prosecution for violating a person's common law rights.