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POLICING THE POLICE: THE DISCRETION TO ARREST FOR MINOR OFFENCES

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ABSTRACT

The police power to arrest necessarily involves the deprivation of the liberty of the individual. Limits are, therefore, required on the discretion to arrest to ensure against the arbitrary exercise of this power. The objective of this paper is to consider the fetters on the power to arrest, with particular regard given to minor offences. It is suggested that criminal proceedings for minor offences may be commenced by an alternative procedure to arrest. In New Zealand, the only alternative to arrest is for the police to proceed by way of summons. However, it is argued that Parliament, the courts, and the police themselves, have failed to provide appropriate guidelines to assist police in determining the circumstances for which arrest may be used. This, in turn, makes the limits of the discretion to arrest difficult to discern. It is argued that the circumstances for which arrest is the appropriate response should be determined by the legitimate purposes of the arrest procedure. It is argued that the reasons for refusing bail will also justify the legitimate use of arrest.

It is appears that an overwhelming number of prosecutions are commenced by way of arrest. In providing an explanation as to why police prefer to rely on the arrest procedure, it is suggested that the police take into account a number of irrelevant considerations. These include, but are not restricted to, the expedience of arrest; negative police perceptions of ethnic minorities; support from the criminal justice system in overcharging offenders; and rights available to the police incidental to arrest.

In advocating reform of the law relating to arrest, it is suggested that it is the role of parliament to provide a clear statement of the legitimate purposes of arrest, which is flexible enough to allow the individual police officer to take into account unusual or special cases. Further, it is argued that Parliament must introduce a more expedient method as an alternative to the arrest procedure for bringing people, suspected of committing a minor offence, before the courts. This approach by Parliament must be backed up by a robust approach from the courts and the police in ensuring that arrest, and the consequent loss of freedom, is reserved for circumstances where it is necessary.

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I INTRODUCTION

During the Christmas and New Year holiday period of 2002/2003, the Tauranga District Council voted to impose a liquor ban on many public areas around the Tauranga, Mount Maunganui and Papamoa Beach districts.[1] The purpose of this ban was "[to get] rid of anti-social behaviour in key public places".[2]

The Council introduced an offence of Breach of Liquor Ban, pursuant to sections 709C and 709G of the Local Government Act 1974. This offence carries a maximum penalty of a $500 fine.

During the course of this holiday period blitz, police made 590 arrests for liquor ban breaches.[3] Correspondence received by the barrister acting on behalf of some of those arrested under the liquor ban, revealed that people were apprehended for simply being within a designated public area consuming, or in possession of, alcohol. The correspondence did not disclose any suggestion of disorderly or violent behaviour, such as using offensive or abusive language, fighting or bottle throwing.[4] It is often this manner of behaviour that is associated with people being intoxicated and could be considered "antisocial".[5] Furthermore, many of the letters stated that those arrested had never been in trouble with the police prior to this incident.[6]

Upon being arrested, offenders were charged, and reported to have been fingerprinted and photographed[7] before being placed into a large, makeshift holding

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[1] "Liquor ban fines reviewed" (3 April 2003) *Bay of Plenty Times* Rotorua 1.
[2] "Liquor ban fines reviewed", above, 1.
[3] "Liquor ban fines reviewed", above, 1.
[4] Interview with Mr. John Miller, barrister (the author, Wellington, 8 July 2003).
[5] "Liquor ban fines reviewed", above, 1.
[6] Interview with Mr. John Miller, above.
[7] Jeff Neems "Accidental 'crims' demand refunds" (3 April 2003) *Bay of Plenty Times* Rotorua 1; Police Act 1958, s 57 gives the police a discretion to take any particulars for identification of a person in custody, "including his photograph, fingerprints, palm prints and footprints" (s57(1)). Section 57(1A) specifically requires the person to be "in lawful custody at a Police Station, or on any other premises, or in any vehicle, being used for the time being as a Police Station".

cell.[8] It is alleged that police told those arrested that it "would be easier for them to sign a document admitting their guilt, rather than going to Court".[9] It is further reported that "nearly everyone" pleaded guilty by letter.[10]

In addition to the ignominy of being detained in custody, those charged with an offence of breaching the liquor ban would have carried the stigma of a criminal conviction but for the Tauranga District Council committing a technical breach of the notice requirements of the Local Government Act 1974, rendering the offence unlawful.[11]

In examining the measures taken by the Tauranga police in this instance, it is not in dispute that the police had the statutory authority to arrest those suspected of breaching the liquor ban.[12] However, the police retain a discretion whether to exercise that power to arrest.[13] Determining the appropriate circumstances under which police ought to apply their discretion to arrest, particularly for more minor offences,[14] highlights the inherent difficulties in "balancing the rights of the offender with the public interest in the prevention of crime and the prosecution of offenders".[15]

In this instance, members of the public caught consuming alcohol in prohibited areas were deprived of their personal liberty for contravening an offence Parliament deemed to be toward the lowest end of the criminal scale. The police

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[8] Interview with Mr. John Miller, above.
[9] Neems, above, 1.
[10] "Liquor ban fines reviewed" (3 April 2003) *Bay of Plenty Times* Rotorua 1; Summary Proceedings Act 1957, s 41 gives a defendant the right to plead guilty by notice to a registrar in respect of a summary offence.
[11] Interview with John Miller, above. An issue was raised with the legality of the by law under which the liquor ban was passed. Local Government Act 1974, s 709F(1) *(repealed)* required public notice of the ban. The ban was required to be advertised 3 times in a local newspaper during the 21 day period immediately prior to the ban coming into force (s709F (2)(b)). The ban appeared only twice in the public notices of the Bay of Plenty Times.
[12] Local Government Act 1974, s 709H (1)(a)(b) (*repealed)* gave police the power to arrest any person whom they found, or had reasonable cause to suspect, of having committed a breach of the liquor ban.
[13] Local Government Act 1974, s 709H (1) states a Police officer "may" exercise their powers under s 709H (1)(a)(b).
[14] See Part I B Defining a 'minor offence'.
[15] *Attorney-General v Hewitt* [2000] 2 NZLR 110, 121 (HC) Randerson and Neazor JJ.

further used their position of authority to induce those arrested for breaching the liquor ban to plead guilty to the offence without proper legal advice. The fact that those detained were held in the, generally, unfamiliar and intimidating environment of a police holding cell would only increase the pressure to plead guilty by notice to enhance their prospects of an early release from custody. In enforcing the Tauranga liquor ban, the rights of the offender were subjugated by the interests of the police in prosecuting those persons alleged to have breached the ban.

A Scope of the Paper

It is well recognised that it is impossible to lay down any set of hard and fast rules to dictate the circumstances under which it would be appropriate for the police to exercise their power of arrest. To do so would create an overly rigid approach, resulting in an overregulation of police power and a failure to give full consideration to the circumstances of the individual case.[16] Rather, "what is required is some guideline, some reasonable standard which will promote the establishment of consistent policies, but which is sufficiently flexible to allow for unusual or special cases".[17]

To this end, it would be preferable that the power of arrest be considered against the legitimate purposes for which the procedure may be used with limitations placed on what amounts to a legitimate purpose of arrest.

The aim of this paper is to consider what fetters exist in governing how the individual police officer may exercise their discretion to arrest for minor offences. More specifically, this paper will consider whether the guidelines currently in place are effective, by adequately assisting a police officer in properly determining the circumstances under which arrest is appropriate, having regard to the legitimate purposes of the arrest procedure.

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[16] Terrance Arnold "Why Arrest" in R.S. Clark (ed.) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z.) Ltd (Wellington), 1971) 202, 217.
[17] Arnold, above, 214.

By limiting the scope of this paper to examine the incidence of arrest for minor offences, it is suggested that the person alleged to have committed the offence could more readily be brought before the criminal justice system by a practical alternative to arrest and being released on immediate bail.[18] Principally, this is by the police officer determining to proceed by way of summons.[19]

It is further assumed that a police officer has a good cause to suspect an offence has been committed, and no issue arises with this aspect of the arrest.[20]

B. Defining a 'minor offence'

For the purposes of this paper, a minor offence will be defined as all offences prescribed by the Summary Offences Act 1981, and any criminal offence, pursuant to the Crimes Act 1961, that carries a maximum penalty of a term of imprisonment not exceeding 3 months. Specifically, these offences are limited to crimes of theft[21] and receiving[22] where the thing stolen or received has a value that does not exceed $100.[23]

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[18] Bail Act 2000, s 7(1)-(2) provides that a defendant is bailable as of right who is charged with an offence no punishable by imprisonment or a charge for which the maximum penalty is less than 3 years imprisonment, unless the defendant has been previously convicted of an offence punishable by imprisonment (s 7(5)); see Part I B Defining a 'minor offence'.

[19] Summary Proceedings Act 1957, s 12(1) provides that criminal proceedings shall commence by the laying of an information or complaint, in circumstances where a defendant has not been arrested without warrant.

[20] Crimes Act 1961, s 315 provides the statutory power for the police to arrest without warrant for any offence punishable by imprisonment; Summary Offences Act 1981, s 39 provides the statutory authority for the police to arrest without warrant an offence against that Act. Both provisions require that a police officer must have good cause to suspect an offence has been committed before exercising the power to arrest (s 315(2)(a) Crimes Act 1961 and s 39(1) of the Summary Offences Act 1981).

[21] Crimes Act 1961, s 227(1)(d).

[22] Crimes Act 1961, s 258(1)(c).

[23] See also Summary Proceedings Act 1957, s 20A which provides for a summary procedure for minor offences. For the purposes of this section, a minor offence is defined as any summary offence for which the maximum penalty is a fine not exceeding $500 (s 20A(12)(b)).

This definition is largely derived from the rationale behind the enactment of the Summary Offences Act 1981.[24] In the second reading speech to the Summary Offences Bill, the Hon D Quigley, MP referred to the offences contained within the bill as "not the most serious, but their importance lies in the fact that many of them set the limits of speech and behaviour in a public place".[25] It is because of the nature of these offences that it was observed that "it [the Summary Offences Act 1981] will be the statute that through which the greatest number of our citizens are likely to meet the enforcement of the criminal law, apart, of course, from traffic cases".[26]

Similarly, for all offences carrying a maximum penalty not exceeding 3 months imprisonment, Parliament has indicated its view of the lack of seriousness of this type of offending by not extending the right to elect to have the matter dealt with by way of trial by jury.[27]

It is this lesser degree of criminality that applies to this type of minor offending that supports the theory that, generally, an offender can be brought before the criminal justice system without the police having to rely on the arrest procedure.

C. Contents

This paper is broken up into the following four parts:

Part II: The Police Power of Arrest

This section considers the statutory authority under which Police are conferred the power to arrest.[28] On the face of it, the legislative provisions bestow a wide discretion as to the circumstances under which Police may exercise the power

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[24] Summary Offences Act 1981 replaced and repealed the Police Offences Act 1927, which contained a number of trivial offences which had become obsolete with the passage of time.
[25] (15 October 1981) 442 NZPD 4178.
[26] Hon B. Brill (9 October 1981) 441 NZPD 4001.
[27] Summary Proceedings Act 1957, s 66 prescribes the defendant's right to elect trial by jury where an offence is punishable by more than 3 months imprisonment.
[28] Crimes Act 1961, s 315; Summary Offences Act 1981, s 39.

to arrest. However, controls do exist in establishing fetters on this discretion. These guidelines may exist in the following forms:

(a) the ability of the Courts to review the appropriateness, or otherwise, of a decision to arrest;
(b) other statutory provisions; and
(c) internal Police controls establishing best practice models governing the use of arrest.

Given that these guidelines are in place, the question still remains as to how effectively these controls operate to ensure that the power of arrest is only exercised under the appropriate circumstances.

Part III: Police Practice

This part of the paper will consider the Police statistics of arrest rates for minor offences. If the guidelines discussed in Part II are to act as an effective control in determining the appropriate circumstances for which the power to arrest is to be exercised, it follows that arrest should be less frequently utilised as a means of initiating criminal proceedings for minor offences. However, the statistics reveal that arrest is the more favoured approach in bringing a prosecution for a minor offence before the courts.

Part IV: Why Arrest?

Under New Zealand criminal procedure, the issue of a summons is the only existing alternative to arrest in initiating criminal proceedings against a defendant.[29] Under this part of the paper, the advantages and disadvantages of using the summons procedure is discussed.

[29] Summary Proceedings Act 1957, s 12(1).

In providing an explanation as to why arrest may be favoured as a means of commencing prosecutions for minor crimes, it is suggested that Police rely on a number of irrelevant considerations when exercising their discretion to arrest. The factors taken into account, not considered to be a legitimate purpose of arrest, may include:

(a) the impact of ethnicity on Police attitudes when considering the use of arrest;
(b) the use of rights against suspects, available to Police only upon a suspect entering into custody;
(c) the 'loading up' of charges with a view to plea bargaining;

Part V: A Comparative Study – the New South Wales Approach to the Discretion to Arrest

The statutory powers conferring the power to arrest upon police officers in New South Wales (NSW) is expressed in wide and unfettered terms,[30] similar to the arrest provisions in New Zealand. However, the NSW parliament has recognised the temptation for police officers to arrest a person, even for a minor offence, as a matter of expediency. In providing an alternative to the arrest and summons procedure, a police officer has the power to issue a notice for the defendant to attend court, which is able to be issued in the field.[31] Given the options available to a police officer in initiating criminal proceedings, this section looks at how the NSW courts have emphasised the use of arrest as a last resort and, as a matter of law, require a police officer to consider all alternatives to arrest for minor offences.

The effective administration of justice relies heavily on the cooperation between the police and the general public. A power which statutorily allows a public body to deprive an individual of their liberty must be transparent, with the limits of that power clearly, and consistently defined. Any abuse of police power,

[30] Crimes Act 1900 (NSW), s 352.
[31] Justices Act 1902 (NSW), s 100AB

including situations in which the use of arrest is not warranted by the circumstances of the offence or the offender, is likely to lead to a division between the police and the community it serves.

PART II: THE POLICE POWER OF ARREST

A. The Arrest Provisions

The power of arrest in New Zealand is wholly conferred by statute.[32] The statutory provisions authorising a constable to arrest without warrant include a seemingly wide and unfettered discretion as to when this power may be exercised.[33]

The first issue to be considered is whether the discretion to arrest should be subject to any form of control at all. In enacting the arrest provisions, Parliament has not attempted to restrict the circumstances under which arrest is appropriate, nor determine the purposes for which arrest is the legitimate response against a suspected criminal offence. Rather, Parliament has provided that a constable may proceed by way of summons, as an alternative method to arrest, in commencing criminal proceedings[34] but has remained silent as to which method is to be the 'usual' one.[35]

It is noted that a police officer retains an overriding discretion as to whether to subject an offender to the criminal justice process at all. In dealing with a more minor offence, an officer may simply decide "to have a few words with him [the alleged offender] and send him on his way".[36] Without any form of regulation over this individual discretion, it is conceivable that a police officer may make a decision to prosecute based on irrelevant considerations such as an individual's appearance

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[32] Crimes Act 1961, s 315; Summary Offences Act 1981, s 39.
[33] Crimes Act 1961, s 315(2) and Summary Offences Act 1981, s 39(1) state a constable "may" exercise their power to arrest.
[34] Summary Proceedings Act 1957, s 28.
[35] But see Terrance Arnold "Why Arrest" in R.S. Clark (ed.) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z.) Ltd (Wellington), 1971) 202, 209. Arnold considers that the arrest provisions are 'permissive' and argues that because of this permissiveness, parliament intended that arrest without warrant be the usual method of commencing criminal proceedings.
[36] The Rt Hon Sir Thaddeus McCarthy "The Role of the Police in the Administration of Justice" in R.S. Clark (ed.), *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z) Ltd (Wellington), 1971) 170, 183.

or attitude.[37] Not only is there the prospect of a Police officer varying in his approach to the individual offender, there is also the risk of disparity between officers as to how certain offences and offenders should be dealt with.

Likewise, once the decision to prosecute has been made, a police officer may also appear to act arbitrarily, relying on similar improper grounds, in deciding to deprive an individual of their liberty through the use of arrest, where an alternative process is available.

This danger is particularly heightened when considering minor offences involving individuals contravening legal standards of public behaviour. On the basis of the comments made by the Hon. D Quigley, MP in the second reading speech to the Summary Offences Bill,[38] it is more likely that individuals of otherwise good character or reputation may fall foul of the law in respect of committing minor public order offences as opposed to committing more serious offences involving violence or dishonesty. In failing to provide reasonable standards by which the use of arrest can be fairly and consistently measured, an individual may be subject to the additional punishment that loss of freedom through arrest brings, such punishment not warranted by the circumstances of the offence or the offender.

Inherent in the exercise of police discretion is that it has such an acute affect on a person's life. This has led Sir Thaddeus McCarthy to assert:[39]

> ...it is a general principle in the administration of justice that discretions should be exercised within a legal framework; that they not be unfettered but limited – discretions ought to be exercised upon proper grounds and ought to be open to review by competent authorities.

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[37] McCarthy, above, 183.
[38] (15 October 1981) 442 NZPD 4178.
[39] McCarthy, above, 182.

The question now to be addressed is to what extent the courts, and the police themselves, have imposed their own fetters on the discretion to arrest, as well as the extent to which this discretion is the subject of review and censure.

B. The Power of the Courts to Review the Discretion to Arrest

The courts have taken the view that they will only review the exercise of the discretion to arrest in very limited circumstances. Where Parliament has conferred a seemingly unrestricted executive discretion upon a constable to arrest, it is not the role of the courts to act in an appellate jurisdiction and substitute its own opinion for that of the arresting officer in deciding whether arrest was an appropriate response in the circumstances of the case. Rather, the power of the Court lies in ensuring that the exercise of that discretion is lawful, by reference to the usual principles of administrative law. [40]

In explaining the rationale behind this approach, the Courts have observed: [41]

> The Court has to recognise the practical realities faced by police officers day by day and ought not place unreasonable strictures upon the exercise of their discretion.

In discussing the dangers of bestowing such a large measure of executive discretion upon the police, the Privy Council in *Hussein v Chong Fook Kam*[42] have drawn on the principles involved in the consideration of bail[43] as factors to be taken into account when deciding whether to arrest an alleged offender: [44]

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[40] *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA).
[41] *Everitt v Attorney-General* (2000) 18 CRNZ 27, 32 (HC) Gendall J.
[42] [1970] AC 942 (PC) Lord Devlin.
[43] See also Bail Act 2000, s 8which sets out the relevant considerations to be taken into account by a Judge for continued detention. Specifically, s 8(1) requires a Judge to take into account:
(a) whether there is a risk that the defendant may fail to appear in court on the date to which the defendant has been remanded;
(b) whether there is a risk that the defendant may interfere with witnesses or other evidence;
(c) whether there is a risk that the defendant may offend while on bail.
[44] *Hussein v Chong Fook Kam*, above, 948.

> in the exercise of it [the executive discretion to arrest] many factors have to be considered beside the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.

In *Hussein v Chong Fook Kam,*[45] the House of Lords held that the discretion to arrest could be challenged by application of the *Wednesbury* principles. These principles provide that in exercising the discretion to arrest, an arresting officer must act in good faith. Furthermore, the decision to arrest must be reasonable. That is, an officer must not take "into account any matters that ought not to be or [have] disregarded matters that ought to be taken into account".[46]

In New Zealand, this approach has been adopted, in part, by the Court of Appeal in *Thomas v The Attorney-General.*[47] The courts, however, have effectively limited the prospects of successfully challenging the decision to arrest to situations where an officer has relied on an irrelevant consideration in exercising their discretion. An arrest may only be unreasonable, and consequently ultra vires, if:

(1) it can be shown that an arresting officer was acting in bad faith; or
(2) that the motive for the arrest was for an improper purpose[48]

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[45] (1984) 78 Cr App R 65 (CA) Arnold P.
[46] *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 228 (CA). In this case, the Court of Appeal considered the exercise of a discretion of a local authority to grant the proprietor of a cinema theatre, permission for Sunday performances, subject to a condition that no children under 15 years of age be admitted. The issue for the Court was whether the imposition of this condition was unreasonable, and therefore ultra vires.
[47] (14 August 1997) Court of Appeal CA 139/96, 9 Keith J.
[48] See also *R v Chalkey* [1998] 2 All ER 155, 176 Auld LJ where it was held that the existence of a collateral motive for an arrest does not necessarily make the arrest unlawful. In *Chalkey*, C was arrested in connection with credit card frauds. It is not in dispute that the Police had reasonable grounds for arresting C. However, during the course of C's detention, the Police installed listening devices in C's home. It was held by the English Court of Appeal that a "collateral motive for arrest on otherwise good grounds did not necessarily make it [the arrest] unlawful".

In *Thomas*, the Court of Appeal was asked to consider whether the arresting officer failed to have regard to a relevant consideration by not turning his mind to other possibilities to arrest, such as proceeding by summons. In this case, the appellant repossessed a car he had sold following non payment for the vehicle. The appellant was arrested for theft after he failed to allow the buyer to retrieve his property from the car. In explanation why the alternative course of summons had not been pursued at the time, the arresting officer stated that he had made three attempts to try and recover the property from the appellant before he was arrested.[49]

The Court considered that it was simply a matter of "good police practice", as opposed to a matter of law, for a police officer to consider other possibilities to arrest.[50]

In reliance on the remarks of Keith J in *Thomas*, the High Court in *Attorney-General v Hewitt*[51] held that the prospects of "a successful challenge on the grounds of failure to take into account relevant considerations is very limited or even non existent".[52] The courts have taken that view that since the legislature has declined to impose any mandatory considerations on the discretion to arrest, it is not the role of the courts to then impose specific factors that a police officer must turn their mind to before making the decision to arrest.

In *Neilsen v The Attorney General,*[53] the Court of Appeal relied on "conventional narrow *Wednesbury* principles"[54] in concluding that the decision to arrest was unreasonable in circumstances where the issue of a summons was the most appropriate course in initiating criminal proceedings. The Court in *Neilsen* did not go as far as retracting its statement in *Thomas* and require an officer to consider other possibilities to arrest in every situation. Rather, the Court

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[49] *Thomas v The Attorney General*, above, 2-3, 9.
[50] *Thomas v The Attorney-General,* above, 9. The Court, however, was satisfied with the arresting officer's explanation as to why a summons was not pursued.
[51] [2000] 2 NZLR 110 (HC) Randerson and Neazor JJ; see also Pt II C.
[52] *Attorney General v Hewitt*, above, 121.
[53] (12 March 2001) Court of Appeal CA 101/00, 17 Richardson P.
[54] *Neilsen v The Attorney General,* above, 17.

considered that the officer had taken into account irrelevant considerations in deciding to arrest Mr. Neilsen. The Court held the purposes for which the arrest was made were an "irrational and illegitimate basis for arresting".[55] Specifically, the Court found that the arresting officer had no evidence that Mr. Neilsen might commit further offences; that the offending was minor; and that the obtaining of Mr. Neilsen's fingerprints were an irrelevant consideration in the decision to arrest.

The failure of parliament and the courts to impose any specific guidelines that a police officer must turn their mind to before making the decision to arrest does give the officer the flexibility to deal with unusual or special cases. However, this approach necessarily means that the propriety, or otherwise, of an arrest cannot be measured against a definite set of criteria. As a guide to the circumstances in which arrest is the appropriate response, this approach offers little assistance to Police and members of the general public in establishing a set of consistent policies that distinguish the legitimate objectives of arrest from the non legitimate.[56] What amounts to taking into account an irrelevant consideration may not be exhaustive and may only be determined by reference to the facts of the individual case.

The line of New Zealand authority indicates then, that the discretion to arrest is subject to review in circumstances where an individual Police officer has relied on irrelevant considerations in determining that arrest is the most appropriate course of action. However, what amounts to an irrelevant consideration must be determined by reference to the legitimate purposes of the arrest procedure. While the arrest provisions themselves remain silent as to what amounts to a legitimate purpose of arrest, the Courts have sought guidance from other statutory provisions, as well as internal Police controls, in establishing the purposes for which arrest is the most appropriate response.

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[55] *Neilsen v The Attorney General*, above, 17.
[56] Terrance Arnold "Why Arrest" in R.S. Clark (ed.) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z.) Ltd (Wellington), 1971) 202.

C. *Statutory Guidelines – Section 22 of the New Zealand Bill of Rights Act 1990.*

Section 22 of the New Zealand Bill of Rights Act 1990 (NZBORA) specifically guarantees the rights of persons not to be arbitrarily arrested or detained.

In New Zealand an unlawful arrest will, in general, be arbitrary.[57] In adhering to this rule, the Courts have limited the Police power to arrest by stating that the discretion to arrest is necessarily constrained by the 'purposes underlying s 315'.[58]

In *Neilsen v Attorney General,*[59] the plaintiff was arrested on two charges of failing to account after depositing cheques of $80 and $50 in his own account after he had carried out work for a client without entering details in the company job book. In cross examination, the arresting constable admitted that there was no evidence the plaintiff might commit further offences; that there were no accomplices and no question of witnesses being interfered with; no question of destruction or concealing the evidence; no suggestion that the plaintiff was likely to abscond and that he did not have a criminal history or a reputation for fraud.

In *Neilsen*, it was not disputed that that the arresting officer had good cause to suspect that an offence had been committed. The requirement was then for the officer to decide whether or not to arrest. The issue in this case was whether the decision to arrest the plaintiff was unlawful, and therefore arbitrary, having regard

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[57] See *R v Goodwin (No. 2)* [1993] 2 NZLR 390, 394 (CA) Cooke P where the Court of Appeal left open the possibility that there may be some limited exceptions to this rule. For example where an unlawful detention is necessary for the safety of the detainee or any other persons; or detention in good faith for reasons falling just short of reasonable and probable grounds.

[58] *Neilsen v The Attorney General*, above 11.

[59] (3 May 2001) Court of Appeal CA 101/00 Richardson P.

to the purposes underlying the arrest provisions in s 315.[60] In considering whether an arrest was arbitrary, the Court held: [61]

> Whether an arrest is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures. Read together, s 22 affirms and infuses values underlying s 315…

The Court held that the arrest without warrant was unlawful and arbitrary because the arresting officer improperly exercised his discretion to arrest in a case where there was clearly no need to arrest the accused and a summons would have sufficed.

The Court of Appeal in *Neilsen* appears to have read down the statutory power conferring Police with the power to arrest. It may be argued that in writing in a specific condition that an arrest must be reasonable, the Courts are placing restrictions on Police officers that Parliament never intended. However, the approach adopted by the Court in *Neilsen* would seem consistent with section 6 of the NZBORA, which requires the Court to prefer to any meaning of an enactment, the meaning that is consistent with the rights and freedoms contained in the Bill of Rights.[62]

Similarly, in *Attorney-General v Hewitt*,[63] the respondent was arrested following an allegation he had assaulted his de facto partner. The Court determined

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[60] Crimes Act 1961.
[61] *Neilsen v Attorney General*, above, 12.
[62] See also *R v Laugalis* (1993) 10 CRNZ 350 (CA) Hardie Boys J where the Court appears to have followed a similar line of reasoning. In *Laugalis*, the Court of Appeal considered the reasonableness of a search, without warrant, of the respondent's vehicle under s 18(2) Misuse of Drugs Act. The vehicle and the occupants were both in Police custody at the time the search took place. In considering s 21 NZBORA (right against unreasonable search and seizure), the Court held that the reasonable exercise of the power to search is limited to circumstances where a search without warrant is reasonably necessary. The Court relied on s 6 NZBORA in imposing this restriction.
[63] [2000] 2 NZLR 110 (HC) Randerson and Neazor JJ.

that the decision to arrest was in "blind adherence"[64] to a police policy in force at the time. The Kapiti Abuse Intervention Programme applied to domestic disputes and required that "when an offence had been disclosed involving assault or danger to a victim from an offender and there is sufficient evidence to arrest the offender, he/she is to be arrested and charged".[65] The Court held that a "fixed determination to arrest come what may is not only unlawful but must also be regarded as arbitrary for the purposes of s22 of the NZBORA".[66]

In reaching its conclusion, however, the High Court in *Hewitt*, did not attempt to read into s 315 any limitation on the police power to arrest, as the Court of Appeal had done in *Neilsen.* More specifically, the Court did not consider it necessary to consider the circumstances in which an 'unnecessary' and 'unreasonable' arrest may be arbitrary.[67] Rather, the Court relied upon the earlier decision in *Thomas*[68] to conclude that the Police officer took into account an irrelevant consideration by adhering to a police policy that mandated arrest in offences involving domestic violence and so disabling the individual officer to exercise their discretion to arrest.

In regard to s 22 of the NZBORA, then, the case law suggests that an arrest may be arbitrary if it is unlawful. Parliament has required that for an arrest to be lawful, an officer must have good cause to suspect an offence has been committed before considering the discretion to arrest. While Parliament has not seen fit to introduce any qualifications to this discretion, the courts have imported a requirement that the decision to arrest must be reasonable, having regard to proper procedures and the underlying purpose of arrest.

This approach differs from international jurisprudence on human rights law.

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[64] *Attorney General v Hewitt*, above, 124.
[65] See *Attorney General v Hewitt,* above, 116.
[66] *Attorney General v* Hewitt, above 124.
[67] *Attorney General v Hewitt*, above, 124, where the Court considered the discussion of "arbitrary" by the Human Rights Committee of the *United Nations in Van Alphen v The Netherlands* (1990-92) 3 NZBORR 327, which required that an arrest must not only be lawful, but be reasonable in all the circumstances.
[68] *Thomas v The Attorney General* (14 August 1997) Court of Appeal CA 139/96 Keith J.

The NZBORA was enacted to give domestic effect to New Zealand's international obligations as a signatory to the International Covenant of Civil and Political Rights (ICCPR). The purpose of this Act was to guarantee fundamental human rights and freedoms within a statutory framework.[69] More relevantly, s 22 of the NZBORA was taken directly from article 9(1) of the ICCPR.[70]

The meaning of arbitrary in the context of article 9(1) has been considered by the Human Rights Committee of the United Nations in *Van Alphen v The Netherlands.*[71] In this case, the author was arrested on suspicion of being involved in a complex tax fraud scheme. The author was detained for approximately nine weeks. It was not in dispute that this detention was lawful, as the judicial authorities who extended the author's detention acted in accordance with the provisions of the Code of Criminal Procedure. The Court went on to consider whether other factors may render an otherwise lawful detention arbitrary.

The Committee held:[72]

> The drafting history of article 9, paragraph 1, confirms that arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that a remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or recurrence of crime.

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[69] New Zealand Bill of Rights Act 1990, the Long Title states that it is an Act:
(a) to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
(b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

[70] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 9(1) specifically provides:
"Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds in accordance with such procedures as are established by law".

[71] (1990-92) 3 NZBORR 326.

[72] *Van Alphen v The Netherlands*, above, 337.

In *Van Alphen*, the Committee determined that the reason for the author's detention was that he refused to disclose any details of the tax scheme. The Committee held that there had been a violation of article 9(1), as the author was not obligated to assist the authorities in the case against him. In these circumstances, the detention, while lawful, was unreasonable and therefore arbitrary in terms of article 9(1).

Similarly, the concept of arbitrariness has been considered in article 17 of the ICCPR.[73] In the Human Rights Committee General comment on article 17, the Committee recommended that: [74]

> arbitrariness is intended to guarantee that every interference provided for under the law should be in accordance with the provisions, aims and objectives of the covenant, and should be, in any event, reasonable in the particular circumstances.

In interpreting what is reasonable, the Human Rights Committee in *Toonen v Australia*[75] considered a reasonable interference with privacy needed to be measured on 'reasonable and objective criteria and which are proportional to the purpose for which they are adopted'.[76]

Therefore, the interpretation of article 9(1) of the ICCPR recognises that an arrest made in accordance with domestic law as being lawful but still may be arbitrary if the arrest is not reasonable and necessary in all the circumstances. Applying the Human Rights Committee's interpretation of article 9(1) to section 22 of the NZBORA, this approach does not put any strain on Parliament's

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[73] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 17 specifically provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence.

[74] Human Rights Committee "General Comment No. 16" in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (International Human Rights Instruments, United Nations, 12 May 2003) 142.

[75] (31 March 1994) Human Rights Committee Communication No. 488/1992.

[76] *Toonen v Australia*, above, 6.

enactment of the arrest provisions. An arrest would be lawful where a Police officer had good cause to suspect an offence had been committed, but may still be arbitrary in circumstances where the arrest was unreasonable or unnecessary.

The New Zealand interpretation to s 22 of the NZBORA maintains that an arbitrary arrest is necessarily unlawful. From a pragmatic point of view, then, does anything turn on whether the arrest is deemed lawful or unlawful if it is unreasonable in the circumstances? From a New Zealand perspective, the answer lies in the long title to the NZBORA. Principally, that it is an act to "affirm, promote, and protect fundamental human rights in New Zealand". A declaration by the courts that an arbitrary arrest is also unlawful is likely to further affirm and promote and protect the rights of the individual against an unreasonable seizure. The significance of the unlawfulness of any arrest may be further reflected in any remedies awarded for a breach of a fundamental human right.[77]

In New Zealand, the Courts have not yet ruled on the issue of whether an arrest, which is lawful, may still be arbitrary for the purposes of s 22 of the NZBORA

The common thread in both the approach in New Zealand, and the approach by the Human Rights Committee is the requirement that to avoid arbitrariness, an arrest must be reasonable in all the circumstances. However, the New Zealand courts have failed to establishing any objective criteria from which the reasonableness of an arrest may be measured.

In interpreting s 22 of the NZBORA, then, the Courts have held an arrest is arbitrary, and therefore unlawful, if it is unreasonable in all the circumstances. An arrest is unreasonable if it is not made by reference to substantive and procedural

[77] See *Simpson v Attorney General [Baigent's case]*[1994] 3 NZLR 667 (CA) which established a remedy of public law damages directly against the State for a breach of the Bill of Rights.

standards.[78] To this end, the Courts have attempted to rely on internal guidelines, issued by the Police themselves, in determining the principles under which arrest is the appropriate response.

D. Internal Police Controls

Section 30 of the Police Act 1958 gives the Commissioner of Police the power to issue guidelines and requires that "all members of the Police shall obey and be guided by those instructions".[79] Specifically, General Instruction A291 (1) requires that in exercising the power to arrest without warrant, a police officer should consider, foremost, "whether prosecution is the best way of resolving the matter".[80] However, once the decision to prosecute has been made, the instructions provide:[81]

> (1) The power to arrest without warrant, especially for minor offences, is to be exercised with discretion. Where persons can be brought before the Courts by way of summons, this course should be followed.

While proceeding by way of summons is the preferred option, particularly for minor offences, no guidance is offered of the type of offences that are to be considered 'minor' or in determining the circumstances under which criminal proceedings "can" be commenced against a person by way of summons.

Similarly, General Instruction A 297[82] serves as a guideline to Police in managing situations involving minor behaviour and language offences. For minor offences where there is no element of violence, it is advised that consideration should be given as to whether the offender should be prosecuted at all.

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[78] *Neilsen v The Attorney General* (12 March 2001) Court of Appeal CA 101/00, 17 Richardson P.
[79] Police Act 1958, s 30(1).
[80] Correspondence with Joanna Bond, Legal Advisor for the Office of the Commissioner of Police (the author, Wellington, 2 September 2003).
[81] Correspondence with Joanna Bond, above.
[82] Correspondence with Joanna Bond, above.

Prosecution action, and therefore, the discretion to arrest for language and minor offending should only be triggered in circumstances where:

(a) the offending is likely to lead to violence to other people or damage to property and;
(b) the offender fails to desist from the unlawful activity when required to stop by police.[83]

It should be noted that more detailed guidance was given to police in the *Manual for Detectives*[84] in the use of their discretion to arrest. These guidelines set out, explicitly, the purposes of arrest and the relevant factors that an officer must consider before making an arrest. However, these guidelines were replaced by a *Manual of Best Practice*, which outlines the legislation and procedures for arresting without warrant.[85] In defining arrest, the manual states the reasons for which an arrest can be made:[86]

- to ensure that the person appears in court;
- to safeguard the persons own interest;
- to safeguard the public interest.

Similar to the General Instructions, the *Manual of Best Practice* asks the police officer to consider whether the offending 'really warrants the intervention of the criminal law'. While the Manual states that one of the purposes of arrest is to ensure a suspect's attendance at court, it remains silent as to the factors to be considered in safeguarding the interests of the suspect and the public interest, though the interests of the public would be met through the prevention of further crime.

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[83] Correspondence with Joanna Bond, above, General Instruction A297(2).
[84] See *Neilsen v The Attorney General* (3 May 2001) Court of Appeal CA 101/00, 13 Richardson P.
[85] Interview with Joanna Bond, Legal Advisor for the Office of the Commissioner of Police (the author, Wellington, 4 September 2003).
[86] Correspondence with Joanna Bond, above.

In safeguarding the interests of the suspect, it appears that the police will arrest a person for 'their own good', even though what is 'good' for them necessarily involves disregarding their freedom. In the case of an intoxicated person suspected of committing a minor public order offence, such as using offensive language in a public place,[87] the police may be justified in arresting the individual if they consider that person to be unable to look after their own welfare until they become sober.

The danger here is that the police are enforcing their decision upon an individual that they are in need of protection, as opposed to allowing the person to accept or reject the offer for assistance. However, it may be argued that an intoxicated person, whose judgment is impaired, may not be in a position to make a reliable decision as to their own welfare or safety.

Pursuant to section 37A of the Alcoholism and Drug Addiction Act 1966, the police may take any person found to be intoxicated in a public place to their usual residence,[88] or to a temporary shelter or detoxification centre if it is not practical to arrange for transport home.[89] As a last resort, an intoxicated person may be detained at a police station for a period not exceeding 12 hours.[90] However, General Instruction A296 of the official police guidelines states that the provision of such transport is not appropriate where the person has committed an offence.[91] This qualification is not replicated in the legislation, which provides that the police may provide transport for *any* intoxicated person found in a public place.

Unless there are reasonable grounds for suspecting that an intoxicated person is likely to commit further offences if not detained, to arrest a person for

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[87] Summary Offences Act 1981, s 4.
[88] Alcoholism and Drug Addiction Act 1966, s 37A(2)(a).
[89] Alcoholism and Drug Addiction Act 1966, s 37A(2)(b).
[90] Alcoholism and Drug Addiction Act 1966, s 37A(2)(c).
[91] Correspondence with Joanna Bond, Legal Advisor for the Office of the Commissioner of Police (the author, Wellington, 2 September 2003).

'their own good' would not seem a legitimate purpose of the power to arrest. An intoxicated person is more likely to resent the police for their decision to arrest, even if it is purported to be made in safeguarding the person's own interest. Consequently, there is a possibility that the decision to arrest may escalate the situation, resulting in the commission of more serious offences against the police. Providing that the name and address of the intoxicated person is readily ascertainable, it is suggested that the police should prefer an alternative course to arrest by providing the intoxicated person with transport home or a temporary shelter, in accordance with section 37A of the Alcoholism and Drug Addiction Act 1966. If the aim of the intoxicated persons legislation is to protect an intoxicated person from harm and to prevent them from causing further trouble, the police should not impose further conditions on the operation of s 37A[92] that parliament did not intend. It is further suggested that in preferring to transport an intoxicated person to a residential address, as opposed to arresting without warrant, the rights of the individual to be secure against arbitrary arrest are further protected.[93]

The official police guidelines, then, emphasise the need for a police officer to consider alternatives to prosecution for minor offences, such as a warning, caution or referral to another agency. Apart from the need to ensure a suspect's attendance at court, the guidelines are largely silent as to when an arrest is warranted once the decision to prosecute has been made. However, the prospect of violence or damage to property in the context of a continuing public order offence may warrant the sanction of the criminal law, and necessarily, a consideration of the use of arrest.

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[92] Alcoholism and Drug Addiction Act 1966.
[93] New Zealand Bill of Rights Act 1990, s 22; s 6.

PART III: POLICE PRACTICE

From the discussion above, the police must rely only on relevant considerations in exercising their power of arrest. What is to be deemed relevant must be based on the legitimate purposes of arrest. Though parliament, the courts, and the police themselves, have been reluctant to clearly lay down the specific purposes for which arrest may be used, it appears that the reasons for refusing bail will often justify the use of arrest. These purposes include the need to confirm the identity of the offender; to ensure the presence of the offender at court; to prevent further crime; and to protect against any interference with evidence or witnesses. A further factor may also include whether the suspect has any previous convictions or reputation for committing similar offences. However, it is not likely that a police officer will be aware of a suspect's criminal history at the time the decision to arrest is made.

It is suggested that these considerations are less likely to be to the fore in dealing with minor offences. The nature of minor offences, as defined for the purposes of this paper, is such that they are largely public order offences.[94] These include offences against the police;[95] committing acts of indecency;[96] nuisance;[97] and loitering and trespassing.[98] These offences are, generally, highly visible. The remaining offences involve dishonesty crimes, resembling simple forgery of public documents[99] and defrauding the public by seeking donations by false pretences[100] or acting as a medium.[101] It is suggested, then, that the identity of a suspect is less likely to be in issue for all these offences. This is due to the high

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[94] Summary Offences Act 1981, ss 3-8.
[95] Summary Offences Act 1981, ss 21-25.
[96] Summary Offences Act 1981, s 27.
[97] Summary Offences Act 1981, ss 32-38.
[98] Summary Offences Act 1981, ss 28-31.
[99] Summary Offences Act 1981, s 17-20.
[100] Summary Offences Act 1981, s 15.
[101] Summary Offences Act 1981, s 16.

visibility of both, the public order and dishonesty offences. However, for offences involving receiving or theft of property of a lesser value,[102] the identity of the suspect may be more of an issue.

Upon being spoken to, a suspect's identification can be easily verified through a form of written identification, such as production of a driver's licence or bank card, for the purposes of serving a summons upon the suspect at a later date.[103] Furthermore, there is little danger of a suspect interfering with witnesses or evidence as the offences are likely to occur in the public domain. There is little opportunity, or hope, to conceal evidence in relation to the offence.

Furthermore, the commission of a minor offence is more likely to be the result of a one off incident, as opposed to an ongoing offence. Therefore the prevention of further crime is less likely to be a relevant consideration in the decision to arrest, although an arrest may be warranted in circumstances where a suspect fails to stop the unlawful activity once being called upon to do so by the police.

The lower range of penalties available for minor offending suggests that the likelihood of a custodial sentence would only be reserved for offences within, or near the most serious of cases, with the defendant having had previous convictions for similar offences.[104] This may mean that the risk of a defendant failing to attend court is diminished as the prospect of a custodial sentence is significantly reduced in minor offending.

Therefore, it is suggested that in bringing offenders before the criminal justice system for minor offences, arrest should be less frequently used than

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[102] Crimes Act 1961, s 227(1)(d); s 258(1)(c).
[103] See also Summary Offences Act 1981, s 39(2) that provides that a police officer may only arrest a suspect without warrant for specified offences, generally being nuisance offences, if the suspect fails to give their name and address on demand.
[104] Sentencing Act 2002, s 8(d).

summons. This is on the proviso that the power to arrest is exercised only in accordance with its legitimate purposes.

The table below illustrates the total number of recorded apprehensions for offences under the Summary Offences Act, and offences under section 227(1)(d) and section 258(1)(c) of the Crimes Act 1961[105], were resolved by prosecution for the fiscal year 2002/2003 (ending 30 June):[106]

Recorded Apprehensions for Summary Offences Act and Selected Crimes Act offences that were resolved by Prosecution for fiscal year 2002/2003 (ending 30 June)

Offence	Section 227(1)(d) and 258(1)(c) of Crimes Act 1961 Offences	Summary Offences Act Offences	Sum:
Total Apprehensions	7271	30802	**38073**

[105] Both specified offences under the Crimes Act 1961 carry a maximum penalty of a term of imprisonment not exceeding 3 months.

[106] Correspondence with Gavin Knight, National Statistics Manager, Office of the Commissioner of Police (the author, Wellington, 15 September 2003).

Also, the total number of recorded apprehensions for selected offences that were resolved by prosecution, and resulted in arrest is shown in the table below.[107]

Recorded Apprehensions for Summary Offences Act and Selected Crimes Act offences that resulted in Arrest and resolved by Prosecution for fiscal year 2002/2003 (ending 30 June)

Offence	Section 227(1)(d) and 258(1)(c) of Crimes Act 1961 Offences	Summary Offences Act Offences	Sum:
Total Apprehensions	6576	29020	**35596**

The statistics show that of 38,073 prosecutions for minor offences for the year ending the 30th of June 2003, 93.5% were commenced by arrest, with only 2477 prosecutions proceeding by way of summons.

A degree of caution should be taken when interpreting these results, however. These statistics are based on the number of apprehensions, as opposed to offenders, that have been recorded. Apprehension statistics count the number of instances where offenders have been dealt with. Therefore, one offender may be

[107] Correspondence with Gavin Knight, above. These statistics relate to Police administrative data derived from the Justice sector Law Enforcement System (L.E.S.)

apprehended many times for more than one offence. The use of arrest may be justified where a person is suspected of committing multiple offences, including more serious offences. Furthermore, the statistics are not able to give any insight into the circumstances of the particular case. Specifically, no insight is gained into whether the commission of these minor offences involved the prospect of violence to other persons or damage to property and whether the offence is a continuing one.

However, given the overwhelming arrest rate for minor offences, it is difficult to avoid the conclusion that the police do not strictly adhere to the legitimate purposes of arrest when exercising this power.

The police may rely on any number of reasons in support of their decision to arrest. Any guideline must, however, take into account the exigencies faced by an individual police officer in their daily work. What is required is a balance between the interests of the police in retaining sufficient flexibility in exercising their discretion to arrest, and the rights of the suspect to be protected from an arrest based on illegitimate grounds. It is suggested that police rely on a number of irrelevant considerations in determining whether an arrest is appropriate in the circumstances of the case, which in turn, has lead to the vast majority of prosecutions being initiated through the arrest procedure.

PART IV: WHY ARREST?

As a matter of criminal procedure, where a police officer suspects an offence to have been committed, the officer may elect to commence criminal proceedings by way of summons. This procedure requires the police officer to lay an information in Court[108], with sufficient particulars to inform the defendant of the offence to which they have been charged[109]. The Court may then issue a summons for the defendant to appear in Court, which is to be served upon the defendant[110]. All members of the Police force are authorised to serve a summons[111]. This method is the only alternative to an arrest without warrant in initiating criminal proceedings.

As illustrated by the statistics, of all minor offences for the year ending the 30th of June 2003, only 6.5 per cent of prosecutions were commenced by way of summons. If it is accepted that the legitimate purposes of arrest are of less significance in bringing a person before the courts for a minor offence, the police must, therefore, take into account matters that they ought not in making the decision to arrest. The reluctance on the part of police to use the summons procedure may be explained by the greater expedience of arresting an alleged offender in commencing criminal proceedings.

A. The Advantages and Disadvantages of the Summons Procedure

By its very nature, the summons procedure does not require the physical detention of an individual. The deprivation of liberty, inherent in an arrest, may be viewed as a 'form of detention without trial'[112] and used as a method of punishing

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[108] Summary Proceedings Act 1957, s 12(1).
[109] Summary Proceedings Act 1957, section 17.
[110] Summary Proceedings Act 1957, s 19(1)(a).
[111] Summary Proceedings Act 1957, s 25(1)(a).
[112] Terrance Arnold "Why Arrest" in R.S. Clark (ed.) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z.) Ltd (Wellington), 1971) 202, 206.

or harassing an individual by placing them in a foreign and uncomfortable environment through the period of their detention. By ensuring the liberty of the individual, the use of a summons adds weight to the traditional notion of the common law that a person is innocent until proven guilty.

As such, the summons procedure has been described as 'discreet', as it involves little publicity and is less likely to cause any conflict between the community at large and the Police, who rely heavily on the good will and cooperation of the public in performing their tasks.[113] It is also likely that the summons is a cheaper method of bringing people before the criminal justice system, as it requires less man hours, and does not require the use of holding cells.

However, in electing to proceed by way of summons, a police officer must, first, be satisfied that the identity of the alleged offender is reliable to ensure service of the summons at a later date. A further perceived disadvantage of the summons procedure is the issue of delay as the person who is summonsed may not be called to appear before the court for some weeks. The police officer is then required to serve the summons, often described as a "wearisome, often frustrating task, much disliked by policemen".[114]

While the summons procedure may not be the most efficient method of bringing an individual before the Court, the fact that it may simply be 'easier' to arrest should not be regarded as a relevant consideration in the officer's discretion to arrest and does not amount to a legitimate objective of arrest.

While expediency may be a major factor taken into account by police in considering their discretion to arrest, it is suggested that police attitudes towards various ethnic groups, particularly Maori, may also impact on the exercise of this discretion.

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[113] Arnold, above, 221.
[114] Arnold, above, 222.

B. Ethnicity

The overrepresentation of Maori, as offenders, appearing before the criminal justice system has a consequent bearing on police perceptions of Maori as well as Maori perceptions of police.[115] The issue is to what extent these views of Maori and police influence the decision making of police in the use of arrest.

In 1997, the New Zealand Police and Te Puni Kokiri commissioned research on perceptions of Maori and Police. In relation to police views about their treatment and attitudes toward Maori, the research found that while, for the most part, police officers reported that Maori and non-Maori were treated similarly, there was a greater tendency for Police to suspect Maori of an offence. It was further reported that "at least two thirds' heard colleagues use racist language about suspects or offenders".[116] This report concludes that "the survey shows that discriminatory language and behaviour are part of the police occupational culture".[117]

The research on Maori perceptions of the police shows that "participants were unanimous in their perception that the police institution is a racist institution that perpetuates strong anti-Maori attitudes".[118] Therefore, participants believed that simply being Maori was sufficient cause for police suspicion.[119] In relating their experiences with Police, participants cite examples in which they perceive

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[115] See G Maxwell & C Smith *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri*.(Institute of Criminology, Victoria University of Wellington, March 1998).

[116] Maxwell & Smith, above, vi.. The authors question the accuracy of police self report and suggest that these results 'underestimate discriminatory behaviour because many police officers will have responded in ways that are consistent with presenting a good image of themselves and their colleagues. Others with negative attitudes may have failed to respond".

[117] Maxwell & Smith, above, 31.

[118] P Te Whaiti & M Roguski *Maori Perceptions of the Police* (He Parekereke/ Victoria Link Ltd, Wellington, September 1998) 2.

[119] B. James *Challenging Perspectives: Police and Maori Attitudes Toward One Another* (Te Puni Kokiri and the New Zealand Police, Wellington, June 2000) 12.

police harassment of Maori on the pretext of criminal suspicion, 'with the intent of provoking Maori into retaliation to justify subsequent arrests'.[120]

An earlier study by Dance looked specifically at whether police decision making in the area of arrest was influenced by the officers' perceptions of the race of the suspect.[121] The study confirmed that police perceptions of Maori were generally negative,[122] but concluded: [123]

> the results of this study support the claim, usually made by police personnel, that police exercise their discretionary powers without reference to the race of the person with whom they are dealing.

However, this study looked only at police perceptions of Maori and failed to address the issue of how Maori and Police relate to each other:[124]

> If individuals believe they will be treated in a certain way, or that others hold particular views about them, then that belief will affect the way those individuals act, regardless of how accurate the belief is.

The police themselves report that policing behaviour is more likely to be related to people displaying certain attitudes, or dependant on context such as people congregating in certain areas, rather than ethnicity.[125] However, if Maori hold the perception that they are going to be targeted on the basis of skin colour, regardless of whether police have formed a reasonable suspicion of criminal

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[120] P Te Whaiti & M Roguski,, above, 30.
[121] O R Dance *The Influence of Police Perceptions of Maoris on Decisions to Arrest or Prosecute* (MBA Research, Paper Victoria University of Wellington, 1987)
[122] Dance, above, 2. In this study, questionnaire's were sent to serving police personnel. The questionnaire's contained a set of narratives describing typical situations dealt with by police. In each narrative, the surname of the offenders were varied so some respondents would perceive the suspect of probably being Maori.
[123] Dance, above, 4.
[124] B. James *Challenging Perspectives: Police and Maori Attitudes Toward One Another* (Te Puni Kokiri and the New Zealand Police, Wellington, June 2000) 8.
[125] G Maxwell & C Smith *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri*.(Institute of Criminology, Victoria University of Wellington, March 1998) 32.

activity, then the behaviour of Maori may reflect this belief. That is, if Maori perceive police to hold negative views of Maori, it is suggested that Maori will display similar negative attitudes toward police.[126] This distrust of police may take the form of non co-operation with police in the course of questioning or Maori obtaining their own redress as a victim of crime, as opposed to going to the police for assistance.[127]

The evidence in the reports suggests that police use their wide discretionary powers to more frequently target Maori.[128] However, where police view this targeting of Maori as a consequence of the demonstration of particular attitudes or behaviour, Maori view this intrusion as a result of racism on the part of police. The overall effect is that the targeting of Maori by police is based on each group holding to negative perceptions of the other.

In addition to the extent that police perceptions of the ethnicity of the offender contribute to the decision to arrest, it is further suggested that police may justify the use of arrest by reference to the seriousness of the offence charged. A temptation for the police to 'overcharge' is now supported by the formal plea bargaining process inherent in the courts exercise of its summary jurisdiction.

C. Plea Bargaining

The practice adopted by New Zealand District Courts, acting in its summary jurisdiction, is now for a case to proceed to a status hearing following the entry of a 'not guilty' plea.[129] The purpose of a status hearing was discussed in the High Court *in Haskett v Thames District Court:*[130]

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[126] P Te Whaiti & M Roguski *Maori Perceptions of the Police* (He Parekereke/ Victoria Link Ltd, Wellington, September 1998) 8.
[127] P Te Whaiti & M Roguski, above, p12.
[128] B. James *Challenging Perspectives: Police and Maori Attitudes Toward One Another* (Te Puni Kokiri and the New Zealand Police, Wellington, June 2000) 11.
[129] Summary Proceedings Act 1957, Part II which governs the exercise of summary proceedings, contains no express authorisation for matters to proceed to a status hearing on the entry of a not guilty plea.

> Typically, a District Court Judge will give some indication of how he or she views the strength of the informant's case, and may give an indication as to likely sentences. In some cases, a defendant may indicate a willingness to plead to a lesser charge, or charges are withdrawn.

It is this practice of the police substituting a lesser charge to secure a guilty plea from a defendant that gives rise to the danger that a police officer may prefer a more serious charge in the first instance. In effect, status hearings are a formal plea bargaining process[131] that may lead to the police 'loading up' on charges with a view to withdrawing or substituting lesser charges following a period of negotiation.[132]

For example, in a fact situation in which one person shapes to punch another at close range, there is an assault.[133] This type of assault can be described as minor at best, as there is no physical injury to the victim. Assuming that a police officer deems the offence to be suitable for criminal sanction, an officer may prefer a charge of assault under the Crimes Act, which carries a maximum penalty of 1 year imprisonment.[134] A more appropriate offence, which reflects the lesser degree of criminality in this instance, is the option of laying a charge of assault under the Summary Offences Act 1981, which carries a maximum penalty of six months imprisonment.[135] The police officer retains a complete discretion as to which Act the offender may be charged.[136]

However, it is acknowledged that a court must have an inherent power to regulate its own proceedings (*Connelly v DPP* [1964] 2 All E R 401 (HL).

[130] 16 CRNZ 377, 379 (HC) Hammond J.

[131] B Davidson "Plea Bargaining Banned in UK – NZ Status Hearings" (2000) 47 Northern Law News 10.

[132] D Webb "Plea Bargaining: Should Criminal Justice be Negotiable" (1992) NZLJ 421.

[133] Crimes Act 196, s 2 defines assault with a corresponding definition in Summary Offences Act 1981, s 2(1). These provisions provide that an assault includes the threat by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has present ability to effect his purpose;

[134] Crimes Act 1961, s 196.

[135] Summary Offences Act 1981, s 9.

[136] Crimes Act 1961, s 10(1) states that where an act or omission constitutes an offence under the Crimes Act and under any other Act, the offender may be prosecuted and punished under either Act.

Assuming there is no danger of any further violence, in preferring the more serious charge of Crimes Act assault an officer may regard themselves as being further justified in exercising their discretion to arrest to mark the more serious nature of the offence. However, this does not necessarily mean that arrest is a legitimate response to more serious offending. Simply because a more serious offence is alleged does not necessarily infer that a suspect is less likely to appear in court when required, though the risk of flight may increase when the maximum penalty prescribed is raised.

While arrest should not be used to mark the seriousness of a crime, there must be a range of more serious crime in which a suspect is to be arrested, with the issue of bail left to be determined.[137]

Once an individual is arrested and taken into custody, the Police, then, have the option of exercising certain rights in processing the individual. Recourse to these rights is incidental to arrest, but may also have a bearing, albeit an illegitimate one, on the decision making process of a police officer who must exercise their discretion to arrest.

D. Rights Incidental to Custody

Section 57(1) of the Police Act 1958, gives the Police a discretion to take the particulars for identification of the person in custody. These particulars include the right to take an individual's photograph, fingerprints and palm print. The only requirement that needs to be fulfilled is for the individual to be in lawful custody at a police station.[138]

On the face of it, this 'processing' of an individual does not appear an overly intrusive procedure. The police may simply make an arrest in situations where

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[137] *Neilsen v The Attorney General* (3 May 2001) Court of Appeal CA 101/00 16, Richardson P.

[138] Police Act 1958, s 57(1A) provides that a police station may include any other premises, or any vehicle, being used for the mean time as a police station.

they are doubtful of the person's identity as an officer would only have been able to proceed by summons once they can be sure that an individual's name and address are correct.

However, in the context of minor offending, this compilation of a formal police record may add to the feeling of a person being treated as a 'common criminal' in cases where the Police have no evidence to suspect an individual may re-offend, interfere with witnesses or commit further offences during the remand period. Certainly, this was the view held by many arrested during the liquor ban in Tauranga over the 2002/03 Christmas and New Year holiday period.[139]

In relying on illegitimate factors in justifying the use of arrest, the Police face two major issues. Firstly, the police may alienate themselves from the wider community in which they work. The police rely on information from the general public to detect and investigate crime. This information will only flow if the community trusts the police to act fairly in the exercise of their powers. If an individual is arrested for a minor offence in circumstances where that arrest is not appropriate, the police may appear heavy handed in their approach in abusing their power to arrest. The resulting distrust of the police to fairly execute their duties may mean the public are less willing to cooperate with police and divulge information leading to the detection and investigation of a criminal offence. The ability of the police to protect the community it serves is, then, necessarily undermined.

Secondly, in using arrest in circumstances where a summons may be the more appropriate response, the Police may further inflame a situation, leading to a suspect committing more serious offences. It is on this basis that the courts in New South Wales have emphasised that the power of arrest should only be used when necessary and under the appropriate circumstances.

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[139] Interview with Mr. John Miller, barrister (the author, Wellington, 8 July 2003).

PART V: A COMPARATIVE STUDY – THE NEW SOUTH WALES APPROACH TO THE DISCRETION TO ARREST.

In New South Wales, the legislature has also provided the police with a wide discretion to arrest without warrant "any person who he with reasonable cause, suspects of having committed any summary or indictable offence".[140] However, the approach taken by the Courts in New South Wales has been to reserve the use of arrest to situations where it is "clearly necessary".[141] This means that police officers must consider alternatives to arrest in bringing a person before the criminal justice system on suspicion of committing a minor offence.

In *DPP v Carr*,[142] the respondent was arrested for continually swearing at a policeman. An offence of offensive language, pursuant to section 4A Summary Offences Act 1988 (NSW) carried a maximum penalty of a $660 fine. The respondent was intoxicated at the time he allegedly uttered the offensive words. A decision was taken to arrest the respondent. During the course of the arrest, the respondent pushed the officer in the chest and took hold of the officer's shirt causing it to tear. The respondent then broke free of the arresting officer and ran down the side of the police vehicle before he was apprehended again and placed inside the police vehicle. While in the dock at the police station, the respondent threatened to kill the arresting office and members of his family. For these acts, the respondent was also charged with offences of resist police,[143] assault police[144] and intimidate police.[145] All these offences are punishable by a term of imprisonment.

The issue for the Court was whether the magistrate properly exercised his discretion in excluding the evidence relating to these further offences as they were

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[140] Crimes Act 1900 (NSW), s 352(2)(a).
[141] *Lake v Dobson* (119 December 1980) PSR 2221(NSWCA) Samuels JA.
[142] *Department of Public Prosecutions v Lance Carr* [2002] NSWSC 194 Smart AJ.
[143] Crimes Act 1900 (NSW), s 546C.
[144] Crimes Act 1900 (NSW), s 60(2).
[145] Crimes Act 1900 (NSW), s 60(1).

obtained in consequence of an improper act,[146] namely, the arrest of the respondent for an offensive language charge.

The Court considered the guidelines on the use of arrest contained in the New South Wales Police Service Handbook. These guidelines emphasise the use of arrest "as a last resort", and clearly state:[147]

> Do not arrest someone for a minor offence, when it is clear a summons or alternative process will do.

In cross examination, the police officer stated he knew the respondent's name and address and did not consider a summons or any other process not requiring arrest as it was "far quicker" to arrest.[148]

In upholding that the evidence before the Local Court enabled the magistrate to make a finding of impropriety, the Court held:[149]

> The Court in its appellate and trial divisions has been emphasising for many years that is it inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded.

The Court specifically concluded that:[150]

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[146] Evidence Act 1995 (NSW). S 138(1).
[147] *Department of Public Prosecutions v Lance Carr* [2002] NSWSC 194, 198 Smart AJ.
[148] *DPP v Carr*, above, 210.
[149] DPP v Carr, above, 201
[150] *DPP v Carr*, above, 203.

> the officer did not issue a summons because that procedure involved him in more work and took far more time. The actions of the officer, as he must have realised would happen, escalated the incident and led to the alleged commission of further offences.

In this instance, the Court observed that the initial arrest was made out of expediency.

The New South Wales Parliament has recognised the temptation for a police officer to arrest as a matter of convenience. The detrimental effect of custody, particularly for Aboriginal people is also well documented.[151]

Pursuant to section 100AB of the Justices Act 1902 (NSW), a police officer has the power to issue a court attendance notice (CAN) for an indictable or a summary offence. The CAN is directed to the defendant and specifies who the informant is, describes the offence with relevant particulars, and directs the defendant to appear before a Local Court at a specified time and place to be dealt with according to law. The consequences of failing to attend court when required are explained, as well as the right to notify a plea in writing.[152]

Prior to 1993, the CAN was used as an alternative to the formal charging process, which included the taking of photographs and fingerprints. However, a police officer was still required to arrest a defendant as a CAN could only be issued by a supervising officer, generally posted at the police station. In 1993, Parliament allowed court attendance notices to be given any member of the police force, and therefore be issued in the field (FCAN). In making this amendment, Parliament intended the use of FCAN's would lead to fewer arrests and fewer offenders being taken into custody.[153] However, a police officer may still arrest and detain a suspect for the purpose of issuing them with a FCAN at the

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[151] See generally Royal Commission into Aboriginal Deaths in Custody *National Report* (NSW, 1991) <http: www.austlii.edu.au/au/special/rsjproject/rciadic/> (last accessed 6 October 2003),
[152] Justices Act 1902 (NSW), s 100AC (a)-(e).
[153] See *DPP v Carr*, above, 199.

roadside.[154] However the internal police guidelines are clear on the use of CAN's, in that the Police Service Handbook provides:[155]

> Do not arrest someone for a minor offence when a summons would get them before court. Do not use CAN's to circumvent proceedings by summons.

In the *Carr* decision, the respondent was charged with the well known trilogy of charges of offensive language, resist arrest and assault police, the latter two charges allegedly arising in the course of the arrest. This trilogy of charges has become known as the 'trifecta' in criminal defence circles and is said to contribute to the significant statistical overrepresentation of Aboriginal defendants before the Australian criminal justice system.[156]

Part of fostering more positive relationships between the police and members of the community, particularly Aboriginal people is to issue CAN'S to be issued in the field. That is to say, the issue of FCAN's without the need to arrest the alleged offender are supported by judicial statements emphasising that arrest only be used as a last resort.

The fact situation in *Carr* is indicative of the needless confrontation between police and citizens that may be avoided if police were more thoughtful in carrying out their duties. The escalation of the incident,[157] as it is referred to by Smart AJ, could easily have been avoided if the arresting officer was prepared to let the respondent calm down and walk away, later issuing him with a summons for the offensive language. Similarly, the officer did not tell the respondent to wait while he issued the respondent with a FCAN. In support of his decision to arrest, the police officer pointed to a need to avoid a continuing breach of the peace as the respondent continued to swear at the officer while walking away. However, the

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[154] Justices Act 1902 (NSW), s 100AD(4).
[155] See *DPP v Carr*, above, 199.
[156] Mark Dennis "Is this the death of the trifecta" (April 2002) 40(3) Law Society Jnl 66..
[157] *DPP v Carr*, above, 203.

Court did not consider it necessary to resort to arrest when there is no harm, in the sense of physical harm, done or likely to be done.

The decision in *Carr* shows that in New South Wales, the Courts are more willing to hold the Police accountable for their actions.

PART VI: CONCLUSION

Justice requires that any executive discretion must always be exercised within a proper legal framework. The purpose of such a framework is to ensure that the limits to that discretion are readily transparent to the individual affected, the body exercising that discretion, and to the general public. This, in turn, enables any misuse of the discretion to be reviewed by the proper authority.[158]

The power to arrest without warrant necessarily involves the deprivation of liberty, a power that may be considered an additional punishment that the police are able to enforce without proof of guilt.[159] The rights of the individual, then, are required to be balanced against the wider public interest in apprehending and prosecuting those persons suspected of having committed a criminal offence.[160] This balancing exercise necessarily varies according to the circumstances of the offence and the offender. To ensure that the police retain the flexibility required to deal with unusual or special cases, it would not be helpful to provide a set of rules detailing the circumstances where the use of arrest is appropriate. Rather, the circumstances in which the power to arrest may be exercised should be determined by reference to the legitimate purposes of the procedure with limits placed on the purposes for which arrest may be used.[161]

For persons suspected of committing minor offences, it is suggested that the interests of justice are met through the police relying on an alternative procedure to arrest in bringing offenders before the courts.

A. Lack of Effective Control: Parliament, the Courts and the Police

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[158] The Rt Hon Sir Thaddeus McCarthy "The Role of the Police in the Administration of Justice" in R.S. Clark (ed.), *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z) Ltd (Wellington), 1971) 170, 182.

[159] Terrance Arnold "Why Arrest" in R.S. Clark (ed.) *Essays on Criminal Law in New Zealand* (Sweet & Maxwell (N.Z.) Ltd (Wellington), 1971) 202, 206.

[160] *Attorney-General v Hewitt* [2000] 2 NZLR 110, 121 (HC) Randerson and Neazor JJ.

[161] Arnold, above, 203.

The power that Parliament has conferred upon a police officer to arrest without warrant involves a wide and unfettered discretion.[162] As the only alternative to the arrest procedure in initiating criminal proceedings, Parliament has provided for the use of summons[163] but has not sought to lay down any rules to determine the purposes for which each method is to be employed.

The specific reasons why a police officer may choose to arrest a suspect for a minor offence are necessarily going to vary and depend on the circumstances of the case. However, it does not follow that the police should, therefore, be allowed an unrestricted discretion to arrest. This approach would allow police officers to arrest on grounds as arbitrary as a suspect's attitude or appearance. Without a measure of control over the police discretion to arrest, the rights of the individual would be inferior to the interests of the police in preventing crime, whatever the cost. In light of Parliament's failure to address this balance, it would then seem appropriate that the courts and the police would provide the purposes for which arrest is the legitimate response.

The courts have taken the approach that while the power to arrest is subject to judicial review, such a review is confined to whether the police have relied on irrelevant considerations in determining that the use of arrest is appropriate in the circumstances of the case.[164] As Parliament has failed to provide any mandatory factors that a police officer must consider in making the decision to arrest, the courts are only prepared to go as far as providing that an arrest must be reasonable to avoid being arbitrary for the purposes of s 22 of the NZBORA. If an arrest is arbitrary, it is also deemed to be unlawful.[165] However, the courts have not gone on to provide any objective criteria against which a reasonable arrest may be measured.

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[162] Crimes Act 1961, s 315; Summary Offences Act 1981, s 39.
[163] Summary Offences Act 1981, s 12(1).
[164] *Thomas v The Attorney General* (14 August 1997) Court of Appeal CA 139/96, 9 Keith J.
[165] *Neilsen v The Attorney General* (12 March 2001) Court of Appeal CA 101/00, 17 Richardson P.

The Police General Instructions have emphasised the need for police to consider alternatives to the prosecution process for minor offences, such as a caution, warning, or referral to another agency. Prosecution action is considered appropriate in circumstances where there is a prospect of violence to other people, or damage to property as a result of a continuing offence. Therefore, the police guidelines indicate that arrest is a legitimate response in preventing further crime. The *Manual of Best Practice* states that a further reason to arrest is to ensure the suspect's attendance at court and that the decision to arrest be made in the interests of the suspect and the general public. No further guidance is offered as to what factors are to be taken into account in considering these interests.[166]

However, it appears that the factors that justify the refusal of bail will also justify the use of arrest.

B. The Legitimate Purposes of Arrest

Though the courts and the police have not sought to impose any mandatory considerations that a police officer must turn their mind to before making the decision to arrest, it is suggested that the following factors may amount to the legitimate purposes of arrest:

- to establish the identity of the suspect;
- to ensure that the accused attends court when ordered;
- to ensure that there is no interference with evidence or prosecution witnesses;
- to prevent the commission of further offences;

It is further suggested that these factors are of less relevance in considering the decision to arrest for minor offences. Therefore, a prosecution for a minor offence can more appropriately be commenced by an alternative method to arrest.

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[166] Correspondence with Joanna Bond, Legal Advisor for the Office of the Commissioner of Police (the author, Wellington, 2 September 2003).

The high visibility of the dishonesty and public order offences prescribed in the Summary Offences Act 1981, suggests that the identity of a suspect is less likely to be in issue. Furthermore, the fact that these offences are likely to be committed in the public domain, means the prospects of a suspect concealing evidence are low.

It is more likely that the commission of a minor offence is a result of a one off incident This reduces the possibility of a suspect committing further offences, unless the suspect fails to desist from the unlawful activity when called up to do so by the police, and there is a prospect that the continuing offence may lead to violence against other people or damage to property.

If convicted of a minor offence, the prospects that a suspect will be ordered to a custodial sentence are very low. Therefore, the risk that a suspect will fail to attend court when required is diminished.

If the police adhered to these legitimate purposes of arrest in respect of initiating criminal proceedings, it would follow that arrest would be less frequently utilised as a method for bringing a suspect before the courts.

However, the arrest rates for minor offence for the year ended 30th of June 2003, shows that police preferred to rely on their power to arrest in commencing 93.5% of 38,073 prosecutions.[167] However, problems do exist in interpreting this data. These statistics only record the number of apprehensions, or number of instances where an offender has been dealt with. The statistics do no record the number of offenders dealt with by way of prosecution action. Therefore, one offender may be responsible for the commission of multiple offences. Furthermore, the statistics give no insight into the circumstances of the individual case, and particularly, whether the offending involved the prospect of violence or

[167] Correspondence with Gavin Knight, National Statistics Manager, Office of the Commissioner of Police (the author, Wellington, 15 September 2003).

damage to property. Despite these difficulties, the overwhelming use of arrest in commencing prosecutions for minor offences suggests the police may also rely on irrelevant considerations in exercising their discretion to arrest.

C. *The Illegitimate Purposes of Arrest*

What amounts to an illegitimate purpose of arrest cannot be contained in an exhaustive list, and will necessarily vary depending on the facts of the individual case. A useful starting point, however, is where an officer purports to arrest for a legitimate purpose, but does not have reasonable grounds for that belief.

It is conceded that the summons procedure is a, largely, inefficient method of bringing a suspect before the court. The use of summons may help to preserve relationships between the police and the community by providing a discreet method of commencing criminal proceedings. However, this method involves considerable delay between the time a police officer lays an information alleging an offence, and the time a suspect is served with a summons. Further, the task of serving a summons upon a suspect takes up additional time and requires the police officer to be satisfied as to the name and address of a suspect. Though it may be easier for a police officer to arrest and release a suspect on bail, this is not a legitimate purpose of the arrest procedure.

Another irrelevant consideration that may impact upon a police officer's discretion to arrest are police perceptions of people of particular ethnic backgrounds. The impact of these perceptions is particularly acute for Maori, who are overrepresented, as offenders, in the criminal justice system. While police report that policing behaviour is more closely linked to people displaying certain attitudes and behavior,[168] studies into Maori perceptions of the police show that

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[168] G Maxwell & C Smith *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri*.(Institute of Criminology, Victoria University of Wellington, March 1998).

Maori believe they are targeted by police for, simply being Maori.[169] Whether this belief is factually accurate is, largely, irrelevant. It is suggested that if Maori believe that police hold racist views toward them, Maori will also display negative attitudes towards police. It is this behaviour, that police then rely on in exercising their powers, including their power to arrest.

Another factor that may be relied upon by police to justify the use of arrest is to mark the seriousness of the offence. While, this is not a legitimate consideration in itself, more serious offending may require the imposition of bail conditions during the remand period, including the need to ensure against the suspect taking flight. It is suggested that the advent of status hearings as a formal plea bargaining process encourages police to inappropriately prefer more serious charges, with a view to negotiating a plea of guilty to a lesser charge later in the proceedings.

Once a suspect is arrested and taken into custody, the police have the option of exercising certain rights over the suspect, such as taking fingerprints and photographs.[170] While this 'processing' of a suspect does not seem overly intrusive, the compilation of a formal police record against a person of otherwise good character, who has committed a minor public order offence, may add to the treatment of that person as a 'common criminal'.

The use of arrest in circumstances where it is not justified by the circumstances of the offence or the offender gives rise to a danger that the police may be alienating themselves from the community in which they work. The police rely on the flow of information from the public in the investigation and detection of criminal offences. An abuse of police power may cause the community to lose trust in the police and result in the general public being

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[169] P Te Whaiti & M Roguski *Maori Perceptions of the Police* (He Parekereke/ Victoria Link Ltd, Wellington, September 1998) 2.
[170] Police Act 1958, s 57(1).

reluctant to volunteer information, and so undermine the effective administration of justice.

D. The Need for Reform

In ensuring that the power to arrest is not used discriminately, it is up to Parliament to provide a clear guideline as to the purposes of arrest. Any legislative statement concerning the purposes of arrest must ensure the police retain a degree of flexibility to allow for the circumstances of the individual case. A degree of responsibility then shifts to the court and the police themselves, to regulate the successful operation of such a purposeful statement.

One example of Parliament's desire to limit the power of arrest is contained in s 495(2) of the Canadian Criminal Code.[171] This section provides that a police officer shall not arrest without warrant where it is in the "public interest having regard to all the circumstances of the case". Particular consideration is given to the need to establish the person's identity; preserve evidence; prevent the commission of further offences; and to ensure the defendant will attend court.

It is noted that in Canada, the legislature allows for police to issue appearance notices.[172] This is similar to the provision of Field Court Attendance Notices (FCAN's) in New South Wales.[173] While a police officer may still arrest a suspect in order to issue him with a FCAN at the roadside,[174] the deprivation of liberty is considerably shortened as it does not involve the police having to take a suspect back to the police station to be processed before they are released on bail.

The inefficiencies of the summons procedure may be remedied by Parliament providing a further procedure for police officers to initiate criminal proceedings, in addition to the use of arrest and summons. The ability of a police

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[171] RS C 1985 c C-46.
[172] Criminal Code RS C 1985 c C-46, ss 495(2) and 496.
[173] Justices Act 1908, s 100AB.
[174] Justices Act 1902 (NSW), s 100AD(4).

officer to issue a notice for a person to attend court will also result in a greater efficiency of police time, as police are not required to take a suspect back to the police station for processing before being released on bail. The issue of bail may then be considered by a court at the first appearance of the defendant. For this reform to work, however, greater communication is required between the courts and the police so a police officer in the field is aware of the dates to which a suspect may be directed to appear, as opposed to waiting on a court to allocate a date for hearing.

While the provision of an intermediate procedure between summons and arrest may alleviate the temptation for police to arrest as a matter of expediency, the courts and the police must take a more robust approach in assisting an officer to determine the circumstances for which each procedure may be used. The courts in NSW have provided that the use of arrest for minor offences is inappropriate and unnecessary in circumstances where the suspect's name and address are known; there is no danger of the suspect departing; and there is no reason to believe that a summons will not be effective.[175] The NSW police have also emphasised the use of arrest as a last resort and require a police officer to look at all alternatives to arrest before determining the most appropriate procedure in commencing criminal proceedings.[176]

Where the power of arrest is used for illegitimate purposes, the police run the risk of escalating a situation where the police may have to resort to force to carry out the arrest. Often, this approach by the police may be met be anger on the part of the suspect, who is aggrieved at the unjustified deprivation of their liberty. This, in turn may lead to the commission of more serious offences, and a further strain on relationships between the police and the community:

> Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary

[175] *Department of Public Prosecutions v Lance Carr* [2002] NSWSC 194 Smart AJ.
[176] *DPP v Carr,* above, 198

arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable".[177]

[177] Donaldson v Broomby (1982) 60 FLR 124, 126

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