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Real Rights: young people engaging with law enforcement

 Cape Town, South Africa



Site in development - FEEDBACK NEEDED

The launch of the Real Rights platform as a DRAFT site in order to obtain feedback from people across the globe. The information included herein represents initial research and responses that need review and commentary on a broader scale. We actively encourage any World Congress attendees or reviewers of this site to provide any comments you may have on the website and the content either by clicking on the "Feedback" button in each city page or by emailing realrights@bakermckenzie.com.

Rights:

What rights do I have when I encounter law enforcement?

Question Asked

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Stopped By The Police On The Street, Now What?

Proposed Information

It is important to follow this advice:

- Stay calm. It is not a good idea to run. Speak carefully and clearly, if you choose to speak at all. Anything you say can be used against you in a court of law.
- It is not a good idea to touch the officers. Keep your hands where the police can see them.
- It is not a good idea to resist, even if you're innocent or think the police are acting unfairly or unlawfully.

Can the police arrest you for refusing to answer questions?

No. The police cannot arrest you for refusing to answer questions, as you have the right to remain silent.

If the police officer suspects that you have committed a crime or that you are able to give evidence about a crime/suspected crime, the officer may ask you to give your full name and address. It is important that you do not refuse to give your name and address, as this may result in the police officer arresting you.

In addition, do not give the police officer an incorrect name and address details, as this would give the officer a basis to arrest you and you may be found guilty of a criminal offence.

If the police officer attempts to arrest you, it is better to allow the arrest to happen without resisting or running away. If you do not allow the arrest, the police will be able to use force to arrest you.

What if the officers do not identify themselves?

You have the right to ask the official to identify him or herself by showing their appointment card, which must be carried by each and every police official, even the personnel appointed under the Public Service Act in the South African Police Service carry distinct appointment cards which are issued to them. If the official refuses to identify him or herself by showing their appointment card, you can demand that you wish to speak or be approached by the official's supervisor or commander.

If the police officer isn't easily identifiable (for example, he or she is wearing plain clothes or driving an unmarked car), you have the right to ask for an identity document showing his or her name and photograph. If he or she refuses, you have the

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to request to speak or to be approached by the police officer's supervisor or commander.

Do not run away, as this may cause the officer to attempt an arrest.

What if an officer just begins speaking to me but does not order me to do anything?

When an officer approaches you, it is a good idea to remain calm and not to run away. If you feel that you are in trouble, you can ask the police officer if you are in trouble or if you are suspected of doing anything wrong. If the officer informs you that you are a suspect, or that you are under arrest, remain calm and ask the police officer what are the allegations brought against you. Remember that you have the right to remain silent and you do not have to try and explain yourself to the officer.

What if the officer is not in uniform or does not identify as an officer but I think they are one?

You may ask the officer/officers to identify themselves. If they do not identify themselves, you can demand to speak or be approached by the police official's supervisor or commander. However, if you attempt to resist the arrest, the police officer may use force. It is therefore very important to remain calm and to ask the police officer in a calm but firm manner to identify themselves before you allow them to arrest you. If you are arrested without the police officer providing their identity and affording you a reason for your arrest, you will later have be able to begin legal proceedings against the police officer for wrongful arrest.

Can I tell police I do not want to speak without a lawyer?

Yes. If the police ask to speak to you about an investigation, it is a good idea to request to speak to your lawyer and have your parents, guardian or an appropriate adult present.

If you cannot afford a lawyer, you are entitled to have a lawyer arranged for you by the government at its expense. You may also get in touch with Legal Aid South Africa, their offices are available at your nearest magistrate's court, who may provide you with legal advice and representation for free. However, as a minor, you should at least request to have your parents present.

If you are at the police station voluntarily for a crime that has been committed, you still have the right to consult with a legal practitioner and to be promptly informed of this right. You have the right to a lawyer from the time you are regarded by the police as a suspect in a criminal investigation.

If I sit down, am I resisting?

It is an offence to interfere with or obstruct a police officer in the performance of their duties. It may be argued that sitting down when a police officer is attempting to arrest you (rather than cooperating), is resisting arrest. In circumstances where you are deemed to be resisting arrest, the officer becomes entitled to use force in effecting the arrest.

A police officer should only attempt to arrest you as a last resort. Accordingly, they should rather secure your attendance at court by providing you with a written notice or summons (court order) to appear at court on a set date.

If I am stopped in a group, and some kids run, can I run?

No, it is best to cooperate. By running, you may create the impression that you have committed an offence, and this may give the police officer reasonable suspicion to arrest you.

If you run and the police have asked you to stop or informed you that you are under arrest, the police are allowed to use reasonable force to bring you under arrest, as you may be deemed to be resisting.

It is a good idea to remain calm.

Can I tell others (siblings, for example) to run?

No. If the police officers are attempting to question you, your friends or your siblings, do not tell them to run. If you do this, you may be regarded as interfering with or obstructing the police officer from performing their duties. You could be arrested and charged for this offence.

If you are concerned about the safety of your siblings or others, and you know your rights, remember what you have learnt in this document and try to assist your friends by explaining their rights, or asking the police officer your rights.

If the officer's language is not my first language, can I tell them without waiving my rights?

Yes. In fact, you have the right to communicate in a language that you understand (this includes the 11 official South African languages and other internationally recognised languages) and a right to request an interpreter if needed.

You have the right to remain silent. Just because you have a right to speak your language of choice does not mean you are expected to give the police information that might be held against you or that accidentally incriminates you. It is also important that you do not let police officers fool you into making admissions once you are afforded an interpreter or are spoken to in your language of choice.

The Constitution also provides that whenever an accused, arrested or detained person is entitled to information in terms of section 35, that information must be given in a language that the person understands.

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If I did not do anything, can they stop me?

Yes. There are various reasons police may stop you. They may be performing lawful search for a person or object, or may be looking for the perpetrator or a reported crime. It is a good idea to remain calm. The police officer may simply want to ask you if you have seen anything suspicious, or if you have seen someone of a particular description. This is why it is important first to stay calm and to cooperate. The police may not arrest for no reason, but they may stop you and in some cases search you if they have reasonable suspicion. As a youth, however, your best interests are protected by the Constitution, including the right to be treated in a manner that is appropriate for your age.

However, the law allows officers to call upon a person to provide their names and address, where:

- the officer has the power to arrest that person;
- that person is reasonably suspected of having committed or of having attempted to commit an offence;
- in the opinion of the officer, the person may be able to give evidence in regard to the commission or suspected commission of any offence. An officer is any person with law enforcement powers.

Furthermore, a police officer has the power to arrest a person, without a warrant, if he reasonably suspects that person of having committed certain offences.

It follows that the police may in certain circumstances stop you or even arrest you if you have not done anything wrong. However, they cannot do either without a warrant or a reasonable suspicion. Sometimes, an officer might reasonably suspect you even if you have not done anything wrong, for example if you meet at a specific description. In these instances, it is important to remain calm. Remember to ask if you are suspected of an offence, and if you need to, ask what your rights are as a suspect.

NOTES:

The Constitution of the Republic of South Africa, 1996 (“**Constitution**”) provides arrested, detained and accused persons various rights, including:

- the right to remain silent;
- the right to be informed promptly of their right to remain silent and the consequences of not remaining silent;
- the right not to be compelled to make any confession or admission that could be used in evidence against that person; and
- the right to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

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In addition, Section 12 of the Constitution states that you have the right to freedom and security of the person, which includes the right:

- to have your dignity respected and protected.
- not to be deprived of freedom arbitrarily or without just cause.
- not to be detained without trial.
- to be free from all forms of violence from either public or private sources.
- not to be tortured in any way.
- not to be treated or punished in a cruel, inhumane or degrading way.

The Constitution is accessible here:

[<https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>]

Your rights when under arrest are further detailed under section 50 of the Criminal Procedure Act, 51 of 1977 (as amended from time to time), which sets out the procedure to be undertaken by the police after arresting a person. Section 41 of the Criminal Procedure Act empowers officers to call upon a person to provide their names and address, where:

- the officer has the power to arrest that person;
- that person is reasonably suspected of having committed or of having attempted to commit an offence;
- in the opinion of the peace officer, the person may be able to give evidence in regard to the commission or suspected commission of any offence. A peace officer is any person with law enforcement powers.

Source: <https://www.saps.gov.za/faqdetail.php?fid=2>

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Legal Aid: <https://legal-aid.co.za/how-it-works/>

An arrest is the most invasive manner of securing the attendance of an accused person (youth) in court.

Section 4(2) of the Child Justice Act, 75 of 2008 (“**Child Justice Act**”) prescribes the manner in which criminal matters implicating children (youth) should be managed. Further, section 17 of the Child Justice Act states that:

The methods of securing the attendance of a child at a preliminary inquiry are:

- i. a written notice, as provided for in section 18;
- ii. a summons, as provided for in section 19; or
- iii. arrest, as provided for in section 20.

Further, where the circumstances permit, a police official should obtain guidance from the Director of Public Prosecutions or a prosecutor on whether or not the child is required to attend a preliminary inquiry and, if so, the manner in which the child’s attendance should be secured.

Raduvha and Minister of Safety and Security CC (2016)

As held by the Constitutional Court in this matter, the police should always consider the circumstances of the youth threatened with arrest or detention and make a well-informed decision of whether the youth’s detention is a measure of last resort otherwise “the detention would be a flagrant violation of section 28(1)(g) and therefore unlawful.”

In this regard, see <https://www.saps.gov.za/faqdetail.php?fid=8>.

Section 3 (d) of the Child Justice Act

“3. Guiding principles (d) every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.”

Section 28(2) of the Constitution states that a child’s best interests are of paramount importance in every matter concerning the child.

We note that a child (youth) in local laws means a person **under the age of 18 years**.

Therefore, even in the arrest and detention the best interest of the child (youth) should be thoroughly considered and balanced against the conduct of arresting or detaining the child.

This is further supported by section 28(1)(g) of the Constitution which provides specific instances and the manner in which a child (youth) may be arrested and detained. Accordingly, section 28(1)(g) of the Constitution states that:

“every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:

- i. kept separately from detained persons over the age of 18 years; and
- ii. treated in a manner, and kept in conditions, that take account of the child’s age”

Sections 12 of the Constitution echoes the rights provided in section 28(1)(g) above in that it provides that:

“Everyone has the right to freedom and security of the person, which includes the right to not be deprived of freedom arbitrarily or without just cause”

Therefore, the right to freedom is applied uniformly to all citizens in South Africa and is only limited in instances where it the last resort for the youth.

Raduvha and Minister of Safety and Security CC (2016)

The Constitutional Court in this matter highlights the argument that the best interests of the child must be taken into consideration, even in circumstances where the child is suspected of committing a crime. However, such consideration does not preclude children from being arrested for crimes that they have committed. It is further emphasised by Justice Bosielo where he stated that:

“Similar to the discussion on arrest, does the constitutional injunction to safeguard children’s rights mean that children will never be detained? The answer is also no. The need to detain a child is necessarily a fact based inquiry that requires a balancing of interests”

When can Police search you and your surroundings?

Proposed Information

It is important to follow this advice:

- You have the right to say no to searches of your person.
- You have the right to say no to searches of your car, house or other surroundings.

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- You cannot be arrested for refusing to consent to a search without a warrant.
- A warrant is a court order so you have no choice but to consent.

What if a police officer wants to search my phone?

You have the right not to have your body or home searched. The police are, however, entitled to search and take any object/article in your possession if that object or article is connected to a particular crime, may provide evidence regarding a particular crime, or if the object/article is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of a crime.

When a police officer wants to search you or your surroundings (where you privately own those surroundings), he or she must present a valid warrant authorising the search.

The search warrant must identify the person that must be searched or the place that must be searched by the police. The search must also be done during the day, unless the search warrant expressly authorises the police officer to undertake the search by night. The person being searched or owner of the premises being searched is entitled to be handed a copy of the search warrant.

A police officer is also allowed to search you or your place without a search warrant, if he or she believes that a search warrant will be issued to him if he applies for it and that delaying the search in order to obtain the search warrant will defeat the object of the search.

If a police officer simply stops you in the street, it is unlikely that a police officer will hold a belief that a warrant to search you would be issued, and accordingly you will be entitled to refuse a search of your phone. If an officer, however, witnesses you filming the commission of a crime, that officer may have reasonable grounds to believe that he would be granted a warrant if he were to seek one and that actually going to obtain the warrant will prevent the purpose of searching your phone. In such circumstances, consider whether the police officer could have a reason to want to search your phone for evidence.

What if a police officer asks me for my password to my phone?

If a police officer has asked to search your phone and you have consented, you may give the officer your password. However, you are not required to consent to a search, and you do not need to hand your phone over to the police if they do not possess a search warrant.

Furthermore, you have a right to privacy, which is protected in terms of the Constitution. This includes the right not to have your property searched. Giving an officer your password allows the officer to search your property. This right is protected under the Constitution and the police officer must consider less restrictive manners to obtain evidence, if that is the purpose of requesting your phone password.

Unless those special circumstances exist, or the police have a warrant, you do not need to give the police access to your phone or passwords.

Remember, the police are not allowed to use evidence against you if they have obtained it wrongfully. They cannot threaten or force you to give them your details. If they do, they will not be allowed to use the evidence in court.

What if they tell me to give them my password or other access to my phone?

Your right to privacy includes the right to privacy of your property. You do not need to give police access to your personal property, including your phone or password, unless a police officer holds a warrant for that information.

Do I have to give them my device password if they demand it from me if I am not under arrest?

You only have to give the police your property to be searched if they hold a warrant. Your right to privacy is protected by the Constitution.

However, you can consent to hand over your information or to a search. Be very careful when consenting to hand over your information. If you consent to hand over your password, make sure you know the reason the police officer is asking for it, and rather unlock your phone for the police officer if he or she needs it. Perhaps the police officer might want to make a call from your phone in an emergency. In this case it would be acceptable, but it is not required and you cannot be expected to hand over your password or unlock your phone for the police.

Remember, the police are not allowed to use evidence against you if they have obtained it wrongfully. They cannot coerce, threaten or force you to give them your details. If they do, they will not be allowed to use the evidence in court.

What tools can police use to search me? What technology? (Facial recognition, hidden cameras, finger print searches, etc.)

As we have indicated, search of your person or property requires a search warrant, unless special circumstances exist. It is unlikely that a police officer will be able to search you in the street with advanced technology.

If a police officer intends to record you with video or audio technology, that police officer will be required to have a warrant authorising him or her to do so. If they do not have this authorization, they need to get your consent. If you are concerned that a police officer may be recording you, ask the officer if you are being recorded.

However, the police are allowed to use certain measures to determine your identity or bodily features in certain circumstances.

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If you are arrested by the police, the police are required to take your fingerprint. Remember the grounds on which they can arrest you. They cannot simply arrest you for no reason, and accordingly remember not to run from police.

Police may take fingerprints of a person if they suspect that a person is guilty of an offence, or if they believe doing so will help them with an investigation. They do not need a warrant to do so if they believe you are guilty of an offence. If a policeman indicates that he wants to take your fingerprints, ask him why. If he says he believes you are guilty of an offence and you are a suspect, you will need to comply with the officer, as refusing to do so allows the police officer to use force.

The police cannot store your fingerprints in the criminal records database if you are not convicted of the crime in question. It is therefore best to cooperate with the officer and not to try and run away. If you are found guilty of an offence, the Child Justice Act provides that children guilty of minor offence may have their record expunged in terms of section 87(1)(a) of the Child Justice Act. Either the child, their parents or an appropriate adult or guardian may apply to have your record removed.

When your record is removed, your data (i.e. your fingerprints or DNA) must be removed from the database of criminal records.

Other samples may be taken on your arrest in order to obtain your DNA, however samples other than fingerprints must be taken by someone authorised to do so. This is usually a registered nurse or doctor.

Can they search my backpack or other item I am carrying?

As we have discussed, the police may only search your person or property if they have a warrant, or if they *reasonably* suspect you of being guilty of an offence.

They can therefore search your bag if they have a warrant or reasonably suspect that you may be carrying stolen or illegal goods.

Their belief must be reasonable, and must entail that they believe a magistrate would have authorised the search if a warrant were requested.

Can they take my picture or record me?

The police are empowered to question anyone without arresting them. They are indeed allowed to ask you where you are going and why. This line of questioning usually arises in a roadblock, however if a police officer stops at random in the street, he may ask you these questions. You are not obliged to tell the police, although you are obliged to tell them your name and address.

NOTES:

Section 14 of the provides the right to privacy. It says:

“Everyone has the right to privacy, which includes the right not to have -

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized;
- d. the privacy of their communications infringed.”

In terms of section 21 of the Criminal Procedure Act, a police officer with a search warrant may search any person identified in the warrant, or enter and search any premises identified in the warrant. The police may also search any person found on or at such premises.

A search warrant must be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night, and may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it (usually a magistrate) or, if such person is not available, by a person with like authority.

A police official executing a warrant must, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

Where the police officer does not have a warrant, he or she may search any person or container or premises if the person concerned consents to the search for and permits the officer to seize any item found or if he on reasonable grounds believes that a search warrant will be issued to him if he applies for such warrant that the delay in obtaining such warrant would defeat the object of the search.

In the case of *Gumede v The State* (800/2015) [2016] ZASCA 148 (30 September 2016), it was held that Evidence obtained as a result of an unlawful search in violation of right to privacy. If the police obtain evidence from you by coercing you to give it to them, they have done so improperly, and this evidence is detrimental to the administration of justice and is inadmissible in terms of s 35(5) of the Constitution

Any limitation on a constitutional right must be justifiable in terms of section 36 of the Constitution. As we have shown above, there are some circumstances in which the police are justified in limiting your right to privacy by searching your person or property.

Section 36B of the Criminal Procedure Act:

A police official must take the fingerprints or must cause such prints to be taken of any—

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- a. person arrested upon any charge related to an offence referred to in Schedule 1;
 - b. person released on bail if such person's fingerprints were not taken upon arrest;
 - c. person upon whom a summons has been served in respect of any offence referred to in Schedule 1;
 - d. person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest;
 - e. person convicted by a court in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subsection.
- [...]

Importantly, The National Commissioner must destroy the fingerprints of a child upon receipt of a Certificate of Expungement in terms of section 87 (4) of the Child Justice Act.

Section 36C of the Criminal Procedure Act:

Any police official may without warrant take fingerprints or body-prints of a person or a group of persons, if there are reasonable grounds to—

- a. suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 1; and
- b. believe that the prints or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.

Under this section

Fingerprints "must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act"; and any fingerprints taken must be destroyed if no prosecution or conviction is made.

Under the Criminal Law (Forensic Procedures) Amendment Act, 2013 (Act no 37 of 2013):

- Buccal samples may be taken from arrested and charged persons. An authorised person - trained police official - will take the buccal sample or it may be taken under the direct supervision of an authorised person.
- Buccal samples may be taken from a person who has not been arrested and charged for investigative purposes, provided consent was given or by court order.
- An authorised person must take the buccal sample immediately after the fingerprints of the person have been taken.
- Any office or place that is private, out of sight and hearing of other persons, may be used as a place where a buccal sample may be taken.
- The buccal sample must be taken in the presence of a witness who must countersign the collection form.
- The victim of a sexual offence must be taken to a registered medical practitioner or registered nurse for the medico-legal examination.
- Only a registered medical practitioner or registered nurse may take intimate samples from any person.

A person may request the authorised officer in writing to confirm whether his or her forensic DNA profile is contained in the National Forensic DNA Database of SA (NFDD), provided that the person must first apply for a police clearance certificate. Read more The criminal record, if any, must be attached to the application.

DNA reference samples and buccal samples must be destroyed within 30 days after obtaining a forensic DNA profile or after the sample has been processed by the SAPS's Forensic Science Laboratory. Buccal samples must be disposed of in medical waste containers, and must be incinerated.

A person who wishes to have his or her forensic DNA profile removed from the NFDD, must apply for a police clearance certificate to confirm that he or she has no criminal record. The police clearance certificate that indicates that the person has no criminal record, must be attached to the written application for the removal of the forensic DNA profile.

The application must indicate the -

- complete details of the applicant
- reason why the buccal sample was originally obtained from the person
- relevant station and CAS/ICDMS number of a forensic DNA profile that was derived from a buccal sample that was taken in respect of the investigation
- reason why the applicant wants the forensic DNA profile removed from the NFDD.

Lodging of complaints to the National Forensic Oversight and Ethical Board

A complaint may be lodged by a person who -

- has knowledge, or becomes aware, of any violation relating to the manner in which a DNA sample or forensic DNA profile is or has been handled
- is affected, or likely to be affected, by the action, omission or decision of the NFDD relating to the manner in which a DNA sample or forensic DNA sample is or has been handled
- has knowledge, or becomes aware, of any breach of security relating to -

(i) the safe transportation or storage of a DNA sample

- (ii) the safe transportation or storage of a forensic DNA profile
- (iii) the physical security of the NFDD
- (iv) any other matter that breaches, prejudices or compromises the proper management of DNA samples, forensic DNA profiles or the integrity of the NFDD

- has knowledge of unethical conduct by an employee in the exercise of any function of the NFDD, or is affected by unethical conduct
- has knowledge of unethical conduct by an independent provider in the provision of services in terms of an arrangement with the NFDD.

A complaint may be made by a person acting on behalf of a person mentioned above who -

- is a child
- is unable to make the complaint himself or herself because of physical disability
- has requested a representative to act on his/her behalf.

[source: <https://www.saps.gov.za/faqdetail.php?fid=58>]

The Regulations Under the South African Police Services Act provide some additional directions as to the requirements for taking samples from people, including children. [see: <http://www.policesecretariat.gov.za/downloads/acts/DNA%20Regulations.pdf>]

Section 37(1)(d) of the Criminal Procedure Act

(1) Any police official may—

(d) take a photographic image or may cause a photographic image to be taken of a person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B (1). (people arrested on any charge or released on bail)

Reasons Police may detain or arrest you

Proposed Information

It is important to follow this advice:

- The police may arrest you because they suspect you of committing (or having committed) a violation of the law, or if they suspect that you currently have evidence of a crime.
- Sometimes police have a warrant for an arrest. You should be clear on what kind of warrant is being presented to you if that is the case.
- It is a good idea to review any paper from police/warrant carefully, to ensure you understand what exactly is covered.
- If arrested, you may be charged with a felony for a more serious crime (with potential jail time of one year or more), a misdemeanor for a less serious crime (with jail time of less than one year) or a violation.
- If the police arrest you, they also have the right to search you. Anything found during this search may be used as evidence against you.

What if I did not do anything illegal, must I speak with the police and answer questions?

The police can ask you certain questions, such as your name and address. Other than that, you are not required to answer questions, given your right to remain silent. Importantly, if the police speak to you, you should address them. Do not run away, as this may give them cause to arrest you.

If you know something about what they are asking for or want to help the police, first make sure you know what they are asking about. If they arrest you, you should avoid saying anything further as the police will be entitled to use your words against you.

What if they tell me something they are investigating that is wrong? Must I correct them?

You have a right not to lay the blame on yourself and a right to remain silent. If you know they are wrong about an investigation, you may be aware of what is being investigated. By telling them they are wrong, you may lay the blame on yourself. In such a case it is best to remain silent. However, if you were a witness to the crime, you may offer to make a statement for the police. Be careful in these circumstances and rather seek the advice of your parent or guardian before doing so. If you are taken in for questioning, request to contact your parent or a lawyer.

What if an officer just begins speaking to me but does not order me to do anything?

In this instance, listen to the police officer and do not try to escape or run. This may give them cause to arrest you. You are entitled to ask them why they are speaking to you and if they are investigating. As we have said, if you would like to be of assistance, you may. It is however sometimes risky to do so. You do not need to assist them in their investigation of a crime.

What is the legal difference between talking to them if they do not tell me I am under arrest, versus after they inform me that I am under arrest?

As soon as you are placed under arrest, anything you tell the police may be held against you. You therefore have the right to remain silent. If a police officer tells you that you are under arrest, it is best to remain silent and only give them your name and address.

Be careful, however, as your words before an arrest may give the police a reason to arrest you. All you are required to tell the police is your name and address if you are asked. In some cases, such as when the police have a warrant (for example in a roadblock), you may be required to answer certain questions. In these circumstances, you should ask to read the warrant so you know exactly what they are entitled to ask.

If you are unsure about anything, inform the police that you are a minor and that you would like to be assisted by your parent or guardian before answering any questions.

NOTES:

The Constitution of the Republic of South Africa, 1996 ("**Constitution**") guarantees arrested, detained and accused persons various rights, including:

- the right to remain silent;
- the right to be informed promptly of their right to remain silent and the consequences of not remaining silent;
- the right not to be compelled to make any confession or admission that could be used in evidence against that person; and
- the right to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

The difference between police TELLING me what to do and asking me to do something

Proposed Information

It is important to follow this advice:

What is the difference between the police deciding to search me or my belongings (phone, person, backpack) and me agreeing to the search?

If you agree to a search, the search becomes lawful and any evidence collected on during the search will likely be admissible in court, provided it is relevant.

If the police do not have a warrant and they search you without your permission, the police need to show that they had the correct reasons to search you without a warrant before anything found on your person can be used as evidence against you.

Ask what the police are looking for if they ask to search you. If you know you do not have that on you, you may consent. This is sometimes a good idea as it avoids you being harassed or arrested by police. Be very careful however. If you are carrying a phone, wallet or anything they could suspect is a stolen item or something that may be evidence, rather do not consent to the search.

What if they tell me to give them information versus them asking and me providing answers voluntarily?

The police cannot force you to give answers. They cannot intimidate, threaten or scare you into giving answers. Doing so will make the answers you give inadmissible in court. If you decide to give the police officer answers, for example in an investigation, make sure you know that you are not under arrest. It is also best to get a legal representative or parent to assist you in answering questions, whether you are arrested or not.

Do police need a warrant to arrest you?

Proposed Information

It is important to follow this advice:

No. Police officers can legally arrest you without a warrant in several circumstances:

- When the crime is committed in front of the police officers; or
- When a police officer has reason to believe that you were involved in the commission of an offence (i.e., "reasonable suspicion")

If I did not do anything, can they stop me?

In some cases, if you have not done anything, but a police officer reasonably suspects you of having committed a crime, the officer may stop you. In such cases, it is best to comply with the police officer, to remain calm, and not to resist or try to flee.

Can I ask for the reason they stopped me?

Yes, you are entitled to ask why you have been stopped. If the police attempt to arrest you, they must provide a reason for the arrest.

Can I advocate for another young person stopped by police if we are stopped together?

Yes. However, you should be cautious when doing so. Sometimes police officers do not like to be challenged. It will be helpful however if you speak to the other young person and explain their rights to them, and make sure the police have answered as to why that person has been stopped. It is also important to tell the other young person that they do not have to answer to any questions other than what their name and address is.

If I think the stop is unjustified, what can I do?

It is a good idea to remain calm and do not attempt to flee. Ask why you have been stopped and let the police know that you are a minor. If the police attempt to arrest you, do not resist. However, be sure to ask for reasons for your arrest if that do not give them to you.

You may also report police official who stopped you if you feel the stop was unjustified or discriminatory. In this regard, see our advice on complaints below.

Can I get the officer's identifying information for a future complaint?

Where an arrest is made, the arresting officer will be required to make an arrest report. You will be able to call for these records at a later stage. In some cases, an officer may give you their name and rank upon request, however where an officer is not forthcoming in this regard, it will be best to approach your local police station or the station in the area where the offence took place, in order to obtain the details of the officer in question to the extent possible.

In order to see if a police official is wearing a name tag you have to be close to him or her which means that you are in a one to one situation with the official. If he or she is not wearing a name tag you cannot just ignore them but you have the right to ask the official to identify him or herself by showing their appointment card, which must be carried by each and every police official, even the personnel appointed under the Public Service Act in the South African Police Service carries distinct appointment cards which are issued to them. If the official refuse to identify him or herself by showing their appointment card you can demand that you wish to speak or be approached by the official's supervisor or commander.

Furthermore you must remember that if you feel unsafe for instance when followed and instructed by an apparent police official whilst driving, you can drive to the nearest police station in order to make sure that it is a bona fide police official that instructed you to pull over.

Remember that police officials attached to the detectives in the South African Police Service are working in normal private clothes and do not wear name tags. If you are approached by an official claiming to be a detective it is a good idea to ask him or her to identify themselves by presenting his or her appointment card.

Source: <https://www.saps.gov.za/faqdetail.php?fid=2>

How do you know if you are under arrest?

Proposed Information

It is important to follow this advice:

You are under police custody if you do not feel free to leave an officer's presence, or if a reasonable person in your shoes would not feel free to leave.

If the following happens, you are likely under arrest under the law:

- an officer handcuffs you;
- an officer forcibly holds you down;
- an officer puts you into the back seat of a police car; or
- an officer warns you about your rights

An officer only has to warn you of your rights before the police question you. This means an officer can arrest you before warning you of your rights.

An arrest without rights warnings is still a valid arrest; it just may mean that evidence collected from it is not admissible in court later.

What if I do not know if I am under arrest?

You will be under arrest once the police restrict your freedom of movement, have read your rights to you and have informed you of the crime which you are suspected of committing.

Arrests should be the last option for the police. The police can also secure your attendance at court by providing you with a written notice or summons (court order) to appear at court on a set date.

If you are not sure, it is important to ask. Arrested persons have certain rights to which they are entitled. If a police person arrests you but does not tell you, the arrest is not lawful and you cannot waive your rights as an arrested person.

What is the difference between detention and arrest?

Arrest is the process of exerting some form of physical control over a person. It is usually intended to secure a person's attendance at court or to bring someone in for questioning.

After an arrest you will, more often than not, be detained at a police station. In detention your personal belongings may be taken from you and you may be searched. This search should be done by a person of the same sex should conduct the search.

If I am handcuffed, am I arrested?

Yes. Handcuffing is one of the ways in which police may exercise control over you during an arrest. A police officer is still required to tell you that you are under arrest and read your rights to you. The police have the right to take your fingerprints and take photographs.

If my liberty is restricted, am I under arrest?

Not necessarily. It could also happen that you are placed under witness protection.

Usually when you are being arrested, the police officer will confirm that you are being arrested and inform you of the charges on which you are being arrested.

Section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child.

We note that a child (youth) in local laws means a person under the age of 18 years.

Therefore, even in the arrest and detention the best interest of the child (youth) should be thoroughly considered and balanced against the conduct of arresting or detaining the child.

This is further supported by section 28(1)(g) of the Constitution which provides specific instances and the manner in which a child (youth) may be arrested and detained. Accordingly, section 28(1)(g) of the Constitution states that:

"every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:

- i. kept separately from detained persons over the age of 18 years; and
- ii. treated in a manner, and kept in conditions, that take account of the child's age"

Sections 12 of the Constitution echoes the rights provided in section 28(1)(g) above in that it provides that:

"Everyone has the right to freedom and security of the person, which includes the right to not be deprived of freedom arbitrarily or without just cause"

Therefore, the right to freedom is applied uniformly to all citizens in South Africa and is only limited in instances where it is the last resort for the youth.

Raduvha and Minister of Safety and Security CC (2016)

The Constitutional Court in this matter highlights the argument that the best interests of the child must be taken into consideration, even in circumstances where the child is suspected of committing a crime. However, such consideration does not preclude children from being arrested for crimes that they have committed. It is further emphasised by Justice Bosielo where he stated that:

"Similar to the discussion on arrest, does the constitutional injunction to safeguard children's rights mean that children will never be detained? The answer is also no. The need to detain a child is necessarily a fact based inquiry that requires a balancing of interests"

What to do after being warned of your rights?

Proposed Information

It is important to follow this advice:

- You can use your right to remain silent or any of your other rights (e.g., the right to an attorney) by saying that you want to use that right.
- You are also able to waive your rights (that is, not use them) by, for example, saying 'Yes, I understand my rights but I am ready to talk to you.' This is not a good idea without a lawyer present.
- Make sure you know what you're doing in giving up your rights. The police have the right to take your fingerprints and take photographs.

How do things change if I am read my rights by police?

Once you are read your rights by the police you will be asked if you understand what has been said. If you answer "yes", you will be taken to have been read your rights and the police will expect you to protect your own rights. The best thing to do is to remain silent at all times and request a parent, guardian or lawyer, who can assist you in protecting your rights.

How do things change if I am read my rights by police?

No. The police, if they are effecting an arrest, must read you your rights during the arrest. If you ask the police what your rights are, should explain to you immediately.

Source: <https://www.saps.gov.za/faqdetail.php?fid=8>

What to do after being warned of your rights?

Proposed Information

It is important to follow this advice:

- You are not required to make a statement, answer police questions or participate in a police investigation, and you never have to go anywhere with the police unless they have arrested you.
- If police have arrested you and if you are under the age of 18, police are required to immediately notify your parent, caretaker or legal guardian.

Am I required to make a statement?

No. You are not required to make a statement, answer police questions or participate in a police investigation, and you never have to go anywhere with the police unless they have arrested you, or you are required to attend a preliminary inquiry (a meeting before the court trial begins). However, it is not a good idea to refuse to give the officer your name and address if required, or give a false name and address. It is not also not a good idea to run, leave without permission or be aggressive. It is good to ask the officer's permission before you walk away.

If you are under the age of 10 (soon to be increased to 12) years, the police official must, in the, immediately hand you over to your parents or an appropriate adult or a guardian, or to a suitable child and youth care center, and must notify a probation officer.

If the police ask to speak to you about an investigation, it is a good idea to request to speak to your lawyer and have your parents, guardian or an appropriate adult present.

Must police notify my guardian?

Yes. If police have arrested you and if you are under the age of 18, police are required to immediately notify your parent, an appropriate adult or guardian of the arrest. The police official must immediately, but not later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction you were arrested.

Must I confess?

No. You have a right as an accused or arrested person to remain silent and a protection against saying anything that will lay the blame on you.

What adults can I ask to be with me?

Either or both of your parents, an adult family member, your legal guardian, a lawyer or a s

Who do police have to contact if I am a legal minor?

If police have arrested you and if you are under the age of 18, police are required to immediately notify your parent, an appropriate adult or guardian of the arrest. You may request them to contact a lawyer if you do not have a pa

NOTES:

When dealing with children (individuals aged 18 and below), police officers have additional requirements and procedures that must be followed under the law.

The police may not arrest children under the age of 10 years old where they are suspected of having committed a crime, but must instead immediately hand them to their parents, guardian or suitable child and youth care center, in the acceptable manner and then inform a probation officer of the suspected offence.

In terms of the acceptable manner, the police officer must:

- a. the introduce himself or herself to the child and person who is to get the child;
- b. establish the identity of the person who is to receive the child;
- c. introduce the child, if the child is handed to a child and youth care center, to the person who is to receive the child;
- d. establish, if the child is handed to a parent, appropriate adult or guardian, the relationship, if any, between the person who is to receive the child and the child;
- e. inform the child and the person who is to receive the child of:
 - a. the nature of the alleged offence;
 - b. the reasons why the child cannot be prosecuted; and
 - c. the procedures to be followed in terms of the law;
- f. explain to the person who is to receive the child:
 - a. what is expected from the child and the person in relation to the procedures to be followed in terms of the law;
 - b. the effects of receiving the child; and
 - c. the aftereffects if the child fails to comply with any of the legal requirements set by the police officer or any of the legal officials.

The police are also not allowed to arrest a child for certain serious offenses, unless there are strong reasons for the arrest, including:

- i. the fact that the officer believes the child does not have a stable residential address,
- ii. the child will continue to commit the offenses,
- iii. the child poses a danger to any person or the offense is in the process of being committed.

The police must first get a warrant of arrest directing that the child be brought to a preliminary inquiry. A preliminary inquiry is when a judge looks at the evidence in your case to decide if there is enough evidence to have a trial.

Children arrested by the police are required to be brought before a preliminary inquiry. During the arrest, the police officer must explain to the child why he or she is being arrested, inform the child of his or her rights and must tell the child's parents or guardian about the arrest.

How do I contact a lawyer and when?

Proposed Information

It is important to follow this advice:

- It is a good idea to contact a lawyer before making any statements to anyone in a criminal case or investigation.
- This applies even if you are told that (i) police officers only want to question you and/or (ii) you are only a witness.
- While you do have to wait until you attend court to get a lawyer appointed if you cannot afford your own lawyer, you should still ask for a lawyer as soon as you are questioned or arrested by the police. If you are arrested, you have the right to remain silent and to not speak until your lawyer is present.

Once arrested, the police must give you a reasonable opportunity to secure legal assistance and allow you to call your attorney and talk to them. You may choose not to give any information in absence of your attorney, except for your name and address.

If you are at the police station voluntarily for a crime that has been committed, you still have the right to consult with a legal practitioner and to be promptly informed of this right. You have the right to a lawyer from the time you are regarded by the police as a suspect in a criminal investigation.

If you cannot afford a lawyer, you are entitled to have a lawyer arranged for you by the government at its expense. You may also get in touch with Legal Aid South Africa (<https://legal-aid.co.za/>) who may provide you with legal advice and representation for free.

What if I am just a witness?

If you are called in to make a statement as a witness to a crime, or if you are subpoenaed to court in order to testify, you do not need a lawyer. It is however to ask the police and ensure that you are not accused or suspected of the crime before you

before you make any statements. Furthermore, you do not have to act as a witness in a proceedings. The police need to get you to agree to come act as a witness, or alternatively need to subpoena you to proceedings.

If you are issued with a subpoena, you must go to court on the day specified in the subpoena. It is a criminal offence not to do so.

NOTES:

S v Orrie and Another (SS 32/2003) [2004] ZAWCHC 25 (14 October 2004)

At the material time the accused was neither an arrested, detained nor an accused person, but merely a suspect. The State conceded, however, that the accused was entitled to be warned of "his rights".

In **S v Sebejan and Others** the Court considered whether a suspect could lay claim to the rights enjoyed by arrested, detained and accused persons under section 25 of the Interim Constitution. Satchwell J expressed the view that although the Constitution was silent with regard to a suspect's rights, such a person is indeed entitled to 'fair pre-trial procedures'. She held further that '[t]hese include the rights which would accrue to an accused when arrested: the right to remain silent and the right to be informed of the right to remain silent; the right to be informed of the consequences of making any statement; the right to choose and to consult with a legal practitioner and to be informed of this right promptly.' The principle enunciated in Sebejan (supra) that a suspect is entitled to fair pre-trial procedures, most notably the warnings to which an accused is entitled, received qualified support in *S v Ndlovu*.

In **S v Langa and Others** the Court declined to follow Sebejan (supra) on the grounds that a suspect did not enjoy the rights of an arrested or detained person. Furthermore, it noted, the views expressed in Sebejan (supra) were obiter by reason of the fact that the accused was held not to be a suspect at the time of the taking of the statement.

Most recently, in *S v Mthethwa* the Court similarly declined to follow Sebejan (supra), again on the basis that section 35 of the Constitution does not afford rights to a suspect. However, the Court, found that a suspect was entitled to be cautioned or warned before being questioned by the police. Notwithstanding a judicial reluctance to extend what can broadly be described as the right to fair pre-trial procedures already enjoyed by arrested, detained and accused persons to suspects, I find the reasoning in Sebejan (supra) persuasive.

S v Melani and Others 1996 (1) SACR 335 (E):

"In order to give proper effect to an accused's right in terms of s 25(1)(c) he/she must be informed of his/her right to consult with counsel in a manner that it can reasonably be supposed that he/she has understood the content of that right."

Do Police always have to tell the truth?

Proposed Information

It is important to follow this advice:

- No. The police may lie to you during the course of an investigation, including lying about the strength of the case they have against you and particular evidence they have in their possession.
- Sometimes police will lie to try and get you to talk more.

Can the police lie to me?

The police are not allowed to lie to you or deceive you. It is often very difficult to show that a police officer has lied to you, perhaps when he stops you in the road. If you know a police officer is lying, try your best to remain calm and call for your parents or a suitable adult or lawyer to assist you.

In criminal proceedings, proof needs to be beyond a reasonable doubt. If you know the police officer was lying, it is best to report this immediately. You should also request a lawyer or your guardian. Sometimes the police will lie in order to try and arrest or intimidate you. If you end up going to court, you must request a lawyer when at court. Tell your lawyer immediately that the police officer lied to you and explain the truth to the lawyer. Your lawyer will put up a version of the events to the court and the court will unlikely not be able to convict you purely based off the police officer's version, without any additional evidence.

Do I have to tell the police the truth?

The police are not allowed to trick you or deceive you into making a confession about a crime that was committed.

The courts would not accept confessions about a crime that was committed unless it has been proven that you had provided the confession freely and voluntarily, and that you were of sound and sober senses and **without having been overly influenced to give the confession.**

Remedies:

How can I raise concerns about my encounter with law enforcement?

How do I make a complaint if I have questions or feel my rights have been violated?

You may report to any police station in the country.

You may file a report to Corruption Watch if you feel the law enforcement officer has abused a position and violated your rights:

<https://www.corruptionwatch.org.za/report-corruption/#gf1>

You may also file a complaint with the Independent Police Investigative Directorate (IPID) for police misconducts (<https://www.gov.za/about-government/contact-directory/departments/departments/independent-police-investigative>).

Johannesburg office: 8th Floor Bram Fischer Towers, 20 Albert Street, Marshalltown, Johannesburg 2000. Tel: 011 220 1500; Fax: 011 333 2705; Email: Complaints.Gauteng@ipid.gov.za

You may lodge a complaint to South African Human Rights Commission: <https://www.sahrc.org.za/index.php/what-we-do/lodge-complaints>

You may get help from Centre for Child Law: Centre for Child Law, Faculty of Law, Law Building (Room 4-31), University of Pretoria, Pretoria, 0002, Tel: +27 12 420 4502, Fax: +27 12 420 4499, Email: centreforchildlaw@up.ac.za

You may get help from Legal Aid South Africa <https://legal-aid.co.za/>

NOTES:

South African Human Rights Commission Act

https://www.gov.za/sites/default/files/gcis_document/201409/37253act40of2013sa-humanrightscom22jan2014.pdf

Complaints Handling Procedures of the South African Human Rights Commission <https://www.sahrc.org.za/index.php/what-we-do/lodge-complaints>

What if I feel I was a victim of discrimination or racism?

You may lodge a complaint in the Equality Court. Information of Equality Court in Johannesburg:

Tel: 011 491 5000 / 011 639 0301 Family Court

Fax: 011 834 1222 / 011 836 0671 Family Court

Postal Address: Private Bag X1, Johannesburg 2000

Physical Address: 26 Fox Street (Cnr Fox & West Street), Johannesburg 2000

You may lodge a complaint to South African Human Rights Commission: <https://www.sahrc.org.za/index.php/what-we-do/lodge-complaints>

You may get help from Centre for Child Law: Centre for Child Law, Faculty of Law, Law Building (Room 4-31), University of Pretoria, Pretoria, 0002, Tel: +27 12 420 4502, Fax: +27 12 420 4499, Email: centreforchildlaw@up.ac.za

You may get help from Legal Aid South Africa <https://legal-aid.co.za/>

There is also an anti-racism app called Zimele Racism Reporting App ("Zirra") endorsed by the SA Human Rights Commission, where you may report any racism situation. The app is free and can be downloaded on various platforms.

How can I respond to circumstances involving discrimination?

Stay calm. You may express that you understand your rights and ask the officer to respect your rights. Get the name of the officer and the organisation. Try to remember as many details of the interaction and surrounding situations. Get professional help as soon as possible. Lodge a complaint or a legal claim as soon as possible

What can you do if the police perform an improper search? Or I was improperly detained?

It is unlawful for the police to act against the powers granted to them by a search warrant and to search a person without the powers to do so. Such an incidence (search or arrest) should be reported to the police station.

When the officer who undertook the search or affected the unlawful arrest is convicted, you may also apply to the court for an award for compensation because of the police officer's conduct.

There is no remedy, however, where a police officer arrests you based on a reasonable mistaken belief that he or she is arresting the right person.

The South African Police Services website (https://www.saps.gov.za/services/service_complaints_centre.php) has various channels available to individuals who wish to make service complaints regarding the conduct of South African Police officials.

NOTES:

Section 28 of the Criminal Procedure Act, a police official who acts contrary to the authority of a search warrant issued to him or her, or who undertakes any search without the necessary authority to do so, is guilty of an offence and liable on conviction to a fine not exceeding ZAR600, or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award. The award in question refers to compensation to the person who was searched and suffered damage or loss of property.

In terms of section 46 of the Criminal Procedure Act, a police officer will be exempted from liability where he had a search warrant or acted upon communication given to him and reasonably believed that he or she is arresting the right person.

The Criminal Procedure Act is accessible here: <https://www.justice.gov.za/legislation/acts/1977-051.pdf>

The South African Police Services website (https://www.saps.gov.za/services/service_complaints_centre.php) has various channels available to individuals who wish to make service complaints regarding the conduct of South African Police officials.

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Law is generally described as of November 2021.