

Analysis of interview tapes  
Police powers review briefing paper

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Research and Prevention Division



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## Abbreviations

CJC	Criminal Justice Commission
PPR Act	<i>Police Powers and Responsibilities Act 1997</i>
QPS	Queensland Police Service

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## Executive Summary

### Introduction

The *Police Powers and Responsibilities Act 1997* and the Police Responsibilities Code came into operation on 6 April, 1998. The legislation expanded and codified a host of police powers which then existed within a number of Acts. The powers provided to police in respect of questioning of suspects were the subject of considerable attention and debate. A number of procedures and safeguards were incorporated into the legislation to protect the rights of the individual in those circumstances.

Amongst other things, the new legislation requires police to inform suspects who are in police custody for the purposes of questioning of their arrest status, their right to contact a friend, relative or lawyer and have that person present, and their right to remain silent. Additional requirements apply for indigenous people, juveniles and 'vulnerable' suspects. The Act (s. 103) further specifies that the giving of information to a person in custody about his or her rights must be electronically recorded, 'if practicable'.

As a means of assessing the level of police compliance with these requirements, and identifying possible problems with the legislation, Criminal Justice Commission (CJC) researchers sought permission from the Queensland Police Service (QPS) to listen to a cross-section of interview tapes. The tapes provided by the QPS were a random sample of interviews conducted in the week of 3-9 August. A total of 176 tapes were analysed, of which 136 were interviews of persons suspected of committing indictable offences. The findings presented in this paper are based largely on these 136 tapes.

### Key Findings

#### Characteristics of Interviews

- Interviews averaged 19 minutes 16 seconds, with the shortest being less than one minute duration and the longest 45 minutes. In nine interviews, one or more 'timeouts' were recorded.
- 85 per cent of interviews were conducted in a police station, mostly by general duties police (53.7%) or CIB detectives (27.2%).
- Most interviews (69.4%) took place between 8.00 a.m and 8.00 p.m.
- The suspects were predominantly male (88.2%).
- Fifteen suspects (11%) were juveniles, with ages ranging from 13 to 16 years.
- The most common indictable offences for which suspects were interviewed involved theft or break and enter (31.6%) followed by drug offences (16.9%) assault (15.4%) and other property offences (14.7%).

#### Arrest Status of Suspect

- 65.4 per cent of interviewees in the sample were identified from either the taped interviews or a cross-check of the Custody Index as volunteers and 17.6 per cent as being under arrest. The status of another 17 suspects (5.1%) could not be determined.

- Of the 89 'volunteers', 45 (40.05%) were not informed on tape that they were free to leave at any time. Section 63 of the Code requires that suspects who are not under arrest be cautioned to this effect prior to the commencement of questioning.

### **Cautioning**

- Five suspects in the sample (3.7%) were not notified on tape of their right to silence and 16 (11.8%) were not told that any evidence which they give could be used against them.
- In most cases, the caution was given in a 'matter of fact' or 'calm' manner.
- In around 40 per cent of cases police took some steps to check that the suspect understood the meaning of the caution.

### **Use of Threats or Promises**

- Most suspects (89%) were asked at the conclusion of the interview if any threat, promise or inducement had been held out to them to get them to take part in the interview. All but one suspect answered no to this question. The suspect who answered yes was indigenous and had showed some tendency to gratuitous concurrence elsewhere in the interview.

### **Third Persons: General**

- 15.4 per cent of suspects were not informed on tape before questioning of their right to telephone a friend or relative and 16.9 per cent were not notified on tape of their right to contact a lawyer. Section 95 of the Act requires that this information be provided to suspects.
- Third persons were present during the interview in only 5.3 per cent of non-indigenous cases.
- A lawyer was present in only five cases in the sample.

### **Juveniles**

- A third person was recorded as being present at each of the 15 juvenile interviews. In 11 of those cases the third person was a parent or guardian of the suspect.

### **Indigenous Persons**

- Twelve suspects were definitely identified as indigenous and in a further 16 cases there was some indication on the tape that the person may have been indigenous. The high proportion of indigenous suspects in the sample (20.6%) is in keeping with other statistics showing over-representation of indigenous people in the criminal justice system.
- Eight of the 12 suspects (75%) who were definitely identified as indigenous had a third person present during the interview, compared with only 37.5 per cent of those suspects who may have been indigenous.
- In only six of the tapes (50%) where the suspects was definitely identified as indigenous was it recorded that a legal aid organisation had been notified that the suspect was in custody.

Section 96 of the Act requires that this be done unless the police officer reasonably suspects that the person is not at a disadvantage in comparison with members of the Australian community generally. In three of these cases, a lawyer or a representative of a legal agency attended the interview.

#### **Vulnerable Persons**

- Eight suspects either exhibited characteristics of a mental illness and intellectual disability, or were apparently under some disability. Three of these suspects had a third person present during questioning.

#### **Conclusion**

Overall, the analysis found a reasonable level of compliance by police with the requirements of the Act. The main areas of concern identified were:

- the large proportion of volunteers who were not informed on tape that they were free to leave
- the apparent failure in a substantial minority of cases to inform suspects of their right to contact a friend, relative or lawyer
- the failure of police in a small number of cases to record the giving of a caution.

It may be that in some instances information and cautions were given to suspects prior to the taped interview commencing. However, where this occurred, it should have been a simple matter for police to place this on tape as well. Strict adherence to s.103 in these instances will minimise opportunities for challenges in subsequent court proceedings.

It is recommended that a similar audit be conducted later in 1999, preferably in conjunction with the QPS, to ascertain if there has been any change in the level of compliance since the interviews examined for this study were conducted.

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## Introduction

This briefing paper presents the findings of an analysis of 136 records of interview conducted by the Queensland Police Service (QPS) in early August 1988. The analysis was undertaken by officers from the Research and Prevention Division of the Criminal Justice Commission (CJC), as part of the CJC's monitoring of the *Police Powers and Responsibilities Act 1997*. The purpose of the study was to ascertain the extent of police compliance with the requirements of the Act relating to questioning of suspects, and to identify any issues which might require remedial action by the Queensland Police Service (QPS).

This briefing paper presents the findings of the research according to the following headings:

- Sampling procedures
- Characteristics of the interviews
- Status of the suspect
- Presence of a third person
- Vulnerable persons
- Juveniles
- Indigenous suspects
- Cautioning
- Conclusions.

Relevant extracts from the *Police Powers and Responsibilities Act 1997* (the PPR Act) and the Police Responsibilities Code (the Code) preface discussion of the individual topics.

## Sampling procedures

The *Police Powers and Responsibilities Act*, which substantially changed legal requirements relating to the questioning of suspects, came into effect on 6 April 1998. In order to allow for a 'settling in' period for police to become familiar with their obligations under the PPR Act, the week of 3 to 9 August 1998 was chosen for sampling for the study.

A list of interview tapes from each day in that week was obtained by staff in the QPS Tapes Registry by requesting the computer to identify the tape index numbers for the selected dates. The first 25 tapes on the lists which were generated were then identified and copies of those tapes were made.

A total of 176 tapes was made available for the study (one extra being included by mistake). The Tapes Registry was asked to include only tapes of formal interviews rather than 'in the field' micro tapes. Nevertheless, eight of the tapes which were provided were 'in the field' interviews, including six tapes of the execution of search warrants, (mostly relating to drug searches, at private residences). These tapes were excluded from the final sample.

The statutory obligation imposed on police to give particular information to a suspect applies only to indictable offences. Accordingly, for the purposes of this study, only interviews involving indictable

offences were analysed to determine the level of compliance with statutory obligations.<sup>1</sup> This resulted in the exclusion of 12 tapes.

In addition, we excluded:

- 17 tapes which were interviews of complainants or other witnesses, rather than of suspects
- one inaudible tape and two which were not records of interview.

These various exclusions left 136 tapes in the sample. Unless otherwise indicated, the observations made in this paper relate to these 136 cases.

## Characteristics of the interviews

### Place of interview

As shown in table 1, most of the interviews (85%) took place in a police station. In 12 cases the location could not be determined, mainly due to poor tape quality.

Table 1 — Location of interview

Place	N	%
Station	115	84.6
Private Residence	3	2.2
Watchhouse	2	1.5
Police Boat	1	0.7
Police Car	1	0.7
Community Council Office	1	0.7
Prison	1	0.7
Unknown	12	8.8
<b>Total</b>	<b>136</b>	<b>100</b>

### Time of interviews

Not all officers recorded whether the time of interview was a.m. or p.m. In 108 interviews (79.4%), the time was able to be ascertained on a 24 hour clock basis. Most of these interviews (69.4%)

<sup>1</sup> Where multiple offences were the subject of interview, the most serious offence was used for coding purposes. The PPR Act (s. 93) provides that Div. 3 of Part 12 applies only to indictable offences. The Operational Procedures Manual (s. 2.1.1) states that:

Although there is no legislative requirement for these provisions to apply to other offences ... officers should consider applying these safeguards and responsibilities in relation to non-indictable offences of a serious nature (e.g. possession of a concealable firearm).

Whenever officers intend to interview a person in relation to an offence which may result in the person being charged with either a non-indictable or an indictable offence (e.g. interview for an offence which may constitute a regulatory offence or imposition or, depending on other factors, such as the criminal history of the offender, may result in charge of an indictable offence under the Criminal Code), officers should comply with the abovementioned safeguards and responsibilities from the outset.

occurred between 8.00 a.m. and 8.00 p.m. Table 2 below shows the times for the 108 interviews where the time (based on a 24 hour clock) was known.

**Table 2 — Time at which interview conducted**

Time	N	%
8:01am - 12:00pm	25	23.1
12:01pm - 4:00pm	25	23.1
4:01pm - 8:00pm	25	23.1
8:01pm - 12:00am	17	15.7
12:01am - 4:00am	7	6.5
4:01am - 8:00am	9	8.3
<b>TOTAL</b>	<b>108</b>	<b>100</b>

### Police officers conducting interviews

Interviews were usually conducted by general duties officers (53.7%) or CIB officers (27.2%). Table 3 gives a breakdown of the work areas of the police officers conducting the interviews.

**Table 3 — Work area of officer conducting interview**

Work Area	N	%
General Duties	73	53.7
CIB	37	27.2
JAB	6	4.4
Traffic	1	0.7
Fraud	1	0.7
Other	11	8.1
Unknown	7	5.1
<b>Total</b>	<b>136</b>	<b>100</b>

In more than half the interviews, two officers were present. Almost all officers present during interviews identified themselves by name on the tape (n=210, 98.6%), and 70 per cent (n=149) also identified themselves by their registered number. Table 4 records the numbers of officers present during interviews.

**Table 4 — Number of officers present during interviews**

Number Present	N	%
One Officer	55	40.4
Two Officers	75	55.1
More than two Officers	2	1.5
Unknown	4	2.9
<b>Total</b>	<b>136</b>	<b>100</b>

### Characteristics of suspects

Most persons interviewed were male (n=120, 88.2%). This proportion is slightly higher than the general offence statistics which show that about 82 per cent of offenders are male (QPS, 1998).

Fifteen (11.0%) of the suspects were identified as juveniles (that is, under 17 years of age). They ranged in age from 13 to 16, with the largest group being 15 years (n=7). In addition, eight of the 'adult' suspects were only 17 years old.

### Offences for which suspect was interviewed

Table 5 provides a breakdown of the various types of offences which were the subject of interview. The most common indictable offences for which suspects were interviewed were those involving theft or break and enter (31.6%).

**Table 5 — Most serious indictable offence for which suspect interviewed**

Offence	N	%
Theft/Break & Enter	43	31.6
Drug Offences	23	16.9
Assault	21	15.4
Other Property Offences	20	14.7
Driving	7	5.1
Fraud	6	4.4
Sexual Assault	5	3.7
Homicide	1	0.7
Other	10	7.4
<b>Total</b>	<b>136</b>	<b>100</b>

The offences which were non-indictable, but which were accompanied by indictable offences, included driving an unregistered vehicle and driving a vehicle while unlicensed. The 12 interviews which dealt only with non-indictable offences involved the following offences: shop stealing; possible breaches of

domestic violence orders; unlawful possession and use of a firearm; and a false vehicle identification number. As indicated, interviews which dealt purely with non-indictable offences are not included in the data in this report.

### Length of interviews

The interviews varied in length from less than one minute (rounded up to one minute for coding purposes) to a maximum length of 45 minutes. The average length of the interviews was 19 minutes 16 seconds.

In nine interviews, one or more 'timeouts' were recorded. The most common reason for this was to contact a third person to request them to attend the interview. Other reasons included: to visit the suspect's house; for the interviewing officer to take a phone call; and for police to talk to another officer who entered the interview room.

### Requirements for electronic recording

The PPR Act sets out requirements for electronic recording of police/suspect interaction. Specifically, sections 103 and 104 provide that questioning of suspects, and the giving of information required by the Act, must be electronically recorded 'if practicable'.

#### The PPR Act

##### Rights of a person in custody to be electronically recorded

103. A police officer who is required under this division to give to a person in custody information (including a caution) must, if practicable, electronically record the giving of the information to the person and the person's response.

##### Recording of questioning etc.

104.(1) This section applies to the questioning of a person in custody.

(2) The questioning must, if practicable, be electronically recorded.

#### The Code

##### Rights of a person in custody to be electronically recorded

75.(1) If it is not practicable for a police officer to electronically record the giving to a person in custody of information (including a caution), the police officer must make a written record of the giving of the information and the person's response.

(2) The police officer must make the record as if the Act, section 104(6) to (10) applied to the giving of the information and the response.

## Status of suspect

### Statutory requirements

The PPR Act provides for persons to be cautioned in accordance with the Police Responsibilities Code (s. 99(1)). The Code requires a police officer, prior to questioning, to explain to a person who has not been arrested that they are not under arrest and are free to leave at any time (s. 63(5)). Where the person has been arrested without a warrant, they must be informed immediately that they are under arrest (s. 113(1), PPR Act).

#### The PPR Act

##### Cautioning of persons in custody

99.(1) ...a police officer must, before starting to question a person in custody, caution the person in the way required under the Responsibilities Code.

##### Information to be given to arrested person

113.(1) A police officer who arrests a person without warrant must, as soon as is reasonably practicable after the arrest, inform the person that the person is under arrest and of the nature of the offence for which the person is arrested.

(2) Before the person is released from police custody, a police officer must give to the person, in writing, the name, rank and station of the arresting officer.

#### The Code

##### Asking persons to attend for questioning

63.(1) This section applies if a police officer wants to question a person who is in custody as a suspect and is not a person mentioned in section 48(2) [person who is refused bail] of the Act.

(2) Before questioning the person, the police officer must caution the person.

(3) If the police officer approaches the person at a place other than a police station or police establishment, the caution must substantially comply with the following:

'I am (name and rank) of (name of police station or police establishment).

I wish to question you about (briefly describe offence).

Are you prepared to come with me to (place of questioning)?

Do you understand that you are not under arrest and you do not have to come with me'?

...

(5) Before the police officer starts to question the person in custody, the police officer must caution the person in a way that substantially complies with the following-

'Do you understand that you are not under arrest?

Do you understand that you are free to leave at any time unless you are arrested?'

(6) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words.

(7) If necessary, the police officer must further explain the caution.

## Findings

It was possible to ascertain from the taped interviews that 68 (50%) interviewees were volunteers and 12 (8.8%) were under arrest at the time of interview. In the remaining 54 cases, the status of the suspect was not clear. Those suspects' names, dates of birth and dates on which they were, according to the tapes, in police custody, were then checked against the QPS Custody Index. This enabled us to ascertain the status of the suspects in an additional 37 cases. Table 6 sets out the status of suspects based on information from the taped interviews and the custody index.

**Table 6 — The custody status of suspects during the interview (based on interview tape data and the custody index)**

Status	N	%
Volunteer	89	65.4
Under Arrest	24	17.6
Status Unclear	17	5.1
Detained	4	2.9
Not applicable	2	1.5
<b>Total</b>	<b>136</b>	<b>100</b>

- Notes: 1. 'Status Unclear' includes matters where the custody index did not indicate the status of the suspect, or where the suspect's name could not be located on the custody index for the relevant date.  
2. 'Not applicable' refers to one interview which took place in a prison and one in a residence.

Of the 89 suspects who were identified as volunteers, a surprisingly high number of 45 (50.6%) were not informed on tape that they were free to leave. In some cases, this advice may have been given prior to the taped interview, or may have been considered unnecessary if a suspect had not been in the company of police when deciding to attend a police station for questioning. Nevertheless, as noted above, the PPR Act requires that the giving of information about a suspect's rights must be electronically recorded where practicable (see s. 103 of the PPR Act). Clearly, as the interview was being tape recorded, it was practicable to give the warning about the suspect being free to leave.

The following extract, which suggests that there was a failure to comply with section 63(3) of the Code highlights the confusion that can occur when the statutory requirements to clearly inform suspects of their status are not met:

### Case study 1

[I = Interviewing officer 1; I2 = Interviewing officer 2; S = suspect]

I: Okay. As I said, I'm Constable I. My registered number is (number supplied) of X Police Station and I wish to question you briefly in relation to the break and enter offence.

Okay. Did you come here of your own free will this morning?

S: Ah, I think I was told to.

I2: Do you agree that at about 10 past 4 this morning, um police, myself, (name of officer) and other uniformed police spoke to you at [Street and suburb name included] near a parkland?

...

I2: Okay. Do you agree that I said to you that I want to ask you questions in relation to a break and enter?

S: Yeah, you asked me that.

I2: Okay.

S: And then I asked whether I was allowed to go or not and I was under the impression that I had to come here.

I2: Okay. Well, no I actually asked you 'are you prepared to come back to the police station and answer some questions', okay?

S: And then I told you I had to work.

I2: Prior to you telling me you had to work, I asked you if you were prepared to come to X Police Station and answer some questions. Do you agree with that?

S: Mmmm I don't know, because I asked to leave and —

I2: Okay. So, you're not here of your own free will any more?

S: Not really.

I2: Okay, effective now, you're under arrest of suspicion of break and enter and for questioning, do you understand that?

S: Why's that?

I2: Because you don't want to be here of your own free will. I'd only ask you back here of your own free will.

S: But how can you arrest me?

I2: I didn't force anyone into the police car. I'm arresting you on suspicion of break and enter for questioning which is what's happening now. We're questioning you.

S: Well, I cannot be arrested because I have to work, simple. So, I'll answer any questions, I just have to work.

I2: That's fine, I'm just explaining to you now that it doesn't matter if you don't want to be here of your own free will. You're arrested for the purpose of this questioning, okay.

S: Okay. I'm just trying to get a clear picture of everything.

I2: Do you agree that prior to the interview, I told you that you had the right to contact a friend, relative or a lawyer of your choice

S: Yes.



- I2: And that they be present for this questioning?
- S: Yes.
- I2: And then you chose not to contact anyone.
- S: Yes.
- I2: Okay.
- I: Okay, before I ask any further questions, I must tell you that you have the right to remain silent. It means you do not have to say anything or answer any questions or make any statement unless you wish to do so. However, if you do say anything or make any statement it may later be used as evidence. Do you understand this warning?

## Presence of a third person

### Statutory requirements

The PPR Act states that the interviewing police officer, *before* starting to question a person in custody, must notify all suspects that they have a right to telephone a friend or relative, or a lawyer, and to have each of those persons present during questioning (s. 95).

#### The PPR Act

##### Right to communicate with friend, relative or lawyer

95.(1) Before a police officer starts to question a person in custody for an indictable offence, the police officer must inform the person he or she may —

- (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
- (b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.

(2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).

(3) If the person arranges for someone to be present, the police officer must delay the questioning for a reasonable time to allow the other person to arrive.

#### The Code

##### Right to communicate with friend, relative or lawyer

66.(1) If a police officer must advise a person in custody of his or her right to contact a friend, relative or lawyer, the advice the police officer gives must substantially comply with the following —

'You have the right to telephone or speak to a friend or relative to inform that person where you are and to ask him or her to be present during questioning.

You also have the right to telephone or speak to a lawyer of your choice to inform that person where you are and to arrange or attempt to arrange for the lawyer to be present during questioning.

If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.

Is there anyone you wish to telephone or speak to?'

(2) If the police officer reasonably suspects the person does not understand the advice, the police officer may ask the person to explain the meaning of the advice in his or her own words.

(3) If necessary, the police officer must further explain the advice.

(4) ...

(6) A reasonable time to delay the questioning to allow a friend, relative or lawyer to arrive at the place of questioning will depend on the particular circumstances, including for example —

(a) how far the person has to travel to the place; and

(b) when the person indicated he or she would arrive at the place.

(7) What is a reasonable time to delay questioning to allow the person to speak to a friend, relative or lawyer will depend on the particular circumstances, including for example the number and complexity of the matters under investigation.

(8) Unless special circumstances exist, a delay of more than 2 hours may be unreasonable.

## Findings

### Presence of third persons

The CJC officers who listened to the interview tapes coded a failure to comply with section 95 of the Act when the advice concerning third persons or lawyers was not given prior to questioning. In some cases there was a subsequent acknowledgement by suspects that they had been informed of their rights, but the giving of this information was not recorded on tape.

Notification of the right to have a third person present during questioning was not given to 29 suspects (21.3%) during the taped interview. Eight of those persons actually had a third person present, but the other 21 (15.4% of the total sample) did not.

There was a low rate of use of third persons overall. Of those adult suspects who were recorded as non-indigenous (n=94), only five (5.3%) appeared to have a third person present during the interview. The circumstances of these cases were as follows:

- Two suspects had a lawyer present. One of these suspects had a depressive illness and the other was on a disability pension.

- Two suspects had a relative or friend present. One suspect was 17 years old and had allegedly committed the offence as a juvenile and the other was an adult questioned for assault.
- A justice of the peace was present during the interview of an intellectually disabled suspect.

In 10 cases where a third person's attendance was sought, the person did not attend. Reasons for non-attendance include:

- the third person sought by the suspect was not able to be contacted by the suspect, despite attempts to do so (n=4)
- in one matter the person who the suspect sought to be present was also a suspect, and police refused to allow him to be present
- in one instance, the suspect initially wanted a solicitor present, but, after being reminded by the police officer that he did not have to say anything, the suspect agreed to be interviewed
- after the suspect spoke with a lawyer by telephone, the interview was postponed to the following day when the suspect agreed to attend again at the station for a voluntary interview.

In three cases, there was no explanation as to why the third person sought by the suspect did not attend. In one of these cases, the police misled the suspect as to the time frame within which the third person was required to attend. This may be seen from the following extract of interview.

#### Case Study 2

[I1 = Interviewing Officer 1; I2 = Interviewing officer 2; S = suspect.

- I1: ... Okay, you also have the right to telephone or speak to a lawyer of your choice to inform that person where you are and to arrange or attempt to arrange for the lawyer to be present during questioning. If you want to telephone or speak to any of these people, the questioning will be delayed for a reasonable time for that purpose. Do you want to telephone or speak to anyone to get them here to be present while we question you?
- S: That means I have to stay here? Um --
- I1: Yeah. Well, what will happen is you'll stay here and we'll telephone someone and then they can come in and they can sit here while you answer the questions.
- I2: It also depends on the time limit as well. Like, you can't telephone someone and they say we're gonna be in in an hour, two hours, because that's just not a viable time - that time limit, so it's got to be someone that you know that can attend straight away.
- S: And, like what happens if I, like, say 'no'. Will I get bail tonight or what happens?
- I1: Um. Well, I don't -- it's -- see it's not up --
- S: It's just that I gotta work at 9 o'clock in the morning.
- I1: Yeah.
- S: That's where I was going back to night, now. So --

### **Right to contact a friend or relative**

The PPR Act imposes the obligation on a police officer to inform the suspect that they may telephone or speak to a friend or relative to inform the person of their whereabouts and ask the person to be present during questioning (s. 95(1)(a)). Thirty-one suspects (22.8%) were not informed on the tape that they had a right to telephone a friend or relative. In eight of these cases a third person was present, which probably explains why there was no specific police advice about this right. However, the other 23 interviewees were apparently not advised and did not have anyone present.

### **Lawyer**

A lawyer or person from a legal agency was present in only five cases.

In 23 interviews (16.9%), suspects were not notified on tape of their right to contact a lawyer. The types of offences involved in these matters were: theft/break & enter (11); fraud (3); wilful damage to property (2); assault (2); drug (3); homicide (1) and one 'unknown'.

It is possible that suspects may have been informed of their right to contact a lawyer prior to the record of interview commencing. However, in view of the requirement to electronically record the giving of information to a suspect 'if practicable', it should have been a simple matter to comply with the requirement while the tape was running. A breach of this requirement to notify could have serious repercussions if the matter proceeds to court.

## Vulnerable persons

### Statutory requirements

The PPR Act and Code provide additional safeguards for certain categories of vulnerable persons. The Code requires that vulnerable suspects should have a carer with them if they exhibit a mental or intellectual disability (s. 67). Section 68 of the Code requires police to delay the questioning of an intoxicated suspect until reasonably satisfied that the suspect can understand their rights and answer questions.

#### The Code

##### Questioning persons with impaired capacity

67.(1) This section applies to a person in custody whose capacity to look after or manage his or her own interests is impaired because of either of the following —

- (a) an obvious loss or partial loss of the person's mental functions;
- (b) an obvious disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.

(2) A police officer must not question a person mentioned in subsection (1) unless —

- (a) before questioning starts, the police officer has, if practicable, allowed the person to speak to a carer in circumstances in which the conversation will not be overheard; and
- (b) a carer is present while the person is being questioned.

(3) Also, the police officer must suspend questioning and comply with subsection (2) if, during questioning, it becomes apparent that the person being questioned is a person mentioned in subsection (1).

(4) This section applies as if it were a section to which section 106 of the Act applies.

##### Questioning intoxicated persons

68.(1) If a police officer wants to question or to continue to question a person in custody who is apparently under the influence of liquor or a drug, the police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and decide whether or not to answer questions.

(2) This section applies as if it were a section to which section 106 of the Act applies.

### Findings

Eight suspects either exhibited characteristics of a mental illness and intellectual disability, or were apparently under some physical disability, including heroin withdrawal, epilepsy or mild hearing impairment exacerbated by the absence of a hearing aid. (This assessment was based on comments by the suspect or speech indicators.) Three of the eight suspects identified as potentially vulnerable had a third person present during questioning. Three suspects appeared to be under the influence of alcohol and two appeared to be under the influence of drugs during questioning, as indicated by slurred or slow speech and/or references to recent alcoholic intake or drug usage.

## Interpreter

### Statutory requirements

The presence of an interpreter is required when a police officer reasonably suspects that the suspect is unable to speak with reasonable fluency in English (s. 101 of the PPR Act and s. 73 of the Code), due either to inadequate knowledge of the English language or a physical disability.

#### The PPR Act

##### Right to interpreter

101.(1) This section applies if a police officer reasonably suspects a person in custody is unable, because of inadequate knowledge of the English language or a physical disability, to speak with reasonable fluency in English.

(2) Before starting to question the person, the police officer must arrange for the presence of an interpreter and delay the questioning or investigation until the interpreter is present.

(3) In this section —

‘investigation’ means the process of using investigative methodologies, other than fingerprinting, searching or taking photos of the person, that involve interaction by a police officer with the person, for example, an examination or the taking of samples from the person.

#### The Code

##### Right to interpreter

73.(1) For deciding whether to arrange for the presence of an interpreter, a police officer may ask a person in custody in relation to an offence any question, other than a question related to the person’s involvement in the offence, that may help the police officer decide if the person needs an interpreter.

(2) In particular, the police officer may ask questions that indicate whether or not the person —

(a) is capable of —

(i) understanding the questions put to him or her and effectively communicating answers to the questions; and

(ii) understanding what is happening to him or her; and

(iii) understanding his or her rights at law; and

(b) is aware of the reason why the questions are being asked.

### Findings

The QPS First Response Handbook encourages police to ask suspects what level of education they have reached and whether they have trouble reading and writing the English language. However, 45 (33.1%) suspects were not asked what level of education they had reached and 47 (34.6%) were not asked if they had trouble reading or writing English. In part, this may be because there had been prior interaction with the suspect and the police officer knew of the suspect’s level of ability, but best

practice requires the formal recording of the asking of the question. Of the 12 indigenous suspects, three were not asked what level of education they had reached and five were not asked whether they had trouble reading or writing English.

In two interviews there were obvious language difficulties on the part of the suspect, but from the tapes it appeared that there was no interpreter present.

## Juveniles

### Statutory requirements

The PPR Act requires an 'interview friend' to be present while a juvenile is being interviewed in relation to an indictable offence (s. 97). The PPR Act also provides that the interview friend should be either a parent or guardian of the child, or a lawyer or person from a legal service. Where those persons are not available, a relative or friend of the child should be present, and if none of those persons is available, a justice of the peace. In all of the fifteen interviews of juveniles, a third person was recorded as being present.

#### The PPR Act

##### Questioning of children

97.(1) This section applies if —

- (a) a police officer wants to question a person in custody as a suspect; and
- (b) the police officer reasonably suspects the person is a child.

(2) The police officer must comply with section 95(1), (2) and (3).

(3) The officer must not question the child unless —

- (a) before questioning starts, the police officer has, if practicable, allowed the child to speak to the interview friend in circumstances in which the conversation will not be overheard; and
- (b) an interview friend is present while the child is being questioned.

(4) If the police officer considers the interview friend is unreasonably interfering with the questioning, the police officer may exclude the person from being present during the questioning.

### Findings

In most cases (n=11), the third person attending the interview was the juvenile's parent or guardian. In two other cases, a relative or friend was present, in one a Justice of the Peace attended, and in the remaining case the status of the third person was not recorded.

## Indigenous suspects

### Statutory requirements

The PPR Act requires that, unless the police officer is aware that an indigenous suspect has arranged for a lawyer to be present during questioning, the police officer must attempt to notify a representative of a legal aid organisation that the person is in custody (s. 96(3)). This requirement does not apply if, having regard for the suspect's level of education and understanding, the police officer 'reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally' (s. 96(4)). In addition, the PPR Act requires that the suspect be given an opportunity to speak to an interview friend and also to have that person present during questioning (unless the suspect has expressly waived that right) (ss. 96(5) and (6)).

#### The PPR Act

##### Questioning of Aboriginal people and Torres Strait Islanders

96.(1) This section applies if the police officer in charge of investigating an offence reasonably suspects a person in custody for the offence is an Aborigine or Torres Strait Islander who is at least 17.

(2) The police officer must comply with section 95(1), (2) and (3).

(3) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must —

- (a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and
- (b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

(4) Subsection (3) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.

(5) The police officer must not question the person unless —

- (a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the interview friend, if practicable, in circumstances in which the conversation will not be overheard; and
- (b) an interview friend is present while the person is being questioned.

(6) Subsection (5) does not apply if the person has, by a written or electronically recorded waiver, expressly and voluntarily waived his or her right to have an interview friend present.

(7) If the police officer considers the interview friend is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

#### The Code

##### Questioning of Aboriginal people and Torres Strait Islanders

71.(1) Before a police officer notifies a representative of a legal aid organisation that an Aborigine or Torres Strait Islander who has not arranged for a lawyer to be present during questioning is in custody, the police officer must



inform the person in custody, in a way that substantially complies with the following, that the organisation will be notified—

'As you have not arranged for a lawyer to be present, a legal aid organisation will be notified that you are here to be questioned about your involvement in an indictable offence.'

(2) However, the police officer must, unless he or she already knows the person in custody, first ask questions necessary to establish the person's level of education and understanding.

(3) The questions the police officer may ask include questions, not related to the person's involvement in the offence, that may help the police officer decide if the person —

(a) is capable of —

(i) understanding the questions put to him or her and effectively communicating answers to the questions; and

(ii) understanding what is happening to him or her; and

(iii) understanding his or her rights at law; and

(b) is aware of the reason the questions are being asked.

(4) If the person in custody has indicated he or she does not wish to telephone or speak to a friend, relative or lawyer or arrange for a person to be present during questioning, the police officer conducting the questioning must inform the person that he or she may have an interview friend present during the questioning.

(5) The information given under subsection (4) must substantially comply with the following —

'Is there any reason why you don't want to telephone or speak to a friend, relative or lawyer, and arrange for a person to be present during questioning?

Do you understand that arrangements can be made for an interview friend to be present during the questioning?

Do you also understand that you do not have to have an interview friend present during questioning? Do you want to have an interview friend present?'

(6) If the police officer reasonably suspects the person is at a disadvantage in comparison with members of the Australian community generally, and the person has not arranged for another person to be present during the questioning, the police officer must arrange for an interview friend to be present.

## Findings

Twelve suspects (8.8%) were recorded as definitely being from an indigenous background. In another 16 cases (11.8%), the CJC officer listening to the tape formed the opinion that the suspect may have been indigenous, based on indicators such as accent and speech patterns, the place where the interview was conducted and the suspect's name. The high proportion of indigenous suspects in the interview sample (20.6% in total) is in keeping with other statistics showing over-representation of indigenous people in the criminal justice system.

The following table sets out the extent to which those suspects identified as indigenous, and those who may have been indigenous were notified of their rights:

Notified of right	Suspect clearly identified as indigenous (n=12)	Suspect possibly indigenous (n=16)	Total indigenous suspects (n=28)
1. To communicate with friend or relative	7	13	20
2. To have present a friend or relative	9	12	21
3. The right to contact a lawyer	10	14	24
4. To notify legal aid organisation where no lawyer present	6	0	6

Eight of the twelve suspects definitely identified as indigenous (one of who was a juvenile) had a third person present during the interview. Of these third persons, three were lawyers or legal agency staff, one was a parent/guardian, two were other relatives or friends, one was from the QPS list of interview friends, and one was not known.

Of the 16 suspects who may have been indigenous, six (of whom three were juveniles) had a third person present: three were parents/guardians, one was another relative or friend, and the status of two third persons was not known.

It was recorded on tape that a legal aid organisation had been notified in relation to the interviews of only six (50%) of the suspects who were identified as indigenous. Again, though, this may not necessarily indicate a failure by police to provide this information, only that notification of that right was not recorded on the tape.

In three of the six interviews where a legal aid organisation had not been notified, it was apparent that the suspect did not feel the need for the assistance of a legal service (in one case the suspect clearly declining to be interviewed). In the three instances when there was no such indication expressed by the suspects, the reasons for not notifying the legal aid organisation were not given on the tape.

## Cautioning

### Statutory requirements

The PPR Act specifically preserves the right of silence (s. 92) and requires officers to caution suspects in the way set down in the Police Responsibilities Code. Section 64 of the Code requires the interviewing police officer, before asking any questions, to caution a suspect that they have the right to remain silent and that anything that is said may be later used as evidence.

The PPR Act

## Right to remain silent not affected

92. Nothing in this Act affects the right of a person to refuse to answer questions, unless required to answer the questions by or under an Act.

## Cautioning of persons in custody

99.(1) Subject to subsection (3), a police officer must, before starting to question a person in custody, caution the person in the way required under the responsibilities code.

(2) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person can not hear adequately.

(3) This section does not apply if another Act requires the person to answer questions put by, or do things required by, the police officer.

The Code

## Cautioning persons in custody about his or her right to silence

64.(1) This section applies if a person in custody is to be cautioned under section 99 of the Act.

(2) A police officer must caution the person in a way that substantially complies with the following —

'Before I ask you any questions I must tell you that you have the right to remain silent. This means you do not have to say anything, or answer any question or make any statement unless you wish to do so. However, if you do say something or make any statement, it may later be used as evidence. Do you understand this warning?'

(3) If the police officer reasonably suspects the person does not understand the caution, the police officer may ask the person to explain the meaning of the caution in his or her own words.

(4) If necessary, the police officer must further explain the caution.

(5) If questioning is suspended or delayed, the police officer must ensure the person being questioned is aware that he or she still has the right to remain silent and, if necessary, again caution the person when questioning resumes.

(6) If a police officer cautions a person in the absence of someone else who is to be present during the questioning, the caution must be repeated in the other person's presence.

## Right to remain silent not affected

65.(1) This section applies if a suspect, the suspect's lawyer, or someone whose presence is required during questioning of the suspect indicates to the police officer questioning or intending to question the suspect that —

(a) if questioning has not started—the suspect does not want to answer questions; or

(b) if questioning has started—the suspect does not want to answer any further questions.

(2) The police officer must clarify the suspect's intent to exercise his or her right to silence by asking the suspect —

(a) whether the suspect does not want to answer any questions generally or only questions about the offence for which the person is being questioned;  
and

- (b) if any further question was asked relating to the offence or another offence, whether the suspect would not answer the question.
- (3) If the suspect confirms that he or she does not want to answer any questions, the police officer must not question or continue to question the suspect.
- (4) However, if the suspect later indicates he or she is prepared to answer questions, a police officer must, before questioning or continuing to question the suspect, ask the suspect —
- (a) why he or she has decided to answer questions; and
- (b) if a police officer or someone else in authority has told the suspect to answer questions.

## Findings

Five suspects (3.7%) were not notified of their right to silence and 16 (11.8%) were not notified that evidence could be used against them. These figures show substantial compliance with the obligation; nevertheless, failure to inform a suspect of this fundamental right in *any* case should be considered a serious matter.

Further analysis of the context in which the interviews were conducted perhaps explains the failure to notify a suspect of this important right in two of these instances.

- One tape recorded an observation by the interviewing officer that the suspect had earlier indicated that he would not take part in an interview without consulting a lawyer. The purpose of the tape may have been to formally record that stance being taken by the suspect
- In an interview relating to an allegation of assault in the previous year, the suspect appears to have attended for interview by way of appointment and may have been informed of the right to silence at the time the appointment was arranged.

In two other interviews there were acknowledgements by the suspects during or at the conclusion of questioning that they had been told that they did not have to say anything. However, in one interview (not within the indictable offence sample), which involved an alleged breach of a domestic violence order, it was clear that the police officer had simply omitted to inform the suspect of the right to silence. At the conclusion of the tape when the interviewing officer asked the suspect if, at the start of the interview, he had been told of his right to silence, the suspect responded in the negative. The police officer then agreed that was the position.

The Code also requires police to ask suspects whether they understood the warning (s. 64(2)). If the officer reasonably suspects that the person did not understand, they may ask the suspect to explain the caution in their own words, or if necessary must further explain the caution. Police asked 22 suspects (16.2%) to restate the caution in their own words. In six of these 22 cases the understanding of the caution was also checked in another way.

In relation to Aboriginal suspects, the Operational Procedures Manual (Paragraph 2.14.11) states:

[G]reat care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent ...

In 29 (25.7%) of the 113 instances where suspects were not requested to explain the caution in their own words, police attempted to check the suspect's understanding in another way. In 18 of the 29 cases, the checking mechanism was merely to ask the suspect 'Do you understand that?'. This is the suggested approach made in the First Response Handbook (p. 166). However, that may not always be appropriate, as is recognised by the Operational Procedures Manual for Aboriginal suspects.

Perhaps the best way of checking the suspect's level of understanding is to put to them open-ended questions requiring other than a 'yes' or 'no' answer. Examples used by some interviewing officers are:

- What did I just say to you?
- What do you understand are your rights?

Those, and the following examples of different approaches which were used by some officers, may be helpful in future situations:

- 'You understand that you don't have to talk to me, mate?'
- '... you can answer some, no or all questions.'
- 'In other words, you don't have to say anything if you don't want to.'

#### **Manner in which caution given**

The manner in which most officers delivered the notification of rights was recorded as 'matter of fact' (64.0%) or 'calm' (13.2%). A small proportion of officers (6.6%) told suspects about their rights in a rushed manner.

Suspects may not understand their rights if this information is read to them in a rushed or mechanical way. The following example is apposite:

#### **Case study 3**

- I1: We are recommencing the interview with S. S do you agree that during the time we stopped the interview we gave you the opportunity to ring a few people, one of them was your boss and we couldn't get through to him. We also tried to ring a few other people. Can you tell me who they were?
- S: My other boss.
- I1: Right, and we couldn't get through, it was disconnected, wasn't it. OK. So you agree that we have allowed you the opportunity to ring people and ask them to come in if they wish to. OK, S, I will just go over these warnings again to make sure that you are still aware of them. OK. Before I ask

any questions I must tell you you have the right to remain silent, you understand what that means? Can you tell me what that means?

S: Means I don't have to say a single word if I don't want to. If I don't say a word, that means I get locked up straight away?

I1: No, that's not true at all. The reasons that we are here is to hear your side of the story. OK, what we have here is a report OK, what we need to do is investigate that report, and part of that report is speaking to you and getting your version of events. OK, so no that's not the case at all. You understand that?

S: So if I say nothing, that means I get released?

I1: If you say, it depends, I haven't thought of the situation yet, OK, we will have to decide that. We will cross that bridge when we come to it. Basically, all you have to do if you want to is tell the truth. You're happy with that? So you can answer our questions if you want to, just listen, you can answer our questions if you want to or you can decide not to answer our questions if you don't wish to. Its entirely up to you. As I said to you before its simply not true that we will lock you up straight away if you don't answer any questions that doesn't happen, this is all part of the investigative process where we ask you what's going on and you tell us and we make a decision based on your answers, if you decide not to tell us anything than we have to make a decision then as well based on what we know. OK. OK, and you are aware that everything is recorded on these tapes. OK. If you say anything or make any statement it may later be used as evidence and you understand that warning as well? OK. Is there anything else you want to say? OK S, I want to ask you about a matter that happened on ...

## Use of threats or promises

### Statutory requirements

The Code reflects the common law in stating that a police officer must not obtain a confession by threat or promise and must also avoid any situation of oppression, unfairness or fear of dominance (s. 62).

#### The Code

##### Questioning generally

62.(1) A police officer who is questioning a person in custody must not obtain a confession by threat or promise.

(2) Also, the police officer, must avoid or attempt to avoid any situation or circumstance that may give rise to any suggestion—

- (a) of oppression, unfairness, fear or dominance by a police officer; or
- (b) that the person questioned may have been overborne, oppressed or otherwise unfairly or unjustly interviewed.

The suggested form of questioning in the QPS First Response Handbook (p. 172) states that suspects should be asked at the close of the interview words to the following effect: 'Has any threat, promise or inducement been held out to you, to get you to take part in this interview?' Most suspects (121, 89.0%) were asked that question, and all except one responded 'no'. Some suspects specifically commented favourably during the course of the interview on the treatment they had received at the hands of police. Favourable comments included; for example:

- [I was treated] better than I would have thought
- I'm happy with the way police treated me.

In two instances, the question 'Has any threat, promise or inducement been held out to you to get you to take part in the interview?' was met with emphatic negative responses ('definitely not' and 'absolutely not').

The one suspect who responded 'yes' to this question was an indigenous person who had answered 'yes' to most of the questions asked of him (that is, he showed a tendency to gratuitous concurrence). Many suspects did not seem to understand the meaning of 'inducement' and often officers chose to follow up with an explanation in simpler words. This points to the desirability of expressing these questions in clearer form.

## Conclusion

The overall impression is that, at the time at which the interviews were conducted (August 1998), police were making real and reasonable attempts to comply with the recently imposed statutory obligations. However, as identified above, there are some areas where greater attention is required given the mandatory nature of the provisions. Set out below are a number of measures which, if adopted, would improve levels of compliance with the obligations imposed by the PPR Act, minimise opportunities for confusion in the minds of suspects, and facilitate future monitoring of the exercise of police powers.

1. Police officers need to be made aware that they have a legal obligation to make clear to suspects whether they are, or are not, under arrest and that a request to accompany a police officer to a police station does not impose an obligation on the person to accompany the police officer unless an arrest is made. In a number of cases in this study, it appears that this information was not given to suspects.
2. It may be that in some instances, information and cautions were given prior to the taped interview commencing. However, where this has occurred, it should have been a simple matter for police to repeat the giving of the information and/or caution on tape. Clearly, strict adherence to such a procedure will minimise opportunities for later challenges in court proceedings.
3. In some situations the PPR Act gives police officers some discretion to adopt one course or another. One example is certain provisions relating to indigenous suspects (s. 96(3)) which need not be complied with if:

having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally (s. 96(4)).

Again, it would be a simple process to explain on tape the rationale behind the decision not to comply with the obligation set out in section 96(3), for example, reliance on section 96(4).

4. The data obtained during this audit show substantial compliance with the obligation for police to notify a suspect of the right to silence but, as observed above, failure to inform a suspect of this fundamental right in any case should be considered a serious matter. To check the suspect's understanding of the right to silence, police should be encouraged to ask a question along the lines of: 'What do you understand are your rights?' If the suspect's response shows a lack of understanding on their part, the police officer would then need to take further steps to ensure the suspect's understanding. This could be done by, for example, stating 'You don't have to talk to me if you don't want to'.

## Future monitoring

The focus of this study was on police interviews conducted four months after the PPR Act came into force. Although the level of compliance was generally at an acceptable level having regard to the relative short time after the legislation was passed, it would be beneficial to conduct a further audit, perhaps towards the end of 1999. The CJC would welcome QPS involvement in undertaking such a monitoring exercise and suggests that a QPS officer be nominated as a liaison for a possible future joint exercise.