CRIMINAL JUSTICE COMMISSION

SUBMISSION IN RESPONSE TO THE POLICE POWERS AND RESPONSIBILITIES BILL 1997

November 1997

KEY ISSUES

The Criminal Justice Commission (CJC) considers that all of the issues identified in this submission should be addressed. However, it particularly draws attention to the following areas of concern:

- the substantial increase in the power of police to enter and remain on premises (p. 2)
- the absence of any legislative restrictions on the use of strip searches (p. 3)
- the lack of a statutory obligation on police to consider alternatives to arrest and the broad grounds on which an arrest may be justified (p. 5)
- the failure of the proposed post-arrest detention scheme to deal with the problem of 'volunteers' (pp. 5–6)
- shortcomings in the procedures governing the determination of the initial detention period and the extension of the detention period (pp. 6–7)
- practical difficulties with the proposal to have a public interest monitor appear at applications for surveillance warrants and the lack of any detail about the qualifications required to be a monitor (pp. 7–8)
- the unjustifiably wide powers to be given to police to move people on and to deal with breaches of the peace (pp. 11–13)
- the absence of any obligation on police to clearly inform people of their arrest status and to advise those who are not under arrest that they are free to leave (p. 14).

Viewed as a whole, the *Police Powers and Responsibilities Bill* will significantly extend the powers available to Queensland police. Given the importance of this legislation, it is regrettable that so little time has been made available to the CJC and other interested bodies and individuals to analyse and comment on the Bill. It has also been very difficult to assess the likely implications of aspects of the Bill in the absence of any information about the content of the proposed Responsibilities Code.

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INTRODUCTION

This submission on the Police Powers and Responsibilities Bill 1997 has been prepared pursuant to the Criminal Justice Commission's (CJC) statutory responsibility under the *Criminal Justice Act 1989* to:

- monitor and report on the use of investigative powers (s. 23(b)); and
- research, generate and report on proposals for reform of the criminal law and the law and practice relating to the enforcement of, or administration of, criminal justice (s. 23(e)).

The submission follows on from the detailed submission prepared by the CJC in August 1997 on the *Review of Police Powers Discussion Paper*, and the five-volume review of police powers published by the CJC in 1993 and 1994.

Because of the very limited time available to the CJC and other interested bodies and individuals to analyse the Bill prior to it being debated in Parliament, it has not been possible to give due consideration to all aspects of the proposed legislation. Preparation of this submission has been further hampered by the fact that the content of the Responsibilities Code which is to accompany the new Act is not yet known. The CJC had previously recommended that:

> Great care must be taken, when drafting the legislation and associated material in the form of regulations, codes and guidelines, that the protections they embody have proper legal effect. The CJC urges that much of the important detail should be settled in conjunction with the Bill, rather than after its passage, so that it can be presented in one package for the information of the public and for informed debate by the Parliament.

The CJC is disappointed that such a course has not been adopted. The CJC will be making a submission to the Minister for Police and Corrective Services on matters which should, as a minimum, go into the Responsibilities Code.

However, within these constraints the CJC has endeavoured to prepare a reasonably detailed commentary, so that public and parliamentary debate about this important legislation is properly informed. The focus of these comments is on areas where the CJC has concern about the drafting of, or the policy underlying, the provisions, but it is acknowledged that many aspects of the legislation are uncontroversial and, indeed, to be welcomed.

The submission is organised under the following headings:

- issues of major concern
- drafting issues
- drafting errors.

ISSUES OF MAJOR CONCERN

PART 2—POWERS FOR ENTRY, INSPECTION, INQUIRIES, ARREST AND CRIME SCENES

The CJC strongly opposes the power given to police under clause 13(3) to enter and stay in a place (other than premises 'used exclusively for residential purposes') for the purpose of making inquiries. This provision is a serious inroad into the traditional rights of owners and occupiers of property and no proper justification is given for this encroachment. A power to enter to make enquiries, in itself, will be of little or no effect where people do not want to cooperate, as police have no power to compel people to answer questions.

However, the CJC is concerned that clause 13 of the Bill empowers police to do more than just make inquiries. It also empowers police to enter and stay on a place to 'investigate' a matter. Implicitly, 'investigate' in this context means something other than 'inquire'.

When considered in conjunction with clause 34, which provides for the seizure of evidence discovered by chance by an officer lawfully in a place, the dramatic extension of police powers effected by these provisions and their potential for abuse becomes clear.

The combined effect of the two clauses appears to permit the entry to places (consent of the occupier is required for places which are dwellings) and possible search of them, if the term 'investigate' is interpreted as including that activity. Further, the officer may seize anything which he or she finds and reasonably suspects is evidence of the commission of an offence.

There is no threshold requirement, as is the case with obtaining search warrants, that the officer entering the place have reasonable grounds to suspect that evidence of the commission of an offence is present on the place. Nor is this power limited to the investigation of serious indictable or even indictable offences.

Clearly, there is potential for these provisions to be used to circumvent the more onerous requirements of the search warrant provisions.

Further, it is not clear whether clause 13(5) relating to premises used for residential purposes is subject to 13(6), which permits the use of minimal force to enter a place. The CJC assumes that 13(5) is not intended to be subject to 13(6), and accordingly, it may be clearer if the subclauses were inverted.

While supporting the grant of power to police to enter premises in order to arrest or detain someone or to execute a warrant, the CJC is concerned that the scope of the power as set out in clause 15 is too broad. Police should be required to have a reasonable suspicion that a person is at any private place prior to entering, but under the existing provisions this restriction applies only if the place is a 'dwelling'.

Clause 15(1) would permit police to enter a place and wait on that place for the arrival or return of a person they are seeking to arrest or detain. Such a power is a dramatic extension of current police powers and a serious encroachment upon the rights of owners and occupiers of property.

CRIME SCENES

The CJC draws attention to the following points raised by the provisions dealing with crime scenes (cls. 16–22):

- Clause 16(b) allows a police officer to enter a place that 'may' be a crime scene. Anywhere would fall within this definition. The legislation should specify that the police officer must *reasonably suspect* that the place is a crime scene.

- Once a crime scene is established the police officer is required to apply as soon as is reasonably practicable for a crime scene warrant (cl. 17(2)). However, it appears that in the interim period before an order is made, all powers available under clause 20 can be exercised. Because the range of circumstances in which police may enter is so wide, these provisions could allow for a 'fishing' expedition and effectively make the process for getting a search warrant unnecessary. A police officer could simply enter any place and, if evidence of a crime is found, exercise the wide powers under clause 20 prior to obtaining a crime scene warrant. The CJC submits that until the police officer has a crime scene warrant, no powers should be able to be exercised in respect of the crime scene except those necessary to preserve evidence (including the giving of reasonable directions).

- The CJC opposes the inclusion within the ambit of the crime scene powers of 'secondary crime scenes' (that is, places where there may be evidence of the commission of a 'serious violent offence' although the offence was not committed there). A crime scene is a place where a crime has been committed, not a place where evidence of the commission of an offence is located. The broad definition of secondary crime scene effectively permits the exercise of extensive and unprecedented police powers in circumstances where it would be more appropriate for police to seek a search warrant, or to rely on their emergency search powers under clause 31.

- The CJC in its review of police powers (rec 29.3) proposed that the lawful occupier or his or her invitees should not be excluded from a designated crime scene unless they refuse to comply with the reasonable directions of a police officer. The Bill does not appear to contain any provision to protect their rights.

POWER TO DEMAND NAME AND ADDRESS

Clause 23 should contain a further requirement that the police officer tell the person whose name and address is being demanded the reason for the demand, especially in the case of people who might be able to assist in an investigation. If a person (who might be a witness) is told the reason his or her name and address is being sought, some of the concerns about, or resistance to, providing those particulars would be allayed. This addition would be in keeping with the spirit of the safeguards proposed in clause 112.

PART 3 — ROADBLOCKS AND TRAFFIC RELATED POWERS

The CJC repeats its submission made in response to the Discussion Paper that a roadblock should be required to be authorised in writing by an officer of the rank of inspector or above, except in urgent circumstances where it can be authorised by any officer, provided it is reported to an inspector or higher as soon as practicable. The CJC also urges that the other safeguards which it recommended be adopted, namely that roadblocks should only be available in the case of offences punishable by a maximum of 14, rather than 7, years imprisonment; and that the officer who stops a vehicle at a roadblock should be required to give the reason for the roadblock prior to searching the vehicle, unless there are reasonable grounds to believe that giving the reason will prejudice the operation.

PART 4 — SEARCHING PEOPLE AND VEHICLES WITH A WARRANT

The CJC is most concerned that there is no definition of the type of personal search which may be carried out prior to a person's arrest. In particular, there is no restriction on the use of strip searches. The CJC has previously recommended that strip searches: should only be conducted as a last resort; be conducted in appropriately private surroundings by a police officer of the same gender as the person being searched; and

be subject to specific information-giving and record-keeping requirements. Similarly, in relation to people in custody, there are no limits on the type, or indeed the frequency, of searches: clause 56(2) allows police to 'search and re-search' such persons.

CLAUSE 28 — SEARCH WARRANTS

The CJC has some concerns about the width of clause 28:

- The CJC does not support allowing search warrants to be issued for *any* offence. Rather, warrants should be confined to searches for things connected with indictable offences, offences under the *Drugs Misuse Act 1986* or the *Weapons Act 1990*; things stolen, suspected of being stolen or otherwise unlawfully obtained; or persons unlawfully detained.

- In clause 28(7)(d) which refers to the execution of a warrant at 'night', there is no specification of the hours intended by that phrase, nor are any criteria required to be satisfied to justify the execution of the warrant at night (see section 679 of the *Criminal Code*, and the definition of 'night' in section 1.55).

- In order to prevent 'forum' shopping, clause 28(11) should allow a police officer to make only one further application to a magistrate for a search warrant if a justice of the peace does not decide to issue it initially. Further applications should only be allowed when there is additional evidence which would support the issue of the warrant.

CLAUSE 31 — SEARCH TO PREVENT LOSS OF EVIDENCE

Because clause 31 gives police extraordinary search powers in certain circumstances without the need to first obtain a warrant, approval of those searches must be restricted. The range of offences for which the extraordinary powers are available is too wide: it includes all indictable offences, as well as offences under other specified Acts. In combination with the proposed powers in respect of 'secondary crime scenes' under Part 2 of the Bill, police will effectively be able to circumvent the need to get a search warrant to search any place where they reasonably suspect evidence of the commission of a crime may be located (for example, in private homes).

Clause 31(4), which allows a magistrate to approve the search after the event *either* where the police officer acted reasonably (i.e. had a reasonable suspicion and there was a reasonable likelihood that evidence would be concealed or destroyed) *or* where 'it is in the public interest', is too broad. It would be a rare circumstance where evidence of an offence had been found, a magistrate would hold it not to be in the public interest to approve the search — thus allowing great scope for misuse of this power. The CJC notes that the Discussion Paper proposed that in determining whether a search without warrant is justified, the magistrate would have to take into account *all* of the factors listed in clause 31(4) (p. A18).

CLAUSE 33 — NOTICE TO PRODUCE

Clause 33(5) allows a 'justice authorised in writing by the magistrate' to deal with issues of public interest immunity and duties of confidentiality owed by a bank to its customers. The CJC submits that the person authorised to deal with such matters should have to be a magistrate, as in many cases very complex issues arise in making and determining such claims.

PART 7 — POWERS RELATING TO ARREST

CLAUSE 35 — ARREST WITHOUT WARRANT

As discussed in the CJC's previous submission, there is considerable evidence that police are overusing their existing powers of arrest. The CJC is concerned that, for the following reasons, the proposed clause 35 does not adequately address this problem:

- There is no statutory obligation on police to first consider alternatives to arrest (as previously recommended by the CJC).
- Paragraph (k) of clause 35(1), which states that an arrest may be made 'because of the nature and seriousness of the offence', is a 'catch-all' provision which effectively negates the limitations imposed by the other paragraphs.
- The restrictions set down in clause 35(1) are further diluted by clause 35(2),which allows a person suspected of having committed an indictable offence to be arrested solely for the purpose of questioning or investigation.

CLAUSE 38 — ARREST MAY BE DISCONTINUED

The CJC is concerned about the proposed operation of the power to 'unarrest' a person (cl. 38). The CJC has previously supported such a power for use in limited circumstances. However, in relation to clause 57(1)(c), the Explanatory Notes contain an example of an arrested person being photographed with the arresting officer and then transported to another holding facility. The Explanatory Notes state: 'The person may then be fingerprinted, "unarrested" and then served with a notice to appear'. The CJC is concerned that the legislation contemplates the use of the 'unarrest' procedure in this manner as it suggests that it will become a routine policing method.

NOTICE TO APPEAR

The CJC supports the proposal to enable police to issue a notice to appear but, as indicated, considers that there should be a positive obligation on police to consider using this procedure as an alternative to arresting a person. Without such a requirement, it is questionable whether police will be prepared to make much use of this procedure.

The CJC also submits that there should be a requirement on the police officer who issues a notice to give the person details of the officer's name, rank and station — as is to be required where a person is arrested (cl.113).

PART 8 — INVESTIGATIONS AND QUESTIONING

CLAUSE 48 — APPLICATION OF PART

A major shortcoming of the proposed regulated questioning scheme is the fact that it will not apply to so-called volunteers.

In contrast to the approach taken in some other jurisdictions that have post-arrest questioning schemes (such as Victoria, the Commonwealth and the United Kingdom), the Queensland scheme will apply only

to persons who have been lawfully arrested or who are already in custody because bail has been revoked or they are under a sentence of imprisonment. This means that Queensland police will be able to evade the restrictions which the Bill imposes on questioning by conveying to suspects the impression that they are under an obligation to accompany and remain with police, without formally arresting them. The risk of this occurring is compounded by the fact that there will be no obligation on police to inform a person that he or she is *not* under arrest and is free to go — only an obligation to inform a person that he or she *is* under arrest (cl. 113). This omission is contrary to the proposal outlined in the Discussion Paper (p. B56) which stated 'In the case of a person who voluntarily attends a police station, the police officer would be required, as soon as is reasonably practicable, to ensure the person understands that they are not currently under arrest'. If police are able to circumvent the restrictions imposed by the Bill by persisting with the fiction of 'voluntary attendance', this will largely defeat the purpose of establishing a regulated scheme.

The CJC submits that an additional clause should be inserted in this Part to apply the provisions relating to limits on periods of investigation and questioning to a person who 'is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an offence'.

CLAUSE 49 — REMOVAL OF PERSONS FROM LAWFUL CUSTODY

Under clause 49, the police may apply to a magistrate for an order for the removal of a person in custody under the *Corrective Services Act 1988* or the *Juvenile Justice Act 1992* to police custody for the purpose of 'investigating an offence'. As the provision is worded, there is no requirement that either the person be *reasonably* suspected of having committed the offence which is being investigated, or have consented to speak to police. This provision would therefore appear to allow a person to be removed from custody for questioning about his or her *possible* involvement in an offence even where the person has made it clear that he or she has no intention of cooperating with the police. To permit this to occur places persons who are in custody on unrelated charges in a different — and markedly less favourable — position than other community members, who cannot be compelled to stay to answer questions put by police if they have not been arrested. The limit on the initial detention period of eight hours also does not apply to those who are 'lawfully held in custody' (cl. 50(2)).

Clause 49 also appears to permit people in custody to be removed without their consent to participate in identification parades. This is inconsistent with clause 59(4) which states that a person may refuse to take part in such parades. The CJC submits that clause 49 should be amended to specify that the consent of the person is required before he or she can be removed from custody for the purposes of participating in an identification parade.

CLAUSE 50 — INITIAL PERIOD OF DETENTION

The CJC welcomes the decision to specify a maximum initial period of detention, but has three main concerns with this clause:

- Clause 50(1)(b), as currently worded, will allow the continuation of the practice of arresting people on 'holding charges' to enable them to be questioned about other offences for which there is insufficient evidence to justify an arrest.

- The grounds on which 'time-outs' will be allowed include some grounds — such as to enable the questioning of co-offenders and the interviewing of witnesses — which ought to form part of the justification for detaining the suspect in the first place, rather than being included in the calculation of 'time-outs'.

- No guidance is provided in the Bill as to how time-outs will be recorded, or who will be responsible for monitoring compliance with these requirements.

CLAUSE 51 — EXTENSION OF DETENTION PERIOD

The CJC agrees that external judicial approval should be required for extension of the detention period. However, given the range and complexity of the factors to be considered in determining whether to grant an extension, the CJC submits that only magistrates and justices of the peace (Magistrates Court) should be authorised to grant extensions at first instance. In order to ensure true external review, justices of the peace who are employed by the Queensland Police Service should not be empowered to grant extensions. The Bill acknowledges that such justices may not act as interview friends for children who are being questioned by police, because of the necessity for that role to be independent; the same considerations should apply to extension of detention periods for questioning and investigation.

The CJC also repeats its view that applications for any further extensions should be required to be made to a Supreme Court judge.

CLAUSE 52 — EFFECT OF UNFORESEEN DELAYS ON DETENTION

The CJC is concerned that clause 52, which allows a person to be detained beyond the authorised time where there is a 'reasonably unforeseen time-out' (cl. 52), may provide police with an opportunity to circumvent the time limits set down in the Bill. One of the examples provided in the Bill concerns a situation where, during an interview with a suspect, the suspect names co-offenders who need to be interviewed before the interview can continue. This should be seen as a normal aspect of the investigation, not as some unforseen event (such as a car or recording equipment breaking down).

PART 10 — SURVEILLANCE POWERS

CLAUSE 79 — PUBLIC INTEREST MONITOR

Clauses 79 to 82 dealing with the establishment of a 'public interest monitor' are replicated in large measure in Part 5 of the Crime Commission Bill 1997 and in the proposed Part 3 Division 1A of the *Criminal Justice Act 1989* (to be inserted by the Crime Commission Bill). The CJC has several concerns about this proposal, as follows:

QUALIFICATIONS FOR APPOINTMENT

The Bill does not specify any qualifications as necessary for appointment to the position of monitor or deputy, or any factors disqualifying particular appointments. Given that one of the stated functions of the monitor is to appear in hearings of applications for the use of intrusive powers, it would seem that, at the least, legal qualifications should be a prerequisite for appointment to such a position.

If, as currently permitted by the draft provision, the monitor need not be a barrister or solicitor, there may need to be an amendment to the *Supreme Court Act 1995* (s. 209) to grant to the monitor a right of appearance.

One of a monitor's functions is to 'appear at any hearing of an application to a Supreme Court judge or magistrate for a surveillance warrant or covert search warrant to "test the validity" of the application'. Given the highly confidential and sensitive nature of the material to which a monitor will have access in

that role, there should be a legislative requirement that persons to be nominated as monitors are of good character and have no relevant criminal history.

PRACTICAL DIFFICULTIES WITH THE APPOINTMENT OF MONITORS

The CJC repeats concerns expressed in its submission on the Discussion Paper about the practicability of having a person, such as a 'public interest monitor' appear at hearings of applications for surveillance warrants.

Many applications are urgent. To ensure the availability of such a person at short notice, a panel — as contemplated by the possible appointment of deputy public interest monitors — will need to be established, which will necessarily incur significant expenses.

Furthermore, the CJC is concerned at the possible difficulties in recruiting persons to accept appointment as monitors. Assuming that it is intended that the person be a barrister or solicitor, there may well be difficulties in those areas where there is only a small number of legal practitioners. Clause 80(1)(b) refers to monitors appearing 'at any hearing of an application to a Supreme Court judge or magistrate for a surveillance warrant or covert search warrant'. Accordingly, a monitor could theoretically be required to appear at any Magistrates Court in Queensland, as well as those centres where the Supreme Court sits. In smaller centres, it is possible that a legal practitioner who had accepted appointment as a monitor could be retained to act for a particular person. On being notified that a surveillance warrant application was to be heard, and without further knowledge, the monitor could appear at the court only to find out that the surveillance warrant was in respect of his or her client's premises. In such a situation, the monitor should, ethically, cease his or her role as monitor in that matter, *and* discontinue acting for the particular client. The monitor would be put in a similar situation even if advised before the actual hearing of the persons in respect of whom a surveillance warrant was to be sought.

Even in larger centres, there may well be a reluctance on the part of practitioners to accept appointment as a monitor because to do so may restrict the prospective monitor's opportunity to act for criminal law clients.

IS A MONITOR REQUIRED TO BE PRESENT AT ALL APPLICATIONS FOR SURVEILLANCE WARRANTS?

Clause 68(6) imposes on the applicant an obligation to advise the public interest monitor of the application. Although the Bill specifies that only certain nominated persons may be present at the application, the Bill does not require the monitor's presence. Nor does the provision contemplate the situations where a monitor is unavailable. Further, the consequences, if any, which flow from a failure to advise should be included in the legislation. For example, is the evidence to be excluded? Clarification of these issues is required.

MONITOR'S APPEARANCE AT HEARINGS SEEKING RETROSPECTIVE APPROVAL

If the concept of a monitor is to be adopted, the monitor's role should extend to appearing on applications for emergency use of surveillance devices where, in effect, retrospective approval is sought from the Supreme Court (cl. 69(4)). Such a role is anticipated by clause 69(5) and the Explanatory Notes (p. 57), but is not expressed in clause 80 dealing with the monitor's functions. In the case of the Crime Commission, the monitor's role is specified to extend to such applications (see cl. 70(2)(b) of the Crime Commission Bill 1997). The Police Powers and Responsibilities Bill should make similar provision. That could be achieved by the inclusion of the words 'or an application under section 69 (4)' after the words 'surveillance warrant' where they appear in clause 80(2)(b) .

NOTIFICATION OF NON-COMPLIANCE BY POLICE OFFICERS

Subclause (2)(d) requires the public interest monitor 'when he or she *considers it appropriate*' to give to the commissioner a report on non-compliance by police officers with this part. The CJC submits that, regardless of whether instances of non-compliance should be reported to the Commissioner, the CJC should also be notified of those instances. The non-compliance may constitute misconduct or official misconduct by a police officer, which the CJC has jurisdiction to investigate. Such a notification is also consistent with the CJC's ongoing monitoring role in relation to the Police Service. The CJC would then be able to review the action (or lack of it) taken by the Police Service in respect of the instances of non-compliance.

CLAUSE 58 — DESTRUCTION OF IDENTIFYING PARTICULARS

Clause 58 refers to destruction 'within a reasonable time'. The CJC supports mandatory destruction of fingerprints but recommends the inclusion of a specified time rather than 'within a reasonable time'. The proposed provision also does not refer to the mechanism by which the process of destruction will occur; for example, whether on the request of the person whose prints have been taken, or by some automatic process. The CJC submits that the legislation should permit a person whose identifying particulars have been taken to instigate the process of destruction and if that person does not make such a request, destruction should occur automatically.

As noted in its submission on the Discussion Paper, the CJC queries the practicality and necessity of a justice of the peace being required to be present at the destruction of the identifying particulars, where those may be lawfully destroyed.

The CJC's preferred position is to have a person conduct an independent auditing role over the destruction process. This could perhaps be done by a Privacy Commissioner, if such an office is established.

CLAUSE 68 — SURVEILLANCE WARRANTS

MEANING OF 'CHILD ABUSE'

The CJC has previously expressed its concern about some aspects of the definition of 'serious indictable offences', specifically 'child abuse, including child pornography'. As stated at page 27 of the CJC's submission on the Discussion Paper, the CJC does not oppose the use of listening devices 'in appropriate situations involving serious child sexual assault, child pornography or organised paedophile activity'. The CJC repeats its concern that the inclusion of the expression 'child abuse, including child pornography' is too broad.

The Crime Commission Bill (cl. 6) defines 'criminal paedophilia' as meaning activities involving:

(a) offences of a sexual nature committed in relation to children; or
(b) offences relating to obscene material depicting children.

The CJC considers that adoption of a similar provision in the Police Powers and Responsibilities Bill would more accurately describe the nature of activities which should fall within those 'serious indictable offences' listed in Schedule 3.

FACTORS TO BE CONSIDERED BY ISSUER OF WARRANT

Subclause (10) lists the factors which the issuer of the warrant for the surveillance device must consider. Clause 82(10) of the Crime Commission Bill contains a similar provision. Those do not include the safety of the person.

The CJC considers that the extent to which the safety of any person is affected or likely to be affected by the use of the listening device is an important factor to be considered by the judge when hearing the application. For example, although a judge may be concerned about the privacy implications of the entry and installation of a listening device, he or she may be satisfied that it is safer than an alternative strategy, such as the use of an undercover operative.

WARRANTS FOR PUBLIC PLACES AND CLASSES OF PLACE

Clause 68(11) [and clause 70] refers to a 'class of place'. The CJC, in its submission on the Discussion Paper, opposed the granting of warrants in respect of classes of premises and repeats its submission that there may be practical difficulties relating to the meaning of 'class of premises' and the problem of a target offender moving from one type of premises to another (for example, from a motel to a hotel to a private residence). The Crime Commission Bill contains a similar provision in clause 82(11).

Clause 68(15) authorises the issuer to impose any conditions on the warrant that the issuer considers are necessary in 'the public interest'. Those conditions *may* include a requirement that, if a listening device is to be used in a public place or class of place, the police officer, before installing or using the device 'must have a reasonable belief that the suspect is or will be in the place where the device is to be used'. The CJC submits that in respect of surveillance devices to be installed in public places or a particular class of premises, it should be a requirement (rather than an obligation imposed at the discretion of the issuer) that before installation of the device, the police officer hold a reasonable belief that the suspect is likely to be in or at the place where the device is to be used.

Further, the CJC submits that the legislation should require that a final report be provided to the issuing judge within a specified period after retrieval of the surveillance device. The grounds which lead to that 'reasonable belief' should be set out in the final report to the judge. The Explanatory Notes in relation to 'class of premises' in clause 70 (p. 58) refer to a device which has been installed in a class of place not being activated until it is known that the target is in the premises. The CJC considers that the legislation should contain a provision along those lines, rather than merely including that in the Explanatory Notes.

CLAUSE 72 — REGISTER TO BE KEPT

Clause 72 establishes an obligation on the Commissioner of Police to keep a register of information disclosed under section 71(2)(d)(ii) or (e). The register is open to inspection by a 'declared law enforcement agency conducting an investigation into a *serious indictable offence* in which the information may be relevant', but there is no indication in the Bill or the Explanatory Notes that the CJC is to be a 'declared law enforcement agency'. The CJC should be able to inspect the register if its contents are relevant to an investigation into a suspected serious indictable offence by a police officer. Furthermore, the contents of the register may be relevant to an investigation by the CJC into suspected misconduct or official misconduct, which in either case could result in dismissal. Misconduct or official misconduct may not constitute a 'serious indictable offence' which would mean that even if the CJC were to be a 'declared law enforcement agency', there would be no entitlement to inspect the register.

The CJC submits that an amendment should be made to grant the CJC a right of access to the register where the information may be relevant to an investigation of *misconduct or official misconduct.*

CLAUSE 73 — DESTRUCTION OF RECORDS

Clause 73(2) of the Police Powers and Responsibilities Bill requires the Commissioner of Police to destroy a record etc. 'as soon as practicable after it is no longer required'. To achieve consistency with the destruction requirements of identifying particulars (cl. 58), the CJC submits that there should be a provision requiring an auditing role to be undertaken by a person independent of the Police Service. As with the destruction of identifying particulars, the CJC suggests a Privacy Commissioner, if such an office is established, be charged with such a role.

Subclause (3) allows information to be preserved 'for any period or indefinitely if there is any possibility that an issue about the conviction may arise'. The Explanatory Notes (p. 61) give as an example a person convicted of murder wishing to lodge an appeal against the conviction. The CJC can see no basis for retaining the information obtained under a surveillance warrant once all appeal avenues have been exhausted. The CJC submits that destruction should occur at that time.

Similar comments apply to clause 87 of the Crime Commission Bill.

CLAUSE 78 — REGISTER OF WARRANTS AND APPLICATIONS

This provision requires the Commissioner of Police to keep a register of applications for surveillance and covert search warrants.

Subclause (2) restricts inspection of the register to specified persons, not including the CJC. As with clause 72, the CJC submits it should have access to the register where relevant to an investigation of misconduct or official misconduct.

For ease of reference, a footnote should be included to refer to the provisions establishing requirements for record-keeping of other search warrants and property registers.

PART 11 — POWER TO GIVE DIRECTIONS IN NOTIFIED AREAS AND OTHER PLACES

DIRECTIONS TO MOVE-ON

The CJC has consistently argued against the granting of a general move-on power to police. While the Bill does not go quite this far, the broad scope of the proposed power raises several serious concerns:

- The Bill empowers police to move people on even though they may not be committing any offence, or obstructing or interfering with anyone else. All that will be required is that a police officer 'reasonably suspects' the behaviour is, or has been, 'causing anxiety to a reasonable person'. This is a highly subjective judgement. It is likely that, in practice, this power will be used against marginalised groups, such as indigenous people, juveniles, homeless and mentally ill people, and individuals who simply look and behave differently from the mainstream population. An additional concern is that some people who are directed to move-on in such circumstances will object to being required to leave an area and may defy the police direction. There is, therefore, a real risk that granting police such a broad power will contribute to increased conflict between police and civilians, especially members of marginalised social groups.

- The proposed powers far exceed those applying to the South Bank area under the *South Bank Corporation Act 1989*, which allows for exclusion of a person who is found actually committing an 'exclusion offence', that is, being drunk or disorderly or creating a disturbance. Those provisions have already attracted much criticism; these new provisions are of even greater concern.

- The move-on power will be able to be used not only against individuals or groups who congregate at or near shops, schools, child-care centres, licensed premises, railway stations and 'railway land' (which is not defined), but to move on anyone who is in, or near, a 'notified area'. Under the Bill, a local government or a government entity may apply to the Police Minister to have some specified area declared a 'notified area'. It is likely that, once the legislation is proclaimed, many councils will move quickly to file such applications, particularly as a way of responding to local community concerns about 'street people' and 'park people'. For example, recent newspaper reports indicate that Cairns City Council has already announced its intention to have the Cairns CBD declared a local area. It will be difficult for a Minister to reject such an application, given the local political pressure which is likely to be brought to bear on the issue. Furthermore, the Bill is completely silent as to the criteria on which the Minister is to base his decision to make such a declaration, or the process which must be followed in making an application. Clause 86(2) would allow for such criteria to be prescribed by regulation, and the CJC urges that requirements such as consultation with representatives of groups which may be affected by such a declaration should be included in the regulation.

- It will be extremely difficult to prevent this power being exercised inappropriately. The only way in which an alleged abuse of the move-on power will come before the courts is if a person: (i) refuses to comply with a direction from police; (ii) is charged with obstructing a police officer in the performance of his or her duties (s. 120); and (iii) contests the charge in court. The vast majority of people who are subject to the exercise of such a power will not have the motivation or resources to take this course of action, even if they feel aggrieved by the police behaviour. The only other means by which potential misuses of this power will come to official attention is if the person makes a complaint to the CJC. In these circumstances the CJC may be able to recommend disciplinary action in cases where the power was clearly used inappropriately, but experience has shown that allegations about the misuse of police powers are very difficult to investigate and prove to the requisite legal standard.

- These powers contravene the spirit and the intention of the *Peaceful Assemblies Act 1992*. Clause 85 provides that the move-on powers will not apply to public assemblies which have been authorised under that Act. However, the *Peaceful Assemblies Act 1992* not only allows authorised public assemblies but preserves the right of public assembly generally. That right could be seriously infringed by the move-on powers.

The CJC also submits that the Explanatory Notes and the Minister's second reading speech fail to justify such a significant expansion of police powers. The second reading speech gives the impression that the move-on provisions in the Bill are little more than a consolidation of existing breach of the peace powers, which is palpably not the case. Furthermore, several of the examples in the Explanatory Notes only serve to highlight why such broad-ranging powers are not needed, or would be ineffective. For instance:

- It is claimed that the power could be used to break up fights and verbal disputes between people in public places. However, police will have ample power to deal with such situations under their powers to deal with actual, imminent or threatened breaches of the peace. This power will also be available to respond to other scenarios outlined in the Explanatory Notes, such as drunks disrupting a school fete, people disrupting entertainment at a shopping centre, and youths abusing pedestrians entering a railway tunnel. In addition, in several of these examples provided by the notes, a specific offence will have been committed. It would, therefore, be quite open to police in these circumstances to threaten to take further action (by way of arrest or the issue of a notice to appear) if such people do not stop the behaviour. In most circumstances, this is likely to be just as effective a means of controlling the behaviour as the issuing of a direction to move on.

- In relation to clause 84, it is asserted that the power could be used to move on 'a person who is known, or reputed, to be selling drugs to school children [and] is standing outside a school yard

without reasonable cause'. This would appear to be a singularly inappropriate and ineffective way of dealing with the problem, as the person in question can simply leave and return at another time, or shift his or her activities to another school or another public space which is not a prescribed area. A much more effective police response would be to place the person under some sort of surveillance in order to obtain evidence to support the laying of charges. In any event, the mere act of police approaching a 'suspicious person' outside a school is likely to be sufficient to encourage many persons to leave the scene or at least to deter engaging in any planned illegal activity. These comments apply equally to the examples which are given of a stranger parking outside a school, or approaching a child and offering to give him or her a ride home.

The CJC submits that Part 11 of the Bill should be withdrawn and that there be further consultation on this issue, particularly with representatives of minority and marginalised groups within the community. Failing that, the Bill should at least be amended to:

- Remove those provisions which would allow a person to be moved on simply because a police officer 'reasonably suspects' that the person's behaviour may cause anxiety to a 'reasonable person'.

- Specify the criteria and process according to which an area may be declared to be a 'notified area'. This should include requirements that there be: (i) documented evidence that there is an ongoing pattern of significant social disorder in the area in question; (ii) a justification of why granting move-on powers to police is a more effective response for dealing with these problems than other strategies (such as improved regulation of licensed premises, or provision of alternative accommodation for homeless people); and (iii) proper consultation with representatives of groups which may be particularly affected by such a proclamation.

- Require police to record on a register details of each instance in which they have given a direction to move on, including the nature of the direction, who it was given to, and the reasons for giving it.

CLAUSE 89 — DEALING WITH BREACH OF THE PEACE

The CJC acknowledges that it may be appropriate to clarify the power of the police to deal with breaches of the peace, but has the following concerns about the provisions as they are currently drafted:

- The power is too broadly drawn. Police should only be empowered to deal with what they *reasonably believe* to be an *actual* or *imminent* breach of the peace. Further, the legislation needs to be more specific about the types of actions which police are authorised to take to prevent a breach of the peace from happening or continuing. Allowing the police to take whatever action they consider 'reasonably necessary' substantially increases the risk of this power being misused. The example given of allowing police to detain a person 'until the need for detention no longer exists' is very open ended and significantly increases police power to detain people who are not under arrest. The second example, of people pushing into a queue, seems a completely inappropriate case for police intervention, given that such action may quickly escalate into a criminal charge for obstructing police.

- As with the move-on power, there should be an obligation on the police to tell the persons who are the subject of any action taken under this section why this action is being taken (see cl. 112).

- Given the broad scope of the proposed power and the potential for possible abuse, details of the exercise of this power should be recorded on a register (as discussed above in relation to the move-on power).

PART 12 — STANDARD SAFEGUARDS

SAFEGUARDS RE QUESTIONING

The CJC endorses the application of the safeguards both to those who have been arrested and those 'in the company of a police officer for the purpose of being questioned as a suspect' (i.e. volunteers). However, the CJC is concerned about the lack of any obligation on police to inform the person that he or she is not under arrest: there is only an obligation to tell an arrested person that he or she has been arrested under clause 113.

The CJC is also concerned that the caution is not included in the legislation but is a matter to be covered in the Responsibilities Code (cl. 99). It must be ensured that the caution includes not just advice on the effect of making admissions, but advice on the suspect's right to silence (as in the case of federal offenders under the *Crimes Act 1914* (Cwlth).

INDEPENDENT THIRD PERSONS

The CJC strongly supports the inclusion of statutory rights to communicate with a third person such as a lawyer and to have that person present during questioning (cl. 95), but considers that the proposals do not go far enough. In particular, clause 95(6) gives police the power to exclude the third person if the police officer 'considers the other person is unreasonably interfering with the questioning'. This exception, although essential to deal with third persons who do truly frustrate the process, is far too wide. It would, for example, exclude many lawyers who may legitimately object to inappropriate or intimidating questioning of their clients, but whom individual police might consider are 'unreasonably interfering'. The CJC notes that this provision appears to be based on provisions in the *Crimes Act 1914* (Cwlth) (ss. 23H and 23K). However, those provisions include an objective rather than a subjective standard, that is, the third person may be excluded where there *is* unreasonable interference, a matter which could be determined by a court if a dispute arose.

The CJC supports the inclusion of special provisions for independent third persons when children or indigenous people are questioned, but has some serious concerns about the scope and wording of the provisions in the Bill:

- There is no similar provision for other categories of people who may be particularly susceptible to questioning. Such people include the mentally ill and intellectually disabled, and those from any other cultural background which makes them particularly vulnerable. Current police procedures recognise that those characteristics may create a 'special need' (OPM Policy 6.3.1). The reason for the exclusion of these categories is not clear. The CJC urges an additional provision which recognises those other categories.

- The provisions which allow the police to exclude an interview friend whom they consider to be 'unreasonably interfering with the questioning' in each case (cls. 96(7) and 97(4)) are subject to the same concerns noted above in relation to legal representatives. Those provisions give the police a great deal of discretion to avoid what are meant to be safeguards for people who are highly suggestible. In relation to children, the proposed provision also conflicts with section 9E of the *Juvenile Justice Act 1992*, which provides that a child's statement in relation to an indictable offence is inadmissible *unless* a third person was present at the time the statement was made (subject to restricted exceptions, that is, that the court is satisfied there was 'proper and sufficient' reason for the absence of the person, and the court considers that the statement should be admitted).

- In regard to indigenous suspects, the police will be allowed to ignore the requirement to notify the legal service if they 'reasonably suspect' (having regard to the person's 'level of education and understanding') that the person is 'not at a disadvantage in comparison with members of the Australian community generally'. This provision assumes that police officers are qualified to assess the level of education and understanding and whether or not a person would be at a disadvantage. The Bill provides no criteria for making such an assessment and leaves it open to a police officer to apply his or her subjective standards in making such an assessment. The officer is also not required to hold a reasonable *belief*, as in the Commonwealth provisions, but only a reasonable *suspicion*. The CJC submits that this provision should be deleted so that the relevant legal service is automatically advised, unless the person has already arranged for a lawyer to be present under clause 95(1).

RIGHT TO AN INTERPRETER

The provision of a statutory right to an interpreter (cl. 101) is welcomed. However, the right should not be restricted to where a person cannot 'speak with reasonable fluency in English', but where they cannot *communicate* with reasonable fluency (that is, both understand questions and answer them). This distinction is very important (see the CJC's previous submission on the Discussion Paper) and is the standard applied elsewhere in the Bill (see cl. 99(2) concerning the giving of cautions) as well as in the Commonwealth *Crimes Act 1914* (s. 23N).

CLAUSE 104 — RECORDING OF CONFESSIONS AND ADMISSIONS

The CJC is concerned that the wording of this clause creates the impression (perhaps inadvertently) that it is acceptable for police to record admissions in writing as opposed to electronically. The CJC has previously recommended that all interviews of suspects undertaken by police should be electronically recorded. At a minimum, the legislation should specify that all admissions must be electronically recorded unless there are exceptional circumstances in which case the admission should be recorded in writing at the time and then later placed on tape (as per the procedures set down in subsections (5) to (9)).

PART 14 — MISCELLANEOUS POWERS

CLAUSE 112 — SUPPLYING OFFICER'S DETAILS

There seems no reason why this provision should not also apply to the breach of the peace provisions (cl. 89) and the directions an officer may give under those powers.

CLAUSE 121 — PREVENTION OF OFFENCES

This power, which provides that it is lawful for a police officer to take the steps he or she considers reasonably necessary to prevent the commission of an offence, could be open to misuse as it is very broad. The CJC queries whether it is necessary, given the other powers provided to police in this Bill. At the very least, the test should be an objective one, that is, a police officer should only be empowered to take reasonable and necessary steps.

PART 15 — GENERAL

CLAUSE 129 — OBTAINING WARRANTS, ORDERS AND AUTHORITIES ETC. BY TELEPHONE OR SIMILAR FACILITY

This provision is intended to allow an officer who requires 'a warrant, approval, notice to produce a document or another authority' before doing an act to obtain that approval by the use of electronic means. The authority may be sought where 'if, for any reason, it is impracticable to apply for the authority in person' (cl. 129(2)). The 'issuer' will vary depending on what type of compulsory process is being sought and may be a Supreme Court Judge, Magistrate or a justice (cl. 28).

The CJC, in its review of police powers and in its submission on the Discussion Paper, supported a provision to allow warrants to be obtained by telephone, facsimile transmission or radio in certain limited circumstances. Such a provision would be consistent with the processes available under the *Drugs Misuse Act*. However, the CJC notes the Bill applies the process more widely to an 'approved authority', that is, a 'warrant, approval, notice to produce a document or another authority' (cl. 129(1)). The CJC submits that a procedure which may involve an issuer of a prescribed authority acting without the benefit of seeing anything in writing to support the application, should be only rarely used. The entitlement to apply for an approved authority should only apply when there are urgent circumstances or where difficulties arise from the remoteness of a police officer's location from an issuer.

DRAFTING ISSUES

CLAUSE 7 — ACT DOES NOT AFFECT COMMON LAW DISCRETION TO EXCLUDE EVIDENCE

Clause 7 purports to preserve the common law discretion of a court to exclude evidence. However, section 130 of the *Evidence Act 1977* provides an equally important discretion — that of excluding evidence on the basis of 'unfairness'. Provisions of the *Juvenile Justice Act 1992* also restrict admissibility of statements made by juveniles. The CJC, therefore, submits that the section should read:

> This Act does not affect any law, statutory or otherwise, under which a court in a criminal proceeding may exclude evidence in the exercise of its discretion.

CLAUSE 13 — GENERAL POWER TO ENTER TO MAKE INQUIRIES, INVESTIGATIONS OR SERVE DOCUMENTS

It is considered that clause 13 should define what is meant by 'private place'. The clause refers to 'places', 'private places' and 'premises used exclusively for residential purposes' (the last term is referred to in clause 13(5) as being a type of 'place' as opposed to a 'private place'). The Explanatory Notes state that entry can be made to a 'yard' and that the clause is not intended to allow entry to dwelling houses. The definitions in the schedule are drafted so widely as to allow confusion in the application of these provisions, and the terms 'place' and 'premises' are drafted inclusively.

CLAUSE 25 — POWERS RELATING TO ROADS AND TRAFFIC

Clause 25(2) should require that a police officer 'reasonably suspects an emergency exists' before exercising the powers conferred. To do otherwise would require the police officer to know positively that an emergency exists. The suggested change is in line with clause 25(3).

CLAUSE 26 — SEARCHING PERSONS WITHOUT WARRANTS

Clause 26(3) allows the police officer to seize things which would afford evidence of the commission of an offence. The CJC suggests that police should also be empowered to seize in circumstances where it is necessary to protect the person who has it (for example, to prevent self-harm) or another person (although it is noted that in this second situation, clause 121 may be of assistance).

CLAUSE 27 — SEARCHING VEHICLES WITHOUT WARRANT

Clause 27(2)(h) purports to refer to circumstances which justify a police officer stopping a vehicle. This subparagraph however, refers to 'the' person, where that person has not been defined by the wording of the clause. The words 'an occupant of the vehicle' or similar should be substituted.

MEDICAL AND DENTAL PROCEDURES IN RELATION TO PERSONS IN CUSTODY

Clauses 60–66 in Division 3 of Part 9 (Powers in relation to persons in custody) deal with medical and dental procedures. The CJC generally supports the provisions in this Division of the Bill, but raises the following concerns.

Clause 60(2) refers to the giving of consent of a child in relation to the conduct of medical and dental procedures. Clause 60 (2)(c) refers, in the context of an indigenous child, to 'an adult Aborigine or Torres Strait Islander, acceptable to the child ...'. There may be situations where an indigenous child would feel more comfortable with a particular non-indigenous person of their choice. The CJC considers that provision should recognise such a situation. Perhaps that could be achieved by the inclusion at the end of the provision words along the lines of the following:

> unless the child indicates a preference to have another adult person present who is not an Aborigine or Torres Strait Islander.

Subclause (2)(e) refers to an 'independent person who is a justice'. That terminology is different from that used in the definition of 'interview friend' in the Dictionary when referring to a justice. The CJC prefers the terminology used in the 'interview friend' definition, namely 'a justice of the peace other than a justice of the peace who is a member of the Queensland Police Service, or a justice of the peace (commissioner for declarations)'.

Clause 61 appears intended to give a person about to undergo a medical or dental procedure the opportunity of having an independent person present. In the absence of any wording to the contrary, the CJC assumes that those provisions apply both to situations where the person has consented to undergoing the procedure and where a court order is obtained because consent has not been given. Clause 61 is silent on what is to occur when a child refuses to give consent to the procedure. The CJC is concerned that a scenario could occur where: a child does not consent to undergoing the procedure; a court order is then obtained to acquire medical or dental samples; and the child is then not in a position to pay for the cost of the independent person's presence. Clause 97(3)(b), which deals with questioning of children, makes mandatory the presence of an 'interview friend' while a child is being questioned. Given the potentially highly invasive nature of medical or dental procedures, the CJC submits that in the case of children, an independent person should have to be present when these procedures are being conducted *unless* the child has clearly indicated that he or she does not require the presence of an independent person, and that indication is electronically recorded. Clause 61(2) also provides that the person about to undergo the procedure 'must pay the cost of the independent person's attendance.' There should be no cost to the child for arranging the attendance of an independent person.

Clause 62 applies where a person consents to the performance of a medical or dental procedure. Clause 62(2) requires the consent to be 'written or electronically recorded'. As previously noted in the CJC's submission in relation to the Discussion Paper, the CJC has concerns about the limited literacy skills of some suspects and does not regard written consent as an adequate safeguard in all cases. The CJC suggests that the requirement be to use electronic recording where practicable, and writing only as a 'last resort'. (The CJC notes that clause 103 requires a police officer who has to give information to a person in custody to 'if practicable, electronically record the giving of the information to the person and the person's response.)

CLAUSE 68 — SURVEILLANCE WARRANTS

This clause replicates clause 82 of the Crime Commission Bill and the same concerns apply to both.

NO EXPRESS REQUIREMENT THAT APPROVAL IS REQUIRED FOR USE OF A SURVEILLANCE DEVICE

Clause 68 does not specify that a prerequisite for the use of a surveillance device is judicial approval, subject to clause 69 (emergency use of surveillance devices). The CJC considers that it should be made clear that police officers are not permitted to use surveillance devices other than in accordance with an approval granted under Part 10.

ALL SURVEILLANCE DEVICES SHOULD REQUIRE APPROVAL

Clauses 68(3) of this Bill and 82(4) of the Crime Commission Bill 1997 refer to surveillance warrants for 'class A' and 'class B' devices. Those are defined as follows:

> **"class A device"** means a surveillance device installed—
> (a) in a private place, or on a suspect's clothing, without the suspect's consent; or
> (b) in a public place
> but does not include ...
>
> **"class B device"** means a tracking device installed in a vehicle or other moveable object without covert entry to a building by the person installing it.

There is some uncertainty whether a tracking device installed in a vehicle, where that installation requires covert entry to private premises, such as a garage, would fall within the definition of a 'class A' or 'class B' device.

For the sake of clarity, and to make perfectly plain from whom an approval is to be sought in respect of a tracking device to be installed by covert entry, the CJC submits that the definition of a class A device include something along the lines of the following after '(b) in a public place':

> (c) a tracking device installed in a vehicle where the installation can only be effected with covert entry to a building by the person installing it.

SURVEILLANCE OF PRACTISING LAWYER'S OFFICE

Subclause (13) precludes class A surveillance warrants being issued in relation to the office of a practising lawyer, 'unless the application for the warrant relates to the lawyer's involvement in a serious indictable offence'. Clause 82(13) of the Crime Commission Bill contains a similar provision. The CJC submits that, for clarity, the word 'criminal' should be included prior to 'involvement'.

CLAUSE 70 — POWERS UNDER SURVEILLANCE WARRANTS

This clause affords various powers to a police officer in the execution of a surveillance warrant. The Discussion Paper indicated that those powers would be required to be authorised by the judge in the warrant (paragraph 6.16 (viii)). Clause 84 of the Crime Commission Bill contains a similar provision. Some of those powers proposed to be conferred by the two Bills may be inappropriate in individual cases. Accordingly, the CJC submits that the two provisions should commence with the words 'Unless the court otherwise orders'.

CLAUSE 74 — COVERT SEARCH WARRANTS

This provision establishes a mechanism by which covert search warrants may be approved. A similar provision is contained in clause 88 of the Crime Commission Bill.

Covert search warrants may only be issued pursuant to the Police Powers and Responsibilities Bill for evidence of 'organised crime' which is defined in the Dictionary as 'an ongoing enterprise to commit serious indictable offences in a systematic way involving a number of people and substantial planning and organisation'. The CJC notes that the definition of 'organised crime' differs from that in clause 8 of the

Crime Commission Bill.[1] The CJC submits that the definition in the Crime Commission Bill is more precise than that proposed in the Police Powers and Responsibilities Bill and should be adopted instead of the one in the Police Powers and Responsibilities Bill.

CLAUSE 117 — PERSONS TO BE GIVEN COPY OF INFORMATION IN REGISTER

Clause 117(3) contains a double negative which is confusing. This clause could be worded more clearly, perhaps along the lines of the following:

> This section applies subject to a provision of this Act or any other Act which prohibits disclosure.

CLAUSE 131 — COMPENSATION

The CJC has previously supported the concept of a simplified system of recovery of compensation by an 'innocent' property owner, but considers that the proposed provision requires clarification. The Bill states that compensation will not be paid where a person 'is found guilty of the commission of an indictable offence because of the exercise of the powers', but is silent as to what is to happen where, for example, joint property is damaged, and only one of the joint owners is found guilty of the commission of an indictable offence. Is a pro rata payment to be made under these circumstances?

SCHEDULE 3

In the definition of 'serious indictable offence', subclause (i) refers to 'conduct related to prostitution or SP bookmaking'. The CJC suggests that more specific terminology should be used rather than 'SP bookmaking'. Perhaps offences constituted under specific legislation should be referred to. Further, it is unclear why the reference to prostitution is preceded by the words 'conduct related to'. The other provisions in the definition do not include similar wording.

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[1] That clause states that 'Organised crime' means criminal activity that involves—
(a) indictable offences punishable on conviction by a term of imprisonment of not less than 7 years; and
(b) 2 or more persons; and
(c) substantial planning and organisation; and
(d) systematic and continuing activity; and
(e) a purpose to obtain profit, gain, power or influence.

DRAFTING ERRORS

CLAUSE 57

Clause 57(6) refers to a notice under 'subsection (1)(c)'. That proposed subsection does not refer to a notice. Presumably, the subsection intended to be referred to is (1)(b)(ii). The Explanatory Notes refer to subclause (1)(b)(iv).

CLAUSE 62

Clause 62(7) refers to 'subsection (2)', whereas the reference should be to subsection (3).

CLAUSE 68

Clause 68(11) appears to contain an error when it includes the word 'warrant' for the second time. Perhaps that should read 'application'.

CLAUSE 71

This provision creates a prohibition on disclosure of information obtained using surveillance warrants, except to certain specified people. However, the consequences of a failure to comply with that prohibition are not stated. Clause 71(2)(a) refers to 'an application under section 70'. Clause 70 does not deal with applications, but sets out the powers under surveillance warrants. Perhaps it was intended to refer to 'section 69' (which includes applications for the retrospective use of surveillance devices in emergencies).

CLAUSE 76

A police officer is required to give to the Supreme Court judge who issued the warrant 'a report complying with the responsibilities code on the exercise of the powers under the warrant' (cl. 76(1)). The CJC supports such a proposal but suggests that an alternative procedure be included to allow for the situation where the judge who issued the warrant is not available at the time at which the report is to be made because, for example, he or she is on circuit or on leave.

CLAUSE 77

The wording of the clause is unclear. The Explanatory Notes state that any restrictions under the *Invasion of Privacy Act* do not apply. Perhaps the clause could be reworded along the lines of the following:

> Part 4 — Listening Devices of the *Invasion of Privacy Act 1971* does not apply to a listening device used for the interception of private conversations under the authority of a surveillance warrant.

CLAUSE 95

Subclause (7) refers to 'section 95 or 96'. This appears incorrect, and the intended reference appears to be 'sections 96 and 97'.

SCHEDULE 1

The reference to 'section 7' at line 3 should refer to section '8'.

ERRORS IN EXPLANATORY NOTES

p. 58 — top line. The word 'distribution' should be 'destruction'
— under the heading *Example for 'class of place'*, 'state' area should be 'stated' area.

p. 70 — 'perported' should be 'purported'.