CRIMINAL JUSTICE COMMISSION SUBMISSION IN RESPONSE TO THE REVIEW OF POLICE POWERS DISCUSSION PAPER

August 1997

Criminal Justice Commission

CONTENTS

INTRODUCTION

The Criminal Justice Commission (CJC) welcomes the opportunity to consult with the Government on the *Review of Police Powers Discussion Paper*.

The ultimate decision on such policy matters lies with the Government of the day. However, for several reasons the CJC considers it appropriate to express its views in relation to the matters raised in the Discussion Paper.

First, the CJC has statutory responsibilities under the *Criminal Justice Act 1989* to monitor and report on such issues. Relevant provisions of the Act include:

> **21.(1)** The Commission shall –
>
> (a) continually monitor, review, co-ordinate and, if the Commission considers it necessary, initiate reform of the administration of criminal justice
>
> ...
>
> **23.** The responsibilities of the Commission include -
>
> ...
>
> (b) monitoring and reporting on the use and effectiveness of investigative powers in relation to the administration of criminal justice generally;
>
> ...
>
> (e) researching, generating and reporting on proposals for reform of the criminal law and the law and practice relating to enforcement of, or administration of, criminal justice, including assessment of relevant initiatives and systems outside the State ...
>
> ...
>
> (j) reporting regularly on the effectiveness of the administration of criminal justice, with particular reference to the incidence and prevention of crime (in particular, organised crime) and the efficiency of law enforcement by the police service.

Second, the CJC has conducted extensive research in the area of police powers. The Commission of Inquiry Pursuant to Orders in Council (the 'Fitzgerald Inquiry') recommended that the CJC conduct a comprehensive review of police powers. The CJC commenced research into this review in November 1990. In September 1991, the Minister for Police and Emergency Services and the CJC jointly released a discussion paper titled *Police Powers in Queensland*. Over the following three years the CJC produced five volumes of its *Report on a Review of Police Powers in Queensland* (CJC 1993a, 1993b, 1993c, 1994a and 1994b) followed in 1995 by *Telecommunications Interception and Criminal Investigation in Queensland: A Report*. These reports presented a very detailed analysis of police powers in Queensland and other Australian and overseas jurisdictions and contained over 150 recommendations. The reports were, in turn, the subject of public review by the Parliamentary Criminal Justice Committee, which conducted public hearings and prepared its own reports in relation to the issues dealt with in the CJC's review.

Third, through its complaints function the CJC is aware of continuing complaints about police misuse and abuse of powers. Many of these complaints are the result of misconceptions on the part of members of the community about the existence or operation of particular police powers and their rights in respect of the exercise of these powers. Accordingly, the CJC has an interest in the law being clarified and standardised to reduce the numbers of complaints arising in these circumstances.

THE CJC'S APPROACH

The CJC is cognisant that its recommendations and the proposals contained in the Discussion Paper need to be viewed as a whole package rather than addressing each proposal in isolation. However, to facilitate comparisons, the format of the CJC's submission follows the structure of the Discussion Paper.

To ensure that the CJC has represented the position expressed in the Discussion paper correctly, and also to enable this document to be read on a 'stand-alone' basis, each proposal is either re-stated or summarised and the CJC response is then indicated. Where the Discussion Paper is silent on an issue which the CJC considers to be important, this is indicated in the text and the CJC's preferred approach is stated.

The CJC's starting point for determining its response to the various issues raised in the Discussion Paper was to ascertain if the proposal was consistent with previous CJC recommendations contained in its *Report on the Review of Police Powers in Queensland*. Where there was a divergence between the Discussion paper and the CJC position, or the Discussion Paper addressed a matter which the CJC had not considered, regard was had to the two key principles which underpinned the CJC's review of police powers:

- police powers should only be increased where the need to do so has been demonstrated; and
- at all times, increased accountability should accompany any increase in police powers.

In addition, in preparing its responses, the CJC has endeavoured to recognise the administrative and operational realities of modern policing.

GENERAL ISSUES

There are a number of general matters arising from the Discussion Paper which the CJC would like to address at the outset. The CJC's responses to the specific proposals contained in the Discussion Paper should be read as being qualified by its comments in respect of these matters.

The CJC notes that the proposals contained in Part A of the Discussion Paper have the Government's endorsement in principle. However, the CJC also notes the comments of the Minister for Police and Corrective Services and Minister for Racing in the introduction to the Discussion Paper, that the Government is still seeking community views on these proposals.

Second, the CJC encountered difficulties responding to some of the proposals contained in the Discussion Paper because the proposed power was couched in general terms with little detail to explain the effect of the proposed power in operation. In many cases, the CJC's response to a proposal could be substantially altered by the drafting of the power in the proposed police powers legislation. It is therefore, very important that there be an opportunity for further consultation when draft legislation has been developed.

Third, paragraph 1.9 of the Discussion Paper identifies a number of Acts, including the *Juvenile Justice Act 1992* which, 'because of their specialised nature, will require retention of current provisions'. The CJC acknowledges that the proposed police powers legislation could contain provisions recognising that the provisions of those Acts have precedence over the police powers legislation where there is a

conflict. However, not all police powers which are exercisable in respect of juveniles are contained in the *Juvenile Justice Act 1992*. The CJC would therefore caution that careful consideration be given to the impact of the proposed police powers legislation on the enforcement of the law against juvenile offenders and the administration of juvenile justice.

Fourth, various powers proposed in the Discussion Paper are often limited in their operation to offences which carry a maximum penalty of 7 years imprisonment or more. In its review of police powers, the CJC also often used this threshold. However, as a consequence of the recent amendments to the *Criminal Code*, which increased penalties across a wide range of offences, the number of offences attracting a maximum penalty of seven years imprisonment or more has greatly increased, and now includes many relatively minor indictable offences, such as, graffiti offences committed in educational institutions and unlawful use of a motor vehicle. In view of the effect of these recent amendments to the *Criminal Code*, it may be appropriate either to consider increasing the maximum period of imprisonment before which the proposed powers will apply, or identifying the offences at which particular police powers are targeted by offence type.

Fifth, the CJC endorses the strong emphasis in the Discussion Paper on the development of statutory safeguards and systems of accountability. However, the CJC emphasises that disciplinary procedures must also be utilised as a deterrent to this behaviour, rather than relying solely on the exclusion of evidence which has been improperly obtained. It is particularly important that the safeguards and the consequences of breaching them are clearly articulated in the legislation or the accompanying codes of conduct or procedural codes.

Sixth, the CJC stresses the need for independent monitoring of the use of the new powers and police compliance with statutory safeguards and internal accountability mechanisms. The CJC is the appropriate body to discharge this role due to its unique structure and position in the criminal justice system, particularly with regard to:

- its statutory responsibilities
- its access to and understanding of the Queensland Police Service (QPS)
- its ability to utilise the complaints mechanism for the investigation and enforcement of official misconduct and disciplinary breaches and to further its research and monitoring responsibilities
- the fact that it has already undertaken a good deal of the baseline research required to adequately perform a monitoring role (e.g. the Defendants' Survey, CJC 1996).

Finally, the CJC assumes that the operation of the new police powers legislation will be evaluated and reviewed after an appropriate period. Information collected as part of the monitoring process should provide the basis for this evaluation.

SPECIFIC CONCERNS

In many instances the CJC has agreed with the proposals contained in the Discussion Paper or has suggested only relatively minor modifications which do not change the underlying intent of the recommendation. However, there are a few proposals in the Discussion Paper with which the CJC does have some significant concerns. These relate specifically to:

- the need for clear provisions relating to the exercise of the power to conduct strip searches
- some aspects of the proposed powers to enter and search without warrant, particularly, the extension of the emergency search powers under the *Drugs Misuse Act 1986* to permit such searches to be conducted in the investigation of any offence for which a search warrant may be obtained
- the broad range of offences in respect of which it is proposed a listening device may be obtained
- the broad operation of the power to arrest without warrant in connection with indictable offences, and the absence of any statutory obligation on police to first consider alternatives to arrest
- the proposed power to enter private premises (excluding dwelling houses) for the purposes of making enquiries
- the proposed power to detain an arrested person for questioning for up to 18 hours without independent review (the CJC notes that the Minister for Police has publicly announced that this aspect of the proposal will be reviewed); the review of detention after that period by 'prescribed persons' who are not judicial officers; and the failure to adopt a free legal advice scheme which the CJC considers is essential to safeguard the rights of people in custody.

PART A

1. CONSOLIDATION AND RATIONALISATION OF POLICE POWERS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police powers be rationalised and consolidated into a single Act.

CJC RESPONSE:

The CJC supports the proposal to consolidate and standardise police powers in Queensland.

The CJC has been a strong advocate for the consolidation and standardisation of police powers. In its *Report on a Review of Police Powers in Queensland Volume I: An Overview* (1993a) the CJC discussed the problems with the current 'system' of police powers, noting that 'there was not in existence a complete list of police powers' (p. 94) and the powers were not uniform in their terminology or operation.

This situation creates the potential for both deliberate and inadvertent abuse of power by police, contributes to confusion amongst members of the public about their rights, undermines public confidence in a criminal justice system which does not appear to operate consistently and rationally.

The benefits of consolidation are obvious. Standardised powers would make it easier for police to perform their duties, as the parameters of their powers would be clear. Members of the public would have a greater knowledge and understanding of their rights and of the bases for the exercise by police of their powers.

Nevertheless, while it is highly desirable that police powers be clearly delineated, it is also necessary for police to have some scope for the exercise of discretion to permit them to execute their duties effectively. The police powers legislation should permit this flexibility while providing guidance to officers on the exercise of their discretion.

2. TAKING POSSESSION OF EXHIBITS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper recommends that:

- a police officer who is **lawfully** in or on any place be able to take possession of any thing which the officer finds and suspects on reasonable grounds will afford evidence of the commission of an offence

- police be empowered to re-enter or remain in the premises for the purpose of taking possession of the thing(s), on the basis that it may be necessary to make several trips from the premises to their vehicle in order to remove all of the evidence from the premises.

CJC RESPONSE:

1. **The CJC considers that the proposed powers are too wide.**

2. **The CJC generally supports a power authorising the seizure of objects discovered by chance and the re-entry of premises, but only where the police are lawfully in a place *pursuant to a search warrant.* The 'chance discovery' power should be limited to objects found in the course of *a reasonable search* pursuant to a warrant and which provide evidence of an *indictable offence.***

3. **The CJC considers that a power to re-enter premises should be limited to situations involving the execution of a search warrant and where the re-entry is so associated in time or circumstance that it may properly be regarded as part of the initial entry and search authorised by the warrant (see CJC rec. 9.9).**

The CJC believes that the proposed power for officers lawfully in a place to seize things suspected of affording evidence of an offence is far too wide. When this power is considered with the proposed power to 'enter to make enquiries' (see section 19 of the Discussion Paper), the potential combined effect is a dramatic extension of current police powers to enter places and seize objects. In effect the proposals give police a power to enter places without warrant (not dwelling houses) to 'make enquiries or investigations', and to seize any thing which is found which the officer suspects on reasonable grounds affords evidence of an offence.

The Discussion Paper does not correctly represent the current common law position on this issue. It states that a police officer who is 'lawfully in or on a place' can take possession of evidence which he or she may find. However, the cases limit this power to situations where the officer is in a place to conduct a lawful search, not merely 'lawfully in a place'. The Discussion Paper provides no explanation or justification for this proposed extension of power. Accordingly, consistent with the principle that police powers should only be increased where the need to do so has been demonstrated, the CJC does not support the power in the form proposed.

This proposal should be distinguished from chance discovery of evidence during a lawful search under a warrant. The CJC recognises that a police officer performing a lawful search under a warrant may come across objects that may afford evidence of the commission of another offence. However, the CJC is mindful of the need to ensure that warrants issued on one ground are not used to justify unconfined searches for objects that are totally unrelated to the initial grounds for entry. Accordingly, the CJC believes that a balanced solution is to limit the power to seize objects found to those objects that are in 'plain view' of an officer conducting a lawful search on the premises and which provide evidence of an indictable offence.

In respect of the chance discovery of evidence, the CJC has previously recommended that:

> The police be entitled to seize:
>
> - objects other than those named in the warrant which provide evidence of the offence contained in the search warrant; and
>
> - objects which provide evidence of an indictable offence not mentioned in the warrant;
>
> where they discover them in the course of a reasonable search pursuant to the terms of the original warrant (CJC rec. 9.7).

In respect of the power to re-enter premises, the CJC recognises that, in practice, police who are executing a search warrant may need to leave the particular building to search under or around it or for some other purpose connected with the search. In such a case, where departure from the premises is brief and is for the purposes of the search authorised under the warrant, re-entry would be authorised by the original warrant.

3. SEARCH ETC. OF PERSONS AND VEHICLES WITHOUT WARRANT

3.1 Suspects and vehicles for illegal or stolen items etc.

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power for police to stop, detain and search a person and anything in the possession of the person or a vehicle where the officer has reasonable grounds to suspect that the person has possession of, or there is in the vehicle:

(i) a weapon in contravention of the *Weapons Act 1990*

(ii) dangerous drugs etc. under the *Drugs Misuse Act 1986*

(iii) stolen property

(iv) unlawfully obtained property

(v) implements of housebreaking or car theft

(vi) tainted property within the meaning assigned to it in the *Crimes (Confiscation) Act 1989.*

(vii) evidence of the commission of an offence punishable by 7 years imprisonment or more and which the police officer has reasonable grounds to suspect may be destroyed or concealed; or

(viii) anything with which a person intends to cause harm to another or to him or herself.

The Discussion Paper also recommends that where it would be inappropriate to conduct a search in view of other members of the public, police should have a power to take a person to the nearest appropriate place where adequate facilities exist to conduct the search.

CJC RESPONSE:

1. **The CJC generally supports the Discussion Paper proposal regarding the search of persons and vehicles without warrant. However, there is a need to clarify the position in relation to search powers in other Acts.**

2. **The CJC believes that more detailed information is required regarding proposals for the conduct of pre-arrest warrantless strip searches and the use of force in the conduct of these searches and that these proposals should be spelt out in legislation or regulations.**

The proposal is generally consistent with previous CJC recommendations (CJC recs 7.1, 7.2, 7.4 and 7.11). However, the CJC also recommended that the powers to search persons and vehicles contained in:

- section 106 *Casino Control Act 1982*
- section 235 *Racing and Betting Act 1980*
- section 131 *Health Act 1937*
- section 31 *Vagrants, Gaming and Other Offences Act 1931*
- section 679B(1)(b) *Criminal Code*

be the subject of review, with more information about their operation being required to justify their retention (see CJC recs 7.3 and 7.12). It is unclear from the Discussion Paper whether these provisions will continue to operate.

The CJC is concerned that the Discussion Paper does not address two issues which the CJC considers to be of particular relevance and importance. These are the use of force in the conduct of pre-arrest searches, and the conduct of pre-arrest strip searches.

In respect of the use of force, the CJC recommended that legislation be drafted stating that reasonable force is only to be used as a last resort where the suspect has made it clear that he or she will not cooperate with the police officer conducting the search (CJC rec. 7.9).

The CJC has also made the following recommendations regarding pre-arrest strip searches:

- they should only be conducted as a last resort
- they should be conducted by a police officer of the same sex as the suspect and no member of the opposite sex should be present at or within view of the place where the search is conducted during the search except at the express request of the suspect. Where a police officer of the same sex is not available to conduct the strip search, arrangements should be made for another suitable person of the same sex to assist the police and conduct the search
- they should be conducted in appropriately private surroundings
- consideration is to be given to whether the particular circumstances of the case warrant such intrusive action
- they should be subject to specific information-giving and record-keeping requirements (referred to later in this submission) (CJC rec. 7.8).

It is important to note that there are a variety of searches which could fall into the category of a strip search. For example, at one end of the spectrum a search may only involve the removal of outer clothing. Alternatively, the search may involve the removal of all clothing other than underwear or the removal of all clothes including underwear. At its most intrusive, a strip search may involve the removal of all clothing and examination of the underarms, genital area and between the buttocks.

Due to the potentially very intrusive nature of this type of search, it is important that the circumstances in which this power may be exercised are clearly defined and police are provided with guidelines for the making of decisions about when, how and what level of search to conduct.

The same issues also arise in respect of pre-arrest body cavity searches (see CJC rec. 7.10).

3.2 Persons in custody

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes to empower police officers and any person acting under the direction of a police officer to search a person in custody and to seize any thing which the officer suspects on reasonable grounds:

(i) may afford evidence of any offence

(ii) could be used by the person to cause injury, or to effect an escape

(iii) should be held for safe keeping during the period of custody.

CJC RESPONSE:

1. **The CJC generally supports the proposal for the power to search people in custody.**

2. **The CJC is concerned that the Discussion Paper does not indicate whether strip searches or body cavity searches may be conducted for the purposes of the proposed power. The CJC believes that a clear proposal in respect of this issue should be formulated by Government and should be the subject of consultation before police powers legislation proceeds.**

In the past, the CJC has been concerned that police in some parts of the State routinely conduct some form of strip search of people in custody. The CJC is of the view that any legislation authorising the search of people in custody should address these matters and provide guidelines for the exercise of the powers and safeguards against their overuse or abuse.

3.3 Establishment of roadblocks

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a police power to stop and search any vehicle where a police officer reasonably suspects that:

(i) a person who has committed an indictable offence punishable by at least 7 years imprisonment may be travelling in a vehicle;

(ii) a person subject of an offence (offender or victim) against section 355 of the *Criminal Code* (Deprivation of Liberty) may be travelling in a vehicle; or

(iii) a person who has escaped from lawful custody may be travelling in a vehicle.

The police officer may only detain a vehicle at a roadblock for such time as is reasonably necessary to determine if the vehicle is the subject of the roadblock.

CJC RESPONSE:

The CJC supports a police power to set up roadblocks, but believes that the proposal to empower police officers of *any rank* to set up a roadblock with the object of apprehending a person suspected of committing an indictable offence punishable by 7 years imprisonment is too wide. Instead, the CJC prefers the form of police roadblock power recommended in its *Report on a Review of Police Powers in Queensland* (rec. 7.15 see below) which is limited to offences carrying a maximum penalty of 14 years imprisonment or more.

Under the Discussion Paper proposal, very junior and inexperienced officers would have authority to set up roadblocks without any requirement to refer to senior officers for advice or approval of such action. The proposal would also authorise the setting up of a roadblock to apprehend a suspect in respect of relatively minor offences, such as graffiti offences involving educational institutions or unlawful use of a motor vehicle, as these offences now carry maximum penalties of 7 years imprisonment.

Roadblocks restrict the right of law-abiding citizens to travel freely from one place to another without interference. There is also the potential to cause accidents where motorists are not expecting to find an obstruction on a road. While the CJC recognises the investigative value of roadblocks, it believes that they should only be used by police in the investigation of more serious crimes or in special police operations and only with the authority of more senior and experienced officers.

The CJC has previously recommended a power to conduct a roadblock[1] with the following features:

- that it be authorised in writing by a police officer of the rank of inspector or above, except in cases of urgency when it can be authorised by an officer of any rank provided it is reported to an inspector or higher as soon as practicable
- that it be permitted when there are reasonable grounds to suspect that there is in a particular vehicle or in any vehicle:
    - * a person whose arrest is sought in connection with an offence carrying a maximum term of imprisonment of 14 years or more; or
    - * a person who has escaped from lawful custody; or
    - * the victim of an abduction.
- that the Commissioner of Police or Deputy Commissioner (Operations) have limited power to authorise a roadblock in a specified area in which there has been serious or frequent criminal activity which warrants such an exercise
- that the police officer who stops a vehicle at a roadblock be required to give the reason for the roadblock to the person in charge of the vehicle prior to taking any further action to search the

1 A roadblock may be defined as the detention and if necessary, search of vehicles on a particular road in order to establish whether an offender, victim or evidence of an offence is being conveyed in the vehicle.

vehicle unless there are reasonable grounds to suspect that giving the reason will prejudice the operation (CJC rec. 7.15).

4. SEARCH ETC. OF PLACES

4.1 With a warrant and *with* the knowledge of the occupier

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a single legislative provision for the issue and execution of all search warrants. Applications for search warrants are to be made to a Justice. The issuing of the warrant is subject to the Justice being satisfied there are reasonable grounds for suspecting there is:

(i) in any place; or

(ii) in the possession of any person in that place;

anything which might provide evidence of the commission of an offence or which is liable to forfeiture.

The objects of the search are to be described as accurately as possible in the application for the search warrant and in the search warrant itself. The warrants must be executed within a fixed period of time after which they will expire.

It is proposed that the warrants will authorise police to:

(i) enter at any time or re-enter the place for a reasonable period after the execution of the warrant for the purposes associated with the execution of the warrant including removing seized property;

(ii) pass through, from, over, under and along any other place for the purpose of making that entry or re-entry;

(iii) search the place so entered or re-entered;

(iv) detain any person found in the place for a reasonable period to ascertain whether that person has possession of any thing which is sought by the warrant;

(v) if authorised by the issuing justice, search any person found therein for any thing named in the warrant where that thing is capable of concealment upon the person.

(vi) use such assistance as is considered necessary by the police officer;

(vii) seize and retain any thing, photograph and videotape any thing, found in, on or about the place or on any person found therein, that the police officer reasonably suspects:

(a) may provide evidence of the commission of the offence;

(b) is intended to be used for the commission of the offence; or

(c) is liable to forfeiture or that may be used as evidence in any forfeiture proceedings under the provisions of an Act; and

(viii) in the case of animals, muster, hold, photograph and inspect any animal that the police officer reasonably suspects may afford evidence as to the commission of an offence.

There will also be provision for the judicial officer issuing the warrant to direct the person whose property is the subject of a search warrant to produce all documents and computer records that are described in the search warrant. Failure to comply would constitute a contempt of the issuing authority.

Where a search warrant is refused by a Justice of the Peace, a police officer may make a further application to a magistrate, who must be advised of the previous application. Further, at the time of an application for a search warrant, the police officer making the application will be required to advise the Justice of the Peace of all applications for a search warrant made within the preceding twelve months in relation to the place specified in the search warrant or the occupier of the place.

CJC RESPONSE:

The CJC response to these issues will be considered under the following headings:

- *Who may issue a search warrant*
- *Objects of search*
- *Description of objects of search*
- *Period of validity of search warrants*
- *Time of executing search warrant*
- *Demand for entry and use of reasonable force to enter premises*
- *Details of the search warrant to be provided to occupier*
- *Entry and re-entry pursuant to the warrant*
- *Search of persons present during execution of warrant*
- *Use of assistants in execution of warrant*

- *Issuing authority to be notified of previous applications for search warrants*
- *Where initial application for warrant is refused*
- *Directing suspects to assist the police.*

Who may issue a search warrant

1. **The Discussion Paper does not specifically address the issue of who should have authority to issue a search warrant. The CJC believes that in view of the legislative changes to the *Justices of the Peace and Commissioners for Declarations Act 1991* the power to issue a search warrant should be limited to stipendiary magistrates, justices of the peace (Magistrates Courts) and justices of the peace (Qualified) as those terms are defined in section 1.04 of the Act (see CJC rec. 8.2).**

The CJC is of the view that the authority empowered to issue a search warrant should be a person with some level of training or understanding of the law relating to the issue of warrants, the role of the issuing authority and the powers conferred by a warrant.

Objects of search

2. **The CJC does not support the proposed wide operation of the search warrant power to all types of offences. The CJC believes that the power to apply for and obtain a search warrant should be limited to the investigation of indictable offences and those other types of offences specified in the CJC's recommendation 8.7.**

The Discussion Paper proposes that the search warrant power be available in respect of the investigation of all offences for which an offender may be arrested with or without warrant. This proposal is consistent with the current law situation under section 679 of the *Criminal Code*. However, if the Discussion Paper proposal to make all offences arrestable offences is carried into law, this should increase the range of offences for which police currently can obtain a search warrant. The Discussion Paper does not address this issue and the outcome may well be inadvertent. However, the combined effect of the two proposals will be to increase the intrusive investigative powers of police in respect of some offences.

In its review of police powers the CJC examined the various legislative provisions for the issue of search warrants in Queensland and other Australian jurisdictions. The CJC preferred the provisions of the *Search Warrants Act 1985* (NSW) which limited search warrants to indictable offences and other specified offences or classes of offences.

The CJC accordingly recommended that:

> A member of the police force be authorised to apply for a search warrant where there are reasonable grounds to suspect that there is in or on any premises:
>
> - a thing connected with a particular indictable offence;
> - a thing connected with a particular offence under the *Drugs Misuse Act 1986;*
> - a thing connected with a particular offence under the *Weapons Act 1990*;
> - a thing stolen, or suspected of being stolen or otherwise unlawfully obtained;
> - a person unlawfully detained.
>
> A thing is connected with a particular offence if it is:
>
> - a thing with respect to which an offence has been committed;
> - a thing that will afford evidence of the commission of the offence; or
> - a thing that was used, or is intended to be used, for the purpose of committing the offence.
>
> A reference to an offence is to include a reference to an offence that there are reasonable grounds to suspect has been or is to be committed (CJC rec. 8.7).

Description of objects of search

3. **The CJC supports the proposal regarding the description of the objects the subject of a search warrant. This proposal is consistent with CJC recommendation 8.8.**

Period of validity of search warrants

4. **The CJC supports the Discussion Paper proposal limiting the period of validity of search warrants. This proposal is consistent with CJC recommendation 8.13.**

Time of executing search warrant

5. **The Discussion Paper does not propose any limit on the time of day at which a search warrant can be executed. The CJC believes that, generally, no search warrants should be executed during night-time hours unless specifically authorised by the issuing justice or magistrate who has taken appropriate matters into consideration (see CJC rec. 9.1). For this purpose, the CJC suggests adopting the *Criminal Code* definition of 'night' as between the hours of 9pm and 6am.**

The CJC can see no basis for a power generally permitting search warrants to be executed outside of reasonable daytime hours. Section 679 of the *Criminal Code* provides that warrants issued under that section 'shall be executed by day unless the justice, by the warrant, specially authorises it to be executed

at night'. The New South Wales *Search Warrants Act 1985* also prevents the issuing authority from authorising the execution of a warrant at night unless satisfied that there are reasonable grounds for doing so. There is no evidence in the Discussion Paper which would support a general power to execute warrants at any time of the day or night, nor is there information to indicate that this power is generally available in other jurisdictions.

The CJC has previously recommended that generally no warrant is to be executed between the hours of 10pm and 6am unless specifically authorised by the issuing authority. The *Criminal Code*, on the other hand, defines 'night' as between the hours of 9pm and 6am. In the interests of consistency, the CJC considers that the Code definition should apply.

The CJC has also recommended that the legislation outline the circumstances in which the issuing authority may authorise execution outside those hours. These should include, but not be limited to, circumstances where:

(a) the execution of the warrant by day is unlikely to be successful because, for example, it is issued to search for a thing which is likely to be on the premises only at night or other relevant circumstances will only exist at night;

(b) there is likely to be less risk to the safety of any person if it is executed at night; or

(c) an occupier is likely to be on the premises only at night to allow entry without the use of force.

With respect to a search for a person unlawfully detained, the CJC has recommended that the fact that the warrant is issued to search for a person is sufficient grounds for it to be executed at any time of the day or night (CJC rec.9.1).

Demand for entry and use of reasonable force to enter premises

6. **The Discussion Paper does not address the issue of the use of force in the execution of search warrants. The CJC believes that this issue requires careful attention to protect the rights of owners and occupiers of properties the subject of search warrants. The CJC recommends that as a general principle, demand is to be made before force is used to effect entry. Where the circumstances require that force be used, the CJC recommends that it be 'such force as is reasonably necessary' (also see CJC rec. 8 10 referred to below).**

The CJC has also recommended that this requirement may be waived in the following circumstances:

1) where to make demand before entry is likely to endanger the life or safety of any person;

2) where to make demand before entry is likely to result in the loss or destruction of material evidence of an indictable offence; or

3) where the warrant authorises a covert entry and search (see CJC rec. 8.10).

Where entry is made by force, either with or without demand before entry, the CJC has recommended that the police officer should be required to record the reasons for this on the back of the warrant and that the details subsequently be entered on the Search Register referred to in CJC recommendations 11.3 and 11.5 (CJC rec. 9.4).

Details of the search warrant to be provided to occupier

7. **The CJC supports the Discussion Paper proposal that a copy of the search warrant be provided to the occupier of premises the subject of the warrant. This proposal is consistent with CJC recommendation 11.2.**

Entry and re-entry pursuant to the warrant

8. **The CJC generally supports the Discussion Paper position in respect of the power to re-enter premises pursuant to a search warrant. However, the CJC would caution that a provision to permit re-entry to premises pursuant to a search warrant will need to be carefully drafted to ensure that the power is limited and only permits re-entry where it is so associated in time or circumstance that it may properly be regarded as part of the initial entry and search authorised by the warrant. These matters are canvassed in CJC recommendation 9.9.**

Search of persons present during execution of warrant

9. **The CJC has some concerns about the Discussion Paper proposal that police be authorised by a search warrant to 'detain any person found in the place for a reasonable period to ascertain whether that person has possession of any thing which is sought by virtue of the warrant'. If this is only proposing detention for the purposes of search, then the CJC supports the proposal. However, if that is what is intended, then why not use that expression? The CJC would only support a power to detain a person found in premises during the execution of a search warrant for the specific purpose of searching the person, and only where the police officer has reasonable grounds to suspect that the objects of the search are being carried on or concealed upon the person (CJC rec. 9.8).**

The CJC has recommended that a power be granted to search persons who are present during the execution of a search warrant in circumstances where the police officer has reasonable grounds to suspect that the objects of the search are being carried on or concealed upon the person (CJC rec. 9.8). If the police have no grounds to suspect that the person has any thing the subject of the search warrant in his or her possession, then the CJC can see no justification for the detention of the person.

Further, the CJC questions the granting of a power in all instances to search persons who are present at the time of the execution of a search warrant. There should be no need to search persons where the objects of the search are of substantial size and incapable of concealment on the person e.g. stolen electrical goods. On the other hand, where the objects of the search are drugs, there is a clear need for the power to search persons found on the premises. Accordingly, the CJC believes that this power should be expressly limited to situations where the police have reasonable grounds to suspect that the objects of the search are being carried on, or are concealed upon, the person.

Use of assistants in execution of warrant

10. **The CJC does not support the Discussion Paper proposal that search warrants generally authorise police to 'use such assistance as is considered necessary' when executing warrants. The CJC believes that the authority of the justice or magistrate issuing the warrant should be specifically obtained for other persons to assist in the execution of a search warrant. However, in exceptional circumstances where the presence of a particular**

person is necessary but was not foreseen at the time of applying for the warrant (e.g. a locksmith to open a safe) a police officer should be authorised to call for that assistance and report later on the use of such assistance to the issuing authority (CJC rec. 9.3).

The CJC recognises that with the increase in sophistication and complexity of crimes there will often be a need for police to take other persons with them when executing a search warrant. However, the CJC is of the view that where the police anticipate that they may need the assistance of persons with particular skills in the execution of a search warrant, they should inform the justice at the time of application for the warrant and obtain specific approval for that class of person to assist in the execution of the warrant.

Issuing authority to be notified of previous applications for search warrants

11. **The CJC supports the Discussion Paper proposal that in all applications for search warrants the issuing authority be informed of all other applications made in the previous twelve months in respect of the same premises.**

12. **The CJC considers that the 'results' of all searches should be entered on the computerised search register. Information about the results of all previous searches relating to a particular individual or premises the subject of an application for a search warrant should be included in the information put before the authority from whom the warrant is sought.**

13. **A police officer may apply for a search warrant where he or she has reasonable grounds to suspect that the search will reveal evidence of the commission of an offence. It is the CJC's view that police applying for a search warrant should be required to set out in the complaint what steps have been taken to verify the information upon which the application is based, or what other basis exists for relying on it.**

The CJC receives numerous complaints about police repeatedly conducting drug searches which produce no evidence of an offence. In the CJC's view, many of these searches could be avoided if procedures governing the seeking of search warrants and the recording of the outcome of searches were amended. In response to complaints about unjustified searches the CJC has recommended to the QPS that the 'results' of all drug searches should be entered on the computerised 'drug index' and should be included in the information put before the authority from whom the warrant is sought. The results of previous searches are clearly relevant to the assessment of whether there is a reasonable suspicion that a further search may secure evidence of an offence.

Police officers applying for search warrants have an obligation to take all reasonable steps to investigate the validity of information upon which they intend to rely as the basis for the search. While the CJC recognises the need to protect the identities of informants, it believes that police must still be able to demonstrate that the information forming the grounds for the search warrant raises a reasonable suspicion that the search will reveal evidence of the commission of an offence. In the CJC's view, merely asserting that 'confidential information' is 'reliable', is not sufficient . Officers need to set out in the complaint what steps have been taken to verify the information or what other basis exists for relying on it.

The CJC believes that these recommendations should apply to all applications for search warrants, not just warrants obtained under the *Drugs Misuse Act 1986*.

Where initial application for warrant is refused

14. **The CJC supports the proposal contained in the Discussion Paper that where an application for a search warrant has been refused by a justice of the peace, a police officer may make further application to a magistrate. However, the CJC is of the view that only *one* further application may be made to a magistrate without the need for additional information in support of the application to be obtained (see CJC rec. 8.5 referred to below).**

In order to address the potential problem of 'forum-shopping' in applications for search warrants the CJC has recommended that:

- as a general rule, where an application for a search warrant has been refused no further application should be made to any magistrate or authorised justice unless further information has been obtained;
- there be an exception to this where the initial refusal is by an authorised justice (other than a stipendiary magistrate), one further application may be made to a magistrate without the need for additional information to be obtained; and
- in all cases, the applicant should be required to inform the issuing authority of any previous applications for a warrant concerning the same circumstances which were refused (CJC rec. 8.5).

Directing suspects to assist the police

15. **The CJC supports the proposal to direct persons whose property is the subject of a search warrant to produce all documents and computer records described in the search warrant.**

The CJC recognises that in the case of very complex computer systems, police will be unable to access information on those systems without the assistance of a person who has intimate knowledge of the system.

4.2 Without a warrant to prevent loss etc. of evidence

DISCUSSION PAPER PROPOSAL:

It is proposed that the emergency search powers available under the *Drugs Misuse Act 1986*, the *Crimes (Confiscation) Act 1989* and the *Weapons Act 1990* be extended to permit such searches to be conducted in the investigation of any offence for which a search warrant may be obtained. An additional accountability measure is the requirement that the police officer must, as soon as practicable, justify the search to a magistrate and seek an order with respect to any thing that was seized during the search. If the search is found not to be justified, the magistrate may make an order for the disposal, return or destruction of any thing seized and evidence obtained from the search will not be admissible in any subsequent proceedings unless it is in the public interest (to be determined by the court hearing the charges to which the evidence relates).

In determining whether the search without warrant was justified, the magistrate must take into account:

(i) any reasonable grounds that existed prior to the conduct of the search;

(ii) in the circumstances prior to the search, the apparent likelihood that evidence would have been concealed or destroyed

(iii) any thing that was located as a result of the search

(iv) whether it is in the public interest to allow such evidence to be presented to a court.

CJC RESPONSE:

1. **The CJC opposes the general power to enter and search without warrant proposed in the Discussion Paper, but does support a more limited power which would be available in emergencies and situations involving specific types of offences which may require more immediate responses.**

2. **The CJC also believes clarification is required of the consequences for officers who abuse these powers.**

When the CJC was undertaking its review of police powers, the Queensland Police Union of Employees advocated a general power permitting searches without warrant similar to that proposed in the Discussion Paper. The CJC considered the Union's submission, but did not support a general power to search without warrant. The CJC accepts that there may be some circumstances where the interests of justice would best be served by allowing a power of search without warrant; however, these circumstances should be carefully circumscribed. The concern with allowing warrantless searches is the diminution of legal control over the exercise of the search power. Part of the protection of the warrant is in having the reasonableness of the entry considered by a neutral and detached authority rather than being decided by the officer investigating the offence.

The CJC also has doubts about the effectiveness of the 'after-the-event' controls proposed in respect of the power. Where a search without warrant has resulted in the seizure of objects which provide evidence of the commission of an offence, it is most unlikely that a magistrate to whom the police officer must later report to justify the search will find that the search was unlawful. Further, the proposal does not state whether police would be required to justify a search without warrant to a magistrate where the search did not result in the seizure of objects. The CJC considers that it is most important that unsuccessful searches without warrant should also be subject to this accountability mechanism.

The CJC recommended a general emergency power for police to enter and search premises without warrant where police have reasonable grounds to suspect that material evidence of an offence is in a place and will be concealed or destroyed unless that place is entered and searched immediately. However, the CJC recommended that this power be limited to the investigation of offences carrying a maximum penalty of seven years imprisonment or more (CJC rec. 10.14). Outside of these circumstances

the CJC recommended the retention or creation of powers to enter and search premises without warrant in the following specific circumstances:

- under section 18(12) of the *Drugs Misuse Act 1986* in special or urgent circumstances to search for evidence of the commission of a drug offence (CJC rec. 10.2)
- under the *Weapons Act 1990* to search for weapons where death or injury is threatened (CJC rec. 10.3)
- under the *Crimes (Confiscation) Act 1989* to search for tainted property (CJC rec. 10.4)
- under the *Domestic Violence (Family Protection) Act 1989* to deal with domestic violence (CJC rec. 10.5)
- under the *State Counter–Disaster Organization Act 1975* to deal with a state of disaster (CJC rec. 10.6)
- under the *Public Safety Preservation Act 1986* in an emergency to preserve public safety (CJC rec. 10.7)
- under the *Casino Control Act 1982* to enter public areas of the casino and, with the authority of a Casino Control Inspector, to enter areas to which the public are denied access (CJC rec. 10.8)
- under the *Noise Abatement Act 1978* to prevent the continuation of 'excessive noise' (CJC rec. 10.10)
- entry to dealers' (i.e. pawnbrokers, second-hand dealers and collectors, auctioneers and agents etc.) premises be confined to entry during business hours without a warrant (CJC rec. 10.13).

The CJC also recommended that:

- the power to enter the premises of second-hand dealers and pawnbrokers by force if necessary, should be made the subject of a search warrant
- there be a review of the power under the *Traffic Act 1949* to enter premises to make enquiries
- the power under the *Art Unions and Public Amusements Act 1992* to enter premises, make enquiries and seize documents be made the subject of a monitoring warrant.

The CJC has a further concern about the general police power proposed. Other than providing for the disposal, return or destruction of things seized during a warrantless search and exclusion of the evidence obtained where the search was found to be unjustified, the proposal does not provide for any other consequences for the officer who conducted the search. If it is not proposed that there should be any consequences for officers who abuse these powers, what incentive is there for these police to exercise their discretion reasonably?

4.3 Entry *without* a warrant to prevent imminent injury to persons or substantial damage to property

DISCUSSION PAPER PROPOSAL:

The Discussion Paper recommends a power authorising police to enter any place without a warrant, where the officer has reasonable grounds to suspect that (i) imminent injury to a person; or (ii) substantial damage to the property of another may occur. In addition it is proposed that the police have power to:

(i) detain (for a reasonable time) any person within the place;

(ii) search the place and any detained persons for any thing which may be used to cause personal injury or property damage; and

(iii) seize and retain any such thing.

Proposed statutory safeguards include:

- the detention of a person will only be permitted to prevent the repetition or continuation of acts of violence or to search the person
- a person detained may only be searched where there are reasonable grounds to suspect that the person has a weapon or explosive or dangerous substance concealed on their person
- limiting the period for which seized property may be retained to seven days, unless action has been taken against the person from whom the property was seized or it is unlawful for that person to have that property.

CJC RESPONSE:

1. **The CJC supports the Discussion Paper proposal that a police officer have power to enter any place without a warrant, where the officer has reasonable grounds to suspect that (i) imminent injury to a person, or (ii) substantial damage to the property of another, may occur.**

2. **The CJC does not support the proposal that police have a power to 'detain (for a reasonable time) any person within the place'. The CJC proposes the following alternative formulation of the proposed power:**

   > **that the police have power to detain any person found within that place who is reasonably suspected of threatening the injury or damage which gave rise to the entry, for the purpose of searching the person where there are reasonable grounds to suspect that the person may have any thing which may be used to cause personal injury or property damage.**

3. **The CJC also does not support the proposed power to detain persons found in premises in these circumstances 'to prevent the repetition or continued acts of violence', as in such cases the police have grounds to arrest the person for an offence.**

The CJC has previously recommended a power to enter and search without warrant to effect an arrest or to prevent serious injury or damage (CJC rec. 10.1). In particular, the CJC recommended legislative effect be given to the common law power to enter and search without a warrant for the purpose of arrest where an officer has reasonable grounds to suspect that the person is on the premises. Unless there is reason to believe that it would further inflame the situation or provide an opportunity to the person threatening the injury to prepare him or herself for resistance, proper announcement is to be made before entry to give the occupier the opportunity to permit entry without force.

The CJC also recommended a limited form of the common law power to enter to prevent a breach of the peace be included in legislation. The recommendation proposed a power to enter and search without a warrant in order to prevent injury to a person or prevent **serious** damage to property (CJC rec. 10.1)0.

In view of the above recommendations and the specific statutory powers contained in the *Domestic Violence (Family Protection) Act 1989* and the *Weapons Act 1990*, the CJC was not satisfied that there was a need for a more general power in the criminal law to prevent a breach of the peace (CJC rec. 10.1).

The CJC does not support the general power proposed in the Discussion Paper to detain any person within the place entered. The CJC believes that in the circumstances described the police should have a limited power to detain certain persons located within the place, but only for the purposes of search.

5. PROVISION FOR THE ISSUE OF A NOTICE TO PRODUCE DOCUMENTS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper recommends a power for police to serve a Notice to Produce Documents on a person or corporation, being an 'innocent' third party requiring the production of documents (including electronic information) which are in the possession of that person or corporation and are relevant to the investigation of an offence. The proposal is subject to a number of safeguards, including:

- the police be required to have reasonable grounds to suspect that the 'third party' possesses relevant documentary evidence
- the application be made to a magistrate
- the third party will still be able to claim legal professional privilege
- the police officer applying for the Notice will be required to advise the magistrate of all applications for such Notices made within the previous 12 months is relation to the suspected offender.

CJC RESPONSE:

1. **The CJC supports the proposal that police have a power to apply for a Notice to Produce Documents.**

2. **The CJC endorses the safeguards proposed in the Discussion Paper, particularly, the requirements for the application to be made to a magistrate and for advice to be given to the magistrate of all applications made in relation to the suspect within the previous 12 months.**

This issue was not addressed in the CJC's police powers review. However, the matter was covered in the Queensland Police Service Review to which the CJC had substantial input. The CJC considers that granting the police this power is essential to enhancing the capacity of the QPS to investigate organised crime and other complex criminal activities, such as sophisticated fraud.

6. USE OF LISTENING DEVICES FOR THE INVESTIGATION OF SERIOUS OFFENCES

Types of offences in respect of which a listening device may be used (para. 6.12)

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that the types of offences for which a listening device may be used generally reflect those offences which may be subject to telephone interceptions referred to in the

Commonwealth *Telecommunications (Interceptions) Act 1979*. The offences listed in the Discussion Paper are **indictable** offences which involve:

(i) serious risk of, or actual, loss of life
(ii) serious risk of, or actual, serious injury to any person
(iii) serious damage to property (in circumstances endangering the safety of any person)
(iv) serious fraud
(v) serious loss of revenue to the State
(vi) official corruption
(vii) serious theft
(viii) organised crime
(ix) conduct related to prostitution or SP bookmaking
(x) child abuse (including child pornography)
(xi) conspiracies; and
(xii) drug offences (punishable by 20 years or more imprisonment).

The Discussion Paper notes that the *Invasion of Privacy Act 1971* currently permits a listening device to be issued for any offence, which may be 'too wide', and that the listed offences restrict the offences for which a listening device may be installed.

CJC RESPONSE:

The CJC considers that the proposed range of offences in respect of which a listening device may be obtained is too broad and is inconsistent with the approach taken in the Commonwealth *Telecommunications (Interception) Act 1979*. The CJC recommends that the offences in respect of which a listening device may be issued should be limited to those contained in its previous recommendation (CJC rec. 24.3 set out below).

The Discussion Paper states that the proposed list of offences generally 'reflect those nominated in the Commonwealth *Telecommunications (Interception) Act 1979* as applying to telephone interceptions'. However, this is not correct. The *Telecommunications (Interception) Act* provisions are restricted to offences which carry a maximum penalty of seven years or more and which satisfy one or more of the listed criteria. For example, there is no provision to enable the use of telecommunications interceptions to investigate serious theft *per se*; an interception would only be possible (under the Commonwealth Act) if it could also be established that there was an organised dimension to the commission of such an offence or if the offence had resulted in a serious loss of revenue of a State or the Commonwealth. There is also no general power under the Commonwealth Act to use interceptions to investigate conspiracies; the conspiracy must be to commit an offence of the type specified in the Act.

The CJC has previously argued that listening devices are at least as intrusive as telecommunications interceptions, and possibly more so. On this basis, it would be inappropriate to allow listening devices to be used in a wider range of circumstances than is consistent with the provisions of the *Telecommunications (Interception) Act*.

In its review of police powers, the CJC considered the types of offences for which a listening device may be sought. The CJC took the view that because of the particularly intrusive nature of listening devices, they should be limited to situations involving a serious offence. The CJC considered that the classification of offences contained in the *Telecommunications (Interceptions) Act 1979* (Cth) was a useful model, but was deficient in two areas—organised crime and official corruption. (The

Telecommunications (Interception) Amendment Act 1995 has since been amended to include those types of offences.)

CJC recommendation 24.3 states that warrants for listening devices should be available only in respect of:

- an offence under Part II of the *Drugs Misuse Act* punishable by 20 years or more imprisonment
- an indictable offence punishable by imprisonment for a period of seven years or more where the conduct constituting the offence involves: the serious risk of loss, or the loss of, a person's life; serious risk of, or serious, personal injury; serious damage to property in circumstances endangering the safety of a person; trafficking in drugs; serious fraud; serious loss to the revenue of the State or Commonwealth or official corruption
- an indictable offence punishable by imprisonment for a period of seven years or more and which satisfies the following criteria: two or more offenders and substantial planning and organisation are involved; the offence involves, or is of a kind which ordinarily involves the use of sophisticated methods and techniques; the offence is committed or is of a kind which is ordinarily committed, in conjunction with offences of a like kind.

The CJC notes that the Discussion Paper proposes the use of listening devices in situations involving 'child abuse (including child pornography)'. The CJC is concerned that this definition is too broad and could encompass, for example, an offence under sections 285 and 324 of the *Criminal Code* (failure to provide the necessaries of life). The CJC does not oppose the use of listening devices in appropriate situations involving serious child sexual assault, child pornography or organised paedophile activity. However, it appears that most of these instances would be covered under the CJC's recommendations. The CJC stresses the need for clear and detailed drafting of any provisions designed to enable the use of listening devices in the investigation of sexual offences against children.

Powers ancillary to installation and operation of listening devices (para. 6.13)

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes to include in the legislation necessary, ancillary matters which a judge may authorise a police officer to perform in the installation and operation of a listening device. Paragraph 6.16 sub-paragraph (viii) also refers to the need to have the prior approval of the judge authorising the warrant to, covertly or through subterfuge, enter to install a device; exercise rights of access; extract electricity; use reasonable force; and intercept and record conversations. Paragraph 6.13(v) further refers to authorisation for a police officer to 'intercept and record private conversations by means of the listening device.'

CJC RESPONSE:

These proposals are generally consistent with previous CJC recommendations. The CJC supports the proposals subject to the following provisos:

- **some criteria specifying when and what type of force may be used in particular circumstances (see CJC rec. 24.7)**

- **where practicable, a warning be given that force will be used**

- **inclusion of an explicit provision for compensation for the owners of property damaged as a result of the installation of a listening device.**

The CJC recommended in its *Report on a Review of Police Powers in Queensland* that the judge issuing the warrant may authorise:

- the use of such force against property as is reasonably necessary for the purpose of carrying out anything authorised by the warrant

- the use of reasonable force against any person in the course of effecting an entry or exit of the premises, where it is necessary for the protection of the police officer or the protection of others (CJC rec. 24.7).

The recommendation also required: a warning be given that force is going to be used, unless it is impracticable to give such a warning; and provision be made for compensation to the owner for any damage to property.

In the interests of clearly defined police powers, the CJC suggests that criteria governing the use of force in the context of surveillance devices be contained in the proposed legislation.

The CJC notes that the Discussion Paper contains a proposal concerning compensation in paragraph 17.1, although the scenario described there does not relate to damage caused during installation or retrieval of a listening device. As acknowledged in the CJC's report (1994b, p. 770), it will be rare for force to be used, but where it is employed, the owner of the property should be compensated for any damage caused. The prohibition referred to in paragraph 17.1 of the Discussion Paper should not apply to damage caused in circumstances involving the installation, service, relocation or retrieval of a surveillance device.

Listening device valid for a number of locations (para. 6.14)

DISCUSSION PAPER PROPOSAL:

The Discussion Paper refers to the problem of 'suspects, including drug traffickers, avoiding detection by listening devices by later disclosure of location of the offence', and argues that it is therefore reasonable that one warrant cover the use of a listening device in a number of locations.

The Paper proposes that a judge be permitted to authorise the installation of a listening device in a class of premises (for example, motel rooms), but only where police have reasonable grounds to suspect the target offender will be in those premises. The Paper notes:

> This authority is particularly important where the suspect only stays in the one place for a short time, for example less than one day. Generally one day is insufficient time to apply for and install a device.

The Discussion Paper expressly notes that it is not the intention to allow police generally to install listening devices in any number of **private** places on one warrant.

CJC RESPONSE:

1. **The CJC does not support the proposal in the Discussion Paper allowing warrants to be issued to install devices in a *class* of premises (such as motel rooms)**

2. **The CJC considers that where practicable, the premises should be specified in the warrant. Where it is not practicable to specify the premises, the warrant should be sought in relation to a particular person, and should authorise entry into any premises in which the person is, or is likely to be, for the purpose of installing, maintaining, testing, using or retrieving a listening device.**

The topic of warrants to install listening devices in multiple locations was not considered in the CJC's Police Powers Report. The CJC is aware that some people involved in organised criminal activities deliberately change premises quite frequently, and at short notice, as a way of concealing their activities form surveillance. However, the CJC is concerned that there may be practical difficulties if the Discussion Paper proposal were to be included in legislation, specifically in relation to the meaning of the phrase 'class of premises'. In addition, such a provision would not address the problem of the target offender who moves from one *type* of premises to another (for example, from a motel to a hotel to a private residence).

One approach to dealing with this problem would be to adopt a provision similar to section 12G of the Commonwealth *Australian Federal Police Act 1979*, which provides that warrants for listening devices may be issued in relation to a particular person or particular premises (s. 12G(1)). Under this Act, a warrant may authorise officials to 'enter any premises in which the person is, or is likely to be, for the purpose of installing, maintaining, testing, using or recovering a listening device or a part of a listening device' (s. 12G(3)).

Some might argue that such a provision is too broad, but this objection could be met by specifying in the legislation that *where practicable* the warrant specify the premises where the listening device is to be installed. In the circumstances envisaged by the Discussion Paper, this would enable an applicant for a warrant to submit to the issuing judge that the warrant should be issued in relation to a person because of the practical difficulty of specifying a particular location for installation of the device.

Listening device for use in public places (para. 6.15)

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes permitting a judge to authorise the installation of a listening device in a public place where the police have reasonable grounds to suspect the target offender will be. The Paper notes that 'retention of any conversations recorded would only be permitted should they relate to the suspect'.

CJC RESPONSE:

The topic of listening devices in public places was not considered in the CJC's Police Powers Report. However, the CJC supports this proposal.

Safeguards (para. 6.16)

There are several issues considered within the broad topic of 'Safeguards' in paragraph 6.16 of the Discussion Paper. The CJC supports most of the proposed safeguards. The following comments relate only to those matters which are inconsistent with or differ from earlier CJC recommendations, namely:

- factors which the judge would be required to consider
- duration of the warrant.

Factors which the judge would be required to consider

DISCUSSION PAPER PROPOSAL:

The Discussion Paper lists some matters which the judge considering the application is required to consider but does not include consideration of the practicality and likelihood of obtaining evidence of the offence by less intrusive means (than a listening device) or the extent to which the safety of any person is likely to be interfered with.

Paragraph 6.16 (iv) (d) includes a requirement that a judge hearing the application consider 'the benefits derived from the issue of any previous warrant in relation to *this person*'.

CJC RESPONSE:

1. **The CJC is of the view that, given the intrusive nature of listening devices, the judge hearing an application be required to take into account the practicality and likelihood of obtaining evidence of the offence by other less intrusive means.**

2. **The CJC considers that paragraph:**

   6.16(iv)(b) should be reworded to include the safety of the person;

   6.16 (iv)(d) should be reworded to refer to 'all previous warrants or extensions thereto sought or granted in connection with the investigation in question'.

The CJC recommended in its *Report on a Review of Police Powers in Queensland* (CJC rec. 24.4) that the judge hearing the application for a listening device warrant must also have regard to 'the practicality and likelihood of obtaining evidence of the offence by other less intrusive means'. This recommendation is consistent with the provisions of the Commonwealth *Telecommunications (Interception) Act 1979*, and with recommendations adopted by the Australian Law Reform Commission, the Law Reform Commission of Canada and the Royal Commission on Criminal Procedure (England and Wales) (CJC 1994b, pp. 764–765). This requirement should be added to the list of criteria.

The CJC's recommendation 24.4 argued 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 issue to be considered by the judge in 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 (CJC 1994b, p. 764). The safety of a person should be included in the list of criteria to be taken into account by the judge.

The proposal to require a judge hearing the application to consider 'the benefits derived from the issue of any previous warrant in relation to *this person*' differs somewhat from the CJC recommendation 24.4, which refers to 'all previous warrants or extensions thereto sought or granted in connection with the investigation in question'. The CJC noted at page 765 of its report (1994b) that many other States have a legislative requirement that the judge hearing the application should have regard to all previous warrants sought or granted in connection with the investigation in question. The *Telecommunications (Interception) Act* also requires that the history of applications in relation to a particular telephone service, and the results of such applications, be included in an affidavit in support of an application relating to that service and person.

In the CJC's view, it is inappropriate to link 'the benefits derived' referred to in the Discussion Paper to a particular person, as distinct from a particular investigation. Merely because probative evidence has been obtained about a particular person pursuant to an earlier warrant in an unrelated investigation, that should not of itself be a basis for asserting that similar probative evidence is likely to be obtained again in relation to a particular person.

Duration of the warrant

DISCUSSION PAPER PROPOSAL:

The Discussion Paper specifies that the duration of a warrant for a listening device would be limited to 'an initial maximum period of 90 days (subject to further judicial extension) unless a shorter period was authorised by the judge'. It is further proposed that:

> regardless of the period specified in the warrant, use of the device must cease when the investigation ceases, unless other criminal activity of a similar nature is uncovered by the use of the device.

CJC RESPONSE:

The CJC does not support the proposed 90 day maximum, but through its own operations, is aware that difficulties in installing devices may cause substantial delays after the warrant has taken effect. A suggested means of addressing this problem may be to set the statutory maximum for initial applications at 28 days as previously proposed by the CJC, but specify that the period commences to run from the day of installation (with some upper limit being placed on the installation period). This will take into account the sometime unexpected difficulties associated with installation of a device.

In its review of police powers (CJC rec. 24.11), the CJC recommended a statutory maximum period of 28 days with opportunities for extensions of up to 28 days (CJC rec. 24.16). As stated in its Report (CJC 1994b, p. 781):

> A limit [on the period for which a warrant may be issued] increases accountability by requiring the matter to return before the judge for extension at designated, reasonably short, intervals. This is important because the intrusiveness of listening devices increases with the length of time they are in use.

However, the CJC acknowledges that the maximum duration of 90 days suggested in the Discussion Paper applies in South Australia and to warrants under the Commonwealth *Telecommunications (Interception) Act 1979*. Furthermore, it is now common practice in Queensland for judges to authorise listening device warrants for up to 90 days.

Use of Assistants

DISCUSSION PAPER PROPOSAL:

The Discussion Paper does not make any reference to allowing the use of assistants.

CJC RESPONSE:

The CJC considers that the issues raised in its recommendations 24.8 and 24.11 relating to the use of assistance in effecting the purpose of the warrant should be reflected in the legislation.

The CJC's recommendations 24.8 and 24.11 respectively relate to the use of assistance as reasonably necessary, and the right of appointment of police and/or civilians to assist in effecting the purposes of the warrant be granted to an Inspector or other higher ranking officer.

Those recommendations are that:

- the judge, upon issuing a warrant, may authorise the use of such assistance as is reasonably necessary to effect the warrant
- the power to authorise police and/or civilians to assist in effecting the purposes of the warrant be conferred on the applicant officer who is an Inspector or higher ranking officer
- all authorisations be in writing, stating the name of the person authorised, the task for which the person is authorised, the date of authorisation, and the name and signature of the authorising person
- copies of the authorisations be given to those authorised and the originals retained on file for inspection by the proposed inspecting agency.

The CJC considers that where assistance from others, such as locksmiths, may be required, their role should be specifically provided for in the warrant.

Notification of Fact of Surveillance

DISCUSSION PAPER PROPOSAL:

The Discussion Paper does not deal with the issue of reporting or notification to a person who has been the subject of surveillance.

CJC RESPONSE:

The CJC considers that, to facilitate greater accountability in respect of intrusive surveillance devices, the proposed legislation should incorporate a provision consistent with the CJC's recommendation 25.6.

CJC recommendation 25.6 states that:

- there be a legislative requirement that, upon a report back to the judge, the judge may, in his or her discretion, direct that the persons who were the subject of the surveillance, or are to be charged arising out of the investigation, be notified of the fact of the surveillance
- a discretion be conferred on the judge to refuse to make the order for notification if to do so would be likely to jeopardise a current or future investigation
- the applicant for the warrant be given the opportunity to be heard prior to the judge directing notification (CJC rec. 25.6).

The CJC accepts that a mandatory notification requirement creates substantial difficulties, but considers that a presumption in favour of notification would facilitate accountability (1994b, p. 810).

Absence of a requirement to make a final report to the judge granting the warrant.

DISCUSSION PAPER PROPOSAL:

The Discussion Paper does not propose a requirement that a final report be given go the judge at the conclusion of the use of the surveillance device, although paragraph 6.16(v) refers to allowing the judge to impose 'regular reporting requirements to the issuing judge'.

CJC RESPONSE:

The CJC repeats its recommendation 25.1 which would require the applicant for the listening device warrant to report to the judge who issued the warrant within two weeks after the retrieval of the device with the information set out in the recommendation.

As noted in the CJC's report (1994b, pp. 799–800), it is a standard practice in Queensland and other jurisdictions for a report to be given to the judge who issued the warrant. The provision of reports to the judge who issues a warrant assists the court to develop a broader knowledge of the use of devices and makes the applicant more accountable for the use of these devices. Proper accountability is a necessary element of the use of listening and other surveillance devices.

7. NAME AND ADDRESS OF PERSONS SUSPECTED OF BEING NAMED IN SUMMONSES, WARRANTS AND OTHER COURT PROCESSES INCLUDING NOTICES TO APPEAR

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police have the power, when serving court processes or executing arrest warrants, to require a person to provide his or her name and address. Police will be required to inform the person of the reason why they are seeking these particulars. It is also proposed that an offence of failing to provide name and address or providing false particulars be created, and that police be required to warn the person from whom they are seeking the particulars that failure to comply may render the person liable to be charged with an offence.

CJC RESPONSE:

The general power

1. **The CJC supports the proposed power to demand the name and address of persons suspected of being named in summonses, warrants and other court processes, provided the powers are only exercisable in respect of persons *reasonably suspected* of being named in the summons, warrant or other court process (see CJC rec. 14.5).**

The CJC's recommendation 14.5 states that a police officer, when executing a warrant or serving a summons, should be authorised to demand the name and address of a person who the police officer has reasonable grounds to suspect is the person named in the warrant or summons.

Offence for refusal or failure to provide name and address

2. **The CJC supports the proposed offence of refusing or failing to provide name and address provided that it should only be a simple offence subject to a monetary penalty. The CJC also endorses the proposed safeguards requiring police to warn the person from whom they are seeking the particulars that failure to comply may render the person liable to being charged with an offence.**

Accountability requirements

3. **The CJC believes that the exercise of this power should be subject to the requirements that the officer:**

   (i) **provide in writing his or her name, rank and station to the person whose name and address is requested;**

   (ii) **inform the person of the offence that has been or is suspected of having been committed;**

   (iii) **explain to the person the reason/s for suspecting that the person may have committed the offence or may be able to assist in inquiries in relation to the offence; and**

(iv) **inform the person that a failure to provide his or her name and address, or the provision of a false name and address, may result in the person being arrested and charged with failing to provide his or her name and address or with providing a false name and address. These proposed requirements are set out in CJC recommendation 14.8.**

It is very important that police clearly inform persons as to why they are being required to provide their name and address and the consequences of a failure to do so. CJC research indicates that failure of police to clearly explain to people why they have been approached contributes to police-civilian conflict and increases the likelihood of police conduct resulting in complaints. A requirement that a police officer provide his or her name in these circumstances is also necessary for accountability purposes.

Review of inconsistent legislative provisions

4. **Existing legislative provisions which are inconsistent with the proposals contained in the Discussion Paper relating to the power to demand name and address should be amended or repealed, unless there are special circumstances justifying the retention of these provisions.**

In its review of police powers, the CJC recommended that a review be undertaken of all existing legislative provisions which were inconsistent with the CJC's recommendations. However, the CJC accepted that there may be some provisions which are intended to operate in situations which could amount to special circumstances which may justify their retention.

8. PERFORMANCE OF MEDICAL AND OTHER PROCEDURES UPON SUSPECTS

8.2 Performance of procedures upon persons in custody

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a provision that closely resembles the current section 259 of the *Criminal Code* which will allow police to remove a person in custody to a suitable place for the purpose of conducting a medical examination. The procedures involve taking body samples, including from orifices. Performance of the procedures would require either the informed consent of the person in custody or an order issued by a magistrate. Those requirements reflect the current section 259.

As a general rule, a person would be entitled to have two independent persons present during any medical or dental examination and, where practicable, would receive a portion of the sample taken from him or her for independent analysis.

CJC RESPONSE:

The CJC supports the proposal for legislation to allow procedures similar to those permitted under the current section 259(3) of the Code, provided the following additional safeguards are prescribed:

- **where a person consents to a procedure, either prior to or following arrest, such consent be audio or video recorded, where practicable. Where video or audio recording is not practicable, consent should be in writing**
- **the procedures should only be available in relation to the investigation of indictable offences**
- **a suspect be granted a right to be heard in applications before a magistrate, who should be required to have regard to: the intrusive and/or humiliating nature of the procedure; the seriousness of the offence; the age and health of the suspect; and the degree of the suspect's alleged involvement in the offence**
- **the safeguards should apply to searches currently conducted under the *Drugs Misuse Act 1986*.**

These proposed safeguards are reflected in the CJC's earlier, recommendations, namely recommendations 26.2, 26.4, 26.6 and 26.7. Throughout the CJC's report, the CJC recommended that the more intrusive police powers be limited to the more serious offences. Consistent with that rationale, recommendation 26.4 proposed that the power under section 259(3) of the Criminal Code be available only in respect of indictable offences, which restricts the current scope of that provision.

Recommendation 26.2 dealt with the audio or video recording of the giving of consent to a procedure. The CJC had concerns about the limited writing skills of some suspects and accordingly did not regard written consent as an adequate safeguard in all cases (CJC 1994b, p. 822).

The other additional safeguards listed above reflect the importance of protecting the rights of a person who is confronted with the exercise of such an intrusive power as taking body samples.

8.3 Performance of procedures upon persons prior to arrest

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes including in legislation a provision which requires the consent of a person who has not been arrested to those examinations or making of samples (such as handwriting sample) which will be permitted post-arrest.

The same statutory safeguards which will apply to the post-arrest procedures, such as the right to have two independent persons present, will apply to the consensual testing.

CJC RESPONSE:

The CJC supports the proposal which is consistent with CJC recommendations (CJC recs 26.1 and 26.2).

9. IDENTIFICATION OF SUSPECTS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a legislative basis to regulate the use of alternative methods of identification which display fairness to the suspect. The Paper recognises that practical difficulties may arise in arranging and conducting identification parades, which is the identification practice favoured by the Courts.

The following methods of identification, subject to judicial discretion, will be available: identification parade, photo board identification, video identification or computer generated identification. The legislative reform which 'will provide realistic options for witness identification of offenders' will recognise technological developments in the identification of suspects. There will be a requirement, where practicable, for the process of a witness identifying an offender to be recorded. An audio record is to be made where video recording facilities are not available.

CJC RESPONSE:

The CJC supports the proposal which is generally consistent with CJC recommendations.

At page 869 of its report (1994b), the CJC accepted that identification parades should continue to be the preferred form of identification. It recommended that where it is impractical to conduct an identification parade, the police conduct a group identification or photographic identification (CJC rec. 28.4). The CJC further recommended that police be required to video-tape any identification procedure involving an eye witness (CJC rec. 28.5).

10. ARREST

10.2 Provision of a general power of arrest without warrant for indictable offences (crimes and misdemeanours)

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that there should be a general power of arrest without warrant for indictable offences (crimes and misdemeanours) where there are reasonable grounds to suspect that the person has committed or is committing the offence.

CJC RESPONSE:

1. **The CJC is opposed to creation of such a broad power.**

2. **The CJC's preferred approach, as set out in its *Report on a Review of Police Powers in Queensland* (CJC recs 13.4 and 13.5), is that the power of arrest should only be available where the person has committed or is committing an offence (indictable or otherwise), and where arrest is necessary to achieve one or more of the following purposes:**

   - **to prevent the repetition or continuation of an offence or the commission of another offence;**
   - **to establish the person's identity;**
   - **to ensure the person's appearance before the court;**
   - **to obtain or preserve evidence;**
   - **to prevent interference with a witness;**
   - **to prevent the fabrication of evidence; or**
   - **to preserve any person's safety.**

3. **The CJC is particularly concerned that the proposal ignores evidence that the police are overusing their current powers of arrest, and refers to its previous recommendation (CJC rec. 13.5) that there should be a statutory obligation on police to first consider alternatives to arrest.**

The only reason given in the Discussion Paper (p. A34) for distinguishing the proposed powers of arrest for indictable offences and simple or regulatory offences is that 'It is considered there is a public expectation that an offender should be liable to arrest if reasonably suspected of having committed an indictable offence. To suggest otherwise for offences such as murder and rape would be untenable.'

The CJC's view is that the exercise of the power to arrest should be determined not by the type of offence but by the circumstances, that is, the purpose of the arrest. Where a simple offence has been committed, there may be some circumstances which make it more appropriate to arrest the offender than to proceed by any other means. On the other hand, the circumstances of some indictable offences, such as forgery, may not justify an arrest; for example, where there is no risk of interference with evidence or witnesses, or of harm to any person or continuation of the offence. One reason why police may wish to arrest offenders is to obtain fingerprints. However, if the proposal to broaden the circumstances in which fingerprints may be taken is accepted (see the response to Section 24 of the Discussion Paper), this particular justification for arrest will no longer apply.

Because the proposal includes all indictable offences, it will actually result in a significant expansion to existing arrest powers rather than a codification of those powers. Indictable offences include both crimes and misdemeanours, which may not be serious offences. The current general rule in regard to misdemeanours is that a warrant is required for arrest (*Criminal Code* s. 5), unless the person is found committing the misdemeanour (s. 548). Examples of misdemeanours include common nuisance (s. 230); lottery offences (s. 234); offences against public health (ss. 237–241); common assault (s. 335); and unlawfully procuring registration as a marriage celebrant (s. 362). It is hard to justify the application of the same reasoning to these offences as to murder and rape.

Of particular concern is the fact that the proposal ignores evidence that police are overusing their existing powers of arrest. Various reviews, both within Queensland and in other jurisdictions, have concluded that arrests should be more restricted (see CJC 1994b, pp. 597–601). QPS statistics have shown arrests in 90 per cent of cases (CJC 1993c, p. 600). The Royal Commission Into Aboriginal Deaths In Custody

(RCIADIC) recommended that all police forces should adopt and apply the principle that arrest is the sanction of last resort (1991, 1993c, p. 42, Rec 87). An evaluation in 1996 of the implementation of RCIADIC recommendations reported continuing high levels of arrest of indigenous people rather than proceeding by way of summons, often in the case of minor offences (Cunneen and McDonald 1997, pp. 110–118).

Recent reports confirm these findings. In the 1997 report on *Reducing Police–Civilian Conflict*, the CJC noted that several conflictual incidents examined could have been avoided if the officers involved had not taken action against the civilians involved, or had used the complaint and summons procedures as an alternative to arrest. Recently in NSW the Wood Royal Commission (1997, CJC 1993b, p. 469) has noted that '... there needs to be a very plain message to police officers that ... the sole purpose of arrest is to protect the public until such time as the person suspected of criminality can be brought before a court'. The Wood Royal Commission (p. 469) recommended a range of strategies to ensure that arrest is used as a last resort, such as the employment of Court Attendance Notices wherever possible and training for police in informal problem solving and conflict resolution techniques. The CJC submits that including clear restrictions in legislation is an important means of ensuring proper use of the arrest power.

10.3 Provision of a power of arrest for simple and regulatory offences where arrest is necessary for a specific purpose

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that there should be a power of arrest for simple and regulatory offences where an officer suspects on reasonable grounds that the person has committed or is committing the offence, AND arrest is necessary for a specified purpose, i.e.

- to prevent the repetition or continuation of an offence or the commission of another offence;
- to establish the person's identity;
- to ensure the person's appearance before the court;
- to obtain or preserve evidence;
- to prevent interference with a witness;
- to prevent the fabrication of evidence; or
- to preserve any person's safety.

CJC RESPONSE:

While the CJC supports the listed criteria (CJC recs 13.4 and 13.5), they should apply to <u>all</u> offences (see discussion above). There should also be a statutory obligation on police to first consider alternatives to arrest, as previously recommended by the CJC (Rec 13.4).

10.4 Information to be provided by police

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that information about the officer's identifying particulars and the suspected offence is to be provided by police to the arrestee. The arresting officer will be required to provide written particulars before the person is released, and this information is to be recorded on the person's copy of the charge sheet, summons or Notice to Appear or, where the person is not charged, on a QPS contact document.

CJC RESPONSE:

1. **The CJC supports the proposal. The CJC has previously recommended, in the context of police demanding the name and address of a person, that the officer should be required to provide his or her name, rank, station and particular information such as the nature of the suspicion held by the officer (CJC rec. 14.8).**

2. **The CJC did not address the issue of information to be provided on documents relating to a person's detention, but supports the proposal put forward by the Discussion Paper.**

10.5 Requirement to take arrested person before a justice to be dealt with according to law etc.

DISCUSSION PAPER PROPOSAL:

According to the Discussion Paper, the current requirement to take an arrested person before a justice as set out in the *Criminal Code* and *Justices Act 1886* will not be affected, other than by provision for post-arrest detention for questioning and use of the proposed Notice to Appear.

CJC RESPONSE:

Although this point was not addressed by the CJC in specific recommendations, it is implicit in the CJC's proposed scheme and is supported on this basis.

10.6 Provision of a power to unarrest a person where the grounds for arrest no longer exist or where an alternative to arrest is appropriate

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police should have the power (and the duty) to 'unarrest' a person where the grounds for arrest no longer exist or where an alternative to arrest is appropriate.

Where a person has been arrested for an indictable offence and subsequently 'unarrested', he or she may only be re-arrested for the same offence where the officer on reasonable grounds suspects that additional evidence has been discovered which reasonably suggests that the person is responsible.

CJC RESPONSE:

The CJC supports the proposal which is consistent with its previous recommendation (CJC rec. 13.7).

II. ARREST FOR OFFENCES AGAINST THE LAWS OF OTHER AUSTRALIAN JURISDICTIONS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that where an offence has been committed in another Australian jurisdiction, police should be able to arrest the offender without warrant where the offence, if committed in Queensland, would be an indictable offence. On arrest, police should have the same powers (especially in relation to post-arrest questioning) as if the offence had been committed in Queensland. Extradition proceedings must commence within 7 days of the arrest.

CJC RESPONSE:

In the CJC's view, this proposal should be given more detailed consideration, particularly in relation to the issue of the power to question suspects after arrest and the admissibility of confessions or admissions in subsequent criminal proceedings.

Although this matter was not discussed in the CJC's Police Powers Report, the CJC has some concerns about the consequences of the proposal. Under current law, a warrant must be obtained by the police in the jurisdiction where the offence was committed and must be faxed to Queensland so that the QPS may arrest the offender and bring him or her before the court for extradition proceedings. The proposal in the Discussion Paper to allow for arrest without waiting for a warrant from interstate is based on similar provisions in section 352A of the *Crimes Act 1900* (NSW) and section 78A of the *Summary Offences Act 1953* (SA).

The Discussion Paper argues two grounds in support of its proposal: (i) there is potential for persons who commit serious offences in northern NSW 'to use Queensland as a haven to avoid immediate apprehension', and (ii) a person being questioned may admit responsibility for offences committed in another jurisdiction, where the offence is not known to police and hence no warrant has been issued. In both cases there may be a time delay before an interstate warrant is issued.

It is acknowledged that allowing for arrest without warrant in these circumstances may offer some advantages, particularly in relation to quick apprehension of offenders fleeing across State borders. However, the argument that people so arrested should then be subject to the same regime of questioning as if they had committed an offence in Queensland presents some philosophical and legal difficulties in terms of the proper role of Queensland police.

There is a fundamental distinction between legislative schemes which provide the mechanics for allowing the arrest and subsequent extradition of offenders between jurisdictions, namely the *Service and Execution of Process Act 1992*, and legislation which allows police who are not from the State or Territory where the offence was committed, and will subsequently be tried, to play a major part in the investigative process. Where one jurisdiction allows investigative procedures (such as extended post-arrest questioning) which would be unlawful in the State where the offence occurred and is to be tried, questions about the voluntariness of confessions or admissions made in that other jurisdiction will arise. Oral advice from the Attorney-General's Department in South Australia indicates that although the operation of the South Australian legislation in this context has not yet been determined by the courts, there are concerns about this issue, based on the Canadian experience, and the law is considered not settled.

Consequently it is urged that the ramifications of this proposal be given more detailed consideration and further legal advice be sought on this point (such as the need for complementary legislation between jurisdictions to validate conflicting investigative procedures).

12. TRAFFIC RELATED POWERS

DISCUSSION PAPER PROPOSAL:

It is proposed that the powers presently contained in a number of provisions of the *Traffic Act 1949*, such as the powers to direct traffic and make enquiries into fatal road accidents, be incorporated into the proposed police powers legislation.

CJC RESPONSE:

1. **The CJC generally supports the proposal to replicate the police powers contained in the *Traffic Act 1949* in the proposed police powers legislation.**

2. **The CJC has previously recommended that the power under section 43 of the *Traffic Act 1949* to enter premises to make enquiries be reviewed to determine whether it should be the subject of a search warrant. The CJC still holds this view.**

The Discussion Paper does not correctly represent the current power of entry and seizure under the *Traffic Act 1949* which it proposes be replicated in any police powers legislation. The power of entry under section 43 of that Act is not limited to the investigation of fatal road accidents as is suggested in the Discussion Paper, but authorises entry and seizure in any case in which 'in the officer's opinion [it] is necessary or desirable to give proper effect to the provisions of this Act'.

The CJC believes that it is difficult to justify a power to enter premises without prior judicial authority for the purposes of making enquiries under the *Traffic Act 1949*. The police currently have powers to arrest without warrant in relation to a number of offences under that Act. They also have a power to enter premises without warrant to effect an arrest and the CJC supports the power proposed in the Discussion Paper in that regard. If entry needs to be made in urgent circumstances, police could use the procedure for obtaining warrants by telephone etc.

Further, if the police powers legislation contains a power as proposed to investigate traffic offences, there is the risk that arguments will later be made for extending the power to all types of offences.

13. USE OF FORCE

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes to set down in legislation the circumstances under, and degree to which, police may use force. These are as follows:

More serious offences Where an officer reasonably suspects that a person is:

(i) committing an offence punishable by life imprisonment;

(ii) attempting to escape from arrest or custody having committed an offence punishable by life imprisonment;

(iii) doing or about to do an unlawful act to another of such a nature that death or grievous bodily harm to that other person is likely to result and the officer reasonably suspects that he or she cannot otherwise preserve the person from death or grievous bodily harm;

the officer may use such force as is reasonably necessary to:

(a) prevent the offence punishable by life imprisonment

(b) prevent the escape

(c) prevent the person from doing the unlawful act.

In the case of potentially lethal force, the officer must, where practicable, first call on the person to cease the unlawful activity.

Less serious offences Where an officer reasonably suspects that a person:

(i) has committed or is committing an offence other than an offence punishable by life imprisonment;

(ii) has committed, is committing or is about to commit a breach of the peace

the officer may use such force as is reasonably necessary to:

(A) prevent the commission of the offence or breach of the peace, or

(B) apprehend the person reasonably suspected of having committed the offence or breach of the peace

provided that such force does not result in grievous bodily harm or death.

Generally, the legislation will authorise police to use such force as is reasonably necessary when exercising any power lawfully.

CJC RESPONSE:

The CJC supports the principle of specifying in legislation the circumstances in which force of different degrees may be used and in particular, restricting those situations where potentially lethal force may be used. However, the CJC has the following concerns.

First, the proposed statutory framework does not address all circumstances currently outlined in the *Criminal Code* where a police officer may use force, and the particular restrictions in each case. The CJC would not support any proposal which has the effect of increasing police powers to use force, particularly in relation to potentially lethal force.

Second, in relation to less serious offences, the proposal to authorise reasonably necessary force which does not result in grievous bodily harm or death is not sound and may actually disadvantage police (see below).

Third, consistent with previous CJC recommendations (CJC rec. 7.9), there should be a statutory limit on the use of force in searching a person; that is, the use of force should be restricted to a 'last resort' after the person has made it clear that he or she will not cooperate.

The proposed statutory framework does not cover all the situations currently addressed by provisions of the Criminal Code. For example, in relation to preventing the escape or rescue of a person in custody for less serious offences (that is, those which are not crimes), the degree of force currently authorised must not be intended or likely to cause death or grievous bodily harm (s. 258 *Criminal Code)*. This situation is not addressed by the proposed 'less serious offences' category.

In relation to less serious offences, the Discussion Paper proposes authorisation of reasonably necessary force which does not result in grievous bodily harm or death. This test is different from the current restrictions on police use of force and is considered undesirable for the following reasons:

- In relation to escape from custody, the degree of force which is currently authorised must not be intended or likely to cause death or grievous bodily harm (s. 258 *Criminal Code*). The intention or likelihood of harm is a more useful test which actually protects police in some situations. If the use of reasonable force on a person who was particularly susceptible (the 'eggshell skull' case) resulted in the person's grievous bodily harm or death, police would be liable for using unlawful force, regardless of the objective reasonableness of their actions.

- In relation to preventing breaches of the peace or suppressing riots, the law currently specifies that the force used must not only be reasonably necessary but 'reasonably proportioned' to the threat (ss. 260, 262). It has not been argued in the Discussion Paper why such restrictions which take account of the threat in very public situations are inadequate.

14. STANDARD STATUTORY SAFEGUARD PROVISIONS

14.1 Search and seizure

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that certain safeguards will apply to the search and seizure powers including:

- in all instances of search, whether of a person, vehicle or place, relevant details of the search will be recorded in a register

- except in the case of a covert search, a copy of the relevant register entry will be provided upon request to the person who was, or whose property was, the subject of the exercise of the power

- where property is seized as a result of a search, the details of the property seized will be recorded in a register

- the person from whom the property was taken will be provided with a receipt listing the seized property

- a copy of the register entry will be provided upon request to the person from whom the property was taken

- seized property is to be taken before a justice and an order sought as to how the property is to be dealt with
- if possession of the property is unlawful, proceedings have been commenced with respect to it or the person from whom it was seized consents to its retention by the police, an order from a justice is not required
- the property will be returned to the person from whom it was seized if it is no longer required for evidentiary purposes and it is lawful for a person to have possession of the property
- the owner of seized property may apply to a magistrate for the return of the property
- where private property is the subject of a non-covert search or a person or vehicle is stopped for the purpose of search, there will be a statutory requirement to provide reasons for the search
- where a person is detained for the purposes of a search, the period of detention will be limited to that reasonably necessary for carrying out the search
- except in exceptional circumstances, the search of a person will be carried out only by a person of the same sex as the person searched

CJC RESPONSE:

1. **The CJC generally endorses the safeguards relating to the search and seizure power proposed in the Discussion Paper and stresses the need for them to form part of the police powers legislation.**

Monitoring

2. **The CJC stresses the need to monitor the use of justices of the peace who are qualified to issue warrants to ensure that police do not rely inappropriately upon a particular justice of the peace.**

   The CJC further stresses the need for the same accountability and record-keeping requirements to apply to consent searches as apply to searches without warrant.

The CJC has previously recommended that where the sole authority for a search is the suspect's consent, the person be informed of his or her right not to allow the search. Where the suspect consents to the search, the police officer is to follow the procedure governing searches without warrant outlined in CJC recommendation 11.6. Under the CJC's recommendation, the consent of the suspect should be recorded in the Search Register as the authority for the search where such consent is the sole authority for the search.

3. **The CJC again stresses the need for the development of guidelines on the circumstances in which it is appropriate to conduct and the method of conducting both pre- and post arrest strip searches.**

14.2 Endorsement of warrant or order

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a legislative requirement that warrants, summonses and other court processes be endorsed on the back by the police officer who served the document or executed the warrant with the following information:

- date and time of service/execution
- the name and identifying particulars of the officer who served/executed the document or warrant and any other officer or person present at the time of service/execution
- the name of the person on whom, or the occupier of the premises upon which, the process/warrant was served/executed.

CJC RESPONSE:

Endorsement of warrants

1. **The CJC generally supports the proposed safeguards in respect of the endorsement of summonses and other court processes and warrants. However, consistent with its previous recommendation (CJC rec. 9.4) the CJC is of the view that additional information should be recorded on warrants and other court processes following execution or service. This should include:**
   - **the reason for not demanding entry and/or the use of force to effect entry;**
   - **any injury or damage which occurred or allegedly occurred at the time of executing the warrant.**

Copy of the Search Warrant

2. **The CJC believes that all search warrants should be issued in duplicate and a copy of the warrant provided to the occupier upon entry to the premises or, where the premises are unoccupied, left in a conspicuous place in the premises. The occupier's copy of a warrant should have on its back a summary of the rights of the occupier and the authority conferred by the warrant (CJC rec. 11.2).**

The CJC believes that it is important for the occupier of premises which are to be searched pursuant to a warrant to be informed of his or her rights and of the extent of the search authorised by the warrant.

Recording the Result of the Search

3. **The CJC has previously recommended that the result of the execution of the search warrant be recorded on the back of the police officer's copy of the warrant. It should include:**

   - **the reason for any failure to demand entry and/or the use of force to effect entry;**
   - **any injury or damage which occurred or allegedly occurred at the time of executing the warrant;**
   - **the date, time and place of the search; and**
   - **the name, rank and station of the officer in charge of the search.**

   The CJC also recommended that where property is seized, a list of the property is to be given to the occupier prior to leaving the premises or, where the premises are unoccupied, left in a conspicuous place (subject to CJC rec. 8.10 concerning covert execution of search warrants). Where the volume of material or other circumstances surrounding the seizure make it impracticable to complete the list of property taken at the scene, this is to be noted and a list of property is to be provided to the occupier as soon as is reasonably practicable thereafter (CJC rec. 11.3).

Report to Issuing Authority

4. **The CJC also believes that the police powers legislation should require the police officer in charge of the execution of the warrant to report to the issuing authority within 10 days of the execution or expiry of the search warrant. Where property has been seized the issuing authority is to make an order as to where the property is to be held (CJC rec. 11.4).**

14.3 Identification requirement for police

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that where a police power such as the power to search and seize or the power under a search warrant is exercised, the officer exercising the power, or in the case where there may be a number of officers in attendance, the officer responsible for coordinating the exercise of the power, will be required to provide his or her identifying particulars to the person or persons who are the subject of the power or the occupiers of a place being searched.

CJC RESPONSE:

The CJC supports the Discussion Paper proposal requiring police to supply identifying particulars to persons who are the subject of the exercise of any police power. This proposal is consistent with a previous CJC recommendation (CJC rec. 11.6).

14.4 Register entry for persons in custody etc

DISCUSSION PAPER PROPOSAL:

A police officer who stops and detains a person or takes a person into custody will be required by legislation to record relevant details in a register, and provide a copy of the register entry, if requested, to the person.

CJC RESPONSE:

The CJC supports a legislative requirement for police to enter details of custody or search and detention in a register. However, consistent with its previous recommendations, the CJC's view is that the nomination of a Custody Officer whose responsibilities would include maintenance of such registers would be preferable to the proposal imposing that duty on the police officer who has searched or arrested the person. The CJC has also previously recommended that details of searches, including whether any force was used and if so, the reason for using the force, should be recorded in the register (CJC rec 11.6).

The CJC has previously recommended that legislation should require police to record in a register relevant details, including the arresting officer, the grounds for and period of detention, property taken from the person, and their communications with lawyers and other third parties (1994a, pp. 727–729). However, the CJC also recommended a scheme of Custody Officers at police stations, based on the scheme in the United Kingdom. The Custody Officer would, where practicable, be a senior police officer who is independent of the investigation (p. 719) and would have responsibility for ensuring that all details would be recorded in the register (pp. 727–729).

15. OBTAINING WARRANTS, ORDERS AND AUTHORITIES ETC. BY TELEPHONE OR SIMILAR FACILITY

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power to apply for a warrant by telephone, radio, telex, facsimile or other similar facility and outlines a procedure and safeguards which would apply.

CJC RESPONSE:

1. **The CJC supports a procedure whereby police can apply for warrants by telephone, radio, telex, facsimile or other similar facility.**

2. **The CJC cautions against this procedure being more widely available for other types of court procedures and orders without specific information and consultation on such proposals.**

3. **The CJC believes that the proposal should limit:**

- **the power to issue warrants in such circumstances to stipendiary magistrates**
- **the availability of the procedure to 'urgent circumstances' or where the remoteness of the location precludes obtaining a warrant**
- **the period of validity of the warrant.**

The CJC has previously recommended that only in urgent circumstances or where the remoteness of the location precludes obtaining a warrant in the ordinary manner, should a warrant be available by radio, facsimile, telephone or other means of remote communication (CJC rec. 8.12).

The CJC also recommended that telewarrants should only be available from stipendiary magistrates and not justices of the peace. The procedure for the application and granting of telewarrants should follow that contained in the *Drugs Misuse Act 1986* section 18 (CJC rec. 8.12).

The CJC further recommended that the maximum period of validity for a telewarrant be 48 hours. The more limited the period, the more it will discourage use of this facility except in urgent circumstances (CJC rec. 8.12).

While the specifics of the proposal refer only to warrants, the heading of the section suggests that the intention is for such provision to be made for a wider range of procedures and court orders. In addition, the proposed power contains no specific limitation on the availability of this procedure to 'urgent circumstances' or where the remoteness of the location precludes obtaining a warrant in the ordinary manner; nor is there any limit proposed on the period of validity of warrants issued in these circumstances, as was recommended by the CJC.

Further, the proposal provides that these types of applications be made to the same category of person i.e. judge, magistrate or justice, as they would be made in the ordinary course. However, the CJC recommended a power similar to that contained in the *Drugs Misuse Act 1986* which requires that an application for a warrant in these circumstances should only be able to be made to a stipendiary magistrate and not a justice of the peace (CJC rec. 8.12).

16. PROTECTION OF METHODOLOGIES

DISCUSSION PAPER PROPOSAL:

The Paper proposes including in legislation governing police powers a provision designed to prevent a police officer from being required to communicate information to a court (with certain exceptions) where that information would be reasonably likely to:

- prejudice an investigation of a contravention or possible contravention of the law
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigation, or dealing with a contravention or possible contravention of the law
- prejudice the effectiveness of a lawful method or procedure for protecting public safety
- assist in the facilitation of a person's escape from lawful custody
- cause danger to any person's life or physical safety; or
- disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement of the law.

In support of the proposal for limiting the types of questions which can be asked, the Discussion Paper gives examples of questions asked by legal representatives for a defendant which, at least implicitly, are regarded as inappropriate. Those include questions on 'the frequency used by a transmitter associated with a listening device, or the locations on vehicles where motor vehicle manufacturers place secret vehicle identification numbers'.

The Paper acknowledges the need to achieve balance between the right of an accused to test the evidence of a police officer during a trial, and the need to ensure some matters associated with an investigation remain undisclosed. A matter would not be exempt from inquiry where a court was satisfied that the disclosure of information is necessary:

- for the fair trial of the defendant
- to reveal that the scope of a law enforcement investigation has exceeded the limits imposed by law; or
- otherwise in the public interest.

CJC RESPONSE:

In the CJC's view, the proposed provision is not a 'police power', and should not be included in the proposed legislation. The proposal should be referred to the Queensland Law Reform Commission (QLRC) to be included in a review of the *Evidence Act 1977*.

The proposed provision is a significant issue which the CJC suggests needs further consideration and consultation. The QLRC has previously received references in respect of the *Evidence Act 1977*, although not on the topic covered by the proposed provision.

17. MISCELLANEOUS PROVISIONS

17.1 Compensation

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes the establishment of a legislative structure to enable a person to obtain compensation for economic loss without the need for litigation. Where agreement cannot be reached regarding the terms of compensation, a court will have authority to determine the matter. The Discussion Paper does not identify who will pay the compensation or the proposed process for settling claims.

Paragraph 17.1.2 provides that there will be a prohibition on the payment of compensation 'where the claimant who suffered loss in connection with the commission of an indictable offence, is found guilty of that offence'. This prohibition is consistent with recent amendments to the *Criminal Code Act 1899*.[2]

CJC RESPONSE:

As a matter of principle, the CJC supports a simplified system by which a property owner whose property is damaged as a result of forced entry by the police may recover the cost of that damage. In stating that, the CJC anticipates that the QPS would be the party liable to pay the compensation.

The CJC does not support the proposal for denying a person who has committed an indictable offence a right to sue for loss or injury received at the hands of police officers.

The issue raised in section 17 of the Discussion Paper of a simplified system of recovery of compensation by an 'innocent' property owner was not considered by the CJC in its Police Powers Report or in its previous submissions on proposed amendments to the Criminal Code.

The CJC has commented previously on amendments proposed by the Criminal Code Advisory Working Group, and particularly on that proposal which deemed certain actions to be 'lawful' which would enable a householder to take advantage of section 6 of the 1899 Act without the need for the householder to be involved in litigation. The CJC opposed the recommended approach and urged a broader review of the issue of civil liability and indemnity.

The CJC acknowledges that the Discussion Paper is not intended to be draft legislation, but is concerned that the proposed provision—assuming it is to be identical with section 6 of the *Criminal Code Act 1899*—raises the following difficulties:

---

2 The amended section 6 of the *Criminal Code Act 1899* now provides as follows:

6.(1) When by the Code any act is declared to be lawful, no action can be brought in respect thereof.

(2) A person who suffers loss or injury in, or in connection with, the commission of an indictable offence of which the person is found guilty has no right of action against another person for the loss or injury.

(3) Subsection (2) applies whether or not a conviction is recorded for the offence.

(4) However, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed, nor shall the omission from the Code of any penal provision in respect of any or omission which before the time of the coming into operation of the Code constituted an actionable wrong affect any right of action in respect thereof.

- the phrase 'in, or in connection with, the commission of an indictable offence' is uncertain and of potentially wide scope

- the provision does not limit the 'loss or injury' or specify the nature of the injury (to the person or to property) which would be precluded from action.

Further, it is unclear how the proposed provision is intended to stand with the recent amendment to section 6 of the *Criminal Code Act 1899*. The inclusion in police powers legislation of such a provision seems unnecessary, unless it is intended to address issues which are not addressed elsewhere. As the CJC currently understands the proposal, both of the following scenarios involving police officers would be caught by the proposed provision:

- a person, in the course of resisting arrest for an indictable offence, precludes the entry of police to his or her home, and the police officers then use considerable force to achieve entry to the premises, thereby significantly damaging the premises

- a person is found damaging property by graffiti (s. 469) which is an indictable offence and during an attempt to flee the scene, is disabled by a police officer, leaving the offender with a permanent disability.

The CJC does not consider that the latter scenario should leave the injured offender without recourse, but arguably that is the consequence of the proposal, unless the expression 'in, or in connection with, the commission of an indictable offence' is limited. The CJC recommends that there be a requirement for a police officer to act reasonably and without malice, before the prohibition against action applies.

17.2 Procedural Code

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a Procedural Code in the form of regulations which will refer to matters which must be complied with by police officers in exercising the powers under the Act.

The Procedural Code will also contain *Instructional Guidelines* which will not form part of the regulations 'but will provide advice to police officers exercising a specific power under the Act'.

CJC RESPONSE:

The CJC supports the concept of a Procedural Code, and would welcome being consulted on its contents at an appropriate time. Presumably, the current QPS Operational Procedures Manual which was finalised in recent years would provide a useful basis for the proposed Procedural Code.

The CJC has previously recognised the value of the United Kingdom model, whereby many details of the statutory scheme of police powers are contained in Codes of Practice (CJC 1993a, p. 50). The proposed distinction between the Procedural Code and the Instructional Guidelines is consistent with the scheme under the *Police and Criminal Evidence Act 1984* (UK) (*PACE Act*), which distinguishes between the contents of the Codes of Practice and the 'Notes for Guidance' following each section.

However, as discussed at section 26.1 of the Discussion Paper, the Codes of Practice under the UK legislation, while operating as a form of delegated legislation requiring the approval of both Houses of Parliament, are not binding on the courts. While breaches of many of the provisions of the Codes are treated as significant by the courts, others are not. It has been commented that 'one of the issues regularly discussed during passage of the PACE Bill was whether items properly belonged to the Bill or to a Code' (Lidstone and Palmer 1996, p. 33), and that 'it is highly arguable that some Notes for Guidance deserve inclusion in the body of the Code and vice versa' (p. 35). 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 Parliament.

PART B

18. PRESERVATION OF A CRIME SCENE

DISCUSSION PAPER PROPOSAL:

It is proposed that a statutory authority be conferred on police to seal off and examine a crime scene.

Proposed powers include authority without warrant to:

- enter, re-enter and remain at, in or on a crime scene
- pass through, over etc. any other place for the purpose of making that entry
- seal off a crime scene to allow examinations and investigations to be made
- direct people to leave or not enter the crime scene.

The power is to be limited to offences which are punishable by a maximum of 7 years imprisonment.

Where the 'crime scene' is private premises where *evidence relating to an offence is located,* rather than being the actual *location of the offence*, crime scene powers will only be available for the investigation of specified serious offences such as murder, rape and deprivation of liberty.

Where a private premises is the *location of an offence*, it is proposed that police be authorised to exercise crime scene powers in respect of that place for a reasonable period up to 24 hours, after which application would be required to be made to a magistrate to extend the period for maintaining the crime scene.

CJC RESPONSE:

1. **The CJC generally supports a power to preserve crime scenes.**

2. **The CJC opposes the proposed definition of crime scene to include a 'location where there are reasonable grounds to suspect that evidence of an offence may be discovered' on the basis that it is too wide. In cases where the police have reasonable grounds to suspect that evidence of a crime is located in a place, the CJC recommends the use of a search warrant power or an emergency search power rather than a crime scene preservation power.**

3. **The CJC supports the proposal to authorise police to enter private property to preserve a crime scene, provided that it is limited to offences carrying a maximum penalty of 7 years imprisonment *and* where failure to enter immediately may result in loss or destruction of evidence of the offence.**

4. **The CJC believes that the crime scene power should not provide for the automatic exclusion of owners/occupiers of private property the subject of the exercise of the power unless they refuse to comply with the reasonable directions of police to preserve the scene of the crime.**

The CJC's position with respect to crime scenes in public places appears to be consistent with the Discussion Paper proposal. On this issue the CJC recommended that:

- police be granted a power to define and mark out a crime scene on public property and to give such reasonable directions as are necessary to prevent the loss, damage, destruction or concealment of evidence or the introduction of new material to the scene

- where a person refuses to comply with a reasonable direction, after having been warned by police that such action could result in arrest, the police be empowered to arrest and charge that person with obstructing a police officer in the performance of the officer's duties (CJC rec. 29.1).

The operation of the proposed power with respect to private property is not so clear. The Discussion Paper proposes a definition of 'crime scene' which includes a 'place where evidence relating to an offence is located'. However, this seems to the CJC to be an unnecessarily wide definition. In cases where the police have reasonable grounds to suspect that evidence of a crime is located in a place, the CJC would recommend the use of a search warrant power or the emergency search power rather than a crime scene preservation power.

The Discussion Paper also does not limit the operation of the crime scene power according to the type of offence suspected of having been committed. In respect of crime scenes on private property, the CJC recommended that police only have power to enter the property:

- where an offence carrying a maximum penalty of 7 years imprisonment or more is suspected of having been committed on the property; and

- if they do not enter immediately, material evidence of the offence may be lost, concealed, damaged or destroyed, or new material introduced to the crime scene (CJC rec. 29.2).

Further, the Discussion Paper's proposal seems to imply that the owners of private property the subject of the exercise of a crime scene power would be excluded from the property for the period required to carry out investigations. The approach preferred by the CJC is that:

- Police be empowered to give reasonable directions as are necessary to preserve the scene of a crime on private property. The lawful occupier or his or her invitees should not be excluded unless they refuse to comply with those directions.

- Where a person refuses to comply with a reasonable direction after having been warned by police that such action could result in arrest, the police be empowered to arrest and charge that person with obstructing a police officer in the performance of the officer's duty (CJC rec. 29.3).

19. MAKING OF ENQUIRIES AND EXECUTION OF PROCESS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power to authorise entry by police to private premises for the purposes of:

(i) making enquiries or investigations

(ii) serving a summons or executing an arrest warrant or other court order

(iii) making an arrest without warrant

(iv) inspecting records, security requirements registers etc under specific legislation, e.g. under the *Weapons Act 1990.*

The power to enter a dwelling house is limited to situations where the police are:

- executing an arrest warrant
- making an arrest without a warrant

and have reasonable grounds to suspect that the person is in the place.

CJC RESPONSE:

1. **The CJC supports a police power to enter private property to:**

   (i) serve a summons or execute an arrest warrant or other court order

   (ii) make an arrest without warrant

   (iii) inspect records, security requirements registers etc under specific legislation, e.g. under the *Weapons Act 1990*

   where the police officer has reasonable grounds to suspect that the person named in the court document or liable to arrest, or the records subject to inspection, is in that place.

2. **The CJC strenuously opposes the proposal to give police a power to enter premises for the purposes of making enquiries or investigations.**

The CJC has recommended powers authorising police to enter places to effect an arrest with or without warrant (rec.10.1), to serve court documents and to inspect records and other registers required under specific legislation (CJC rec. 10.13). However, the CJC has never supported a police power to *enter places to make enquiries or investigations* as is proposed in the Discussion Paper.

Police can enter any place to make enquiries or investigations with the consent of the owner or occupier (express or implied), but have no power to remain there if the owner or occupier demands that they leave. If the police did have a power to enter places for these purposes, the power would be of little or no effect

where people did not want to cooperate, as police do not have the power to compel people to answer questions or to assist them with their enquiries.

The Discussion Paper provides no clear basis for the claim for this power. Nor is there any explanation for why the power is only to be available in respect of private property which is not a dwelling house. The limitation of the power to non-dwelling house private property is, in the CJC's view, irrelevant. The CJC believes that there is a risk that once the power exists, the anomalous situation of it being available only in respect of non-dwelling house private property could be used as an argument for expanding its operation to all private property. The CJC is not persuaded that there is a need for the power; nor as pointed out above, is there any evidence that if such a power existed it would make the police more effective in the investigation of offences. There is no doubt, however, that such a power would significantly encroach on the traditional rights of owners and occupiers of property. When this power is considered with the proposed 'chance discovery' power (see section 3 of the Discussion Paper), the potential combined effect is a dramatic extension of current police powers to enter and search without warrant.

20. AUTHORITY TO ISSUE A SEARCH WARRANT FOR EVIDENCE ABOUT TO BE BROUGHT ONTO A PLACE

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power to apply to a Justice for a search warrant where there are reasonable grounds to suspect that the objects of search are likely to be brought onto any place within the next 72 hours.

CJC RESPONSE:

The CJC supports the proposed power to apply for a warrant for objects to be brought onto premises within the next 72 hours subject to the power to issue such warrants being limited to an 'authorised' justice or magistrate (as defined in the CJC response to section 4 of the Discussion Paper).

This matter was addressed by CJC recommendation 8.11 of the CJC's police powers review.

21. USE OF TRACKING DEVICES, VISUAL SURVEILLANCE DEVICES AND COVERT SEARCH WARRANTS

21.2 Tracking Devices

DISCUSSION PAPER PROPOSAL:

The Discussion Paper notes that the use of a tracking device is currently authorised only under the *Drugs Misuse Act 1986*. Under this Act, there is no requirement to first obtain a warrant to use the device. The Discussion Paper proposes that the use of a tracking device be available only for indictable offences, and subject to prior judicial approval. Where the installation of a tracking device on a vehicle or other moveable object does not require entry into premises, a magistrate may give the necessary authorisation. In other situations, the warrant may only be obtained from a Supreme Court judge. The judicial officer hearing the warrant application must have regard to, among other matters:

- the gravity of the matter being investigated
- the extent to which the privacy of a person is likely to be interfered with if a warrant is issued
- the extent to which the prevention or detection of the offence is likely to be assisted if a warrant is issued
- the extent to which any previous installation warrant issued in relation to the same person, has benefited an investigation.

A person from outside the Police Service is to be appointed to monitor all applications, particulars of which would be included in an annual report relating to the use of all surveillance devices and covert search warrants.

CJC RESPONSE:

The CJC generally supports the proposal in the Discussion Paper in relation to tracking devices. The CJC notes that if this proposal proceeds, there will also need to be an amendment to the *Drugs Misuse Act 1986,* to ensure that in future a warrant will be required before a tracking device can be used in relation to a suspected offence under that Act. The CJC further notes that the requirement to obtain the authorisation of a magistrate to install devices which do not require entry into premises is more restrictive than the approach previously proposed by the CJC.

The CJC considered the use of tracking devices at pages 793–795 of its report (CJC 1994b). The CJC noted that, apart from the *Drugs Misuse Act 1986,* no other statute regulates the use of tracking devices. The CJC expressed the view that where the installation of the device involves entry to the vehicle or entry onto private premises, or the device is of a type that stores data or has a listening device capability, the device not be used without the authority of a judge of the Supreme Court (CJC rec. 24.21).

The CJC further recommended that where a tracking device merely emits a signal to assist in locating and tracking a vehicle and is to be attached to the outside of a vehicle on public property, the use of the device be authorised in writing by an officer of a rank of Inspector or higher.

The CJC considered that a warrant was not necessary in such circumstances because a decision to use such a device in these circumstances might have to be taken at very short notice, thereby making the obtaining of a warrant impracticable. Further, the attachment of the device in the circumstances proposed will not involve entry onto private premises or entry into a vehicle, and therefore cannot be regarded as being as intrusive as other forms of surveillance.

However, if the proposal in the Discussion Paper is considered by the QPS to be workable, the CJC has no objection to the proposal.

21.3 Visual Surveillance Devices

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police have power to use visual surveillance devices (VSDs) on private property in relation to those offences for which listening devices could be used. The safeguards in respect of VSDs would be the same as those for listening devices (outlined in paragraph 6.17 of the Discussion Paper). The judge considering the application must consider the extent to which the privacy of a person is likely to be interfered with, and should specifically authorise which locations within a place a VSD may be installed.

CJC RESPONSE:

1. **The CJC supports the proposal that the use of VSDs be subject to judicial approval.**

2. **The CJC supports the proposal to limit the use of such devices to the investigation of offences for which listening devices could be used, subject to the concerns which the CJC has expressed above in commenting on Paragraph 6 of the Discussion Paper concerning the proposed scope of the listening device power.**

3. **The CJC supports the Discussion Paper proposal to impose a requirement that the judge hearing the application specifically authorise the locations within a place in which a VSD may be installed.**

There is currently no general prohibition against the use of VSDs, as long as they have no listening device capacity. The *Drugs Misuse Act 1986* is the only statute in Queensland in which reference is made to the use of visual surveillance devices. The CJC considered that the power to install a VSD should be extended to the same serious offences for which warrants for listening devices may be obtained (CJC rec. 24.3). It was further recommended that:

- entry onto private property for the purpose of installing a visual surveillance device be permitted under the authority of a warrant issued by a judge of the Supreme Court, or with the consent of the owners or lawful occupiers of the property[3]

- the warrant requirements which apply to listening devices apply equally to visual surveillance devices (CJC rec. 24.20).

21.4 Emergency Use of Surveillance device

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police be given a power to use surveillance devices without the need to first obtain a warrant in 'life threatening situations'. The use of the device must be authorised by a

3 Where the owner is not the occupier, the owner should not be able to give consent.

commissioned officer of the rank of Inspector or above who believes there are reasonable grounds to suspect that 'the delay involved in seeking a warrant may endanger the life of, or result in serious injury to, a person, e.g. a hostage situation'. The evidence obtained through the use of the listening device would become admissible subject to the relevant reporting requirements and retrospective approval of the use of the device by a judge of the Supreme Court which should be obtained as soon as practicable and within 7 days. The circumstances of the use of the device would be required to reported to an independent person appointed from outside the Police Service to monitor and report on the use of surveillance devices.

CJC RESPONSE:

The CJC does not support the proposed power and is not persuaded that the situations described as justifying the use of the power to install surveillance devices without the need for a warrant would preclude the obtaining of warrants in the expedited manner recommended by the CJC in recommendations 24.13 and 24.14.

In recommendation 24.12, the CJC expressly recommended against allowing the use of listening devices without prior judicial approval, because of the highly intrusive nature of listening devices. The CJC's report also observed that, in the practical sense, the amount of time that it takes to organise the installation of a listening device should be sufficient to allow for an emergency application to be made by telephone. In relation to emergencies recommendations 24.13 and 24.14[4] state that:

- an expedited court procedure, similar to that under section 26 of the *Drugs Misuse Act 1986* be available in emergency circumstances in respect of all listening device applications

- provision be made for applications for listening device warrants to be made by telephone, fax etc. in urgent circumstances where it is impracticable for the applicant to appear and make the application in the usual manner or in the expedited manner recommended above.

The Discussion Paper presents the following scenarios as justifying the use of a surveillance device without judicial approval:

> [S]ome surveillance devices can be installed and commence monitoring conversations or images in a matter of minutes. The provision of an 'emergency' type power would allow microphones to be used to monitor conversations almost immediately upon police arriving at the scene of a siege, and until the installation of more sophisticated devices became practicable (paragraph 21.4.2 of the Discussion Paper).

The CJC submits that, as a matter of practice, there would necessarily be a delay at a siege situation while officers first at the scene waited for the arrival of officers who had access to and could install such devices. The CJC understands that even the less sophisticated microphones referred to in the Discussion Paper are not part of the standard items issued to general duties police officers. The CJC can therefore see no reason why, during the time while the equipment is being organised, steps could not be taken to obtain a warrant by one of the emergency methods recommended by the CJC.

---

4 See comments above regarding paragraph 15 of the Discussion Paper. Recommendation 8.12 dealing with search warrants recommended that police be able to obtain telewarrants but only in urgent circumstances or where the remoteness of the location precludes obtaining a warrant in the ordinary manner.

21.5 Covert Search Warrants

DISCUSSION PAPER PROPOSAL:

The Discussion Paper argues that 'execution of a search warrant without the knowledge of the person concerned is a valuable investigative tool' and notes that an occupier whose premises are the subject of the covert search is 'likely to be unaware of its occurrence for some period of time' which 'poses difficulties in subsequently challenging the search'. The Paper recognises possible difficulties with 'the planting of evidence' and proposes, where practicable, that covert searches be video-recorded as a safeguard against fabrication of evidence.

The Discussion Paper suggests that the warrant be available only in respect of certain serious drug offences and offences involving organised crime. Safeguards similar to listening devices (discussed above) are also proposed, including:

- the Supreme Court judge hearing the application would have to be satisfied that the knowledge of the occupier or owner of the place would be likely to frustrate the investigation
- the duration of the warrant would be limited to 14 days unless a longer period is authorised
- the police officer making the application would be required (where practicable) to advise the judge of all previous applications for a covert search warrant in relation to the place (or the occupier of the place) specified in the application
- the police officer making the application be required to furnish to the judge 'at the first reasonable opportunity and within seven days of the execution of the warrant' a written report on the exercise of the power and the circumstances in which it was exercised and any thing seized, or photograph or film taken.

The Paper also proposes that an independent person from outside the Police Service be appointed to monitor covert search warrant applications and their usefulness. The same reporting requirements for surveillance devices would apply to cover search warrant (paragraph 21.5.8).

CJC RESPONSE:

The CJC supports the Discussion Paper proposal, subject to the following provisos:

- **The Discussion Paper states that police would have to notify the judge of previous applications for a covert search warrant in relation to the place or the occupier of the place only 'where practicable'. The CJC considers that such a requirement should be mandatory.**
- **There should be a requirement that covert search warrants be recorded in the search register.**

The CJC considered the issue of covert search warrants in Volume II of its Report (pp. 378-383). The Discussion Paper proposal is broadly consistent with the CJC's recommendation 8.10, the major inconsistency relating to the reporting requirement following execution of the warrant.

Although the CJC had recommended a report be provided to the issuing judge 72 hours after execution of the warrant, the CJC has no strong objection to the seven day period proposed in the Discussion Paper as it relates to a post-search report. The CJC acknowledges that covert searches are a valuable investigative tool necessary because of the increasingly sophisticated approach of organised crime often involving protracted and complex operations. However, the surreptitious nature of covert searches puts them at the most intrusive end of the scale of police powers. Accordingly, there should be close supervision of covert searches, which should be allowed to run only for brief periods.

The Discussion Paper proposes the life of a covert search warrant be 14 days, whereas the CJC recommended that a warrant be valid for seven days or for such other period as is specified in the warrant (CJC rec. 8.13 — this recommendation did not refer to covert search warrants specifically). However, the CJC does not object to the Discussion Paper proposal.

There must be proper record-keeping in relation to covert searches. The CJC is concerned that the Discussion Paper expressly excludes covert search warrants from the requirement to record details of property seized in registers. As the Discussion Paper acknowledges (paragraph 21.5.5), the execution of a search warrant without the knowledge of the person concerned is a particularly intrusive power which, if granted, must be subject to appropriately stringent safeguards. The CJC notes that the monitoring regime proposed in paragraph 21.6.4 is intended to apply to covert search warrants. Clearly, to enable that monitoring to take place, the fact that a covert search warrant has been issued and executed must be recorded somewhere. Further, in view of the intrusive nature of the power, and the need to provide a database which can be used to check whether previous searches have been made, the CJC does not consider it appropriate to omit covert search warrants from the proposed mandatory recording requirements. The CJC recommends that particulars of those warrants be included in the proposed Computerised Search Register (CJC rec. 11.5) with access to those details to be strictly limited until the occupier has been provided with the information (CJC rec. 8.10).

21.6 Supervising and reporting on matters relating to the use of surveillance devices and their effectiveness

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes the appointment of an independent person outside the Police Service to overview all applications made for the use of surveillance devices and covert search warrants. The appointed person will be responsible for the collation of information concerning the number of applications for, and the use, duration and effectiveness of surveillance warrants and covert search warrants. An annual written report would be required to be compiled and delivered to the relevant Minister, who would later table it in Parliament. The annual report would set out such matters as:

- how many applications were made and then issued for warrants or for extensions to the warrants
- the categories of the serious offences specified in applications made
- the average period of the initial warrants and renewals of the warrants
- how many arrests were made in connection with the issue of the warrants, and the categories of offences for which the arrests were made.

CJC RESPONSE:

The CJC supports the proposal for the appointment of a person outside the Police Service to overview and monitor applications for, and the use of, surveillance devices and covert search warrants and report on these matters annually to Parliament.

The CJC's recommendation 25.2 was that the Ombudsman or some other independent body prepare an annual report . That recommendation specified that the annual report 'be tabled in Parliament by the Minister responsible for the legislation'. Recommendation 25.3 proposed that the Ombudsman or some other independent body conduct regular inspections to ensure records and registers relating to electronic surveillance are being maintained and stored in accordance with the proposed Act. More recently, the CJC has suggested that a Privacy Commissioner could perform that role.[5]

The CJC is aware of criticism that the process for obtaining warrants for surveillance devices does not provide sufficient safeguards for those who might be subject to those warrants. One method suggested which would provide greater scrutiny is to have 'a friend of the Court' who could be present in the Court when an application is heard. The role of that person would be to cross-examine the applicant for the surveillance warrant or covert warrant.

The CJC considers that such a process is impracticable, as many applications are urgent. Furthermore, to ensure the availability of such a person, a panel of persons would need to be established, with the associated expense.

There is clearly a need for proper scrutiny of processes in relation to surveillance devices. The CJC suggests that the preferable approach may be for the judge hearing the application for the warrant to adopt a more inquisitorial role. However, the CJC acknowledges there may be difficulties in drafting appropriate legislation to prescribe such a role.

22. PROVISION TO REQUIRE THE NAME AND ADDRESS OF SUSPECTED OFFENDERS AND WITNESSES TO INDICTABLE OFFENCES

22.1 Persons reasonably suspected of committing or having committed offences

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power to demand the name and address of a person found committing or reasonably suspected of having committed any offence.

5 See CJC submission to the Legal Constitutional and Administrative Review Committee in relation to Issues Paper on Privacy (August 1997).

CJC RESPONSE:

The CJC supports the proposed power to demand the name and address of a person found committing or reasonably suspected of having committed any offence. The CJC has previously recommended a power to demand name and address in essentially the same terms as proposed in the Discussion Paper (CJC recs 14.1, 14.2, 14.3).

The CJC emphasises that its recommendation for a power to demand name and address in these circumstances was designed to operate hand-in-hand with the CJC's recommendations regarding the power of arrest and the limitations on the exercise of that power (see response to section 10 above).

22.2 Persons who may be able to assist in certain investigations

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power to demand the name and address of a person who is found at or in close proximity to the scene of an indictable offence who the police have reasonable grounds to suspect may be able to assist with the investigation of the offence.

CJC RESPONSE:

The CJC supports the proposed power to demand the name and address of a person who is found at or in close proximity to the scene of an indictable offence who the police have reasonable grounds to suspect may be able to assist with the investigation of the offence. The CJC has previously recommended a power to demand the name and address of a person who may be able to assist the police in the investigation of an offence, in similar terms to the power proposed (CJC rec. 14.4).

22.3 Power to require evidence of name and address

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes a power to require verification of name and address. Also, based on the Discussion Paper proposals it will be an arrestable offence to refuse to provide particulars or to give false particulars.

CJC RESPONSE:

The CJC opposes the proposed power to demand verification of name and address. However, if the proposal is to proceed, the CJC endorses the safeguards against overuse of the power proposed in the Discussion Paper.

The CJC specifically recommended against a power to require verification of name and address (rec. 14.6). The main argument for such a power is that it is needed to ensure that people do not provide police with false information. While the CJC accepted that there was some merit to this argument, it was not persuaded that such a power should be granted to police. The reasons for this were:

- Where a police officer is not satisfied about a person's identity, the person would be liable to arrest for the substantive charge. This provision would also permit a police officer to arrest an uncooperative witness if the officer had reasonable grounds to suspect that the witness had given a false name and address.

- The CJC would not like to see a situation develop where police routinely require verification of name and address and people are penalised simply because they do not carry identifying information with them.

22.4 Identification requirement for police

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that a police officer be required to provide his or her identification details when requiring the name and address of a person.

CJC RESPONSE:

1. **The CJC supports the requirement that a police officer provide his or her identification details when requiring a person to give his or her name and address.**

2. **The CJC believes that the power to demand name and address should be accompanied by additional accountability requirements as detailed in its recommendation 14.8 referred to below.**

The CJC is of the view that police should be required to explain to people the reasons why they are requiring a person to provide his or her name and address. If information of this nature is provided to people in these circumstances, there is a greater likelihood that they will cooperate with the police than if no explanation is provided.

Consistent with this view, the CJC has previously recommended that each time the power to demand name and address is exercised by a police officer, the officer be required to:

(i) provide in writing his or her name, rank and station to the person whose name and address is requested;

(ii) inform the person of the offence that has been or is suspected of having been committed;

(iii) explain to the person the reason/s for suspecting that the person may have committed the offence or may be able to assist in inquiries in relation to the offence; and

(iv) inform the person that a failure to provide his or her name and address, or the provision of a false name and address, may result in the person being arrested and charged with failing to provide his or her name and address or with providing a false name and address (CJC rec. 14.8).

23. PROVISION OF A NOTICE TO APPEAR AS AN ALTERNATIVE TO PROCEEDING BY WAY OF ARREST OR COMPLAINT AND SUMMONS

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police officers may commence proceedings for any offence by the issue of a Notice to Appear, provided the officer has reasonable grounds to suspect that a person has committed an offence. The Notice would contain a short statement and brief particulars of the offence and would require the person to appear at a given time and date before a specified court. If the person failed to appear, the magistrate could either issue a warrant for arrest, or 'where appropriate, deal with the matter in the person's absence'. This process should be 'coupled with a power' to obtain the person's fingerprints and photograph. Since circumstances may change, the issue of the Notice should not prevent police from later arresting the person to ensure appearance before the court or to prevent interference with a witness.

CJC RESPONSE:

Consistent with previous recommendations (CJC rec. 13.6), the CJC strongly supports the introduction of Notices to Appear as an alternative to arrest, and recognises that the power to take photographs and fingerprints is a necessary part of making that strategy effective (CJC rec. 27.1 and 27.7).

However, the CJC is concerned about the lack of detail on some aspects of the proposal, particularly in relation to the court's power to determine matters in the person's absence where a serious offence may be involved.

The CJC is concerned about the proposal to allow the court to determine a matter in the person's absence 'where appropriate'. Such a procedure is permitted in limited circumstances under the *Justices Act 1886* (ss. 142 and 142A) where a person fails to answer a summons relating to a simple offence or breach of duty. However, because such a process contravenes the person's right to be present to answer charges against him or her, the power of the court to deal with the matter in the person's absence should be restricted to minor offences. The proposal needs to be more detailed on this point.

The Discussion Paper wrongly states (paragraph 23.4) that the proposed notice system has not been trialed elsewhere, whereas Field Court Attendance Notices have been trialed in NSW in the past couple of years. Voluntary Agreements to Attend Court are also in use in the ACT. Evaluation of that experience may be of assistance to the QPS. A suggested contact in regard to the NSW scheme is Sgt David Darcy, Policy and Planning Officer, Region Support Command, NSW Police Service.

24. POWER TO PHOTOGRAPH AND FINGERPRINT ETC. OFFENDERS IN ARREST AND NON-ARREST SITUATIONS

Offences for which fingerprints etc. may be taken (para. 24.15)

DISCUSSION PAPER PROPOSAL:

The Discussion Paper suggests that police be provided with a power to take fingerprints and other forms of identification (palm prints, footprints, toe prints, photographs, samples of handwriting and voice prints) for an offence which has a penalty of one year or more imprisonment.

The Paper proposes (paragraph 24.16) that it will be necessary to preserve the existing authority to take fingerprints with respect to offences under the proposed Act, e.g. providing a false name or address and under the *Vagrants Act, Weapons Act* and *Regulatory Offences Act*. This is on the basis that 'a significant number of offenders are identified through the taking of fingerprints of offenders punishable by less than one year imprisonment'.

CJC RESPONSE:

1. **The CJC supports this proposal, which is broadly consistent with previous CJC recommendations.**

2. **The CJC repeats that part of its recommendation 27.1 which includes a power to take fingerprints in respect of 'offences in other statutes which, upon repeat conviction, require the imposition of a mandatory term of imprisonment'.**

As discussed at page 842 of its report (CJC 1994b), the CJC referred to the very important role which fingerprints play in relation to criminal records. The report stated:

> As noted, courts require accurate criminal record data if they are to discharge their sentencing responsibilities properly. In a system which places considerable importance on an offender's previous history (including, in some cases, by providing an ascending scale of penalties related to the number of prior convictions), the prosecution needs to be able to put a reliable record of a convicted person's history before the court. In the case of first offenders, prints need to be taken both to confirm that the person has not offended before, and to provide the basis for building an accurate criminal record in the future.

The report recommended that offences 'in other statutes which, upon repeat conviction, require the imposition of a mandatory term of imprisonment' as should be offences for which fingerprints can be taken, and referred specifically to section 16 of the *Traffic Act 1949*. That Act requires a term of imprisonment to be imposed upon an offender who is convicted three times within five years of a major drink-driving offence. The Discussion Paper proposal would not permit fingerprints to be taken in respect of a first offence under section 16 of that Act because the term of imprisonment which may be imposed is less than one year.[6] Clearly, the history of convictions is relevant to the penalty to be imposed on second and subsequent convictions, and it is this concern which prompted the CJC to make its recommendation 27.1.

---

6 The penalty for a first offence under: s. 16(1) is 9 months; under s. 16(2) 3 months.

When fingerprints will be able to be taken (para. 24.18)

DISCUSSION PAPER PROPOSAL:

The power to take fingerprints would apply where a person has been arrested, summoned or issued with a Notice to Appear. Police would be authorised to give to the person a notice directing him or her to attend a particular police station within a specified period for the purpose of having fingerprints, photographs etc. taken. Failure to attend would result in the person being arrested for the offence in respect of which the summons or notice was issued.

CJC RESPONSE:

The CJC supports this proposal which is broadly consistent with previous CJC recommendations.

In addition to recommending that police should be able to fingerprint a person who has been issued a summons or Field Court Attendance Notice (FCAN), the CJC recommended that the courts should be able to order the taking of fingerprints, either at the time of a person's appearance to answer a charge, summons or FCAN, or after a finding of guilty (CJC rec. 27.1). The CJC acknowledged (1994b, pp. 845–846) that those other options may present practical problems: for example, adjournment for the purpose of fingerprinting may cause delays in court, and obtaining fingerprints after conviction will not assist in ensuring the accuracy of criminal records presented to the court in that case. The CJC concluded that while those alternative court-ordered processes may not be widely utilised, they should be included as part of the fingerprinting power.

Where fingerprints etc. may be taken (para. 24.23)

DISCUSSION PAPER PROPOSAL:

Where a person has been arrested for an offence, police will be empowered to take fingerprints and photographs at a place other than by or at the direction of the Officer in Charge. The example given for the need for such a power is set out in paragraph 24.22, namely, where there are arrests of large numbers of persons in a relatively short period of time, and where several offenders are transported to the watchhouse in the absence of the arresting officers. The suggestion is that in those circumstances:

> for administrative purposes, and to maintain and ensure the integrity of complete criminal records, it is essential that the identity of each individual offender be clearly linked to both the arresting officer and the alleged offences. This may be most effectively achieved through the taking of a photograph of the offender with the arresting officer.

CJC RESPONSE:

The CJC does not oppose the suggestion that police be empowered to take fingerprints and photographs at a place other than by or at the direction of the Officer in Charge, assuming that there exists technology sufficient to ensure clarity and integrity of the photographs and fingerprints taken at other than a police station.

The CJC's Report (1994b, p. 846) discussed the issue of 'in-the-field' fingerprinting and noted that the Australian Federal Police has been using field fingerprinting for several years. The Discussion Paper did not specifically consider the issue of 'in-the-field' fingerprinting. The CJC did not consider the issue of photographing in the field.

Destruction of fingerprints (para. 24.24)

DISCUSSION PAPER PROPOSAL:

Where a person is found not guilty or is not proceeded against, any fingerprints taken with respect to that offence will be destroyed within a reasonable time in the presence of a justice, unless:

- the person has been arrested upon a charge of any other offence (punishable by imprisonment of one year or more) which is then pending
- the person has been found guilty of any other offence
- the fingerprints, etc. are required as evidence in respect of any other offence alleged to have been committed by that person; or
- the person is not proceeded against because he or she has been found to be incapable to stand trial due to a mental condition.

Failure to provide or offering resistance to the taking of fingerprints would constitute the offence of obstruction of a police officer under the *Police Service Administration Act 1990.*

CJC RESPONSE:

1. **The CJC supports mandatory destruction of fingerprints in the circumstances envisaged by the Discussion Paper, subject to the following qualifications.**

2. **The CJC strongly supports the inclusion of a specified time limit for the destruction of fingerprints, rather than by reference to 'within a reasonable time'.**

3. **The CJC supports oversight of the destruction of fingerprints by an independent agency or person. While the CJC does not oppose the proposal for a justice to oversee destruction (provided the justice is independent of the Police Service), the practicality of that process is queried.**

The CJC has previously recommended that police be required to destroy a person's fingerprint records automatically upon the expiration of a specified period after the person is found not guilty of a charge or if the person has not been charged or the charge has not proceeded (CJC rec. 27.3). The CJC strongly supports specifying in legislation the timeframe in which automatic destruction must occur, rather than the uncertain definition of 'within a reasonable time'. The inclusion of a maximum time limit in legislation would be consistent with both the Victorian and Commonwealth legislation.

The proposal 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 pursuant to some

automatic process after a particular time. As previously recommended (CJC rec 27.4), the CJC's view is that an independent agency, such as the Ombudsman, should be given statutory responsibility for ensuring compliance with the regime for destruction of fingerprints. Independent oversight is important if public confidence in the process is to be preserved. The CJC considered that periodic audits were the most appropriate means of monitoring compliance and that it would need to be ensured that the agency was given adequate powers and resources to perform its role effectively (1994b, p. 850).

In a recent submission to the Legal, Constitutional and Administrative Review Committee on the Issues Paper on Privacy in Queensland, the CJC has suggested that if a Privacy Commissioner were to be established in Queensland, his or her role could include oversight of the destruction of fingerprints. The CJC assumes that the reference in the Discussion Paper to the presence of a 'justice' would refer only to justices of the peace who are independent of the Police Service. While the proposal about destruction of fingerprints in the presence of a justice is not opposed, the CJC prefers its recommended model of auditing by an independent agency, which would seem to be a more efficient process.

The CJC notes also that the Discussion Paper does not consider the issue of fingerprinting of juveniles (see the discussion of that issue in CJC 1994b, pp. 850–855, CJC recs. 27.5 and 27.6). Given the amendments to the *Juvenile Justice Act 1992* in 1996, the CJC assumes that the proposed police powers legislation will not apply to the fingerprinting of juveniles.

25. PREVENTION OF BREACHES OF THE PEACE, OFFENCES ETC.

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposal on this issue is difficult to understand. The Paper is inconsistent on whether it is proposing to consolidate the current legislative and common law powers relating to breaches of the peace or proposing an enhancement of those powers. It also seems to be proposing specific legislative provision for policing problems associated with nightclubs. However, the Discussion Paper then makes a more general reference to the need to prevent people obstructing, hindering or impeding others attending 'late night convenience stores' and 'students, parents or teachers as they enter or leave a school'. The proposal suggests the creation of 'notified zones' in which police will have 'preventative powers not otherwise generally granted'.

CJC RESPONSE:

The CJC cautions against any action in respect of this proposal to extend police powers until the details of the proposal are clarified and the following issues addressed:

- **In exactly what circumstances would these powers come into operation?**
- **What public spaces would be subject to these powers?**
- **How would the public spaces subject to this power be identified and selected?**
- **Does the government anticipate that every city or town mall or centre, all schools, late night convenience stores, shopping centres and nightclub areas throughout Queensland will become subject to these powers? If not, how does it propose to prevent this eventuality?**
- **What specific safeguards will apply to the exercise by police of these extended powers in these places?**

The CJC has had difficulty responding to this proposal due to its lack of clarity and detail. The Discussion Paper proposes quite extensive and previously unknown powers for police in certain public spaces including a move-on power. The CJC is concerned that the proposal lacks sufficient clarity and detail for proper consultation to occur. The proposal involves significant encroachments on the rights of people when in public spaces. Accordingly, the CJC is concerned about the operation of such a power and its potential for generating police–civilian conflict.

As argued in its review of police powers, the CJC opposes a general move-on power for police on the grounds that:

- Queensland has a wide range of 'public order' offences which, with the 'breach of the peace' provision in the *Criminal Code*, should be sufficient to deal with most instances of unruly behaviour in public settings.
- If the community considers certain public behaviours to be unacceptable the proper response is to create additional offences proscribing that behaviour.

- In the great majority of cases where the police approach individuals who they suspect may be planning to commit an offence, that will be sufficient to deter those persons or to persuade them to leave the scene. A specific move-on power would normally not be required to achieve this result.

- It is doubtful whether a move-on power would be particularly useful for dealing with groups of youths or gangs which gather in public places, because there is nothing to stop them from re-assembling somewhere else, perhaps where there are no police present. If there are concerns about the behaviour of groups in particular areas, the more appropriate response is to allocate more resources to those areas.

- Such a power would be highly discretionary, requiring police to make judgments about who does and does not have a legitimate reason for being in a particular locality.

- The power may be used to the detriment of those who make most use of public space, such as the young, the homeless and Aboriginal people.

26. INVESTIGATIONS AND QUESTIONING

26.1 Post-arrest detention for a reasonable period for the purposes of questioning and conducting investigations for indictable offences

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that where a person has been arrested for an indictable offence, a police officer may seek the approval of an officer of the rank of Inspector or above to detain the person for a 'reasonable time' for the purpose of questioning or making an investigation. The officer must act in accordance with a *Responsibilities Code*, which will require him or her to consider factors such as the number and complexity of matters to be investigated, need for travel time, any suspension of questioning for attendance by a third party or because the person was intoxicated or needed medical attention, and the time to conduct forensic investigations. The initial period of detention may not exceed 6 hours.

An officer of or above the rank of Superintendent may approve extensions for up to 18 hours. Further extensions 'as reasonably necessary' may be granted by a magistrate or prescribed person (Justices of the Peace (Qualified) employed by the Magistrates Court). In considering extensions, the *Code* shall impose a duty on commissioned officers and magistrates or prescribed persons to consider factors such as the nature of the evidence; whether the person has requested or received legal advice; and whether the person 'is assisting with the investigation'.

No detention for simple or regulatory offences is proposed.

CJC RESPONSE:

1. **Consistent with its previous recommendations in the Police Powers Report (1994a), the CJC supports a scheme of post-arrest detention for the purposes of questioning and investigation. However, the CJC is concerned that the current proposal contains insufficient safeguards to ensure that the rights of suspects are protected. In particular, the CJC makes the following comments:**

   - **The CJC recommended that the maximum initial detention period be four hours (disregarding 'time-outs'). While this is the preferred period and is in line with the Commonwealth provisions, the CJC acknowledges that the proposed period of six hours, which appears to include time outs, may be acceptable.**

   - **The CJC is strongly opposed to the proposal that extensions beyond six hours up to a maximum of 18 hours should be granted by police officers of the rank of Superintendent or above. The CJC recommended (CJC rec. 20.5) that an extension of the initial period for a further period of up to eight hours could only be obtained from a magistrate. Any extension beyond that, which would only happen in exceptional circumstances, would need to be obtained from a Supreme Court judge. Because the scheme of post-arrest detention for questioning involves a significant extension to police powers, it is essential that there is some external scrutiny of the process. A review of research in the United Kingdom on the operation of the *PACE Act* has noted that reviews by police of detention are 'largely**

routinised procedures with little heed being paid to representations made by, or on behalf of, the suspect' (Home Office 1997, p. 62, citing Bottomley et al 1989). These findings reinforce the CJC's view that external scrutiny of this process is essential.

- **The CJC strongly opposes the proposal that 'prescribed persons' such as clerks of court should be able to determine this significant issue: the scrutiny should be undertaken by a judicial officer.**

- **The CJC's recommendations regarding pre-charge detention were contingent upon the introduction of a free legal advice scheme (CJC rec. 18.1). The current proposal requires police to inform suspects of their right to contact a solicitor, but does not ensure that legal assistance will be made available. The CJC retains the view that this safeguard as most important.**

- **The CJC also proposed (CJC rec. 20.3) that decisions about whether to detain a person post-arrest should be the responsibility of a designated Custody Officer (modelled on the UK *PACE Act* scheme). The CJC acknowledges that the current proposal, which would require an Inspector to authorise the initial period of detention, does go some way towards ensuring that the decision to detain for questioning is made at an appropriately senior level; however, the Custody Officer scheme is preferred.**

2. **The CJC endorses the concept of a *Responsibilities Code*, on the proviso that it will be enforceable. However, the CJC recommends that criteria relevant to the decision of whether a person should be detained or the detention extended be included in legislation for the reasons outlined below.**

3. **The CJC also stresses the need for proper record-keeping processes to ensure that these processes can be monitored and audited.**

The CJC does not agree with the Discussion Paper's dismissal of the custody officer proposal as impractical on the grounds that it would 'create' multiple positions in the QPS (p. B46). As discussed in the Police Powers Report (1994a, p. 718), rather than new positions being created, the functions of the Custody Officer could be exercised by a senior police officer who is independent of the investigation, or where unavoidable, by telephone authorisation from a commissioned officer.

The Discussion Paper (paragraph 26.1.34) proposes that a detailed Responsibilities Code based on the *PACE Act* would set out the factors to be considered by police in deciding whether to detain or extend the detention of a person, and proposes that the Code should impose obligations on magistrates and other prescribed persons to consider those and other factors. However, the Codes in place under the *PACE Act* are not binding on the courts, as discussed at the response to section 17.2 of the Discussion Paper. As a matter of drafting policy, many of the criteria which are relevant to the exercise of a statutory duty or authority should be contained in the legislation itself. Consequently, the CJC recommends that such criteria be included in the legislation.

26.2 Rights of a person arrested for an indictable offence

DISCUSSION PAPER PROPOSAL:

Statutory safeguards for a person who has been arrested would include:

- police must have reasonable grounds to suspect that a person has committed an indictable offence;
- the suspect's right to silence to be expressly preserved;
- electronic recording of interviews;
- general inadmissibility of admissions not electronically recorded, subject to the court's discretion to admit them if satisfied that the circumstances justify the admission;
- police to 'advise the detained person of his or her status with respect to arrest';
- provision of an interpreter before commencing questioning where the arrestee does not have a sufficient knowledge of English to enable them to understand the questioning;
- police to advise suspect of the right to silence;
- police to advise suspect of the right to have a third person present during questioning, such as a lawyer, relative or friend;
- police to have the third person present during questioning where requested or where the person has a special need or disability, except where the delay in waiting for the person to arrive may result in injury to another (e.g. kidnapping), or where the third person is suspected of being involved in the offence;
- police to provide an audio copy of the recorded interview and, if requested, a copy of the transcript where one has been prepared;
- if the person is re-arrested within 24 hours, the investigation period is cumulative unless the later arrest is for an indictable offence committed during that 24 hour period.

CJC RESPONSE:

1. **The CJC supports the inclusion of statutory safeguards for those who are being questioned and generally supports the concepts contained in the Discussion Paper, while noting that much will depend on how these provisions are drafted.**

2. **The CJC has some concerns arising from the wording of the proposal, in particular: the ambit of the exception to the general rule on the inadmissibility of unrecorded admissions or confessions; the lack of a requirement to administer a caution about the effect of any statement made to police; and the narrow grounds for providing an interpreter (see below).**

The CJC has made several recommendations which are not reflected in the current proposal and which the CJC believes are most important. First, in regard to admissibility of unrecorded confessions, the CJC recommended that confessions and admissions should be inadmissible unless the prosecution establishes on the balance of probabilities that the circumstances were exceptional and justify the reception of the evidence (CJC rec. 23.3). This test, which follows section 464H of the Victorian *Crimes Act 1958*, is stricter than that proposed in the Discussion Paper (i.e. satisfying the magistrate that the circumstances justify the admission). It should be made clear in legislation that such an exception to the general rule only applies in extraordinary cases.

Second, the CJC recommended that police, as well as advising the person of the right to silence, should be obliged to administer a caution which informs the person that any statement may be used in evidence in subsequent proceedings (CJC rec. 19.3). It is important to inform those who are being interviewed of the effect of their statements.

Third, the CJC also proposed (CJC rec. 23.1) a formal procedure for notifying the Commissioner of Police where it becomes apparent during court proceedings that police have acted in a way that may warrant criminal, disciplinary or remedial action. This recommendation does not appear to be reflected in the Discussion Paper.

In addition to those recommended inclusions, the CJC is concerned about the wording of the proposed provision relating to interpreters. Paragraph 26.2.2(vi) proposes that an interpreter should be provided where the arrested person does not have a sufficient knowledge of English to enable him or her to understand the questioning. While the CJC strongly supports statutory recognition of a suspect's right to an interpreter, the circumstances proposed in the Discussion Paper, which appear to be modelled on the Victorian legislation, are too narrow, particularly where the investigation may involve complex information or concepts. The right to an interpreter should arise not only where a person does not understand the questioning, but also where he or she does not have sufficient English skills to make an adequate reply. This important safeguard has been noted in various reports calling for statutory recognition of a person's right to an interpreter in the investigative process where the person is unable to communicate orally with reasonable fluency in English (for example, Attorney-General's Department 1991, p. 79; Australian Law Reform Commission 1992, pp. 54–59; Access to Justice Advisory Committee 1994, p. 51; see also the *Crimes Act 1914* (Commonwealth) section 23N). The broader grounds are also reflected in the QPS's current procedures (see Operational Procedures Manual, order 6.3.2 which specifies the criteria to be taken into account in establishing whether the person has a special need, and policy 6.3.7 concerning communications and interviews using interpreters).

26.3 Retention of the right to speak to and question a person in circumstances where that person has not been detained for questioning etc.

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police should ensure, as soon as reasonably practicable, that a person who voluntarily attends a police station understands that he or she has not been arrested.

Police may also invite a person to take part in an interview after the person has been charged with the offence. Questioning would be restricted to where it is necessary to clear up any ambiguity or where new evidence has been discovered. Police must advise the person of his or her right to silence; the right to communicate with a lawyer or third person and to have that person present during the interview; and that the person is free to discontinue questioning at any time.

As in post-arrest questioning, interviews would be recorded; be delayed to enable the requested third person to be present; and be conducted in the third person's presence except where a delay may result in injury to another, or where the third person is suspected of being involved in the offence. An interpreter must be present where the person does not have a sufficient knowledge of English to enable him or her to understand the questioning.

CJC RESPONSE:

1. **Consistent with its previous recommendations (1994a), the CJC supports legislative protection of 'voluntary attendees' as an essential element in any scheme of police questioning. The proposals in the Discussion Paper go some way to ensuring that those who are not under arrest are aware of their status and rights, although it is noted that the proposal does not clearly distinguish between: those who have not been arrested but are requested to attend a police station; those who have been charged and released; and those who have been arrested, questioned, charged and are still in custody.**

2. **In relation to the provision of an interpreter and to other statutory safeguards which should apply to those who are being questioned, the CJC's concerns are outlined in the previous response.**

In the CJC's view, additional safeguards are necessary to ensure that there can be no advantage to police in avoiding the restrictions on post-arrest questioning by deeming suspects to be voluntary attendees. The reality of the situation is that once a person is inside a police station and being questioned, he or she is likely to be subject to pressure to remain. Consequently the same requirements should apply to both voluntary attendees and those who are detained after arrest (CJC rec. 20.8).

27. TELECOMMUNICATIONS INTERCEPTION

DISCUSSION PAPER PROPOSAL:

The Discussion Paper proposes that police be provided with a legislative basis from which they may apply for 'eligible authority' status from the Commonwealth Government under the *Telecommunications (Interception) Act 1979*. Telephone interceptions would then be permitted for two classes of offences broadly consistent with those referred to in the Commonwealth *Telecommunications (Interception) Act 1979*.

Various safeguards are referred to in the Discussion Paper (sub-paragraphs 27.4.4 – 27.4.19) including limiting persons who have access to the recorded product, record-keeping, imposing a requirement on the Commissioner of Police to prepare and deliver a report to the Minister for Police setting out various matters; and destruction of restricted records when no longer required.

CJC RESPONSE:

The CJC supports the proposal contained in the Discussion Paper which is consistent with the CJC's recommendation in relation to the QPS.

The CJC in its 1995 *Telecommunications Interception and Criminal Investigation in Queensland: A Report* recommended that the Queensland Government take the necessary steps to enable the QPS 'to intercept telecommunications as they pass over the telecommunications system'. The CJC's recommendation also included an identical power for the CJC, as well as the QPS. The CJC appreciates that the issue of whether legislation which grants to the CJC a similar power (as recommended in its report) is a decision for another Minister.

The steps required to implement that recommendation are the introduction of a State Act which conforms with the requirement of the Commonwealth *Telecommunications (Interception) Act 1979* and a request by the Queensland Premier to the Commonwealth Attorney-General to have the QPS declared an 'agency' for the purposes of the Commonwealth Act.

The issue of which independent body should be responsible for the oversight of the use of telephone interceptions, was considered that issue at page 37 of the CJC's 1995 Report, which noted:

> To date, all States with complementary legislation have vested this authority in the State Ombudsman or equivalent, but it would be open to a State Government to allocate the oversight function to some other agency, such as a Privacy Commissioner.
>
> . . .
>
> If it is felt that the Queensland Ombudsman should not be given the monitoring role required by the Act, this would strengthen the argument for creating a Privacy Commissioner in Queensland. On the other hand, if the oversight function is allocated to the ombudsman it will be necessary to review the *Parliamentary Commissioner Act 1974* and to consider providing the Ombudsman with additional resources.

BIBLIOGRAPHY

Access to Justice Advisory Committee 1994, *Access to Justice: An Action Plan*, ATJAC Canberra.

Attorney-General's Department 1991, *Access to Interpreters in the Australian Legal System*, AGPS Canberra.

Australian Law Reform Commission 1992, *Multiculturalism and the Law*, (Report No. 57), ALRC Sydney.

Criminal Justice Commission 1993a, *Report on a Review of Police Powers Volume I: An Overview*, Author, Brisbane.

—— 1993b *Report on a Review of Police Powers Volume II: Entry Search and Seizure*, Author, Brisbane.

—— 1993c *Report on a Review of Police Powers Volume III: Arrest Without Warrant, Demand Name and Address and Move-on Powers*, Author, Brisbane.

—— 1994a, *Report on a Review of Police Powers Volume IV: Suspects' Rights, Police Questioning and Pre-charge Detention,* Author, Brisbane.

—— 1994b, *Report on a Review of Police Powers Volume V: Electronic Surveillance and Other Investigative Procedures*, Author, Brisbane.

—— 1995, *Telecommunications Interception and Criminal Investigation in Queensland: A Report*, Author, Brisbane

—— 1996, *Defendants' Perceptions of the Investigation and Arrest Process*, Author, Brisbane.

—— 1997, *Reducing Police-Civilian Conflict: An Analysis of Assault Complaints Against Queensland Police*, Author, Brisbane.

Cunneen, C and McDonald, D 1997, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, Office of Public Affairs ATSIC, Canberra.

Home Office Research and Statistics Directorate 1997, *PACE Ten Years On: A Review of Research*, (Home Office Research Study 155), Home Office, London.

Lidstone, K and Palmer, C 1996, *Bevan and Lidstone's The Investigaton of Crime: A Guide to Police Powers*, Butterworths, London.

Royal Commission into Aboriginal Deaths in Custody 1991, *National Report* (Commissioner Hon E F Johnston QC), AGPS, Canberra.

Royal Commission into the New South Wales Police Service 1997, *Final Report*, (Commissioner Hon Justice J R T Wood), Government of New South Wales, Sydney.

Zander, M 1985, *The Police & Criminal Evidence Act 1984*, Sweet & Maxwell Limited.