CRIMINAL JUSTICE
COMMISSION

REPORT ON
A REVIEW OF POLICE POWERS
IN QUEENSLAND

VOLUME I:
AN OVERVIEW

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Dear Sirs

In accordance with section 2.18 of the *Criminal Justice Act 1989*, the Commission hereby furnishes to each of you its Report on a Review of Police Powers in Queensland, Volume I.

Yours faithfully

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FOREWORD

In 1989, in the Report of the Commission of Inquiry, Fitzgerald QC recommended a comprehensive review of police powers in Queensland. These two volumes mark the first of a series of reports on police powers to be produced by the Criminal Justice Commission. To deal thoroughly with such a topic in a single report would have meant considerable delay. The Commission therefore decided to release a series of reports for discussion in stages.

This first volume is an introduction to the complex subject of police powers. It sets out the review process undertaken by the Commission as well as describing similar reviews by committees and commissions in other jurisdictions. This volume also discusses the nature of police powers and their relationship to police effectiveness and various concepts and definitions that frequently arise in discussing police powers.

The very difficult question of consolidating into one piece of legislation police powers that are spread across a large number of different Acts is also raised in this volume. In so doing, the report includes a comprehensive list of those powers that are currently conferred upon police officers. This is the first time that all of the powers of the Queensland Police have been collected into one document and it enables one to view these individual police powers in context. A perusal of Appendix 3 will reveal the enormity of the review task and the breadth of powers to be considered in any proposed scheme of consolidation. The final chapter of the volume discusses the prospect of such a scheme outlining the difficulties associated with a complete consolidation of police powers and proposing a scheme of partial consolidation for consideration.

Released with Volume One is a second volume dealing with the police powers of entry, search and seizure prior to arrest. It addresses matters relating to the stopping and searching of persons, the issue and execution of search warrants and many other more specific questions within this broad subject area.

The Commission makes a number of recommendations for changes to and clarification of the law relating to entry, search and seizure in Queensland. The recommendations reflect two broad principles upon which the Commission proceeded. Firstly, that police powers should only be increased where the need to do so was demonstrated and secondly, that at all times, increased accountability should accompany any increase in police powers. They have been made after considerable research and contain proposals which the Commission believes are practical.

The Commission proposes to release further volumes on the power to demand name and address, the power to arrest without warrant, the power to detain for questioning, electronic surveillance and the power to take body samples.

The subject of police powers is controversial involving many competing interests. It is hoped that these and future reports will contribute towards the introduction into Queensland of a scheme of police powers which reflects an appropriate balance between the competing interests involved.

R. S. O'Regan

R.S. O'Regan QC
Chairman

ACKNOWLEDGEMENTS

The Commission has received assistance and goodwill from numerous organisations and individuals in the preparation of this report. More than 100 written submissions were received in response to the issues paper and the Commission acknowledges with thanks the contribution of the authors of those submissions. A list of authors is included in Appendix 4 of Volume I. The Commission is grateful to Avril Alley of the Research and Co-ordination Division for her hard work in reviewing and summarising those submissions.

A number of authors of submissions attended and spoke at the public hearings held by the Commission and their contribution is appreciated. Throughout the review officers of the Commission have consulted with officers of the Queensland Police Service, members of the legal profession and other interested individuals and organisations. Although too numerous to mention individually, the Commission is grateful for the time that these people made available to discuss some of the complex issues surrounding police powers.

As part of the review the Commission sought advice from the Queensland Police Service and a number of other government departments concerning the circumstances surrounding the use of many of the powers contained in Queensland legislation. The Commission appreciates the valuable and timely advice provided by officers of those departments.

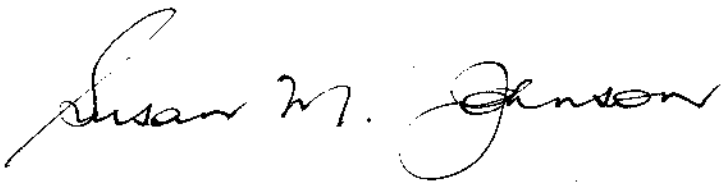
The preparation of the first two volumes of this report has been a combined effort. Dr David Dixon an external consultant provided a useful paper which was the basis of the chapters on the nature, history and development of police powers. Frazer Moss, who was employed as a consultant for six months, contributed much of the research into search and seizure powers of other jurisdictions. Shanthi Herd has been employed part-time as a consultant and has had the painstaking task of preparing the tables contained in Appendix 3 and 5 of Volumes I and II respectively. Both Frazer and Shanthi deserve thanks for their hard work and their goodwill throughout the project.

In the final five months the Research and Co-ordination Division was fortunate to have the services of David Cameron from the Official Misconduct Division who brought not only considerable knowledge to the task but also an unfailing enthusiasm which helped us all through the final often tedious stages of drafting. For this the Commission thanks him.

Deserving of special recognition are Amanda Carter and Megan Atterton of the Research and Co-ordination Division who have both worked unstintingly at producing draft after draft of these volumes. Amanda has worked tirelessly at editing and appropriately referencing the report and has assisted Megan in the painstaking task of transforming it from the writers' poor handwriting or inexpert typing to the document in its present form. We thank them especially for maintaining their good humour throughout the trying times.

I would like to express my gratitude to the staff of the Research and Co-ordination Division and to Dr Satyanshu Mukherjee, former Director of the Division under whose guidance the review was conducted, for their forbearance and support.

Finally I would like to thank Mr O'Regan QC, Chairman, the Commissioners, the Directors and the former Chairman Sir Max Bingham QC and former Commissioner Dr Janet Irwin for their input and encouragement.



Susan M. Johnson
Principal Research Officer
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CONTENTS

VOLUME I

ABBREVIATIONS

ALRC	Australian Law Reform Commission
Blackburn Inquiry	Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therewith (New South Wales)
Coldrey Committee	Consultative Committee on Police Powers of Investigation in Victoria
Commission	Criminal Justice Commission (Queensland)
Fitzgerald Inquiry	Commission of Inquiry Pursuant to Orders in Council (Queensland)
Gibbs Committee	Review Committee of Commonwealth Criminal Law (Australia)
LRCC	Law Reform Commission of Canada
Lucas Inquiry	Committee of Inquiry into the Enforcement of Criminal Law in Queensland
Mitchell Committee	Criminal Law and Penal Methods Reform Committee of South Australia
NSWLRC	New South Wales Law Reform Commission
PACE Act 1984	Police and Criminal Evidence Act 1984
Philips Commission	Royal Commission on Criminal Procedure (England and Wales)
RCPPP	Royal Commission on Police Powers and Procedure (England and Wales)
Runciman Commission	Royal Commission on Criminal Justice (England and Wales)
Sturgess Inquiry	Inquiry into Sexual Offences Involving Children and Other Related Matters (Queensland)
WALRC	Western Australian Law Reform Commission
Williams Commission	Australian Royal Commission of Inquiry into Drugs

EXECUTIVE SUMMARY

The primary purpose of Volume I of the Criminal Justice Commission's (hereinafter referred to as the 'Commission') report on the subject of police powers is to describe the framework and context within which recommendations contained in subsequent volumes concerning various aspects of police powers will be made. Volume I also proposes a scheme for the consolidation of police powers for discussion which, if implemented, will address a number of the shortcomings of the current system of police powers.

With this in mind, the chapters in the first volume of this report are structured as follows:

- Chapter One describes the background to and manner of preparation of this report, including previous efforts to review police powers;
- Chapter Two describes the nature of police powers, in terms of their development and the purposes which such powers serve;
- Chapter Three gives an explanation of concepts and definitions which are used in the language and affect the content of police powers, in particular, those of a legal nature;
- Chapter Four examines the relationship between police powers and police effectiveness;
- Chapter Five considers reviews of police powers and criminal procedure undertaken in other jurisdictions, including within Australia; and
- Chapter Six provides an explanation of the issues concerning consolidation and proposes a possible scheme of consolidation of police powers.

Accompanying Volume I is a set of tables which give a comprehensive list of police powers contained in the statutes of the Queensland Parliament, current as at 1 July 1992. These statutory powers of police are tabulated so as to include the type of power involved (powers to enter and search premises, to arrest persons, to demand name and address etc.), the circumstances in which police officers may exercise the powers, and the persons and things affected by such exercise.

CHAPTER ONE: THE BACKGROUND TO THIS REPORT

The Commission's report on police powers, consisting of a series of volumes, is the direct result of the recommendations of the Commission of Inquiry Pursuant to Orders in Council (hereinafter referred to as the 'Fitzgerald Inquiry'). The Fitzgerald Inquiry recommended that police powers, as an aspect of criminal law enforcement, ought to be reviewed for the purposes of reform.

The review undertaken by the Commission is by no means the first in Queensland. The Committee of Inquiry into the Enforcement of Criminal Law in Queensland published its findings in 1977, which included numerous recommendations for the reform of police powers, although few of its recommendations were acted upon at the time. In 1985, the Inquiry into Sexual Offences Involving Children and Other Related Matters (Queensland) dealt with various sexual offences and included recommendations affecting police powers, specifically, the power to take body samples from suspects. This recommendation was acted upon by the parliament. However, the review undertaken by this Commission is the most comprehensive undertaken in Queensland to date.

The Commission commenced its review of Queensland police powers in November 1990, bearing in mind the specific recommendations of the Fitzgerald Inquiry that any review of police powers ought to consider the proper and balanced relationship between individual rights and the public interest as they relate to police powers, and should be based upon wide research (rather than concentrating upon specific and narrow issues).

Several distinct research strategies were employed in the production of this volume and the other volumes of this report which will follow, including:

- a review of the literature on police powers in Australia and other common law countries;
- an examination of current laws and their operation in other jurisdictions in Australia and in the United Kingdom, Canada and other countries;
- the development and publication in September 1991 of an issues paper in conjunction with the Office of the Minister for Police and Emergency Services;
- the review and analysis of more than 100 submissions received from individuals and interest groups in response to that paper;

- a public hearing, conducted on 10 and 11 June 1992, into the issue of police powers at which concerned persons and organisations could ventilate issues raised in the submissions concerning police powers;

- a review of police powers conferred under legislation administered by departments other than the Queensland Police Service and the collection and review of information provided by departments concerning the exercise of such powers by police and departmental officers;

- a collection and review of anecdotal evidence provided by police officers in various districts throughout Queensland of particular cases where it is said that police investigation of offences has been hampered by a lack of powers;

- numerous meetings and seminars involving police officers, lawyers, academics, social workers and researchers; and

- interviews with persons who have been charged with criminal offences.

The most compelling fact revealed is the need for far greater research to be conducted before meaningful recommendations can be made in relation to a number of matters affecting police powers. This Commission is of the view that this can be achieved only by the creation and maintenance of records by police and others involved in the criminal justice system.

CHAPTER TWO: THE NATURE OF POLICE POWERS

This chapter and Chapter Four were adapted from material prepared by Dr David Dixon, an external consultant to the Commission, who has conducted extensive research into police powers in England, and more recently, in New South Wales.

The focus of this chapter is not upon specific powers, but upon 'police powers' as a concept; the relationship between powers and duties of police, the role of powers in policing practices and the legal concept of police powers in response to concerns about crime and disorder.

The limitations of the legalistic conceptions of police powers as merely exemptions from legal liability (for example, an arrest would amount to assault and false imprisonment if not otherwise authorised) is identified. Matters of social and political substance, such as what amounts to 'acceptable' state intervention, find no expression in the legalistic conception.

The manner in which the legislature and the judiciary have indirectly and perhaps unintentionally affected the content of police powers is also considered in this chapter. The legislature has allowed an incremental and ad hoc accretion of police powers which has resulted in confusion and anomaly, while the judiciary has not satisfactorily articulated the principles and policies underlying the exercise of police powers, resulting in contradictory case authority and a selective concern for citizen's rights.

The important point is made in this chapter that it is not possible to neatly delineate between police powers and police practices which have developed in jurisdictions based on emergent or common law. What a power means is usually defined, at least in part, by how it is used and how it is permitted in practice to be used.

Judicial decisions may stamp practice with authority or illegitimacy. Likewise, judicial inaction may effectively increase police powers by failing to impose sanctions in respect of unauthorised conduct (such as excluding evidence obtained illegally). Judges and others within the criminal justice system also condone legal fictions about police practices which allow them to become substantially, if not formally legalised, (e.g. the effect of 'consent' of a suspect to police activity). Even in the absence judicial review, practice, over time, claims its own authority.

The chapter concludes with a discussion of the purpose of police powers; again a purely legalistic answer is too simplistic. Police powers can be regarded as tools of social discipline and control which, if used excessively, can be dysfunctional or counter-productive for such purpose. Providing new police powers by legal change need not necessarily mean extending powers; providing formal legal powers may authorise less than what previously was common practice, and accordingly reduce the potential for dysfunctionality.

CHAPTER THREE: CONCEPTS AND DEFINITIONS

This chapter gives an explanation of frequently occurring concepts and definitions which are used in the language and affect the content of police powers. These have largely a legal content, and create distinctions which are easily (and understandably) lost on the layreader. In particular, the concepts and definitions listed below are discussed in this chapter.

- 'Suspicion' and 'Belief'
- 'Reasonable'
- 'Consent'
- Codes of Practice

- 'Reasonable Force'
- Classification of Offences in Queensland
- Remedies for Police Misconduct

In relation to consent, the problem is identified of police seeking the consent of a suspect to certain police activity, where the police have a coercive power to engage in that activity. The question is raised as to whether the police continue to use consent as an alternative to the power; and it is concluded that if policing by consent is to be endorsed, it must be on the basis that the consent of the suspect be real and informed, in order for it to be considered as consent.

In relation to Codes of Practice, the Commission considers it appropriate for procedures which directly affect the public to be included in Codes of Practice as also recommended in a number of other jurisdictions. These Codes of Practice should be public documents having the force of law. At present, much police behaviour is regulated by the Police Commissioner's General Instructions to police, which may be changed unilaterally by the Commissioner and which are not widely available.

CHAPTER FOUR: THE EFFECTIVENESS OF POLICE AND POLICE POWERS

This chapter explores the relationship between the powers available to police and police effectiveness and questions the often made assumption that an increase in police power will mean a corresponding decrease in crime rates.

A number of factors militate against making such an assumption. It is not possible to rely upon police records as an accurate measure of actual crime rates; they are at best an indication of police activity which will not necessarily reflect the crime rate. In any event, most criminal activity is unaffected by police, either because it is not reported or is not detected. Further, experiments such as the Kansas City Preventive Patrol Experiment indicate that the style of policing has no significantly differential effect on crime or fear of crime or on attitudes towards police.

Given the lack of empirical evidence to indicate the relationship between police powers and levels of crime and the fact that an increase in police powers often includes as a corollary the reduction of rights of citizens, calls for increased police powers need to be analysed specifically. The problem which such powers are intended to redress should be carefully identified and consideration given to how the power would help to solve it, what alternatives are available, and the costs of increasing powers. It may be that the costs outweigh the benefits.

CHAPTER FIVE: HOW OTHER JURISDICTIONS HAVE REVIEWED POLICE POWERS

Since the 1970s, there has been an increasing concern with the reform of criminal procedure in common law countries. The Commission has drawn from the extensive reviews conducted elsewhere in Australia, England, Wales and Canada on police powers.

While it is recognised that any scheme which may operate in another jurisdiction cannot be simply transposed to Queensland, there are lessons to be learned from the extensive research conducted and the varied practices introduced in other jurisdictions.

The Commonwealth of Australia has commissioned reviews of matters related to criminal procedure, and police powers in particular. Reference is made to the 1975 Australian Law Reform Commission's (hereinafter referred to as the 'ALRC') report titled *Criminal Investigation;* and the review undertaken in 1987 by the Review Committee of Commonwealth Criminal Law (hereinafter referred to as the 'Gibbs Committee'), which published a series of discussion papers and interim reports before delivering its final report. A number of recommendations made by the ALRC were taken up by the Gibbs Committee and the draft legislation appearing in the earlier report by the ALRC formed the basis of the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991.*

Most of the Australian States and Territories have undertaken reviews of a similar nature, including Victoria (in particular, the Consultative Committee on Police Powers of Investigation), New South Wales (the New South Wales Law Reform Commission, pursuant to a reference in 1982), Tasmania (the Law Reform Commission of Tasmania in 1988), South Australia (the Criminal Law and Penal Methods Reform Committee in 1971), Western Australia (the Western Australian Law Reform Commission over a period of time up to 1992) and the Northern Territory (the Police Power Review Committee, which published its reports in 1990).

A comprehensive review of the criminal justice system in England and Wales was conducted from 1978 to 1981 by the Royal Commission on Criminal Procedure (hereinafter referred to as the 'Philips Commission'), which reviewed the criminal process from the start of a police investigation to the trial of the accused. It was on the basis of the recommendations of the Philips Commission that the *Police and Criminal Evidence Act 1984* was ultimately enacted.

The Law Reform Commission of Canada (hereinafter referred to as the 'LRCC') has undertaken a progressive review of a range of criminal justice issues over the past 20 years. The recommendations made in the series of reports formed the basis of a draft consolidated code on criminal procedure prepared by the LRCC and published in 1991.

No review conducted in Queensland has covered the issue of police powers in as much depth as many of these reviews. The Commission draws on the material made available by the research of other jurisdictions in order to present a comprehensive background to the options for reform in Queensland.

CHAPTER SIX: CONSOLIDATION OF POLICE POWERS

There are at present more than 90 separate enactments of the Queensland Parliament which confer powers upon police, each having been drafted to confer powers upon police independently of other enactments. Such an ad hoc approach has resulted in a lack of uniformity and the creation of anomalies across the various Acts. Further, it has led to the undesirable situation where it is not possible for either the police or the public to know the extent of police powers and how and when they may be exercised. This chapter proposes a general scheme of consolidation of police powers for public discussion.

Although the benefits of consolidation are clear (including the facilitation of police training and execution of police duties) there are a number of reservations concerning consolidation which must be considered. Primary among these concerns is that an inappropriate scheme of consolidation may permit unnecessary invasions of civil liberties, for example, by conferring the same invasive powers in respect of both serious and minor offences.

The problems of formulating an appropriate scheme of consolidation are highlighted by the fact that police are conferred with powers not only in a direct manner (under 'first level' legislation), but also in an indirect manner (under 'second level' legislation). The difference lies in the capacity in which the officer exercises the power; in the case of second level legislation, the police officer is acting in some other public capacity. A number of the government departments which administer such second level legislation were concerned that a scheme of consolidation which affects powers of police would also detrimentally affect the powers of departmental officers who also act in these other public capacities.

Powers may be conferred on police officers indirectly in a number of circumstances; where police officers are called to aid other public officers, where they are empowered to exercise the powers of the public officers, where police officers are appointed as public officers by virtue of their office, and where police officers are expressly appointed to some other public office.

The Fitzgerald Inquiry suggested a scheme in which regulatory (as opposed to prohibitive) legislation is administered and enforced by government bodies and departments other than the Queensland Police Service. Such legislation roughly correlates with 'second level' legislation. Accordingly, the Commission proposes that the powers of police who are called to aid public officers should be limited to the protection of life, health and safety of the public officers and members of the public, and the protection of their property. Police powers in these circumstances should not extend to the exercise of the public officer's powers.

There is insufficient data available to make recommendations concerning the other circumstances in which powers are conferred upon police indirectly, but the Commission is of the view that a further review of these powers and the powers of public officers is appropriate.

An ill-considered scheme of consolidation might lead on one hand to the police having insufficient powers to enable them to fulfil their role according to the expectations of the public, or on the other hand, to arming the police with powers which are not justifiable in the circumstances. However, a scheme which successfully takes account of these reservations may be possible.

The Commission suggests that a consolidation of all police powers into one Act is neither desirable nor feasible. Rather, the Commission proposes for discussion a scheme which would be a compromise between a complete consolidation of all police powers into one piece of legislation and the ad hoc approach which has existed to date.

Such a scheme would allow a number of existing provisions to be repealed, reducing the total number of police powers provisions in the various Acts, would provide a central reference point from which the full extent of police powers may be ascertained and would provide a procedural code regulating the exercise of police powers, regardless of the source of the power.

It is suggested that a central police powers Act and supporting legislative framework might operate in the following way:

- it would ultimately be expressed to apply to all circumstances in which police purport to exercise powers, whether in a primary or secondary capacity;

- while it is not possible to bind future parliaments, an attempt should be made to give a police powers Act paramountcy over existing and future legislation when interpreting other Acts;

- the police powers Act would have a series of schedules, listing the Acts of the Queensland Parliament which confer powers on police and which have not been repealed by the enactment of the consolidated legislation;

- the police powers Act would provide a procedural code regulating the manner in which such powers are exercised whatever the source of that power, although it may not regulate the circumstances in which such powers arise.

Including schedules of Acts containing police powers in a police powers Act will require an amendment to these schedules each time parliament passes legislation conferring further powers upon police. This would specifically highlight the police powers issue for both parliamentary and public debate.

Such a scheme would not affect the powers exercisable by other public officers, but would apply to all powers exercisable by police, whether in a primary or secondary capacity.

Although not achieving the objective of completely centralising the law on police powers, a scheme of this nature can be tailored such that concerns for civil liberties and police effectiveness need not be sacrificed in the name of uniformity.

CHAPTER ONE

BACKGROUND TO THIS REPORT

The Commission of Inquiry Pursuant to Orders in Council (hereinafter referred to as the 'Fitzgerald Inquiry') identified a number of major problems within the Queensland Police Service and within the entire criminal justice system in Queensland. The focus and tenor of its report were to ventilate the problems and recommend approaches and mechanisms for dealing with those problems (Fitzgerald Inquiry 1989). The area of criminal law reform was an area identified by Mr Fitzgerald QC as requiring major attention, especially in relation to such issues as prostitution, illegal gambling, the sale of illegal drugs and police powers. It was because of the complexity of these problems and the inability of the Fitzgerald Inquiry to fully explore them that Mr Fitzgerald, recognising that making recommendations without comprehensive research would be as counter-productive as ignoring the problems altogether, referred them to the proposed Criminal Justice Commission (hereinafter referred to as the 'Commission') and more specifically the Research and Co-ordination Division for research.

To date the Commission has produced an issues paper and report on prostitution and an issues paper and report on SP bookmaking. This report is a direct result of Mr Fitzgerald's recommendation that the Commission conduct a comprehensive review of police powers. The Fitzgerald Inquiry (1989, p. 172) recognised the need for objective research, analysis and inquiry into such a complex and emotive issue:

> The problem is that law enforcement involves values and interests which often conflict.
>
> First, there is the desire to preserve and protect equality, privacy, reputation, freedom of thought, freedom of conscience, freedom of expression and religious and political freedoms as well as the rights to personal security, liberty and fair trial which traditionally include the presumption of innocence, a right to remain silent and for serious offences, the right to trial by jury.
>
> Secondly, there is the right of the individual to protection by the state. There is a powerful public interest in opposing the spread of illegal drug trafficking, official corruption and other organised crime.
>
> The apparent conflict between these interests is accentuated by the manner in which the discussion on them is conducted. The debate over the formulation of policies and laws relevant to crime tends to become emotional at the thought of crime on the one hand and the loss of civil liberties on the other.

The resolution of these conflicts was, in Mr Fitzgerald's view, hampered because rational informed deliberation of the issues was often obstructed by generalised assertions, slogans, cliches or personal abuse and stifled by a lack of community information. Sometimes the difficulties and unpleasantness of the matters under consideration inhibited discussion (Fitzgerald Inquiry 1989, p. 172).

The Fitzgerald Inquiry expressed the view that, if we are to achieve the appropriate balance between individual rights and public interest, there is a need for a wider and more accurate understanding based on general research rather than a piecemeal and distorted picture based on the action of particular individuals. With this in mind the Commission embarked upon its review of police powers.

PRIOR EFFORTS TO REVIEW POLICE POWERS IN QUEENSLAND

In Queensland, a major step in the review of police powers was taken in 1976 with the establishment of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (hereinafter referred to as the 'Lucas Inquiry'). It was convened by the Queensland Government in November 1976 to inquire into:

> the enforcement of criminal law in Queensland and in respect thereof to consider whether any changes are desirable in the interests of fair and efficient administration of justice with particular reference to:-
>
> (a) Preventing or inhibiting the fabrication of evidence or testimony by police officers or other persons;
>
> (b) The protection of individuals from undue pressure in respect of the investigation of offences by police officers;
>
> (c) Whether police powers of investigation, interrogation, search, seizure and arrest are adequate to meet the needs of the community in present day circumstances. (Lucas Inquiry 1977, p. 248, Appendix A)

The Lucas Inquiry arose of out a hearing in June 1975 in the Magistrates Court at Southport in the case of *Horgan v. Sieber and Saunders*. In that case a police officer, Constable Davey, gave evidence that a substantial part of the prosecution case had been concocted:

> He claimed that the inspector in charge of the Licensing Branch and some of his senior officers and a constable had conspired to present this false evidence, that they had forged search warrants many months after the searches had taken place and, assisted by the police prosecutor, had engaged in further concoctions during the hearing of the case. This "Southport" case as it came to be commonly called, aroused a great deal of public interest as Mr Davey could support the bulk of his

> allegations by tape recordings he had made secretly when the matters his allegations related to were taking place. The Government promised a public inquiry so soon as it could properly be held.
>
> Davey's evidence was accepted by the magistrate; there was an appeal to the full court which was dismissed. Shortly after this the hearing of a criminal trial commenced in which much of the evidence of the "Southport" case was reagitated. This trial lasted more than six months. It concluded on the 5th of November, 1976, and by Order-in-Council of the 18th of November, 1976, this Inquiry was instituted. (Lucas Inquiry 1977, p. 1)

The Committee comprised three members chaired by Mr Justice Lucas of the Supreme Court of Queensland and sat for 32 days to hear evidence and to receive submissions. The Lucas Inquiry heard evidence and received submissions from a number of people. Organisations which were represented before the Lucas Inquiry included:

- The Bar Association of Queensland
- The Queensland Law Society
- The Queensland Crown Prosecutors Association
- The Queensland Police Union of Employees
- The Queensland Police Officers' Union
- The Police Prosecutions Corps
- The Aborigines and Torres Strait Islanders Legal Service
- The Queensland Council for Civil Liberties

It also heard evidence in public and in private from a number of individuals including police officers.

The Lucas Inquiry sat for two days at the Brisbane prison to hear evidence from prisoners. In addition, inspections of police establishments, watchhouses and the Central Courts were made by the Lucas Inquiry. Although the Lucas Inquiry was not required to inquire into specific instances of police misconduct it did hear evidence of such matters as "it was realised that the object of such evidence was to demonstrate the type of thing that might happen, which it would be useful to bear in mind when the Committee was framing its recommendations" (Lucas Inquiry 1977, p. iii).

Fifty-seven recommendations were made by the Lucas Inquiry including "certain extensions to the power of police and the withdrawal of certain privileges which suspected or accused persons . . . enjoy" (Lucas Inquiry 1977, p. iii). In respect of that the Committee said:

> We are of the opinion that these measures are necessary in order to permit of the proper investigation of crime and the apprehension and conviction of offenders. We have constantly borne in mind the necessity for preserving a balance between the requirements of police investigation and the liberty of the subject, and we have wherever possible suggested the adoption of safeguards to prevent or hinder the abuse of such additional powers that we recommend. (Lucas Inquiry 1977, p. iii)

The 'privileges' of which the Lucas Inquiry advocated withdrawal included the rule that prevents the drawing of an adverse inference from a suspect's silence in response to police questioning.

Other areas to which the recommendations of the Lucas Inquiry were directed included:

- dealing with Aborigines, disadvantaged persons, and children;
- searches of premises;
- arrest;
- identification parades;
- detention for questioning;
- video or audio recording of interrogations;
- street questioning and searching of suspects;
- search of the person;
- roadblocks; and
- search for a person.

The recommendation that the Lucas Inquiry considered the most significant was the electronic recording of interrogations by police. It believed that the recommendations it made for an increase in police power and a reduction in the

privileges of suspects or accused should not be adopted without its recommendations for electronic recording being adopted.[1]

The report of the Fitzgerald Inquiry (1989, p. 48) outlined the fate of the Lucas Inquiry's report in the following terms:

> In a cynical exercise of obfuscation and delay, the Government set up a Committee comprising Lewis, the then Solicitor-General, and the then Under-Secretary, Department of Justice to review the Lucas Report. For practical purposes that was the end of the matter for over a decade . . . The Report . . . was effectively ignored.

Other reviews of the criminal law in Queensland have been conducted, which have made some recommendations impacting upon police powers. One such review was the Inquiry into Sexual Offences Involving Children and Other Related Matters (hereinafter referred to as the 'Sturgess Inquiry') conducted by Mr Desmond Sturgess QC. In the report of that Inquiry, Mr Sturgess, who had previously been a member of the Lucas Inquiry, made a recommendation that the police be given power to take samples from the body of a person who has been arrested. This recommendation included the power to take samples of blood, saliva and hair and to collect from any person including the orifices of the body, any substance or thing provided such collection is of such a nature that it would be unlikely to cause bodily harm to a person fully co-operating with the taking of it. Contrary to the fate of the Lucas Inquiry, that recommendation was in fact taken up by the Government and legislated in 1989; though in a slightly modified form to that recommended by Mr Sturgess (Sturgess Inquiry 1985, pp. 73-74; *Criminal Law Amendment Act 1989*). Mr Sturgess also recommended a modification of the right to silence although this was not accepted and has not since been legislated (Sturgess Inquiry 1985, p. 81).

Overall however, prior to this review it was the Lucas Inquiry which conducted the most extensive review of police powers in a general sense rather than relating to specific issues such as sexual offences.

Although most of the Lucas Inquiry recommendations have not been implemented, there has still been a significant increase in the powers of police and other public officers over the last 20 years. The changes have been made in a piecemeal and incremental manner rather than as the result of a comprehensive review. Appendix 2(i), shows the power of police and other officers to arrest under the various pieces of legislation in force in 1974 and those legislative provisions in force in 1992 which authorise such persons to arrest. Whilst the list does not set out all the circumstances in which the police could exercise that power either in 1974 or in

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1 Despite such a recommendation the electronic recording of interviews in the Queensland Police Service has only been progressively implemented since 1989. The Queensland Police Service *Electronic Recording of Interviews and Evidence Manual* (1989) sets out instructions for such recordings. Dr Monika Henderson, Director of Police Research and Evaluation, in evidence given at the recent Condren hearing stated: ". . . 114 police stations/establishments have been equipped with audio/video rooms and all Criminal Investigation Branches, Stock Squads and Juvenile Aid Bureaus across the State have been supplied with electronic recording equipment" (1989, p. 76).

1992, the mere fact that there are now nearly 20 more pieces of legislation conferring that authority, compared to 1974, would suggest that the powers in that area have increased. Similarly Appendix 2(ii) shows the power of police to fingerprint etc. as at 1974 and at 1992. Appendix 2(iii) showing demand name and address powers as at 1974 and 1992, again tends to confirm the view that powers have increased considerably. Recognising that police powers have developed in this way, a major aim of this report is to introduce some organisation into a scheme of police powers which appears to have developed without an overall plan.

The task is complicated by the fact that police powers have not remained static whilst this review was being conducted. For example, in December 1991, after the process of review by the Commission had commenced, the *Classifications of Publications Act 1991* was passed creating a new type of warrant which allows any police to enter any premises, other than a private home, as often as they like in a six month period and to search for restricted publications. The *Nature Conservation Act* which was passed in early 1992 empowered police officers to act as 'conservation officers' with the attendant powers of investigation and enforcement of those officers. These include powers to stop and search, demand name and address and others.

The new *Liquor Act 1992* was also passed during the term of this review replacing the *Liquor Act 1912*. Some of the many changes made included changes to the police powers provisions.

The *Justice Legislation (Miscellaneous Provisions) Act* was passed in 1992. It changes the position of police in the enforcement of the *Second-hand Dealers and Collectors Act 1984* and others. Provisions which are yet to be proclaimed provide for specified police officers to be appointed as "authorised police officers" under the Act allowing them to exercise certain powers. This is an example of a second level police power (which is discussed in more detail in Chapter Six of this report) - that is a power not conferred directly on police but on certain officers by virtue of their appointment as authorised officers under legislation. The *Classification of Films Act 1991* and the *Classification of Publications Act 1991* which were passed in December 1991 also affect the second level powers of police.

Apart from legislative changes, other reviews have complicated the issue. The Queensland Criminal Code Review Committee which was established in April 1990 to review the provisions of the *Criminal Code*, produced its final report in June 1992. While it recognised that the subject of police powers was under review by the Commission, the Criminal Code Review Committee decided that its review of the Code should also include recommendations on a number of the powers which are currently included in the *Criminal Code*.

The Commission does not expect the state of policing in Queensland to remain static while it conducts its review. However, it will be appreciated that the task of review is somewhat more difficult when the subject of the review is an ever-changing body of law.

THE DEVELOPMENT OF THIS REPORT

This report is the product of several distinct research strategies:

- a review of the literature on police powers in Australia and other common law countries;
- an examination of current laws and their operation in other jurisdictions in Australia and in the United Kingdom, Canada and other countries;
- the development and publication of an issues paper;
- the review and analysis of more than 100 submissions received from individuals and interest groups in response to that paper;
- a public hearing into the issue of police powers;
- a review of legislation administered by departments other than Queensland Police Service which affects police powers;
- a collection and review of anecdotal evidence provided by police officers in various districts throughout Queensland of particular cases where it is claimed that their investigation of offences has been hampered by a lack of police powers;
- numerous meetings and seminars involving police officers, lawyers, academics, social workers and researchers; and
- interviews with persons who have been charged with criminal offences.

These strategies are explained in more detail below.

A REVIEW OF THE LITERATURE ON POLICE POWERS

Throughout the process of review the Commission has had the benefit of existing research on police powers, most of which originated overseas. While there have been a number of papers and reports produced in Australia (especially by Law Reform Commissions) countries like the United Kingdom, Canada and the United States of America have been more prolific in their production of the literature on policing. Much of the literature reviewed provided background to this study so the reference list will include only those materials used in the production of this report.

AN EXAMINATION OF CURRENT LAWS AND THEIR OPERATION IN OTHER JURISDICTIONS

There has been a trend throughout the common law countries in the second half of the twentieth century to review various aspects of criminal law and criminal procedure. The Commission has reviewed the law concerning police powers in a number of jurisdictions which operate similar criminal justice systems. Chapter Five of this report gives an overview of the process of law reform in this area in other jurisdictions. Each of the chapters in Volume II of this report will make reference to the current law operating in those jurisdictions. While the Commission recognises that any scheme which may operate in another jurisdiction cannot simply be transposed to Queensland, there is much to be learned from the varied practices of other jurisdictions.

POLICE POWERS IN QUEENSLAND - AN ISSUES PAPER

The Commission commenced research into the issues involved in the debate on police powers in November 1990, with a view to producing an issues paper on the topic. Shortly after its commencement, the then Police Minister, Mr Mackenroth, announced that legislation consolidating all police powers in one statute would be introduced in Parliament in early 1991 (*The Courier-Mail* 8 Nov. 1990). The Commission was concerned that if the Bill was introduced, the issues paper that the Commission was preparing for public discussion would have a limited impact as the public may perceive that there was little point in contributing to debate when a Bill was already before Parliament. Accordingly, discussions were then held between the Commission and the Office of the Minister for Police and Emergency Services. It was agreed that the Commission, in preparing its issues paper, would consult with both the Minister's Office and the Queensland Police Service in order to ensure that it addressed the issues that the Minister and the Queensland Police Service were intending to cover in their review. The Commission agreed to this consultation process and after completing its draft of the issues paper in April 1991, spent some months consulting on the draft with the Queensland Police Service and the Office of the Minister.

In September 1991, the Commission and the Office of the Minister for Police and Emergency Services jointly released an issues paper titled *Police Powers in Queensland*. It was prepared with a view to generating constructive debate within the wider Queensland community. All individuals and organisations interested in the process of law enforcement, the protection of the community and the preservation of the rights of the individual, were invited to consider the issue of police powers and make their views known through submissions to the Commission. Copies of the issues paper were widely distributed throughout Queensland and to various agencies interstate. They were sent to a wide range of community interest groups including legal aid offices, community legal centres, prisoners legal services,

a number of government departments, the Queensland Council for Civil Liberties, a number of universities, Aboriginal community councils and many other individuals and agencies. All council libraries throughout Queensland were also sent a copy, as were all members of Parliament. Copies were also sent to all police stations throughout Queensland.

The issues paper was made available to members of the public who requested it and advertisements inviting people to obtain a copy of the paper were placed in *The Courier-Mail* on 28 September 1991 and 23 November 1991, in *The Sunday-Mail* on 29 September 1991 and in the following regional newspapers on similar dates:

- *Mackay Daily Mercury*
- *Maroochydore Sunshine Coast Daily*
- *Mount Isa Star* (27/9/91 and 22/11/91)
- *Maryborough Chronicle Queensland*
- *Bundaberg News Mail*
- *Rockhampton Bulletin*
- *Cairns Post*
- *Toowoomba Chronicle*
- *Gold Coast Bulletin (Southport)*
- *Townsville Bulletin*
- *Ipswich Queensland Times*

It was also advertised nationally in the *Weekend Australian* on 23 November 1991. Two thousand four hundred issues papers were distributed, including those specifically requested by members of the public who had read the advertisement.

The closing date for receipt of written submissions was originally 10 January 1992, but was later extended to 10 February 1992, due to requests from a number of individuals and organisations. The extension was advertised in the above papers on the weekend of 25 and 26 January 1992 (24 January 1992 in the *Mount Isa Star* and 18 January *Weekend Australian*). By the formal closing date the Commission had received over 90 written submissions dealing with many of the matters raised in the issues paper. In total 111 submissions have been received on various issues relating to police powers.

Issues concerning both the need for and usefulness of existing police powers and the need for and usefulness of any new and/or additional powers were raised. Members of the public were urged when considering these issues to examine them as part of a system, being aware that the granting of one power to the police may do away with the need for another power and that the removal of one power might necessitate the granting of another. It was pointed out that, while many of the issues raised might appear simple at first glance, they could have far-reaching consequences for other parts of the criminal justice system. Every effort was made to try and match the interrelationships, but it was a difficult task because of the multitude of issues and their complexity. Readers of the paper were urged to bear that in mind.

The issues paper did not attempt to be an exhaustive statement of the police powers that currently exist in Queensland or in other jurisdictions. Nor did the extent of discussion of each topic raised indicate any measure of its relative importance. The paper addressed the following topics:

- consolidation of police powers;
- the power to demand name and address;
- move-on power;
- voluntary attendance;
- the power of arrest;
- post-arrest power of detention;
- search of persons, vehicles and taking of samples;
- identification procedures;
- search warrants;
- electronic surveillance;
- indemnification of witnesses;
- the use of entrapment/agent provocateur; and
- the need for a comprehensive review.

In relation to each of those powers the community was asked to consider the following questions throughout the paper:

- Is there a demonstrated need for the use of the power?
- If there is a demonstrated need, how serious must be the crime to justify the use of the power?
- At what stage of the investigative process should the power be available?
- Who should be able to authorise the use of the power - a senior police officer, judicial officer etc.?
- What procedures and safeguards should accompany the granting of the power?
- What should the consequences be of a failure to comply with the procedures set down?

In a more general sense the issues paper demonstrated that the topic of police powers was a complex one which had significant ramifications for our whole criminal justice system. It pointed out that piecemeal changes made to individual statutes in the past led to the creation of a complicated system of police powers. It also suggested any future action should deal with the problems in a more holistic manner. The issues paper therefore invited members of the public to consider other issues such as:

- the extent to which police are accountable for the exercise of the powers;
- the establishment of an on-going system to monitor the effectiveness of any increase in power;
- whether legislation conferring increased powers, or at least specific sections of such, should be subject to a sunset clause, limiting its operation to a specific time period during which the use of the power can be monitored to see whether it has achieved the aims sought;
- whether the legislation conferring powers on the police should be consolidated; and
- the financial implications of any proposed changes.

PUBLIC SUBMISSIONS

As was expected, the written submissions received from various individuals and organisations varied greatly in length and intricacy. Some were little more than a paragraph or two outlining the person's opinions on one aspect of police powers whilst others were pages long addressing all aspects raised in the issues paper and more. Those public submissions that were not marked confidential were made available in the Commission library for perusal by any member of the public. A list of those individuals and organisations who made non-confidential submissions to the Commission is attached at Appendix 4.

The substance of the public submissions will be discussed in greater detail in the various chapters of this report dealing with specific powers, however it is useful to make some comment here. In few areas was there clear consensus among those who wrote to the Commission. Nonetheless, one of the areas on which most people agreed was the need for a clarification and simplification of police powers in Queensland. In general terms it was recognised that there was a need for a comprehensive review. As one person wrote:

> The time has come when the powers and responsibility of police should be consolidated into one simple piece of legislation. This will also make the general public aware of police powers. It would simplify policing and save valuable time.

Quite a number of submissions made general comments in relation to police powers. One member of the community wrote that:

> I believe that the ROLE of POLICE in QUEENSLAND is to:-
>
> "Protect the lives and property of every Decent Citizen from Criminal Acts; whilst upholding the Democratically PROPER LAWS which are designed for the PEACE - - WELFARE and GOOD GOVERNMENT of QUEENSLAND."
>
> Therefore I submit:-
>
> "Our POLICE must have all the NECESSARY POWERS, with the LATEST TECHNOLOGY and EQUIPMENT, so as to ENSURE CRIME WILL BE DETERRED, DETECTED; also CRIMINALS APPREHENDED and BROUGHT TO JUSTICE, to be justly dealt with." (Capitals in original)

In contrast, another submission opposed any increase in police powers on the basis that when the current state and status of police powers throughout Australia are examined, the position has now been reached where a halt should be called to the imperceptible but inexorable increase in police powers in relation to a whole host of agencies exercising compulsive police type powers (Queensland Council for Civil Liberties 1992). Another suggestion was that police be given substantial increases

in their powers and these powers be used in accordance with rigid guidelines and when powers are misused or abused, the police officer responsible be punished in accordance with set procedures.

Many people who made submissions argue that police should be given more powers and there should be 'appropriate safeguards' put in place to ensure that the excesses revealed in the Fitzgerald Inquiry are prevented. However, few submissions outlined any details of what were considered to be 'appropriate safeguards'.

A popular suggestion was to have more police walking the streets and for them to have a more visible police presence within the community.

Many of the submissions dealt with the relationship between the police and the public and whilst they did not all believe that the relationship was ideal, there was a general consensus that it was an important issue. One of the submissions suggested there was no need for a significant extension of police powers, but there was a serious need for a radical change in the attitude of police, especially in the way they interact with the public. The view was expressed by some groups that an increase in police powers would only widen the rift between the community and the police (Juvenile Advocacy Service 1992). On the other hand, another member of the public pointed out that if society wishes to survive with all its basic freedoms intact it is up to members of the community to support the police to the hilt since they are society's protectors.

Another point that was obvious throughout submissions was that many people talked about the balance between the rights of innocent citizens and the rights of the offender. Many people believe that the offender should have no rights and that the emphasis should be on protecting innocent citizens and society from offenders. There was however, no distinction made by these people between those suspects who are offenders and those who are not. It was rarely recognised in submissions that many persons to whom the police speak and against whom they exercise coercive powers are not offenders but merely suspects. To many people, including a number of police officers to whom we spoke, the word 'suspect' is synonymous with 'offender'.

PUBLIC HEARINGS

The Commission conducted public hearings into police powers on 10 and 11 June 1992. These hearings were designed to provide members of the public with an opportunity to hear some of the arguments for and against proposed changes to police powers in Queensland. Selected individuals and representatives of organisations who had made submissions to the Commission in response to the issues paper were invited to speak at the hearing. Individuals were allocated 30 minutes to speak and were

asked to expand upon or clarify any areas included within their written submissions which they felt were important. Organisations were allocated 40 minutes for the same purpose. Each speaker was then asked questions by a panel of Commissioners and officers of the Commission. A number of the questions asked by the panel were provided prior to the hearings to enable the speakers to prepare their answers. The panel also asked questions on the day which arose out of matters addressed in the oral submissions. The following is a list of those persons and, where appropriate, the organisations which they represented at the public hearing:

- Senior Sergeant J.K.V. O'Gorman (Queensland Police Service Union of Employees)
- Mr L. Moynihan (Logan Youth Legal Service)
- Ms S. Inglis / Mr I. Davies (Victims of Crime Association)
- Mr J. Ward (Queensland Advocacy Incorporated)
- Ms A. McMillan (Solicitor) / Ms M. Burgess (Solicitor) (QAILS and Prisoners Legal Service)
- Mr J. Murrell (Individual)
- Mr M. Shanahan (Barrister) (Legal Aid Office (Queensland))
- Mr J. Robertson (Solicitor) (Queensland Law Society)
- Mr R. Mulholland QC (Queensland Bar Association)
- Mrs E. Daniels (Individual)
- Mr B. White (ATSIC - Aboriginal and Torres Strait Islander Commission)
- Mr T. O'Gorman (Solicitor) (Queensland Council for Civil Liberties)
- Acting Commissioner D. Blizzard (Queensland Police Service)
- Mr L. Gugenberger and Mr A. Leitch (Queensland Watchdog Committee)
- Dr D. Dixon (Individual)

The hearings were advertised in newspapers and were attended by approximately 80 people over the two days. They received considerable media coverage which greatly assisted in generating public interest in the issues. The Commission allowed a further three weeks after the conduct of the hearings to receive further submissions arising out of matters that had been raised. A further 11 submissions have been received to date.

During the hearings, the opportunity was given to members of the panel to put to the various speakers, the views of other individuals or organisations who might have been opposing those of the speaker. The responses to this greatly assisted the Commission's consideration of the issues. It enabled the Commission not only to deal with the views of individuals and organisations represented in their written submissions but any comment they may have had in relation to alternative proposals.

Tape recordings of the public hearings were made available to members of the public for a small fee. This enabled those persons unable to attend the hearings to be apprised of the various views on such a contentious issue as police powers.

A broad range of issues were canvassed by the various speakers at the hearings. Senior Sergeant O'Gorman, representing the Queensland Police Service Union of Employees, focused upon the need by police for some increased powers such as the power to demand name and address of a suspected offender and the power to detain a person who the police officer suspects has committed an offence. The Police Union believes this would enable the officer to make some further inquiries before arresting or charging the person. Senior Sergeant O'Gorman also pointed out some of the inconsistencies in the current law relating to police powers.

Mr Moynihan representing the Logan Youth Legal Service pointed out that increasing police power would not stop offending. He argued it would have more adverse consequences such as encouraging dislike, distrust and fear of police in juveniles. In his view it would result in less co-operation being provided by members of the community with the police and this would have a flow on effect, resulting in further offences such as resisting arrest. He focused on the vulnerability of young people who are subjected to the use of police powers and said that there was a need to create an environment and a society where people were willing to give information to police.

The representatives of the Victims of Crime Association pointed out that the victims of crime were generally forgotten and ignored in the whole process. In their view police resources were inadequate and needed to be increased to enable police to address the needs of victims. The Association considered the priorities should be, firstly for the police to prevent crime, secondly, to deal with victims, and third, the apprehension of offenders.

Issues raised by the Victims of Crime Association relating to police resources and the education and training of police were also raised by Mr Jeremy Ward who represented Queensland Advocacy Incorporated. He explained some of the difficulties encountered when police deal with people who have a disability. Police may not always recognise that some persons are disabled, such as those who are hearing, visually or mentally impaired, and this may result in problems of control for the police. He pointed out that it is very difficult to legislate to provide safeguards for those groups and any legislation is only of use if the police recognise that a person is a disabled person. A major issue mentioned by Mr Ward was the

very complex area of the issue of consent for persons with disabilities. He expressed a view that was endorsed by many others, that whoever argues for an extension of police powers has the onus of proving that the current powers are not sufficient if they are backed up with appropriate resources.

Mr Ward also pointed out that issues concerning people with a disability were becoming more important as a result of the move towards integration of disabled people into the wider community. His organisation supports any proposal for a process whereby changes to police powers would be subject to ongoing monitoring and review.

Ms McMillan and Ms Burgess of the Queensland Association of Independent Legal Services and Prisoners Legal Service respectively asked how the community is going to benefit from an increase in police powers. They expressed concern as to what extent the safeguards that may be imposed could be enforced and questioned the ability of many of their clients to insist on these safeguards. They expressed concern that until there were sufficient resources to enable all people to have access to legal advocates, safeguards which may be imposed may not be effective.

Mr Murrell, a citizen of North Queensland spoke of the right of everyone to be protected in our community. He said that there was much talk about the rights of the suspect and that in the flurry of trying to protect the suspect's right, the victim was forgotten.

Mr Shanahan of the Public Defender's Office expressed his view that many of the proposals put forward by the police were aimed at obtaining more confessions and that already in our criminal justice system there is too much reliance on confessions. In his view, increased resources may be more useful than increased powers. He also referred to a matter expressed earlier that it is an illusory protection to inform a person of his or her right to legal representation unless provision is made for legal representation to be provided to all parties. He outlined a system whereby powers in relation to minor offences would differ from those in relation to serious offences and it was only in the latter category where the more extensive powers should be given. He did agree that a power to demand name and address could be a useful addition to the police. However, he was of the view that such a power should not extend to witnesses.

The Queensland Law Society was represented at the hearings by Mr John Robertson who spoke of the need for the onus to be on those who are seeking more power to justify their claims by actual case studies. He believed there was a need for an independent bureau of crime statistics in order to maintain some objective evidence of various types of criminal offences and the impact of police powers on those offences. His organisation agreed with the need to consolidate police powers especially in terms of standardising the powers of arrest. Much emphasis was placed on the need for safeguards including tape-recording of suspects from the point of first contact.

The Queensland Bar Association, represented at the hearing by Mr Robert Mulholland QC, did not favour any change to police powers except to require the police to record interviews at least for serious offences. However, the Association did concede that if some change was to be made, its preferred option was in areas such as powers of detention and searches. It also supported codification of police powers and spoke of the need for a proper duty lawyer scheme.

A representative of the Aboriginal and Torres Strait Islander Commission, Mr White, gave his observations on the relationship between police and the Aboriginal communities in North Queensland. He was of the view that the most effective approach was to encourage community meetings between representatives of the Aboriginal and Torres Strait Islander communities and the police and that any increase in police power would widen the gap in community relations between Aboriginal and Torres Strait Islanders and the police. Mr White also said that the circulation of an issues paper was not a meaningful way to disseminate information to the Aboriginal and Torres Strait Islander communities nor the way to receive a response from them. He believed there was a need to obtain advice from a broad group of Aboriginal and Torres Strait Islanders, namely urban, Deed of Grant in Trust communities and other regional representatives. He also spoke of some of the ways that law enforcement affects Aboriginal and Torres Strait Islanders which are different from the ordinary community, especially where there is conflict with traditional laws. There was a need for a flexible approach to police powers in Aboriginal communities because communities often varied in their manner of regulation and control.

Mr Terry O'Gorman spoke on behalf of the Queensland Council for Civil Liberties of the significant but imperceptible increase in police powers that has occurred over the last 10 to 15 years. The Council put the view that the call for an increase in power was the net effect of a failure to provide adequate resources for the police. He was concerned that once you give the police a power you can never take it away and therefore much care had to be taken before increasing any powers. In that same context the Council would support a consolidation of police powers as long as it did not result in an increase.

The Queensland Police Service official view was presented by the then Acting Commissioner Blizzard who addressed the community's expectation of police and said that if it expects them to do the job it must give them the proper tools. In his view this was not a question of resources but was a question of appropriate powers. Acting Commissioner Blizzard also argued strongly for a consolidated package of authorities which would cover all aspects of police investigations into breaches against the law. This, he pointed out, should replace the present ad hoc situation, where authorities have haphazardly been conferred upon the Queensland Police Service with little consideration of the relevance to the Queensland Police Service.

Speaking on behalf of the Queensland Watchdog Committee were Mr Gugenberger and Mr Leitch. Mr Gugenberger outlined the Committee's view of an acceptable approach to policing as being one of social control rather than the traditional para-

military model of policing. He argued that in order for an officer to carry out policing in a social context there must exist a willing co-operation between the public and the police. For this to transpire, Mr Gugenberger suggested police needed more education on aspects of modern society. Such an educational program should highlight the cultural, ethnic, age and gender factors of the particular community an officer is to police. Additionally, Mr Leitch argued for the recognition of rights and compensation for the citizen in areas of identification procedures such as fingerprinting, and the power of the Queensland Police Service to maintain these records.

The final speaker at the hearing was Dr David Dixon[2] who has been doing research on police powers for over five years in England and more recently in New South Wales. An important point that he made, having sat through the hearings for the two days, was the lack of basic information on which the review of police powers had to be conducted. In his opinion a great deal of what had been presented was rhetoric and euphemism rather than any kind of empirical reality. He spoke about the apparent complacency of members of the legal profession who expressed the view that it was better to leave police powers as they are. In his view that would not achieve the desired result of a properly regulated scheme, especially with respect to detention for questioning. Dr Dixon also spoke about the need to provide substance to those legal rights of citizens; for example, the right to have access to a lawyer. He believed it should not be enough just to say that people have a right to a lawyer, there is needed some kind of scheme which will provide that legal advice to people in police stations.

At the conclusion of the public hearings, the Commission was still very much aware of the need for further information about the use of particular types of police powers.

POLICE POWERS IN LEGISLATION ADMINISTERED BY OTHER GOVERNMENT DEPARTMENTS

Chapter Six of this report addresses the very difficult issue of consolidation of police powers. It explains that many of the powers exercised by police are not in one piece of legislation that is administered by the Queensland Police Service. In fact, police powers are dealt with in a wide range of different Acts that are administered by other government departments. Various ways in which these powers are conferred on police are explained in more detail in that chapter. For present purposes, suffice it to say that the Commission felt it important to endeavour to determine the frequency with which those powers were used and to assess whether they are of continuing relevance to police activities.

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2 Dr David Dixon became an external consultant to the Commission after these public hearings; material prepared by Dr Dixon has been adapted in Chapters Two and Four of this volume.

The Commission wrote to the Directors-General of the various departments which controlled provisions relating to police powers and asked the departments to advise the Commission of the number of occasions during the previous 12 months that police had relied on particular legislative provisions and to provide comments on the necessity for preserving those powers. The response by the departments was encouraging and the results of that review are incorporated in later volumes of this report.

The Commission also wrote to the Commissioner of Police to ascertain whether the Queensland Police Service could provide information on the use of those powers. In order to minimise the effort and resources required by Queensland Police Service in collating the information, this was requested on only a portion of the legislative provisions. This included a total of about 40 sections from 15 different Acts.

The Queensland Police Service advised the Commission that the advice of operational police was that the specific use of many of these powers would not generally be documented other than perhaps in police notebooks. Accordingly, it was virtually impossible to collate the information.

The Queensland Police Service raised the issue at the September Command Conference and the Assistant Commissioners agreed to seek advice within their regions as to what information might be available and forward it to the Commission. The Commission received responses in respect of a number of districts within the various regions, although it was apparent that it was not possible for the Police Service to provide complete data on the use of the powers conferred by the various Acts. (The Service noted that it was unlikely that other Police Services in Australia would record such information especially as it related to powers of police acting in their capacity as authorised officers under an Act.)

ANECDOTAL EVIDENCE FROM POLICE OFFICERS

In its written submission to the Commission, the Queensland Police Service expressed the view that from time to time investigation of offences was constrained or frustrated by limits on existing police powers or the lack of sufficient powers. The then Acting Commissioner Blizzard also made reference to this in his oral submission on behalf of the Queensland Police Service at the public hearings held by the Commission and stated there was a great deal of anecdotal evidence to support this assertion. The Commission asked to be provided with that anecdotal evidence which it hoped would identify specific instances where police were hampered in their investigations. The Commission wrote to the Assistant Commissioners of each region asking for one division in their region to keep records

for a month of the specific instances where investigation of the following specified offences was hampered by lack of police powers. The offences specified were:

(i) homicide;

(ii) rape;

(iii) serious sexual offences;

(iv) robbery;

(v) serious assault (assault occasioning grievous bodily harm);

(vi) unlawful wounding; and

(vii) drug offences.

Such serious crimes as listed above are relatively rare when compared to total number of crimes in Queensland. Yet it can be understood that members of the public are most concerned that police be able to adequately investigate such crimes. This anecdotal evidence is therefore important in enabling the public to be informed of the difficulties police may face in carrying out their duty.

Officers were also invited to provide to the Commission details of any previous investigations of any serious offences in which they had in some way been constrained or frustrated by limits on existing powers or a lack of police powers. This information has been supplemented by a number of instances detailed by the operational police with whom Commission staff have spoken.

If it is accepted that the onus is on police to justify the need for further powers, the importance of this information in this review will be apparent. Whilst it does not provide any statistical foundation for interpretation or application across the state, it does give a glimpse of the problems perceived by police in their every day endeavours to deal with crime and to police the community. The Commission recognises of course that this information represents only the police officer's view of events and has borne that in mind in its use of the information provided.

DISCUSSIONS WITH POLICE, LAWYERS, SOCIAL WORKERS, ACADEMICS ETC.

In order to be as well informed as possible prior to making any recommendations, officers of the Commission have engaged over the past 12 months in a series of formal and informal discussions with a number of different people. Approximately 70 police officers from various ranks and various stations throughout Queensland have had discussions with officers of the Commission on a confidential basis in

order to provide their views and their experiences with the operation of currently existing police powers. These have been most informative and the Commission thanks those officers who took the time to speak to Commission staff.

A number of criminal law practitioners have also engaged in further discussions with Commission staff as have a number of people who work with Aboriginal and Torres Strait Islander community members. Commission staff have also spoken with practitioners, police and magistrates in other jurisdictions. Staff members from all Divisions of the Commission have also contributed to the ongoing debate.

INTERVIEWS WITH PERSONS CHARGED

During the course of the review it became apparent that the Commission had received the views of a wide range of individuals and organisations including lawyers, police officers, Council for Civil Liberties and many others, but there had been very few submissions from persons who were actually at the receiving end of police powers. Accordingly, the Commission decided to interview persons who had been charged with criminal offences about their experiences and their knowledge of the criminal justice system. This was done by approaching persons who were appearing at a number of selected Magistrates Courts as near as possible to the time when they had been charged.

Prior to commencing the interviews the Commission sought the approval of the Chief Stipendiary Magistrate and the then Department of Justice (now the Department of Justice and Attorney-General). The Commission also advised the Commissioner of Police.

People approached at the courts were advised of the purpose of the interviews, that their participation was voluntary and that no identifying particulars would be sought from them. Thirty-six people agreed to be interviewed. Whilst the Commission recognised that these people represented only those who had actually been charged with offences and who may therefore present a biased view of their dealings with the system and the police, it enabled the Commission to at least get some idea of people's individual experiences with police and their knowledge of their rights.

The interviews revealed a fairly widespread lack of knowledge by the interviewees about their rights and about police powers. There was a marked difference in the knowledge of people who had previous dealings with police and those whose first contact with the police resulted in their present charges. It was interesting to note that many of those who were aware of their rights did not exercise them. Many of these who chose not to exercise their rights preferred to co-operate with the police as they perceived some advantage in doing so.

One person who was charged with a number of drug offences was asked to accompany police to the station. He agreed to do so because if he did not, he said, the police would have arrested him. If arrested, the police would have been very limited in the extent to which they could question him.[3] Thus the only information he would receive from the police about the alleged offences would have been contained in the Bench Charge Sheets. By agreeing to attend the station, the person then engaged in a record of interview with the police. He consistently responded to questions saying that he wished to seek his solicitor's advice before answering. At the end of the process he was arrested and charged but at least he had a greater knowledge of the police allegations than would have been the case if he had refused to attend voluntarily and had been arrested.

On the other hand many lesser informed people were unaware they could refuse to go to the police station unless they were arrested. When asked why they attended at the request of police, they frequently replied that they thought they had no choice. When asked if they had actually been arrested at any stage many of these people were unsure. Where people said that they had been arrested, many were unsure of exactly when that had occurred.

Similar deference to the authority of the police was obvious in many cases where police requested the name and address of the person or asked to carry out a search.

THE NEED FOR FURTHER RESEARCH

Whilst the above indicates the broad range of areas in which the Commission sought to research issues concerning police powers, much of it simply revealed the need for far greater research to be conducted in the area before any conclusion could be made. Throughout the body of this report there will be a number of areas where the Commission has recommended that further research be conducted. It is important therefore that records be kept by police officers and other people involved in the criminal justice system so that any further reviews of police powers can be based on empirical evidence. Wherever possible in its recommendations, the Commission has outlined the type of records that it believes ought to be kept in order to make the ongoing evaluation and monitoring of police powers far more effective.

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3 The rules which limit the extent to which police officers may question a person in custody will be covered in some detail in a forthcoming volume of this report.

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CHAPTER TWO

THE NATURE OF POLICE POWERS*

This chapter examines the nature of police powers. The focus is not on specific powers (although some are discussed as examples) but rather on 'police powers' as a concept. Issues discussed include the relationship between powers and duties, the role of powers in policing practices and the legal concept of police powers in response to concerns about crime and disorder. The argument cannot fully, or even usefully, be considered in legalistic isolation. What a power means is usually defined (at least in part) by how it is used. In this sense, police powers and policing practices cannot be neatly distinguished.

Police powers are not coterminous with the police. In some instances, they long predate organised police forces.[4] In certain circumstances, they are available for use by people who are not police officers, both private citizens and state officials. Meanwhile, many police duties, responsibilities and activities are not facilitated by the provision of specific powers. The focus here is the coercive powers which are available to police officers, and the use thereof.

WHAT ARE POLICE POWERS?

As a legal concept 'police powers' are simply exemptions from criminal or civil liability for what otherwise would be unlawful acts. For example, a search of a person constitutes an assault unless a power is provided:

> It is in this sense, then, that search and seizure laws confer powers. More particularly, they confer *exceptional* powers, powers to do what an individual is, in ordinary circumstances, forbidden to do . . . Rules defining police powers have a specific function . . . they set out exceptions to the ordinary prohibitions against intrusions upon an individual's person, private domain and possessions. While this function is a critical one it is also in a sense quite modest. Our legal tradition does not purport to devise permissible enforcement strategies or define situations in which intrusions *should* be performed. Rather it establishes when intrusions *may* be performed, by requiring that when law enforcement officers determine to pursue an investigation through an intrusive action, they justify the intrusion, obtain the proper authorisation and perform it within the limits set down in the law. (LRCC 1983, pp. 10 & 122)

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* This chapter was adapted from material prepared by Dr David Dixon; an external consultant to the Commission.

4 For a detailed history of policing and police powers see Appendix 1.

If police officers do not have authority, their actions can be lawfully resisted just as if they were private citizens infringing another's interests. The result can be seen in cases in which people have been acquitted of assaulting police officers who have been found not to be acting within their duty searching, detaining or touching (e.g. *Pedro v. Diss* [1981] 2 All ER 50). The court's discomfort with such results is evident in attempts to avoid the conclusion that the officer was not acting in the course of duty: see e.g. *Donnelly v. Jackman* [1970] 54 Cr. App. 229). There is nothing special about the powers of the police from this perspective. Police powers are not conceptually distinct from, for example, a citizen's right to make arrests or the powers of a wide range of public officials (immigration officers, welfare officers, revenue officers, public utility officials) to enter property or to arrest in certain circumstances:

> If a police power exists and is exercised, it transforms legal relations between state and individual. A peace officer who arrests an individual puts that individual in lawful custody, from which escape is an offence, and deprives the citizen of a right to resist what would, without the authority to arrest, amount to an unlawful assault. (LRCC 1985, p. 2)

The transformation process is not all negative: arresting a citizen may activate certain rights (e.g. to publicly funded counsel) which a person who merely 'assists officers with their inquiries' may not possess.

A doctrinal corollary of this approach to police powers is that they should be clearly defined and specific, so that police and citizen alike know what is, and what is not, authorised. This is a traditional account of the rule of law, usually associated with A.V. Dicey (1902). As will be shown below, the considerable distance between concept and legal reality limit the validity of this approach.

The police do not need to have legal powers for everything that they do. Like other citizens, they may do anything that the law does not forbid. Indeed, most police work entails duties which do not involve the use of coercive powers:

> the police (contrary to popular mythology) do not mainly operate as crime-fighters or law-enforcers, but rather as providers of a range of services to members of the public, the variety of which beggars description . . . (C)rime fighting has never been, is not, and could not be the prime activity of the police. (Reiner, R. 1985, pp. 111-112 & 171, and see 111-123 passim for a good summary of the police role which avoids simple dichotomies of 'force' and 'service')

Powers are only necessary when a person's identifiable interest is to be infringed. The common law's definition of such interests is limited. For example, a man whose telephone was being tapped sought an injunction against London's Metropolitan Police (*Malone v. Metropolitan Police Commissioner* [1979] Ch. 344). This was refused on the ground that the telephone tapping did not involve any trespass or other unlawful act: the court could identify only the Post Office's property interest

and not the man's interest in privacy, communication or the message communicated. It was for Parliament to legislate for the controls on telephone tapping which are needed to satisfy obligations under the European Convention on Human Rights. (This unwillingness to extend citizens' interests contrasts with extension of police powers by English courts in recent times: see below. The Australian High Court has been more concerned to preserve rights: see e.g. *Williams v. R* [1987] 66 ALR 385 on pre-charge detention questioning and *Petty and Maiden v. R* [1991] 65 ALJR 625 on the right to silence.)

The limitations of a narrow legal conception of police powers are clear. Practices of arrest and search by organised police forces are much more than mere exemptions from legal liability:

> The . . . proposition that the police should not be subject to any special restrictions that don't apply to other people . . . is absurd, because the power (both legal and physical) that the police have makes them especially dangerous *as well as* useful. Acting within the state apparatus, officials can do things to citizens which are quite different in character from the sort of things citizens can do to one another. (Waldron, J. 1990, p. 41, original emphasis: the question of resolving this 'absurdity' is considered below)

In consequence, any useful discussion of police powers must break out of the limits set by legalistic definitions.

Waldron's indication of the ambivalent nature of police powers reflects a discomfort which police officers often display in using the term 'police powers'. In discussions in the context of this report, several police officers have bridled when asked about aspects of their 'powers'. Similarly, the Queensland Police Service, in its submission to the Commission, prefers to speak of "policing authorities" rather than powers (Queensland Police Service submission 1992, p. 1). Such use of euphemisms is not uncommon in policing: they are used to present what is thought to be a more favourable aspect, as in the current English police fashion of describing charge rooms and cells as 'the custody suite'. In the present case, the sensitivity is misplaced: the use of the word 'powers' in the context of policing should have no pejorative implication, and 'powers' is a standard usage in legal discussions of public bodies.

The Malone case is a good illustration of another sometimes problematic consequence of conceptualising police powers as exemptions from prohibitions. In legal systems such as Australia and the United Kingdom which lack constitutional measures such as a Bill of Rights, the relevant prohibitions are those specified in tort and particularly, the criminal law: Malone's investigators did not need to consider the possibility that their actions might be unlawful by virtue of transgressing a constitutionally protected right to privacy. (Although they should have considered the European Convention on Human Rights: see *Malone v. UK* [1984] ECHR series A, vol. 82). They were simply doing something which was not

unlawful. By focusing on prohibitions, this legal tradition sees the non-prohibitive as a legal vacuum. Activities within it are private rather than public, as the discussion of 'consent' later in this chapter illustrates. The creation of a new offence simply reduces the area of the vacuum.

Limitations of this legalistic way of conceptualising police powers and criminal law are apparent: the legal vacuum has social and political substance. When people object that a proposed extension of police powers or criminal law would infringe their 'rights', this is not an expression of legal unsophisticatedness. These kind of rights are much less clear than those specified in constitutional documents, but they are none the less significant. At issue here are understandings of the limits of acceptable state intervention which are historical products of social and political disputes and negotiations. When Malone complained that his right of privacy was infringed by telephone tapping, the implicit reference was to a social and political understanding of the citizen's relationship with the state. This originated in the liberal democratic settlement which emerged from the social, political and legal conflicts of the seventeenth and eighteenth centuries. The potency of this concept of rights did not lie in its legal or even historical accuracy. For example, it relied on an account of the 'free-born' Anglo-Saxon Englishman and his subjugation to the 'Norman Yoke' which was largely mythical, but which was highly significant in the democratic movements of the eighteenth and nineteenth centuries (Hill, C. 1954; Thompson, E.P. 1963: Chap. 3).

TYPES OF POLICE POWERS

This section presents an overview drawing on police powers in England and Wales, Canada and Australia. While comparative material is useful, it is again important to note differences in national (and state) developments. As noted above, higher Australian and Canadian courts have been less willing than those in England and Wales to extend police powers (LRCC 1983, p. 47). Similarly, there are important differences in the extent to which criminal procedure has been legislated and codified.

Statute

As Appendix 1 shows, a major source of police powers is legislation prohibiting an activity. While the primary focus of such legislation is the substantive criminal law, its corollary is an extension of police powers. This may result either explicitly when a statute provides a special power facilitating enforcement of a prohibition or, more commonly, implicitly when a statute, for example, designates an activity as an arrestable offence. Again, this designation may be explicit or implicit, for example, by setting a penalty which is above the level at which certain police powers become available.

The distinction between offence and power is sometimes overlooked (or is practically irrelevant). A good example here is the controversy in New South Wales in the late 1970s and 1980s about public order laws. At issue were 'offences' (notably, offensive language and conduct). However, the debate was conducted largely in terms of 'powers': police argued that their powers had been reduced when an offence had been statutorily amended and that they should be restored. (This legislation did include some powers, but these were not at issue in the controversy). Similarly, the 1988 legislation which 'restored' police powers:

> contains only a single new provision that deals with police powers, allowing police to seize liquor from minors in a public place and administer a caution . . . The new Act does, however, expressly re-criminalise offensive language, further restricts soliciting for the purposes of prostitution, and increases the penalties for most offences. (Brown et al. 1990, p. 965)

The implications of this example are:

> First, substance and process are so inextricably bound up, that to 'increase police powers' may actually mean 'to create substantive offences which make it easier for police to charge people' . . . Second, the enormous discretion which is vested in police operating this system on the streets is bounded as much or as little, by the prevailing ethos as by the 'requirements' of law. The 1979 and 1988 legislative shifts only marginally impinged on formal police powers. Of considerably more importance were the signals given to police and magistrates by those changes. (Brown et al. 1990, p. 965; see also Egger, S. and Findlay, M. 1988)

The linking of offences and powers has been influenced by the way in which statutes are written. As the examples cited in Appendix 1 demonstrate, the favoured style of legislative drafting in the nineteenth century was to define offences very specifically and minutely, rather than the broad generic drafting now favoured, powers were attached to (or implied from) prohibitions. Similarly, when a perceived need for a power arose, it would be tagged on to other legislation. As in the case of Canadian search powers, the result was "an assortment of powers" which was:

> the product of a growth that has occurred in piecemeal fashion over the past 300 years. The tendency for legislators has been to enact a search power and append it to a particularized enactment when and where the need for one has been evident. Consequently, search and seizure powers have been regarded individually, as incidents of larger enactments, rather than collectively, as incidents of a category of power . . . (P)rocedural rules governing search have followed the tradition of English criminal law; they have not developed so much as accumulated. (LRCC 1983, p. 8)

This approach was a corollary of the definition of powers as exemptions which has been discussed above. As Leigh suggests:

> English law insisted strongly that invasions of liberty . . . had not necessarily to be grounded in positive law . . . Government did not seek to create a comprehensive framework of police powers; instead, powers were granted on an ad hoc basis, sometimes grudgingly, sometimes as with the old Vagrancy Act, entirely too readily, but generally with some reference to some demonstrable need. Unfortunately, and perhaps inevitably, the particular settlement arrived at became both cumbersome and in many respects illiberal. (Leigh, L.H. 1985, p. 33 & 35)

This incremental accretion of powers via prohibitions resulted in confusion and anomaly until significant codification of major police powers was provided in England and Wales in the *Police and Criminal Evidence Act 1984* (PACE Act).

Common Law and Judicial Interpretation of Codes and Statutes

English judges have often prided themselves as protectors of citizen's rights. This image is easier to maintain if attention is directed towards great eighteenth century cases, such as *Entick v. Carrington* (see Appendix 1). Courts became increasingly willing to extend police powers in the 1960s and 1970s, notably in search and seizure and pre-charge detention for investigation (Dixon 1992a). Canadian courts felt pressure to expand police powers the same way. As in England, courts typically dealt with cases ad hoc. Discussion of the nature of powers and of the proper relationship between powers and duties was generally lacking. The result was "a body of contradictory case authority for which the underlying principles remain unclear" (LRCC 1985, p. 37).

While principles and policies were never properly articulated, this tendency "to construe the rules liberally in order to allow some scope to police inquiries" constituted a move "tentatively towards an ancillary powers doctrine which would enable police to perform such reasonable acts as are necessary for the due execution of their duties" (Leigh, L.H. 1975, pp. 31 & 33). Similarly, Canadian courts have sometimes recognised ancillary powers "the notion that the duties conferred upon peace officers imply the powers necessary and incidental to their performance" (LRCC 1983, pp. 14-15; LRCC 1985, pp. 37 & 39). A concern here was to align more closely police powers and police duties: an action might be considered as a police power (i.e., protected from the consequences of unlawfulness) if it was carried out justifiably in the course of police duties (LRCC 1985, p. 3). This potentially broadened police powers very considerably:

> The obvious problem with the doctrine is that general police duties are extremely wide, and a test of whether or not an action is a 'justifiable interference' with liberty or property is not sufficiently precise to be any real safeguard to fundamental rights and freedoms. (LRCC 1985, p. 39)

It is possible to distinguish between power ancillary to another power and power ancillary to duty. This contrast may be drawn, for example, between allowing police during a search to seize articles which had not been specified in an authorising warrant and on the other hand, allowing police to cordon off a street or to detain witnesses or groups of people; for example in crowd control or as part of a major crime investigation. The latter type of action is so rarely challenged that its legal basis is not an issue of dispute in practice: its existence is assumed from necessity and practice. (The difficulties of providing an appropriate statutory power apparently discouraged the British Government from following the Royal Commission on Criminal Procedure's 1981 recommendations on this, hereinafter referred to as the 'Philips Commission', paras 3.91-3.93). This raises an issue which will be considered further below: the intersection of law and policing practice.

CONTROLS ON POLICE POWERS

It is convenient here to comment on more general characteristics of police powers which serve as controls on their exercise.

A significant heritage of the old constabulary arrangements was the relationship between police and magistrates. As noted in Appendix 1, nineteenth century police in Australia, England and Wales were controlled and directed by justices of the peace. This general control was accompanied by specific controls built into police powers. Searches of property and arrests in many situations could be done only on the authority of a magistrate's warrant. Arrested suspects had to be taken before a magistrate without delay. More generally, requirements that powers be exercised only on reasonable suspicion or with good cause were intended to make possible an objective assessment by magistrates (and other judicial officers) of the legality of using a power when there had been no prior judicial authorisation (LRCC 1985, p. 45).

A crucial factor which has been consistently underemphasized in criminal justice studies is that the relationship between police and magistrates upon which these control arrangements depended was fundamentally altered in the mid-nineteenth century. As police forces became more organised and 'professional', magistrates withdrew from the investigation of crime into a narrower judicial role. The shift was most significant in the area of arrest, charge and interrogation. Police took on responsibility for investigating crimes after arrests had been made. Practices evolved of police arresting suspects and taking them to the station for investigation and charging before presentation to magistrates. However, no provision was made in the law for this enormously significant change in practice (except in regard to police bail). The formally conducted process of in-station charging had no legal basis and was not recognised by many influential commentators until quite recently (e.g. Devlin, P. 1960 and for a study of this history, see Dixon, D. 1992a). The result

of this disjunction between law and practice was seen, in Australia, in *Williams v. R.* In that case the High Court re-affirmed the Australian common law position that police must bring an arrested person before a justice without delay where it is practicable to do so. The Court held that police are not entitled to delay this for the purpose of questioning the arrested person or for conducting any other investigation into the suspected criminal activity of the arrested person. Belatedly, federal and some state legislatures have created powers of pre-charge detention.[5]

Some modern legislation has continued to use magistrates as supervisors of police powers. For example, the *PACE Act 1984 (UK)* not only continues magistrate's responsibility for arrest and search warrants, but also involves magistrates in the authorisation of pre-charge detention beyond 36 hours. However, other methods of control are also employed. Notably, the *PACE Act 1984* relies heavily on supervision and management within police forces and on bureaucratic record-making. The latter may provide material for use by controllers both within the police and externally, including the courts. (On the effectiveness of these safeguards, see Dixon et al. 1990; Bottomley et al. 1991).

The *PACE Act 1984 (UK)* also attempts to strengthen the control imposed by the 'reasonable suspicion' requirement by providing directive guidance in a Code of Practice which details what constitutes reasonable suspicion in the context of using stop and search powers (see Code of Practice A, s. 1). The effect of such provisions and of related record-making requirements has proved to be very limited (Dixon et al. 1989). This emphasises the importance of distinguishing between powers exercised in public and those in the police station: the former may be considerably less amenable to control by bureaucratic and managerial methods, and more imaginative approaches to controlling them are required.

The controls provided in the *PACE Act 1984* restricted some practices (e.g. of detention for questioning) which had previously been effectively legalised by the court's acceptance of evidence produced from them, as well as by *Dallison v. Caffery* [1984] 1 AER 1054. While acknowledging that the Act extends some powers, police officers feel that others are reduced. Taking police powers away is rare: their growth is usually incremental. As Finnane (1987, p. 102) suggests, the effective reduction in police powers by the changes to summary offences in New South Wales in 1979 was most unusual. This explains some of the anger which the legislative change produced (Egger, S. and Findlay, M. 1988).

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5 For example, see s. 460 *Crimes Act 1958* (Vic.): s. 78 *Summary Offences Act 1953* (SA); s. 137 *Police Administration Act 1979* (NT); s. 23c *Crimes (Investigation of Commonwealth Offences) Act 1991* (Cwlth).

'EXCEPTIONAL' POWERS

A category which would conventionally be included here is 'exceptional' or 'emergency' powers, i.e. those introduced to deal with a special situation in a way which does not accord with the usual standards regarding suspect's rights. The Prevention of Terrorism Acts in England and Wales (which have been renewed repeatedly since the 1970s) are the usual example. Australia has some notable examples of exceptional powers: these include the *Bushranging Act 1834* consorting and garotting provisions (ss. 546a and 37 *Crimes Act 1900 (NSW)*), and public order laws.

However, it seems preferable to resist the dichotomous classification of normal and exceptional powers. It relies on a rosy view of 'normal' powers, usually associated with the account of common law powers which is criticised in Appendix 1. It understates the strength of 'normal' powers provided by statute. Many 'normal' (or 'normalised') powers are the result of short-term moral panics (e.g. the recent Western Australian legislative reaction to young car thieves); but they stay in the statute book long after the panic subsides. Garotting, the Victorian equivalent of 'mugging' is a good example (see Davis, J. 1980). It is better to conceive police powers as lying on a continuum, rather than as being neatly divided into 'normal' and 'exceptional'.

POWERS: THE LAW/PRACTICE DICHOTOMY

To this point, the analysis has been largely formalistic in implicitly defining police powers as specific authorities provided by statute or common law. However, a discussion of police powers as provided by case-law inevitably stretches this formalistic definition and demands consideration of the relationship between law and policing practice.

Judges can only develop (or limit) police powers when disputes about an existing police practice reach their courts. In this sense, a judicial decision is reactive rather than creative: it stamps practice with authority (or illegitimacy). In circumstances which do not present the opportunity for judicial review, practice over time claims its own authority. As suggested in Appendix 1, what came to be dignified as 'common law police powers' were in some important respects simply established practices which lacked formal judicial recognition:

> For example, the power to search arrested people is often assumed to be traceable to the earliest days of common law jurisprudence . . . In fact the practice of such searches clearly predated the existence of any specific authority for them . . . these searches seem to have been simply assumed over the course of time to be proper and valid. This is due in large part to the historical tolerance of intrusive and indeed violent acts towards persons accused of crimes. (LRCC 1983, p. 48)

Similarly, the report of the Royal Commission on Police Powers and Procedure (England and Wales, hereinafter referred to as the 'RCPPP 1929') found in 1929 that there was no clear authority for searching an arrested person's premises. However, "the practice seems to have had the tacit approval of the Courts for so long that, in the opinion of the Home Office, it has become part of the common law" (RCPPP 1929, p. 14). This opinion was crucial: police forces would seek guidance on such matters and the Home Office's opinion would be decisive. In this sense, the executive was responsible for shaping the common law at least as much as the judges dignifying such practices by describing them as common law had clear legitimating effects.

Police powers can be increased by judicial inaction as well as action. If judges consistently refuse to exclude evidence obtained in some unlawful way, then that practice has a judicial imprimatur which is hard to distinguish from authorisation. (While it is true to say that the practice is not fully legalised in the sense that it may found a civil claim, this possibility is usually not significant.)

A central example of this in Australia is detention for questioning. It appears that practices of detaining for questioning which mirrored those in England and Wales emerged in Australian jurisdictions. The previously accepted common law rule (that the requirement to take an arrested person before a magistrate without delay did not allow detention for questioning) was strongly reasserted by the High Court in *Williams v. R.*[6] As noted above, some states have provided statutory powers to detain for questioning. In the states which have not yet done so, methods have been adopted to allow the High Court's decision to be sidestepped or ignored. For example, in the the foremost commentary on criminal law in Queensland, the section dealing with the duty to take arrested suspects before a justice (s. 552 *Criminal Code*) gives as authority *Dallison v. Caffery*, an English decision which the majority in the High Court hearing of Williams rejected. Williams is mentioned merely in passing (Carter, R.F. 1992, p. 7388). This text is similar to New South Wales Police Instructions, which prefer *Dallison v. Caffery* and the dissenting opinion of Gibbs C.J. in Williams to the clear ruling of the High Court's majority (Dixon, D. 1992, pp. 38-99).

If judges (and other actors, notably defence lawyers) condone legal fictions about police practices, they become substantially if not formally legalised. A major example here is the way in which restrictions on police powers may be avoided by obtaining a suspect's 'consent' to police activity (Dixon et al. 1990). The legal effect

6 See p. 31 of this volume for a discussion of this case.

is to make irrelevant the officer's status: it is as if one private citizen were making a request of another:

> The advantages of resorting to consent as the basis of authorization for a search or seizure are many - a diminished likelihood of review, a possible psychological edge over the person searched, the less burdensome procedural requirements, and the absence of confinement to the usual 'grounds of belief'. (LRCC 1983, p. 159)

In Australia, the most significant issue in this area is the practice of 'voluntary attendance' by suspects at police stations which effectively provided Australian police forces with non-statutory powers to detain for questioning. It is beyond dispute that most attendances of this kind would not meet a developed legal definition of voluntariness, which would require knowledge of alternatives and active choice rather than the submission or passive acceptance of authority, which usually characterise voluntary attendances (Dixon et al. 1990). Analyses of this issue often conclude that a clear distinction between consent and coercion cannot be made when policing activities are involved (Dixon et al. 1990; LRCC 1983, p. 160), and that consequently 'consensual' activities should be brought within a framework of legal regulation:

> It is important . . . to regard 'consent' searches as an intrinsic part of the scheme of police procedures and not as privately sanctioned transactions that fall outside the concern of the public law-maker. (LRCC 1983, p. 159)

Examples of such provisions in force can be found in the *PACE Act's 1984* Codes of Practice on search of premises and investigative detention, while recommendations for similar provisions are made in the New South Wales Law Reform Commission's 1990 report on *Police Powers of Detention and Investigation after Arrest* (hereinafter referred to as 'NSWLRC').

The argument advanced here is that a clear line cannot be drawn between law and practice in the police powers which have developed in jurisdictions based on or emergent from the common law. As Doreen McBarnet (1981) has argued, the appropriate distinction is not between law and practice, but rather between the law and practice on one side and legal rhetoric and ideology on the other. The vehicle for this combination of law and practice has been the case-law form, with its flexibility and adaptability (on McBarnet's discussion of this, see Dixon, D. 1992, pp. 53-55).

Finally, powers cannot be considered in isolation from other features of criminal justice systems. For example, police powers of custodial interrogation are particularly significant in adversarial systems "in which the surest way to 'victory' is aborting formal combat - the trial - by obtaining the other side's surrender - a guilty plea or at least a confession" (Lustgarten, L. 1986, p. 9). Powers which are conducive to producing confessions are also increased in importance when proof of intention is stressed in substantive criminal law. Juries may infer intention

from actions; but the best evidence of it will always be a reliable confession. These factors provide the context for the emphasis which police have placed on interrogation and the significance to them of appropriate powers to detain for questioning. Similarly, if police are responsible for prosecutions (or have great influence on public prosecutors), then the power to arrest and charge assumes greater significance than when an effective screening of prosecutions is provided by a powerful and independent public prosecutor (Lustgarten, L. 1986, pp. 4-7). Police powers cannot be considered apart from the broader criminal justice system in which they are located.

WHAT ARE POLICE POWERS FOR?

A legalistic answer to this question would be specific and simplistic. For example, it is said that the power of arrest begins the process of bringing suspected offenders before the courts to be tried (Devlin, P. 1960). The reality of arrest in policing practice is rather different. Arrest serves a number of functions. For example, it can be preventative. This is legally recognised in the power to arrest to prevent a breach of the peace and under statutory powers (such as suspected persons or loitering offences). In such circumstances, arrest is an expression of power, a demonstration of police control over a situation. Secondly, arrest can serve as punishment. It is now well recognised in criminal justice studies that the experience of arrest, detention and trial can be just as punitive as any formal punishment which a court imposes (Feeley, M. 1973).

This perspective provides a way of understanding disputes about powers associated with public order offences. Those who argue that, for example, offensive language should not be an arrestable offence on the grounds that a summons will usually be appropriate, overlook (perhaps deliberately) the ways in which police use such a charge. Often, this is not (or not simply) to respond to an offence. Rather, an offensive language charge is a method of control, a justification for removing a person from a public place. This is particularly the case when, as so often happens, the victim of the offensive language is a police officer (Egger, S. and Findlay, M. 1988). Public order law provides clear examples of the breadth of police discretion, but similar analysis can be made of much policing activity:

> 'enforcing the law', in the sense of arresting someone, may be only one of several resources available to policemen *[sic]* for handling incidents. From this point of view an arrest is not adequately explained by the evidence presented by the arresting officer to justify his use of the resource, i.e. his use of his powers of arrest. For on other occasions when this power might have been invoked, an alternative resource may have been used to deal with the incident. (Chatterton, M. 1976, p. 105)

Chatterton goes on to insist that we should suspend "the conventional idea that laws are things to be enforced, and (think) of them instead as resources to be used to achieve the ends of those who are entitled or able to use them" (1976, p. 114; cf. Bittner, E. 1970). These ends include resolving trouble, restoring public order, getting a suspect into custody so that other possible charges can be investigated, and punishing the blameworthy. So, arrest powers are not just the legal method of setting the criminal process in motion: the choice of their use is also to be seen as a tool of social discipline.

It is important to stress that this perspective requires abandoning the mythology in which crime-fighting is the sole police function (see Appendix 1):

> The core mandate of policing, historically and in terms of concrete demands placed upon the police, is the more diffuse one of order maintenance. Only if this is recognised can the problems of police powers and accountability really be confronted in all their complexity, and perhaps intractability. In this light, the vaguely defined 'public order' offences . . . (which are such a scandalous embarrassment from either a crime control or due process approach) speak to the heart of the police function. (Reiner, R. 1985, p. 172)

It is only in this context that, for example, police demands for a 'move-on' power can be properly addressed. To concentrate on the penalty for a failure to move on draws attention away from the central issue of how police contribute to social ordering, the diversity of behaviour which a society can tolerably encompass, and the relations between police and the socially marginal groups who are directly affected by order maintenance policing.

Similar issues arise in the case of powers to stop and search. Historically, stop and search has been used not just to investigate those suspected (reasonably or not) of having committed offences, but as a more general technique of social surveillance and discipline - checking on people whose appearance is incongruous because, for example, they appear to be in a commercial area at night, or a black person in a white neighbourhood. The use of such powers is justified as contributing to crime detection (even if only some 17 per cent of stops lead to arrests: Dixon et al. 1989, p. 190), to information gathering (particularly in the case of stops for suspected illegal drugs), and to crime prevention (deterrent stop and search is an important, if often unrecognised, part of a beat officer's activities). But these are only part of a more general use of a power for purposes of social surveillance and discipline. (Note that this terminology does not necessarily imply criticism of such activities. For a discussion of these issues related to stop and search in England, see Dixon et al. 1989.)

The case of stop and search is an excellent example of how excessive use of a police power can be dysfunctional or counter-productive. A major pre-condition of the 1981 Brixton riots was the intensive use of stop and search powers which worsened relations between police and young black people. The result was serious rioting and the commission of many serious offences (Scarman, L. 1981). Similar results have been produced by other instances of intensively using stop and search or 'field

interrogation' in an aggressive patrol strategy. Studies in the United States and in England suggest that the level of some crimes may be reduced, but "the price in alienation of some sections of the public (primarily young males, especially blacks) is very high" (Reiner, R. 1985, p. 123). The lesson to be learnt is that any potential benefits which police powers may provide can be dissipated if they are used inappropriately. This is particularly significant given police reliance on information from the public in crime detection: this issue is raised again in the context of police effectiveness in Chapter Four.

Lord Scarman's discussion of stop and search powers in his Brixton report insisted that police powers cannot be considered in isolation from their use or from the broader context of police duties and responsibilities. In an analysis which has been influential, Lord Scarman argued that the primary police duty is the maintenance of social order. Enforcing the law is a secondary duty. It may be a means of achieving the former, but on occasions "law enforcement puts at risk public tranquillity . . . (and) can cause acute friction and division in a community" (1981, para. 4.57). When a conflict between the duties arises, the maintenance of order must take priority. This is achieved by the use of discretion which "lies at the heart of the policing function" (1981, para. 4.58). The important link which His Lordship makes stresses that the balance between law enforcement and order maintenance will only be achieved when another, that between police independence and accountability, is successfully made. This balance in turn depends upon the police securing the consent of the communities in which they work (1981, paras 4.59-4.60). Lord Scarman's Report showed clearly the indissoluble links between police powers, discretion and accountability.

While stop and search attracted most attention in debates about policing in England and Wales in the early 1980s, the central issue in Australia in the early 1990s is custodial interrogation. From a legalistic perspective, the central purpose of police powers to detain for questioning is the collection of evidence for potential use in court. A more socially realistic perspective suggests that the division between investigative and judicial functions is too neat. Criminal justice systems which depend on very high rates of guilty pleas for their effective functioning have transferred the crucial site of determination from the court to the police station. When cases are effectively determined by a confession, then a power to detain and question is, in practice if not in law, more than an investigative power.

It may seem 'common sense' that providing new police powers by legal change means extending police power. This may not be the case, and one effect of legislating on police powers may be to control police power. This paradoxical result may be produced when police develop informal practices such as relying on 'consent' in order to search or question, or when more clearly coercive unlawful practices are not challenged in court, or when legal powers are used inappropriately (e.g. when stop and search is carried out without reasonable suspicion). If a legislature provides formal legal powers, these may authorise less than was previously common practice.

This is well illustrated by contrasts in the reception of the *PACE Act 1984*. Many civil libertarians and other critics complained vociferously that the Act introduced draconian police powers. Meanwhile, police officers could be heard complaining about the constriction of their powers. It was as if two quite different and conflicting statutes were being discussed. In fact, one side was comparing the Act to a (rather idealised) view of the previous law, while the other compared it to their practical experience of the law in policing practice. While the Act does significantly extend some powers (notably of arrest), its effect on stop and search should have been considerably to restrict previous practices (although as noted above success has been limited: see Dixon et al. 1989). The new regime for pre-charge detention provides much greater control over these crucial practices (even if this control is by no means ideal: see Dixon et al. 1990a).

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CHAPTER THREE

CONCEPTS AND DEFINITIONS

A review of police powers reveals there are a number of concepts which frequently require definition - for example, the concept of a 'reasonable suspicion' may appear in relation to powers of arrest, powers of entry, powers to demand name and address and many others.[7] The use of 'reasonable force' is also permissible across a wide range of different circumstances and in relation to a wide range of different powers. Many of these concepts are complex and technical and may be difficult for the layreader to understand, yet their understanding is essential to the proper consideration of police powers.

This same problem became evident to the Commission when conducting its review of laws relating to prostitution. Much of the debate over the issues was clouded by the use of terminology such as 'legalisation' and 'decriminalisation' which although used frequently, were inconsistently defined by various users. In some publications the terms were contrasted while in others the terms were used interchangeably. Although the Commission in its report (*Regulating Morality? An Inquiry into Prostitution in Queensland*, 1991) went to great lengths to define the terms and steer away from the use of unclear terminology, the public debate upon the publication of the report continued to confuse these terms.

In order to ensure that there is minimal confusion regarding the substance and recommendations of this report, the Commission decided to devote a chapter to explaining in detail some of the more difficult and frequently occurring concepts. This will also avoid repetition in the chapters dealing with the various powers.

SUSPICION VS BELIEF

The concept of 'reasonable suspicion' is one that often arises in a discussion of police powers. However a closer analysis of the provisions conferring powers on the police reveals that the legal threshold for the exercise of almost all of the coercive powers of the police is more properly described as 'reasonable grounds to believe' or 'reasonable grounds to suspect'. These concepts also limit the power of magistrates and justices to authorise police exercise of powers.

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7 The trigger for the exercise of many of these powers is the police officer's 'reasonable suspicion' that, for example, an offence has been committed.

In the absence of reasonable grounds to believe or suspect or some similar test, an exercise of most police powers is not permitted and in those circumstances any interference with the individual's liberty will be unlawful.

A review of the arrest powers contained in Tables 6 and 7, the search warrant provisions contained in Table 4, and many of the other specific legislative provisions conferring powers on police reveals that the concepts of 'reasonable grounds to believe', 'reasonable grounds to suspect', 'believes on reasonable grounds' or 'suspects on reasonable grounds' are important elements in almost all of the investigative work of police. It is essential that some space be allocated to explaining the exact meaning of these words.

One of the most important points to realise is that 'believe' and 'suspect' have different meanings. A higher threshold is imposed on those powers which require the existence of reasonable grounds to 'believe'.

The distinction between 'belief' and 'suspicion' was made by the High Court in *George v. Rockett* [1990] 170 CLR 104 at 115:

> Suspicion, as Lord Devlin said in *Hussein v. Chong Fook Kam* (63), "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty. Ltd. v. Rees* (64), a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay [its] debts as they became due" as that phrase was used in s. 95(4) of the *Bankruptcy Act 1924* (Cth). Kitto J. said (65):
>
> > A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the subsection describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.
>
> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists; the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

It is not necessary to have substantial proof before one can be said to believe, but the existence of a belief implies there is more information available which turns conjecture or surmise into an acceptance that something is true (Bevan, V. and Lidstone, K. 1991).

'REASONABLE'

The requirement that the grounds for the belief or suspicion must be reasonable imports an objective standard. It refers to the facts and the circumstances which would lead an impartial third party to form the requisite belief or suspicion. A police officer is not constrained as is the court by the rules of evidence in forming his or her belief or suspicion and may therefore take into account anonymous information, and hearsay. This type of information however, must itself be reasonable and the officer must satisfy himself or herself that it is true or that it could be true. The extent to which the officer must verify such information depends upon whether he or she must reach the level of reasonable grounds to believe or the lesser threshold of reasonable grounds to suspect. In the case of information provided by an informer, the level of verification will depend in part upon the type of information provided and in part upon the credibility of the informer. For example, where the information comes from fellow police officers, an officer may be justified in acting on it without any verification whatsoever.

The matter is further complicated when one looks at the distinction between an officer having 'reasonable grounds to believe' and an officer who 'believes on reasonable grounds'. A question arises as to whether the latter indicates that the officer himself or herself must actually believe that, for example, the person committed the offence or whether it is sufficient for the officer to merely have reasonable grounds to show why he or she could have believed it. The Review Committee of the Commonwealth Criminal Law (hereinafter referred to as the 'Gibbs Committee') raised this ambiguity in its *Review of Commonwealth Criminal Law Fifth Interim Report* (1991, pp. 19-20), and said:

> Although all these formulae may be the same in ultimate effect, a distinction is possible and the Review Committee considers that, having regard to the importance of preserving the liberty of a person against avoidable infringement, it should be made clear that the officer must himself or herself believe (or suspect) that the arrested person had the requisite connection with the offence and that the belief or suspicion should have been reasonably held. The submissions received by the Review Committee on the point agreed that any future provision should depart from the words of section 8A in this respect. The Review Committee also consider the expression "on reasonable grounds" to be preferable to "with reasonable cause", since it is the basis of the belief or suspicion rather than its cause that should be reasonable.

In practice, the distinction becomes quite difficult. One of the most difficult areas is that of stopping and searching persons or vehicles. An examination of Tables 1 and 2 reveals that most of the stop and search powers are used on the basis of

reasonable grounds for suspicion. This is the test applied under the stop and search provisions of the *PACE Act 1984* of the United Kingdom and much has been written about the exercise of those grounds in the United Kingdom. However, a definition has proved elusive. The United Kingdom Committee on Drug Dependency in 1970 considered the stop and search power under the misuse of drugs legislation and concluded that reasonable suspicion could not be positively defined. While the Committee was urged to define it negatively by stating what was not reasonable suspicion, it could only agree that dress and hairstyle should be excluded as sole grounds for suspicion (Bevan, V. and Lidstone, K. 1991). The Philips Commission in 1981 also concluded that the criterion of reasonable suspicion could not be defined and it recommended in relation to stop and search powers that the giving of reasons, the recording of those reasons and the supervision of junior officers would be most effective in ensuring that the criterion was not devalued by the lack of definition (Bevan, V. and Lidstone, K. 1991).

Some guidance was given to police officers under the Codes of Practice that were issued in relation to the *PACE Act 1984*.

Code A, paragraph 1.6 states:

> Whether reasonable grounds for suspicion exist will depend on the circumstances in each case, but there must be some objective basis for it. An officer will need to consider the nature of the article suspected of being carried in the context of other factors such as the time and the place, and the behaviour of the person concerned or those with him. Reasonable suspicion may exist, for example, where information has been received such as a description of an article being carried or of a suspected offender; a person is seen acting covertly or warily or attempting to hide something; or a person is carrying a certain type of article at an unusual time or in a place where a number of burglaries or thefts are known to have taken place recently. But the decision to stop and search must be based on all the facts which bear on the likelihood that an article of a certain kind will be found.

In essence it requires that there must be objectively verifiable facts pointing to the likelihood that an unlawfully possessed article will be found. In reality this is a very difficult test.

Code A, paragraph 1.7 states:

> Reasonable suspicion can never be supported on the basis of personal factors alone. For example, a person's colour, age, hairstyle or manner of dress, or the fact that he is known to have a previous conviction for possession of an unlawful article, cannot be used alone or in combination with each other as the sole basis on which to search that person. Nor may it be founded on the basis of stereotyped images of certain persons or groups as more likely to be committing offences.

The development of this Code arose as efforts were made to control the abuse of stop and search procedures which by all accounts had developed into a manner of use which applied mainly to stereotypes. It was seen as important to attempt to exclude stereotyping as an adequate ground for suspicion justifying the use of

coercive powers. Dixon et al. (1989) argued that this concentration on the problematic results of suspicion based on stereotyping induced a misunderstanding of the nature of suspicion in police patrol work: it failed to take account, or provide for, a type of suspicion which is at least as significant as that based on stereotyping, and which is deeply rooted historically in the policing mandate and in the culture of police work (Dixon et al. 1989). This suspicion has been called the 'incongruity procedure'. Individuals attract suspicion, not because they conform to a stereotype, but because they do not meet the variable contexts of activity, place and time considered by officers to be normal, according to criteria such as age, sex and class. Bottomley and Coleman (1981, p. 105) said that the experienced patrolman develops a set of background expectations about his beat as a set of normal appearances, normal for particular times, days, seasons and so forth. He is sensitised in such a way that slight variations warrant an investigation of presented appearances.

According to this notion the police stop and search people who do not 'fit'. In many cases there can be an overlap with stereotyped suspicion - people may be suspicious both because they are out of place and because they fit a stereotype; for example, a scruffy person driving an expensive car or a black pedestrian in a white middle class area. However, the incongruity procedure differs from stereotyped suspicion because it depends on a particular combination of variable factors of age, sex, race, behaviour, time and place (Bevan, V. and Lidstone, K. 1991).

The use of suspicion based on the recognition of incongruity is and has been highly valued in police culture (Reiner, R. 1985, Chap. 3). However, it must be recognised that this concept of suspicion differs from the legal requirement of reasonable grounds for suspecting. The relevant issue is not how a person fits, but how he or she looks and acts. The basis must be a legally identifiable fact, not an experiential hunch (Dixon et al. 1989).

Our discussions with a number of operational police have revealed that in practice the legal complexities of distinctions between reasonable grounds for believing and reasonable grounds for suspecting are not of major concern. There appears to have been little challenge in the Queensland courts in relation to this area and certainly the submissions received and the comments at the public hearing did not reveal this to be a contentious area. However, it ought to be noted that the Commission's view is that members of the public are unaware of the high threshold placed upon police in exercise of these powers. Many comments have been received by members of the public indicating they believe that police ought to be able to take action where they find something suspicious - in terms of a person being out of place. This is more akin to Dixon's "incongruity procedure" than to reasonable grounds for suspicion. While this may not be so for the exercise of powers of arrest, a view was expressed by some people that powers of detaining a person and demanding name and address ought to be available to police on these grounds.

Whilst the Council for Civil Liberties and other such groups argue strenuously against this type of power, it must be recognised that many members of the community expect police to go out and look for suspicious behaviour and take action when they find it. The community must therefore think very carefully about what it expects the police to do when they find such behaviour and ensure that the powers given to them enable them to carry out those expectations.

It is obvious that the requirement of reasonable suspicion would not permit the exercise of certain powers, especially for example the power of stop and search, in many circumstances in which the police may wish to exercise them. However, many argue that there remains a need for the operational use of these powers which puts pressure on a police officer to exercise them despite the requirement of reasonable grounds for suspicion or to seek to avoid the requirement by relying on the consent of the suspect. The difficulty with the latter course is that quite often the suspect will not be consenting but simply submitting to the authority of the police officer. Bevan and Lidstone say of the United Kingdom experience that senior officers have long been aware of the difficulty, yet pressure continues to be put upon junior officers to exercise the powers on the basis of mere suspicion or to circumvent this requirement by the pretence of consent (Bevan, V. and Lidstone, K. 1991 p. 19).

CONSENT

Consent has been described as one of the most important and effective 'powers' in the armoury of the police (Bevan, V. and Lidstone, K. 1991). The statutory requirements and the limits imposed on the exercise of police power do not apply where a police officer performs the activity with the 'consent' of the suspect. For example, section 20 of the *Drugs Misuse Act 1986* in Queensland provides for a register to be kept of searches that are carried out under that Act. Where a search is carried out without a warrant, the police officer must complete the form which lists details of the search. Where a search is carried out with a warrant, a record of that search is made on the back of the search warrant. However, where a search is carried out with the alleged 'consent' of the suspect, there is no requirement in the Act to keep a record of the circumstances and results of that search, although some police districts require it as an administrative procedure.

The requirements in the *Drugs Misuse Act 1986* reflect a recent trend apparent in most common law jurisdictions to impose some form of legal regulation on police activities. This has involved extending, clarifying and specifying various police powers and suspects' rights by rules, codes of practice, statutory provisions, internal police guidelines etc. In order to ensure that the police are accountable for the exercise of these powers, provision has been made for detailed record keeping in a number of areas often including supervision by senior officers and involving disciplinary sanctions for a failure to fulfil the requirements. The best example of this type of scheme is that which is included in the *PACE Act 1984* (UK).

One issue that this trend toward legal regulation has not properly addressed is the issue of consent. The legal regulation aims to limit the powers of the police, yet consent changes the relationship between the police officer and the suspect from that of a state official and a private citizen to a relationship between two private citizens (Dixon et al. 1990). It is in this context that consent becomes increasingly significant.

What is meant by the term 'consent'? It encompasses a range of states, including approving agreement, unwilling acquiescence, submission, co-operation or compliance ignorant of the possibility of acting differently (Dixon et al. 1990). In *Chatterton v. Gerson* [1980] 3 WLR 1003 Bristow J. said:

> It is clear law that in any context in which consent of an injured party is a defence to what would otherwise be a crime or civil wrong the consent must be real. (p. 1012)
>
> A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will. *Bowater v. Rowley Regis Corp* (1944) cited with approval by Lord Hodson in *ICIB Shatwell* (1965)

Freedom of choice is the essence of consent. It involves two significant concepts, (1) knowledge: the information and understanding about what is being requested and (2) power: the ability to make choices on the basis of that knowledge and to use the available information (Dixon et al. 1990).

Statistics from the Home Office in the United Kingdom show that in 1990, 256,900 searches of persons or vehicles were carried out under section 1 of the *PACE Act 1984*. These are only the searches that were carried out by the police using this power and do not include those carried out 'with consent'. It is impossible to estimate how many consent searches took place. However, one would expect that almost as many persons are searched with consent as under the section 1 power. This is especially so when one considers the limitation imposed by the requirement of reasonable suspicion and the administrative burden imposed by the requirement that records be kept when the power is used, as well as the general ethos which sees consent as more in keeping with modern policing (Bevan, V. and Lidstone, K. 1991, p. 22). Whilst we cannot estimate the number of consent searches that are carried out in Queensland, discussions with operational police reveal that they do rely to some extent on consent searches and that often no record is kept of those searches.

Of more importance is the manner of requesting the consent of the suspect. In many cases it is indicated that a search will take place regardless of whether or not the suspect consents, and in such circumstances a refusal by the suspect may make the police more suspicious. In reality, the person whose premises are being searched believes that a power is being exercised; perhaps more politely than he or she expected but nevertheless, a power.

CONSENT VS POWER

Particular problems may arise where police officers have available to them a coercive power. Should they continue to use consent as an alternative to the exercise of the power?

It is not unusual for officers to attempt to get consent for example to a search of premises even where a power is available to them and where they have obtained a warrant. Ninety-five per cent of the officers interviewed by Dixon et al. (1990) in their study in the United Kingdom indicated that they would do this. They prefer to search by consent because it makes dealing with householders easier (Dixon et al. 1990, p. 353). Whilst no such study has been undertaken in Queensland, anecdotal evidence suggests that there certainly are police officers who do prefer to work with the consent of the suspect rather than by executing a search warrant.

The Philips Commission in 1981 anticipated the continued use of consent but not as an alternative to available powers and certainly not as a means of evading the constraints on such powers and the safeguards against their abuse. For example in relation to the search of premises it said:

> There will no doubt continue to be circumstances when premises are searched with the occupier's consent, where, for example, no arrest has been made and in the course of general police enquiries. (Philips Commission 1981, para. 3.50)

Bevan and Lidstone (1991, p. 22) argue that consent should not be seen as an alternative to an available power:

> It should be sought only when no power is available and the action which the police wish to take is necessary for the prevention or detection of crime - necessary, not because there is pressure to achieve specific results which cannot be achieved within the available powers, but because it is in the public interest that the contemplated action be taken. If such necessity exists and no power is available, the person whose consent is sought should be told what action the police wish to take, why it is thought necessary to take that action, that he is not obliged to permit that action to be taken and the consequences of that action as they affect him.

They suggest that it is only in those circumstances that consent obtained from a suspect is likely to be real or informed consent.

It might be argued that it is preferable to rely on 'policing by consent' rather than to rely on the use of coercive powers - especially when the Queensland Police Service is now committed to the concept of community policing. This may well be so, however, policing by consent should involve the real consent and co-operation of the citizen. Dixon et al. (1990) argued that policing by consent should not be seen as either inherently preferable or necessarily undesirable but rather as an area that requires attention and when appropriate, regulation just as much as the use of police powers.

An interesting point to note is that very often operational police will admit that the general public are unaware of their rights and are unaware of the limits of powers of the police. Yet police continue to insist that many of the actions they carry out concerning these persons are based on consent. More recently, a number of police, including senior police officers, have stated publicly that they often rely on bluff in order to achieve certain ends. It would be fair to interpret this as meaning that they rely on the uninformed consent of the suspect.

CODES OF PRACTICE

Much of the police behaviour in Queensland is regulated by the Police Commissioner's general instructions issued to police. These are subject to change unilaterally by the Police Commissioner. They are rarely sighted by the courts and generally are not seen as having significant legal effect.[8] To some extent this could be explained by the fact that they are not widely available and therefore many defence lawyers are not going to be in a position to argue about breaches of the police general instructions if they are not familiar with the content of them.

Under the *PACE Act 1984* in the United Kingdom, a system has been developed that includes codes of practice. The Codes of Practice are far more detailed and cover a wider area than their precursor, the Judges' Rules. Whereas the Judges' Rules were promulgated by a Committee of Judges without a process of consultation, the Codes of Practice are put out by the Home Office pursuant to the *PACE Act 1984*. This requires the Home Secretary to issue them and to bring them into force by a statutory instrument approved by resolution in both Houses of Parliament, before which time they have been debated in both houses (Zander, M. 1990, p. 174).

A breach of any of the Codes amounts to a disciplinary offence, however, Zander explains:

> It does not mean of course that a breach will necessarily be penalised as a disciplinary offence. No doubt breaches of the Codes where discovered to have taken place will often be the subject of guidance and warnings rather than full blown disciplinary charges. But if there has been a breach of the Codes the police authorities would be entitled to bring such proceedings. (Zander, M. 1990, pp. 174-175)

Criminal or civil proceedings may be brought against an officer who breaches the Codes only if the breach is also a breach of the criminal or civil law. Where such proceedings are instituted the *PACE Act 1984* provides that the Codes "shall be admissible in evidence, and if any provision of such a Code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question" (s. 67). According to Zander (1990, p. 175) the courts have quite often excluded evidence obtained in breach of the Codes.

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8 However, see the decision of Dowsett J. in *R. v. W. and Ors* [1988] 2 Qd R. 308 at 319.

The NSWLRC in their report *Criminal Procedure: Police Powers of Detention and Investigation After Arrest* (1990) also recommended the use of codes of practice. The NSWLRC cites several reasons why the codes of practice are preferable to the maintenance of the Commissioner's General Instructions.

Firstly, the codes of practice could be promulgated as statutory instruments (regulations), subject to parliamentary disallowance. This gives them the force of law and provides for formal open legal regulation of the criminal investigation process.

Secondly, the process of development of codes of practice should involve persons outside the Police Service and should allow for community consultation and input. This was the process which occurred in the United Kingdom in developing their more recently revised codes of practice. A draft was distributed to various police forces for comment. A second draft was released for public comment and submissions were called in response to it. A working group comprised of police officers, lawyers, legal academics and heads of government departments then considered the submissions and produced a third draft which was again released for public comment. A fourth and final draft followed that extensive process of public consultation (NSWLRC 1990, p. 141). This provided an opportunity for democratic scrutiny of policing practices. The final advantage is that, while there is some form of legislative authority in a code of practice, it does allow for periodic review which would not be available for legislation.

Whilst it would seem appropriate to maintain matters which relate solely to internal police issues within the general instructions, those procedures which will directly affect the public should be considered for inclusion in a code of practice.

REASONABLE FORCE

A number of powers conferred upon the police are associated with a power to use such force as is reasonable in the circumstances to enable the power to be exercised. For example, the power to search a person or to take his or her fingerprints may involve a power to apply force against a hostile person who refuses to co-operate. The word 'reasonable' limits the amount of force by requiring objective facts which in turn justify the application of the degree of force. The word 'necessary' imports a similar limitation that also means that other non-coercive means have been used in an attempt to exercise the power or that these means are likely to fail (Bevan, V. and Lidstone, K. 1991, p. 30).

The amount of force that is used in order to be lawful must be related to the purpose for which the power is to be exercised. It would only be in very serious cases, for example the prevention of serious crime or the escape of a dangerous offender, where lethal force may be used. The use of excessive or unnecessary force, though

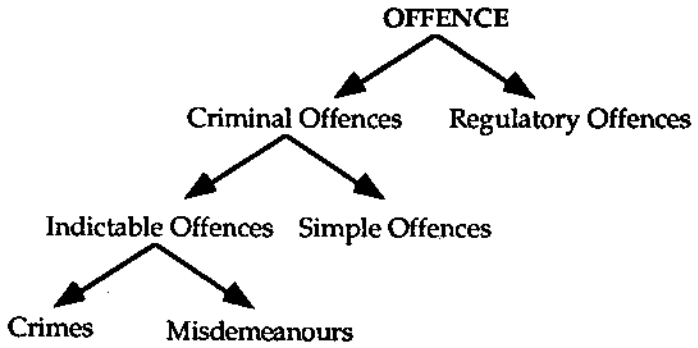
unlawful and likely to form the basis of an action for assault, does not necessarily affect the lawfulness of the power being exercised (See Bevan, V. and Lidstone, K. 1991, p. 31).

OFFENCES

The availability of many police powers will often depend upon the nature of the offence in question. The *Criminal Code* section 2 defines an offence in the following terms:

> An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.

Offences are then divided into different categories as follows:



Regulatory offences are those included in the *Regulatory Offences Act 1985* and include such things as shoplifting or leaving a restaurant without paying for the meal. These offences are dealt with in the Magistrates Court.

Simple offences are the largest category of offences and are also dealt with in the Magistrates Court. In some cases, some specified indictable offences can also be dealt with by a Magistrates Court. These offences, if punishable upon conviction before a magistrate are defined as simple offences (see s. 4 *Justices Act 1886*).

Indictable offences comprising crimes and misdemeanours are the more serious offences with the latter being the less serious of the two. Apart from some specific circumstances provided for in the Code, these offences will be dealt with in the District or Supreme Court. The Criminal Code Review Committee has recommended that the term 'misdemeanour' be abolished and that criminal offences comprise crimes (which are indictable offences) and simple offences (Criminal Code Review Committee 1992, p. 6).

REMEDIES FOR POLICE MISCONDUCT

Any discussion of police powers must necessarily involve a discussion of the individual's rights because it is these two things which are often in conflict. However, the rights that are so often talked about can only exist to the extent that they can be enforced if police abuse their powers. Thus it is important to look at what sort of enforcement mechanisms are in place to deal with an abuse of power.

A number of options are available if a citizen suffers a serious infringement of his or her liberty through an abuse of police power. A civil suit may be brought against a police officer for a serious violation of personal liberty and damages may be obtained through the court. Another option is that a complaint may be made to the Commission about the police behaviour and that in turn can lead to disciplinary action against the officer involved for misconduct or official misconduct. If there is evidence that a police officer has committed a criminal offence then the matter can be referred to the Director of Prosecutions or other appropriate prosecuting authority.

If the police conduct complained of falls short of misconduct but amounts to a breach of discipline by a police officer, the Queensland Police Service rather than the Commission, has jurisdiction to take appropriate action in respect of that breach.

An oft quoted method of enforcing rights is the rule which permits a court to exclude evidence obtained unfairly or unlawfully. This is part of the general discretion of the court which can often result in even guilty defendants being protected from punishment.

Damages for Civil Wrongs

Where a police officer has committed a civil wrong or a tort there are various civil suits for damage available. For example, where an arrest has been effected without the relevant suspicion or belief an officer may be sued for the tort of false imprisonment.[9] Where a prosecution is brought against a person whom a police officer knows to be innocent, then an action may be taken for malicious prosecution. Unlawful entry to premises may well constitute an action in trespass. An advantage of pursuing a police officer in the civil courts rather than making a complaint to the Commission or the Queensland Police Service is that a successful action may result in an award of damages.

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9 By virtue of s. 10.5(1) of the *Police Service Administration Act 1990* the Crown is jointly liable for such torts and therefore an action may be brought against the Crown.

Complaints Against Police to the Criminal Justice Commission

On 22 April 1990, the function of investigating complaints against police passed to the Commission. The Commission established a Complaints Section to deal with complaints against police and other officers of units of public administration. This effectively took over the role that had previously been carried out by the internal investigation unit of the Queensland Police Service and by the Police Complaints Tribunal.

Under the *Criminal Justice Act 1989* all complaints or information received concerning police misconduct shall be brought to the notice of the Complaints Section of the Commission. The Commissioner of the Police Service is required to refer to the Complaints Section all complaints of or matters involving, suspected misconduct by members of the Police Service, whether such complaints or matters arise from within or from outside the Police Service.

Further, section 7.2(2) of the *Police Service Administration Act 1990* imposes a duty upon officers and staff members of the Queensland Police Service to report conduct to the Police Commissioner and the Commission which is known or reasonably suspected to amount to misconduct on the part of a police officer.

Section 2.28(5) of the *Criminal Justice Act 1989* empowers the Commission to issue guidelines to regulate or modify the duties imposed on the Commissioner of the Police Service and on other principal officers to report instances of misconduct and official misconduct. In accordance with clause 3(1) of Guidelines and Directions issued by the Commission to the Commissioner of the Police Service, the Commissioner is required to "investigate, determine and where appropriate take disciplinary action in respect of, all complaints of, or matters involving, suspected misconduct of a minor nature by members of the Police Service:

(a) that are referred to him by the Commission; or

(b) that come to his notice from any other source unless, in any such case, the Commission requests that the complaint or other matter be referred for its determination".

Consistent with this, the initial assessment of each complaint is carried out by the Commission.

The disciplinary action which may be imposed under the Police Service (Discipline) Regulations 1990 (whether for misconduct or a breach of discipline) ranges from a caution or reprimand to dismissal from the Police Service. Cases which are assessed as involving a prima facie case of official misconduct may be referred to the Misconduct Tribunal. The Misconduct Tribunal may order a range of sanctions including dismissal, reduction in rank or salary or payment of a monetary penalty (s. 2.44 *Criminal Justice Act 1989*).

Prosecution

Where a case involves prima facie evidence of criminal conduct, the matter can be referred to the Director of Prosecutions or other appropriate prosecuting authority for a decision as to whether criminal proceedings should be instituted against the officer.

In cases where there is clear evidence of a criminal offence a police officer may face prosecution for an offence based on an abuse of power. However, it is often difficult to establish a convincing case against those who abuse power, when they do so within an organisation whose members have a strong sense of solidarity and a professional awareness of their rights.

Exclusion of Evidence

It has been a matter of some debate whether or not the criminal courts should play a part in punishing police misbehaviour by excluding improperly obtained evidence from a trial. In the United States, the Supreme Court long ago adopted the principle that it is better for the guilty to go free than for the state to play an unworthy part - a principle supported by the common sense consideration that the only sure way to stop police obtaining evidence illegally is to remove the incentive by forbidding them to use it (Robertson, G. 1989).

British law and of course our system of law does not address the issue quite as directly but leaves the decision to the discretion of the trial judge. In effect the court considers whether the admission of the evidence illegally obtained would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

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CHAPTER FOUR

POLICE POWERS AND POLICE EFFECTIVENESS*

> (A) constant call from police circles is for more powers to be able to deal with crime suspects. The assumption is that if more powers were available, the police would be able to detect more crime, successfully prosecute more offenders and thus significantly reduce crime levels. The implicit claim is that there exists a causal link between the powers provided and 'success' in the 'war against crime'. Apart from the fact that in many instances the police already exercise the powers that they are seeking (and in asking for changes to the law they are, in effect, asking for their present practices to be given legal status), short of granting quite draconian powers, what evidence there is raises very considerable doubts about the validity of the assumptions made by the police and others in arguing for more powers. (Sallmann, P. and Willis, J. 1984, p. 217)

How is police effectiveness influenced by a change in police powers? It is important to examine this question because an answer to it is usually taken for granted in calls for the extension of police powers. When a problem of crime is perceived, the remedy most commonly advanced is an extension of police powers to deal with it. As the Commission's public hearings on police powers demonstrated, some advocates of this remedy do not fully consider either the powers already available to police or the likely effect on the perceived problem of extending powers, or indeed whether measures other than police powers might be more effective. This suggests the crucial symbolic significance of police powers. As Reiner suggests:

> Until relatively recently discussions about criminal justice policy and the police specifically, have been locked into the law and order mythology that given adequate resources and powers the police could tackle the problem of rising crime. The only opposition to the law and order lobby was on civil libertarian grounds that police effectiveness must not be bought at too high a price in the undermining of civil rights. However, a recent wave of . . . research in the US and Britain has begun to question the assumption that increased police power and resources could control crime. (Reiner, R. 1985, p. 117)

The relationship between police powers and police effectiveness has received much less detailed attention than the relationships between police resources and policies, and police effectiveness. It is helpful to note some of the lessons and conclusions which can be drawn from these debates, because they are in many respects comparable to our current concerns.

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* This chapter was adapted from material prepared by Dr David Dixon; an external consultant to the Commission.

First, crime rates cannot be used as a simple indicator of police success: "one of the classic pitfalls of police performance analysis is the tendency to use crime statistics to measure effectiveness" (Grabosky, P. 1988, p. 3). At base, they are no more than a record of the documented activities of police officers: their relationship with 'actual crime' is mediated through a series of policies and recording practices which fundamentally affect the result. Carefully analysed nevertheless, they can still be useful sources of data (Bottomley, A.K. and Coleman, G.A. 1981; Bottomley, A.K. and Pease, K. 1986, Chap. 2). What is clear is that a falling (or rising) crime rate cannot be simply read as denoting police success (or failure). The creation of a new police power (either directly or via a new offence) may lead to an increase in the crime rate (i.e. if police are able to deal with more suspects or if an activity is newly criminalised). Matters are rarely as straightforward as this; but the fundamental point is that increasing police powers may increase (officially recorded) crime.

Secondly, "a significant proportion of police resources is devoted to tasks quite unrelated to the prevention of crime and the apprehension of offenders" (Grabosky, P. 1988, p. 1). The Commission has analysed calls for service data, from a Queensland Police Service District, covering a six month non-contiguous period from August 1991 to December 1992. The results of this data have shown that only 30 per cent of calls for service made by the general public were directly related to criminal activity, the remaining were calls for such things as noise level complaints, general disturbance and lost and found calls, all of which were unrelated to the prevention of crime and apprehension of offenders.

Meanwhile, most criminal activity is unaffected by the police either because it is not reported or is, to all intents and purposes, undetectable (Hough, J.M. and Clarke, R.V.G. 1980, pp. 7-8). The 1991 *Crime Victims Survey* shows that there exist various reasons why certain crimes go unreported to the police. During the 12 month period (1990) that the survey covered, the Queensland Police Service became aware of only 30 per cent of household crimes (Government Statistician's Office 1991, p. 17). The most frequent response for not reporting this type of crime to the police was because the victim felt the crime was of a trivial nature. The next most frequent response was the victim's perception that police could or would not do anything about the crime. On the other hand police were made aware of 93 per cent of motor vehicle theft. Of crimes against the person, except for the crime of deliberate use of weapon, only a minority become known to the police. Of those crimes involving deliberate use of a weapon only slightly over half become known to the police. The two main reasons for not reporting a personal crime to the police were that respondents considered the crime to be too trivial, and a perception that police could not or would not do anything about it (Government Statistician's Office 1991, pp. 36-39).

Hence, it is obvious through these examples that the level of reported crime can depend upon the victims concept of the seriousness of the crime, combined with their personal judgement as to what actions the police may take and whether or not there would be any advantage in reporting the crime.

Police impact on criminal activities is unlikely to be decisively increased by increasing resources and power to any level which can currently be contemplated. The classic example here is the Kansas City Preventive Patrol Experiment, in which very different styles of policing were found to have no significantly differential effect on crime or on fear of crime or on attitudes towards police: indeed, it seems that they were hardly noticed by many residents (Kelling et al. 1974; for a review of later research, see Reiner, R. 1985, pp. 117-119). Together, these factors mean that a change in police powers may not have a direct or substantial effect on crime.

Thirdly, fear of crime is a factor which should be taken into account in evaluating police effectiveness. For many people, fear of crime is at least as great a problem as the real likelihood of victimisation. Police forces are important producers of knowledge, information and opinion about crime; for example, in August 1979 the New South Wales Police Association as part of a campaign over public order legislation placed an advertisement in the *Sydney Daily Telegraph*:

> You can still walk the streets of NSW, but we can no longer *guarantee* your safety from harassment . . . What concerns Police is that you have families who use our streets and we can no longer guarantee them protection from harassment by the hoodlum element. But there is an even more alarming factor - there is a real danger that Police could eventually lose control of the streets . . . Is it possible that the Offences in Public Places Act (1979) could be the seed from which a growth pattern of New York style street crime will be the future harvest? (quoted in Brown et al. 1990, p. 967)

When police officers complain that they cannot do their job properly because of a lack of powers, this is likely to increase public fear of crime:

> The popular image of the police battling with an almost intractable crime problem is arguably the main source of people's fear of crime - a fear justified neither by the risks nor by the nature of the vast bulk of crime. (Hough, J.M. and Clarke, R.V.G. 1980, p. 9)

Finally, a lack of powers does not emerge from relevant research as a significant factor influencing the effectiveness of the police. Research commissioned for the Philips Commission concluded that "[t]here are no obvious powers which police might be given that would greatly enhance their effectiveness in the detection of

crime" (Steer, D. 1980, p. 125). The detection and clear-up of most crime depend, not on police powers, but on the provision of information by the public:

> the prime determinant of success is information immediately provided by members of the public (usually the victim) to patrol officers or detectives . . . If adequate information is provided to pinpoint the culprit fairly accurately, the crime will be resolved, if not it is almost certain not to be. This is the conclusion of all the relevant studies. (Reiner, R. 1985, p. 121)

If the flow of such information is so crucial, it may be important to concentrate efforts on improving police-community relations; indeed, if an increase in powers contributes to alienation between police and public, the result may well be counter-productive.

Calls for increasing police powers usually include as a corollary reducing the rights of citizens. These rights, it is claimed, obstruct effective police work. Three points should be made here. (These are based on research in England and Wales, but the results are of relevance to Australian criminal justice systems). First, suspects rarely exercise the rights which are supposed to be so obstructive. The prime example here is the 'right to silence', the target of concerted attacks since the 1960s. All empirical studies (reviewed in Dixon, D. 1991) show that very few suspects exercise this right. It is hardly surprising, given the difficulties of remaining silent, lack of knowledge of rights, and lack of legal advice. This is (or should be) well known. The conclusion must be that the right of silence has become an issue of symbolic rather than instrumental significance: it is the site on which general ideological conflicts about criminal justice are fought (Dixon, D. 1991).

Secondly, the legal status of these rights is often doubtful. The lack of legal substance for suspects' 'right' of access to legal advice in Australia (and in England and Wales before 1986) provides a good example. If 'rights' are not protected by the courts nor made real by the provision of services such as publicly-funded duty solicitors in police stations, then they are of little value or meaning (Brown, D. 1984).

Thirdly, the assumption that rights obstruct policing depends on a model of criminal justice as balanced between police powers and suspect's rights: increase one, and the other must decrease. Research on the effects of the *PACE Act 1984* shows how unhelpful such dichotomous thinking can be. The experience of England and Wales is that rights and powers can increase together, indeed that they can complement each other. A good example is the provision of legal advice to suspects in custody. Far from producing (from the police perspective) a disastrous increase in use of the right to silence, legal advice has had considerable benefits for police as well as for suspects: communication between police and suspects is eased and in appropriate cases, earlier confessions are made. Use of the right of silence has not increased dramatically, is not 'abused' by professional criminals and has little or no effect on the likelihood of a suspect being charged or convicted (Dixon, D. 1991a; 1992). Similarly, both police and suspects have benefited from the introduction of a

clear regime for detention for questioning and the systematic tape-recording of interrogations (Dixon et al. 1990). Reiner's authoritative review of the research literature concludes that:

> It is not plausible that changes in police powers would significantly increase police effectiveness in crime control . . . There is no evidence that rules of criminal procedure allow a significant proportion of suspects to avoid conviction . . . (Reiner, R. 1985, p. 173)

In any case, to focus on a supposed lack of power or any single factor is misleading because neither policing in general nor law enforcement in particular are unitary activities. In order to understand the field, the focus must be much tighter, concentrating for example on factors such as varying detectability of types of crime, the likelihood of one detection leading to other crimes being cleared up (as offences 'taken into consideration' or 'written off'), the influence of relationships between suspect and victim, and between police and public (1981 Bottomley, A.K. and Coleman, C.A. 1980, pp. 85-89). In sum, policing is a much more complex activity than nostrums about the need for more powers would suggest. Claims for more powers need to be analysed specifically: what is the problem to be addressed? How would increasing police powers help to solve it? What are the alternatives? What would be the costs of increasing powers and might these outweigh the benefits? There is a clear need for research which analyses specific instances of legal change and its effect on policing practices.

Pressure for changes in police powers often comes from the police themselves. The "perennial clamour by law enforcement officials for increased powers" can be traced back to the earliest days of organised police forces in Australia (Haldane, R. 1986, p. 15). Current concerns have to be seen in the light of their long history (Finnane, M. 1987; 1989; 1989a). In recent decades, senior officers have become increasingly frequent and influential contributors to public debates about policing and a wide range of social matters. Clearly, police have status as experts in areas of their specialisation. However, it is equally clear that claims for increased powers are made by police not just as disinterested experts, but as politically aware bureaucrats. Claims for increased police powers are sometimes linked to other bureaucratic interests, notably increased resources and establishments. Once again, claims for more police powers may have a very significant symbolic dimension, drawing attention to perceived crime threats or needs of police, or indeed drawing attention away from other public concerns such as police corruption or indiscipline.

This suggests that there is difficulty even at a superficial level in knowing what a change in police powers is intended to achieve. Some examples demonstrate that the measurement of intended effects is likely to be a highly complex matter.

A simple case is a police power to conduct random alcohol testing on drivers. Measures of effectiveness would include trends in convictions and road deaths. But a direct relation between the power (to carry out random breath-tests) and the

result (declining alcohol-related road deaths) is confounded by other immeasurable factors, such as the effect of road safety advertising and more generally, changing social attitudes towards drinking and driving.

Other examples are less straightforward. Police powers and their use in dealing with domestic violence illustrate the point. In a number of jurisdictions (notably in the United States), police have been directed to use arrest powers in dealing with incidents of domestic violence. (Although new arrest powers are not usually introduced, the effect is comparable to such a legal change.) The impact of such policies has attracted a great deal of research, probably more than on any comparable shift in police power and practice (Sherman L.W. 1992a). Early claims that such a policy reduced domestic violence (Sherman, L.W. and Berk R.A. 1984) led to their widespread adoption in numerous jurisdictions. However, it is now becoming clear that the effects are much less certain and desirable than the initial studies suggested. It is suggested that arrest has different effects on different kinds of people (see Sherman, L.W. 1992, pp. 6-9 for a summary of this research).

Such research raises methodological problems which are common to projects relying on crime statistics and official data. The measurement is of arrests, not of incidence of domestic violence. The relationship between arrest and incidence is complex: for example, the previous record of suspects may be decisive. More fundamentally, questions may be asked about measures of 'effectiveness': while arrest rates are easy to calculate, women's feelings of security and empowerment (which may result from knowledge of presumptive arrest policies) are much less so.

A final example is the effect of the *PACE Act 1984* on the investigation of crime in England and Wales. As noted above, irreconcilable predictions were made about the likely effects of this legislation. Subsequent empirical studies of its effects have reflected these expectations (Dixon, D. 1992). Brown's study of the impact of the *PACE Act 1984* on investigations of domestic burglary provides useful insight into these problems of evaluation. It was commissioned in response to "a fall in the number and percentage of crimes cleared up by the police" in 1986 (the first year that the legislation was in force) which "some took . . . to indicate that PACE had indeed given the balance of advantage to the suspect" (Brown, D. 1991, p. vi). After 1986, the statistics returned to their previous pattern and it appears that the 1986 dip was "a temporary aberration" (Brown, D. 1991, p. vi) which was largely due to officers' unfamiliarity and caution in operating new procedures (Brown, D. 1991, p. 85). However, this does not mean that the *PACE Act 1984* did not change policing, but rather that its impact cannot be adequately grasped at the level of generalities. Brown examined the way that the *PACE Act 1984* affected burglary investigations at three stations which contrasted sharply in their investigative methods: one "cleared a high proportion of burglaries through interviewing convicted offenders in prison about other offences"; at the second, suspects were frequently interviewed at the station for offences that might be taken into consideration (TICs) along with the main charge; while at the third "the policy tended to be to charge offenders and lay little emphasis on interviewing about

further offences" (Brown, D. 1991, p. vii). The research found that these contrasting practices significantly affected the impact of the *PACE Act 1984* which varied from station to station, but that there was "no evidence that *PACE* led to any consistent reduction in police effectiveness against burglary" (Brown, D. 1991, p. xi). It also emphasised other differences between the stations, notably "in the standard of evidence considered necessary to justify an arrest and subsequent detention at the police station" (Brown, D. 1991, p. xii). Brown makes clear the difficulty in disentangling the effects of the *PACE Act 1984* (which itself is complex and multi-faceted) from other contemporary changes, many of which are immeasurable, some of which may be imperceptible. These range from changes of personnel at the research sites to other legislative changes (notably, the introduction of the Crown Prosecution Service), to broader social and political changes (Brown, D. 1991, p. 8).

Such vital considerations tend to be overlooked when legislative changes are discussed. In such debates, there is a good deal of loose talk about legislative 'intention'. Indeed, legislation is sometimes anthropomorphized, as when people talk about the *PACE Act 1984* 'trying' or 'intending' to achieve some objective. While this is, of course, largely a matter of shorthand, it threatens to over-simplify matters. To ask whether the *PACE Act 1984* achieved its objectives is a misleading question: such complex, multi-determined legislation can only in a very qualified sense be said to have 'intentions' (Dixon, D. 1992).

These examples suggest the need for great care and specificity in making claims about the effects of proposed or actual legislative changes in police powers. Sweeping generalisations and unfounded assumptions need to be replaced by thorough, well-grounded research. The outcome need not be an accumulation of specific case-studies without more general relevance. Brown provides an exemplar of how broader lessons may be drawn from closely-focused studies (Brown, D. 1991, Chap. 8).

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CHAPTER FIVE

HOW OTHER JURISDICTIONS HAVE REVIEWED POLICE POWERS

Since the 1970s, there has been an increasing interest in the reform of criminal procedures in common law countries A review of one or more aspects of police powers of investigation has occurred in all States and Territories in Australia, in England and in Canada. Those reviews have been undertaken by law reform commissions, special committees of review, or royal commissions. So numerous have been the reviews into reform of the law of criminal investigation that Justice Michael Kirby described the process of reform as a "graveyard of reports" (1979, p. 628). The complexities of the issues involved is demonstrated by the length of time it has taken for these reviews to be completed. For example, the LRCC has engaged in a 20 year programme of review. The Philips Commission, consisting of 15 members took three years to report. A further three years of debate in Parliament followed before changes were enacted.

A notable feature of the reviews has been a concern to develop principles upon which to base criminal procedure (see in particular the report of the Philips Commission 1981, Chaps 1 & 2; LRCC 1988). This is a deliberate shift away from the traditions of ad hoc change and challenges simplistic accounts of criminal justice as balancing police powers and suspects' rights. The major legislative product of this trend is the *PACE Act 1984* for England and Wales. As comments contained in this report will indicate this legislation has, amongst other things, demonstrated that police powers and suspects' rights can be increased together, and that changes need not be at the expense of one or the other. However, the inadequacies of *PACE Act* which have emerged since 1986 show how fundamental restructuring of criminal procedure must be if it is to be successful.

This chapter will review the process of law reform in the field of police powers of investigation in a number of jurisdictions which have systems of criminal justice similar to ours. While it is recognised that any scheme which may operate in another jurisdiction cannot be simply transposed to Queensland, there are lessons to be learned from the research and the variety of practices of other jurisdictions.

COMMONWEALTH OF AUSTRALIA

In September 1975 the Australian Law Reform Commission (hereinafter referred to as 'ALRC') delivered its report titled *Criminal Investigation*. This report was prepared in response to the reference by the Commonwealth Attorney-General in May 1975 to "inquire into and report as to the appropriate legislative means of

safeguarding individual rights and liberties in relation to the law enforcement process by the Australia Police". The ALRC was asked to examine in particular:

- the conduct of investigations;
- the powers of arrest, search and seizure; and
- the rights of persons who are detained in custody to access legal advice, protection against compulsory self-incrimination, speedy access to a justice or magistrate, and to humane and dignified treatment (ALRC 1975, Terms of Reference).

The remarkably speedy issue of the comprehensive report (only four months) was achieved through the referral of many of the matters under review to consultants.[10] Nevertheless, the ALRC also sought public submissions "so that as far as possible, our proposals could reflect not only the view of the experts but also the values now held by society" (ALRC 1975, Foreword). Written submissions were received and discussions were held in all parts of Australia with a range of persons and organisations including police, professional associations and civil liberties organisations.[11] The report contained recommendations about a broad range of police powers including:

- Consolidation of the powers to a single legislative code of procedure.
- Arrest and Summons:
  - * proceed by summons rather than arrest wherever possible;
  - * streamlined procedures for issue of summons;
  - * defined criteria to be satisfied before arresting a person; and
  - * persons arrested to be notified at the time of arrest of the reasons for the arrest.

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10 Consultants to the ALRC included The Honourable Mr Justice R.J.B. St John (Judge of the Australian Industrial Court), Ms Susan Armstrong (Research Director Australian Commission of Inquiry into Law and Poverty), Mr A.J. Cameron (Aboriginal Legal Service), Mr W.B. Fisse (Consultant to the Criminal Law and Penal Methods Reform Committee of South Australia), Chief Superintendent J.B. Giles (S.A Police Legal and Training Section), Mr T.R. Carney (Lecturer in Law), Prof. J.D. Heydon (Professor of Law).

11 Written Submissions were received from such groups as Australian Crime Prevention Council, Bar Association of Queensland, Central Australian Aboriginal Legal Service, Council for Civil Liberties (NSW, Vic. & SA), Institute of Criminology, Law reform Commission (NSW, Qld, Tas), Police Association (ACT, NSW, NT, SA, Vic.), Prisoners' Aid Association, Law Societies of NSW, SA & WA.

- Procedures Short of Arrest:

  * power to require the name and address of a person in certain circumstances; and

  * a person voluntarily attending at a police station to be advised of their rights where the person may conceivably have committed the crime.

- Custodial Investigation:

  * a scheme for the detention of persons in custody to enable questioning of those persons and the further investigation of offences they are suspected to have committed prior to their being charged and brought before a court;

  * duties and powers in relation to persons in custody;

  * notification to persons in custody of their rights;

  * provision of facilities necessary to enable persons in custody to contact and have present a lawyer during questioning; and

  * powers for obtaining of fingerprints, photographs and the like.

- Questioning and the Right to Silence:

  * statutory recognition of the right to silence; and

  * interviews preferably to be mechanically recorded or corroborated by a third person.

- Search, Surveillance and Entrapment:

  * general search warrants in all forms to be abolished;

  * searches and seizures made without warrant to be lawful in only very limited situations;

  * telephone and other electronic surveillance; and

  * entrapment to be prohibited.

- Special Problems of Minority Groups and of Remote Areas:
    - special procedures and safeguards for questioning persons of special groups.
- Enforcing the Rules:
    - a scheme for encouraging police to comply with the recommended procedures.

The ALRC included as an appendix to the report draft legislation incorporating its recommendations. In 1977 a Criminal Investigation Bill was prepared by the Federal Government which adopted many of the ALRC's recommendations but was never enacted. A revised Bill was also prepared in 1981 but again was not enacted.

No further general review of investigative powers of police was undertaken by the Commonwealth until 1987.[12]

In February 1987 the Commonwealth Attorney-General established a committee, comprising three members (chaired by former Chief Justice of the High Court of Australia, Sir Harry Gibbs), to review generally the Commonwealth criminal law. The committee was formally titled the Review Committee of Commonwealth Criminal Law but was informally known as the Gibbs Committee. In the course of the review, which concluded nearly five years later in December 1991, the Gibbs Committee issued 21 Discussion Papers, five Interim Reports and its Final Report.

Discussion Papers (DP) produced by the Committee which concerned the investigative powers of police included:

- *Arrest and Related Matters* (DP 3 - September 1987)
- *Search Warrants* (DP 4 - September 1987a)
- *Matters Ancillary to Arrest* (DP 11 - February 1988)
- *Human Rights in Relation to the Commonwealth Criminal Law* (DP 15 - July 1988a)

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12 In 1986 the ALRC reported on *The Recognition of Aboriginal Customary Laws* following an extensive and intensive examination of that issue. Part of that examination and subsequent report considered Criminal Investigation and Police Interrogation of Aborigines (Chap. 22 of the report). The Commission had reference to previous proposals for change to safeguard the rights of Aborigines in police interrogation and the existing situation of legislative, police guideline and judicial regulation. Numerous formal and informal discussions with interested groups were also held by the Commission prior to the preparation of its report and recommendations.

In March 1989 the Gibbs Committee delivered its *Interim Report: Detention Before Charge*.[13] The report was prepared in response to a request of the Attorney-General in September 1988 to provide an interim report on that issue. In preparing the report, the Committee reviewed, *inter alia*, the then current position in law of detention for investigation and considered the submissions it had received in response to the discussion papers listed above. The recommendations of the Gibbs Committee for legislative action which are contained in the report include:[14]

- a scheme permitting the detention of persons in custody prior to the person being charged and brought before a court to enable them to be questioned and allow the further investigation of offences which they are suspected to have committed;

- special protective measures to regulate the police in the exercise of their investigative and detention powers upon Aboriginal and Torres Strait Islanders;[15] and

- confessions and admissions to be tape recorded where the suspect is detained for questioning for any offence or charged with an offence carrying a penalty of greater than 12 months imprisonment.

The recommendations of the Gibbs Committee in its 1989 *Interim Report* were similar in many respects to those of the ALRC in its 1975 report. The Gibbs Committee appended to the report draft legislation incorporating the recommendations. This draft formed the basis for the preparation and subsequently the enactment of the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991*.

The *Fourth Interim Report* of the Gibbs Committee dated November 1990 dealt with, amongst other things, search warrants. The basis for the preparation of this report was the discussion paper issued in September 1987 (DP 4) and the submissions received while preparing it and later in response to it. The recommendations of the Committee included:

- a scheme for the grant of warrants to search premises and named persons including who should be authorised to issue a warrant, by what means and the duration of validity of the warrant;

- implementation of measures to ensure that occupiers/owners of premises being searched are aware of what is happening and what their rights are;

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13 The first report of the Gibbs Committee was *Interim Report: Computer Crime* published in November 1988.

14 The majority of these recommendations have been incorporated into recent amendments to the *Crimes Act 1914* [*Crimes (Investigation of Commonwealth Offences) Amendment Act 1991*].

15 The recommendations of the Committee for ATSI were drawn from clauses 26 and 27 Criminal Investigation Bill 1981.

- specification of the extent of the search to be permitted by a search warrant, safeguards on the execution of the search and measures for accountability of the executing officer/s;

- permitting an officer executing a warrant to leave the premises being searched for a period of up to one hour (or longer period agreed to in writing by the occupier) and to re-enter;

- permitting officers executing a search warrant to seize objects not specified in the warrant in limited circumstances; and

- returning goods as soon as it is determined that items seized are not to be used in evidence and provided they are not forfeitable goods or the subject of disputed ownership.

The Gibbs *Fifth Interim Report* dated June 1991 dealt with, amongst other things, arrest and matters ancillary to it. The basis for the preparation of this report were Discussion Papers No.'s 3 and 4 issued in September 1987 and February 1988 respectively and the submissions received during the preparation of those discussion papers and, later, in response to them. The recommendations of the Committee included:

Arrest:

- there be one legislative provision which would deal comprehensively with the police power to arrest without warrant unless there is a special need for such a provision in any particular Act;

- there be limits on times when arrest warrants are ordinarily exercisable upon dwelling houses or motel rooms and the like.

Search of the person and seizure:

- a police officer who makes or is present at an arrest may frisk search[16] the arrested person if the officer believes it is necessary to do so to ascertain if the person is carrying anything which will be dangerous to themselves or others or assist in their escape from custody and to seize any such thing. The officer may require the person to remove overcoat, coat, jacket, gloves, shoes and hat only;

- strip searching a person at a police station should be permitted if the person consents in writing or in other limited circumstances;

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16 The Gibbs Committee defined a frisk search to be a quick search of the person by the rapid and methodical running of hands over the person's outer garments and an examination of anything conveniently and voluntarily removed by the person.

- removal of an outer layer of garments should be conducted in a private area by an officer of the same sex and where no person of the opposite sex (except a medical practitioner) or unnecessary person is present;

- implementing special protective provisions regarding search of persons under 18 years of age or those mentally or physically incapable of managing their own affairs;

- disallowing searches which involve an internal physical examination of a person's orifices;

- taking a non-intimate sample[17] from an arrested person by a police officer should be permitted with or without the arrested person's consent; and

- taking an intimate sample should only be permitted by or under the supervision of a medical practitioner following the giving of written consent of the person or by order of a magistrate. If the person fails to provide the sample requested or ordered, the hearing may receive evidence concerning that and may draw inferences from it.

Stop and search vehicles:

- providing for a power to stop and search vehicles in a public place subject to procedural controls; and

- permitting establishment of a road block in limited circumstances.

Fingerprints and photographs:

- permitting prints of the fingers, hands, feet or toes; voiceprint; samples of handwriting and photographs of an arrested person to be taken in nominated circumstances; and

- specifying that the fingerprints etc. should be destroyed if the person is acquitted, the charge is not proceeded with, or the person is found guilty but no conviction is recorded.

Identification parades and identification photographs:

- permitting an identification parade in limited circumstances and subject to compliance with strict guidelines.

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17 Defined by the Gibbs Committee to mean a sample of hair (not pubic); a sample from under a person's fingernail or toenail; a swab from any part of the person's body other than a body orifice; a footprint or similar impression of any part of the body other than the hand.

Furnishing name and address:

- providing a general power to demand the name and address of a person whose name and address are unknown to the officer when certain criteria are fulfilled; and

- prohibiting a person requested to provide his or her name and address from refusing to supply those details if the officer has informed him or her of the reasons for making the request and, if the person has requested them, the officer has supplied the person with details of the officer's name and address of place of duty.

Recommendations for the reform of police powers have also arisen out of the report of the Australian Royal Commission of Inquiry into Drugs (hereinafter referred to as the 'Williams Commission')[18] and two further reviews which examined police powers relative to a police officers' interaction with specific cultural groups in the community.[19]

VICTORIA

The reform of police powers in Victoria has been the subject of a number of reviews and inquiries in the last 20 years and in the 1980s in particular. Recommendations for the reform of investigative police powers in Victoria have arisen from references before the Law Reform Commission of Victoria[20] and from specialist committees established by the Government to examine one or more aspects of police powers.

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18 A joint Royal Commission was established by the Governments of the Commonwealth of Australia, Victoria, Queensland, Western Australia and Tasmania in October 1977. The Commission was chaired by The Honourable Mr Justice E.S. Williams and delivered its extensive six part report in December 1979.

19 The first of these was the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) which comprised a three year inquiry; reports into individual deaths were delivered during 1989/91. The national report was delivered in 1991. The RCIADIC recognised that the cultural differences of ATSI required that special protective measures regulate the exercise of police powers of detention of ATSI.
The second review was conducted by the ALRC which in 1992 published its report *Multiculturalism and the Law*. That report made certain recommendations for the manner in which police exercise their powers in recognition of cultural differences, including the translation of rights into a language the person being investigated can understand, and the provision of legal services at the time of police interview.

20 The present LRC, established by the *Law Reform Commission Act 1984*, has undertaken a number of reviews of criminal law issues indirectly affecting police powers. The Commission has reported on such matters as *Public Drunkenness* (June 1989) and *Offensive Weapons* (September 1989). It is soon to publish a discussion paper on the *Summary Offences and Vagrancy Acts*. While not reviewing police powers directly these reports contain recommendations which do affect those powers.

The Consultative Committee on Police Powers of Investigation in Victoria (hereinafter referred to as the 'Coldrey Committee'), comprising nine members and chaired by Mr John Coldrey QC, was one such specialist committee. It was set up in 1985 and reported on a number of areas until 1989 as detailed below.

In late 1983, and as a result of a number of trials where evidence of confessions obtained voluntarily from accused in custody were excluded by judges exercising their discretion to exclude unfairly or illegally obtained evidence, the Attorney-General requested the Director of Prosecutions Mr John Phillips QC, to look into the problem. The judges had exercised their discretion to exclude such evidence on the basis of the interpretation that the sole purpose for which police could take a person into custody under section 460 *Crimes Act 1958* (Vic.) was to bring the person before a magistrate or justice as soon as practicable. Delay in doing so for any other purpose amounted to an unlawful detention.

Phillips recommended that a new section 460 be enacted to provide that following arrest, an accused in custody be brought before a justice or magistrate within six hours of having been taken into custody unless the person was sooner bailed or released. To overcome the problem of the exclusion of voluntary confessional evidence obtained during the prescribed period of detention, Phillips recommended that the new legislation provide that evidence gathered by means of a voluntary statement or investigations carried out with the consent of the person in lawful detention within the prescribed period be deemed not to be inadmissible only by reason of the detention. It recommended that the prescribed period of detention could be increased beyond six hours upon approval of a magistrate and with the approval of the suspect. If the person refused to be interrogated or to partake in inquiries/investigation, Phillips stated that the obligation of the police was to discharge the person if there was insufficient evidence to charge him or her or if charged, to bring the person before a court to be released, bailed or remanded. Any statement or evidence obtained beyond the period reasonably required to bring the person before the court after refusing to co-operate or after the prescribed period has expired, may be excluded by the court through the exercise of its common law discretions. These recommendations were adopted by Parliament and amendments to section 460 operated from 5 June 1984.

In 1985 a specific review of the powers of police in the investigation of offences was carried out by the Coldrey Committee. The Committee issued its first report in April 1986 on the topic of custody and investigation (*Report on Section 460 of the Crimes Act: Custody and Investigation*). They subsequently reported on *Identification Tests and Procedures - Fingerprints* (1987), *Body Samples and Examinations* (1989) and produced a discussion paper on the *Power to Demand Name and Address* (?1988).

The Coldrey Committee's report on *Custody and Investigation* outlined the results of its review of the operation of the amended section 460 *Crimes Act 1958*. Such a review had been foreshadowed by the Government at the time of introduction of the amendment in June 1984. During the course of its review, the Coldrey Committee considered a report prepared by the Victorian Police Service on the results of a monitoring programme of the operation of the amended section 460 in its first six months. That report contained a number of submissions on the operation of the section and recommendations for change. The Coldrey Committee also had reference to reports, research and legislation from other jurisdictions as well as to submissions it had received on the matter. Following deliberation, the Coldrey Committee concluded that the amended section 460 be repealed and replaced by a new section 460 permitting detention for a "reasonable time". In particular, it recommended that:

- The provisions operate subject to the following requirements to be incorporated into legislation:
    - the right to silence;
    - the voluntariness rules of admissibility of confessional material;
    - the discretion of the courts to exclude unfairly obtained evidence; and
    - the discretion of the courts to exclude illegally obtained evidence.
- Before any questioning or investigation by police of a person reasonably believed to have committed an offence who is in their company, the police must inform the person that:
    - he or she may communicate with or attempt to communicate with a friend or relative to inform that person of their whereabouts;
    - he or she may communicate with or attempt to communicate with a legal representative of the person's choice;
    - he or she is not obliged to say anything, but anything the person does say may be given in evidence.

The majority of these recommendations were adopted by the Victorian legislature in the *Crimes (Custody and Investigation) Act 1988* which repealed the amended section 460 and enacted, for the greater part, the recommendations of the Coldrey Committee.

The October 1987 report of the Coldrey Committee on *Identification Tests and Procedures - Fingerprinting* followed a comprehensive examination of the issues surrounding the taking of fingerprints and was part of a larger examination of

forensic procedures and tests generally. In conducting its fingerprint review (which included toeprints, footprints, and palmprints) the Committee considered written submissions; consulted with fingerprint experts; reviewed statistics concerning fingerprints and crime; examined legislation in other Australian and overseas jurisdictions; and reviewed reports and literature on the subject. The Committee made comprehensive recommendations concerning the procedures and law relating to the taking of fingerprints including:

- subject to certain conditions, a person 17 years or older present at a police station and who has been charged with an offence or is to be charged on summons with an offence may, with his or her consent, be fingerprinted;
- subject to satisfaction of procedural and factual matters, which include that a fingerprint was found at the scene of the crime, a magistrate should be entitled to authorise the taking of fingerprints if:
    * the suspect person is 17 years or older,
    * the person has been arrested or is in de facto custody (i.e. not yet arrested but the officer would be in a position to do so);
    * the provision of fingerprints will tend to confirm or deny that persons involvement in the offence; and
    * the person has declined to provide the fingerprints when requested to do so.
- the taking of fingerprints of children under 12 years be prohibited. For juveniles between 12 and 16 the Committee presented a number of options including that fingerprinting be permitted only by order of a magistrate.

The *Crimes (Fingerprinting) Act*, which received assent in May 1988, took up many of the recommendations of the Coldrey Committee. Clarification of the taking of fingerprints of juveniles (ages 10 to 16) was subsequently undertaken by section 12 *Crimes Legislation (Miscellaneous Amendments) Act 1989*. During the Commission's discussions with Victorian police and practitioners the Commission was advised that there are currently calls for further amendments to the fingerprinting powers so as to enable police to take fingerprints without an order of a magistrate following the charging of a person and notwithstanding the absence of consent. Anecdotal evidence from the magistracy, police and practitioners suggests that police do not apply for fingerprint approval very frequently.

The Coldrey Committee reported on *Body Samples and Examinations* in September 1989. In arriving at its recommendations, the Committee undertook a similar task of examination and research as it had applied to the fingerprinting issue. The recommendations of the report included:

- A strictly regulated scheme for the taking of body samples from suspects which is subject to strict safeguards and measures of accountability including the specification of:
  - * persons authorised to conduct examinations;
  - * warnings to be given;
  - * consequences for failure by police to comply with legal requirements;
  - * statutorily enshrined standards of admissibility;
  - * system of accreditation from forensic scientists;
  - * provision of samples to the accused;
  - * provision of maximum privacy; and
  - * subsequent use of samples and their destruction.
- That there be no power to compulsorily acquire samples of saliva, semen, urine or dental impressions, or to take physical measurements.
- That, for indictable offences, there be a power to compulsorily acquire gunshot residues, hair samples, fingernail scrapings, skin swabs and washings (limited), and blood samples from a person in custody and a person charged and a person on remand.
- That, for all offences, all procedures referred to in the report (including sampling of urine, semen, saliva, dental impressions and physical measurements) may be carried out with the informed consent of the suspect where the investigating officer believes the participation of the suspect in the procedure will tend to confirm or disprove the person's involvement in the offence for which he or she is in custody or on remand. The rights and obligations of the suspect and the police in this area of consenting investigation to be legislatively delineated.[21]

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21 The rights include the suspect being advised of the offence the person is suspected of having committed; the procedure to be carried out; the purpose of the procedure; that any evidence obtained through the use of such procedure may be used in evidence; that they are not obliged to consent to the procedures but if the person has been charged, an application may be made for an order of a Magistrate permitting compulsory taking of those samples which are able to be compulsorily acquired.

- No person under ten years of age may be subjected to any body examination or sample procedure. No procedure may be carried out on juveniles between the ages of 10 and 17 except pursuant to an order of a Children's Court Magistrate.

In respect of the taking of blood samples, the Victorian legislature acted quickly following the issue of the report and passed the *Crimes (Blood Samples) Act* in December 1989. This legislation adopted many of the recommendations of the Coldrey Committee but was limited to the taking of blood samples. No further legislation adopting the recommendations of the Committee has been enacted. However, the Victorian Parliament presently has before it the Crimes (Blood Samples) (Clarification) Bill 1991.

NEW SOUTH WALES

The NSWLRC, established in 1966, has investigated the reform of a number of aspects of the criminal justice system pursuant to a reference in 1982. The reference was of a general nature to inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto.

That general reference generated a major research project which resulted in the production of numerous publications by the NSWLRC. The topics investigated and the subsequent publications of the NSWLRC particularly relevant to police powers include:

- *Unsworn Statements of Accused Persons* (Report - October 1985).
- *Criminal Procedure: Police Powers of Arrest and Detention* (Issues Paper - August 1987).
- *Police Powers of Detention and Investigation After Arrest* (Report - December 1990).
- *People with an Intellectual Disability and the Criminal Justice System* (Issues Paper - May 1992).

The NSWLRC's examination and report on *Police Powers of Detention and Investigation After Arrest* arose from a specific reference by the Attorney-General in 1987 following the decision of the High Court of Australia in *Williams v. The Queen* (1986) 161 CLR 278.[22] As a result of this decision, the NSWLRC was asked by the Attorney-General in January 1987 to review the whole question of the rights and powers of police following arrest.

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22 See p. 31 of this volume for a discussion of the effect of this case.

Following preliminary research into this matter the NSWLRC prepared a consultative paper which was distributed widely including distribution to all judges, magistrates, crown prosecutors, public defenders, numerous private lawyers and interested organisations. The NSWLRC called for submissions and comments on the issues raised in the paper.

In light of its receipt of numerous, often conflicting, submissions in response to the consultative paper and because of the complexity and importance of the issues involved, the NSWLRC decided to undertake further research and prepare a discussion paper. A detailed discussion paper titled *Criminal Procedure: Procedure From Change To Trial, Specific Problems and Proposals* was distributed in August 1987 for the purpose of consultation. The discussion paper contained some 67 tentative proposals for reform covering such topics as:

- a code of arrest and detention;
- power to stop and search;
- power to demand name and address;[23]
- power to set up road checks;
- questioning before arrest;[24]
- police power to arrest;
- power of search on arrest;
- procedure following arrest;
- questioning following arrest;
- use of electronic recording equipment;
- fingerprinting of arrested persons;
- photographing of arrested persons;
- obtaining forensic evidence;

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23 The NSWLRC tentatively proposed that a police officer have the power to "require a person whose identity is unknown to give his or her name and address to the officer if the officer reasonably believes that the person may be able to assist his or her inquiries in relation to a criminal offence, irrespective of whether the person is suspected of being implicated in the offence or not" (p. 90). Such a power would apply to witnesses as well as suspects. The proposal required the officer to give the reason for the request and, if the person requested it, the officer must provide his or her name, rank and station.

24 The proposals of the NSWLRC were that, apart from name and address, a person should not be obliged to answer questions from a police officer. The officer should not question a person whom the officer believes on reasonable grounds may have committed an offence or ask the person to attend at a police station without first cautioning the person. In addition, the NSWLRC recommended that the questioning of such a person be electronically recorded.

- conduct of identification parades; and
- consequences for breach of procedural rules.

By mid-1988, the NSWLRC had received a large number of submissions in response to the discussion paper and had undertaken informal discussions with interested individuals and organisations. However, due to funding and staff constraints the preparation of the report was severely limited from then until August 1990 when substantial work resumed. Following refresher discussions with interested groups in August and September 1990 a report was completed and released in December 1990 titled *Police Powers of Detention and Investigation After Arrest*..

The report contained recommendations for the establishment of a scheme enabling police to detain suspects for a reasonable period after arrest for questioning or conducting other authorised investigative procedures.[25] The proposed scheme provided for an initial maximum period of four hours of detention although limited extensions were available. The NSWLRC expressly declined to recommend that police officers have the power to detain suspects for questioning or other forms of investigation in the absence of arrest, the NSWLRC being of the view that an "extension of police powers of arrest merely to facilitate questioning or other forms of investigation would amount to an unwarranted intrusion upon personal liberty" (NSWLRC 1990, p. 30). Their scheme provided that at the end of the prescribed period of detention the person must be released, or released on the basis that a summons will be issued, or charged. If the person is charged, the granting of bail is to be considered. If bail is refused the person is to be brought before a justice or magistrate as soon as practicable. The prescribed period of detention and the proposed scheme as a whole was to also apply to persons who consented to be 'in custody'[26] of a police officer for questioning or investigation but who were not under arrest. The NSWLRC stated that such a person was to be informed from the point of first contact with the police that the person is not obliged to attend and may leave at will.

As yet, the New South Wales Parliament has not adopted the recommendations of the NSWLRC contained in the report.

In May 1992 the NSWLRC published an issues paper titled *People with an Intellectual Disability and The Criminal Justice System*. This issues paper was produced following a reference from the Attorney-General in September 1991 to inquire into and review the law relating to the treatment of the intellectually

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25 Authorised investigative procedures during detention were stated by the Commission to include (to the extent the procedures are already authorised by law): questioning or obtaining statements from witnesses or other persons who may have relevant information; searching of the arrested person; fingerprinting; photographing; conducting medical examinations; obtaining forensic samples and holding identification parades.

26 For the purposes of the proposed scheme a person is to be deemed to be "in custody" if the person is in a police station, a police vehicle or any other place for the purpose of being questioned or assisting with an investigation to determine if the person was involved in the commission of the offence being investigated.

disabled in the criminal justice system and matters incidental thereto. As a result of the broad nature of the reference and the number of interest groups and people with whom it would want to consult, the NSWLRC sought a preliminary response to the terms of reference by releasing an issues paper before preparing a discussion paper and formulating specific proposals. The call for submissions on matters raised in the issues paper closed at the end of July 1992 and the NSWLRC is currently preparing a discussion paper which is expected to be released in May 1993.

Apart from the reviews by the NSWLRC, there have also been a number of inquiries not specifically directed towards a review of police powers but which have made recommendations for the reform of the powers or their manner of exercise. Of particular note are the *Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therewith* (June 1990), the Royal Commission into Aboriginal Deaths in Custody - *Report of the Inquiry into the Death of David John Gundy* (February 1991) and the *Report of the Police Tribunal of New South Wales to the Minister for Police and Emergency Services Pursuant to an Inquiry Under Section 45 of the Police Regulation (Allegations of Misconduct) Act 1978 into Certain Matters Relating to Discipline in the Police Force.* These inquiries and the recommendations or comments arising from them will be referred to in the Commission's discussion of specific police powers later in this report.

TASMANIA

Prior to September 1988 the Law Reform Commission of Tasmania examined and reported on a number of specific references of issues of criminal law reform which touched upon police powers. Those references included:

- Review of the Criminal Process (Bodily Descriptions) Bill 1974 (September 1975);[27] and
- *Powers of Arrest, Search and Bail* (February 1977).[28]

In September 1988 the Law Reform Commissioner (replacing the Law Reform Commission) received a standing reference on Criminal Law and Procedure. Since then, and in respect of issues directly affecting police powers, the Commissioner has delivered a report on *Police Powers of Arrest and Detention* (April 1990). The

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27 This report dealt with issues of identification and search procedures. The Bill was enacted as the *Criminal Process (Identification and Search Procedures) Act 1976.*

28 The Law Reform Commission recommended the consolidation of arrest powers into one document. The Commission also recommended police be given a general power to demand name, address and explanation from a person who the officer reasonably believes is committing or has committed an offence. If the person refused to comply with the officer's request then the officer would be entitled to arrest the person.

Law Reform Commissioner appointed a committee of five, comprising a judge, magistrate, Director of Public Prosecutions, Commissioner of Police and a lawyer to assist him in the preparation of that report. A draft of the report was circulated amongst the judiciary, the magistracy, legal profession and other interested associations. The comments from these groups generally supported the proposals contained in the report.

The report recommended the adoption of legislation similar to the recommendations of the Victorian Coldrey Committee wherein the primary obligation upon a police officer who has arrested any person or who has the custody of an arrested person is to either release that person or present the person upon a charge before a court within a reasonable time. The Commissioner detailed a number of factors to determine what is a reasonable time, what the police may do during that period and the safeguards which are to apply in the operation of the scheme. No further work affecting police powers has been undertaken by the Commissioner.

SOUTH AUSTRALIA

In December 1971, an extensive review of issues in the criminal law and penal methods in South Australia was referred by the Attorney-General of South Australia to a specialist committee titled The Criminal Law and Penal Methods Reform Committee of South Australia (hereinafter referred to as the 'Mitchell Committee').[29]

In its six years of operation the Mitchell Committee produced five reports containing over 900 recommendations for reform on topics covering:

- *Sentencing and Corrections* (July 1973)
- *Criminal Investigation* (July 1974)
- *Court Procedure and Evidence* (July 1975)
- *Rape and Other Sexual Offences* (March 1976a)
- *The Substantive Criminal Law* (July 1976)

Numerous recommendations concerning appropriate powers of police in undertaking investigations and the enforcement of the law were made by the Mitchell Committee in its report on *Criminal Investigation* issued in July 1974. These ranged from recommendations on training to recommendations on search, identification of suspects, interrogation and identification. A number of the recommendations

29 The Criminal Law and Penal Methods Reform Committee of South Australia (the Mitchell Committee) comprised the Honourable Justice Roma Mitchell, Professor Colin Howard, and Mr David Biles.

related to a scheme of pre-arrest detention proposed by the Mitchell Committee. Many of the other recommendations of the Committee have been adopted although a substantial number of those were to leave things as they were. Legislation passed in 1985 and 1986 addressed approximately 35 of the recommendations which resulted in reform of the procedures to be used in questioning suspects, balancing the rights of accused persons and the repeal of offences which the Mitchell Committee considered obsolete and useless.[30] The Mitchell Committee made a number of recommendations for the reform of the powers of search and seizure but these have not as yet been addressed by legislation.

In arriving at its recommendations on criminal investigation, the Mitchell Committee invited persons and organisations appearing to have a special interest in criminal investigation and procedures to forward written submissions to it. A number of submissions were received from the Commissioner of Police and his officers while a further 21 submissions were received from other individuals and organisations. The Mitchell Committee interviewed some of those who had made submissions and also visited police establishments where inspections of facilities and informal discussions with staff took place. Two members of the Mitchell Committee and its research officers accompanied detectives and uniformed police officers on evening patrols. In addition, before arriving at its recommendations, the Mitchell Committee reviewed many overseas and Australian publications and drew upon the collective experience and learning of its members, its consultant and its research officers (Mitchell Committee 1974, Chap. 1).

No further comprehensive review has been undertaken in South Australia since the Mitchell Committee. However, recently there is a movement for large-scale law reform through the codification of the criminal law in South Australia which is currently based on English common law.[31] Areas which have been identified by the Attorney-General's Department as requiring reform include: offences of dishonesty; forgery; offences of a public nature; homicide; general principles of criminal responsibility, and powers of search and seizure.

WESTERN AUSTRALIA

Reviews of police powers in Western Australia have been undertaken on an issue by issue basis and not as a comprehensive review at one time. The reviews have been undertaken by select committees or more recently by the Law Reform Commission of Western Australia (hereinafter referred to as 'WALRC').

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30 *Police Offences Act Amendment Act 1985* (inter alia, this renamed the *Police Offences Act 1953* the *Summary Offences Act 1953*); *Summary Offences Act Amendment Act (No.3) 1986*; *Summary Offences Act Amendment Act (No. 4) 1986*.

31 The Mitchell Committee was in favour of codification for South Australia.

The WALRC, in its Police Act Offences Project (No. 85), is currently examining the powers of arrest, entry, search and seizure contained in the *Police Act 1892*.[32] Powers of entry and search generally have been referred to the WALRC as part of its Privacy reference (No. 65).

The approach of the WALRC in its review of the *Police Act 1892* has to date conformed to the work method adopted by it in the majority of its projects, namely:

- Preparation of a preliminary paper on the scope of the project seeking submissions from nominated and other interested organisations or individuals.
- Detailed research into the law and practice in Western Australia and elsewhere, together with undertaking other detailed research which is required. This includes consultation with experts and interested groups and individuals plus any necessary field research.
- Following the research and consultation period, a discussion paper containing a number of suggestions of reform is prepared and issued for public comment. Public discussion of the issues in the discussion paper is encouraged and public hearings may be held.
- After considering the submissions received throughout the project, the Commission formulates its recommendations and the final report is prepared. That report is presented to the Attorney-General for tabling in Parliament.

For the Police Act Offences Project, the WALRC issued a discussion paper in June 1989 in response to which numerous detailed submissions were received. Following analysis of the submissions and discussions with interested individuals and groups, the WALRC produced a *Report on Police Act Offences Act* in August 1992. That report dealt with the police powers of arrest, entry, search and seizure that were contained in the *Police Act 1892*. The WALRC recommended that a number of those powers be transferred to the *Criminal Code*.

NORTHERN TERRITORY

Following upon the decision of the High Court of Australia in *Williams v. The Queen* (1986) 161 CLR 278 legislative amendments to the *Police Administration Act 1990 and Bail Act 1989* were enacted in March 1988 to allow police to detain a person for a reasonable period following arrest in order that the person could be questioned or investigations carried out before the person was brought before a justice.

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32 Apart from regulating the police service, this Act creates a number of offences and contains powers of arrest, entry and search in relation to those offences. The review by the WALRC is of these offences and related police powers.

Considerable concern was expressed within the community about those amendments. In response to those concerns, the Northern Territory Government established in March 1988 a review committee responsible for monitoring the amendments made as well as considering the wider issue of police powers and rights of suspects generally. The Committee, formally titled the Review Committee on Police Investigations and Rights of Persons Suspected or Accused of Crime, but more simply known as the Police Power Review Committee, comprises representatives of the Law Society and Bar Association as well as the police, government and legal aid lawyers.

The Police Power Review Committee published interim reports in February 1990 and September 1990. The February 1990 report provided information on the operation of the investigatory detention power and discussed the Committee's consideration of initiatives such as electronic recording of interviews, use of listening devices, police powers associated with drug legislation, forfeiture of proceeds of crime provisions and domestic violence laws. The report contained details including:

- data on the operation of the detention power in the Northern Territory and other jurisdictions;
- the Committee's strong support for the use of electronic recording of interviews; and
- a summary of the recommendations by the Committee to the Northern Territory Government in respect of listening device legislation.

The investigatory detention power, listening devices and electronic recording of interviews were briefly discussed in the Police Power Review Committee's short interim report of September 1990.

The investigatory detention power was further considered by the Police Power Review Committee in 1991 following the receipt of legal advice from a member of the private bar on the operation of the legislation and recommendations in respect of it. In response to the recommendations of both the advice and the Police Power Review Committee's consideration of the matter, the Government enacted legislative amendments to the power in early 1992. The amendments and the detention power will be discussed in a forthcoming volume of this review.

ENGLAND AND WALES

A comprehensive review of the criminal justice system was undertaken in England and Wales from 1978 to 1981 by the Philips Commission consisting of 15 members who examined and reviewed the criminal process from the start of investigation of an offence to trial of the offender. Prior to the establishment of the Philips Commission reforms introduced into the system had been piecemeal with no complete review having been undertaken.

The Philips Commission was commanded to examine whether changes were needed in England and Wales in:

- the powers and duties of the police in respect of the investigation of criminal offences and the rights and duties of suspects and accused persons, including the means by which these were secured;
- the process of and responsibility for the prosecution of criminal offences; and
- such other features of criminal procedure and evidence as relate to the above (Philips Commission 1981).

In undertaking this examination the Philips Commission was required by the command to have regard to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime and to take into account also the need for the efficient and economical use of resources.

The Philips Commission dissected the broad terms of the reference into 24 topics to provide a framework for the preparation of written evidence by witnesses. These topics included:

- powers to stop and search a person or vehicle;
- powers to enter and search premises and to seize property;
- powers of arrest;
- detention for questioning;
- questioning of suspects, including cautioning, the taking of statements and confessions, and the possibility of tape-recording or otherwise recording interviews;
- right of silence during investigation;
- right of the suspect to have access to legal advice and to other persons;
- the particular rights of juveniles;
- photographing, fingerprinting and medical examinations of suspects or accused persons; and
- identification procedures.

Submissions were invited generally and also from specific individuals and organisations, resulting in 447 written submissions being received. The Philips Commission quickly identified a remarkable lack of existing information on the operation of the criminal justice system and established an extensive research programme. The Philips Commission stated that the main purpose for the research was to "supplement and fill the gaps in the factual material contained in the

written evidence and to obtain evidence of a type unlikely to be dealt with at all in the evidence" (Philips Commission 1981, p. 199). A substantial volume on the law and procedure of the investigation and prosecution of criminal offences as it existed was prepared. In addition, a research series was undertaken which led to the publication of 12 papers across a broad range of topics.[33]

In order to observe and obtain views on relevant aspects of the criminal justice system the Philips Commission made visits to every police force in England and Wales, attended at police stations of all kinds, held discussions with police officers of all levels, and met with prosecution and defence lawyers and other interested groups and individuals. The Commission also made excursions to other jurisdictions[34] in an effort to gain a perspective on and a perception of the problems faced in England and Wales (Philips Commission 1981, p. 200). When the review was approximately half completed and the Commission had to hand some results of the research, the written submissions had been reviewed and the visits to other jurisdictions were completed, the Philips Commission received oral evidence from key people involved in the system to test opinion on primary issues that had been identified by the Commission and on some of the tentative options for change (Philips Commission 1981, p. 201).

The report of the Philips Commission was completed in January 1981 and contains hundreds of recommendations for the reform of the criminal investigative powers of police.

Following the delivery of the report of the Philips Commission and after a three year period of sometimes heated debate[35] legislation was enacted in England in 1984 which followed the broad outline of the report and adopted many of the reform recommendations. This legislation is the *PACE 1984*. The operation of this legislation has been the subject of intense research by the Home Office and other researchers. The provisions of the *PACE Act 1984* and the results of this research will be referred to throughout this report.

Recently, a Royal Commission on Criminal Justice chaired by Viscount Runciman (hereinafter referred to as the 'Runciman Commission') has been established to undertake a wide-ranging review of the criminal justice system in England and Wales. It commenced sitting in June 1991 and will examine the pre-trial stage, the role of the police and prosecutors, and the possible use of investigative magistrates

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33 E.g. Police Interrogation; Confessions in Crown Court Trials; Uncovering Crime: The Police Role; Arrest, Charge and Summons: Current Practice and Resource Implications.

34 Jurisdictions visited included Northern Ireland, Scotland, Republic of Ireland, United States of America, Netherlands, Denmark and Sweden, Canada and Australia.

35 The three year period before legislation was enacted was due to a number of factors. It took the Government 20 months to prepare a Bill based on the recommendations but which the Government had modified. This Bill was subject to fierce criticism predominantly on the issue of police access to doctor's and clergy's notes. A number of amendments were made but before the Bill could be passed the Parliament was prorogued in May 1983 for the purposes of an election. A further Bill was introduced in October 1983 and was subject to much debate in Parliament until finally passed in October 1984.

similar to those in other jurisdictions such as France. The terms of the Runciman Commission specifically include the examination of the gathering of evidence, police questioning and the conduct of investigations generally as well as the access of accused persons to legal advice. Bevan and Lidstone (1991) believe that following so closely upon the 1981 Philips Commission, the 1991 Runciman Commission is unlikely to recommend radical changes in the investigative powers of police (Bevan, V. and Lidstone, K. 1991, p. 2).

CANADA

In the last 20 years, the LRCC has undertaken a progressive and comprehensive review of a diverse range of criminal justice issues which impact upon police powers of investigation and detention. These issues have been dealt with in working papers (WP) and reports (Rep.) as follows:

- *Arrest* (WP 41 - 1985; Rep. 29 - 1986)
- *Search and Seizure* (WP 30 - 1983a; Rep. 24 - 1984b; Rep. 33 1988)
- *Electronic Surveillance* (WP 47 - 1986a)
- *Questioning Suspects* (WP 32 - 1984; Rep. 23 - 1984)
- *Eyewitness Identification* (Study Paper 1983)

In recognition of the need for an effective criminal justice system which supports society rather than hinder it the LRCC, in undertaking the reviews, sought to incorporate into the criminal justice system principles of fairness, efficacy, clarity, restraint, accountability, participation, and protection (LRCC 1988, p. 23).

The review procedure typically adopted by the LRCC includes public consultation and discussion in an effort to ensure that the system reflects the values, needs and demands of the community as a whole. Firstly, the LRCC prepares a working paper which summarises the current position of the law in Canada, identifies where it considers reform of that law is necessary and makes preliminary recommendations of what it believes the reforms should be. This exercise has in the past tended to be largely a matter of legal and comparative law analysis rather than empirical and social research. Following release of the working paper submissions are called for and a period of discussion and consultation usually occurs before the final report with recommendations is prepared by the LRCC and presented to the Government.

The recommendations of the LRCC have been wide-ranging and comprehensive, covering such issues as:

- Search and seizure (LRCC 1984b):
  - * the disparate array of powers (common law and statutory) governing the authorisation and execution of powers of search and seizure for criminal investigation be replaced by a single, comprehensive regime incorporating safeguards to individuals and measures of accountability of officers exercising those powers.
- Searches of the body (LRCC 1991, vol. 1, Part 3):
  - * a scheme permitting police officers, upon the granting of a warrant or without a warrant in limited emergency circumstances, to take body samples where a person has been arrested for, charged with or issued with an appearance notice in respect of a crime punishable by more than two years imprisonment.
- Arrest (LRCC 1986):
  - * statutory enactment of what constitutes arrest and the rights and obligations of both the police and suspect upon arrest
- Questioning suspects (LRCC 1984a):
  - * a scheme for the questioning of suspects which contains procedural rules, safeguards and measures of accountability which are incorporated into legislation.

The recommendations of the LRCC on each of the individual investigative powers of police and its recommendations for changes to the substantive criminal law formed the basis for the preparation by the LRCC of a draft consolidated code on criminal procedure which it published in February 1991 (LRCC 1991).

IMPLICATIONS FOR QUEENSLAND

Queensland has had its share of reviews of matters affecting police powers, the most notable being the Committee of Inquiry into the Enforcement of Criminal Law in Queensland in 1977. This has been discussed in greater detail in Chapter One of this report.

The Criminal Code Review Committee has also recently produced a draft *Criminal Code* which proposes amendments to police powers and are shortly to produce a report on the review of the *Vagrants, Gaming and other Offences Act 1931* which is expected to make some recommendations in relation to police powers contained in that Act.

However, none of the Queensland reviews have covered police powers to the same extent as many of those reviews discussed in this chapter. The United Kingdom and Canadian reviews in particular have been detailed, lengthy and costly. Much research was commissioned in order to answer many questions raised in their reviews. The Criminal Justice Commission proposes to draw on that material in the following chapters of this report so as to present a comprehensive background to the options for reform in Queensland.

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CHAPTER SIX

CONSOLIDATION OF POLICE POWERS

INTRODUCTION

There are more than 90 pieces of legislation current in Queensland which confer various powers on police. These Acts appear in Appendix 3 of this report, and have been tabulated according to the nature of the powers they confer. The issue of consolidation is considered in the context of Queensland legislation only, as the Queensland parliament cannot effectively legislate to alter valid Commonwealth legislation. Accordingly, only Queensland Acts which confer powers on police appear in the tables to this report.

Unfortunately, Queensland legislative history is such that when each Bill conferring police powers was drafted it conferred such powers independent of other existing enactments. It may be that initially such a procedure was considered necessary to ensure that the most effective means of law enforcement was provided for each issue addressed. Indeed, there is little doubt that such a policy will, in the short term, be effective. However, it will remain effective only so long as there are a minimal number of Acts which require police action in their administration.

As may be expected, in the 132 years of the Queensland Parliament the number of Acts which confer powers upon police has been anything but minimal. The consequences of adopting a legislative policy which caters for the independent enforcement needs of each department of the government are numerous:

- An anomaly exists where the powers conferred for the enforcement of an Act intended to deal with such weighty matters as the protection of human life or the apprehension of violent offenders are not as extensive as those contained in relatively less important Acts.

- Civil rights which may be safeguarded in one Act may be neglected in another without apparent reason. An obvious illustration is the strict requirements imposed in order to conduct a search under the *Domestic Violence (Family Protection) Act 1989* as opposed to those under section 24 of the *Vagrants, Gaming and Other Offences Act 1931*.

- It is impossible for the general public to understand what the police are or are not empowered to do.

- A police officer cannot reasonably be expected to have a ready recall of the vast number of powers and individual requirements contained in the various Acts. Consequently, needless mistakes are made which are often misinterpreted as abuses of power.

Many jurisdictions throughout the Commonwealth have recognised the problems which emanate from a series of unrelated Acts each containing independent policing authorities. Various Australian committees and commissions have been established to examine the need for the consolidation of police authorities under the umbrella of one Act.

As early as 1979, Justice Kirby, as Chairman of the ALRC addressed the issue of the consolidation of police authorities in a paper presented to the 20th Australian Legal Convention:

> [As] . . . a focus for our own clear thinking and for articulating the modern balance which our society is prepared to strike between its need for effective law enforcement and the protection of individual rights, we should endeavour to collect the principal rights and duties of citizens and police in a comprehensive statute. No longer should this area of the law be the province only of the expert. This is one area where knowledge of . . . [civil] . . . rights is vital.

There is little doubt that the current situation in Queensland is complicated. The issue therefore is to what extent, if any, the multitude of police powers should be consolidated into one Act. How can this best be achieved so as to ensure that the powers available to the police adequately reflect the seriousness of the offence and the need for such powers in each individual case?

This chapter identifies some of the problems of consolidation and canvasses a possible general scheme of consolidation. Subsequent reports in this series will identify the difficulties associated with specific powers, which are followed by more specific recommendations concerning a scheme of consolidation. The tables accompanying this report also provide a comprehensive list of powers under various statutes and the conditions under which those powers are granted.

This is the first time in Queensland that such a comprehensive listing and analysis of police powers has been undertaken. The Commission has attempted to identify all police powers in the statutes of Queensland as at 1 July 1992, which appear in the tables in Appendix 3 of this report. If there are any provisions which the Commission has overlooked, it invites you to bring them to its attention.

It should be noted that, although the tables to this report are current as at 1 July 1992, there have been some significant legislative changes in Queensland since then which affect police powers. One of the most significant of those is made by the

Justice Legislation (Miscellaneous Provisions) Act 1992, assented to on 14 August 1992. Insofar as this Act affects police powers, it:

- Repeals the *Hide, Skin and Wool Dealers Act 1958;*

- Alters the capacity in which police officers exercise powers under the *Hawkers Act 1984*, the *Pawnbrokers Act 1984* and the *Second-hand Dealers and Collectors Act 1984*. This is a class of Acts concerned in large part with offences involving goods which have been stolen or otherwise unlawfully obtained, and the powers given to police are largely intended for the detection and investigation of such offences.

The powers conferred by the Hawkers, Pawnbrokers and Second-hand Dealers legislation are conferred on police officers directly, without the need for any further authorisation. These Acts have been so amended that when their provisions take effect[36] only police officers who are appointed as "authorised officers" or "authorised police officers" may exercise the powers. In exercising the powers, police officers will be acting primarily as authorised officers under the specific legislation; they will act by virtue of public office other than their office as members of the police force.

Legislative powers appearing in the tables to this report which have been amended or repealed since 1 July 1992 are also noted in Appendix 3 of this report.

PROBLEMS WITH THE CURRENT 'SYSTEM'

One of the most obvious problems with the current system of police powers is that, prior to undertaking this review, there was not in existence a complete list of police powers. The Commission requested a comprehensive list from the Queensland Police Service who could not provide it, although the Service did have a list of those Acts frequently used by police. Accordingly, the Commission, with the assistance of officers of the Police Service, embarked upon a lengthy process of going through the statutes of Queensland to identify the relevant provisions. The result of that process is the tables accompanying this report.

In a society where people are increasingly encouraged to become aware of their rights and responsibilities there is a need for a central reference point to enable individuals to have access to information on the nature and extent of police powers. As the extensive tables of police and public officers' powers clearly illustrate, such powers appear to have been conferred in an ad hoc manner, and without any consideration for uniformity.

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36 It is expected that the relevant provisions of the *Justice Legislation (Miscellaneous Provisions) Act 1992* will take effect at the end of 1993.

For example, in order to exercise the power to require name and address under section 35 of the *Local Government (Queen Street Mall) Act 1981*, the police officer must have a belief based on reasonable grounds that a person has committed an offence against the Act. Under section 3 of the *Litter Act 1971*, the officer need only have a "reasonable suspicion". Given that the powers are conferred in respect of offences of a similar level of seriousness, is there a rationale for the different tests?

Furthermore, the inconsistent terminology used in various sections with similar purposes contributes to a variety of judicial interpretations of phrases that are similar but not the same.

Among other things the consequences of such a 'system' are; the creation of a potential for both deliberate and unknowing abuse of power by police, the lack of public confidence in a criminal justice system which does not appear to operate consistently and rationally; and the difficulty for police in conducting their own internal review of procedures in order to avoid later instances of public grievance.

THE BENEFITS OF CONSOLIDATION

The benefits of consolidation are clear. A centralised and standardised source of powers would no doubt assist in the training of police by reducing the number of sources which must be consulted in order to know the law. Further, the execution of police duties would be facilitated, as the parameters within which police must operate would be clear.

The police may also come to enjoy a greater rapport with the public where the rights of both are clearly delineated and understandable. This might well be manifested by a decrease in the number of reports of police abuse of powers which undoubtedly occur in part because of a lack of knowledge and understanding of powers both by the police and the public.

A standardisation of powers and of the procedures to be adopted in their exercise would also facilitate the internal review procedures of the police and allow the police to take pro-active steps to reduce complaints concerning their conduct.

Nevertheless, it should be recognised that, although both substantive and procedural reform may be highly desirable, it is also necessary to leave the police with a margin for the exercise of discretion to allow them to execute their duties effectively. The success of any consolidated legislation will ultimately rest upon the ability of police to exercise their discretion appropriately in all circumstances.

RESERVATIONS CONCERNING A SCHEME OF CONSOLIDATION

A major consideration in the consolidation issue is the protection of civil liberties. The concern is that a consolidation of police powers may result in conferring broad and absolute powers upon police which may be exercised in respect of relatively minor offences not warranting any significant invasion of civil rights.

There is a necessary and proportional relationship between the seriousness of an offence and its consequences for society and the degree to which the community will accept the exercise of police powers which invade an individual's rights to privacy of person and property. There is a danger that an inappropriate consolidation scheme may undermine this proportionality.

There is also a concern that consolidation may result in a narrowing of existing police powers, such that police operations would be hindered in the efficient detection and investigation of crime.

The problem is further highlighted by the division of powers between those conferred exclusively on police and those powers conferred primarily on other public officers and in a secondary sense on police. While consolidation may be suitable where a particular power is conferred exclusively upon police officers, it may not be appropriate to consolidate other powers which are conferred only indirectly on police, often in relation to comparatively minor offences.

The perception of a number of government departments administering legislation which confers powers primarily upon officers appointed within the department and only on police in an indirect manner is that the functioning and administration of their departments may be adversely affected by a consolidation of such powers. The manner in which powers are conferred in a secondary sense or indirectly and the problems of consolidation are discussed below.

A practical difficulty also presents itself in that, while a particular power may be framed in similar terms in different pieces of legislation, the prescribed circumstances in which the power may be exercised will vary, as will the threshold test which must be satisfied before the power can be exercised. A good example of this is the power to arrest without warrant (see Table 6 in Appendix 3). In addition, ancillary powers may be exercised when the primary power is invoked, such as under section 31 of the *Crimes (Confiscation of Profits) Act 1989* under which officers, having exercised a power to enter premises, may exercise a power to search persons found on the premises. These ancillary powers may also differ between the various pieces of legislation.

THE NATURE OF POWERS CONFERRED ON POLICE

In order to consider the feasibility of consolidation it is necessary to look more closely at the different categories of powers conferred on police. There are a number of broad classifications into which police powers fall, including powers to enter, to search and seize, to demand name and address and to arrest with or without warrant, which will be discussed in some detail in later reports and which are set out in the tables accompanying this report.

Many of those powers are conferred directly upon police officers, and may be exercised by police officers in that capacity and without reference to any other public officer. The legislation directly conferring these powers shall be termed 'first level legislation'.

However, there is a significant volume of 'second level legislation' indirectly conferring on police powers, which are often of the same type and exercisable to the same degree as powers conferred under first level legislation. The difference between the powers conferred under each level is the capacity or circumstances in which the powers they may be exercised by police.

There are four circumstances in which powers are conferred on police under second level legislation.

The first is when a police officer is called to the aid of a public officer who has been appointed under the particular Act and upon whom the powers are directly conferred. This will usually occur where the public officer has a reasonable apprehension of being obstructed in the exercise of duties and performance of functions under the particular Act. Some of the Acts go so far as to say that a police officer called in aid of an officer under the Act will be deemed an officer for the purposes of the Act (e.g. the *Dairy Industry Act 1989*). Such police officers would then be entitled to exercise the powers conferred by the Act.

Other Acts make no specific reference to whether a police officer called in aid may exercise powers not directly conferred on police by the Act (e.g. the *Factories and Shops Act 1960*). However, presumably a police officer would be unable to 'aid' in a useful manner unless he or she could exercise the powers necessary to allow the purposes of the Act to be fulfilled. Both types of Act often provide that the police officer is to aid the officer appointed under the Act as required by that officer and in accordance with the Act (e.g. the *Banana Industry Protection Act 1989*).

The second situation is where powers are conferred on a police officer acting in some other official capacity which the police officer occupies by virtue of his or her position as a police officer. An example of this can be found in the *Poultry Act 1988* which deems every police officer to be an inspector for the purposes of the Act. A similar formulation exists in other Acts, including the *Brands Act 1915*, the regulations to the *Stock Act 1915* and the *State Transport Act 1960*. In such cases,

the police officer is acting primarily by virtue of his or her appointment as an officer under the relevant Act, and in a secondary sense by virtue of being a police officer.

The third situation is where particular police officers are appointed as public officers under an Act which expressly contemplates such appointments. An example of this is the *Classification of Films Act 1991*, which allows the appointment of particular police officers as inspectors, with the agreement of the Commissioner of Police.

The fourth circumstance is where the relevant legislation allows any person to be appointed as the official who may exercise powers under the Act, but does not expressly contemplate the appointment of police officers to such office. However, it appears to the Commission that, as a matter of practice, police officers (among other persons) are being appointed to such positions. Examples of this can be found in relation to the appointment of inspectors by the Governor in Council under section 13 of the *Auctioneers and Agents Act 1971* and the appointment of persons by the Committee under section 25 of *The Hen Quotas Act 1973*. *The Carriage of Dangerous Goods by Road Act 1934* contains similar provisions. A reading of these Acts does not reveal that police officers are being appointed as officers equipped with the powers conferred by the Acts, and do not appear in the tables to this report. It should however be borne in mind that the conferral of powers upon police officers does occur in this fashion, albeit not often.

An analysis of the various types of police powers reveals that consolidation would not be straightforward as it may appear at first glance.

SUBMISSIONS ON CONSOLIDATION

Submissions in Response to the Issues Paper

The Commission in its September 1991 issues paper *Police Powers in Queensland* called for public submissions on a variety of issues relating to police powers in Queensland, including that of consolidation.

The overwhelming majority of submissions, made by private individuals and by private and public organisations, favoured the introduction of a legislative scheme to centralise police powers, to replace the case-by-case system of conferring police powers that is currently in place.

The recurring themes in the submissions were the desirability of ensuring consistency in the powers which may be exercised by police and in the nature and extent of such powers and also the circumstances in which powers may be exercised. Many submissions were concerned with ensuring that police powers be easily knowable and understood both by members of the Police Service and by the public.

A number of the submissions expressed concern over the ambiguity and uncertainty existing in the present system. The difficulty under present legislation for both police and members of the public was recognised in the submissions, including those of the Queensland Police Service and the Queensland Police Union of Employees.

There were however a number of reservations and riders expressed in the submissions. The Queensland Council for Civil Liberties expressed a concern that consolidation may present an opportunity for a "significant overall extension" of police powers, in that invasive powers may be made exercisable in circumstances not sufficiently serious to warrant their exercise.

Concern that a consolidating scheme of powers might result in the police having powers not warranted for all infringements of law was echoed in a number of the submissions. It was also suggested in submissions (see, for instance, the submission of the Queensland Law Society's Criminal Law Committee) that the problem might be avoided by a careful categorisation of offences, the more invasive powers being available for only the more serious offences.

The submissions expressed various views on the question of the extent to which powers ought to be consolidated and centralised. The submission of the Director of Prosecutions, for example, suggested that there may be cases where special needs require that special powers be contained in a particular statute dealing with the particular matter.

On the other hand, it was the view of the Queensland Law Society Criminal Law Committee that consolidation should only be introduced if all other legislative provisions containing police powers were repealed, and that to allow new powers to be introduced by different pieces of legislation would undermine the consolidation exercise.

A number of the submissions, including those of the Juvenile Advocacy Service and the Queensland Council for Civil Liberties, were concerned that given the complexities, both practical and substantive, of the issues involved there be an adequate process of public consultation and discussion on any proposed legislative scheme.

While there seems to be support for the consolidation of powers in varying degrees, great difficulty lies in structuring a practical scheme of consolidation which is equitable both for the effective performance of police duties and the protection of the civil liberties of the individual. A possible legislative scheme is proposed in later reports in respect of specific police powers. Ultimately, the Commission will publish a report which draws together the specific recommendations.

Government Departments

In order to formulate its recommendations, the Commission sought information from and canvassed the views of the government departments charged with the administration of the various Acts which confer powers upon police officers.

A number of the departments, such as the Department of the Environment and Heritage and the Department of Employment, Vocational Education, Training and Industrial Relations saw no benefit in the consolidation of police powers under the various Acts in one piece of legislation. Others, such as the Department of Transport, while acknowledging its benefits, questioned whether consolidation was feasible, given the differing intentions of the various pieces of legislation.

A number of compelling reasons were given for opposition to a scheme of consolidation, not least of which was the impracticality of having to consult more than one piece of legislation to determine the extent of powers, and the consequent difficulty in ascertaining the law.

Further, there are a number of Acts which confer powers on police which the departments were concerned to expressly preserve. An example is the *Health Act 1931* (administered by the Health Department) which confers powers on police to protect abused and neglected children.

There was also positive support for the idea of consolidation from such departments as the Department of Primary Industries which administers a significant number of the Acts containing police powers. However, regardless of whether or not there was support in principle for the idea of consolidation, there was a recurring concern among the departments that there exists a continuing need for officers to be able to call for the aid of police officers.

The Department of Health points out that its officers carry out duties in what can be difficult and volatile circumstances where the life and safety of such officers may be threatened. This concern was echoed by the Department of Employment, Vocational Education, Training and Industrial Relations and the Department of Lands. The Health Rights Commission gave the example of a serious and urgent matter threatening safety of persons arising in a remote area, where the police are the most likely agency to be able to respond swiftly.

The departments recognised that these instances will in practice be rare, but the potential danger to the departmental officers and the public in such instances would justify action by the police. Accordingly, they suggest it is inadvisable to affect police powers which presently cover such contingencies.

Further, the Department of Health and the Department of Employment, among others, recognised that it is easier for departmental officers to secure the co-operation of persons in the exercise of their duties when there is an actual police presence or if such persons know that the police can be called upon. Again, this was acknowledged as not being a frequent occurrence, but as being sufficiently serious to warrant police being empowered to assist departmental officers.

The information usefully provided by the departments revealed the frequency of police exercise of powers under second level legislation. For example, of the sixteen Acts administered by the Department of Primary Industries which allow police to be called on to assist departmental officers in the past year, the police had not, to the Department's knowledge, been called to assist under nine of them.

Under the *Medical Act and Other Acts (Administration) Act 1966* (administered by the Health Department), the police have been called upon to assist only once in the past seven years. However, the police are often informed of planned inspections under the Act, should assistance become necessary.

On the other hand, a significant number of offences were dealt with by police activity under the *Liquor Act 1912* and the *Liquor Act 1992* (administered by the Department of Tourism Sport and Racing) in the 1991/92 period.

There are a few cases where departments perceive that there is no need for police powers under some Acts. The Treasury Department suggested that powers conferred directly on police under section 29 of the *Stamp Act 1894* (which includes a power to enter and remain in any place in order to conduct inquiries) are unnecessary, but that its officers should continue to be able to call for police assistance. Similarly, the power conferred directly upon police by section 8 of the *Radioactive Substances Act 1958* are viewed by the Health Department as unnecessary, but again, that assistance of police officers should continue to be available to departmental officers.

It is likely that there would be a number of other legislative provisions which can be considered similarly redundant. However, this should not be allowed to diminish the importance of those occasions when police powers to render assistance are undoubtedly necessary.

In a number of cases departments were unable to provide information on the frequency of use of powers by police under legislation for which they are responsible. This was for a variety of reasons, such as that certain Acts are administered by regional or local authorities, or that the police were the only public officers to take any enforcement action under the relevant Acts and accordingly, the department had not been directly involved in the exercise of the powers. It appears that some Acts fall within an administrative "grey area", where record-keeping responsibilities are unclear.

The Queensland Police Service

A response was also sought from the Queensland Police Service as to frequency of use by police of a selection of the provisions.[37] The Commission was informed that the specific use of many of these powers would generally not be documented other than, perhaps, in police notebooks, and certainly not in a manner that the information could be easily collated.

For example, an officer may indicate in his or her notebook the details of an incident, how a suspect was proceeded with and under what legislation, but it is unlikely that the specific section providing the general power would be specifically recorded.

The selection of legislative provisions in respect of which a response was sought was quite broad. It included provisions under the *Mineral Resources Act 1989*, the *Health Act 1937*, the *Noise Abatement Act 1978* and the *State Transport Act 1960*. The responses as to frequency of use of the powers provided by such Acts indicated that a number of existing police powers are seldom if ever used, although others appear to be quite commonly used (e.g. *State Transport Act 1960, Noise Abatement Act 1978*).

A number of the responses suggested that, although a number of powers were not frequently used, they should nonetheless be retained as they would be necessary on occasions.

However, the responses should be viewed in light of the repeated rider contained in many of them that "accurate" figures are not available on the frequency of use of the powers. A number of reasons were given for the inaccuracy of the figures, including that such an exercise would necessitate inquiry of individual police officers. It was also stated that there are no police records concerning the exercise of powers by police where proceedings are instituted by the body responsible for the administration of the specific legislation conferring the powers.

The Commission is of the view that an alteration in police powers either by conferring further powers, or withdrawing existing powers (whether or not within a scheme of consolidation) should be approached with some circumspection in the absence of accurate and reliable records reflecting current usage of powers. The issue of appropriate record-keeping is raised in Volume II of this report.

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37 The Service was not asked to respond in relation to all of the provisions as it would have been too resource-intensive.

The Powers of Police When Aiding Public Officers

A significant number of criminal offences are simple offences only. These offences are often created by legislation which regulate otherwise legal conduct, as opposed to prohibiting conduct outright as in the case of serious criminal offences. The former type of legislation is, in many cases, administered by government departments which have their own enforcement staff.

Such legislation often confers powers on police for the purposes of enforcing that legislation. The Fitzgerald Inquiry noted that a significant part of total police resources were committed to investigating and charging offenders under this type of legislation and suggested that ". . . this may well be a misallocation of resources" (Fitzgerald Inquiry 1989, p. 188).

The Fitzgerald Inquiry suggested a scheme under which all legislation of this type would be the responsibility of one or other of the government departments. At present, there exists an ad hoc distribution of responsibilities for administering such Acts between the police and government departments. Such departments would have their own enforcement staff who would seek police assistance only when necessary (Fitzgerald Inquiry 1989, p. 189).

It is suggested by the Commission that police assistance is 'necessary' where there is some threat to the life, health, safety or property of such enforcement staff or other persons and to overcome resistance offered by persons where such staff are carrying out their duties under the relevant Act.

It is recommended that, where public officials other than police are charged with the enforcement of legislation but may call for the aid of police officers, the degree of police assistance to facilitate such enforcement should be limited to powers for the protection of life, health, safety and property of the officers and members of the public. A power to overcome resistance met by the enforcement officers would also be necessary; for example, where the enforcement officer has a right of entry, police officers may assist by using reasonable force to obtain entry.

It is suggested that such a scheme would meet with the approval of the various departments which expressed concern that the safety of their officers and the public be adequately protected, and that an actual or potential police presence encourages the co-operation of those persons being investigated by enforcement officers. At the same time, a scheme of this type would overcome one of the difficulties of consolidation of police powers, in that a wide range of powers presently conferred on police to assist public officers could be replaced by a more general provision.

Powers of Police by Virtue of their Appointment as other Public Officers

Police are conferred with powers not only where they are called to aid other public officers in the execution of duties, but also where police officers are appointed to other public office, either automatically or under specific appointment. Examples of these situations have been given above.

Anecdotal evidence is to the effect that police use these powers in the execution of policing duties, in circumstances which are not necessarily within the purview of the Act conferring the powers.[38] This might indicate a number of flaws in the existing system, including that police are ill-equipped to perform their usual police duties under the powers conferred on them directly or that the powers as they exist under second level legislation are too widely framed.

As noted above, there is a lack of data on the frequency and circumstances of use of such powers. Accordingly, no useful analysis can be attempted nor recommendations made at this stage as to whether these powers are necessary, whether they should be reformed, or whether it is appropriate to include such powers in a scheme of consolidation. However, it would be a curious result if police officers appointed to other public office by virtue of their position as police officers (as opposed to being called to aid another officer) were not subject to the same controls as when exercising powers conferred directly upon them as police officers.

The Commission recommends that steps be taken by the Queensland Police Service and by the government departments administering legislation which indirectly confers power on police officers to keep a record of the use of such powers where practicable.

The value of a coherent system of record keeping, noting the frequency of and circumstances in which police officers assist other departmental officers in the enforcement of legislation, would be significant. An analysis of such records would allow the formulation of meaningful recommendations concerning police powers exercisable in such circumstances. The issue of record-keeping is dealt with in Volume II of this report.

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38 For example, police investigating motor vehicle theft have been appointed as Inspectors under the *Auctioneers and Agents Act 1971* and frequently use the powers of such Inspectors to detect and solve motor vehicle thefts, which are not strictly within the purview of that Act. Other examples cited by police include use of *Traffic Act 1949* powers to demand name and address to assist in detection or solution of other serious offences.

A POSSIBLE LEGISLATIVE FRAMEWORK

It is suggested that a consolidation of all police powers into one Act is neither desirable nor feasible. Such a completely centralised scheme could not take account of the diversity of circumstances in which the exercise of powers might be justified, nor the need for flexibility to enable the same powers to be used in respect of Acts which are intended to achieve different objectives and to address different social evils. This is explored in further detail in subsequent chapters.

As noted above, an ill-considered scheme of consolidation might lead, on the one hand, to the police having insufficient powers to enable them to fulfil their role according to the expectations of the public, or on the other hand, to arming the police with powers which are not justifiable in all the circumstances in which they may be exercised.

However, a useful scheme of consolidation which successfully takes account of the reservations outlined above is obviously desirable. The Commission proposes for discussion a scheme that would be a compromise between a complete consolidation of all police powers into one piece of legislation and the *ad hoc* approach which has existed to date in Queensland legislation.

Such a compromise would mean that there would not be a complete fulfilment of the objective to centralise the law; there would still be a need for both the police and the public to refer to more than one source in order to ascertain their respective rights and obligations under the law. However, the difficulties under the present system would be significantly reduced by the implementation of a scheme which:

- Allows a number of existing provisions to be repealed, reducing the total number of police powers provisions in the various Acts;

- Provides a central reference point from which the full extent of police powers can be ascertained. This would be achieved by the use of schedules to a police powers Act, which exhaustively list the Acts of the Queensland Parliament which confer police powers;

- Provides a procedural code regulating the exercise of police powers, regardless of the source of the power (for example, a universal procedure to be observed upon entry to premises). This will standardise the manner in which police powers are exercised, even though a legislative consolidation of all the circumstances in which a power can be exercised is not achieved.

An additional benefit of a partial consolidation is that the scheme can be tailored to avoid any unwarranted diminution or expansion of police powers; such a scheme does not require these considerations to be sacrificed for the sake of uniformity.

A central police powers Act and a supporting legislative framework might operate in the following way:

- A police powers Act would ultimately be expressed to apply to all circumstances in which police are authorised to exercise such powers, whether in a primary or secondary capacity. The recommendations made in this and subsequent reports largely relate to powers under first level legislation although a number of recommendations which will be made in respect of procedures for the exercise of police powers will apply regardless of the manner in which they are conferred on police officers. However, as stated above, a review of public officers' powers is considered necessary by the Commission.

- While it is not possible to bind future parliaments in the exercise of their legislative powers, an attempt should nevertheless be made in the drafting of a police powers Act to give it paramountcy over existing and future legislation.

- A police powers Act would have a series of schedules, listing the Acts of the Queensland Parliament which confer powers on police and which have not been repealed by the enactment of the consolidated legislation. These schedules would be linked to substantive provisions of the police powers Act, acknowledging that such powers continue to exist notwithstanding the provisions of the police powers Act. Including such schedules to a police powers Act will require an amendment to these schedules each time parliament passes legislation conferring further powers upon police.

- A police powers Act would provide a procedural code, regulating the manner in which police powers are exercised regardless of the source of the power, although it may not exhaustively regulate the circumstances which justify the exercise of such powers.

The inclusion of schedules to a police powers Act listing the Queensland Acts which confer powers on police would have several advantages. Read in conjunction with the substantive provisions of the police powers Act, it would provide a conclusive reference point, both for the police and the public, from which to ascertain the sources, nature and extent of police powers. At the same time, such a scheme would allow the particular Act conferring the power to be tailored according to the requirements of the situation it is intended to address.

It has been suggested that Acts such as the *Litter Act 1971* (which arguably confers powers on police which go beyond what is necessary for effective enforcement of that Act, in that it empowers police to arrest a person who fails to comply with a request for his or her name and address) have been passed without appropriate debate, because no one would suspect that such an apparently innocuous Act would contain such wide powers. It is in fact often necessary to closely scrutinise an Act to ascertain whether, of what type and to what extent it confers powers on police.

Such oversights may be avoided if, when a Bill is introduced which confers any powers on police, the passing of such Bill would require a corresponding amendment to the police powers Act. Thus, the fact that there is to be some expansion of police powers would be brought expressly to the attention of the public and engender appropriate debate in parliament. Any amplification of police powers could then be made in an informed and considered process, and only when necessary.

The implementation of such a scheme would go some considerable way towards ensuring uniformity in the circumstances of and manner in which police exercise powers, regardless of the nature of the Act under which powers are exercisable.

As noted above, concern has been expressed by various departments administering Acts which confer powers on police in a secondary capacity (either where they act in aid of other officials or where, by virtue of their status as police, they act in some other official capacity). These departments consider their own officers' functions would be adversely affected by a complete consolidation of the legislation which confers powers on police. It is suggested that a scheme having the characteristics outlined above would be a useful consolidation of police powers, in that it would not affect the powers exercisable by other public officers[39], but would apply to all powers exercisable by police, whether in a primary or secondary capacity.

REFERENCES

Commission of Inquiry Pursuant to Orders in Council 1989, Report, 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989, (Chairperson G.E. Fitzgerald QC), Government Printer, Brisbane.

Fitzgerald Inquiry. *See Commission of Inquiry Pursuant to Orders in Council 1989.*

Officer of the Minister for Police and Emergency Services and the Criminal Justice Commission 1991, *Police Powers in Queensland: An Issues Paper*, Government Printer, Queensland.

39 It is beyond the scope of this report to consider whether or how the powers of public officers other than police officers should be regulated.